

HOUSE BILL NO. 127

INTRODUCED BY N. FRITZ

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING CONSUMER PROTECTION AND UNFAIR TRADE PRACTICES, TELEMARKETING FRAUD PREVENTION, AND VEHICLE WARRANTY LAWS; DEFINING "CONSUMER" AND DELETING THE DEFINITION OF "NATIONAL ADVERTISING"; CLARIFYING EXEMPTIONS FROM THE PROVISIONS OF THE MONTANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT OF 1973; PROVIDING THAT THE DEPARTMENT OF ADMINISTRATION MAY BRING AN ACTION TO RESTRAIN UNFAIR METHODS OF COMPETITION OR UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN LEWIS AND CLARK COUNTY WITHOUT CONSENT OF THE PARTIES; REMOVING THE PROVISION THAT INJUNCTIONS TO RESTRAIN UNLAWFUL ACTS BE ISSUED WITHOUT BOND; PROVIDING THAT THE STATE IS ENTITLED TO ATTORNEY FEES AND COSTS IF IT PREVAILS IN CERTAIN CONSUMER PROTECTION ACTIONS; INCREASING THE MINIMUM DAMAGES FOR UNLAWFUL ACTS TO \$500 AND MAKING THE AWARD OF TREBLE DAMAGES MANDATORY; INCREASING THE MAXIMUM CIVIL FINE FOR UNLAWFUL ACTS TO \$10,000; REVISING THE DEFINITION OF "ARTICLE OF COMMERCE"; DELETING PROVISIONS ON COST SURVEYS AS EVIDENCE OF COST AND ON ESTABLISHMENT OF COST SURVEYS; DELETING PROVISIONS ON FORCED SALES AS A BASIS OF COST PRICE; DELETING PROVISIONS RELATING TO FAIR PRICES FOR AGRICULTURAL PRODUCTS; DELETING PROVISIONS RELATING TO CERTAIN REBATES; PROVIDING THAT THE DEPARTMENT OF ADMINISTRATION'S OBLIGATION TO ENFORCE CERTAIN PROVISIONS OF THE UNFAIR TRADE PRACTICES LAWS IS PERMISSIVE RATHER THAN MANDATORY; INCREASING THE MAXIMUM PENALTY FOR A VIOLATION OF A DEPARTMENT ORDER UNDER THE UNFAIR TRADE PRACTICES LAWS TO \$10,000; INCREASING THE RECOVERY FOR A PERSON BRINGING AN ACTION UNDER THE UNFAIR TRADE PRACTICES LAWS AND PROVIDING FOR ATTORNEY FEES AND COSTS FOR PREVAILING PARTIES; DELETING CERTAIN PROVISIONS RELATING TO AUTOMOBILE GLASS REPAIR AND REPLACEMENT; PROVIDING THAT A VIOLATION OF CERTAIN PROVISIONS OF THE UNFAIR TRADE PRACTICES LAWS MAY BE A FELONY RATHER THAN A MISDEMEANOR; GENERALLY REVISING LAWS REGARDING PERSONAL SOLICITATION SALES; REVISING THE DEFINITION OF "PERSONAL SOLICITATION"; ELIMINATING THE DISCLOSURE OBLIGATION EXEMPTION FOR NONPROFIT ORGANIZATIONS; CLARIFYING WHEN A BUYER'S RIGHT TO CANCEL BEGINS TO RUN; INCREASING THE BUYER'S RECOVERY UNDER REVOKED PERSONAL

