

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

A Bill

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 TELEPHONIC
15 SELLERS."

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

19 SECTION 1. Legislative finding, declaration, and intent.

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

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

1 This act shall be construed liberally in order to achieve these purposes.

2

3 SECTION 2. Telephonic seller defined.

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

9 (1) A telephone solicitation or attempted telephone solicitation
10 wherein the telephonic seller initiates telephonic contact with a prospective
11 purchaser and represents or implies one or more of the following:

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

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

20 (i) Purchase or rent any goods or services.

21 (ii) Pay any money, including, but not limited to,
22 a delivery or handling charge.

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

28 (D) That the seller is a person other than the person he or she
29 is.

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

32 (2) (A) A solicitation or attempted solicitation which is made by
33 telephone in response to inquiries generated by unrequested notifications sent
34 by the seller to persons who have not previously purchased goods or services
35 from the seller or who have not previously requested credit from the seller,

1 to a prospective purchaser wherein the seller represents or implies to the
2 recipient of the notification that any of the following applies to the
3 recipient:

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

6 (ii) That the recipient will receive a prize, gift, or award if
7 the recipient calls the seller.

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

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

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

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

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

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

29 (D) A person soliciting business from prospective purchasers who
30 have previously purchased from the business enterprise for which the person is
31 calling.

32 (E) A person soliciting without the intent to complete and who
33 does not complete the sales presentation during the telephone solicitation but
34 completes the sales presentation at a later face-to-face meeting between the
35 solicitor and the prospective purchaser. However, if a seller directly

1 following a telephone solicitation, causes an individual whose primary purpose
2 it is to go to the prospective purchaser to collect the payment or deliver any
3 item purchased, this exemption does not apply.

4 (F) Any supervised financial institution or parent, subsidiary, or
5 affiliate thereof. As used in this subdivision, "supervised financial
6 institution" means any commercial bank, trust company, savings and loan
7 association, credit union, industrial loan company, personal property broker,
8 consumer finance lender, commercial finance lender, or insurer, provided that
9 the institution is subject to supervision of an official or agency of this
10 state or of the United States.

11 (G) Any burial association operating pursuant to authority of §
12 23-78-101 et seq..

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

15 (I) An issuer or subsidiary of an issuer that has a class of
16 securities which is subject to and which is either registered or exempt from
17 registration to § 23-42-401 et seq..

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

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

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

31

32 SECTION 3. Definitions.

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

34 (a) "Consumer Protection Division" shall mean the Consumer Protection
35 Division of the Office of the Attorney General.

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

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

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

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

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

14 (g) "Salesperson" means any individual employed, appointed or
15 authorized by a telephonic seller, whether referred to by the telephonic
16 seller as an agent, representative, or independent contractor, who attempts to
17 solicit or solicits a sale on behalf of the telephonic seller. The principals
18 of a seller are themselves salespersons if they solicit sales on behalf of the
19 telephonic seller.

20

21 SECTION 4. Registration procedures; fees; duration.

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

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

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

34 (d) Whenever, prior to expiration of a seller's annual registration,
35 there is a material change in the information required under this act, the

1 seller shall, within ten (10) days, file an addendum updating the information
2 with the Consumer Protection Division. However, changes in salespersons
3 soliciting on behalf of a seller shall be updated in quarterly intervals
4 computed from the effective date of registration.

5 (e) Upon receipt of a filing and filing fee pursuant to subsections
6 (a) or (b), the Consumer Protection Division shall send the telephonic seller
7 a written confirmation of registration. If the seller has more than one
8 business location, the confirmation of registration shall be sent to the
9 principal business location identified in the seller's filing in sufficient
10 number so that the seller has a confirmation of registration for each location
11 to be displayed in a conspicuous place at each of the seller's business
12 locations and available for inspection by any governmental agency at each
13 location. Until confirmation of registration is received and posted, the
14 seller shall post in a conspicuous place at each of the seller's business
15 locations within this state a copy of the first page of the registration form
16 sent to the Consumer Protection Division.

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

26 (g) All fees collected by the Attorney General under this section
27 shall be deposited in the State Treasury as general revenues.

