

1                                   **TELEPHONE SOLICITATION AMENDMENTS**

2   2006 GENERAL SESSION

3   STATE OF UTAH

4                                   **Chief Sponsor: Parley G. Hellewell**

5                                   House Sponsor: \_\_\_\_\_

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7 **LONG TITLE**

8 **General Description:**

9           This bill addresses telephone solicitation provisions.

10 **Highlighted Provisions:**

11           This bill:

- 12           ▶ defines terms;
- 13           ▶ requires identification of businesses for whom a telephone soliciting business
- 14 solicits by registered business name;
- 15           ▶ allows a private action under Title 13, Chapter 25a, Telephone and Facsimile
- 16 Solicitation Act, for a violation of federal law;
- 17           ▶ extends the Telephone Fraud Prevention Act's right of rescission to apply to
- 18 telephone solicitors that are not required to be registered;
- 19           ▶ allows a private right of action for violations of the Telephone Fraud Prevention
- 20 Act;
- 21           ▶ expands the list of prohibited practices under the Telephone Fraud Prevention Act;
- 22 and
- 23           ▶ makes technical changes.

24 **Monies Appropriated in this Bill:**

25           None

26 **Other Special Clauses:**

27           None



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **13-25a-102**, as last amended by Chapter 263, Laws of Utah 2003

31 **13-25a-103**, as last amended by Chapters 90 and 263, Laws of Utah 2004

32 **13-25a-107**, as last amended by Chapter 263, Laws of Utah 2003

33 **13-26-2**, as last amended by Chapter 18, Laws of Utah 2005

34 **13-26-4**, as last amended by Chapter 170, Laws of Utah 1996

35 **13-26-5**, as last amended by Chapter 189, Laws of Utah 1994

36 **13-26-8**, as last amended by Chapter 18, Laws of Utah 2005

37 **13-26-11**, as last amended by Chapter 18, Laws of Utah 2005



39 *Be it enacted by the Legislature of the state of Utah:*

40 Section 1. Section **13-25a-102** is amended to read:

41 **13-25a-102. Definitions.**

42 As used in this chapter:

43 (1) "Advertisement" means material offering for sale, or advertising the availability or  
44 quality of, any property, goods, or services.

45 (2) (a) "Automated telephone dialing system" means equipment used to:

46 (i) store or produce telephone numbers;

47 (ii) call a stored or produced number; and

48 (iii) connect the number called with a recorded message or artificial voice.

49 (b) "Automated telephone dialing system" does not include equipment used with a  
50 burglar alarm system, voice messaging system, fire alarm system, or other system used in an  
51 emergency involving the immediate health or safety of a person.

52 (3) "Division" means the Division of Consumer Protection in the Department of  
53 Commerce.

54 (4) (a) "Established business relationship" means a relationship that:

55 (i) is based on inquiry, application, purchase, or transaction regarding products or  
56 services offered;

57 (ii) is formed by a voluntary two-way communication between a person making a  
58 telephone solicitation and a person to whom a telephone solicitation is made; and

59 (iii) has not been terminated by:

60 (A) an act by either party; or

61 (B) the passage of 18 months since the most recent inquiry, application, purchase,  
62 transaction, or voluntary two-way communication.

63 (b) "Established business relationship" includes a relationship with an affiliate as  
64 defined in Section 16-10a-102.

65 (c) A person's seller-specific do not call request terminates an existing business  
66 relationship for the purpose of telemarketing and telephone solicitation, despite a person  
67 continuing to do business with the seller in another context.

68 (5) "Facsimile machine" means equipment used for:

69 (a) scanning or encoding text or images for conversion into electronic signals for  
70 transmission; or

71 (b) receiving electronic signals and reproducing them as a duplicate of the original text  
72 or image.

73 (6) "Negative response" means a statement from a party stating the party does not wish  
74 to listen to the sales presentation or participate in the solicitation presented in the telephone  
75 call.

76 (7) "Telephone solicitation" means the initiation of a telephone call or message for a  
77 commercial purpose or to seek a financial donation, including calls:

78 (a) encouraging the purchase or rental of, or investment in, property, goods, or services,  
79 regardless of whether the transaction involves a nonprofit organization;

80 (b) soliciting a sale of or extension of credit for property or services to the person  
81 called;

82 (c) soliciting information that will be used for:

83 (i) the direct solicitation of a sale of property or services to the person called; or

84 (ii) an extension of credit to the person called for a sale of property or services; or

85 (d) soliciting a charitable donation involving the exchange of any premium, prize, gift,  
86 ticket, subscription, or other benefit in connection with any appeal made for a charitable  
87 purpose.