SOLICITATION SALES; REVISING THE DEFINITION OF "SUPERVISED FINANCIAL INSTITUTION"; REQUIRING A \$500 APPLICATION FEE FOR SELLERS AND TELEMARKETERS REGISTERING WITH THE STATE AND REQUIRING A COURT TO IMPOSE A FINE OF \$1,000 TO \$10,000 FOR A VIOLATION OF CERTAIN REGISTRATION REQUIREMENTS; ELIMINATING CERTAIN PERSONS AND ENTITIES AS BEING EXEMPT FROM REGISTRATION AND BONDING REQUIREMENTS; CLARIFYING THE EXISTENCE OF A TELEMARKETING AND CONSUMER FRAUD AWARENESS PROGRAM; PROVIDING THAT SOME CLAIMS UNDER THE MONTANA TELEMARKETING REGISTRATION AND FRAUD PREVENTION ACT MAY BE BROUGHT IN JUSTICE'S COURT; PROVIDING THAT VIOLATION OF CERTAIN NEW VEHICLE WARRANTY LAW PROVISIONS MAY BE A FELONY RATHER THAN A MISDEMEANOR; INCLUDING MOTORCYCLES IN THE DEFINITION OF "MOTOR VEHICLE"; INCREASING THE WARRANTY PERIOD FOR A NEW MOTOR VEHICLE FROM 18,000 TO 30,000 MILES OF OPERATION; PROVIDING FOR AN ARBITRATOR TO BE CHOSEN BY THE DEPARTMENT OF ADMINISTRATION INSTEAD OF THE USE OF AN ARBITRATION PANEL; AMENDING SECTIONS 30-14-102, 30-14-105, 30-14-111, 30-14-131, 30-14-133, 30-14-142, 30-14-202, 30-14-213, 30-14-219, 30-14-220, 30-14-222, 30-14-223, 30-14-224, 30-14-501, 30-14-502, 30-14-503, 30-14-504, 30-14-506, 30-14-1403, 30-14-1404, 30-14-1405, 30-14-1406, 30-14-1407, 30-14-1413, 61-4-501, 61-4-516, 61-4-518, AND 61-4-519, MCA; REPEALING SECTIONS 30-14-210, 30-14-211, 30-14-212, 30-14-214, 30-14-215, AND 30-14-225, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 30-14-102, MCA, is amended to read:

"30-14-102. Definitions. As used in this part, the following definitions apply:

(1) "Consumer" means a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes.

~~(1)~~(2) "Department" means the department of administration created in 2-15-1001.

~~(2)~~(3) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, ~~wherever situate.~~

~~(3)~~(4) "Examination" of documentary material includes the inspection, study, or copying of documentary material and the taking of testimony under oath or acknowledgment in respect to any documentary material or copy of documentary material.

~~(4) "National advertising" means any advertising run simultaneously in five or more states and over which a local advertiser has no control.~~

(5) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services, ~~and~~ any property, tangible or intangible, real, personal, or mixed, ~~and or~~ any other article, commodity, or thing of value, wherever located, and includes any trade or commerce directly or indirectly affecting the people of this state."

Section 2. Section 30-14-105, MCA, is amended to read:

"30-14-105. Exemptions. ~~Nothing in this~~ This part ~~shall~~ does not apply to:

(1) actions or transactions permitted under laws administered by the Montana public service commission ~~or the state auditor acting under statutory authority of this part or the United States; or~~

(2) acts ~~done by the~~ of a retail ~~merchants~~ merchant, publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station or advertising agency in the publication or dissemination of an advertisement; when the merchant, publisher, owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement ~~and did not have a direct financial interest in the advertised product or service;~~

~~(3) national advertising."~~

Section 3. Section 30-14-111, MCA, is amended to read:

"30-14-111. Department to restrain unlawful acts. (1) Whenever the department has reason to believe that ~~any~~ a person is using, has used, or is about to knowingly use any method, act, or practice declared by 30-14-103 to be unlawful and that proceeding would be in the public interest, the department may bring an action in the name of the state against ~~such~~ the person to restrain by temporary or permanent injunction or temporary restraining order the use of ~~such~~ the unlawful method, act, or practice; upon ~~the~~ giving of appropriate notice to that person.

(2) The notice must state generally the relief sought and be served in accordance with 30-14-115 at least 20 days before the hearing of the action ~~where~~ in which the relief ~~to be~~ sought is a temporary or permanent injunction. The notice for a temporary restraining order is governed by 27-19-315.

(3) ~~The~~ An action under this section may be brought in the district court in the county in which ~~such a~~

person resides or has his the person's principal place of business or, ~~with consent of the parties,~~ may be brought in the district court of Lewis and Clark County.

(4) ~~The courts are~~ A district court is authorized to issue temporary or permanent injunctions or temporary restraining orders to restrain and prevent violations of this part, ~~and such injunctions shall be issued without bond."~~

Section 4. Section 30-14-131, MCA, is amended to read:

"30-14-131. Restoration -- court orders -- state attorney fees and costs. (1) (a) The court may ~~enter make such additional orders or judgments as may be necessary to restore to any a person any moneys money~~ enter or property, real or personal, ~~which that~~ that may have been acquired by means of any practice in this part declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

(b) The court may enter any other order or judgment required by equity to carry out the provisions of this part.