28 *SECTION 5. Exemption information; requirements.*

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

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

1 SECTION 6. Filing information.

2 Each registration filing pursuant to this act shall contain the
3 following information:

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

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

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

11 (2) The seller's business form and place of organization and, if the
12 seller is a corporation, a copy of its articles of incorporation and bylaws
13 and amendments thereto, or, if a partnership, a copy of the partnership
14 agreement, or if operating under a fictitious business name, the location
15 where the fictitious name has been registered. All the same information shall
16 be included for any parent or affiliated organization disclosed pursuant to
17 subdivision (1).

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

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

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

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

33 (7) A list of the names and principal residence addresses of
34 salespersons who solicit on behalf of the telephonic seller and the names the
35 salespersons use while soliciting.

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

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

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

19 (A) A list of the items offered.

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

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

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

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

29 (ii) The odds a single prospective purchaser has of
30 receiving each described item.

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

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

3 (11) The name and address of the telephonic seller's agent in this
4 state, other than the Attorney General, authorized to receive service of
5 process in this state.

6

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

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

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

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

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

20 (4) The complete street address of the location from which the
21 salesperson is calling the prospective purchaser and, if different, the
22 complete street address of the telephonic seller's principal location.

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

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

31 Every telephonic seller shall file with the Attorney General, in the
32 form prescribed by the Attorney General, an irrevocable consent appointing the
33 Attorney General to act as the seller's attorney to receive service of any
34 lawful process in any noncriminal suit, action, or proceeding against the
35 seller or the seller's successor, executory, or administrator, which may arise

1 under this act, when the agent designated in the seller_s registration filing
2 cannot with reasonable diligence be found at the address designated or if no
3 agent has been designated pursuant thereto. When service is made upon the
4 Attorney General in conformance with this section, it shall have the same
5 force and validity as if served personally on the seller. Service may be made
6 by leaving a copy of the process in the office of the Attorney General, but it
7 shall not be effective unless both of the following are done:

8 (1) When service is effected pursuant to this section, the plaintiff
9 shall forthwith send by certified first-class mail, return receipt requested,
10 a notice of the service and a copy of the process to the defendant or
11 respondent at the last address on file with the Consumer Protection Division.

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

15

16 SECTION 9. Reference to compliance with this act.

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

19

20 SECTION 10. Soliciting prospective purchasers on behalf of unregistered
21 telephonic seller prohibited; violation, misdemeanor.

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

26

27 SECTION 11. Punishment for violation of provisions of this act.

28 (a) Except as provided in Section 10, any person, including, but not
29 limited to, the seller, a salesperson, agent or representative of the seller,
30 or an independent contractor, who willfully violates any provision of this act
31 or who directly or indirectly employs any device, scheme, or artifice to
32 deceive in connection with the offer or sale by any telephonic seller, or who
33 willfully, directly or indirectly, engages in any act, practice, or course of
34 business which operates or would operate as fraud or deceit upon any person in
35 connection with a sale by any telephonic seller shall, upon conviction, be

1 guilty of a Class D felony.

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

13

14 SECTION 12. Remedies provided for violation of provisions of this act
15 not exclusive; rights of attorney general.

16 (a) The provisions of this act are not exclusive. The remedies
17 specified in this article for violation of any section of this act or for
18 conduct proscribed by any section of this act shall be in addition to any
19 other procedures or remedies for any violation or conduct provided for in any
20 other law.

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

27

28 SECTION 13. Bond requirement; promotions; notice prior to inception.

29 (a) Every telephonic seller shall maintain a bond issued by a surety
30 company authorized to do business in this state. The bond shall be in the
31 amount of fifty thousand dollars (\$50,000) in favor of the State of Arkansas
32 for the benefit of any person suffering injury or loss by reason of any
33 violation of this act, to be paid under the terms of any order of a court of
34 competent jurisdiction obtained by the Attorney General or prosecuting
35 attorney as a result of any violation of this act. A copy of the bond shall

1 be filed with the Consumer Protection Division of the Office of the Attorney
2 General.

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

23

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

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28 SECTION 15. Severability.

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

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

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