

No. 1996-147

AN ACT

SB 1317

Providing for registration requirements for telemarketers and for powers and duties of the Office of Attorney General.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Telemarketer Registration Act.

Section 2. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Consumer goods and services.” Real or personal property or services used for personal, family or household purposes.

“Prize.” Anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

“Prize promotion.”

(1) A sweepstakes or other game of chance; or

(2) an oral or written express or implied representation that a person has won, has been selected to receive or may be eligible to receive a prize or purported prize.

“Telemarketer.” Any person or business which, in connection with telemarketing, initiates or receives telephone calls to or from a consumer in this Commonwealth, or when the person or business acting in connection with telemarketing is located within this Commonwealth when such calls are initiated or received. For purposes of registration under section 3(a), “telemarketer” does not include any of the following:

(1) A person or business soliciting sales through a catalog which:

(i) Contains a written description or illustration and price of each of the goods or services offered for sale.

(ii) Includes the business address of the seller.

(iii) Includes at least 24 pages of written material or illustration.

(iv) Is distributed in more than one state.

(v) Has been issued not less frequently than once a year.

(vi) Has an annual circulation of not less than 250,000 consumers.

(2) A person or business soliciting without the intent to complete and who does not complete the sales presentation during the telephone solicitation, but completes the sales presentation at a later face-to-face meeting between the solicitor and the prospective purchaser, or who offers to send the purchaser descriptive literature and does not require payment prior to the purchaser's review of the descriptive literature. However, if a seller, directly following a telephone solicitation, causes an individual whose primary purpose it is to go to the prospective purchaser to collect the payment, this exemption does not apply.

(3) A book, video or record club or contractual plan or agreement:

(i) under which the seller provides the consumer with a form which the consumer may use to instruct the seller not to ship the offered merchandise;

(ii) which is regulated by the Federal Trade Commission trade regulation concerning "use of negative option plans by sellers in commerce"; or

(iii) which provides for the sale of books, records or videos which are not covered under subparagraph (i) or (ii), including continuity plans, subscription arrangements, standing order arrangements, supplements and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive such merchandise on a periodic basis.

(4) A person or business conducting a business-to-business sale where the selling business has been operating continuously for at least three years under the same business name and has at least 50% of its dollar volume consisting of a repeat sales to existing businesses.

(5) A person or business engaged in a business or occupation which is licensed by, certificated by or registered with a Federal or Commonwealth agency while acting within the scope of the business for which licensure, certification or registration is required.

(6) Any of the following organizations unless a professional fundraising counsel or a professional solicitor, who is neither registered nor exempt from registration under this act, is utilized:

(i) Educational institutions, the curricula of which in whole or in part are registered with or approved by the Department of Education, either directly or by acceptance of accreditation by an accrediting body recognized by the Department of Education, and any auxiliary associations, foundations and support groups which are directly responsible to educational institutions.

(ii) Hospitals which are subject to regulation by the Department of Health or the Department of Public Welfare and the hospital foundation, if any, which is an integral part thereof.

(iii) Public nonprofit library organizations which receive financial aid from State and municipal governments and file an annual fiscal report with the State Library System.

(iv) Senior citizen centers and nursing homes which are nonprofit and charitable and which have been granted tax-exempt status under the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 1 et seq.).

(v) Bona fide parent/teacher associations or parent/teacher organizations as recognized in a notarized letter from the school district in which they are located.

(vi) Any corporation established by an act of Congress of the United States that is required by Federal law to submit annual reports of its activities to Congress containing itemized accounts of all receipts and expenditures after being fully audited by the Department of Defense.

(vii) Any charitable organization which receives contributions of \$25,000 or less annually.

(7) A person or business soliciting business from prospective purchasers who have previously purchased from the business enterprise for which the person is calling where the business enterprise has been operating continuously for at least three years under the same business name.

(8) A person or business primarily soliciting the sale of a newspaper, magazine or other periodical of general circulation where the business which publishes the newspaper, magazine or other periodical of general circulation has been operating continuously for at least two years under the same business name; the person soliciting is an employee of the publisher or an employee of an agent of the publisher and the person soliciting discloses the following during the initial contact: the total costs to purchase, receive or use and the quantity of the newspapers, magazines or other periodicals of general circulation that are the subject of the sales offer. For the purposes of this paragraph, the term "agent" means a person or business which has entered into a written agreement directly with the publisher.