(2) If the state prevails in any action brought under this part, the court shall award the state its reasonable attorney fees and costs incurred in bringing the action."

Section 5. Section 30-14-133, MCA, is amended to read:

"30-14-133. Damages -- mandatory treble damages -- notice to public agencies -- attorney fees -- prior judgment as evidence. (1) ~~Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby~~ A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an individual claim ~~but not or~~ a class action under the rules of civil procedure in the district court of the county in which the seller, ~~or lessor,~~ or service provider resides or has ~~his~~ its principal place of business or is doing business to recover actual damages or ~~\$200~~ \$500, whichever is greater. An individual claim, but not a class action, may be brought in justice's court. The court ~~may, in its discretion, shall,~~ absent an honest mistake, award up to three times the actual damages sustained and may provide ~~such~~ any other equitable relief as that it considers necessary or proper.

(2) Upon commencement of any action brought under subsection (1) ~~of this section,~~ the clerk of court shall mail a copy of the complaint or initial pleading to the department and the appropriate county attorney and, upon entry of any judgment or decree in the action, shall mail a copy of ~~such~~ the judgment or decree to the

department and the appropriate county attorney.

(3) In any action brought under this section, the court may award the prevailing party reasonable attorney fees incurred in prosecuting or defending the action.

(4) Any permanent injunction, judgment, or order of the court made under 30-14-111 ~~shall be~~ is prima facie evidence in an action brought under this section that the respondent used or employed a method, act, or practice declared unlawful by 30-14-103."

Section 6. Section 30-14-142, MCA, is amended to read:

"30-14-142. Penalties. (1) ~~A~~ In addition to any fine that a person might be subject to under subsection (2), a person who violates the terms of an injunction or temporary restraining order issued under 30-14-111 shall forfeit and pay to the state a civil fine of not more than \$10,000 for each violation. For the purposes of this section, the district court issuing an injunction or temporary restraining order retains jurisdiction and the cause must be continued, and in those cases, the department, acting in the name of the state, may petition for recovery of civil penalties.

(2) In an action brought under 30-14-111, if the court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by 30-14-103, the department, upon petition to the court, may recover on behalf of the state a civil fine of not more than ~~\$4,000~~ \$10,000 for each violation. The fine provided for in this subsection is in addition to any liability that a person might be subject to under subsection (1).

(3) A person who engages in a fraudulent course of conduct declared unlawful by 30-14-103 shall upon conviction be fined an amount not more than \$5,000, imprisoned for not more than 1 year, or both, in the discretion of the court. ~~Nothing in this~~ This subsection limits ~~does not limit~~ any other provision of this part.

(4) For purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that the conduct was a violation of 30-14-103."

Section 7. Section 30-14-202, MCA, is amended to read:

"30-14-202. Definitions. As used in this part, unless the context indicates otherwise, the following definitions apply:

(1) (a) "Article of commerce" includes but is not limited to any commodity, product, service or output of a service trade, or any product of the soil.

(b) The term does not include:

(i) a product or service of a public utility;

(ii) an insurance product or service; or

(iii) a security.

(2) "Business" includes any person, domestic or foreign, engaged in the production, manufacture, distribution, purchasing, or sale of any article of commerce within the state of Montana.

(3) (a) "Cost", as applied to production, includes the cost of raw materials, labor, and all overhead expenses of the producer.

(b) Cost, as applied to distribution, means either the invoice price of the article or product sold or the cost to the dealer or vendor for replacing the article or product in the quantity last purchased within 90 days prior to the sale of the article or product, whichever is less, minus all trade discounts except customary cash discounts plus the cost of doing business by the vendor.

(4) "Cost of doing business" or "overhead expense" includes all costs of doing business incurred in the conduct of a business and includes but is not limited to the following items of expense:

(a) labor (including salaries of executives and officers);

(b) rent;

(c) interest on borrowed capital;

(d) depreciation;

(e) selling cost;

(f) maintenance of equipment;

(g) delivery costs;

(h) credit losses;

(i) all types of licenses;

(j) taxes; and

(k) insurance and advertising.

