

CHAPTER 569

H.B. No. 364

AN ACT

relating to the regulation of telephone solicitation; providing civil and criminal penalties.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. Subtitle 3, Title 79, Revised Statutes (Article 5069–9.01 et seq., Vernon's Texas Civil Statutes), is amended by adding Chapter 18 to read as follows:

CHAPTER EIGHTEEN

SUBCHAPTER A. GENERAL PROVISIONS

Art. 1. *DEFINITIONS.* In this chapter:

- (1) "Item" means property or a good or service and includes:
  - (A) a coupon book that is to be used with a business or company; and
  - (B) an interest in real property.
- (2) "Owner" means a person who owns, controls, or otherwise has claim to 10 percent or more of the net income of a seller.
- (3) "Person" includes an individual, sole proprietorship, firm, association, corporation, partnership, joint venture, or any other business entity.
- (4) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor, a trustee of a trust, or another individual with similar supervisory functions with respect to any person.
- (5) "Purchaser" means a person who is:
  - (A) solicited to become or becomes obligated for the purchase or rental of an item; or
  - (B) offered the opportunity to claim or receive an item.
- (6) "Registration statement" means a registration statement required under this chapter.
- (7) "Salesperson" means a person employed or authorized by a seller to cause, or to attempt to cause, a telephone solicitation.
- (8) "Seller" means a person who, on the person's own behalf, causes or attempts to cause a telephone solicitation.
- (9) "Supervised financial institution" means a bank, trust company, savings and loan association, credit union, industrial loan company, personal property broker, consumer

finance lender, commercial finance lender, insurer, or other financial institution that is subject to supervision by an official or agency of this state or the United States.

(10) "Telephone solicitation" means a telephone call to or from a person, initiated by a seller, salesperson, automatic dialing machine, or recorded message device for the purpose of inducing the person to purchase, rent, claim, or receive an item and includes a call made by a purchaser in response to a solicitation sent by mail or made by any other means.

Art. 2. EXEMPTIONS. (a) This chapter does not apply to:

(1) a person offering or selling a security that has been qualified for sale under Section 7, The Securities Act (Article 581-7, Vernon's Texas Civil Statutes), and its subsequent amendments, or that is subject to an exemption under Section 5 or 6 of that Act;

(2) a publicly traded corporation registered with the Securities and Exchange Commission or the State Securities Board, or a subsidiary or agent of the corporation;

(3) a person licensed under the Insurance Code, if the solicited transaction is governed by the Insurance Code;

(4) a person soliciting the sale of a subscription to:

(A) a daily or weekly newspaper of general circulation;

(B) a magazine or other periodical of general circulation; or

(C) a cable television service;

(5) a supervised financial institution or parent, subsidiary, or affiliate of a supervised financial institution;

(6) a person or affiliate of a person whose business is regulated by the Public Utility Commission of Texas;

(7) an educational institution or organization or a nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986;

(8) a sale in which the purchaser is a business that intends to:

(A) resell the item purchased; or

(B) use the item purchased in a recycling, reuse, remanufacturing, or manufacturing process;

(9) a person soliciting the sale of food;

(10) a person who periodically issues and delivers catalogs to potential purchasers if the catalog:

(A) includes a written description or illustration and the sales price of each item offered for sale;

(B) includes at least 24 full pages of written material or illustrations;

(C) is distributed in more than one state; and

(D) has an annual circulation of not less than 250,000 customers;

(11) the solicitation of contracts for the maintenance or repair of items previously purchased from the person making the solicitation or on whose behalf the solicitation is made;

(12) a person soliciting:

(A) without intent to complete or obtain provisional acceptance of a sale during the telephone solicitation;

(B) who does not make the major sales presentation during the telephone solicitation but arranges for the major sales presentation to be made at a later face-to-face meeting between the salesperson and the purchaser; and

