

SALES AND EXCHANGES

CHAPTER 433

SENATE BILL NO. 2114

(Industry, Business and Labor Committee)
(At the request of the Public Service Commission)

AUCTIONEER AND CLERK FEES AND BONDS

AN ACT to amend and reenact section 51-05.1-01.1 of the North Dakota Century Code, relating to auctioneer and auction clerk license fees.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 51-05.1-01.1 of the North Dakota Century Code is amended and reenacted as follows:

51-05.1-01.1. Auctioneer's license - Clerk's license - Fees - Bonds.
~~Application~~ The initial application for an annual auctioneer's or clerk's license must be in writing, verified, and must show the name, residence, and address of the applicant. An application must be filed at least ten days prior to the first auction sale the applicant is to conduct or clerk. Application for renewal of an annual license must be on forms designated by the commission. The fee for the annual license or renewal is thirty-five dollars and must accompany the application. The name and license number must appear on all advertising of sales conducted by an auctioneer or clerk. Renewals that are not ~~submitted~~ received by January thirty-first must be assessed an additional twenty-five dollar fee.

Before a license is issued to an auctioneer or auction clerk, the applicant must file a corporate surety bond with the commission. This bond must provide annual coverage of not less than five thousand dollars for an auctioneer or ten thousand dollars for an auction clerk, must run to the state of North Dakota, and must be for the benefit of any person injured by the licensee's improper conduct. Bonds may not be canceled on less than sixty days' written notice to the commission. ~~When a licensee states that it is bonded, the~~ The size of the licensee's bond must be clearly and prominently stated in all contracts with sellers.

Approved March 14, 2003
Filed March 17, 2003

CHAPTER 434

SENATE BILL NO. 2229

(Senators Trenbeath, Espegard, Urlacher)
(Representatives Herbel, Schmidt)

AUCTIONEER LICENSING

AN ACT to amend and reenact subdivision d of subsection 1 of section 51-05.1-03 of the North Dakota Century Code, relating to grounds for refusal, suspension, or revocation of an auctioneer's or auction clerk's license.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subdivision d of subsection 1 of section 51-05.1-03 of the North Dakota Century Code is amended and reenacted as follows:

- d. Failed to account for or to remit, within a reasonable time, not exceeding ~~fifteen~~ thirty days, any moneys coming into the licensee's possession belonging to another, ~~or subsequent to July 4, 1975,~~ commingled funds of others with the licensee's own, failed to keep such funds or others in an escrow or trust account with a bank or other recognized depository in this state, or failed to keep records relative to the deposits, which must contain such information as ~~may be~~ prescribed by the rules ~~and regulations~~ of the commission ~~relative thereto~~.

Approved March 19, 2003
Filed March 19, 2003

CHAPTER 435

HOUSE BILL NO. 1266

(Representatives Delzer, Kempenich)
(Senator Krebsbach)

IMPLEMENT CONTRACT TERMINATION REMEDIES

AN ACT to amend and reenact sections 51-07-01, 51-07-01.1, and 51-07-03 of the North Dakota Century Code, relating to contract remedies for termination of certain retail contracts; and to repeal section 51-07-02 of the North Dakota Century Code, relating to calculation of costs for merchandise of certain retail contracts.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 51-07-01 of the North Dakota Century Code is amended and reenacted as follows:

51-07-01. Retail farm implement; lawn and garden equipment; or car vehicle dealer may recover price of articles merchandise upon discontinuance of contract by wholesaler or retail dealer.

1. If a person engaged in the business of ~~selling and~~ retailing farm implements ~~and, machinery, or attachments, or parts for farm implements,~~ the same; lawn and garden equipment, or parts for the same; or in the business of selling and retailing automobiles, trucks, or semitrailers, or parts for the same, enters a ~~written~~ contract under which the retailer agrees to maintain a stock of ~~parts or complete or whole machines, or attachments~~ the merchandise covered under this section with a wholesaler, manufacturer, or distributor of farm implements, machinery, attachments, or parts for the same, or automobiles, trucks, or semitrailers, or parts for the same, of the covered merchandise and tools and the wholesaler, manufacturer, or distributor or the retailer desires to cancel or discontinue the contract, the wholesaler, manufacturer, or distributor shall pay to the retailer, unless the retailer ~~should desire~~ desires to keep the merchandise, a sum equal to ~~one~~:
 - a. One hundred percent of the net cost of all current unused complete farm implements, machinery, and attachments; lawn and garden equipment; and automobiles, trucks, and semitrailers; including.
 - b. One hundred percent of the actual merchandise and tool transportation charges that have been paid by the retailer, and eighty-five.
 - c. Ninety percent of the ~~current~~ net prices on parts, including superseded parts listed in ~~current~~, as shown in the manufacturer's, wholesaler's, or distributor's current price lists or catalogs which in effect at the time the contract is canceled, discontinued, or not renewed. These parts had must have previously been purchased from the wholesaler, manufacturer, or distributor, and must have been either held by the retailer on the date of the cancellation or of, discontinuance of, or failure to renew the contract or thereafter