88 (8) "Telephone solicitor" means any natural person, firm, organization, partnership,  
89 association, or corporation who makes or causes to be made an unsolicited telephone call,

90 including calls made by use of an automated telephone dialing system.

91 (9) "Unsolicited telephone call" means a telephone call for a commercial purpose or to  
92 seek a financial donation other than a call made:

93 (a) in response to an express request of the person called;

94 (b) primarily in connection with an existing debt or contract, payment or performance  
95 of which has not been completed at the time of the call;

96 (c) to any person with whom the telephone solicitor has an established business  
97 relationship; or

98 (d) as required by law for a medical purpose.

99 Section 2. Section **13-25a-103** is amended to read:

100 **13-25a-103. Prohibited conduct for telephone solicitations -- Exceptions.**

101 (1) Except as provided in Subsection (2), a person may not operate or authorize the  
102 operation of an automated telephone dialing system to make a telephone solicitation.

103 (2) A person may operate an automated telephone dialing system if a call is made:

104 (a) with the prior express consent of the person who is called agreeing to receive a  
105 telephone solicitation from a specific solicitor; or

106 (b) to a person with whom the solicitor has an established business relationship.

107 (3) A person may not make a telephone solicitation to a residential telephone without  
108 prior express consent during any of the following times:

109 (a) before 8 a.m. or after 9 p.m. local time;

110 (b) on a Sunday; or

111 (c) on a legal holiday.

112 (4) A person may not make or authorize a telephone solicitation in violation of Title 47  
113 U.S.C. Sec. 227 or the Federal Communications Commission regulations implementing that  
114 section.

115 (5) Any telephone solicitor who makes an unsolicited telephone call to a telephone  
116 number shall:

117 (a) identify the telephone solicitor;

118 (b) identify the business on whose behalf the telephone solicitor is soliciting;

119 (c) identify the purpose of the call promptly upon making contact by telephone with the  
120 person who is the object of the telephone solicitation;

121 (d) discontinue the solicitation if the person being solicited gives a negative response at  
122 any time during the telephone call; and

123 (e) hang up the phone, or in the case of an automated telephone dialing system  
124 operator, disconnect the automated telephone dialing system from the telephone line within 25  
125 seconds of the termination of the call by the person being called.

126 (6) A telephone solicitor may not withhold the display of the telephone solicitor's  
127 telephone number from a caller identification service when that number is being used for  
128 telemarketing purposes and when the telephone solicitor's service or equipment is capable of  
129 allowing the display of the number.

130 Section 3. Section **13-25a-107** is amended to read:

131 **13-25a-107. Private action.**

132 (1) In addition to any other remedies, a person may bring an action in any state court of  
133 competent jurisdiction if:

134 (a) (i) the person has received two or more telephone solicitations or facsimile  
135 advertisements from the same individual or entity that:

136 (A) violates this chapter; or

137 (B) violates Title 47 U.S.C. 227; and

138 (ii) the person, following the first telephone solicitation or facsimile advertisement,  
139 notified the sender of the person's objection to receiving the telephone solicitation or facsimile  
140 advertisement; or

141 (b) the person has received one telephone solicitation or facsimile advertisement in  
142 violation of:

143 (i) Subsection 13-25a-103(1);

144 (ii) Subsection 13-25a-103(3);

145 (iii) Subsection 13-25a-103(5);

146 (iv) Subsection 13-25a-103(6); or

147 (v) Subsection 13-25a-104(1)~~]; or~~

148 (c) the person has a right of action under 47 U.S.C. Sec. 227.

149 (2) In a suit brought under Subsection (1), a person may:

150 (a) recover the greater of \$500 for each separate violation of this chapter or the amount  
151 of the pecuniary loss, if any;

- 152 (b) recover court costs and reasonable attorneys' fees as determined by the court; and  
153 (c) seek to enjoin any conduct in violation of this chapter.

154 Section 4. Section **13-26-2** is amended to read:

155 **13-26-2. Definitions.**

156 As used in this chapter, unless the context otherwise requires:

157 (1) "Continuity plan" means a shipment, with the prior express consent of the buyer, at  
158 regular intervals of similar special-interest products. A continuity plan is distinguished from a  
159 subscription arrangement by no binding commitment period or purchase amount.

160 (2) "Division" means the Division of Consumer Protection.

161 (3) "Fictitious personal name" means a name other than an individual's true name. An  
162 "individual's true name" is the name taken at birth unless changed by operation of law or by  
163 civil action.

164 (4) "Material statement" or "material fact" means information that a person of ordinary  
165 intelligence or prudence would consider important in deciding whether or not to accept an offer  
166 extended through a telephone solicitation.

