
SUBSTITUTE SENATE BILL 5210

State of Washington

61st Legislature

2009 Regular Session

By Senate Labor, Commerce & Consumer Protection (originally sponsored by Senators Berkey, Holmquist, Kohl-Welles, Fairley, Regala, Honeyford, and Shin; by request of Attorney General)

READ FIRST TIME 02/25/09.

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, or 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 the initial charge will be submitted for payment or,
26 if the date cannot be determined at the time of the offer, the
27 triggering event that will cause the charge to be made; the period of
28 time between subsequent charges after the initial charge; the date of
29 the automatic renewal, if any; the total cost of the initial charge;
30 the total cost or range of costs of each subsequent payment; and the
31 specific steps the customer must take to avoid the charge or charges,
32 including a specific means by which the consumer may cancel the good or
33 service or reject the offer; and

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

1 attempting to charge for the goods or services unless the seller has
2 obtained from the customer prior to the consummation of the sale his or
3 her express agreement to be charged for the goods or services according
4 to the terms and conditions under which the goods or services are being
5 offered.

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

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

10 (1) Obtain from the customer, at a minimum, the last four digits of
11 the account number to be charged, or visually display to the customer,
12 at a minimum, the last four digits of the account number to be charged,
13 at the time of the express agreement as provided in section 3(2) of
14 this act;

15 (2) Obtain from the customer prior to consummation of the sale his
16 or her express agreement to be charged for the goods or services and to
17 be charged using the account number identified by, or visually
18 displayed to, the customer pursuant to subsection (1) of this section;
19 and

20 (3) Notify the customer at least five days prior to the first
21 charge of the date the charge will be submitted for payment, and the
22 specific steps the customer must take to avoid the charge or charges.

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

25 Violation of RCW 19.56.030 or section 2, 3, or 4 of this act is a
26 matter affecting the public interest for the purpose of applying
27 chapter 19.86 RCW. Failure to comply with this chapter is not
28 reasonable in relation to the development and preservation of business.
29 A violation of RCW 19.56.030 or section 2, 3, or 4 of this act
30 constitutes an unfair or deceptive act or practice in trade or commerce
31 for the purposes of applying chapter 19.86 RCW.

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

34 (1) The legislature finds that deceptive promotional advertising of

1 prizes is a matter vitally affecting the public interest for the
2 purpose of applying the consumer protection act, chapter 19.86 RCW.

3 (2) Deceptive promotional advertising of prizes is not reasonable
4 in relation to the development and preservation of business. A
5 violation of this chapter is an unfair or deceptive act in trade or
6 commerce for the purpose of applying the consumer protection act,
7 chapter 19.86 RCW, and constitutes an act of deceptive promotional
8 advertising.

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

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

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

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

20 (d) Used to induce a person to purchase or use a product or
21 service, or provide personal information on the internet.

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

24 Unless the context clearly requires otherwise, the definitions in
25 this section apply throughout this chapter.

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

33 (2) "Continuing obligation check" means a document that is a check,
34 draft, note, bond, or other negotiable instrument that, when cashed,
35 deposited, or otherwise used, imposes on the payee an obligation to
36 enter into a loan transaction. This does not include checks, drafts,

1 or other negotiable instruments that are used by consumers to take
2 advances on revolving loans, credit cards, or revolving credit
3 accounts.

4 (3) "Financial institution" means any bank, trust company, savings
5 bank, savings and loan association, credit union, industrial loan
6 company, or consumer finance lender subject to regulation by an
7 official agency of this state or the United States, and any subsidiary
8 or affiliate thereof.

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

17 (5) "Incentive" means a prize offered on the internet in a
18 commercial context, with or without involvement of the element of
19 chance, as an enticement to purchase or use a product or service, or
20 provide personal information on the internet.

21 (6) "Incentive program" means an advertisement, advertising
22 program, sweepstakes, contest, direct giveaway, or solicitation on the
23 internet that includes the award of or opportunity or chance to be
24 awarded an incentive.

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

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

32 ((+2)) (9) "Personal information" means any of the following:
33 (a) First name or first initial in combination with last name;
34 (b) A home or other physical address including street name;
35 (c) An electronic mail address;
36 (d) A credit or debit card number, bank account number, or a
37 password or access code associated with a credit or debit card or bank
38 account;

1 (e) Social security number, tax identification number, driver's
2 license number, passport number, or any other government-issued
3 identification number;

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

6 (i) Account balances;

7 (ii) Overdraft history; and

8 (iii) Payment history; and

9 (g) Telephone number.

10 (10) "Prize" means a gift, award, travel coupon or certificate,
11 free item, or any other item offered in a promotion or incentive
12 program that is different and distinct from the goods, service, or
13 property promoted by a sponsor. "Prize" does not include:

14 (a) A bonus with purchase; or

15 (b) An item offered in a promotion where all of the following
16 elements are present:

17 ~~((a))~~ (i) No element of chance is involved in obtaining the item
18 offered in the promotion;

19 ~~((b))~~ (ii) The recipient has the right to review the merchandise
20 offered for sale without obligation for at least seven days, and has a
21 right to obtain a full refund in thirty days for the return of
22 undamaged merchandise;

23 ~~((c))~~ (iii) The recipient may keep the item offered in the
24 promotion without any of the obligations described in RCW
25 19.170.030(6); and

26 ~~((d))~~ (iv) The recipient is not required to attend any sales
27 presentation or spend any sum in order to receive the item offered in
28 the promotion.