received by the retailer from the wholesaler, manufacturer, or distributor after the date of the cancellation, discontinuance, or failure to renew. The wholesaler, manufacturer, or distributor shall also pay the retailer a sum equal to five

- d. Fifty percent of the net cost of all complete specialized tools for the covered merchandise.
- e. Five percent of the current net price of all parts returned for the handling, packing, and loading of the parts back to the wholesaler, manufacturer, or distributor.
2. Upon the payment of the sum equal to one hundred percent of the net cost of the farm implements, machinery, attachments, automobiles, trucks, and semitrailers plus transportation charges that have been paid by the retailer and eighty-five percent of the current net prices on parts, plus freight charges that have been paid by the retailer, plus five percent of the current net prices for handling and loading costs on parts only amounts under subsection 1, the retailer shall pass the title to the farm implements, farm machinery, attachments, automobiles, trucks, semitrailer, or parts covered merchandise and tools to the manufacturer, wholesaler, or distributor making the payment, and the manufacturer, wholesaler, or distributor is entitled to the possession of the farm implements, machinery, attachments, automobiles, trucks, semitrailers, or parts covered merchandise and tools. All payments required to be made under this section must be made within thirty days after the final settlement between the retailer and the wholesaler, manufacturer, or distributor.
3. The provisions of this section are supplemental to any agreement between the retailer and the manufacturer, wholesaler, or distributor covering the return of farm implements, machinery, attachments, automobiles, trucks, semitrailers, and parts so that the any merchandise and tools covered under this section. The retailer can elect to pursue either the retailer's contract remedy or the remedy provided in this section. An election by the retailer to pursue the retailer's contract remedy does not bar the retailer's right to the remedy provided in this section as to these farm implements, machinery, attachments, automobiles, trucks, semitrailers, and parts any merchandise and tools covered under this section which is not affected by the contract remedy.
4. The obligations of any wholesaler, manufacturer, or distributor under this section and sections 51-07-01.1 and 51-07-03 apply to any successor in interest or assignee of that wholesaler, manufacturer, or distributor. A successor in interest includes any purchaser of assets or stock, any surviving corporation or limited liability company resulting from a merger or liquidation, any receiver, or any trustee of the original wholesaler, manufacturer, or distributor.
5. The provisions of this section apply to all contracts now in effect which have no expiration date and are a continuing contract, and all other contracts entered or renewed after ~~June 30, 1987~~ July 31, 2003. Any contract in force and effect on ~~July 4, 1987~~ August 1, 2003, which by its own terms will terminate on a date subsequent thereto is governed by the law as it existed before ~~July 4, 1987~~ August 1, 2003.

SECTION 2. AMENDMENT. Section 51-07-01.1 of the North Dakota Century Code is amended and reenacted as follows:

51-07-01.1. Termination of franchises retail contract to be done in good faith - Definition of good cause.

