

ACT 170

S.B. NO. 947

A Bill for an Act Relating to Telemarketing Fraud.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
TELEMARKETING FRAUD PREVENTION ACT**

§ -1 **Definitions.** Whenever used in this chapter, unless the context requires otherwise:

“Consumer” or “purchaser” means a person who is, or may be, required to pay for goods or services offered by a seller or telephone solicitor through telemarketing and includes but is not limited to a consumer as defined in section 480-1.

“Express verifiable authorization” means express written authorization by the consumer, including but not limited to the consumer’s signature on a negotiable instrument, that specifically authorizes the seller or telephone solicitor to obtain payment from a consumer’s checking, savings, or bankcard account.

“Goods or services” means any real property or any tangible or intangible personal property or services of any kind provided or offered to a consumer.

“Investment opportunity” means anything tangible or intangible, that is offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

“Material” means any factor likely to affect a person’s choice of, or conduct regarding, goods or services.

“Outbound telephone call” means a telephone call initiated by a seller or telephone solicitor to induce the purchase of goods or services.

“Payment” means anything of value, including any interest, benefit, privilege, claim, or right with respect to anything of value, whether real or personal, tangible or intangible.

“Prize” means anything offered or purportedly offered and given or purportedly given to a consumer by chance.

“Prize promotion” means a sweepstakes or other game of chance or an oral or written representation that a consumer has won, has been selected to receive, or is eligible to receive a prize or purported prize.

“Recovery service” means any business or other practice in which a person represents or implies that, for a fee, any amount a consumer has paid out to a seller or telephone solicitor may be recovered.

“Seller” means any person, who, in connection with a telemarketing transaction, solicits funds or contributions, or arranges for a telephone solicitor to solicit funds or contributions, or provides, offers to provide, or arranges for others to provide goods or services to the consumer in exchange for consideration.

“Telemarketing” means a plan, program, or campaign, including a prize promotion or investment opportunity, that is conducted to induce the purchase of goods or services or to solicit funds or contributions by use of one or more telephones and that involves more than one telephone call.

“Telephone solicitor” means any person who in connection with telemarketing, initiates or receives telephone calls to or from a consumer, where either or both parties to the telephone call are located in this State.

§ -2 Unfair or deceptive acts or practices prohibited. (a) It is an unfair or deceptive act or practice and a violation of this chapter for any seller or telephone solicitor to:

- (1) Fail to commence, within the first minute of an outbound telephone call, and complete within the first three minutes of the outbound call, and before payment is requested and prior to any solicitation, disclosure of the following:
 - (A) The true purpose of the telephone call;
 - (B) The telephone solicitor’s name and the company or entity on whose behalf the solicitation is being made; and
 - (C) The goods or services being offered;
- (2) Misrepresent or fail to disclose, in a clear, conspicuous, and intelligible manner and before payment is received from the consumer, the following information:
 - (A) Total purchase costs to the consumer of the goods or services to be received;
 - (B) Any restrictions, limitations, or conditions to purchase or to use the goods or services that are the subject of any offer;
 - (C) Any material term or condition of the seller’s refund, cancellation, or exchange policy, including, if applicable, that no such policies exist;
 - (D) All material costs or conditions related to receiving a prize, including the odds of winning the prize, and if the odds are not calculable in advance, the factors used in calculating the odds, the nature and value of a prize, that no purchase is necessary to win the prize, and the “no purchase” method of entering the contest;
 - (E) Any material aspect of an investment opportunity being offered, including but not limited to risk, liquidity, earnings potential, market value, and profitability; and
 - (F) The quantity, and any material aspect of the quality or basic characteristics of any goods or services offered;

