WEST VIRGINIA CODE CHAPTER 46a ARTICLE 6F

WV Legislature

PART I. DEFINITIONS.

§46A-6F-101. Applicability of definitions.

For the purposes of this article, the words or terms defined in this part have the meanings ascribed to them. These definitions are applicable unless a different meaning clearly appears from the context.

WV Legislature

§46A-6F-102. Chance promotion.

"Chance promotion" means any plan in which premiums are distributed by random or chance selection.

WV Legislature

§46A-6F-103. Consumer; purchaser.

?Consumer" or ?purchaser" means a person who is solicited to become or does become obligated to pay for consumer goods or services offered by a telemarketer through telemarketing.

WV Legislature

§46A-6F-104. Consumer goods or services.

?Consumer goods or services" means:

(1) Any property or services offered or sold to a natural person primarily for personal, family, household or agricultural purposes;

(2) Any property or service offered or sold for the purpose of providing a profit or investment opportunity; or

(3) Any property intended to be attached to or installed in any real property, without regard to whether it is so attached or installed, as well as timeshare estates and licenses, resort and campground memberships, and any services related to such property.

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§46A-6F-105. Division.

?Division" means the consumer protection division of the office of the Attorney General.

WV Legislature

§46A-6F-106. Individual.

?Individual" means a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity.

WV Legislature

§46A-6F-107. Investment opportunity.

?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.

WV Legislature

§46A-6F-108. Material aspect or element.

?Material aspect or element" means any factor likely to affect a person's choice of, or conduct regarding, goods or services and includes currency values and comparative expressions of value including, but not limited to, percentages or multiples.

WV Legislature

§46A-6F-109. Person.

?Person" includes any individual, group of individuals, firm, association, corporation, partnership, joint venture, sole proprietorship, or any other business entity.

WV Legislature

§46A-6F-110. Prize, gift or award.

?Prize, gift or award" means anything offered or given, or purportedly offered or given, to a consumer as part of a prize promotion.

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§46A-6F-111. Prize promotion.

?Prize promotion" means:

(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, gift or award.

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§46A-6F-112. Telemarketing solicitation.

(a) ?Telemarketing solicitation" means and includes any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:

(1) The telemarketer makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in, or obtaining information regarding, the consumer goods or services offered by the telemarketer; or

(2) The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the course of one or more subsequent telephone communications with the consumer.

(b) For purposes of this article, ?communication" means a written or oral notification or advertisement transmitted from a telemarketer to a consumer by any means.

WV Legislature

§46A-6F-113. Telemarketer.

(a) ?Telemarketer" means any person who initiates or receives telephone calls to or from a consumer in this state for the purpose of making a telemarketing solicitation as defined in section one hundred twelve of this article.

(b) A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson or through an automated dialing machine.

(c) A telemarketer does not include any of the persons or entities exempted pursuant to part II of this article.

(d) A telemarketer does not include a salesperson as defined in section one hundred fourteen of this article.

(e) A telemarketer includes, but is not limited to, owners, operators, officers, directors, partners or other individuals engaged in the management activities of a business entity that is subject to licensing and registration pursuant to this article.

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§46A-6F-114. Telemarketer in good standing.

?Telemarketer in good standing" means a telemarketer who, during the previous two years has continually been engaged in the business of telemarketing and who has not been convicted, or pled guilty or nolo contendere to racketeering, embezzlement, fraudulent conversion, misappropriation of property or any violations of state or federal securities laws, a theft offense, or any consumer protection law or telemarketing law.

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PART II. EXEMPT PERSONS OR ENTITIES.

§46A-6F-201. Inapplicability of registration and bonding provisions of this article to charitable organizations.

A charitable organization that is exempt from filing an annual registration statement with the Secretary of State under the provisions of section six, article nineteen, chapter twenty-nine of this code is exempt from the registration and bonding provisions of this article when making a telemarketing solicitation.

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§46A-6F-202. Inapplicability of article to licensed securities, commodities, or investment broker, dealer, or investment adviser.

The provisions of this article do not apply to any licensed securities, commodities, or investment broker, dealer, or investment adviser, when soliciting within the scope of his license. As used in this section, ?licensed securities, commodities, or investment broker, dealer, or investment adviser" means a person who is licensed or registered as such by the securities and exchange commission, by the national association of securities dealers or some other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. §781), or by an official or agency of this state or of any state of the United States.

