

1 **AMENDMENTS RELATING TO DECEPTIVE**
2 **PRACTICES INVOLVING CONSUMERS**

3 2010 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Marie H. Poulson**

6 Senate Sponsor: Wayne L. Niederhauser

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies provisions relating to deceptive practices involving consumers.

11 **Highlighted Provisions:**

12 This bill:

13 ▶ provides that certain false expressions in an advertisement are deceptive acts or
14 practices for purposes of the Utah Consumer Sales Practices Act and truth in
15 advertising provisions.

16 **Monies Appropriated in this Bill:**

17 None

18 **Other Special Clauses:**

19 None

20 **Utah Code Sections Affected:**

21 AMENDS:

22 **13-11-4**, as last amended by Laws of Utah 2008, Chapter 232

23 **13-11a-3**, as last amended by Laws of Utah 2009, Chapter 133

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

26 Section 1. Section **13-11-4** is amended to read:

27 **13-11-4. Deceptive act or practice by supplier.**

28 (1) A deceptive act or practice by a supplier in connection with a consumer transaction
29 violates this chapter whether it occurs before, during, or after the transaction.

30 (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or
31 practice if the supplier knowingly or intentionally:

32 (a) indicates that the subject of a consumer transaction has sponsorship, approval,
33 performance characteristics, accessories, uses, or benefits, if it has not;

34 (b) indicates that the subject of a consumer transaction is of a particular standard,
35 quality, grade, style, or model, if it is not;

36 (c) indicates that the subject of a consumer transaction is new, or unused, if it is not,
37 or has been used to an extent that is materially different from the fact;

38 (d) indicates that the subject of a consumer transaction is available to the consumer for
39 a reason that does not exist[?], including any of the following reasons falsely used in an
40 advertisement:

41 (i) "going out of business";

42 (ii) "bankruptcy sale";

43 (iii) "lost our lease";

44 (iv) "building coming down";

45 (v) "forced out of business";

46 (vi) "final days";

47 (vii) "liquidation sale";

48 (viii) "fire sale";

49 (ix) "quitting business"; or

50 (x) an expression similar to any of the expressions in Subsections (2)(d)(i) through
51 (ix);

52 (e) indicates that the subject of a consumer transaction has been supplied in
53 accordance with a previous representation, if it has not;

54 (f) indicates that the subject of a consumer transaction will be supplied in greater
55 quantity than the supplier intends;

56 (g) indicates that replacement or repair is needed, if it is not;

57 (h) indicates that a specific price advantage exists, if it does not;

58 (i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier
59 does not have;

60 (j) (i) indicates that a consumer transaction involves or does not involve a warranty, a
61 disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if
62 the representation is false; or

63 (ii) fails to honor a warranty or a particular warranty term;

64 (k) indicates that the consumer will receive a rebate, discount, or other benefit as an
65 inducement for entering into a consumer transaction in return for giving the supplier the
66 names of prospective consumers or otherwise helping the supplier to enter into other consumer
67 transactions, if receipt of the benefit is contingent on an event occurring after the consumer
68 enters into the transaction;

69 (l) after receipt of payment for goods or services, fails to ship the goods or furnish the
70 services within the time advertised or otherwise represented or, if no specific time is advertised
71 or represented, fails to ship the goods or furnish the services within 30 days, unless within the
72 applicable time period the supplier provides the buyer with the option to:

73 (i) cancel the sales agreement and receive a refund of all previous payments to the
74 supplier if the refund is mailed or delivered to the buyer within 10 business days after the day
75 on which the seller receives written notification from the buyer of the buyer's intent to cancel
76 the sales agreement and receive the refund; or

77 (ii) extend the shipping date to a specific date proposed by the supplier;

78 (m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the
79 requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale
80 within three business days of the time of purchase if:

81 (i) the sale is made other than at the supplier's established place of business pursuant
82 to the supplier's personal contact, whether through mail, electronic mail, facsimile
83 transmission, telephone, or any other form of direct solicitation; and

84 (ii) the sale price exceeds \$25;

85 (n) promotes, offers, or grants participation in a pyramid scheme as defined under

86 Title 76, Chapter 6a, Pyramid Scheme Act;

87 (o) represents that the funds or property conveyed in response to a charitable
88 solicitation will be donated or used for a particular purpose or will be donated to or used by a
89 particular organization, if the representation is false;

90 (p) if a consumer indicates the consumer's intention of making a claim for a motor
91 vehicle repair against the consumer's motor vehicle insurance policy:

92 (i) commences the repair without first giving the consumer oral and written notice of:

93 (A) the total estimated cost of the repair; and

94 (B) the total dollar amount the consumer is responsible to pay for the repair, which
95 dollar amount may not exceed the applicable deductible or other copay arrangement in the
96 consumer's insurance policy; or

97 (ii) requests or collects from a consumer an amount that exceeds the dollar amount a
98 consumer was initially told the consumer was responsible to pay as an insurance deductible or
99 other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that
100 amount is less than the full amount the motor vehicle insurance policy requires the insured to
101 pay as a deductible or other copay arrangement, unless:

