
SENATE BILL 5210

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By Senators Berkey, Holmquist, Kohl-Welles, Fairley, Regala, Honeyford, and Shin; by request of Attorney General

Read first time 01/16/09. Referred to Committee on Labor, Commerce & Consumer Protection.

1 AN ACT Relating to unsolicited goods and the promotional
2 advertising of prizes; amending RCW 19.56.020, 19.170.010, 19.170.020,
3 19.170.030, and 19.170.040; adding new sections to chapter 19.56 RCW;
4 and adding a new section to chapter 19.170 RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 19.56 RCW
7 to read as follows:

8 The definitions in this section apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "Customer" means any person who is or may be required to pay
11 for goods or services.

12 (2) "Express agreement" means a customer's written or electronic
13 signature indicating the customer's request for, and acceptance to pay
14 for, the specific goods or services being offered under the terms and
15 conditions disclosed at the time of the offer. An express agreement is
16 not evidenced by a prechecked box or other similar feature next to a
17 statement indicating the customer's request for, and acceptance to pay
18 for, the specific goods or services being offered under the terms and
19 conditions disclosed at the time of the offer.

1 (3) "Free to pay conversion" means, in an offer or agreement to
2 sell or provide any goods or services, a provision under which a
3 customer receives a product or service for free for an initial period
4 and will incur an obligation to pay for the product or service if he or
5 she does not take affirmative action to cancel before the end of that
6 period.

7 (4) "Negative option feature" means, in an offer or agreement to
8 sell or provide any goods or services, a provision under which the
9 customer's silence or failure to take an affirmative action to reject
10 goods or services or to cancel the agreement is interpreted by the
11 seller as acceptance of the offer.

12 (5) "Person" means any individual, group, unincorporated
13 association, limited or general partnership, corporation, or other
14 business entity.

15 (6) "Preacquired account information" means any information that
16 enables a seller to cause a charge to be placed against a customer's
17 account without obtaining the account number directly from the customer
18 during the sales transaction pursuant to which the account will be
19 charged.

20 (7) "Seller" means any person who provides, offers to provide, or
21 arranges for others to provide goods or services to the customer in
22 exchange for consideration. The term shall not apply to a telemarketer
23 as that term is defined in the telemarketing sales rule, C.F.R. Part
24 310 (TSR) of the telemarketing and consumer fraud and abuse prevention
25 act, 15 U.S.C. Secs. 6101-6108, as existing on the effective date of
26 this section.

27 **Sec. 2.** RCW 19.56.020 and 1992 c 43 s 1 are each amended to read
28 as follows:

29 If unsolicited goods or services are provided to a person, the
30 person has a right to accept the goods or services as a gift only, and
31 is not bound to return the goods or services. The seller is prohibited
32 from billing or otherwise attempting to charge the person for the
33 unsolicited goods or services. Goods or services are not considered to
34 have been solicited unless the ((~~recipient specifically requested, in~~
35 ~~an affirmative manner, the receipt of~~)) seller obtained the customer's
36 prior express agreement to receive and pay for the goods or services
37 according to the terms and conditions under which the goods or services

1 (~~(according to the terms under which they)~~) are being offered. Goods
2 or services are not considered to have been (~~(requested)~~) solicited if
3 a person fails to respond to an invitation to purchase the goods or
4 services and the goods or services are provided notwithstanding. If
5 the unsolicited goods or services are either addressed to or intended
6 for the recipient, the recipient may use them or dispose of them in any
7 manner without any obligation to the (~~(provider)~~) seller, and in any
8 action for goods or services sold and delivered, or in any action for
9 the return of the goods, it is a complete defense that the goods or
10 services were provided voluntarily and that the defendant did not
11 (~~(affirmatively order or request the)~~) provide prior express agreement
12 to receive and pay for the goods or services(~~(, either orally or in~~
13 ~~writing))~~).