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§46A-6F-203. Inapplicability of article to licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser.

The provisions of this article do not apply to any licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser, when soliciting within the scope of his license. As used in this section, ?licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser" means any associated person registered or licensed by the national association of securities dealers or other self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. §781) or by an official or agency of this state or of any state of the United States.

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§46A-6F-204. Inapplicability of article to person who does not make the major sales presentation.

The provisions of this article do not apply to a person who does not make the major sales presentation during the telephone solicitation and who does not intend to, and does not actually, complete or obtain provisional acceptance of a sale during the telephone solicitation, but who makes the major sales presentation and completes the sale at a later face-to-face meeting between the seller and the prospective consumer in accordance with the home solicitation provisions in this chapter and as a home solicitation sale as defined by section one hundred two, article one of this chapter. However, if a seller, in violation of subdivision (4), subsection (a), section five hundred one of this article, causes an individual to go to the prospective consumer for the primary purpose of collecting payment or delivering any item purchased, this exemption does not apply.

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§46A-6F-205. Inapplicability of article to person who solicits sales by catalog.

The provisions of this article do not apply to a person who solicits sales by periodically publishing and delivering a catalog of a seller's merchandise to prospective purchasers, if the catalog:

(1) Contains a written description or illustration of each item offered for sale;

(2) Includes the business address or home address of the seller;

(3) Includes at least twenty pages of written material and illustrations and is distributed in more than one state; and

(4) Has an annual circulation, by mailing, of not less than one hundred fifty thousand catalogs.

WV Legislature

§46A-6F-206. Inapplicability of article to business-to-business sale.

The provisions of this article do not apply to a business-to-business sale.

WV Legislature

§46A-6F-207. Inapplicability of article to person who solicits contracts for the maintenance or repair of goods.

The provisions of this article do not apply to a person who solicits contracts for the maintenance or repair of goods previously purchased from the person making the solicitation or on whose behalf the solicitation is made.

WV Legislature

§46A-6F-208. Inapplicability of article to person soliciting a transaction regulated by the commodity futures trading commission.

The provisions of this article do not apply to a person soliciting a transaction regulated by the federal commodity futures trading commission if the person is registered or temporarily licensed for this activity with the commodity futures trading commission under the Commodity Exchange Act (7 U.S.C. §1 et seq.) and the registration or license has not expired or been suspended or revoked.

WV Legislature

§46A-6F-209. Inapplicability of article to supervised financial organization.

The provisions of this article do not apply to any supervised financial organization or an affiliate or subsidiary thereof or regulated consumer lender subject to regulation by the commissioner of banking or a federal agency charged with regulating such supervised financial organizations or regulated consumer lenders when acting within the scope of the supervised or regulated activity. As used in this section, the terms ?supervised financial organization" and ?regulated consumer lender" shall have the same meanings as ascribed to them in section one hundred two, article one of this chapter.

WV Legislature

§46A-6F-210. Inapplicability of article to licensed insurance broker, agent, customer representative, or solicitor.

The provisions of this article do not apply to any licensed insurance broker, agent, customer representative, or solicitor when soliciting within the scope of his or her license. As used in this section, ?licensed insurance broker, agent, customer representative, or solicitor" means any insurance broker, agent, customer representative, or solicitor licensed by an official or agency of this state pursuant to subsection (a), section one, article twelve, chapter thirty-three of this code, or of any state of the United States.

WV Legislature

§46A-6F-211. Inapplicability of article to person soliciting the sale of services provided by a cable television system.

The provisions of this article do not apply to a person soliciting the sale of services provided by a cable television system operating under authority of a franchise or permit, or to a person soliciting the sale of subscriber television services or advertising.

WV Legislature

§46A-6F-212. Inapplicability of article to certain telephone and communications companies.

The provisions of this article do not apply to any of the following entities to the extent that its acts or practices are subject to the jurisdiction or regulation of the West Virginia Public Service Commission or the federal communications commission:

(1) A telephone company, or any affiliate or agent of a telephone company; or

(2) Any provider of commercial mobile service, as defined by the Communications Act of 1934, as amended by the Telecommunications Act of 1966 (47 U.S.C. §151, et seq.).

WV Legislature

§46A-6F-213. Inapplicability of article to persons maintaining continuing business locations for sales of consumer goods or services.