1. Any manufacturer, wholesaler, or distributor of ~~farm implements, machinery, and parts for the same, or of automobiles, trucks, semitrailers, and parts for the same~~ merchandise and tools covered under section 51-07-01, who enters into a contract with any person engaged in the business of ~~selling and retailing farm implements and parts for farm implements, or in the business of selling and retailing automobiles, trucks, or semitrailers, or parts for the same~~ the covered merchandise by which the retailer agrees to maintain a stock of ~~parts or complete or whole machines or attachments, automobiles, trucks, or semitrailers~~ the covered merchandise may not terminate, cancel, or fail to renew the contract with the ~~person~~ retailer without good cause.
2. For the purpose of this section, good cause for terminating, canceling, or failing to renew a contract is limited to failure by the ~~person in the business of selling and retailing~~ retailer to substantially comply with those essential and reasonable requirements imposed by the ~~written~~ contract between the parties if the requirements are not different from those requirements imposed on other similarly situated ~~dealers~~ retailers. Further, the determination by the manufacturer, wholesaler, or distributor of good cause for the termination, cancellation, or failure to renew must be made in good faith.
3. In any action against a manufacturer, wholesaler, or distributor for violation of this section, the manufacturer, wholesaler, or distributor shall establish that the termination, cancellation, or failure to renew was made in good faith for good cause ~~as that term is defined in this section~~. If the manufacturer, wholesaler, or distributor fails to establish good cause for its action, ~~it~~ the manufacturer, wholesaler, or distributor is liable for all special and general damages sustained by the plaintiff, including the costs of the litigation and reasonable attorney's fees for prosecuting the action and the plaintiff, ~~when~~ if appropriate, is entitled to injunctive relief. ~~The obligations of any wholesaler, manufacturer, or distributor apply to any successor in interest or assignee of that wholesaler, manufacturer, or distributor. A successor in interest includes any purchaser of assets or stock, any surviving corporation or limited liability company resulting from a merger or liquidation, any receiver, or any trustee of the original wholesaler, manufacturer, or distributor. The provisions of this section apply to all contracts now in effect which have no expiration date and are continuing contracts and all other contracts entered into, amended, or renewed after June 30, 1987~~ July 31, 2003. Any contract in force and effect on ~~July 4, 1987~~ August 1, 2003, which by its terms will terminate on a date subsequent thereto is governed by the law as it existed before ~~July 4, 1987~~ August 1, 2003.

SECTION 3. AMENDMENT. Section 51-07-03 of the North Dakota Century Code is amended and reenacted as follows:

51-07-03. Failure to pay sum specified on cancellation of contract - Liability. ~~In the event that any~~ If a manufacturer, wholesaler, or distributor of ~~farm machinery, farm implements, and parts for farm machinery and farm implements, or~~

~~of automobiles, trucks, semitrailers, and parts for the same merchandise and tools covered under section 51-07-01, upon cancellation of a contract by either a retailer or a manufacturer, wholesaler, or distributor, fails or refuses to make payment to the dealer retailer as is required by section 51-07-01, or refuses to supply farm machinery, farm implements, and parts for farm machinery and farm implements or automobiles, trucks, or semitrailers, or parts for the same, covered merchandise or tools to any retailer of the products merchandise, who may have a retail sales contract dated after June 30, 1987 July 31, 2003, or a contract with no expiration date or a continuing contract in force or effect on July 4, 1987 August 1, 2003, with the manufacturer, wholesaler, or distributor, the manufacturer, wholesaler, or distributor shall be is liable in a civil action to be brought by the retailer for one hundred percent of the net cost of the farm implements, machinery, attachments, automobiles, and trucks, plus transportation charges that have been paid by the retailer and eighty-five percent of the current net price of parts, plus five percent for handling and loading plus freight charges that have been paid by the retailer the amounts provided under subsection 1 of section 51-07-03. The obligations of any wholesaler, manufacturer, or distributor apply to any successor in interest or assignee of that wholesaler, manufacturer, or distributor. A successor in interest includes any purchaser of assets or stock, any surviving corporation or limited liability company resulting from a merger or liquidation, any receiver, or any trustee of the original wholesaler, manufacturer, or distributor.~~

SECTION 4. REPEAL. Section 51-07-02 of the North Dakota Century Code is repealed.

Approved March 13, 2003

Filed March 13, 2003

CHAPTER 436**SENATE BILL NO. 2037**

(Legislative Council)
(Family Law Committee)

**CREDIT CARD RECEIPT INFORMATION
RESTRICTIONS**

AN ACT to provide restrictions on the information a business may include on an electronically printed credit card receipt.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Restrictions on electronically printed credit card receipts.

Except as otherwise provided under this section, a person that accepts credit cards for the transaction of business and also electronically prints receipts for these credit card transactions may not print on the receipt provided to the customer more than the last five digits of the credit card account number nor print on the receipt provided to the customer the expiration date of the credit card. This section does not apply to a credit card transaction in which the sole means of recording the customer's credit card number is by handwriting or by an imprint or copy of the credit card. This section becomes operative on January 1, 2004, with respect to any cash register or other machine or device that electronically prints receipts for credit card transactions which is first put into use after December 31, 2003. This section becomes operative on January 1, 2007, with respect to any cash register or other machine or device that electronically prints receipts for credit card transactions which is first put into use before January 1, 2004.