(5) "Customary cash discount" means any allowance not exceeding 2%, whether a part of a larger discount or not, made to a wholesale or retail vendor when the vendor pays for merchandise within a limited or specified time.

(6) "Department" means the department of administration provided for in 2-15-1001.

(7) "Person" includes any person, partnership, firm, corporation, joint-stock company, or other association engaged in business within this state.

(8) "Vendor" includes not only any person acting as one known generally and legally as a vendor but also any person who performs work upon, renovates, alters, or improves any personal property belonging to another

person."

Section 8. Section 30-14-213, MCA, is amended to read:

"30-14-213. Sales excepted. Sections Section 30-14-209, 30-14-210, and 30-14-212 ~~do~~ does not apply to any sale made:

(1) in closing out in good faith the owner's stock or any part ~~thereof~~ of the stock for the purpose of discontinuing ~~his~~ the owner's trade in any article of commerce;

(2) of seasonal goods;

(3) in good faith of perishable goods to prevent loss to the vendor by spoilage or depreciation; ~~provided~~ if notice is given to the public ~~thereof~~ of the sale;

(4) when the goods are damaged or deteriorated in quality and notice is given to the public ~~thereof~~ of ~~the sale~~;

(5) by an officer acting under the orders of any court;

(6) in a good faith endeavor to meet the legal prices of a competitor selling the same article of commerce in the same locality or trade area; or

(7) to the state of Montana or any of its institutions."

Section 9. Section 30-14-219, MCA, is amended to read:

"30-14-219. Recovery on illegal contracts forbidden. A contract, express or implied, made by a person in violation of any of the provisions of 30-14-205 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218 is an illegal contract ~~and no~~ upon which a recovery ~~thereon~~ may ~~not~~ be had."

Section 10. Section 30-14-220, MCA, is amended to read:

"30-14-220. Enforcement by department. (1) The department ~~shall~~ may prevent a person from violating any of the provisions of this part.

(2) Upon receiving notice that a person is violating or has violated any of the provisions of this part, the department shall immediately direct the person giving the notice either to appear before the director of the department or to make a written reply to show probable cause of a violation. If probable cause is shown, the department ~~shall~~ may

(a) make its own investigation; ~~and~~

(b) ~~within 60 days of the finding of probable cause make a written report of its investigation; and~~

~~_____ (c) mail a copy of its findings to the person initially giving notice of a violation.~~

(3) (a) If the department, after an investigation, has reason to believe that the person has been or is engaging in any course of conduct or doing any act in violation of this part ~~and or~~ if it appears to the department that a proceeding by it would be in the interest of the public, it ~~shall~~ may issue and serve upon the person a complaint stating the charges and containing a notice of a hearing, ~~at a place~~ the location of the hearing, and ~~upon a day~~ the date of the hearing, which may not be less than 5 days after the service of the complaint.

(b) A complaint may be amended by the department in its discretion at any time 5 days prior to the issuance of an order based on it.

(c) ~~The~~ A person ~~so complained against who is the subject of a complaint~~ may appear at the ~~place and time so fixed~~ hearing and show cause why an order should not be entered by the department requiring ~~such~~ the person to stop the violation of the law charged in the complaint.

(d) Any person may ~~make application~~ apply and upon showing good cause ~~shown may~~ be allowed by the department to intervene and appear in the proceeding by counsel or in person.

(e) The testimony in the proceeding ~~shall~~ must be reduced to writing and filed with the department.

(f) If upon the conclusion of the hearing the department ~~believes~~ determines that the act or conduct in question is prohibited by this part, it shall make findings of fact in writing and issue and cause to be served on the person charged an order requiring ~~such~~ the person to stop the ~~acts~~ act or conduct.

(g) Until a transcript of the record in the hearing has been filed in a district court, the department may at any time, upon the notice and in the manner it considers proper, modify or set aside, in whole or in part, a report or an order made or issued by it under this section.

(4) A court reviewing an order of the department may issue ~~such~~ writs ~~as~~ that are ancillary to its jurisdiction or that are necessary in its judgment to prevent injury to the public or to competitors pending the outcome of the suit.

(5) To the extent that the order of the department is affirmed, the court shall ~~thereupon~~ issue its own order ~~commanding obedience to~~ requiring compliance with the terms of the order of the department.