The provisions of this article do not apply to a person who offers to sell consumer goods or services through telemarketing activities if the person maintains a permanent business location under the same exact name as that used in connection with the telemarketing sales, and both of the following activities occur on a continuing basis:

(1) The identical consumer goods or services offered for sale by the person through telemarketing activities are offered for sale at the person's business location; and

(2) More than fifty percent of all of the consumer goods or services offered for sale by the person are provided to consumers at the person's business location rather than through telemarketing sales.

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§46A-6F-214. Inapplicability of article to issuer of certain securities.

The provisions of this article do not apply to an issuer or a subsidiary of an issuer that has a class of securities which is subject to §12 of the Securities Exchange Act of 1934 (15 U.S.C. §781) and which is either registered or exempt from registration under paragraphs (A), (B), (C), (E), (F), (G), or (H) of subsection (g)(2) of that section.

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§46A-6F-215. Inapplicability of article to book, video, record, or multimedia club.

The provisions of this article do not apply to a book, video, record, or multimedia club or contractual plan or arrangement:

(1) 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;

(2) That is regulated by the federal trade commission trade regulation concerning use of negative option plans by sellers in commerce; or

(3) That provides for the sale of books, records, videos, multimedia products or other goods that are not covered under subdivision (1) or (2) of this section, including continuity plans, subscription arrangements, standing order arrangements, single sales of items offered for sale one time, 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.

WV Legislature

§46A-6F-216. Inapplicability of article to registered developer or a real estate salesperson or broker.

The provisions of this article do not apply to a person who is licensed as a real estate broker, associate broker, or real estate salesperson, in accordance with the provisions of article twelve, chapter forty-seven of this code, when such person is acting within the scope of their license.

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§46A-6F-217. Inapplicability of article to person soliciting the sale of electric or natural gas energy or related goods or services.

The provisions of this article do not apply to a person soliciting on behalf of an entity that sells electric or natural gas energy, or an affiliate of such an entity, if the solicitation is for the sale of electric or natural gas energy or related goods and services, and the transaction is governed and regulated by the Public Service Commission or the federal energy regulatory commission.

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§46A-6F-218. Inapplicability of article to person soliciting the sale of a magazine or newspaper.

The provisions of this article do not apply to a person primarily soliciting the sale of a single magazine subscription or subscription to a newspaper of general circulation or the sale of advertisements therein.

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§46A-6F-219. Inapplicability of article to certain telemarketers based on continuous sales and gross sales for exempt persons.

The provisions of this article do not apply to any telemarketer, in good standing, who has been providing telemarketing sales services continuously for at least two years under the same name and ownership and which derives fifty percent of its gross telemarketing sales revenues from contracts with persons exempted from this part: Provided, That telemarketers under this exemption must register, without bond, with the secretary of tax and revenue to establish eligibility for this exemption.

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§46A-6F-220. Inapplicability of article to the annual sale of less than one hundred dollars for food stuffs and edibles.

The provisions of this article do not apply to a person soliciting the sale of food stuffs and edibles, except vitamins, if the solicitations neither intends to result in, or actually results in a sale or sales which costs the consumer in excess of $100 annually to a single address: Provided, That such sales are not solicited by professional telemarketers.

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PART III. REGISTRATION, SECURITY AND RECORD KEEPING.

§46A-6F-301. Registration of telemarketers.

(a) No person shall act as a telemarketer without first having registered with the secretary of the Department of Tax and Revenue.

(b) The initial application for registration shall be made at least sixty days prior to offering consumer goods or services, or offering for sale consumer goods or services through any medium, and an application for renewal shall be made on an annual basis thereafter. The Department of Tax and Revenue shall charge reasonable application and renewal fees for administration of the registration requirements pursuant to this article. The application and renewal fees shall be established through the promulgation of a legislative rule pursuant to chapter twenty-nine-a of this code. The fees so collected shall be deposited into the State Treasury to the credit of the special revenue fund known as the ?telemarketer registration fund" pursuant to section three hundred four of this article.