167 (5) "Premium" means a gift, bonus, prize, award, certificate, or other document by  
168 which a prospective purchaser is given a right, chance, or privilege to purchase or receive  
169 goods or services with a stated or represented value of \$25 or more as an inducement to a  
170 prospective purchaser to purchase other goods or services.

171 (6) "Subscription arrangements," "standing order arrangements," "supplements," and  
172 "series arrangements" mean products or services provided, with the prior express request or  
173 consent of the buyer, for a specified period of time at a price dependent on the duration of  
174 service and to complement an initial purchase.

175 (7) (a) "Telephone solicitation," "sale," "selling," or "solicitation of sale" means:

176 (i) a sale or solicitation of goods or services in which:

177 (A) (I) the seller solicits the sale over the telephone;

178 (II) the purchaser's agreement to purchase is made over the telephone; and

179 (III) the purchaser, over the telephone, pays for or agrees to commit to payment for  
180 goods or services prior to or upon receipt by the purchaser of the goods or services;

181 (B) the solicitor, not exempt under Section 13-26-4, induces a prospective purchaser  
182 over the telephone, to make and keep an appointment that directly results in the purchase of

183 goods or services by the purchaser that would not have occurred without the telephone  
184 solicitation and inducement by the solicitor;

185 (C) the seller offers or promises a premium to a prospective purchaser if:

186 (I) the seller induces the prospective purchaser to initiate a telephone contact with the  
187 telephone soliciting business; and

188 (II) the resulting solicitation meets the requirements of Subsection (7)(a); or

189 (D) the solicitor solicits a charitable donation involving the exchange of any premium,  
190 prize, gift, ticket, subscription, or other benefit in connection with any appeal made for a  
191 charitable purpose by an organization that is not otherwise exempt under Subsection  
192 13-26-4(2)(b)(iv); or

193 (ii) a telephone solicitation as defined in Section 13-25a-102.

194 (b) A solicitation of sale or telephone solicitation is considered complete when made,  
195 whether or not the person receiving the solicitation agrees to the sale or to make a charitable  
196 donation.

197 (8) "Telephone soliciting business" means:

198 (a) a sole proprietorship, partnership, limited liability company, corporation, or other  
199 association of individuals engaged in a common effort to conduct telephone solicitations[-];  
200 and

201 (b) a company on whose behalf a telephone solicitation is made.

202 (9) "Telephone solicitor" or "solicitor" means a person, partnership, limited liability  
203 company, corporation, or other entity that:

204 (a) makes a telephone solicitation; or

205 (b) causes a telephone solicitation to be made.

206 Section 5. Section **13-26-4** is amended to read:

207 **13-26-4. Exemptions from security requirement.**

208 (1) In any enforcement action initiated by the division, the person claiming an  
209 exemption has the burden of proving that the person is entitled to the exemption.

210 (2) The following are exempt from the requirements of this chapter except for the  
211 requirements of Sections 13-26-5, 13-26-8, and 13-26-11:

212 (a) a broker, agent, dealer, or sales professional licensed under the licensure laws of  
213 this state, when soliciting sales within the scope of his license;

- 214 (b) the solicitation of sales by:
- 215 (i) a public utility that is regulated under Title 54, Public Utilities, or by an affiliate of
- 216 the utility;
- 217 (ii) a newspaper of general circulation;
- 218 (iii) a solicitation of sales made by a broadcaster licensed by any state or federal
- 219 authority;
- 220 (iv) a nonprofit organization if no part of the net earnings from the sale inures to the
- 221 benefit of any member, officer, trustee, or serving board member of the organization, or
- 222 individual, or family member of an individual, holding a position of authority or trust in the
- 223 organization; and
- 224 (v) a person who periodically publishes and delivers a catalog of the solicitor's
- 225 merchandise to prospective purchasers, if the catalog:
- 226 (A) contains the price and a written description or illustration of each item offered for
- 227 sale;
- 228 (B) includes the business address of the solicitor;
- 229 (C) includes at least 24 pages of written material and illustrations;
- 230 (D) is distributed in more than one state; and
- 231 (E) has an annual circulation by mailing of not less than 250,000;
- 232 (c) any publicly traded corporation registered with the Securities and Exchange
- 233 Commission, or any subsidiary of the corporation;
- 234 (d) the solicitation of any depository institution as defined in Section 7-1-103, a
- 235 subsidiary of a depository institution, personal property broker, securities broker, investment
- 236 adviser, consumer finance lender, or insurer subject to regulation by an official agency of this
- 237 state or the United States;
- 238 (e) the solicitation by a person soliciting only the sale of telephone services to be
- 239 provided by the person or the person's employer;
- 240 (f) the solicitation of a person relating to a transaction regulated by the Commodities
- 241 Futures Trading Commission, if:
- 242 (i) the person is registered with or temporarily licensed by the commission to conduct
- 243 that activity under the Commodity Exchange Act; and
- 244 (ii) the registration or license has not expired or been suspended or revoked;