Approved March 13, 2003

Filed March 13, 2003

CHAPTER 437

SENATE BILL NO. 2228

(Senators Trenbeath, Holmberg, Urlacher)
(Representatives Belter, Grosz)

UNLAWFUL SALES OR ADVERTISING PRACTICES

AN ACT to amend and reenact sections 44-04-18.12, 51-15-01, 51-15-04, 51-15-05, 51-15-06, 51-15-06.1, 51-15-07, 51-15-08, 51-15-10, and 51-15-11 of the North Dakota Century Code, relating to the confidentiality of agreements between a governmental agency in another jurisdiction and the attorney general and to unlawful sales or advertising practices; to provide a penalty; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 44-04-18.12 of the North Dakota Century Code is amended and reenacted as follows:

44-04-18.12. Cooperative investigations and litigation. A record acquired under a ~~written~~ an agreement between or involving a governmental agency in another jurisdiction and the attorney general is confidential, except for the purposes specified in the agreement, if the attorney general determines:

1. The record is necessary to further a civil investigation or litigation by the state;
2. The record can be obtained only by agreeing to keep the record confidential; and
3. The record is treated as confidential by the provider of the records.

SECTION 2. AMENDMENT. Section 51-15-01 of the North Dakota Century Code is amended and reenacted as follows:

51-15-01. Definitions. In this chapter, unless the context or subject matter otherwise requires:

1. "Advertisement" includes the attempt by publication, dissemination, solicitation, or circulation, oral or written, to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in any merchandise.
2. "Attorney general" means the attorney general of North Dakota or the attorney general's authorized delegate.
3. "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, charitable contributions, or services.
4. "Person" means any natural person or the person's legal representative, partnership, corporation, limited liability company, company, trust, business entity, or association, and any agent, employee, salesman,

partner, officer, director, member, stockholder, associate, trustee, or cestuique trust thereof.

5. "Sale" means any charitable solicitation, or any sale, offer for sale, or attempt to sell any merchandise for any consideration.

SECTION 3. AMENDMENT. Section 51-15-04 of the North Dakota Century Code is amended and reenacted as follows:

51-15-04. Powers of attorney general. When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or any of the provisions of by other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, or when the attorney general believes it to be in the public interest ~~that an investigation should be made to ascertain to investigate~~ whether a person in fact has engaged in, is engaging in, or is about to engage in, any unlawful practice under this chapter or other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, the attorney general may:

1. Require that person to file, on forms the attorney general prescribes, a statement or report in writing, under oath or otherwise, of all the facts and circumstances concerning the sale or advertisement of merchandise by that person, as well as other data and information the attorney general may determine necessary.
2. Examine under oath any person in connection with the sale or advertisement of any merchandise.
3. Examine any merchandise or sample thereof, record, book, document, account, or paper as the attorney general may determine necessary.
4. Pursuant to an order of a district court impound any merchandise or sample thereof, record, book, document, account, or paper, ~~or sample of merchandise~~ material to that practice and retain the same in the attorney general's possession until the completion of all proceedings undertaken under this section or in the courts.

SECTION 4. AMENDMENT. Section 51-15-05 of the North Dakota Century Code is amended and reenacted as follows:

51-15-05. Subpoena - Hearing - Rules. To accomplish the objectives and to carry out the duties prescribed by this chapter or by other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, the attorney general, in addition to other powers conferred upon the attorney general by this chapter, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, and prescribe forms and adopt rules as may be necessary.

SECTION 5. AMENDMENT. Section 51-15-06 of the North Dakota Century Code is amended and reenacted as follows:

51-15-06. Failure to supply information or obey subpoena. If any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to a district court and, after hearing thereon, request an order:

1. Granting injunctive relief, restraining the sale or advertisement of any merchandise by such persons;
2. Vacating, annulling, or suspending the charter of a for-profit or nonprofit corporation or limited liability company created by or under the laws of this state or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or limited liability company or revoking or suspending any other licenses, permits, or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and
3. Granting such other relief as may be required;

until the person files the statement or obeys the subpoena.

SECTION 6. AMENDMENT. Section 51-15-06.1 of the North Dakota Century Code is amended and reenacted as follows:

51-15-06.1. Assurance of discontinuance. The attorney general may accept an assurance of discontinuance of any act or practice the attorney general determines to be in violation of this chapter, or other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, from any person the attorney general alleges is engaging in, or has engaged in, the act or practice. The assurance of discontinuance must be in writing and must be filed with and is subject to the approval of the district court of the county in which the alleged violator resides or has as a principal place of business or in Burleigh County. An assurance of discontinuance may not be considered an admission of a violation. However, failure to comply with an assurance of discontinuance which has been approved by the district court is contempt of court.