(c) The application for a certificate of registration or renewal shall include, but not be limited to, the following information:

(1) The true name, mailing address, telephone number and physical address of the telemarketer, including each name under which the telemarketer intends to engage in telemarketing;

(2) Each occupation or business that the telemarketer's principal owner has engaged in for two years immediately preceding the date of the application;

(3) Whether any principal or manager has been convicted, or pled guilty to, or is being prosecuted by indictment for, racketeering, any violations of state or federal securities laws, a theft offense, or any consumer protection law or telemarketing law;

(4) Whether there has been entered against any principal or manager an injunction, temporary restraining order or a final judgment in any civil or administrative action, involving fraud, theft, racketeering, embezzlement, fraudulent conversion, misappropriation of property, or any consumer protection law or telemarketing law, including any pending litigation against the applicant;

(5) Whether the telemarketer, at any time during the previous seven years, has filed for bankruptcy, been adjudged bankrupt or been reorganized because of insolvency;

(6) The true name, current home address, date of birth, social security number and all other names of the following:

(A) Each person participating in or responsible for the management of the seller's business;

(B) Each person, office manager, or supervisor principally responsible for the management

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of the seller's business.

(7) The name, address and account number of every institution where banking or any other monetary transactions are done by the seller.

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§46A-6F-302. Security requirement.

(a) An application for registration or renewal shall be accompanied by a continuing surety bond executed by a corporation that is licensed to transact the business of fidelity and surety insurance in the State of West Virginia. The bond must be approved by the Department of Tax and Revenue before a certificate of registration is issued in accordance with the provisions of section three hundred one of this article. A separate bond in the amount of $100,000 may be filed for each telemarketing location, including each principal office and each branch office thereof, or a single bond in the amount of $500,000 may be filed for all locations of the telemarketer.

(b) The bond shall provide that the telemarketer will pay all damages to the state or a private person resulting from any unlawful act or action by the telemarketer or its agent in connection with the conduct of telemarketing activities.

(c) The registration of any telemarketer shall be void upon termination of the bond of the surety company, or loss of the bond, unless, prior to such termination, a new bond has been filed with the Department of Tax and Revenue. The surety, for any cause, may cancel the bond upon giving a sixty-day written notice by certified mail to the telemarketer and to the Department of Tax and Revenue. Unless the bond is replaced by that of another surety before the expiration of the sixty-day notice of cancellation, the registration of the telemarketer shall be treated as lapsed.

(d) The surety bond shall remain in effect for three years from the period the telemarketing business ceases to operate in this state.

(e) Any business required under this article to file a bond with a registration application, may file, in lieu thereof, an irrevocable letter of credit, with annual renewals, a certificate of deposit, cash or government bond in the same amount as would be required for the bond. The Department of Tax and Revenue shall deposit any such funds in an interest bearing account. The Department of Tax and Revenue shall hold such letter of credit, cash, certificate of deposit or government bond for three years from the period the telemarketing business ceases to operate or registration lapses, in order to pay claims made against the telemarketing business during its period of operation. At the end of the three-year term all interest accrued, not required for payment of claims, shall be remitted to the telemarketer.

(f) The registration of the telemarketing business will be treated as lapsed if at any time, the amount of the letter of credit, bond, cash, certificate of deposit or government bond falls below the amount required by this section.

(g) Should the license of any surety company to transact business in this state be terminated, all bonds given pursuant to this article upon which such company is surety shall thereupon be suspended, and the Department of Tax and Revenue shall immediately notify each affected licensee of such suspension and require that a new bond be filed. This notice shall be sent by registered or certified mail, return receipt requested, and shall be addressed to

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the telemarketer at his or its principal place of business as shown by the Department of Tax and Revenue records. The failure of any telemarketer to file a bond with new or additional surety within thirty days after being advised in writing by the Department of Tax and Revenue of the necessity to do so shall be cause for the Department of Tax and Revenue to revoke the telemarketer's registration.

(h) An action may be brought in any court of competent jurisdiction upon the bond by any person to whom the licensee fails to account and pay as set forth in such bond. The aggregate liability of the surety company to all persons injured by a telemarketer's violations may not exceed the amount of the bond.

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§46A-6F-303. Failure to register or meet security requirement; remedies.

(a) Any person is subject to a civil administrative penalty, to be levied by the Department of Tax and Revenue, of not more than $5,000 if the person:

(1) Acts as a telemarketer without first registering pursuant to section three hundred one of this article;

(2) Acts as a telemarketer without first meeting the security requirements set forth in section three hundred two of this article;

(3) Acts as a telemarketer after failing to maintain a certificate of registration accompanied by a surety bond as required by sections three hundred one and three hundred two of this article;

(4) Includes any material information on a registration application that is false or misleading; or

(5) Misrepresents that a telemarketer is registered.