14 NEW SECTION. Sec. 3. A new section is added to chapter 19.56 RCW
15 to read as follows:

16 In any offer for goods or services that includes a negative option
17 feature including, but not limited to, an offer that includes a free to
18 pay conversion or an automatic renewal of a term agreement, the seller
19 must:

20 (1) Disclose to the customer clearly and conspicuously and at the
21 point of making the offer all material terms and conditions of the
22 negative option feature including, but not limited to, the fact that
23 the customer will be billed or the customer's account will be charged
24 unless the customer takes an affirmative action to avoid the charge or
25 charges, the date or dates the charge or charges will be submitted for
26 payment; the total cost of the initial charge; the total cost or range
27 of costs of each subsequent payment; and the specific steps the
28 customer must take to avoid the charge or charges, including a specific
29 means by which the consumer may cancel the good or service or reject
30 the offer; and

31 (2) Obtain from the customer prior to consummation of the sale his
32 or her express agreement to be charged for the goods or services
33 according to the terms and conditions under which the goods or services
34 are being offered. The seller is prohibited from billing or otherwise
35 attempting to charge for the goods or services unless the seller has
36 obtained from the customer prior to the consummation of the sale his or

1 her express agreement to be charged for the goods or services according
2 to the terms and conditions under which the goods or services are being
3 offered.

4 NEW SECTION. **Sec. 4.** A new section is added to chapter 19.56 RCW
5 to read as follows:

6 In any sales transaction involving preacquired account information
7 and a free to pay conversion feature, the seller must also:

8 (1) Obtain from the customer, at a minimum, the last four digits of
9 the account number to be charged;

10 (2) Obtain from the customer prior to consummation of the sale his
11 or her express agreement to be charged for the goods or services and to
12 be charged using the account number identified by the consumer pursuant
13 to subsection (1) of this section; and

14 (3) Notify the customer at least ten days prior to the first charge
15 of the date the charge will be submitted for payment, and the specific
16 steps the customer must take to avoid the charge or charges.

17 NEW SECTION. **Sec. 5.** A new section is added to chapter 19.56 RCW
18 to read as follows:

19 Violation of RCW 19.56.030 or section 3 or 4 of this act is a
20 matter affecting the public interest for the purpose of applying
21 chapter 19.86 RCW. Failure to comply with this chapter is not
22 reasonable in relation to the development and preservation of business.
23 A violation of RCW 19.56.030 or section 3 or 4 of this act constitutes
24 an unfair or deceptive act or practice in trade or commerce for the
25 purposes of applying chapter 19.86 RCW.

26 **Sec. 6.** RCW 19.170.010 and 1991 c 227 s 1 are each amended to read
27 as follows:

28 (1) The legislature finds that deceptive promotional advertising of
29 prizes is a matter vitally affecting the public interest for the
30 purpose of applying the consumer protection act, chapter 19.86 RCW.

31 (2) Deceptive promotional advertising of prizes is not reasonable
32 in relation to the development and preservation of business. A
33 violation of this chapter is an unfair or deceptive act in trade or
34 commerce for the purpose of applying the consumer protection act,

1 chapter 19.86 RCW, and constitutes an act of deceptive promotional
2 advertising.

3 (3) This chapter applies to a promotion offer or an incentive
4 program:

5 (a) Made to a person in Washington to a computer located in
6 Washington, or to an electronic mail address that the sender knows or
7 has reason to know is held by a Washington resident;

8 (b) Used to induce or invite a person to come to the state of
9 Washington to claim a prize, attend a sales presentation, meet a
10 promoter, sponsor, salesperson, or their agent, or conduct any business
11 in this state; ((or))

12 (c) Used to induce or invite a person to contact by any means a
13 promoter, sponsor, salesperson, or their agent in this state; or

14 (d) Used to induce a person to purchase or use a product or
15 service, provide information, or view advertising on the internet.

16 **Sec. 7.** RCW 19.170.020 and 1991 c 227 s 2 are each amended to read
17 as follows:

18 Unless the context clearly requires otherwise, the definitions in
19 this section apply throughout this chapter.

20 (1) "Assist" means an action taken by a person to provide
21 substantial assistance or support which enables any person to
22 formulate, compose, send, originate, initiate, or transmit an offer or
23 an incentive program when the person providing the assistance knows or
24 consciously avoids knowing that the promoter of the offer or incentive
25 program is engaged, or intends to engage, in any practice that violates
26 the consumer protection act.

27 (2) "Continuing obligation check" means a document that is a check,
28 draft, note, bond, or other negotiable instrument that, when cashed,
29 deposited, or otherwise used, imposes on the payee an obligation to
30 enter into a loan transaction. This does not include checks, drafts,
31 or other negotiable instruments that are used by consumers to take
32 advances on revolving loans, credit cards, or revolving credit
33 accounts.