- (3) Misrepresent any material aspect of the quality or basic characteristics of any goods or services offered;
 - (4) Represent that the telephone solicitor or seller is registered as a telephone solicitor in the State or has in any way received an endorsement or approval by any governmental agency of the State;
 - (5) Make a false or misleading statement with the purpose of inducing a consumer to pay for any goods or services;
 - (6) Request or accept payment from a consumer or make or submit any charge to the consumer's credit or bank account before the telephone solicitor or seller receives from the consumer an express verifiable authorization; provided that no express verifiable authorization is required if the seller adopts and complies with a policy that:
 - (A) Affords the consumer at least seven days after the receipt of goods or services to review goods or services and return undamaged or unused goods or submit a cancellation of services notice;
 - (B) Requires the seller to process the full refund within thirty days after receipt of returned merchandise or the cancellation of services notice from the consumer; and
 - (C) Requires the disclosure of the seller's return and refund policy to the consumer, orally by telephone, and in writing with any advertising or promotional material, and with delivery of the goods or services;
 - (7) Fail to include on the express verifiable authorization in a clear and conspicuous manner, the following language:
 "YOU ARE NOT OBLIGATED TO MAKE ANY PAYMENT UNLESS YOU SIGN THIS CONFIRMATION AND RETURN IT TO THE SELLER";
 - (8) Procure the services of any professional delivery, courier, or other pick-up service to obtain immediate receipt or possession of a consumer's payment;
 - (9) Offer to consumers in the State any prize promotion, in which a purchase or payment is necessary to obtain the prize; or
 - (10) Fail to comply with the recordkeeping requirements of this chapter.
- (b) It is a violation of this chapter for any person to assist, support, or provide substantial assistance to any seller or telephone solicitor, where that person knows or should have known that the seller or telephone solicitor is engaged in any unlawful or deceptive practice defined within this chapter.
- (c) Engaging in any other unfair or deceptive conduct that will create a likelihood of confusion or misunderstanding is a violation of this chapter.

§ -3 Abusive telemarketing acts or practices. It is an abusive telemarketing act or practice and a violation of this chapter for any seller or telephone solicitor to engage in the following conduct:

- (1) Threaten, intimidate, or use profane or obscene language;
- (2) Request a fee to remove derogatory information from or improve a consumer's credit history or credit record until:
 - (A) The time frame in which the seller or telephone solicitor has represented that all of the goods or services will be provided to that consumer has expired; and
 - (B) The seller or telephone solicitor has provided the consumer with documentation in the form of a credit report from a credit reporting agency demonstrating that the promised results have been achieved, the report having been issued more than six months

after the results were achieved. Nothing in this chapter should be construed to affect the requirement of the Fair Credit Reporting Act, 15 U.S.C. 1681b, that a consumer report may only be obtained for a specified permissible purpose;

- (3) Request or receive payment from a consumer to recover or otherwise aid in the return of money or any other item lost by the consumer in a telemarketing transaction, until seven business days after the money or other item is delivered to the consumer;
- (4) Request or actually receive payment of any fee in advance of obtaining a loan or other extension of credit when a high likelihood of success has been represented to the consumer by the seller or telephone solicitor;
- (5) Cause the telephone to ring more than ten times in an outbound telephone call;
- (6) Engage any consumer repeatedly or continuously with behavior a reasonable person would deem to be annoying, abusive, or harassing;
- (7) Initiate an outbound telephone call to a consumer, when the person has stated previously that the consumer does not wish to receive telephone calls from that seller or telephone solicitor; provided that the seller or telephone solicitor will not be liable for violating this paragraph if:
 - (A) It has established and implemented written procedures to comply with this paragraph, which procedures shall meet the minimum standards set forth in 47 C.F.R. 64.1200(e)(2);
 - (B) It has trained its personnel in the procedures established pursuant to subparagraph (A);
 - (C) The seller, or telephone solicitor acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted in compliance with this paragraph; and
 - (D) The call is the result of error.
- (8) Initiate an outbound telephone call to a consumer's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the location of the consumer called.

§ -4 Recordkeeping. Every telephone solicitor shall keep true and accurate records of all telemarketing activities initiated in this State or directed to consumers located in this State. Upon demand, the records shall be made available to the department of commerce and consumer affairs, the attorney general, and any other governmental entity with authority to enforce this chapter. These records shall be retained for a period of two years after the date of any outbound telephone call initiated from, directed into, or within this State. The records shall include but are not limited to the following information:

- (1) The location of the telephone solicitor and seller and the street addresses of any locations from which the outbound telephone calls originated;
- (2) Copies of any injunction, temporary restraining order, judgment, consent judgment, or assurance of voluntary compliance in any civil or administrative action, including any pending action, involving a violation or alleged violation by telephone solicitor or the seller of any state or federal telemarketing law;
- (3) The name, any fictitious name used, last known home address, telephone number, and job title of all telephone solicitors, who place or placed calls on behalf of a seller or who participate in or are responsible for the management of the business of the telephone solicitor; however, if the seller or telephone solicitor permits fictitious names to be used by employees or agents, each fictitious name shall be traceable to only one

specific telephone solicitor, employee or agent. Where one or more telephone solicitors is employed by or otherwise acting on behalf of a seller, the reporting requirements of this chapter may be met by the seller on behalf of itself and its telephone solicitors, but only to the extent the records comply with the requirements of this chapter;