In assessing a civil administrative penalty, Department of Tax and Revenue shall take into account the seriousness of the violation, any good faith efforts to comply with applicable requirements, any benefit obtained by the act or omission, and any other appropriate factors as the Department of Tax and Revenue may establish by rules proposed for promulgation by the Legislature in accordance with the provisions of article three, chapter twenty-nine-a of this code.

(b) No assessment shall be levied pursuant to subsection (a) of this section until after the alleged violator has been notified by certified mail or personal service. The notice shall include:

(1) A reference to this section, sections three hundred one and three hundred two of this article, and any legislative rule that was allegedly violated;

(2) A concise statement of the facts alleged to constitute the violation;

(3) A statement of the amount of the administrative penalty to be imposed; and

(4) A statement of the alleged violator's right to an informal hearing.

(c) The alleged violator has twenty calendar days from receipt of the notice within which to deliver to the Department of Tax and Revenue a written request for a hearing. If no hearing is requested, the notice becomes a final order after the expiration of the twenty-day period. If a hearing is requested, the Department of Tax and Revenue shall inform the alleged violator of the time and place of the hearing. The Department of Tax and Revenue may appoint a hearing examiner to conduct the hearing and then make a written

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recommendation to the Department of Tax and Revenue concerning the assessment of a civil administrative penalty. Within thirty days following the hearing, the Department of Tax and Revenue shall issue and furnish to the alleged violator a written decision which explains the rationale for any assessment of an administrative penalty. The authority to levy an administrative penalty is in addition to all other enforcement provisions of this article and the payment of any assessment does not affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied. No assessment levied pursuant to this section becomes due and payable until the procedures for review of such assessment as set out in this subsection have been completed.

(d) The Department of Tax and Revenue may seek an injunction, or may institute a civil action against any person allegedly in violation of the provisions of this section, sections three hundred one and three hundred two of this article. An application for injunctive relief or civil action under this section may be filed and relief granted notwithstanding the fact that all administrative remedies provided for in this article have not been exhausted or invoked against the person or persons against whom such relief is sought. Upon request of the Department of Tax and Revenue, the division or the prosecuting attorney of the county in which the violation occurs shall assist the Department of Tax and Revenue in any civil action under this section.

(e) Independently of the Department of Tax and Revenue, with respect to any action brought by the division or a private citizen regarding unfair or deceptive acts or practices, or abusive acts or practices under the provisions of this article or under other applicable consumer protection laws set forth in this code, the division or a private citizen may also apply to the court for appropriate relief under this section against a person violating the provisions of sections three hundred one and three hundred two of this article, pending final determination of the proceedings.

(f) Any funds recovered and all registration fees, as provided for in this article, shall be paid into the State Treasury to the credit of a special revenue fund to be known as the ?telemarketer registration fund" which is hereby created. The moneys so credited to the fund shall be used solely for the purposes of administering and enforcing the registration and security requirements of this article.

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§46A-6F-304. Record keeping requirements.

(a) A telemarketer shall keep for a period of four years from the date the record is produced the following records related to its telemarketing activities:

(1) One of each advertisement, brochure and other promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

(4) The name, last known home address and telephone number, and the job title for all current and former employees directly involved in telephone sales;

(5) All verifiable authorizations required to be provided or received under this article; and

(6) A copy of all scripts, outlines or presentation material the seller will require the telemarketer to use when soliciting, as well as all sales information to be provided by the seller to a purchaser in connection with any solicitation.

(b) A seller or telemarketer may keep the records required by subsection (a) of this section in any form, and in any manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by subsection (a) of this section shall be a violation of this article.

(c) The telemarketer is responsible for complying with the above provisions.

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that telemarketer shall maintain all records as required under this section. In the event of any sale, assignment or other change in ownership of the seller's business, the successor shall maintain all records required under this section.

(e) (1) The division may require a telemarketer to file true copies of all scripts, outlines and promotional material and any modifications thereto with the division of consumer protection for a time period to be determined by the division. Such filing may be required upon an investigation and finding by the division that:

(A) A telemarketer is using scripts, outlines or presentation material that contain material misrepresentations or that fail to state material facts; or

(B) A telemarketer is deviating from scripts, outlines or presentation material so as to make material misrepresentations or to fail to state material facts.

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(2) The Attorney General shall comply with the requirements of article five, chapter twenty-nine-a of this code for hearings requested pursuant to Part III.