(9) A person or business, or an agent of such person or business, which has been operating for at least two years a retail business establishment in this Commonwealth under the same name as that used in connection with telemarketing and both of the following occur on a continuing basis:

(i) Either products are displayed and offered for sale or services are offered for sale and provided at the business establishment.

(ii) A majority of the seller's business involves buyers obtaining such products or services at the seller's location. For the purposes of this paragraph, the term "agent" means a person or business which has entered into a written agreement directly with the retail business establishment.

(10) Any person or business which has been providing telemarketing services continuously for at least five years under the same ownership and

control and who derives 75% of its gross telemarketing sales revenues from contracts with persons or businesses exempted in this section.

(11) A person or business soliciting the sale of food or produce if the solicitation is not intended to result and does not result in a sale which costs the purchaser in excess of \$500 where the person or business selling the food or produce has been operating continuously for at least two years under the same business name.

(12) An issuer or subsidiary of an issuer that has a class of securities which is subject to section 12 of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. § 781) and which is either registered or exempt from registration under paragraph A, B, C, E, F, G or H of subsection (g)(2) of that section.

“Telemarketing.” A plan, program or campaign which is conducted to induce the purchase of goods or services or to solicit contributions for any charitable purpose, charitable promotion or for or on behalf of any charitable organization by use of one or more telephones and which involves more than one telephone call. For purposes of this act, the terms “charitable purpose,” “charitable promotion,” “charitable organization,” “professional fundraising counsel,” “professional solicitor” and “solicitation” have the meanings as defined in the act of December 19, 1990 (P.L.1200, No.202), known as the Solicitation of Funds for Charitable Purposes Act.

“Telemarketing business.” A business entity that is or has engaged in the business of telephone solicitations and employs at least one telemarketer.

Section 3. Registration requirement.

(a) **General rule.**—In addition to any other requirements imposed by law, a telemarketer or the telemarketing business which employs the telemarketer is required to register with the Office of Attorney General at least 30 days prior to offering for sale consumer goods or services through any medium. This section will not apply, however, to persons or businesses licensed by or registered with a Federal or Commonwealth agency. Notwithstanding any other provision of this act, any business which provides telemarketing services to other entities and has been under the same ownership and control for less than five years shall register under this section.

(b) **Unlawful conduct.**—It shall be unlawful for any telemarketer to initiate a telephone call to or receive a telephone call from a consumer in connection with the purchase of consumer goods or services unless the telemarketer or the telemarketing business which employs the telemarketer is registered with the Office of Attorney General.

(c) **Penalty.**—Failure to register as required by this act constitutes a misdemeanor of the second degree.

Section 4. Registration and application process.

(a) **Application form.**—The Office of Attorney General shall provide an application form for biennial registration except for those persons or businesses covered by subsection (c). The form shall include, but not be limited to, the following information:

(1) Name and current address, telephone number and location of the telemarketer or telemarketing business.

(2) Name and current address and telephone number of each principal owner of the telemarketing business.

(3) A list of telemarketers currently employed by the telemarketing business.

(b) Security.—The application for registration completed by persons or businesses pursuant to subsection (a) shall be accompanied by a surety bond in the sum of \$50,000 with conditions and in a form prescribed by the Office of Attorney General. The bond shall provide for the indemnification of any person suffering a loss as the result of any fraud, misrepresentation, violation of section 5 or violation of the act of December 17, 1968 (P.L.1224, No.387), known as the Unfair Trade Practices and Consumer Protection Law, by the principal. The term of the bond shall be continuous, but it shall be subject to cancellation by the surety in the manner described in this section. The surety may terminate the bond upon giving a 60-day written notice to the principal and to the Office of Attorney General, but the liability of the surety for acts of the principal and its agents shall continue during the 60 days' notice of cancellation. The notice does not absolve the surety from liability which accrues before the cancellation becomes final but which is discovered after that date and which may have arisen at any time during the term of the bond. Unless the bond is replaced by that of another surety before the expiration of the 60 days' notice of cancellation, the registration of the principal under this act will be treated as lapsed. Any person or business required under this section to file a bond with a registration application may file, in lieu thereof, cash, a certificate of deposit or government bonds in the amount of \$50,000. Such deposit is subject to the same terms and conditions as are provided for in the surety bond required in this subsection. The Office of Attorney General shall hold such cash, certificate of deposit or government bonds for a reasonable period from the date the telemarketer or telemarketing business ceases to operate or registration lapses in order to pay claims made against the telemarketer or telemarketing business during its operation. Any interest or earnings on such deposits are payable to the depositor. If, after registered, the amount of bond, cash, certificate of deposit or government bonds falls below the amount required by this subsection, the registration of the telemarketer or telemarketing business will be treated as lapsed. The Office of Attorney General shall prescribe the methods and procedures for handling claims under this subsection.