34 (3) "Financial institution" means any bank, trust company, savings
35 bank, savings and loan association, credit union, industrial loan
36 company, or consumer finance lender subject to regulation by an

1 official agency of this state or the United States, and any subsidiary
2 or affiliate thereof.

3 (4) "Internet" means the global information system that is
4 logically linked together by a globally unique address space based on
5 the internet protocol, or its subsequent extensions, and that is able
6 to support communications using the transmission control
7 protocol/internet protocol suite, or its subsequent extensions, or
8 other internet protocol-compatible protocols, and that provides, uses,
9 or makes accessible, either publicly or privately, high level services
10 layered on the communications and related infrastructure.

11 (5) "Incentive" means a prize offered on the internet in a
12 commercial context, with or without involvement of the element of
13 chance, as an enticement to purchase or use a product or service,
14 provide information, or view advertising.

15 (6) "Incentive program" means an advertisement, advertising
16 program, sweepstakes, contest, direct giveaway, or solicitation that
17 includes the award of or opportunity or chance to be awarded an
18 incentive.

19 (7) "Offer" means a written notice delivered by hand, mail, or
20 other print medium offering goods, services, or property made as part
21 of a promotion to a person based on a representation that the person
22 has been awarded, or will be awarded, a prize.

23 (8) "Person" means an individual, corporation, the state or its
24 subdivisions or agencies, business trust, estate, trust, partnership,
25 association, cooperative, or any other legal entity.

26 ((+2)) (9) "Personally identifiable information" means any of the
27 following with respect to an individual who is an owner or operator:

28 (a) First name or first initial in combination with last name;

29 (b) A home or other physical address including street name;

30 (c) An electronic mail address;

31 (d) A credit or debit card number, bank account number, or a
32 password or access code associated with a credit or debit card or bank
33 account;

34 (e) Social security number, tax identification number, driver's
35 license number, passport number, or any other government-issued
36 identification number; and

37 (f) Any of the following information in a form that personally
38 identifies an owner or operator:

- 1 (i) Account balances;
2 (ii) Overdraft history; and
3 (iii) Payment history.

4 (10) "Prize" means a gift, award, travel coupon or certificate,
5 free item, or any other item offered in a promotion that is different
6 and distinct from the goods, service, or property promoted by a
7 sponsor. "Prize" does not include an item offered in a promotion where
8 all of the following elements are present:

9 (a) No element of chance is involved in obtaining the item offered
10 in the promotion;

11 (b) The recipient has the right to review the merchandise offered
12 for sale without obligation for at least seven days, and has a right to
13 obtain a full refund in thirty days for the return of undamaged
14 merchandise;

15 (c) The recipient may keep the item offered in the promotion
16 without obligation; and

17 (d) The recipient is not required to attend any sales presentation
18 or spend any sum in order to receive the item offered in the promotion.

19 ~~((+3))~~ (11) "Promoter" means a person conducting a promotion or an
20 incentive program.

21 ~~((+4))~~ (12) "Promote" means to conduct a promotion or an incentive
22 program.

23 (13) "Promotion" means an advertising program, sweepstakes,
24 contest, direct giveaway, or solicitation directed to specific named
25 individuals, that includes the award of or chance to be awarded a
26 prize.

27 ~~((+5) "Offer" means a written notice delivered by hand, mail, or~~
28 ~~other print medium offering goods, services, or property made as part~~
29 ~~of a promotion to a person based on a representation that the person~~
30 ~~has been awarded, or will be awarded, a prize.~~

31 ~~(+6))~~ (14) "Recipient" means the person who receives an offer or
32 who participates in an incentive program.

33 (15) "Sponsor" means a person on whose behalf a promotion is
34 conducted to promote or advertise goods, services, or property of that
35 person.

36 ~~((+7))~~ (16) "To sponsor" means to participate in a promotion or an
37 incentive program to advertise goods, services, or property.