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PART IV. DISCLOSURES AND CONTRACT REQUIREMENTS.

§46A-6F-401. Mandatory disclosures.

(a) A telemarketer shall promptly disclose, in a clear and conspicuous manner, the following material information when making a telemarketing communication with a consumer:

(1) The true identity of the telemarketer;

(2) That the purpose of the call is to sell consumer goods or services; and

(3) The nature of the goods or services offered for sale.

(b) Before a consumer pays for the goods or services offered for sale, the telemarketer shall disclose, in a clear and conspicuous manner, the following material information:

(1) The total costs to purchase, receive or use the consumer goods or services that are the subject of the telemarketing communication;

(2) The quantity of the consumer goods or services that are the subject of the telemarketing solicitation;

(3) All material restrictions, limitations or conditions to purchase, receive, or use the consumer goods or services that are the subject of the telemarketing solicitation;

(4) All material aspects of the performance, quality, efficacy, nature or basic characteristics of the consumer goods or services that are the subject of the telemarketing solicitation;

(5) All material aspects of the nature or terms of the telemarketer's refund, cancellation, exchange or repurchase policies;

(6) All material aspects of a prize promotion, disclosed prior to requesting the consumer to enter into a sale or lease, including, but not limited to, the following:

(A) A description of the prizes, gifts or awards offered or to be given to consumers participating in the prize promotion;

(B) A statement of the true retail value of each prize, gift or award offered or to be given to participating consumers;

(C) A clear identification of the person or entity on whose behalf the contest or promotion is conducted;

(D) A description of all material conditions which a participant must satisfy;

(E) A clear and unequivocal statement that the consumer is not required to make any purchase, lease or rental of consumer goods or services in order to qualify for any prize, gift

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or award or to otherwise participate in the prize promotion;

(F) A clear and unequivocal statement that the consumer is not required to pay any handling or shipping costs or to make any other payment of any kind in order to win or receive a prize, gift or award or to otherwise participate in the prize promotion;

(G) The actual numbers of the prizes, gifts or awards to be awarded;

(H) The odds of receiving a prize, gift or award; and

(I) A clear explanation of the no-purchase/no-payment method of participating in the prize promotion, with instructions on how to participate.

(7) All material aspects of any investment opportunity being offered, including, but not limited to, a description of the following factors:

(A) Risk;

(B) Liquidity;

(C) Earnings potential;

(D) Profitability;

(E) Benefits; and

(F) If applicable, the value, price and location of any real or personal property that the consumer will acquire by investing.

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§46A-6F-402. Accepting returns or canceling services.

(a) Every telemarketer shall, at a minimum, have the following policy:

(1) Accepting returns or canceling services for a period of not less than seven days after the date of delivery to the consumer and providing a cash refund for a cash purchase or issuing a credit for a credit purchase, which credit is applied to the account to which the purchase was debited in connection with the return of its unused and undamaged merchandise or canceled services. For purposes of this subsection, it will be presumed that goods were received seven days after they were mailed unless it can be clearly demonstrated that the goods were not received or received at a later date;

(2) Disclosing the telemarketer's return and refund policy to the buyer, orally by telephone or in writing with advertising, promotional material, or with delivery of the products or service; and

(3) Restoring such payment or issuing such credit, as required under subdivision (1) of this section, within thirty days after the date on which the telemarketer receives returned merchandise or notice of cancellation of services. A seller who discloses, in writing, that a sale is made or provided ?satisfaction guaranteed", with ?free inspection," ?no risk guarantee", or similar words or phrases, shall be deemed to meet the requirements of the review and return for refund policy set forth in this subparagraph.

(b) Failure to comply with the provisions of this section is unfair or deceptive act or practice.

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§46A-6F-501. Unfair or deceptive acts or practices.

It is an unfair or deceptive act or practice and a violation of this article for any seller or telemarketer to engage in the following conduct:

(1) To advertise or represent that registration as a telemarketer equals an endorsement or approval by the state or any governmental agency of the state;

(2) To request or receive payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(A) The time frame in which the telemarketer has represented all of the goods or services will be provided to that person has expired; and

(B) The telemarketer has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved;

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

(A) Express written authorization by the customer, which may include the customer's signature on the negotiable instrument; or

(B) Express oral authorization which is tape recorded and made available upon request to the customer's bank 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:

(i) The date of the draft(s);

(ii) The amount of the draft(s);

(iii) The payor's name;

