

1 **State of Arkansas**
2 **79th General Assembly**
3 **Regular Session, 1993**
4 **By: Senators Hardin and Scott**

A Bill

ACT 137 OF 1993
SENATE BILL 11

For An Act To Be Entitled

8 "AN ACT TO REGULATE TELEPHONIC SELLERS, TO REQUIRE
9 REGISTRATION OF TELEPHONIC SELLERS; TO REQUIRE DISCLOSURE
10 TO PROSPECTIVE PURCHASERS; TO PROVIDE REMEDIES UPON
11 VIOLATION; AND FOR OTHER PURPOSES."

Subtitle

14 **"AN ACT TO REQUIRE REGISTRATION AND TO REGULATE**
15 **TELEPHONIC SELLERS."**

17 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:**

SECTION 1. Legislative finding, declaration, and intent.

20 **(a) The Arkansas General Assembly recognizes that the widespread use of**
21 **telephone solicitors to initiate sales of goods, real property, and investment opportunities has**
22 **created numerous problems for purchasers and investors which are inimical to good business**
23 **practices. Telephonic sales have a significant impact upon the economy and well-being of this**
24 **state and its local communities. However, purchasers have suffered substantial losses because**
25 **of (1) misrepresentations, (2) lack of full and complete information regarding both the**
26 **telephonic seller and the goods and investments the telephonic seller is offering, and (3) failure**
27 **of delivery. The provisions of this act relating to telephonic sellers are necessary for the public**
28 **welfare.**

29 **(b) It is the intent of the Legislature in enacting this act to (1) provide each**
30 **prospective telephonic sales purchaser with information necessary to make an intelligent**
31 **decision regarding the offer made, (2) safeguard the public against deceit and financial**
32 **hardship, (3) insure, foster, and encourage competition and fair dealings among telephonic**
33 **sellers by requiring adequate disclosure, and (4) prohibit representations that tend to mislead.**
34 **This act shall be construed liberally in order to achieve these purposes.**

SECTION 2. Telephonic seller defined.

1 **As used in this act, "telephonic seller" or "seller" means a person who on his or her own**
2 **behalf or through salespersons causes a telephone solicitation or attempted telephone**
3 **solicitation to occur which meets the criteria specified in subdivision (1) or (2) and who is not**
4 **exempted by subdivision (3), as follows:**

5 **(1) A telephone solicitation or attempted telephone solicitation wherein the**
6 **telephonic seller initiates telephonic contact with a prospective purchaser and represents or**
7 **implies one or more of the following:**

8 **(A) That a prospective purchaser who buys one or more items will also receive**
9 **additional or other items, whether or not of the same type as purchased, without further cost.**
10 **For purposes of this subdivision, "further cost" does not include actual postage or common**
11 **carrier delivery charges, if any.**

12 **(B) That a prospective purchaser will receive a prize or gift, if the person also**
13 **encourages the prospective purchaser to do either of the following:**

- 14 **(i) Purchase or rent any goods or services.**
15 **(ii) Pay any money, including, but not limited to,**
16 **a delivery or handling charge.**

17 **(C) That a prospective purchaser is able to obtain any item or service at a price**
18 **which the seller states or implies is below the regular price of the item or service offered. This**
19 **subdivision (1)(C) shall not apply to retailers who, within the previous twelve (12) months,**
20 **have sold a majority of their goods or services through in-person sales at retail stores.**

21 **(D) That the seller is a person other than the person he or she is.**

22 **(E) That the items for sale are manufactured or supplied by a person other than**
23 **the actual manufacturer or supplier.**

24 **(2)(A) A solicitation or attempted solicitation which is made by telephone in response**
25 **to inquiries generated by unrequested notifications sent by the seller to persons who have not**
26 **previously purchased goods or services from the seller or who have not previously requested**
27 **credit from the seller, to a prospective purchaser wherein the seller represents or implies to**
28 **the recipient of the notification that any of the following applies to the recipient:**

29 **(i) That the recipient has in any manner been specially selected to receive the**
30 **notification or the offer contained in the notification.**

31 **(ii) That the recipient will receive a prize, gift, or award if the recipient calls the**
32 **seller.**

33 **(iii) That if the recipient buys one or more items from the seller, the recipient**
34 **will also receive additional or other items, whether or not of the same type as purchased,**
35 **without further cost or at a cost which the seller states or implies is less than the regular price**

1 of such items.