SECTION 7. AMENDMENT. Section 51-15-07 of the North Dakota Century Code is amended and reenacted as follows:

51-15-07. Remedies - Injunction - Other relief - Receiver - Cease and desist orders - Civil penalties - Costs recoverable in adjudicative proceedings. Whenever it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter, or by other provisions of law, including chapter 50-22, 51-13, 51-14, 51-16.1, or 51-18, the attorney general may seek and obtain in an action in a district court an injunction prohibiting that person from continuing the unlawful practice or engaging in the unlawful practice or doing any act in furtherance of the unlawful practice after appropriate notice to that person. The notice must state generally the relief sought and be served at least ten days before the hearing of the action. The court may make an order or judgment as may be necessary to prevent the use or employment by a person of any unlawful practices, or which may be necessary to restore to any person in interest any money, or property that may have been acquired by means of any practice in this chapter, or in other provisions of law, including chapter 50-22, 51-13, 51-14, 51-16.1, or 51-18, declared to be unlawful, including the appointment of a receiver.

When it appears to the attorney general that a person has engaged in, or is engaging in, a practice declared to be unlawful by this chapter, or by other provisions of law, including chapter 50-22, 51-13, 51-14, 51-16.1, or 51-18, and that the person is about to conceal assets or oneself or leave the state, the attorney general may apply to the district court, ex parte, for an order appointing a receiver of the assets of that person. Upon a showing made by affidavit or other evidence that the person has

engaged in, or is engaging in, a practice declared to be unlawful by this chapter and that the person is about to conceal assets or oneself or leave the state, the court shall order the appointment of a receiver to receive the assets of the person.

When it appears to the attorney general that a person has engaged in, or is engaging in, a practice declared to be unlawful by this chapter, or by other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, or by an order of the attorney general issued under this chapter, the attorney general, without notice and hearing, may issue any cease and desist order, which the attorney general deems necessary or appropriate in the public interest, including if a person fails or refuses to file a statement or report, or to obey a subpoena issued by the attorney general under this chapter, or under other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18. In addition to any other remedy authorized by this chapter, or by other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, the attorney general may impose by order and collect a civil penalty against a person found in an adjudicative proceeding to have violated a cease and desist order issued pursuant to this section, in an amount not more than one thousand dollars for each violation. The attorney general may bring an action in district court to recover penalties under this section. A person aggrieved by an order issued under this section may request a hearing before the attorney general if a written request is made within ten days after the receipt of the order. An adjudicative proceeding under this section must be conducted in accordance with chapter 28-32, unless otherwise specifically provided herein. If the attorney general prevails in an adjudicative proceeding pursuant to this section, the attorney general may assess the nonprevailing person for all adjudicative proceeding and hearing costs, including reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action.

SECTION 8. AMENDMENT. Section 51-15-08 of the North Dakota Century Code is amended and reenacted as follows:

51-15-08. Powers of receiver. When a receiver is appointed by the court pursuant to this chapter, the receiver may sue for, collect, receive, or take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description, derived by means of any practice declared to be unlawful by this chapter, or by other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, including property with which the property has been mingled if it cannot be identified in kind because of the commingling, and sell, convey, and assign the property and hold and dispose of the proceeds under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that that person has in fact been damaged may participate with general creditors in the distribution of the assets to the extent that person has sustained out-of-pocket losses. The court has jurisdiction of all questions arising in these proceedings and may make orders and judgments therein as may be required.

SECTION 9. AMENDMENT. Section 51-15-10 of the North Dakota Century Code is amended and reenacted as follows:

51-15-10. Costs recoverable. In any action brought under the provisions of this chapter, or under other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, the court shall award to the attorney general is entitled to recover costs, expenses, and attorney's fees incurred by the attorney general in the investigation and prosecution of such action. In any inquiry or investigation initiated under this chapter in which fraud is determined, the attorney general may request

~~and collect costs, expenses, and attorney's fees incurred by the attorney general in the inquiry or investigation~~ reasonable attorney's fees, investigation fees, costs and expenses of any investigation and action brought under this chapter, or under other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18. All attorney's fees, investigation fees, costs, and expenses, ~~and attorney's fees~~ received by the attorney general under this section must be deposited into the attorney general refund fund.