(iv) The number of draft payments (if more than one);

(v) A telephone number for customer inquiry that is answered during normal business hours; and

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

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(C) 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, that includes:

(i) All of the information contained in subparagraphs (i) through (vi), paragraph (B), subdivision (3) of this section; and

(ii) The procedures by which the customer can obtain a refund from the telemarketer in the event the confirmation is inaccurate;

(4) To procure the services of any professional delivery, courier or other pick-up service to obtain immediate receipt and possession of a consumer's payment unless:

(A) Such service is requested by the consumer;

(B) The consumer is informed that he or she can inspect the goods or services prior to payment and may refuse to accept the goods or services; and

(C) The consumer is actually afforded an opportunity to inspect the goods or services prior to payment;

(5) To engage in any other unfair or deceptive conduct which will create a likelihood of confusion or misunderstanding to any reasonable consumer;

(6) To misrepresent the requirements of this section;

(7) To provide substantial assistance or support to any telemarketer when that person knows or consciously avoids knowing that the telemarketer is engaged in any act or practice that violates this section;

(8) To engage in any "unfair methods of competition and unfair or deceptive acts or practices" as specified in §46A-6-102(f) of this code and made unlawful by the provisions of §46A-6-102 of this code; or

(9) To engage in transmission of misleading or inaccurate caller identification information, including, but not limited to, circumventing caller identification technology that allows the consumer to identify from what phone number or organization the call has originated from, or to otherwise misrepresent the origin and nature of the solicitation: Provided, That the provisions of this subsection do not apply to a communications service provider that delivers a communication originated by another person or entity.

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§46A-6F-502. Causes of action arising out of unfair or deceptive acts or practices; limitation of actions.

(1) If a telemarketer violates the provisions of section five hundred one of this article, the consumer has a cause of action to recover actual damages and, in addition, a right to recover from the violator a penalty in an amount, to be determined by the court, of not less than $100 nor more than $3,000. No action brought pursuant to the provisions of this subsection may be brought more than two years after the date upon which the violation occurred or the due date of the last scheduled payment of the agreement, whichever is later.

(2) If a telemarketer violates the provisions of section five hundred one of this article, any sale or lease of consumer goods or services is void and the consumer is not obligated to pay either the principal or any finance charge. If the consumer has paid any part of the principal or of the finance charge, he or she has a right to recover the payment from the violator or from any assignee of the violator's rights who undertakes direct collection of payments or enforcement of rights arising from the debt.

(3) A consumer is not obligated to pay a charge in excess of that allowed by the sales agreement, and if the consumer has paid an excess charge, he or she has a right to a refund. A refund may be made by reducing the consumer's obligation by the amount of the excess charge. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover in an action the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against the consumer arising from the debt.

(4) If a telemarketer has contracted for or received a charge in excess of that allowed by the sales agreement, the consumer may, in addition to recovering such excess charge, also recover from the telemarketer or the person liable in an action a penalty in an amount determined by the court not less than $100 nor more than $3,000. No action brought pursuant to the provisions of this subsection may be brought more than two years after the date upon which the violation occurred or the due date of the last scheduled payment of the agreement, whichever is later.

(5) A telemarketer has no liability for a penalty under subsection (1) or subsection (4) of this section if, within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the telemarketer notifies the consumer of the error and corrects the error.

(6) If the telemarketer establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section, and the validity of the transaction is not affected.

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§46A-6F-503. Operating a criminal recovery service; penalties.

(a) A person is guilty of operating a criminal recovery service when the person:

(1) Makes a representation that he will recover all or any portion of the consideration that a consumer has paid to a telemarketer in response to a telemarketing solicitation;

(2) Does not intend to make such recovery or has no reasonable expectation to anticipate that recovery will be made; and

(3) Receives any remuneration from the consumer before a recovery of consideration is made.

(b) Any person who violates the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional center not less than one year nor more than ten years, or fined not more than $5,000 and confined in a state correctional center not less than one year nor more than ten years.

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PART VI. ABUSIVE ACTS OR PRACTICES; PENALTIES.

§46A-6F-601. Abusive acts or practices.

(a) It is an abusive telemarketing act or practice and a violation of this article for any telemarketer to engage in the following conduct:

(1) Threaten, intimidate or use profane or obscene language;

(2) Engage any person repeatedly or continuously with behavior a reasonable person would deem to be annoying, abusive or harassing;

(3) Initiate 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 telemarketer whose goods or services are being offered;

(4) Engage in telemarketing to a person's residence at any time other than between eight a.m. and nine p.m. local time, Monday through Sunday, at the called person's location; or

(5) Engage in any other conduct which would be considered abusive to any reasonable consumer.