(6) Proceedings under this section ~~shall~~ must be given precedence over other civil cases pending in the district court and ~~shall~~ must be in every way expedited.

(7) A person who violates an order of the department after it has become final and while the order is in effect shall forfeit and pay to the state a penalty of not more than ~~\$1,000~~ \$10,000 for each violation.

(8) The remedies and method of enforcement of this part provided for in this section are concurrent and in addition to the other remedies provided in this part."

Section 11. Section 30-14-222, MCA, is amended to read:

"30-14-222. Injunctions -- damages -- production of evidence. (1) Any person, ~~if who is or might be injured thereby,~~ the department, or the attorney general may maintain an action to enjoin ~~a continuance of an act that is~~ in violation of 30-14-205 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218 and for the recovery of damages. If ~~in such action~~ the court finds that the defendant is violating or has violated any of the provisions of 30-14-205 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218, it shall enjoin the defendant ~~from a continuance thereof.~~ It is not necessary to allege or prove actual damages to the plaintiff.

(2) (a) In addition to ~~such~~ injunctive relief, the plaintiff is entitled to recover from the defendant the greater of three times the amount of actual damages sustained or \$1,000.

(b) In addition to any amount recovered pursuant to subsection (2)(a), a plaintiff who proves a violation of 30-14-209 is entitled to \$500 a day for each day that a violation of 30-14-209 occurred.

(3) A defendant in an action brought under this section may be required to testify under the Montana Rules of Civil Procedure. In addition, ~~the books and records of any such~~ the defendant may be brought into court and introduced into evidence by reference. ~~No information so~~ Information obtained pursuant to this subsection may not be used against the defendant as a basis for ~~a misdemeanor~~ prosecution under 30-14-205 through 30-14-209, 30-14-213, 30-14-216 through 30-14-218, and or 30-14-224.

(4) (a) If the department or the attorney general prevails in an action, the department or attorney general is entitled to attorney fees and costs.

(b) In an action brought by a party other than the state, the prevailing party is entitled to attorney fees and costs."

Section 12. Section 30-14-223, MCA, is amended to read:

"30-14-223. Department to institute Department's institution of suit. Upon the ~~third~~ violation of any of the provisions of 30-14-205 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218 by any business, the department ~~shall may~~ institute proper suits or quo warranto proceedings a proceeding in a court of competent jurisdiction for the forfeiture of ~~its~~ the business's charter, rights, franchises or privileges, and powers exercised by ~~such~~ the business and to permanently enjoin it from transacting business in this state. If in ~~such action~~ the proceeding the court finds that the business is violating or has violated any of the provisions of 30-14-205 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218, ~~it~~ the court shall enjoin the business from doing business in this state permanently or for ~~such a period of time as that~~ the court orders or the court shall annul the charter or revoke the franchise of ~~such~~ the business."

Section 13. Section 30-14-224, MCA, is amended to read:

"30-14-224. Penalties. (1) ~~Except as otherwise provided in this section, a~~ A person, whether as principal, agent, officer, or director, who intentionally violates any of the provisions of ~~30-14-206 through 30-14-218~~ 30-14-207 through 30-14-209, 30-14-213, or 30-14-216 through 30-14-218 is guilty of ~~a misdemeanor~~ an offense for each ~~single~~ violation and upon conviction ~~thereof shall~~ may be fined an amount not less than ~~\$100~~ \$1,000 or more than ~~\$1,000~~ \$10,000 or and shall be imprisoned for a term not to exceed ~~6 months~~ 2 years, or both.

(2) A violation of 30-14-205 is punishable by imprisonment ~~in the county jail~~ for a period of not less than ~~24 hours~~ or more than ~~1 year~~ 5 years or by, and the offender may be subject to a fine in an amount not exceeding \$25,000, ~~or both.~~

(3) When there is a violation of 30-14-216, in addition to the penalty specified in subsection (1), the court before which a conviction is had shall, within 10 days after judgment of conviction is given, forward a certified copy of the judgment to the department of agriculture and that department shall revoke any license issued to the convicted person ~~so convicted~~. ~~In such case no~~ A new license may not be granted to the person whose license is revoked or to anyone either directly or indirectly engaged with ~~him~~ that person ~~in such that~~ business for a period of ~~1 year~~ 5 years."