2 **(B) This subdivision (2) does not apply to the solicitation of sales by a catalog**
3 **seller who periodically issues and delivers catalogs to potential purchasers by mail or by other**
4 **means. This exception only applies if the catalog includes a written description or illustration**
5 **and the sales price of each item or merchandise offered for sale, includes at least twenty-four**
6 **(24) full pages of written material or illustrations, is distributed in more than one state, and**
7 **has an annual circulation of not less than 250,000 customers.**

8 **(3) For purposes of this act, "telephonic seller" or "seller" does not include any of the**
9 **following:**

10 **(A) A person offering or selling a security and who is registered pursuant to §**
11 **23-42-301 et seq..**

12 **(B) A person offering or selling insurance and who is licensed pursuant to § 23-**
13 **64-201 et seq..**

14 **(C) A person primarily soliciting the sale of a newspaper of general circulation,**
15 **a magazine, or membership in a book or record club whose program operates in conformity**
16 **with § 4-89-101 et seq. and § 4-95-101 et seq..**

17 **(D) A person soliciting business from prospective purchasers who have**
18 **previously purchased from the business enterprise for which the person is calling.**

19 **(E) A person soliciting without the intent to complete and who does not**
20 **complete the sales presentation during the telephone solicitation but completes the sales**
21 **presentation at a later face-to-face meeting between the solicitor and the prospective**
22 **purchaser. However, if a seller directly following a telephone solicitation, causes an individual**
23 **whose primary purpose it is to go to the prospective purchaser to collect the payment or deliver**
24 **any item purchased, this exemption does not apply.**

25 **(F) Any supervised financial institution or parent, subsidiary, or affiliate**
26 **thereof. As used in this subdivision, "supervised financial institution" means any commercial**
27 **bank, trust company, savings and loan association, credit union, industrial loan company,**
28 **personal property broker, consumer finance lender, commercial finance lender, or insurer,**
29 **provided that the institution is subject to supervision of an official or agency of this state or of**
30 **the United States.**

31 **(G) Any burial association operating pursuant to authority of § 23-78-101 et**
32 **seq..**

33 **(H) A person or an affiliate of a person whose business**
34 **is regulated by the Public Service Commission.**

35 **(I) An issuer or subsidiary of an issuer that has a class of securities which is**

1 subject to and which is either registered or exempt from registration to § 23-42-401 et seq..

2 **(J)** A person soliciting a transaction regulated by the Commodity Futures
3 Trading Commission if the person is registered or temporarily licensed for this activity with
4 the Commodity Futures Trading Commission under the Commodity Exchange Act, (7 U.S.C.
5 Sec. 1 et seq.) and the registration or license has not expired or been suspended or revoked.

6 **(K)** *A person soliciting a transaction directed to a purchaser holding a permit*
7 *pursuant to the Arkansas Gross Receipts Act, ACA 26-51-101 et seq.*

8 **(4)** In any civil proceeding alleging a violation of this act, the burden of proving an
9 exemption or an exception from a definition is upon the person claiming it, and in any criminal
10 proceeding alleging a violation of this act, the burden of producing evidence to support a
11 defense based upon an exemption or an exception from a definition is upon the person claiming
12 it.

13

14 **SECTION 3. Definitions.**

15 As used in this act, the following terms have the following meanings:

16 **(a)** "Consumer Protection Division" shall mean the Consumer Protection Division
17 of the Office of the Attorney General.