(c) Registration procedure for other businesses.—The Attorney General shall promulgate regulations providing for the registration of persons and businesses that are licensed by, certificated by or registered with a Federal or State agency but who engage in telemarketing related to activities outside the scope of the business for which such licensure, certification or registration is required. Regulations adopted under this subsection shall not apply to any person or business that is otherwise exempt from registration under this act.

(d) Application fee.—The biennial fee for those persons or businesses registering under subsection (a) shall be \$500. The fee must be submitted with the application. Application fees shall be deposited in a separate restricted account in the State Treasury. All moneys in this account are hereby appropriated to the Office of Attorney General on a continuing basis to administer and enforce the provisions of this act.

(e) Rules and regulations.—The Office of Attorney General may adopt rules and regulations necessary to enforce and administer this act.

Section 5. Unlawful acts and penalties.

(a) Acts enumerated.—The following acts are prohibited:

- (1) Conducting telemarketing after 9 p.m. or before 8 a.m.
- (2) Initiating an outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered. A seller or telemarketer will not be liable for violating the provisions of this paragraph if:

- (i) he has established and implemented written procedures to comply with this paragraph;

- (ii) he has trained his personnel in the procedures;

- (iii) the seller or the telemarketer acting on behalf of the seller has maintained and recorded lists of persons who may not be contacted; and

- (iv) any subsequent call is the result of error.

- (3) Obtaining or submitting for payment a check, draft or other form of negotiable paper drawn on a person's checking, savings, share or similar account without the person's express verifiable authorization. Such authorization shall be deemed verifiable if any of the following means are employed:

- (i) Express written authorization by the customer, which may include the customer's signature on the negotiable instrument.

- (ii) Express oral authorization which is tape recorded and made available upon request to the customer's bank and customer and which evidences clearly both the customer's authorization of payment for the goods and services that are the subject of the sales offer and the customer's receipt of all of the following information:

- (A) The date of the draft or drafts.

- (B) The amount of the draft or drafts.

- (C) The payor's name.

- (D) The number of draft payments, if more than one.

- (E) A telephone number for customer inquiry that is answered during normal business hours.

- (F) The date of the customer's oral authorization.

- (G) A statement that the transaction is one for which the customer may receive a full refund by returning undamaged and unused consumer goods within ten days after receiving them or by sending a cancellation of service notice to the telemarketer or

telemarketing business within five days after the transaction and that a refund shall be processed within 30 days after receiving the returned goods or cancellation from the customer. The statement required by this clause need not be provided to the consumer orally by telephone if it is provided in writing with advertising, promotional material or with delivery of the goods or services. A seller who discloses in writing that a sale is made or provided "SATISFACTION GUARANTEED," with "FREE INSPECTION" or "NO RISK GUARANTEE" with similar words or phrases shall be deemed to meet the requirements of the review and return for refund policy set forth in this clause.

(iii) Written confirmation of the transaction, sent to the customer prior to submission for payment of the customer's check, draft or other form of negotiable paper, which includes:

(A) all of the information contained in subparagraph (ii); and

(B) the procedures by which the customer can obtain a cancellation of the transaction from the seller or telemarketer in the event that confirmation is inaccurate.

(4) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by or promised to that person in a previous telemarketing transaction until seven business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney.

(5) Failing to disclose promptly to any consumer during the initial telephone contact the purpose of the call, the name of the telemarketer or telemarketing business and what the telemarketer or telemarketing business is selling.

(6) In the case of prize promotions, failing to provide the odds of winning, advising that no purchase or payment is necessary to win and identifying restrictions or conditions on obtaining a prize. In any prize promotion, if the odds are not calculable in advance, the factors used in calculating the odds must be disclosed. The no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate shall be provided. All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion must also be provided. Disclosure under this paragraph must be made prior to the customer's payment for the goods or services offered.

(7) Failing to reduce any sale of goods or services made during a telemarketing call to a written contract and obtaining the consumer's signature on the written contract, except as provided in subsection (d).

(8) Failing to end a telemarketing solicitation call when the consumer indicates he wants to end the call.

(b) Recordkeeping.—Telemarketers who are required to make verifiable authorizations under subsection (a)(3) shall keep such records for at least 24 months.