29 ~~((3))~~ (11) "Promoter" means a person conducting a promotion or an
30 incentive program.

31 ~~((4))~~ (12) "Promote" means to conduct a promotion or an incentive
32 program.

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

37 ~~((5)) "Offer" means a written notice delivered by hand, mail, or~~

1 ~~other print medium offering goods, services, or property made as part~~
2 ~~of a promotion to a person based on a representation that the person~~
3 ~~has been awarded, or will be awarded, a prize.~~

4 ~~(6))~~ (14) "Recipient" means the person who receives an offer or
5 who participates in an incentive program.

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

9 ~~((7))~~ (16) "To sponsor" means to participate in a promotion or an
10 incentive program to advertise goods, services, or property.

11 (17) "Simulated check" means a document that is not currency or a
12 check, draft, note, bond, or other negotiable instrument but has the
13 visual characteristics thereof. "Simulated check" does not include a
14 nonnegotiable check, draft, note, or other instrument that is used for
15 soliciting orders for the purchase of checks, drafts, notes, bonds, or
16 other instruments and that is clearly marked as a sample, specimen, or
17 nonnegotiable.

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

25 ~~(9))~~ (18) "Transmit" means to transfer, send, or make available
26 computer software or content, or any component thereof, via the
27 internet or any other medium, including local area networks of
28 computers, other nonwire transmission, and disc or other data storage
29 device. "Transmit" does not include any action by a person providing
30 the internet connection, telephone connection, or other means of
31 transmission capability such as a compact disc or digital video disc
32 through which the software was made available.

33 (19) "Verifiable retail value" means:

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

37 (b) If the prize is not available for retail sale in the local

1 market, the retail fair market value in the local market of an item
2 substantially similar in each significant aspect, including size,
3 grade, quality, quantity, ingredients, and utility; or

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

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

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

14 No person may promote or sponsor an offer or incentive program,
15 conspire with another to promote or sponsor an offer or incentive
16 program, or assist another to promote or sponsor an offer or incentive
17 program that violates the provisions of this chapter.

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

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

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

24 (3)(a) If an element of chance is involved, each offer or incentive
25 program must state the odds the participant has of being awarded each
26 prize. The odds must be expressed in Arabic numerals, in ratio form,
27 based on the total number of prizes to be awarded and the total number
28 of offers or incentive programs distributed. If the odds of obtaining
29 a prize in an incentive program cannot be determined because they are
30 dependent on the number of participants in the promotion, that fact
31 must be clearly and conspicuously disclosed in lieu of stating the
32 odds.

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

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

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

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

14 (6) No item in an offer or incentive program may be denominated a
15 prize, gift, award, premium, or similar term that implies the item is
16 free if, in order to receive the item or use the item for its intended
17 purpose the intended recipient is required to spend any sum of money,
18 including but not limited to shipping fees, deposits, handling fees,
19 payment for one item in order to receive another at no charge, ((~~or~~)
20 the purchase of another item or the expenditure of funds in order to
21 make meaningful use of the item awarded in the promotion, or the
22 recipient is required to agree to any of the following:

23 (a) To provide personal information that will be shared with or
24 sold to persons other than the promoter, unless the promoter does the
25 following prior to collection of the information:

26 (i) Gives the recipient the option to restrict the use of the
27 information only to the promoter, and prohibit its sale or sharing,
28 except as otherwise necessary to administer the awarding of the prize
29 in connection with the offer or incentive program;

30 (ii) Provides an easily used and clearly disclosed mechanism by
31 which the recipient may choose to restrict the use of the information
32 as provided in (a)(i) of this subsection; and

33 (iii) Discloses clearly and conspicuously how the information will
34 be used, and the ability of the recipient to restrict the sale or
35 sharing of the information as provided in (a)(i) of this subsection;

36 (b) To participate in any trial service or subscription, unless
37 prior to the provision of goods or services which require payment after

1 the trial period has concluded, the sponsor of the trial service or
2 subscription obtains the express agreement of the recipient to pay for
3 the service or subscription under section 3 of this act;

4 (c) To enter into any agreement to purchase any product or service;
5 or

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

10 (7) If the receipt of the prize or incentive is contingent upon
11 certain restrictions or qualifications that the recipient must meet, or
12 if the use or availability of the prize or incentive is restricted or
13 qualified in any way, including, but not limited to restrictions on
14 travel dates, travel times, classes of travel, airlines,
15 accommodations, travel agents, or tour operators, the restrictions or
16 qualifications must be disclosed on the offer or incentive program in
17 immediate proximity on the same page with the first listing of the
18 prize in type at least as large as the typeface used in the standard
19 text of the offer or incentive program or, in place thereof, the
20 following statement printed in direct proximity to the prize or prizes
21 awarded in type at least as large as the typeface used in the standard
22 text of the offer or incentive program:

23 "Details and qualifications for participation in this promotion
24 may apply."

25 This statement must be followed by a disclosure, in the same size
26 type as the statement, indicating where in the offer or incentive
27 program the restrictions may be found. The restrictions must be
28 printed in type at least as large as the typeface used in the standard
29 text of the offer or incentive program.

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

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

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

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

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

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

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

19 (b) If the rain check cannot be honored within thirty days, the
20 promoter or sponsor shall mail to the person a valid check or money
21 order for the verifiable retail value of the prize described in this
22 chapter.

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

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

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

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

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