Section 14. Section 30-14-501, MCA, is amended to read:

"30-14-501. Purpose. The purpose of this part is to afford ~~consumers~~ persons subjected to high pressure personal solicitation sales tactics a cooling-off period."

Section 15. Section 30-14-502, MCA, is amended to read:

"30-14-502. Definitions. As used in this part, the following definitions apply:

(1) "Buyer" means anyone who gives a consideration for the purchase or use of goods or services.

(2) "Personal solicitation" means any attempt by a seller ~~who regularly engages in transactions of the same kind to sell goods or services which are primarily for personal, family, or household purposes~~, when either the seller or a person acting for ~~him~~ the seller contacts the buyer by telephone or in person other than at the place of business of the seller, except:

(a) an attempted sale in which the buyer, prior to the attempted sale, personally knows the identity of the seller, the name of the business, firm, or organization ~~he~~ that the seller represents, and the identity or kinds of goods or services offered for sale;

- (b) an attempted sale in which the buyer has initiated the contact with the seller;
- (c) an attempted sale of a newspaper subscription in which the seller is a minor engaged in both the delivery and the sale of the newspaper; ~~or~~
- (d) an attempted sale of an insurance policy; or
- (e) an attempted sale of more than \$5,000 of goods or services that are not primarily for personal, family, or household purposes.

(3) "Personal solicitation sale" means the purchase, lease, or rental of any goods or services following a personal solicitation by the seller or a person acting for ~~him the seller~~; ~~provided if~~ the buyer is required to give consideration in excess of \$25 in cash or credit ~~therefor~~.

(4) "Seller" means a lessor, renter, or anyone offering goods or services for consideration, including an assignee of a seller."

Section 16. Section 30-14-503, MCA, is amended to read:

"30-14-503. Disclosure obligation. Before any personal solicitation, each seller shall, at the time of initial contact or communication with the potential buyer, clearly and expressly disclose the individual seller's name, the name of the business, firm, or organization ~~he that the seller~~ represents, and the identity or kinds of goods or services ~~he that the seller~~ wishes to demonstrate or sell, ~~and that he wishes to demonstrate or sell the identified goods or services.~~ When the initial contact is made in person, the seller shall also show the potential buyer an identification card ~~which that~~ clearly states the seller's name and the name of the business or organization ~~he that the seller~~ represents. The disclosures required by this section ~~shall~~ must be made before asking any questions or making any statements except an initial greeting. ~~Nonprofit organizations are exempt from the requirements of this section.~~ Failure to provide the information required by this section is a violation of 30-14-103."

Section 17. Section 30-14-504, MCA, is amended to read:

"30-14-504. Buyer's right to cancel -- time allowed -- notice -- return of goods. (1) Except as provided in ~~subsection (5)~~ subsections (5) and (6), in addition to any other right ~~otherwise~~ to revoke an offer, the buyer or any other person obligated for any part of the purchase price may cancel a personal solicitation sale until midnight of the third business day after the day on which the buyer has signed an agreement or offer to purchase relating to ~~such a~~ such a sale, provided that in the case of a personal solicitation sale made by telephone, the buyer may cancel at any time prior to ~~his the buyer's~~ the buyer's signing ~~of~~ an agreement or offer to purchase relating to ~~such the~~ such the sale.

(2) Cancellation occurs when written notice of cancellation is given to the seller.

(3) Notice of cancellation, if given by mail, is considered given when deposited in a mailbox properly addressed and postage prepaid.

(4) Notice of cancellation need not take the form prescribed and ~~shall be~~ is sufficient if it indicates the intention of the buyer not to be bound.

(5) A personal solicitation sale may not be canceled if, in the case of goods, the goods cannot be returned to the seller in substantially the same condition as when received by the buyer.

(6) A buyer's right to cancel does not commence running until the seller has provided the buyer with a valid business address and working telephone number for the seller's business."

Section 18. Section 30-14-506, MCA, is amended to read:

"30-14-506. Repayment to buyer -- retention of goods by buyer -- court award, costs, and attorney fees. (1) Except as provided in this section, within 10 days after a personal solicitation sale has been canceled or an offer to purchase revoked, the seller shall tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(2) If the ~~down payment~~ downpayment includes goods traded in, the goods ~~shall~~ must be tendered in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(3) If the seller refuses within the period prescribed by subsection (1) to return the ~~cash down payment~~ downpayment or goods tendered as ~~down payment~~ downpayment, ~~he the seller shall be~~ is liable to the buyer for the entire ~~down payment~~ downpayment, and if the buyer is successful in his a court action ~~therefor~~ for recovery, the court shall also award ~~him~~ the buyer ~~\$100~~ \$1,000 plus reasonable ~~attorneys'~~ attorney fees and costs.