1 (17) "Simulated check" means a document that is not currency or a
2 check, draft, note, bond, or other negotiable instrument but has the
3 visual characteristics thereof. "Simulated check" does not include a
4 nonnegotiable check, draft, note, or other instrument that is used for
5 soliciting orders for the purchase of checks, drafts, notes, bonds, or
6 other instruments and that is clearly marked as a sample, specimen, or
7 nonnegotiable.

8 ~~((8) "Continuing obligation check" means a document that is a
9 check, draft, note, bond, or other negotiable instrument that, when
10 cashed, deposited, or otherwise used, imposes on the payee an
11 obligation to enter into a loan transaction. This definition does not
12 include checks, drafts, or other negotiable instruments that are used
13 by consumers to take advances on revolving loans, credit cards, or
14 revolving credit accounts.~~

15 ~~(9))~~ (18) "Transmit" means to transfer, send, or make available
16 computer software or content, or any component thereof, via the
17 internet or any other medium, including local area networks of
18 computers, other nonwire transmission, and disc or other data storage
19 device. "Transmit" does not include any action by a person providing
20 the internet connection, telephone connection, or other means of
21 transmission capability such as a compact disc or digital video disc
22 through which the software was made available.

23 (19) "Verifiable retail value" means:

24 (a) A price at which a promoter or sponsor can demonstrate that a
25 substantial number of prizes have been sold at retail in the local
26 market by a person other than the promoter or sponsor; or

27 (b) If the prize is not available for retail sale in the local
28 market, the retail fair market value in the local market of an item
29 substantially similar in each significant aspect, including size,
30 grade, quality, quantity, ingredients, and utility; or

31 (c) If the value of the prize cannot be established under (a) or
32 (b) of this subsection, then the prize may be valued at no more than
33 three times its cost to the promoter or sponsor.

34 ~~((10) "Financial institution" means any bank, trust company,
35 savings bank, savings and loan association, credit union, industrial
36 loan company, or consumer finance lender subject to regulation by an
37 official agency of this state or the United States, and any subsidiary
38 or affiliate thereof.))~~

1 NEW SECTION. **Sec. 8.** A new section is added to chapter 19.170 RCW
2 to read as follows:

3 No person may promote or sponsor an offer or incentive program,
4 conspire with another to promote or sponsor an offer or incentive
5 program, or assist another to promote or sponsor an offer or incentive
6 program that violates the provisions of this chapter.

7 **Sec. 9.** RCW 19.170.030 and 1999 c 31 s 1 are each amended to read
8 as follows:

9 (1) The offer or incentive program must identify the name and
10 address of the promoter and the sponsor of the promotion.

11 (2) The offer or incentive program must state the verifiable retail
12 value of each prize offered in it.

13 (3)(a) If an element of chance is involved, each offer or incentive
14 program must state the odds the participant has of being awarded each
15 prize. The odds must be expressed in Arabic numerals, in ratio form,
16 based on the total number of prizes to be awarded and the total number
17 of offers or incentive programs distributed.

18 (b) If the promotion identified in the offer or incentive program
19 is part of a collective promotion with more than one participating
20 sponsor, that fact must be clearly and conspicuously disclosed.

21 (c) The odds must be stated in a manner that will not deceive or
22 mislead a person about that person's chance of being awarded a prize.

23 (4) The verifiable retail value and odds for each prize must be
24 stated in immediate proximity on the same page with the first listing
25 of each prize in type at least as large as the typeface used in the
26 standard text of the offer or incentive program.

27 (5) If a person is required or invited to view, hear, or attend a
28 sales presentation in order to claim a prize that has been awarded, may
29 have been awarded, or will be awarded, the requirement or invitation
30 must be conspicuously disclosed under subsection (7) of this section to
31 the person in the offer or incentive program in bold-face type at least
32 as large as the typeface used in the standard text of the offer or
33 incentive program.