(C) who does not cause an individual to go to the prospective purchaser to collect payment for the purchase or to deliver any item purchased directly following the telephone solicitation;

(13) a person subject to the control or licensing regulations of the Federal Communications Commission;

(14) a person selling:

(A) a contractual plan regulated by the Federal Trade Commission trade regulation on use of negative option plans by sellers in commerce under Title 16, Code of Federal Regulations, Part 425; or

(B) merchandise under an arrangement in which the seller periodically ships the merchandise to a consumer who has consented in advance to receive the merchandise on a periodic basis;

(15) a person:

(A) who provides telephone solicitation services under contract to sellers;

(B) who has been operating continuously for at least three years under the same business name; and

(C) for whom at least 75 percent of the person's contracts are performed on behalf of other persons exempt under this section;

(16) a person soliciting business from a former or current customer if the person has operated under the exact same business name for at least two years;

(17) a person engaging in a commercial telephone solicitation that is an isolated transaction and not done in the course of a pattern of repeated transactions of a like nature;

(18) a person who for at least two years has been operating under the same name as that used in connection with its telemarketing operations a retail establishment where consumer goods are displayed and offered for sale on a continuing basis if a majority of the person's business involves the buyers obtaining services or products at the person's retail establishment;

(19) a person subject to the filing requirements of Chapter 1054, Acts of the 70th Legislature, Regular Session, 1987 (Article 9023a, Vernon's Texas Civil Statutes), or any successor to this statute; or

(20) a person soliciting a transaction regulated by the Commodity Futures Trading Commission if the person is registered or temporarily licensed for that activity with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. Section 1 et seq.) and the registration or license has not expired or been suspended or revoked.

(b) In a civil proceeding alleging a violation of this chapter, the burden of proving an exemption is on the person claiming the exemption, and in a criminal proceeding alleging a violation of this chapter, the burden of producing evidence to support a defense based on an exemption is on the person claiming the exemption.

(c) The exemptions provided in this section apply only to a seller engaging in a telephone solicitation on its own behalf, except that the exemption provided in Subsection (a)(15) applies to a person providing telephone solicitation services to sellers.

Art. 3. CONSTRUCTION AND APPLICATION. This chapter shall be liberally construed and applied to promote its underlying purpose to protect persons against false, misleading, or deceptive practices in the telephone solicitation business.

#### SUBCHAPTER B. REGISTRATION OF TELEPHONE SELLERS

Art. 4. REGISTRATION REQUIRED. (a) A seller may not engage in telephone solicitation from a location in this state or to a purchaser located in this state without a certificate of registration for the business location from which the solicitation is made.

(b) A separate certificate is required for each business location from which a solicitation is made.

Art. 5. CONTENTS OF REGISTRATION STATEMENT; VERIFICATION; PUBLIC INFORMATION. (a) To obtain a certificate of registration, a seller must file a registration statement with the secretary of state.

(b) A registration statement must be in the form prescribed by the secretary of state and contain the information required by Subchapter C of this chapter.

(c) A registration statement must be verified by each principal of the seller and must specify the date and location of verification.

(d) All information included in or attached to a registration statement is public information.

Art. 6. **FILING FEE.** The filing fee for a registration statement is \$200.

Art. 7. **ISSUANCE OF CERTIFICATE OF REGISTRATION.** (a) On receipt of a completed registration statement, the filing fee required by Article 6 of this chapter, the security required by Article 10 of this chapter, and the consent regarding service of process required by Article 11 of this chapter, the secretary of state shall issue a certificate of registration and mail the certificate to the seller.

(b) If the seller uses one registration statement to register more than one business location, the secretary of state shall issue a certificate for each business location and mail all the certificates to the principal business location shown on the registration statement.

Art. 8. **EFFECTIVE DATE; RENEWAL.** The effective date of a registration statement is the date on which the secretary of state issues the certificate. A registration statement is effective for one year after its effective date and may be renewed annually by filing a renewal registration statement with the information required by Subchapter C of this chapter and paying the filing fee.