(c) Contract provisions.—A contract under subsection (a)(7) shall contain the following information:

(1) The name, address and telephone number of the telemarketer or telemarketing business.

(2) The total price of the consumer goods or services purchased.

(3) A detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation.

(4) Any oral or written representations made during the telemarketing solicitation.

(5) A statement that reads “You are not obligated to pay any money unless you sign this contract and return it to the seller.”

(d) Exception.—A signed, written contract is not needed if any of the following apply:

(1) The contractual sale is regulated under other laws of this Commonwealth.

(2) The transaction was made as a result of prior negotiations by the consumer and telemarketer or telemarketing business, where the consumer visited a merchant operating a retail business establishment in a permanent location where consumer goods are displayed or offered for sale on a continuing basis.

(3) All of the following apply:

(i) The transaction is one for which the consumer may receive a full refund upon the return of undamaged and unused consumer goods within ten days of receipt of the consumer goods or upon sending a cancellation of consumer service notice to the telemarketer or telemarketing business within five days of the transaction.

(ii) The return and refund policy is disclosed to the consumer orally by telephone or in writing with the advertising, promotional material or with delivery of the goods or services. A seller who discloses in writing that a sale is made or provided “SATISFACTION GUARANTEED,” with “FREE INSPECTION” or “NO RISK GUARANTEE” or with similar words or phrases shall be deemed to meet the requirements of the review and return policy set forth in this subparagraph.

(iii) The refund is processed within 30 days of receipt of the returned consumer goods or upon receipt of the cancellation of the consumer.

(4) The transaction is a result of the consumer examining an advertisement, sample, brochure or catalog of the telemarketer or telemarketing business which contains the name, address and telephone

number of the telemarketer or telemarketing business, a description of the goods or services and any limitations or restrictions that apply to the offer.

(5) The transaction is a sale or solicitation made by or on behalf of a bona fide charitable organization which is tax exempt under section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501(c)(3)).

Section 6. Violations.

(a) Other law.—A violation of this act is also a violation of the act of December 17, 1968 (P.L.1224, No.387), known as the Unfair Trade Practices and Consumer Protection Law.

(b) Second or subsequent offense.—Upon a second or subsequent violation of this act, the Office of Attorney General may seek revocation of registration or the right to conduct telemarketing in this Commonwealth.

(c) Procedure.—All actions of the Office of Attorney General under this act shall be taken subject to the right of notice, hearing and adjudication and the right of appeal therefrom in accordance with 2 Pa.C.S. (relating to administrative law and procedure).

Section 7. Remedies available to consumers.

Nothing in this act shall be construed to limit the remedies available to consumers, the Attorney General or any district attorney under the act of December 17, 1968 (P.L.1224, No.387), known as the Unfair Trade Practices and Consumer Protection Law, or any other State or Federal law.

Section 8. Burden of proof.

(a) Proceeding under this act.—In any civil proceeding alleging a violation of this act, the burden of proving an exemption or an exception from a definition is upon the person claiming it, and, in any criminal proceeding alleging a violation of this act, the burden of producing evidence to support a defense based upon an exemption or an exception from a definition is upon the person claiming it.

(b) Other proceedings.—Compliance with this act does not satisfy nor substitute for any requirements for license, registration or regulation mandated by other laws.

Section 9. Investigation.

(a) Authority.—If the Attorney General has reason to believe that a violation of this act has occurred, the Attorney General shall have authority to investigate on behalf of the Commonwealth, its citizens or a political subdivision.

(b) Procedure.—Prior to the institution of a civil action, the Attorney General is authorized to require the attendance and testimony of witnesses and the production of documents. For this purpose, the Attorney General may issue subpoenas, examine witnesses and receive evidence. If a person objects to or otherwise fails to comply with a subpoena or request for testimony, the Attorney General may file in Commonwealth Court an action to enforce the subpoena or request. Notice of hearing the action and a copy of all pleadings shall be served upon the person who may appear in opposition.

(c) Confidentiality.—Any testimony taken or material produced shall be kept confidential by the Attorney General except to the extent he may use information in a judicial proceeding or if the disclosure is authorized by the court for good cause shown or confidentiality is waived by the person being investigated and by the person who has testified, answered interrogatories or produced materials.

Section 10. Effective date.

This act shall take effect in 90 days.

APPROVED—The 4th day of December, A.D. 1996.

THOMAS J. RIDGE