34 (6) No item in an offer or incentive program may be denominated a
35 prize, gift, award, premium, or similar term that implies the item is
36 free if, in order to receive the item or use the item for its intended
37 purpose the intended recipient is required to spend any sum of money,

1 including but not limited to shipping fees, deposits, handling fees,
2 payment for one item in order to receive another at no charge, ((or))
3 the purchase of another item or the expenditure of funds in order to
4 make meaningful use of the item awarded in the promotion, or the
5 recipient is required to agree to any of the following:

6 (a) To provide personally identifiable information, unless the
7 promoter does the following prior to collection of the information:

8 (i) Gives the recipient the option to restrict the use of the
9 information only to the promoter, and prohibit its sale or sharing;

10 (ii) Provides an easily used and clearly disclosed mechanism by
11 which the recipient may choose to restrict the use of the information
12 only to the promoter, and prohibit its sale or sharing; and

13 (iii) Discloses clearly and conspicuously how the information will
14 be used, and the ability of the recipient to restrict the sale or
15 sharing of the information to anyone other than the promoter, and
16 prohibit its sale or sharing;

17 (b) To participate in any trial service or subscription, unless
18 prior to the provision of goods or services which require payment after
19 the trial period has concluded, before billing takes place and after
20 the trial period has concluded, the sponsor of the trial service or
21 subscription obtains the express agreement of the recipient to pay for
22 the service or subscription under section 3 of this act;

23 (c) To enter into any agreement to purchase any product or service;
24 or

25 (d) To obtain the agreement of any other person to participate in
26 the promotion. The payment of any applicable state or federal taxes by
27 a recipient directly to a government entity is not a violation of this
28 section.

29 (7) If the receipt of the prize or incentive is contingent upon
30 certain restrictions or qualifications that the recipient must meet, or
31 if the use or availability of the prize or incentive is restricted or
32 qualified in any way, including, but not limited to restrictions on
33 travel dates, travel times, classes of travel, airlines,
34 accommodations, travel agents, or tour operators, the restrictions or
35 qualifications must be disclosed on the offer or incentive program in
36 immediate proximity on the same page with the first listing of the
37 prize in type at least as large as the typeface used in the standard
38 text of the offer or incentive program or, in place thereof, the

1 following statement printed in direct proximity to the prize or prizes
2 awarded in type at least as large as the typeface used in the standard
3 text of the offer or incentive program:

4 "Details and qualifications for participation in this promotion
5 may apply."

6 This statement must be followed by a disclosure, in the same size
7 type as the statement, indicating where in the offer or incentive
8 program the restrictions may be found. The restrictions must be
9 printed in type at least as large as the typeface used in the standard
10 text of the offer or incentive program.

11 (8) If a prize will not be awarded or given unless a winning
12 ticket, the offer itself, a token, number, lot, or other device used to
13 determine winners in a particular promotion is presented to a promoter
14 or a sponsor, this fact must be clearly stated on the first page of the
15 offer or incentive program.

16 **Sec. 10.** RCW 19.170.040 and 1991 c 227 s 4 are each amended to
17 read as follows:

18 (1) Before a demonstration, seminar, or sales presentation begins,
19 the promoter shall inform the person of the prize, if any, the person
20 will receive.

21 (2) A prize or a voucher, certificate, or other evidence of
22 obligation given instead of a prize in an offer shall be given to a
23 person at the time the person is informed of the prize, if any, the
24 person will receive.

25 (3) A copy of the offer shall be returned to the person receiving
26 the prize at the time the prize is awarded.

27 (4) It is a violation of this chapter for a promoter or sponsor to
28 include a prize in an offer when the promoter or sponsor knows or has
29 reason to know that the prize will not be available in a sufficient
30 quantity based upon the reasonably anticipated response to the offer.

31 (5)(a) If the prize in an offer is not available for immediate
32 delivery to the recipient, the recipient shall be given, at the
33 promoter or sponsor's option, a rain check for the prize, the
34 verifiable retail value of the prize in cash, or a substitute item of
35 equal or greater verifiable retail value.

36 (b) If the rain check cannot be honored within thirty days, the

1 promoter or sponsor shall mail to the person a valid check or money
2 order for the verifiable retail value of the prize described in this
3 chapter.

4 (6) A sponsor shall fulfill the rain check within thirty days if
5 the person named as being responsible fails to honor it.

6 (7) The offer shall contain the following clear and conspicuous
7 statement of recipients' rights printed in type at least as large as
8 the typeface used in the standard text of the offer:

9 "If you receive a rain check in lieu of the prize, you are
10 entitled by law to receive the prize, an item of equal or
11 greater value, or the cash equivalent of the offered prize
12 within thirty days of the date on which you claimed the prize."

13 (8) It is a violation of this chapter to misrepresent the quality,
14 type, value, or availability of a prize.

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