(4) Until the seller has complied with this section, the buyer may retain possession of goods delivered ~~to him~~ by the seller and ~~shall have~~ has a lien on the goods ~~in his possession~~ or control for any recovery to which ~~he~~ the buyer may be entitled."

Section 19. Section 30-14-1403, MCA, is amended to read:

"30-14-1403. Definitions. As used in this part, the following definitions apply:

(1) "Consumer" means a person who is or may be required to pay for goods or services offered by a seller or telemarketer through telemarketing.

(2) "Department" means the department of administration created in 2-15-1001.

(3) "Goods or services" means any real property, any tangible or intangible personal property, or services of any kind provided or offered to a person.

(4) "Material aspect" means any factor likely to affect a person's choice of or conduct regarding goods or services. The term includes currency values and comparative expressions of value, including but not limited to percentages or multiples.

(5) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity.

(6) "Prize" means anything offered, purportedly offered, given, or purportedly given to a person by chance.

(7) "Prize promotion" means a sweepstakes or other game of chance or an oral or written representation, express or implied, that a person has won, has been selected to receive, or is eligible to receive a prize or purported prize.

(8) "Seller" means a person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the consumer in exchange for consideration.

(9) "Solicitation" means a written or oral notification or advertisement that:

(a) is transmitted by or on behalf of a seller or telemarketer by any printed, audio, video, cinematic, telephonic, or electronic means to a consumer; and

(b) in the case of a notification or advertisement other than by telephone, either of the following conditions is met:

(i) the notification or advertisement is followed by a telephone call from a seller or telemarketer; or

(ii) the notification or advertisement induces a response by telephone and, through that response, a seller or telemarketer attempts to make a sale of goods or services.

(10) "Supervised financial organization" means any bank, trust company, savings and loan association, mutual savings bank, credit union, industrial loan company, consumer finance lender, commercial finance lender, or insurer, provided that the organization is subject to supervision by an agency of this or any other state of the ~~United States~~ or an agency, bureau, or department of government of the United States.

(11) "Telemarketer" means a person, located within or outside of this state, who in connection with telemarketing initiates or receives telephone calls to or from a consumer in this state. The term includes a seller directly engaged in telemarketing on the seller's own behalf or a person engaged in telemarketing at the direction of a seller.

(12) "Telemarketing" means a plan, program, or campaign that is conducted by telephone to induce the

purchase of goods or services and that involves more than one telephone call to a consumer."

Section 20. Section 30-14-1404, MCA, is amended to read:

"30-14-1404. Registration of sellers or telemarketers -- application fee -- fines. (1) (a) Unless exempt under 30-14-1405, a person may not ~~act~~ use a telephone to call into or out of Montana as a seller or telemarketer without first having registered with the department.

(b) The initial application for registration must be approved by the department prior to a seller or telemarketer offering or offering for sale consumer goods or services through any medium.

(c) A registered seller or telemarketer shall submit an application for renewal of registration annually to the department.

(d) The application for a certificate of registration or renewal must include but is not limited to the following information:

(i) the true name, current address, telephone number, and location of the seller or telemarketer, including each name under which the seller or telemarketer intends to engage in telemarketing;

(ii) each occupation or business that the seller's or telemarketer's principal owner has engaged in for the 2 years immediately preceding the date of the application;

(iii) whether any principal or manager has been convicted or pleaded guilty to or is being prosecuted by indictment for racketeering, violations of state or federal securities laws, or a theft offense;

(iv) whether there has been entered against any principal or manager an injunction, a temporary restraining order, or a final judgment in any civil or administrative action involving fraud, theft, racketeering, embezzlement, fraudulent conversion, misappropriation of property, or violation of any federal or state consumer protection law. The information must include any pending litigation against the applicant.