245 (g) the solicitation of a contract for the maintenance or repair of goods previously  
246 purchased from the person:

247 (i) who is making the solicitation; or

248 (ii) on whose behalf the solicitation is made;

249 (h) the solicitation of previous customers of the business on whose behalf the call is  
250 made if the person making the call:

251 (i) does not offer any premium in conjunction with a sale or offer;

252 (ii) is not selling an investment or an opportunity for an investment that is not  
253 registered with any state or federal authority; and

254 (iii) is not regularly engaged in telephone sales;

255 (i) the solicitation of a sale that is an isolated transaction and not done in the course of  
256 a pattern of repeated transactions of a like nature;

257 (j) the solicitation of a person by a retail business establishment that has been in  
258 operation for at least five years in Utah under the same name as that used in connection with  
259 telemarketing if both of the following occur on a continuing basis:

260 (i) products are displayed and offered for sale at the place of business, or services are  
261 offered for sale and provided at the place of business; and

262 (ii) a majority of the seller's business involves the buyer obtaining the products or  
263 services at the seller's place of business;

264 (k) a person primarily soliciting the sale of a magazine or periodical sold by the  
265 publisher or the publisher's agent through a written agreement, or printed or recorded material  
266 through a contractual plan, such as a book or record club, continuity plan, subscription,  
267 standing order arrangement, or supplement or series arrangement if:

268 (i) the seller provides the consumer with a form that the consumer may use to instruct  
269 the seller not to ship the offered merchandise, and the arrangement is regulated by the Federal  
270 Trade Commission trade regulation concerning use of negative option plans by sellers in  
271 commerce; or

272 (ii) (A) the seller periodically ships merchandise to a consumer who has consented in  
273 advance to receive the merchandise on a periodic basis; and

274 (B) the consumer retains the right to cancel at any time and receive a full refund for the  
275 unused portion; or

276 (1) a telephone marketing service company that provides telemarketing sales services  
277 under contract to sellers if:

278 (i) it has been doing business regularly with customers in Utah for at least five years  
279 under the same business name and with its principal office in the same location;

280 (ii) at least 75% of its contracts are performed on behalf of persons exempted from  
281 registration under this chapter; and

282 (iii) neither the company nor its principals have been enjoined from doing business or  
283 subjected to criminal actions for their business activities in this or any other state.

284 Section 6. Section **13-26-5** is amended to read:

285 **13-26-5. Right of rescission -- Cancellation.**

286 (1) (a) Except as provided in Subsections (1)(b) and (c), in addition to any right to  
287 otherwise revoke an offer, a person making a purchase from a telephone soliciting business  
288 [~~required to be registered under this chapter~~] may cancel the sale up to midnight of the third  
289 business day after the receipt of the merchandise or premium, whichever is later, provided the  
290 solicitor advises the purchaser of his cancellation rights under this chapter at the time any  
291 solicitation is made.

292 (b) If the solicitor [~~required to be registered under this chapter~~] fails to orally advise a  
293 purchaser of the right to cancel under this section at the time of any solicitation, the purchaser's  
294 right to cancel shall be extended to 90 days.

295 (c) If the solicitor [~~required to be registered under this chapter~~] fails to orally advise a  
296 purchaser of his true name, telephone number, and complete street address at the time of any  
297 solicitation, the purchaser may cancel the sale at any time.

298 (2) (a) Sales shall be cancelled by mailing a notice of cancellation to the telephone  
299 solicitor's correct street address, postage prepaid.

300 (b) If the telephone solicitor [~~provided~~] provides no correct street address, cancellation  
301 [~~can~~] may be accomplished by sending a notice of cancellation to the division's offices, postage  
302 prepaid.

303 (3) (a) If a cancellation involves durable goods, as defined by rule, those goods shall be  
304 returned to the seller.

305 (b) If expendable goods are involved, the purchaser shall return any unused portion of  
306 those goods.

307 (c) (i) A reasonable attempt shall be made to return goods to the solicitor's correct  
308 street address within seven days of exercising the right to cancel, providing the solicitor has  
309 provided the purchaser with the address.

310 (ii) If the solicitor has failed to give a correct address, no return is required to qualify  
311 for a full refund of the purchase price.

