

HOUSE Substitute for Substitute for SENATE BILL No. 296

AN ACT concerning consumer protection; relating to certain unsolicited telephone calls; prohibiting certain acts and providing penalties for violations; relating to profiteering from a disaster; amending K.S.A. 2001 Supp. 50-670 and repealing the existing section.

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

Section 1. K.S.A. 2001 Supp. 50-670 is hereby amended to read as follows: 50-670. (a) As used in this section *and section 2, and amendments thereto:*

(1) "Consumer telephone call" means a call made by a telephone solicitor to the residence of a consumer for the purpose of soliciting a sale of any property or services to the person called, or for the purpose of soliciting an extension of credit for property or services to the person called, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of property or services to the person called or an extension of credit for such purposes;

(2) "Unsolicited consumer telephone call" means a consumer telephone call other than a call made:

(A) In response to an express request of the person called;

(B) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call; or

(C) to any person with whom the telephone solicitor or the telephone solicitor's predecessor in interest ~~had an existing business relationship if the solicitor is not an employee, a contract employee or an independent contractor of a provider of telecommunications services, or has an established business relationship, unless the consumer has objected to such consumer telephone calls and requested that the telephone solicitor cease making consumer telephone calls.~~

(3) "Telephone solicitor" means any natural person, firm, organization, partnership, association or corporation who makes or causes to be made a consumer telephone call, including, but not limited to, calls made by use of automatic dialing-announcing device;

(4) "Automatic dialing-announcing device" means any user terminal equipment which:

(A) When connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator; or

(B) when connected to a telephone line can disseminate a recorded message to the telephone number called, either with or without manual assistance;

(5) "Negative response" means a statement from a consumer indicating the consumer does not wish to listen to the sales presentation or participate in the solicitation presented in the consumer telephone call.

(6) "*Established business relationship*" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and consumer with or without an exchange of consideration, on a basis of an application, purchase or transaction by the consumer, within the preceding 36 months, regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(b) Any telephone solicitor who makes an unsolicited consumer telephone call to a residential telephone number shall:

(1) Identify themselves;

(2) identify the business on whose behalf such person is soliciting;

(3) identify the purpose of the call immediately upon making contact by telephone with the person who is the object of the telephone solicitation;

(4) promptly discontinue the solicitation if the person being solicited gives a negative response at any time during the consumer telephone call;

(5) hang up the phone, or in the case of an automatic dialing-announcing device operator, disconnect the automatic dialing-announcing device from the telephone line within 25 seconds of the termination of the call by the person being called; and

(6) a live operator or an automated dialing-announcing device shall answer the line within five seconds of the beginning of the call. If answered by automated dialing-announcing device, the message provided shall include only the information required in subsection (b)(1) and (2), but shall not contain any unsolicited advertisement.

(c) A telephone solicitor shall not withhold the display of the telephone solicitor's telephone number from a caller identification service when that number is being used for telemarketing purposes ~~and~~, *except that before January 1, 2005, a telephone solicitor's telephone number shall not be required to be displayed* when the telephone solicitor's service or equipment is *not* capable of allowing the display of such number.

(d) A telephone solicitor shall not transmit any written information by facsimile machine or computer to a consumer after the consumer requests orally or in writing that such transmissions cease.

(e) A telephone solicitor shall not obtain by use of any professional delivery, courier or other pickup service receipt or possession of a consumer's payment unless the goods are delivered with the opportunity to inspect before any payment is collected.

(f) Local exchange carriers and telecommunications carriers shall not be responsible for the enforcement of the provisions of this section.

(g) Any violation of this section is an unconscionable act or practice under the Kansas consumer protection act.

(h) This section shall be part of and supplemental to the Kansas consumer protection act.

New Sec. 2. (a) The attorney general shall contract with the direct marketing association for the no-call list provided for by this section to be the national no-call list maintained by the telephone preference service of such association. The contract shall establish:

(1) The maximum fees that telephone solicitors may be charged for access to the no-call list;

(2) the maximum fees that consumers may be charged to register for inclusion on the no-call list;

(3) the schedule of dates by which consumers must register in order to appear on updates of the no-call list. Such schedule of dates shall provide that time period prior to the date of the next quarterly update in which consumers must submit their information in order to be included in the next quarterly update shall not exceed 30 days;

(4) the schedule of dates by which telephone solicitors will be provided updates of the no-call list. Such schedule of dates shall provide that the no-call list shall be updated no less frequently than on a quarterly basis, on January 1, April 1, July 1 and October 1;

(5) what information shall be furnished, without charge, upon request of a consumer, registered in accordance with this section, concerning a telephone solicitor or other person who the consumer believes has engaged in an unsolicited consumer telephone call prohibited by this section; and

(6) the consent of the direct marketing association to subject itself to the jurisdiction of the courts of this state for the purpose of enforcing the provisions of this section; the designation of a resident agent, who is a resident of Kansas, by the direct marketing association, for service of process, and who registers with the secretary of state pursuant to K.S.A. 60-306, and amendments thereto; and the agreement of the direct marketing association and its resident agent to comply with the provisions of this section.