Art. 9. **UPDATE ADDENDUM REQUIRED.** (a) A seller shall file with the secretary of state an update addendum at quarterly intervals, computed from the effective date of registration, providing all required registration information for all salespersons who are currently soliciting or have solicited on behalf of the seller at any time during the period between the filing of the registration statement or the last addendum and the current addendum. For the purposes of compliance with this section, the seller may provide a copy of the "Employer's Quarterly Report" for employee wages it files with the Texas Employment Commission.

(b) In addition to the quarterly updates, if a material change in information submitted in a registration statement, other than the information described by Subsection (a) of this article, occurs before the date for renewal, a seller shall submit that information to the secretary of state by filing an update addendum.

Art. 10. **SECURITY.** (a) A registration statement filed under this chapter must be accompanied by:

(1) a bond executed by a corporate surety approved by the secretary of state and licensed to do business in this state;

(2) an irrevocable letter of credit issued for the benefit of the registrant by a supervised financial institution whose deposits are insured by an agency of the federal government; or

(3) a certificate of deposit in a supervised financial institution whose deposits are insured by an agency of the federal government, the principal of which may be withdrawn only on the order of the secretary of state.

(b) The amount of the bond, letter of credit, or certificate of deposit must be \$10,000, and the bond, letter of credit, or certificate of deposit must be conditioned on compliance by the seller with this chapter.

Art. 11. **SECRETARY OF STATE AS SELLER'S AGENT TO RECEIVE SERVICE.** (a) A seller shall file with the secretary of state, in the form prescribed by the secretary of state, an irrevocable consent appointing the secretary of state to act as the seller's agent to receive service of any lawful process in any noncriminal suit, action, or proceeding against the seller or the seller's successor, executor, or administrator that may arise under this chapter, when:

(1) an agent has not been designated under Subdivision 15, Article 12, of this chapter;

(2) the agent has resigned or died and a replacement has not been designated under Article 9 of this chapter; or

(3) the agent cannot with reasonable diligence be found at the designated address.

(b) *Service on the secretary of state under this article has the same force and validity as service on the seller. Service on the secretary of state may be made by:*

- (1) *leaving a copy of the process in the office of the secretary of state;*
- (2) *promptly sending by first-class mail a notice of the service and a copy of the process to the seller's principal business location at the last address on file with the secretary of state; and*
- (3) *filing the plaintiff's affidavit of compliance with this article in the case on or before the return date of the process, if any, or within an additional period that the court allows.*

### SUBCHAPTER C. CONTENTS OF REGISTRATION STATEMENT

**Art. 12. DISCLOSURE OF CERTAIN NAMES, ADDRESSES, AND ORGANIZATIONAL INFORMATION.** *A registration statement must contain the following information:*

(1) *the seller's name and the name under which the seller is doing or intends to do business, if different from the seller's name;*

(2) *the name of each parent and affiliated organization of the seller that:*

(A) *will engage in business transactions with purchasers relating to sales solicited by the seller; or*

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

(3) *the seller's business form and place of organization;*

(4) *if the seller is a corporation, a copy of its articles of incorporation and bylaws;*

(5) *if the seller is a partnership, a copy of the partnership agreement;*

(6) *if the seller is operating under an assumed business name, the location where the assumed name has been registered;*

(7) *for any parent or affiliated organization disclosed under Subdivision (2) of this article, the applicable information that is required of a seller under Subdivisions (3)–(6) of this article;*

(8) *the complete street address of each location of the seller, designating the principal location from which the seller will be conducting business;*

(9) *if the principal business location of the seller is not in this state, a designation of its main location in the state;*

(10) *a listing of each telephone number to be used by the seller and the address where each telephone using the number is located;*

(11) *the name and title of each of the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as applicable, and the name of each of those persons who have management responsibilities in connection with the seller's business activities;*