102 (A) the consumer's insurance company denies that coverage exists for the repair, in
103 which case, the full amount of the repair may be charged and collected from the consumer; or

104 (B) the consumer misstates, before the repair is commenced, the amount of money the
105 insurance policy requires the consumer to pay as a deductible or other copay arrangement, in
106 which case, the supplier may charge and collect from the consumer an amount that does not
107 exceed the amount the insurance policy requires the consumer to pay as a deductible or other
108 copay arrangement;

109 (q) includes in any contract, receipt, or other written documentation of a consumer
110 transaction, or any addendum to any contract, receipt, or other written documentation of a
111 consumer transaction, any confession of judgment or any waiver of any of the rights to which
112 a consumer is entitled under this chapter;

113 (r) charges a consumer for a consumer transaction that has not previously been agreed

114 to by the consumer;

115 (s) solicits or enters into a consumer transaction with a person who lacks the mental
116 ability to comprehend the nature and consequences of:

117 (i) the consumer transaction; or

118 (ii) the person's ability to benefit from the consumer transaction;

119 (t) solicits for the sale of a product or service by providing a consumer with an
120 unsolicited check or negotiable instrument the presentment or negotiation of which obligates
121 the consumer to purchase a product or service, unless the supplier is:

122 (i) a depository institution under Section 7-1-103;

123 (ii) an affiliate of a depository institution; or

124 (iii) an entity regulated under Title 7, Financial Institutions Act;

125 (u) sends an unsolicited mailing to a person that appears to be a billing, statement, or
126 request for payment for a product or service the person has not ordered or used, or that implies
127 that the mailing requests payment for an ongoing product or service the person has not
128 received or requested;

129 (v) issues a gift certificate, instrument, or other record in exchange for payment to
130 provide the bearer, upon presentation, goods or services in a specified amount without printing
131 in a readable manner on the gift certificate, instrument, packaging, or record any expiration
132 date or information concerning a fee to be charged and deducted from the balance of the gift
133 certificate, instrument, or other record; or

134 (w) misrepresents the geographical origin or location of the supplier's business in
135 connection with the sale of cut flowers, flower arrangements, or floral products.

136 (3) (a) The notice required by Subsection (2)(m) shall:

137 (i) be a conspicuous statement written in dark bold with at least 12 point type on the
138 first page of the purchase documentation; and

139 (ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT
140 ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period
141 reflecting the supplier's cancellation policy but not less than three business days) AFTER THE

142 DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS
143 LATER".

144 (b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's
145 cancellation policy:

146 (i) is communicated to the buyer; and

147 (ii) offers greater rights to the buyer than Subsection (2)(m).

148 (4) (a) A gift certificate, instrument, or other record that does not print an expiration
149 date in accordance with Subsection (2)(v) does not expire.

150 (b) A gift certificate, instrument, or other record that does not include printed
151 information concerning a fee to be charged and deducted from the balance of the gift
152 certificate, instrument, or other record is not subject to the charging and deduction of the fee.

153 (c) Subsections (2)(v) and (4)(b) do not apply to a gift certificate, instrument, or other
154 record useable at multiple, unaffiliated sellers of goods or services if an expiration date is
155 printed on the gift certificate, instrument, or other record.

156 Section 2. Section **13-11a-3** is amended to read:

157 **13-11a-3. Deceptive trade practices enumerated -- Records to be kept --**

158 **Defenses.**

159 (1) Deceptive trade practices occur when, in the course of a person's business,
160 vocation, or occupation that person:

161 (a) passes off goods or services as those of another;

162 (b) causes likelihood of confusion or of misunderstanding as to the source,
163 sponsorship, approval, or certification of goods or services;

164 (c) causes likelihood of confusion or of misunderstanding as to affiliation, connection,
165 association with, or certification by another;

166 (d) uses deceptive representations or designations of geographic origin in connection
167 with goods or services;

168 (e) represents that goods or services have sponsorship, approval, characteristics,
169 ingredients, uses, benefits, or qualities that they do not have or that a person has a

170 sponsorship, approval, status, affiliation, or connection that the person does not have;

171 (f) represents that goods are original or new if they are deteriorated, altered,
172 reconditioned, reclaimed, used, or second-hand;

173 (g) represents that goods or services are of a particular standard, quality, or grade, or
174 that goods are of a particular style or model, if they are of another;

175 (h) disparages the goods, services, or business of another by false or misleading
176 representation of fact;

177 (i) advertises goods or services or the price of goods and services with intent not to sell
178 them as advertised;

179 (j) advertises goods or services with intent not to supply a reasonable expectable
180 public demand, unless:

181 (i) the advertisement clearly and conspicuously discloses a limitation of quantity; or

182 (ii) the person issues rainchecks for the advertised goods or services;

183 (k) makes false or misleading statements of fact concerning the reasons for, existence
184 of, or amounts of price reductions[;], including the false use of any of the following

185 expressions in an advertisement:

186 (i) "going out of business";

187 (ii) "bankruptcy sale";