If the direct marketing association does not agree to enter into the contract provided for by this subsection, the attorney general may contract, upon bids, with another vendor to establish and maintain the no-call list provided for by this section.

(b) Prior to making unsolicited consumer telephone calls in this state and quarterly thereafter, a telephone solicitor shall consult the no-call list provided for by this act, and shall delete from such telephone solicitor's calling list all state residents who have registered to be on such list. The direct marketing association, or other vendor maintaining the no-call list, shall offer to consumers at least one method of registration at no cost and such registration shall be for a period of five years. Consumers desiring to register to be on the no-call list may contact the direct marketing association or other vendor maintaining the no-call list, or the attorney general. The attorney general may compile a list of telephone numbers from consumers desiring to register for such service. The attorney general shall forward the list to the direct marketing association or such other vendor in electronic format no less than 15 days prior to the date of the next quarterly update. No registration fee shall be imposed on the attor-

ney general for submission of such list to the direct marketing association or such other vendor. Membership in the direct marketing association shall not be a requirement for telephone solicitors to obtain the telephone preference service list and telephone solicitors shall have access to the list. A telephone solicitor prior to accessing the no-call list shall submit the appropriate fee and complete a subscription agreement that: (1) Restricts use of the no-call list exclusively for purposes authorized by this act; (2) provides the telephone solicitor's contact and mailing information; and (3) selects the method of updates required (monthly or quarterly). A consumer desiring to register shall submit to the direct marketing association, or other vendor, the consumer's name, address, city, state and zip code and the telephone numbers to be registered. The direct marketing association, or other vendor, shall make available to the attorney general, in an electronic format, the no-call list and all quarterly updates of such list at no cost.

(c) The attorney general and the direct marketing association, or other vendor, shall ensure that consumers are given clear notice that telephone numbers are not immediately added to the no-call list upon submission of a consumer's registration and that it may be as long as 120 days before telephone solicitors receive a new no-call list which includes the consumer's telephone number; that it may be as long as 30 days from the time of publication of the current quarterly update of the no-call list before the consumer's telephone number is removed from the telephone solicitor's calling lists; and that the consumer and the attorney general may not be able to enforce the provisions of this section until 150 days have passed since the consumer submitted the consumer's registration to be on the no-call list.

(d) Telephone solicitors shall have a period of not more than 30 days from the time of publication of the current quarterly update of the no-call list to remove a consumer's telephone number from the telephone solicitor's calling lists.

(e) No telephone solicitor may make or cause to be made any unsolicited consumer telephone calls to any consumer if the consumer's telephone number or numbers appear in the current quarterly list of consumers registered on the no-call list. A telephone solicitor shall not use the no-call list for any other purpose than to remove consumers' telephone numbers from calling lists.

(f) A telephone solicitor shall be liable for violations of subsections (d) and (e) if such telephone solicitor makes or causes to be made an unsolicited telephone call to a state resident whose telephone number appears on the current quarterly no-call list or uses the list for any unauthorized purpose.

(g) It shall be an affirmative defense to a violation of this section if the telephone solicitor can demonstrate, by clear and convincing evidence, that: (1) The telephone solicitor at the time of the alleged violation had: (A) Obtained a copy of the updated no-call list; (B) established and implemented, with due care, reasonable practices and procedures to effectively prevent unsolicited consumer telephone calls in violation of this section; (C) trained the telephone solicitor's personnel in the requirements of this section; and (D) maintained records demonstrating compliance with this section; and (2) the unsolicited consumer telephone call was the result of an error. Such defense shall not be exercised by a telephone solicitor more than once within the state of Kansas in any 12-month period. A telephone solicitor shall be deemed to have exercised such defense if asserted in response to any consumer complaint about a violation of this section, regardless of whether litigation has been initiated.

(h) It shall be an affirmative defense to a violation of this section if the telephone solicitor can demonstrate by clear and convincing evidence that: (1) The consumer affirmatively listed or held out to the public such consumer's residential number as a business number; (2) the telephone solicitor had knowledge of and relied upon such consumer's actions as provided in subsection (h)(1) at the time of the telephone solicitor's alleged violation; and (3) the purpose of the call was directly related to the consumer's business.