18 **(b)** "Item" means any goods and services, and includes coupon books which are to be
19 used with businesses other than the seller's business.

20 **(c)** "Owner" means a person who owns or controls ten percent (10%) or more of the
21 equity of, or otherwise has claim to ten percent (10%) or more of the net income of, a
22 telephonic seller.

23 **(d)** "Person" includes an individual, firm, association, corporation, partnership,
24 joint venture, or any other business entity.

25 **(e)** "Principal" means an owner, an executive officer of a corporation, a general
26 partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any
27 other individual with similar supervisory functions with respect to any person.

28 **(f)** "Purchaser" or "prospective purchaser" means a person who is solicited to
29 become or does become obligated to a telephonic seller.

30 **(g)** "Salesperson" means any individual employed, appointed or authorized by a
31 telephonic seller, whether referred to by the telephonic seller as an agent, representative, or
32 independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic
33 seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of
34 the telephonic seller.

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1 **SECTION 4. Registration procedures; fees; duration.**

2 **(a) Not less than ten (10) days prior to doing business in this state, a telephonic**
3 **seller shall register with the Consumer Protection Division by filing the information required**
4 **by this act and a filing fee of one hundred dollars (\$100.00). A seller shall be deemed to do**
5 **business in this state if the seller solicits prospective purchasers from locations in this state or**
6 **solicits prospective purchasers who are located in this state.**

7 **(b) Registration of a telephonic seller shall be valid for one year from the effective**
8 **date thereof and may be renewed by making the filing required by this act and paying a filing**
9 **fee of one hundred dollars (\$100.00).**

10 **(c) The information required by this act shall be submitted on a form prescribed by**
11 **the Attorney General and shall be verified by a declaration signed by each principal of the**
12 **telephonic seller under penalty of perjury.**

13 **(d) Whenever, prior to expiration of a**
14 **seller's annual registration, there is a material change in the information required under this**
15 **act, the seller shall, within ten (10) days, file an addendum updating the information with the**
16 **Consumer Protection Division. However, changes in salespersons soliciting on behalf of a**
17 **seller shall be updated in quarterly intervals computed from the effective date of registration.**

18 **(e) Upon receipt of a filing and filing fee pursuant to subsections (a) or (b), the**
19 **Consumer Protection Division shall send the telephonic seller a written confirmation of**
20 **registration. If the seller has more than one business location, the confirmation of registration**
21 **shall be sent to the principal business location identified in the seller's filing in sufficient**
22 **number so that the seller has a confirmation of registration for each location to be displayed in**
23 **a conspicuous place at each of the seller's business locations and available for inspection by any**
24 **governmental agency at each location. Until confirmation of registration is received and**
25 **posted, the seller shall post in a conspicuous place at each of the seller's business locations**
26 **within this state a copy of the first page of the registration form sent to the Consumer**
27 **Protection Division.**

28 **(f) Every salesperson must be employed in a principal-agent relationship by a**
29 **telephonic seller registered pursuant to this act, and shall, within seventy-two (72) hours after**
30 **accepting such employment, register with the Consumer Protection Division. Application for**
31 **registration shall be on a form prescribed by the Attorney General, verified by a declaration**
32 **signed by each salesperson under penalty of perjury, and shall be accompanied by a fee in the**
33 **sum of ten dollars (\$10.00). When effective, such registration shall be for a period of one (1)**
34 **year and may be renewed upon the payment of the fee prescribed in this section for additional**
35 **one-year periods.**

(g) All fees collected by the Attorney General under this section shall be deposited

1 *in the State Treasury as general revenues.*

2 **SECTION 5. Exemption information; requirements.**

3 **(a) Any person claiming an exemption from registration as provided by this act shall**
4 **keep full and accurate records in such form as will enable the person to provide to the**
5 **Attorney General, upon request, the information required to substantiate an exemption**
6 **under this act.**