SECTION 10. AMENDMENT. Section 51-15-11 of the North Dakota Century Code is amended and reenacted as follows:

51-15-11. Civil penalties. The court may assess for the benefit of the state a civil penalty of not more than five thousand dollars for each violation of this chapter or for each violation of chapter 51-12, 51-13, 51-14, or 51-18. The penalty provided in this section is in addition to those remedies otherwise provided by this chapter or by chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18.

SECTION 11. EMERGENCY. This Act is declared to be an emergency measure.

Approved April 4, 2003
Filed April 4, 2003

CHAPTER 438

SENATE BILL NO. 2255

(Senators Traynor, Krebsbach, Lindaas)
(Representatives Hawken, Kasper, Warner)

TELEPHONE SOLICITATIONS

AN ACT to create and enact chapter 51-26 of the North Dakota Century Code, relating to telephone solicitations; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 51-26 of the North Dakota Century Code is created and enacted as follows:

51-26-01. Definitions. In this chapter, unless the context or subject matter otherwise requires, the terms shall have the meanings as follows:

1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.
2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.
3. "Caller identification service" means a telephone service that permits telephone subscribers to see the telephone number of incoming telephone calls.
4. "Established business relationship" means a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.
5. "Message" means any telephone call, regardless of its content.
6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.
7. "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:

- a. To any subscriber with that subscriber's prior express written request, consent, invitation, or permission.
- b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.
- c. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:
 - (1) The telephone call is made by a volunteer or employee of the charitable organization; and
 - (2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:
 - (a) The person's true first and last name; and
 - (b) The name, address, and telephone number of the charitable organization.
- d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-26-02.
- e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchaser.
- f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01.

51-26-02. Use of prerecorded or synthesized voice messages. A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-26-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.

51-26-03. Message requirements. When the message is immediately preceded by a live operator, the operator must disclose at the outset of the message:

1. The name of the business, firm, organization, association, partnership, or entity for which the message is being made;
2. The purpose of the message;
3. The identity or kinds of goods or services the message is promoting; and

4. If applicable, the fact that the message intends to solicit payment or commitment of funds.

51-26-04. Requirements on automatic dialing-announcing devices. A caller may not use an automatic dialing-announcing device unless the device is designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber. A caller may not use an automatic dialing-announcing device that uses a random or sequential number generator unless the equipment excludes calls to the following telephone numbers:

1. Emergency telephone numbers, including 911, of any hospital, medical physician, health care facility, ambulance or emergency medical provider, fire protection facility, or law enforcement agency.
2. Any guest room or patient room of a hospital, health care facility, elderly care home, or similar establishment.
3. A paging service, a cellular telephone service, a specialized mobile radio service, or any service for which the called party is charged for the call.
4. The telephone numbers maintained on a do-not-call list established pursuant to section 51-26-09.

51-26-05. Time of day limit. A caller may not use an automatic dialing-announcing device nor make any telephone solicitation before eight a.m. or after nine p.m. at the telephone subscriber's location.

51-26-06. Prohibited telephone solicitations. A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least ninety days before the date the call is made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-26-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

51-26-07. Identification by caller. Any caller who makes a telephone solicitation to a subscriber in this state shall immediately and clearly state at the beginning of the call the caller's true first and last name, the caller's telephone number, the caller's city and state of location, and the name of the business on whose behalf the telephone solicitation is made.

51-26-08. Interference with caller identification. A caller who makes a telephone solicitation to a subscriber in this state may not knowingly use any method to block or otherwise deliberately circumvent the subscriber's use of a caller identification service.

51-26-09. Establishment of do-not-call list - Federal trade commission do-not-call registry.

1. The attorney general shall establish and maintain a list of telephone numbers of subscribers who object to receiving telephone solicitations. The attorney general may fulfill the requirements of this section by contracting with an agent for the establishment and maintenance of the list or by using the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of

Federal Regulations, part 310. The attorney general may adopt rules governing the establishment, distribution, and operation of the do-not-call list, as the attorney general deems necessary and appropriate to fully implement the provisions of this chapter, in addition to the following provisions:

- a. Any subscriber may contact the attorney general or the attorney general's agent and give notice, in the manner prescribed by the attorney general, that the subscriber objects to receiving telephone solicitations. The attorney general shall add the telephone number of any subscriber who gives notice of objection to the list maintained pursuant to this section.
 - b. Any notice given by a subscriber under this section is effective for five years unless revoked by the subscriber. Any subsequent notices given by the same subscriber related to a different telephone number are separate from the original notice.
 - c. The attorney general shall allow subscribers to give notice under this section by mail, telephone, or electronically.
 - d. The attorney general shall establish the procedures by which a person wishing to make telephone solicitations may obtain access to the list. To the extent practicable, those procedures shall allow for access to paper or electronic copies of the list.
 - e. The attorney general may include in the list established under this section subscribers who live in North Dakota and are included in the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310. The attorney general may provide to the federal trade commission the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations for inclusion in the national do-not-call registry.
 - f. A person or entity desiring to make telephone solicitations shall pay a fee, payable to the attorney general, for access to, or for paper or electronic copies of, the list established under section 51-26-09. The fee for acquisition of the list may not exceed two hundred dollars per quarter, or eight hundred dollars per year.
2. Notwithstanding any other provision of this chapter, the attorney general may designate the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 61, as the state do-not-call list.

51-26-10. Release of information. Information contained in the list established under section 51-26-09 may not be used for any purposes except compliance with this chapter or in a proceeding or action under this chapter or chapter 51-15. The information contained in the list is an exempt record as defined in section 44-04-17.1.

51-26-11. Private enforcement. Any person who receives a telephone solicitation or message in violation of this chapter may bring an action to enjoin such

violation, or for damages, or both. The court may award the plaintiff the plaintiff's actual damages or damages up to two thousand dollars for each violation, whichever is greater. The court may award the plaintiff costs, expenses, and reasonable attorney's fees. This section shall not limit any other claims the person may have against the caller.

51-26-12. Limitation of actions. No action or proceeding may be brought under this chapter:

1. More than one year after the person bringing the action knew or should have known of the alleged violation; or
2. More than one year after the termination of any proceeding or action by the attorney general, whichever is later.

51-26-13. Powers of the attorney general - Remedies - Injunction - Other relief. When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter, the attorney general, in enforcing this chapter, has all powers provided in this chapter or chapter 51-15, and may seek all remedies in this chapter or chapter 51-15.

51-26-14. Cease and desist orders. When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general, without notice and hearing, may issue any cease and desist order which the attorney general deems necessary or appropriate in the public interest, including if any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general under this chapter or chapter 51-15. A person aggrieved by an order issued under this section may request a hearing before the attorney general if a written request is made within ten days after the receipt of the order. An adjudicative proceeding under this section must be conducted in accordance with chapter 28-32, unless otherwise specifically provided herein.

51-26-15. Civil penalties in an adjudicative proceeding. When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general may impose by order and collect a civil penalty against any person found in an adjudicative proceeding to have violated any provision of this chapter, or any rule or order adopted under this chapter, in an amount not more than two thousand dollars for each violation of this chapter or any rule or order adopted under this chapter. The attorney general may bring an action in district court to recover penalties under this section.

51-26-16. Costs recoverable in adjudicative proceeding - Hearing costs. If the attorney general prevails in an adjudicative proceeding pursuant to section 51-26-14 or 51-26-15, the attorney general may assess the nonprevailing person for all adjudicative proceeding and hearing costs, including reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-26-17. Civil penalties in court proceeding. The court may award the attorney general civil penalties of not more than two thousand dollars per violation of this chapter. A violation of this chapter constitutes a violation of chapter 51-15 and the court may award civil penalties under section 51-15-11.

51-26-18. Costs recoverable in court proceeding. The attorney general is entitled to an award of reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-26-19. Separate violations - Nonexclusive remedies and penalties. For each remedy or penalty under this chapter or chapter 51-15, or otherwise provided by law, each telephone solicitation or message shall constitute a separate violation for purposes of an adjudicative proceeding or an action in district court. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15, or otherwise provided by law.

51-26-20. Caller identification service nonliability. No provider of caller identification service shall be held liable for violations of this chapter committed by other persons or entities.

51-26-21. Disposition of fees, penalties, and recoveries. All fees, penalties, and recoveries of attorney's fees, investigation fees, costs, and expenses collected pursuant to this chapter shall be retained by the attorney general for enforcement of this chapter, including to pay costs, expenses, and attorney's fees and salaries incurred in the operation of the attorney general's consumer protection and antitrust division. However, the attorney general may deposit any excess funds not required for enforcement of this chapter in the attorney general refund fund under section 54-12-18.