(12) *the complete address of the principal residence, the date of birth, and the number and state of issuance of the driver's license of each person whose name is disclosed under Subdivision (11) of this article;*

(13) *the name and principal residence address of each person the seller leaves in charge at each location from which the seller does business in this state, and the business location at which each of these persons is or will be in charge;*

(14) *the name and principal residence address of each salesperson who solicits on behalf of the seller or a copy of the "Employer's Quarterly Report" for employee wages the seller files with the Texas Employment Commission and the name the salesperson uses while soliciting;*

(15) *the name and address of the seller's agent in this state, other than the secretary of state, authorized to receive service of process; and*

(16) the name and address of each financial institution with which banking or similar monetary transactions are made by the seller and the identification number of each of the seller's accounts in each institution.

**Art. 13. DISCLOSURE OF CERTAIN CONVICTIONS, JUDGMENTS, ORDERS, AND BANKRUPTCIES.** (a) With respect to the seller and each person identified under Subdivision (11) or (13), Article 12, of this chapter, a registration statement must state the identity of each person:

(1) who has been convicted of or pleaded *nolo contendere* to a felony or misdemeanor involving an alleged violation of this chapter, or fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property;

(2) against whom has been entered a final judgment or order in a civil or administrative action, including a stipulated judgment or order, in which the complaint or petition alleged acts constituting a violation of this chapter, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property, the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property, or the use of unfair, unlawful, or deceptive business practices;

(3) who is subject to an injunction or restrictive court order relating to business activity as the result of an action brought by a federal, state, or local public agency, including an action affecting any vocational license; or

(4) who has, during the previous seven tax years, filed in bankruptcy, been adjudged a bankrupt, been reorganized due to insolvency, or has been a principal, director, officer, trustee, general or limited partner, or had management responsibilities of a corporation, partnership, joint venture, or other business entity that has filed in bankruptcy, been adjudged a bankrupt, or been reorganized due to insolvency while the person held that position or within one year after the date on which the person last held that position.

(b) Under Subsections (a)(1), (2), and (3) of this article, the statement must identify the court or administrative agency rendering the conviction, judgment, or order, the docket number of the matter, the date of conviction, judgment, or order, and the name of the governmental agency, if any, that brought the action resulting in the conviction, judgment, or order. Under Subsection (a)(4) of this article, the statement must include the name and location of the person filing in bankruptcy, adjudged a bankrupt, or reorganized due to insolvency, and must include the date of the filing, judgment, or reorganization order, the court having jurisdiction, and the docket number of the matter.

**Art. 14. DISCLOSURE OF CERTAIN SALES INFORMATION.** The registration statement must be accompanied by the following information:

(1) a description of the items the seller is offering for sale;

(2) a copy of all sales information and literature, including scripts, outlines, instructions, and information regarding the conduct of telephone solicitations, sample introductions, sample closings, product information, and contest or premium-award information, provided by the seller to salespersons or about which the seller informs salespersons, and a copy of all written material the seller sends to any purchaser;

(3) if the seller represents or implies, or directs salespersons to represent or imply, to purchasers that the purchaser will receive a specific item, including a certificate that the purchaser must redeem to obtain the item described in the certificate, or one or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise:

(A) a list of the items described;

(B) the value of each item and the basis for the valuation;

(C) the price paid by the seller to its supplier for each item and the name, address, and telephone number of each item's supplier;

(D) if the purchaser is to receive fewer than all of the items described by the seller:

(i) the manner in which the seller decides which item a particular purchaser is to receive;

(ii) for each item, the odds of a single purchaser's receiving the item; and

(iii) the name and address of each recipient who has received, during the preceding 12 months, or if the seller has not been in business that long, during the period the seller has been in business, the item having the greatest value and the item with the smallest odds of being received; and

(E) all rules, regulations, terms, and conditions a purchaser must meet in order to receive the item;