7 **(b) The information provided under this section shall be verified by a declaration**
8 **signed under penalty of perjury by each principal of the person claiming exemption.**

9 **SECTION 6. Filing information.**

10 **Each registration filing pursuant to this act shall contain the following information:**

11 **(1) The name or names of the seller, including the name under which the seller is**
12 **doing or intends to do business, if different from the name of the seller, and the name of any**
13 **parent or affiliated organization:**

14 **(A) that will engage in business transactions with purchasers relating to sales**
15 **solicited by the seller, or**

16 **(B) that accepts responsibility for statements made by, or acts of, the seller**
17 **relating to sales solicited by the seller.**

18 **(2) The seller's business form and place of organization and, if the seller is a**
19 **corporation, a copy of its articles of incorporation and bylaws and amendments thereto, or, if a**
20 **partnership, a copy of the partnership agreement, or if operating under a fictitious business**
21 **name, the location where the fictitious name has been registered. All the same information**
22 **shall be included for any parent or affiliated organization disclosed pursuant to subdivision**
23 **(1).**

24 **(3) The complete street address or addresses of all locations, designating the**
25 **principal location from which the telephonic seller will be conducting business. If the**
26 **principal business location of the seller is not in this state, then the seller shall also designate**
27 **which of any locations within this state is its main location in the state.**

28 **(4) A listing of all telephone numbers to be used by the seller and the address where**
29 **each telephone using each of these telephone numbers is located.**

30 **(5) The name of, and the office held by, the seller's officers, directors, trustees,**
31 **general and limited partners, sole proprietor, and owners, as the case may be, and the names of**
32 **those persons who have management responsibilities in connection with the seller's business**
33 **activities.**

34 **(6) The complete address of the principal residence, the date of birth, and the social**
35 **security number of each of the persons whose names are disclosed pursuant to subdivision (5).**

1 **(7) A list of the names and principal residence addresses of salespersons who solicit**
2 **on behalf of the telephonic seller and the names the salespersons use while soliciting.**

3 **(8) A description of the items the seller is offering for sale and a copy of all sales**
4 **scripts the telephonic seller requires salespersons to use when soliciting prospective**
5 **purchasers, or if no sales script is required to be used, a statement to that effect.**

6 **(9) A copy of all sales information and literature including, but not limited to,**
7 **scripts, outlines, instructions, and information regarding how to conduct telephonic sales,**
8 **sample introductions, sample closing, product information and contest or premium-award**
9 **information provided by the telephonic seller to salespersons or of which the seller informs**
10 **salespersons, and a copy of all written materials the seller sends to any prospective or actual**
11 **purchaser.**

12 **(10) If the telephonic seller represents or implies, or directs salespersons to**
13 **represent or imply, to purchasers that the purchaser will receive certain specific items,**
14 **including a certificate of any type which the purchaser must redeem to obtain the item**
15 **described in the certificate, or one or more items from among designate items, whether the**
16 **items are denominated as gifts, premiums, bonuses, prizes, awards, or otherwise, the filing**
17 **shall include the following:**

18 **(A) A list of the items offered.**

19 **(B) The value or worth of each item described to prospective purchasers and**
20 **the basis for the valuation.**

21 **(C) The price paid by the telephonic seller to its supplier for each of these items**
22 **and the name, address, and telephone number of each item's supplier.**

23 **(D) If the purchaser is to receive fewer than all of the items described by the**
24 **seller, the filing shall include the following:**

25 **(i) The manner in which the telephonic seller decides which item or**
26 **items a particular prospective purchaser is to receive.**

27 **(ii) The odds a single prospective purchaser has of receiving each**
28 **described item.**

29 **(iii) The name and address of each recipient who has, during the**
30 **preceding twelve (12) months, or if the seller has not been in business that long, during the**
31 **period the telephonic seller has been in business, received the item having the greatest value**
32 **and the item with the smallest odds of being received.**

33 **(E) All rules, regulations, terms, and conditions a prospective purchaser must**
34 **meet in order to receive the item.**

35 **(11) The name and address of the telephonic seller's agent in this state, other than**

1 the Attorney General, authorized to receive service of process in this state.