(b) A telemarketer will not be liable for violating subdivision (3), subsection (a) of this section if:

(1) It has established and implemented written procedures to avoid outbound telephone calls to persons who have previously stated that they do not wish to receive such calls;

(2) It has trained its personnel in the procedures established pursuant to subdivision (1) of this subsection;

(3) The telemarketer has maintained and recorded lists of persons who have previously stated that they do not wish to receive such calls; and

(4) Any subsequent call is the result of error.

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PART VII. REMEDIES.

§46A-6F-701. Civil remedies.

(a) If a telemarketer violates the provisions of section six hundred one of this article, the consumer has a cause of action to recover actual damages and, in addition, a right to recover from the violator a penalty in an amount, to be determined by the court, of not less than$100 nor more than $3,000. No action brought pursuant to the provisions of this subsection may be brought more than two years after the date upon which the violation occurred or the due date of the last scheduled payment of the agreement, whichever is later.

(b) If a telemarketer violates the provisions of section six hundred one of this article, any sale or lease of consumer goods or services is void and the consumer is not obligated to pay either the principal or any finance charge. If the consumer has paid any part of the principal or of the finance charge, he or she has a right to recover the payment from the violator or from any assignee of the violator's rights who undertakes direct collection of payments or enforcement of rights arising from the debt.

(c) Any consumer that suffers harm as a result of any abusive act or practice shall receive injunctive or declaratory relief.

(d) The state, on behalf of its residents who have suffered a loss or harm as a result of a violation of this article, may seek injunctive or declaratory relief, actual damages, consumer restitution, civil penalties, forfeiture of bond, attachment of property, costs, attorney's fees and any other remedies available to the division under the provisions of this chapter or otherwise provided by law.

(e) In any action brought under this article where damages are awarded to a consumer, the court may adjust the damages to account for inflation from July 1, 1998, to the time of the award of damages, in an amount determined by the application of data from the consumer price index. Consumer price index means the last consumer price index for all consumers published by the United States department of labor.

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§46A-6F-702. Remedies not exclusive.

Nothing contained in this article shall be construed to adversely alter or affect a right or benefit accruing to a consumer or the state in accordance with other provisions of this chapter, or to limit any civil or criminal remedy otherwise provided for by law. In the case of provisions contained in this article that exempt a person from the requirements of this article or that otherwise limit the applicability of this article to a person, those provisions are exclusive to this article and shall not be construed to otherwise exempt a person or to limit the applicability of any other provisions of this code.

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§46A-6F-703. Service of process on certain nonresidents.

Any nonresident person, except a nonresident corporation authorized to do business in this state pursuant to the provisions of chapter thirty-one of this code, who directs telemarketing solicitations to persons residing in this state, shall be conclusively presumed to have appointed the Department of Tax and Revenue as his attorney-in-fact with authority to accept service of notice and process in any action or proceeding brought against him arising out of such consumer credit sale, consumer lease or consumer loan. A person shall be considered a nonresident hereunder if he is a nonresident at the time such service of notice and process is sought. No act of such person appointing the Department of Tax and Revenue shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the Department of Tax and Revenue with the original notice or process, together with the fee required by section two, article one, chapter fifty-nine of this code, the Department of Tax and Revenue shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to such person at his address, which address shall be stated in such process or notice: Provided, That such return receipt shall be signed by such person or an agent or employee of such person if a corporation, or the registered or certified mail so sent by said Department of Tax and Revenue is refused by the addressee and the registered or certified mail is returned to said Department of Tax and Revenue, or to his office, showing thereon the stamp of the U.S. postal service that delivery thereof has been refused, and such return receipt or registered or certified mail is appended to the original process or notice and filed therewith in the clerk's office of the court from which such process or notice was issued. But no process or notice shall be served on the Department of Tax and Revenue or accepted fewer than ten days before the return date thereof. The court may order such continuances as may be reasonable to afford each defendant opportunity to defend the action or proceeding.

The provisions for service of process or notice herein are cumulative and nothing herein contained shall be construed as a bar to the plaintiff in any action from having process or notice in such action served in any other mode and manner provided by law.

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