312 (d) (i) If the purchaser has used any portion of the services or goods purchased, the  
313 solicitor or telephone soliciting business shall receive a reasonable allowance for value given.  
314 [~~This~~]

315 (ii) The allowance provided for in Subsection (3)(d)(i) may be deducted from any  
316 refund due the purchaser.

317 (e) A solicitor [~~shall be~~] is jointly and severally liable with the telephone soliciting  
318 business for any refund amount due following the cancellation of a sale made by the solicitor.

319 (4) For the purposes of this section, "business day" does not include Sunday or a  
320 federal or state holiday.

321 Section 7. Section **13-26-8** is amended to read:

322 **13-26-8. Penalties -- Private action.**

323 (1) (a) Any telephone soliciting business or any person associated with a telephone  
324 soliciting business, including [~~solicitors, salespersons, agents, representatives~~] a solicitor,  
325 salesperson, agent, representative of a solicitor, or independent contractor, who violates this  
326 chapter as a first offense is guilty of a class B misdemeanor.

327 (b) In the case of a second offense, the person is guilty of a class A misdemeanor.

328 (c) In the case of three or more offenses, the person is guilty of a third degree felony.

329 (d) (i) In addition to other penalties under this Subsection (1), the division director may  
330 issue a cease and desist order and impose an administrative fine of up to \$2,500 for each  
331 violation of this chapter.

332 (ii) All money received through administrative fines imposed under this section shall  
333 be deposited in the Consumer Protection Education and Training Fund created by Section  
334 13-2-8.

335 [~~(2) Any telephone soliciting business or any person associated with a telephone~~  
336 ~~soliciting business, including solicitors, salespersons, agents, representatives of a solicitor, or~~  
337 ~~independent contractors, who violates any provision of this chapter shall be subject to a civil~~

338 ~~penalty in a court of competent jurisdiction not exceeding \$2,500 for each unlawful~~  
339 ~~transaction.]~~

340 (2) A person who receives a telephone call in violation of this chapter has a cause of  
341 action against the telephone soliciting business and any person associated with the telephone  
342 soliciting business, including a solicitor, salesperson, agent, representative of a solicitor, or  
343 independent contractor, who violates this chapter.

344 (3) In a suit brought under Subsection (2), the person may:

345 (a) recover not less than \$1,000 nor more than \$2,500 for each separate violation or the  
346 amount of any pecuniary loss, whichever is greater;

347 (b) recover court costs and reasonable attorneys' fees; and

348 (c) seek to enjoin conduct that violates this chapter.

349 Section 8. Section **13-26-11** is amended to read:

350 **13-26-11. Prohibited practices.**

351 (1) It is unlawful for any solicitor:

352 (a) to solicit prospective purchasers on behalf of a telephone soliciting business that is  
353 not registered with the division or exempt from registration under this chapter;

354 (b) to use a fictitious personal name in connection with a telephone solicitation;

355 (c) to make or cause to be made any untrue material statement, or fail to disclose a  
356 material fact necessary to make any statement made not misleading, whether in connection  
357 with a telephone solicitation or a filing with the division;

358 (d) to make or authorize the making of any misrepresentation about its compliance  
359 with this chapter to any prospective or actual purchaser;

360 (e) to fail to refund within 30 days any amount due a purchaser who exercises the right  
361 to cancel under Section 13-26-5; ~~[or]~~

362 (f) to fail to orally advise a purchaser of the purchaser's right to cancel under Section  
363 13-26-5 ~~[unless the solicitor is exempt under Section 13-26-4.];~~

364 (g) when requested by any person during the solicitation, to refuse to provide:

365 (i) the true name of the telephone soliciting business; or

366 (ii) the telephone soliciting business's address or telephone number; or

367 (h) to provide a false name, telephone number, or caller identification information.

368 (2) It is unlawful for any telephone soliciting business:

369 (a) to cause or permit any solicitor to violate any provision of this chapter; or  
370 (b) to use inmates in telephone soliciting operations where inmates have access to  
371 personal data about an individual sufficient to physically locate or contact that individual, such  
372 as names, addresses, telephone numbers, Social Security numbers, credit card information, or  
373 physical descriptions.

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**Legislative Review Note**

as of 1-30-06 10:57 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

**Office of Legislative Research and General Counsel**

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**Fiscal Note**  
**Bill Number SB0203**

**Telephone Solicitation Amendments**

*01-Feb-06*

*11:46 AM*

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**State Impact**

No fiscal impact.

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**Individual and Business Impact**

Costs to businesses of compliance with this bill are expected to be minimal.

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**Office of the Legislative Fiscal Analyst**