2

3 **SECTION 7. Information to be provided each prospective purchaser.**

4 **If the telephonic seller represents or implies that a prospective purchaser will receive,**
5 **without charge therefor, certain specific items or one item from among designated items,**
6 **whether the items are denominated as gifts, premiums, bonuses, prizes, awards or otherwise,**
7 **the seller shall provide, at the time the solicitation is made and prior to consummation of any**
8 **sales transaction, the following:**

9 **(1) The manner in which the telephonic seller decides which item or items a particular**
10 **prospective purchaser is to receive.**

11 **(2) The odds a single prospective purchaser has of receiving each described item.**

12 **(3) All rules, regulations, terms, and conditions a prospective purchaser must meet in**
13 **order to receive the item.**

14 **(4) The complete street address of the location from which the salesperson is calling**
15 **the prospective purchaser and, if different, the complete street address of the telephonic**
16 **seller's principal location.**

17 **(5) The total number of individuals who have actually received from the telephonic**
18 **seller, during the preceding twelve (12) months or if the seller has not been in business that**
19 **long, during the period the seller has been in business, the item having the greatest value and**
20 **the item with the smallest odds of being received.**

21

22 **SECTION 8. Irrevocable consent appointing attorney general to act as seller's**
23 **attorney to receive service; conditions of effective service.**

24 **Every telephonic seller shall file with the Attorney General, in the form prescribed by**
25 **the Attorney General, an irrevocable consent appointing the Attorney General to act as the**
26 **seller's attorney to receive service of any lawful process in any noncriminal suit, action, or**
27 **proceeding against the seller or the seller's successor, executory, or administrator, which may**
28 **arise under this act, when the agent designated in the seller's registration filing cannot with**
29 **reasonable diligence be found at the address designated or if no agent has been designated**
30 **pursuant thereto. When service is made upon the Attorney General in conformance with this**
31 **section, it shall have the same force and validity as if served personally on the seller. Service**
32 **may be made by leaving a copy of the process in the office of the Attorney General, but it shall**
33 **not be effective unless both of the following are done:**

34 **(1) When service is effected pursuant to this section, the plaintiff shall forthwith**
35 **send by certified first-class mail, return receipt requested, a notice of the service and a copy of**

1 the process to the defendant or respondent at the last address on file with the Consumer
2 Protection Division.

3 **(2)** The plaintiff's affidavit of compliance with this section shall be filed in the case
4 on or before the return date of the process, if any, or with such further time as the court allows.

5
6 **SECTION 9. Reference to compliance with this act.**

7 **No seller shall make or authorize the making of any reference to its compliance with**
8 **this act to any prospective or actual purchaser.**

9
10 **SECTION 10. Soliciting prospective purchasers on behalf of unregistered telephonic**
11 **seller prohibited; violation, misdemeanor.**

12 **No salesperson shall solicit prospective purchasers on behalf of a telephonic seller who**
13 **is not currently registered with the Consumer Protection Division pursuant to this act. Any**
14 **salesperson who violates this section shall be guilty of a Class A misdemeanor.**

15
16 **SECTION 11. Punishment for violation of provisions of this act.**

17 **(a)** Except as provided in Section 10, any person, including, but not limited to, the
18 seller, a salesperson, agent or representative of the seller, or an independent contractor, who
19 willfully violates any provision of this act or who directly or indirectly employs any device,
20 scheme, or artifice to deceive in connection with the offer or sale by any telephonic seller, or
21 who willfully, directly or indirectly, engages in any act, practice, or course of business which
22 operates or would operate as fraud or deceit upon any person in connection with a sale by any
23 telephonic seller shall, upon conviction, be guilty of a Class D felony.