(4) if the seller is offering an item that the seller neither manufactures nor supplies:

(A) the name, address, and telephone number of each of the seller's suppliers and a description of each item provided by the supplier;

(B) if the possession of the item is to be retained by the seller or will not be transferred to the purchaser until the purchaser has paid in full:

(i) the address of each location where the item will be kept;

(ii) if not kept on premises owned by the seller or at an address registered under Subdivision (8) or (9), Article 12, of this chapter, the name of the owner of the business at which the item will be kept; and

(iii) a copy of any contract or other document that evidences the seller's right to store the item at the address designated under Subparagraph (ii) of this paragraph;

(C) if the seller is not selling the item from its own inventory but purchases the item to fill an order already taken from a purchaser, copies of all contracts or other documents evidencing the seller's ability to call on suppliers to fill the seller's orders;

(D) if the seller represents to purchasers that the seller has insurance or a surety bond of any type relating to a purchaser's purchase of any item, a complete copy of each insurance policy and bond; and

(E) if the seller makes any representation as to the post-purchase earning or profit potential of an item, data to substantiate the claims made, and if the representation relates to previous sales made by the seller or a related entity, substantiating data based on the experiences of at least 50 percent of the persons who purchased that particular type of item from the seller or related entity during the preceding six months, or if the seller or related entity has not been in business that long, during the period the seller or related entity has been in business, including:

(i) the length of time the seller or related entity has been selling the particular type of item being offered;

(ii) the number of purchasers of the item from the seller or related entity known to the seller or related entity to have made at least the same earnings or profit as those represented; and

(iii) the percentage that the number disclosed under Subparagraph (ii) of this paragraph represents of the total number of purchasers from the seller or related entity of the particular type of item offered; and

(5) if the seller is offering to sell an interest in oil, gas, or a mineral field, well, or exploration site:

(A) the seller's ownership interest, if any, in each field, well, or site being offered for sale;

(B) the total number of interests to be sold in each field, well, or site being offered for sale; and

(C) if, in selling an interest in any particular field, well, or site, reference is made to an investigation of the field, well, or site by the seller or anyone else:

(i) the name, business address, telephone number, and professional credentials of the person who made the investigation; and

(ii) a copy of the report and other documents relating to the investigation prepared by the person.

## SUBCHAPTER D. ADDITIONAL INFORMATION FROM SELLER

**Art. 15. INFORMATION POSTED OR AVAILABLE AT SELLER'S BUSINESS LOCATION.** (a) A seller shall post the certificate of registration in a conspicuous place at the location for which it is issued.

(b) A seller shall make available at each of the seller's business locations a copy of the entire registration statement and update addenda, if any, for inspection by any purchaser or representative of any governmental agency.

(c) A seller shall post in close proximity to the certificate of registration the name of each individual in charge of the location.

**Art. 16. DISCLOSURES TO PROSPECTIVE PURCHASERS.** A seller shall, when the solicitation is made and before consummation of any sales transaction, provide to each purchaser:

(1) the complete street address of the location from which the salesperson is calling the purchaser and, if different, the complete street address of the seller's principal location;

(2) if the seller represents or implies that a purchaser will receive without charge a specified item or one item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise:

(A) the information required to be filed by Subdivisions (3)(D)(i) and (ii) and (3)(E), Article 14, of this chapter, as appropriate; and

(B) the total number of individuals who have actually received from the seller during the preceding 12 months, or if the seller has not been in the business that long, during the period the seller has been in business, the item having the greatest value and the item with the smallest odds of being received;

(3) if the seller is offering to sell an interest in oil, gas, or mineral field, well, or exploration site, the information required by Subdivision (5), Article 14, of this chapter; and

(4) if the seller represents that an item is being offered at a price below that usually charged for the item, the name of the manufacturer of the item.