188 (iii) "lost our lease";

189 (iv) "building coming down";

190 (v) "forced out of business";

191 (vi) "final days";

192 (vii) "liquidation sale";

193 (viii) "fire sale";

194 (ix) "quitting business"; or

195 (x) an expression similar to any of the expressions in Subsections (1)(k)(i) through

196 (ix);

197 (l) makes a comparison between the person's own sale or discount price and a

198 competitor's nondiscounted price without clearly and conspicuously disclosing that fact;
199 (m) without clearly and conspicuously disclosing the date of the price assessment
200 makes a price comparison with the goods of another based upon a price assessment performed
201 more than seven days prior to the date of the advertisement or uses in an advertisement the
202 results of a price assessment performed more than seven days prior to the date of the
203 advertisement without disclosing, in a print ad, the date of the price assessment, or in a radio
204 or television ad, the time frame of the price assessment;

205 (n) advertises or uses in a price assessment or comparison a price that is not that
206 person's own unless this fact is:

207 (i) clearly and conspicuously disclosed; and

208 (ii) the representation of the price is accurate;

209 (o) represents as independent an audit, accounting, price assessment, or comparison of
210 prices of goods or services, when the audit, accounting, price assessment, or comparison is not
211 independent;

212 (p) represents, in an advertisement of a reduction from the supplier's own prices, that
213 the reduction is from a regular price, when the former price is not a regular price as defined in
214 Subsection 13-11a-2(14);

215 (q) advertises a price comparison or the result of a price assessment or comparison that
216 uses, in any way, an identified competitor's price without clearly and conspicuously disclosing
217 the identity of the price assessor and any relationship between the price assessor and the
218 supplier;

219 (r) makes a price comparison between a category of the supplier's goods and the same
220 category of the goods of another, without randomly selecting the individual goods or services
221 upon whose prices the comparison is based;

222 (s) makes a comparison between similar but nonidentical goods or services unless the
223 nonidentical goods or services are of essentially similar quality to the advertised goods or
224 services or the dissimilar aspects are clearly and conspicuously disclosed in the
225 advertisements; or

226 (t) engages in any other conduct which similarly creates a likelihood of confusion or of
227 misunderstanding.

228 (2) (a) For purposes of Subsection (1)(i), if a specific advertised price will be in effect
229 for less than one week from the advertisement date, the advertisement must clearly and
230 conspicuously disclose the specific time period during which the price will be in effect.

231 (b) For purposes of Subsection (1)(n), with respect to the price of a competitor, the
232 price must be one at which the competitor offered the goods or services for sale in the product
233 area at the time of the price assessment, and must not be an isolated price.

234 (c) For purposes of Subsection (1)(o), an audit, accounting, price assessment, or
235 comparison shall be independent if the price assessor randomly selects the goods to be
236 compared, and the time and place of the comparison, and no agreement or understanding
237 exists between the supplier and the price assessor that could cause the results of the assessment
238 to be fraudulent or deceptive. The independence of an audit, accounting, or price comparison
239 is not invalidated merely because the advertiser pays a fee for the audit, accounting, or price
240 comparison, but is invalidated if the audit, accounting, or price comparison is done by a full or
241 part-time employee of the advertiser.

242 (d) Examples of a disclosure that complies with Subsection (1)(q) are:

- 243 (i) "Price assessment performed by Store Z";
- 244 (ii) "Price assessment performed by a certified public accounting firm"; or
- 245 (iii) "Price assessment performed by employee of Store Y".

246 (e) For the purposes of Subsection (1)(r), goods or services are randomly selected
247 when the supplier has no advance knowledge of what goods and services will be surveyed by
248 the price assessor, and when the supplier certifies its lack of advance knowledge by an
249 affidavit to be retained in the supplier's records for one year.

250 (f) (i) It is prima facie evidence of compliance with Subsection (1)(s) if:

- 251 (A) the goods compared are substantially the same size; and
- 252 (B) the goods compared are of substantially the same quality, which may include
253 similar models of competing brands of goods, or goods made of substantially the same

254 materials and made with substantially the same workmanship.

255 (ii) It is prima facie evidence of a deceptive comparison under this section when the
256 prices of brand name goods and generic goods are compared.

257 (3) Any supplier who makes a comparison with a competitor's price in advertising
258 shall maintain for a period of one year records that disclose the factual basis for such price
259 comparisons and from which the validity of such claim can be established.

260 (4) It is a defense to any claim of false or deceptive price representations under this
261 chapter that a person:

262 (a) has no knowledge that the represented price is not genuine; and

263 (b) has made reasonable efforts to determine whether the represented price is genuine.

264 (5) Subsections (1)(m) and (q) do not apply to price comparisons made in catalogs in
265 which a supplier compares the price of a single item of its goods or services with those of
266 another.

267 (6) To prevail in an action under this chapter, a complainant need not prove
268 competition between the parties or actual confusion or misunderstanding.

269 (7) This chapter does not affect unfair trade practices otherwise actionable at common
270 law or under other statutes of this state.