

Enrolled
Senate Bill 292

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CHAPTER

AN ACT

Relating to free offers to consumers; creating new provisions; and amending ORS 646.608.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2011 Act is added to and made a part of ORS 646.605 to 646.652.

SECTION 2. (1) As used in this section:

(a) "Affirmative consent" means a consumer's agreement to incur a financial obligation as a result of accepting a free offer, or to provide the consumer's billing information, given or made in the manner specifically identified for the consumer to indicate the consumer's agreement.

(b) "Billing information" means any record or information compiled or maintained with respect to a consumer that identifies the consumer and provides a means by which the consumer's financial obligation incurred by accepting a free offer may be paid or otherwise satisfied, including but not limited to information pertaining to a consumer's credit card, payment card, charge card, debit card, checking, savings or other banking account, and electronic funds transfer information.

(c) "Clear and conspicuous information" means language that is readily understandable and presented in such size, color, contrast and location, or audibility and cadence, compared to other language as to be readily noticed and understood, and that is in close proximity to the request for consent to a free offer.

(d) "Consumer" means an individual who seeks to accept or accepts a free offer.

(e)(A) "Free offer" means an offer of goods or services without cost, or for a one-time payment to cover only incidental charges such as shipping and handling, to a consumer that, if accepted, causes the consumer to incur a financial obligation for:

(i) The goods or services received;

(ii) Additional goods or services other than those initially received; or

(iii) Enrollment in a membership, subscription or service contract as a result of accepting the offer.

(B) "Free offer" does not include a free good or service that is received by a consumer as a result of the consumer's entering into an agreement for enrollment in a membership, subscription or service contract that is not otherwise a free offer or a consequence of the consumer's agreement to accept a free offer.

(2) A person may not make a free offer to a consumer, or impose a financial obligation on the consumer as a result of the consumer's acceptance of a free offer, unless the person provides the consumer with clear and conspicuous information regarding the terms of the free offer before the consumer agrees to accept the free offer, including at a minimum:

(a) Identification of all goods or services, or enrollments in a membership, subscription or service contract, that the consumer will receive or incur a financial obligation for as a result of accepting the free offer;

(b) The cost to the consumer of any financial obligation the consumer will incur if the consumer accepts the free offer, including any fees or charges;

(c) Any requirement, if applicable, that the consumer take affirmative action to reject the free offer and instructions about how the consumer is to indicate the consumer's rejection of the free offer;

(d) A statement, if applicable, that by accepting the free offer, the consumer will become obligated for additional goods or services, or enrollment in a membership, subscription or service contract, unless the consumer takes affirmative action to cancel the free offer or otherwise reject receipt of the additional goods or services or the enrollment in a membership, subscription or service contract;

(e) Except as provided in paragraph (h) of this subsection, the consumer's right to cancel the free offer using procedures specifically identified for that purpose that, at a minimum, enable the consumer to cancel by calling a toll-free telephone number or to cancel in a manner substantially similar to that by which the consumer accepted the free offer;

(f) The time period during which the consumer must cancel in order to avoid incurring a financial obligation as a result of accepting the free offer;

(g) If applicable, the consumer's right to receive a credit on goods or services received as a result of accepting the free offer when the goods or services are returned or rejected, and the time period during which the goods or services must be returned or rejected for the purpose of receiving a credit; and

(h) With respect to a free offer that is for a publication, including but not limited to a magazine, newspaper or other periodical, a statement that the consumer will receive information regarding the consumer's right to cancel the free offer and an explanation of the procedure to cancel the free offer at the time the consumer receives an invoice to pay for the publication, including but not limited to written notice of cancellation by mail to the person providing the free offer.

(3) A person may not cause a consumer to incur a financial obligation as a result of accepting a free offer unless:

(a) The person obtains the consumer's billing information directly from the consumer;

or

(b) The consumer gives affirmative consent at the time the consumer accepts a free offer for the person to provide billing information to a person other than the person making a free offer. For purposes of this subsection, a person obtains a consumer's billing information directly from the consumer if it is obtained by the person or by the person's agent or employee.

(4) A person may not impose a financial obligation on a consumer as a result of the consumer's acceptance of a free offer unless the consumer's affirmative consent to the terms of the free offer as set forth in subsection (2) of this section is obtained.

(5) A person that makes a free offer to a consumer may not fail or refuse to cancel the free offer if the consumer has used, or made reasonable efforts to attempt to use, one of the procedures required by subsection (2)(e) of this section.

(6) A person who violates a provision of this section engages in an unlawful practice subject to enforcement and penalty under ORS 646.605 to 646.652.

(7) This section does not apply to free offers made in connection with services that are subject to the federal Communications Act of 1934 (47 U.S.C. 151 et seq.).

SECTION 3. ORS 646.608 is amended to read:

646.608. (1) A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

- (a) Passes off real estate, goods or services as those of another.
- (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
- (c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.
- (d) Uses deceptive representations or designations of geographic origin in connection with real estate, goods or services.
- (e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.
- (f) Represents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.
- (g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.
- (h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.
- (i) Advertises real estate, goods or services with intent not to provide them as advertised, or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.
- (j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.
- (k) Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred.
- (L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting real estate, goods or services to be used for model or demonstration purposes or in exchange for submitting names of potential customers.
- (m) Performs service on or dismantles any goods or real estate when not authorized by the owner or apparent owner thereof.
- (n) Solicits potential customers by telephone or door to door as a seller unless the person provides the information required under ORS 646.611.
- (o) In a sale, rental or other disposition of real estate, goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the customer in consideration of the customer giving to the person the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the person in making a sale, lease, or loan to another person, if earning the rebate, discount or other value is contingent upon occurrence of an event subsequent to the time the customer enters into the transaction.
- (p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service.
- (q) Promises to deliver real estate, goods or services within a certain period of time with intent not to deliver them as promised.
- (r) Organizes or induces or attempts to induce membership in a pyramid club.
- (s) Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services.
- (t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.
- (u) Engages in any other unfair or deceptive conduct in trade or commerce.
- (v) Violates any of the provisions relating to auction sales, auctioneers or auction marts under ORS 698.640, whether in a commercial or noncommercial situation.
- (w) Manufactures mercury fever thermometers.