**Art. 17. NO REFERENCE TO COMPLIANCE WITH STATUTE.** A seller may not make or authorize the making of a reference to its compliance with this chapter to a purchaser.

## SUBCHAPTER E. OFFENSES

**Art. 18. VIOLATION OF CHAPTER.** (a) A person commits an offense if the person knowingly or intentionally violates Article 4, 9, 15, 16, or 17 of this chapter. Each violation constitutes a separate offense.

(b) An offense under this article is a Class A misdemeanor.

**Art. 19. SALESPERSON FOR UNREGISTERED SELLER.** (a) A person commits an offense if the person knowingly or intentionally acts as a salesperson on behalf of a seller who violates the registration requirements of this chapter. Each violation constitutes a separate offense.

(b) An offense under this article is a Class A misdemeanor.

**Art. 19A. CHARGE TO A CREDIT CARD ACCOUNT OR DEBIT OF A CHECKING ACCOUNT AFTER OFFER OF FREE ITEM.** (a) A seller commits an offense if the seller knowingly:

(1) represents or implies that a purchaser will receive without charge an item or service, regardless of whether denominated as a gift, premium, bonus, prize, or otherwise; and

(2) requests a credit card account number or checking account number from the purchaser for the purpose of charging to the credit card account or debiting from the checking account an amount as a condition precedent to the purchaser's receipt of an item.

(b) An offense under this article is a Class A misdemeanor.



SUBCHAPTER F. ENFORCEMENT

Art. 20. **INJUNCTION.** The attorney general may sue in a court of competent jurisdiction to enjoin a person from violating this chapter. The attorney general shall notify the defendant of the alleged prohibited conduct not later than the seventh day before the date the suit is filed, unless the attorney general intends to request that the court issue a temporary restraining order, in which event notice is not required. The party bringing the suit shall recover all reasonable costs of prosecuting these cases including, but not limited to, costs of investigation, depositions, witness fees, attorney's fees, and other costs of court.

Art. 21. **CIVIL PENALTIES.** A person is subject to a civil penalty of not more than \$5,000 for a single violation. A person who violates an injunction issued under Article 20 of this chapter is liable to the state for a civil penalty of not more than \$25,000 for a single violation and not more than \$50,000 for all violations of the injunction. The attorney general may bring suit to recover the civil penalty in the court that issued the original injunction. The party bringing the suit shall also recover all reasonable costs of prosecuting these cases including, but not limited to, costs of investigation, depositions, witness fees, attorney's fees, and other costs of court.

Art. 22. **DECEPTIVE TRADE PRACTICES.** A violation of this chapter is a false, misleading, or deceptive act or practice under Subchapter E, Chapter 17, Business & Commerce Code, and its subsequent amendments, and any public or private right or remedy prescribed by that subchapter may be used to enforce this chapter.

Art. 23. **ACTION TO RECOVER AGAINST SECURITY.** (a) A person who is injured by the bankruptcy of a seller or the seller's breach of an agreement entered into during a telephone solicitation may bring and maintain an action to recover against the bond, letter of credit, or certificate of deposit required under Article 10 of this chapter.  
 (b) The liability of the surety on a bond provided pursuant to Article 10 of this chapter does not exceed the amount of the bond, regardless of the number of claims filed or the aggregate amount claimed. If the amount claimed exceeds the amount of the bond, the surety shall deposit the amount of the bond with the secretary of state for distribution to claimants entitled to recovery, and the surety is then relieved of all liability under the bond.

Art. 24. **NO WAIVER.** An attempted waiver of a provision of this chapter is void.

Art. 25. **CUMULATIVE REMEDIES.** The remedies provided by this chapter are in addition to any other procedures or remedies provided for by other law.

SECTION 2. (a) This Act takes effect September 1, 1993.  
 (b) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 23, 1993, by a non-record vote; passed by the Senate on May 27, 1993, by a viva-voce vote.

Approved June 11, 1993.

Effective Sept. 1, 1993.