51-26-22. Venue. The attorney general or a plaintiff in a private enforcement action may bring an action pursuant to this chapter in either the county of the telephone subscriber's residence or Burleigh County.

Approved April 16, 2003

Filed April 17, 2003

CHAPTER 439

HOUSE BILL NO. 1388

(Representatives Warner, Hawken, N. Johnson)
(Senators Andrist, Krauter)

COMMERCIAL ELECTRONIC MAIL SOLICITATION

AN ACT to create and enact chapter 51-27 of the North Dakota Century Code, relating to commercial electronic mail solicitation; to provide a penalty; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 51-27 of the North Dakota Century Code is created and enacted as follows:

51-27-01. Definitions. In this chapter, unless context otherwise requires:

1. "Assist the transmission" means actions taken by a person to provide substantial assistance or support that enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates chapter 51-15.
2. "Commercial electronic mail message" means an electronic mail message sent to promote real property, goods, or services for sale or lease. The term does not mean an electronic mail message to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account if the sender has agreed to such an arrangement.
3. "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.
4. "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message, unless the intervening interactive computer service assists in the transmission of an electronic mail message when the interactive computer service knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates chapter 51-15.
5. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the internet and systems operated or services offered by libraries and educational institutions.
6. "Internet domain name" refers to a globally unique, hierarchical reference to an internet host or service, assigned through centralized

internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

51-27-02. False or misleading messages prohibited.

1. A person may not initiate the transmission, conspire with another to initiate the transmission, or assist the transmission of a commercial electronic mail message from a computer located in this state or to an electronic mail address that the sender knows, or has reason to know, is held by a resident of this state that:
 - a. Uses a third-party's internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a resident of this state if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

51-27-03. Unpermitted or misleading electronic mail - Violation of consumer protection law.

1. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that:
 - a. Uses a third-party's internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. It is a violation of chapter 51-15 to assist in the transmission of a commercial electronic mail message if the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates chapter 51-15.

51-27-04. Subject disclosure - Violation of consumer protection law.

1. The subject line of a commercial electronic mail message must include "ADV" as the first characters. If the message contains information that consists of material of a sexual nature that may only be viewed by an individual eighteen years of age or older, the subject line of the message must include "ADV-ADULT" as the first characters.
2. For purposes of this section, a commercial electronic mail message does not include a message if the recipient has consented to receive or has solicited electronic mail messages from the initiator, from an organization using electronic mail to communicate exclusively with its

members, from an entity which uses electronic mail to communicate exclusively with its employees or contractors, or if there is a business or personal relationship between the initiator and the recipient.

3. For purposes of this section, a business relationship means a prior or existing relationship formed between the initiator and the recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.
4. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that violates this section.

51-27-05. Toll-free number.

1. A sender initiating the transmission of a commercial electronic mail message shall establish a toll-free telephone number, a valid sender-operated return electronic mail address, or another easy-to-use electronic method that the recipient of the commercial electronic mail message may call or access by electronic mail or other electronic means to notify the sender not to transmit any further unsolicited commercial electronic mail messages. The notification process may include the ability for the commercial electronic mail messages recipient to direct the initiator to transmit or not transmit particular commercial electronic mail messages based upon products, services, divisions, organizations, companies, or other selections of the recipient's choice.
2. A commercial electronic mail message must include a statement informing the recipient of a toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or access by electronic mail or another electronic method established by the initiator, notifying the sender not to transmit to the recipient any further unsolicited commercial electronic mail messages to the electronic mail address specified by the recipient, and explaining the manner in which the recipient may specify what commercial electronic mail messages the recipient does and does not want to receive.

51-27-06. Violations - Damages.

1. Damages to the recipient of a commercial electronic mail message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.
2. Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

51-27-07. Blocking of commercial electronic mail by interactive computer service - Immunity from liability.

1. An interactive computer service may block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of this chapter.

2. An interactive computer service may not be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail which it reasonably believes is, or will be, sent in violation of this chapter.

51-27-08. Nonexclusive causes of action, remedies, and penalties. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15 or otherwise provided by law.

51-27-09. Relationship to federal law. If any federal law is enacted that regulates false, misleading, or unsolicited commercial electronic mail messages, but does not preempt state law on the subject, the federal law supersedes any conflicting provision of this chapter.

SECTION 2. EXPIRATION DATE. The governor shall certify to the legislative council the effective date of any federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages. This Act becomes ineffective upon the effective date contained in the certification of federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages.

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