(x) Sells or supplies mercury fever thermometers unless the thermometer is required by federal law, or is:

(A) Prescribed by a person licensed under ORS chapter 677; and

(B) Supplied with instructions on the careful handling of the thermometer to avoid breakage and on the proper cleanup of mercury should breakage occur.

(y) Sells a thermostat that contains mercury unless the thermostat is labeled in a manner to inform the purchaser that mercury is present in the thermostat and that the thermostat may not be disposed of until the mercury is removed, reused, recycled or otherwise managed to ensure that the mercury does not become part of the solid waste stream or wastewater. For purposes of this paragraph, "thermostat" means a device commonly used to sense and, through electrical communication with heating, cooling or ventilation equipment, control room temperature.

(z) Sells or offers for sale a motor vehicle manufactured after January 1, 2006, that contains mercury light switches.

(aa) Violates the provisions of ORS 803.375, 803.385 or 815.410 to 815.430.

(bb) Violates ORS 646A.070 (1).

(cc) Violates any requirement of ORS 646A.030 to 646A.040.

(dd) Violates the provisions of ORS 128.801 to 128.898.

(ee) Violates ORS 646.883 or 646.885.

(ff) Violates ORS 646.569.

(gg) Violates the provisions of ORS 646A.142.

(hh) Violates ORS 646A.360.

(ii) Violates ORS 646.553 or 646.557 or any rule adopted pursuant thereto.

(jj) Violates ORS 646.563.

(kk) Violates ORS 759.690 or any rule adopted pursuant thereto.

(LL) Violates the provisions of ORS 759.705, 759.710 and 759.720 or any rule adopted pursuant thereto.

(mm) Violates ORS 646A.210 or 646A.214.

(nn) Violates any provision of ORS 646A.124 to 646A.134.

(oo) Violates ORS 646A.095.

(pp) Violates ORS 822.046.

(qq) Violates ORS 128.001.

(rr) Violates ORS 646.649 (2) to (4).

(ss) Violates ORS 646A.090 (2) to (4).

(tt) Violates ORS 87.686.

(uu) Violates ORS 646.651.

(vv) Violates ORS 646A.362.

(ww) Violates ORS 646A.052 or any rule adopted under ORS 646A.052 or 646A.054.

(xx) Violates ORS 180.440 (1) or 180.486 (1).

(yy) Commits the offense of acting as a vehicle dealer without a certificate under ORS 822.005.

(zz) Violates ORS 87.007 (2) or (3).

(aaa) Violates ORS 92.405 (1), (2) or (3).

(bbb) Engages in an unlawful practice under ORS 646.648.

(ccc) Violates ORS 646A.365.

(ddd) Violates ORS 98.854 or 98.858 or a rule adopted under ORS 98.864.

(eee) Sells a gift card in violation of ORS 646A.276.

(fff) Violates ORS 646A.102, 646A.106 or 646A.108.

(ggg) Violates ORS 646A.430 to 646A.450.

(hhh) Violates a provision of ORS 744.318 to 744.384, 744.991 and 744.992.

(iii) Violates a provision of ORS 646A.702 to 646A.720.

(jjj) Violates ORS 646A.530 30 or more days after a recall notice, warning or declaration described in ORS 646A.530 is issued for the children's product, as defined in ORS 646A.525, that is the subject of the violation.

(kkk) Violates a provision of ORS 697.612, 697.642, 697.652, 697.662, 697.682, 697.692 or 697.707.
(LLL) Violates the consumer protection provisions of the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 et seq., as in effect on January 1, 2010.

(mmm) Violates a provision of ORS 646A.480 to 646A.495.

(nnn) Violates ORS 646A.082.

(ooo) Violates ORS 646.647.

(ppp) Violates ORS 646A.115.

(qqq) Violates a provision of ORS 646A.405.

(rrr) Violates a provision of section 2 of this 2011 Act.

(2) A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under ORS 646.605 to 646.652, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) An action or suit may not be brought under subsection (1)(u) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS chapter 183 declaring the conduct to be unfair or deceptive in trade or commerce.

(5) Notwithstanding any other provision of ORS 646.605 to 646.652, if an action or suit is brought under subsection (1)(xx) of this section by a person other than a prosecuting attorney, relief is limited to an injunction and the prevailing party may be awarded reasonable attorney fees.

SECTION 4. Section 2 of this 2011 Act and the amendments to ORS 646.608 by section 3 of this 2011 Act apply to free offers, as defined in section 2 of this 2011 Act, made on or after the effective date of this 2011 Act.

Passed by Senate April 26, 2011

Received by Governor:

Repassed by Senate June 10, 2011

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Approved:

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Robert Taylor, Secretary of Senate

.....M,....., 2011

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Peter Courtney, President of Senate

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John Kitzhaber, Governor

Passed by House June 6, 2011

Filed in Office of Secretary of State:

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Bruce Hanna, Speaker of House

.....M,....., 2011

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Arnie Roblan, Speaker of House

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Kate Brown, Secretary of State