(i) Any violation of this section is an unconscionable act or practice under the Kansas consumer protection act.

(j) (1) Upon request of the attorney general for the purpose of enforcing the provisions of this section, the direct marketing association, or

other vendor, shall furnish the attorney general with all information requested by the attorney general concerning a telephone solicitor or any person the attorney general believes has engaged in an unsolicited consumer telephone call prohibited by this section. The direct marketing association, or other vendor, shall not charge a fee for furnishing the information to the attorney general.

(2) The direct marketing association, or other vendor, shall comply with any lawful subpoena or court order directing disclosure of the list or any other information.

(k) The direct marketing association, or other vendor, shall promptly forward any complaints concerning alleged violations of this section to the attorney general.

(l) Except as directed by the attorney general, the direct marketing association shall be prohibited from disclosing or using, in any way, any and all addresses obtained from consumers in the course of registering such consumer's phone numbers on the no-call list.

(m) Penalties and fees recovered from prosecutions of violations of this section shall be paid to the attorney general to investigate and prosecute violations of this section.

(n) The attorney general may convene a meeting or meetings with consumer advocacy groups to collectively develop a method or methods to notify the consumer advocacy group's membership and educate and promote to Kansas consumers generally the availability of the no-call list, and of a telephone solicitor's obligations under this section.

(o) On or before the first day of each regular legislative session, the attorney general shall report to the standing committees of the house and senate which hear and act on legislation relating to telecommunications issues on the status of implementation of the provisions of this section, including, but not limited to, the number of consumers who have given notice of objection, the number of requests for the data base, state revenues received from the respective sources of revenue under this section, the number of complaints received alleging violations of this section and actions taken to enforce the provisions of this section.

(p) If the federal trade commission establishes a single national no-call list the attorney general may designate the list established by the federal trade commission as the Kansas no-call list.

(q) The attorney general may promulgate rules and regulations to carry out the provisions of the Kansas no-call act.

(r) The provisions of this section shall be a part of and supplemental to the Kansas consumer protection act.

(s) The provisions of this section shall be known and may be cited as the Kansas no-call act.

New Sec. 3. (a) It shall be an unconscionable act within the meaning of K.S.A. 50-627, and amendments thereto, for any supplier to profiteer from a disaster.

(b) As used in this section:

(1) "Profiteer from a disaster" means unjustifiably increasing during a time of disaster the price at which any necessary property or service is offered for sale to consumers. Actual sales at the increased price shall not be required for the increase to be considered unconscionable. In determining whether the price increase described in this subsection is unjustified, the court shall consider all relevant circumstances including, but not limited to, the following: (A) Whether the price charged by the supplier during the time of disaster grossly exceeded the price charged by the supplier for similar property or services on the business day before the disaster, and an increase of more than 25% shall be *prima facie* evidence of gross excess;

(B) whether the amount charged by the supplier during the time of disaster grossly exceeded the price at which the same or similar property or services were readily obtainable by other consumers in the trade area, and a price difference of more than 25% shall be *prima facie* evidence of gross excess; and

(C) whether the increase in the amount charged by the supplier during the time of disaster was attributable to additional costs incurred by the supplier in connection with the sale of the product or service, and proof the supplier incurred such additional costs shall be *prima facie* evidence that the price increase was justified when such additional costs

were actually incurred by the supplier during the period in which the substantially increased price was being charged;

(2) “time of disaster” means the period of time when a declaration of a state of emergency by the president of the United States or the governor is in effect; or 30 days after the occurrence of the event that constitutes the disaster, whichever is longer;

(3) “disaster” means natural or man-made events including, but not limited to, tornado or other severe storm, earthquake, flood, fire, riot, act of war, terrorism, civil disorder or other extraordinary adverse circumstance. The court shall find that an event constitutes a disaster if the event results in the declaration of a state of emergency by the president of the United States or the governor. The court may find that an event constitutes a disaster in the absence of a declared state of emergency; and

(4) “necessary property or service” means any necessary property or service for which consumer demand does, or is likely to, increase as a consequence of the disaster and includes, but is not limited to, consumer food items or property, property or services for emergency cleanup, emergency supplies, communication supplies and services, medical supplies and services, home heating fuel, building materials and services, freight, storage services, housing, lodging, transportation and motor fuels.

(c) The provisions of this section shall be part of and supplemental to the consumer protection act.

Sec. 4. K.S.A. 2001 Supp. 50-670 is hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

\_\_\_\_\_  
SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

Passed the HOUSE  
as amended \_\_\_\_\_

HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

APPROVED \_\_\_\_\_  
\_\_\_\_\_  
*Governor.*