- (4) Copies of all substantially different scripts, outlines, or presentation materials the seller requires a telephone solicitor to use when soliciting, as well as of all information to be provided by a telephone solicitor to a consumer in connection with any telemarketing;
- (5) All written consents to utilize a name or names of any person, as defined in section 1-19, in any endorsement;
- (6) Materials that substantiate any claims about the performance, efficacy, nature, or characteristics of health, nutrition, or diet related goods or services that are the subject of telemarketing;
- (7) A copy of the refund, cancellation, exchange, or repurchase policies for any goods or services offered by a seller or telephone solicitor, unless the seller or telephone solicitor offers and provides an unconditional satisfaction guaranteed policy and provides a full refund for returned goods or cancelled services;
- (8) Copies of all written confirmations of telemarketing transactions;
- (9) Copies of all express verifiable authorizations and signed order confirmations;
- (10) Copies of any training instructions, handbooks, or other guidelines distributed by telephone solicitors to their staff or by sellers to their telephone solicitors, employees, or agents;
- (11) Procedures for maintaining a list of persons who do not wish to receive outbound telephone calls made by or on behalf of the seller or telephone solicitor, which procedures shall meet the minimum standards set forth in 47 C.F.R. section 64.1200(e)(2), as well as the do not call lists maintained pursuant to those procedures; and
- (12) Copies of written contracts and agreements between the telephone solicitor and the seller.

§ -5 Exemptions. This chapter shall not apply to:

- (1) A person who initiates telephone calls to a residence for the sole purpose of polling or soliciting the expression of ideas, opinions, or votes, or a person soliciting solely for a political or religious cause or purpose;
- (2) A securities broker-dealer, salesperson, investment advisor, or investment advisor representative who is registered with this State to sell securities or who is authorized to sell securities in this State pursuant to federal securities laws, when soliciting over the telephone within the scope of the person's registration;
- (3) A financial institution that is authorized to accept deposits under its chartering or licensing authority where such deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, such as a bank, savings bank, savings and loan association, depository financial services loan company, or credit union, or a nondepository financial services loan company that is licensed or authorized to conduct business in this State by the commissioner of financial institutions, or an affiliate or subsidiary of a financial institution as defined in chapter 412;
- (4) A person or organization that is licensed or authorized to conduct business in this State by the commissioner of insurance including but

- not limited to an insurance company and its employees, while engaged in the business of selling or advertising the sale of insurance products or services;
- (5) A college or university accredited by an accrediting organization recognized by the United States Department of Education;
 - (6) A person who publishes a catalog of at least fifteen pages, four times a year, with a circulation of at least one hundred thousand, where the catalog includes clear disclosure of sale prices, shipping, handling, and other charges;
 - (7) A political subdivision or instrumentality of the United States, or any state of the United States;
 - (8) The sale of goods or services by telecommunications or landline (i.e. cable) or wireless video service providers, for which the terms and conditions of the offering, production, or sale are regulated by the public utilities commission or the Federal Communications Commission, or pursuant to chapter 440G, including the sale of goods or services by affiliates of these telecommunications or video service providers; provided that nothing herein shall be construed to preclude or preempt actions brought under any other laws including chapter 480;
 - (9) A real estate broker or salesperson who is licensed by this State to sell real estate, when soliciting within the scope of the license; or
 - (10) A travel agency that is registered with this State, when engaging in the business of selling or advertising the sale of travel services.

§ **-6 Unfair or deceptive act or practice.** Any person who violates this chapter shall be deemed to have engaged in an unfair method of competition or unfair and deceptive act or practice in the conduct or any trade or commerce within the meaning of section 480-2.

§ **-7 Other relief available.** The relief provided in this chapter is in addition to remedies otherwise available for the same conduct under the common law or other state or federal statutes or rules.

§ **-8 Contracts voidable.** A contract or agreement made as a result of telemarketing activity that violates this chapter is voidable by the consumer for any reason at any time and shall not be enforced against the consumer and any debt arising therefrom shall not be reported to a credit reporting agency."

SECTION 2. This Act shall take effect upon its approval.

(Approved July 1, 1999.)