24 **(b)** Every person who controls a seller liable under this section, or a salesperson
25 liable under Section 10 of this Act; every partner, officer, or director of such a seller or
26 salesperson; every person occupying a similar status or performing a similar function; every
27 employee of such a seller or salesperson who materially aids in the sale or attempted sale are
28 also liable jointly and severally with, and to the same extent as, the seller or salesperson, unless
29 the non-seller or non-salesperson who is so liable sustains the burden of proof that he or she
30 did not know, and in the exercise of reasonable care could not have known, of the existence of
31 the facts by reason of which the liability is alleged to exist. There is contribution as in cases of
32 contract among the several persons so liable.

33
34 **SECTION 12. Remedies provided for violation of provisions of this act not exclusive;**
35 **rights of attorney general.**

1 **(a) The provisions of this act are not exclusive. The remedies specified in this**
2 **article for violation of any section of this act or for conduct proscribed by any section of this act**
3 **shall be in addition to any other procedures or remedies for any violation or conduct provided**
4 **for in any other law.**

5 **(b) Violation of any of the provisions of this Act shall constitute an unfair or**
6 **deceptive act or practice as defined by the Deceptive Trade Practices Act, A.C.A. § 4-88-101 et**
7 **seq.. All remedies, penalties, and authority granted to the Attorney General under the**
8 **Deceptive Trade Practices Act shall be available to the Attorney General for the enforcement**
9 **of this Act.**

10
11 **SECTION 13. Bond requirement; promotions; notice prior to inception.**

12 **(a) Every telephonic seller shall maintain a bond issued by a surety company**
13 **authorized to do business in this state. The bond shall be in the amount of fifty thousand**
14 **dollars (\$50,000) in favor of the State of Arkansas for the benefit of any person suffering**
15 **injury or loss by reason of any violation of this act, to be paid under the terms of any order of a**
16 **court of competent jurisdiction obtained by the Attorney General or prosecuting attorney as a**
17 **result of any violation of this act. A copy of the bond shall be filed with the Consumer**
18 **Protection Division of the Office of the Attorney General.**

19 **(b) At least ten (10) days prior to the inception of any promotion offering a**
20 **premium with an actual market value or advertised value of five hundred dollars (\$500) or**
21 **more, the telephonic seller shall notify the Attorney General in writing of the details of the**
22 **promotion, describing the premium, and its current market value, the value at which it is**
23 **advertised or held out to the consumer, the date the premium shall be awarded, and the**
24 **conditions under which the award shall be made. The telephonic seller shall maintain an**
25 **additional bond for the total current market value or advertised value, whichever is greater, of**
26 **the premiums held out or advertised to be available to a purchaser or recipient. A copy of the**
27 **bond shall be filed with the Consumer Protection Division of the Office of the Attorney**
28 **General. The bond, or portion thereof necessary to cover the cost of the award, shall be**
29 **forfeited if the premium is not awarded to a bona fide customer within thirty (30) days of the**
30 **date disclosed as the time of award or other time required by law. The proceeds of the bond**
31 **shall be paid to any person suffering injury or loss by reason of any violation of this act, or shall**
32 **be paid pursuant to the terms of any order of a court of competent jurisdiction obtained by the**
33 **Attorney General or prosecuting attorney as a result of any violation of this act. The bond shall**
34 **be maintained until the seller files with the Attorney General proof that the premium was**
35 **awarded.**

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SECTION 14. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 15. Severability.

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are declared to be severable.

SECTION 16. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 17. EMERGENCY CLAUSE. It is hereby found and determined by the General Assembly that the widespread use of telephone solicitors to initiate sales of goods, real property, and investment opportunities has created numerous problems for purchasers and investors which are inimical to good business practices; that telephonic sales have a significant impact upon the economy and well-being of this state and its local communities; and that this act is necessary for the protection of the people of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

/s/Senators Hardin and Scott

APPROVED: 2/16/93

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