(v) whether the seller, at any time during the previous 7 years, has filed for bankruptcy, been adjudged bankrupt, or been reorganized because of insolvency;

(vi) the true name, current home address, date of birth, social security number, and all other names of the following:

(A) each telemarketer or other person to be employed by the seller;

(B) each person participating in or responsible for the management of the seller's business; and

(C) each person, office manager, or supervisor principally responsible for the management of the seller's business;

(vii) the name, address, and account number of every institution where banking or any other monetary

transactions are conducted by the seller; and

(viii) a copy of all scripts, outlines, or presentation material that the seller will require a telemarketer to use when soliciting, as well as all sales information to be provided by the seller to a purchaser in connection with any solicitation.

(2) (a) The application for registration or renewal must be accompanied by a one-time application fee of \$500 and a surety bond in the amount of \$50,000. The bond must provide for indemnification to the state of Montana for any person suffering a loss as the result of violation of this part, and the bond must meet any other requirements that the department may establish.

(b) The surety may for any cause cancel the bond upon giving a 60-day written notice by certified mail to the applicant and to the department. Unless the bond is replaced by that of another surety before the expiration of the 60-day notice of cancellation, the registration of the seller or telemarketer must be treated as lapsed.

(c) The surety bond must remain in effect for 1 year from the period the telemarketing business ceases to operate in this state.

(d) (i) Any business required under this part to file a bond with a registration application may file, in lieu of the bond, a certificate of deposit, cash, or a government bond in the amount of \$50,000.

(ii) The department shall hold the cash, certificate of deposit, or government bond for 1 year from the period the telemarketing business ceases to operate in this state or registration lapses in order to pay claims made against the telemarketing business for its activities during its period of operation in this state.

(iii) For the purposes of this section, "government bond" means any United States bond, treasury note, or other public debt obligation of the United States that is unconditionally guaranteed as to both interest and principal by the United States.

(e) The registration of a telemarketing business must be treated as lapsed if at any time the amount of the bond, cash, certificate of deposit, or government bond falls below the amount required by this section.

(f) The aggregate liability of the surety company to the state of Montana for all persons injured by a seller's or telemarketer's violations may not exceed the amount of the bond.

(3) The following constitute a violation of this part:

- (a) failure to register, maintain, or renew a registration if required;
- (b) failure to meet the surety bond requirement if required to provide a bond;
- (c) including any false or misleading information on a registration application; and
- (d) misrepresenting that a seller or telemarketer is registered.

(4) A violation of subsection (3) ~~of this section~~ also constitutes a violation of 30-14-103 and is subject

to the penalty provisions of 30-14-1414 ~~and the Montana Unfair Trade Practices and Consumer Protection Act of 1973.~~ If the department prevails in an action brought for a violation of subsection (3), the court shall impose a fine in an amount of not less than \$1,000 or more than \$10,000 for each day in which a violation has occurred."

Section 21. Section 30-14-1405, MCA, is amended to read:

"30-14-1405. Exemptions from registration and bonding. The registration and bonding requirements of 30-14-1404 do not apply to:

(1) any securities, commodities, or investment brokers, dealers, or investment advisers or any associates of securities, commodities, or investment brokers, dealers, or investment advisers who are subject to licensure or registration by the securities and exchange commission, the national association of securities dealers, or another self-regulatory organization, as defined by 15 U.S.C. 78(c), or by an agency of this state or any other state and who are soliciting within the scope of their license or registration;

(2) a person engaged in solicitation for a religious, charitable, political, educational, or other noncommercial purpose or a person soliciting for a domestic or foreign nonprofit corporation that is registered with the Montana secretary of state;

(3) a business-to-business sale;

~~(4) a person that solicits sales by periodically publishing and delivering a catalog of the person's merchandise to prospective purchasers, if the catalog:~~

~~—— (a) contains a written description or illustration of each item offered for sale;~~

~~—— (b) includes the business or home address of the person soliciting the sale;~~

~~—— (c) includes at least 20 pages of written material and illustrations;~~

~~—— (d) is distributed in more than one state; and~~

~~—— (e) has a circulation by mailing of not less than 150,000;~~

~~(5) a person who solicits contracts for maintenance or repair of goods previously purchased from that person or from the person on whose behalf the solicitation is made;~~

~~(6)~~(4) a person soliciting a transaction regulated by the commodity futures trading commission if the person is registered or temporarily licensed with the commodity futures trading commission under the Commodity Exchange Act, Title 7, chapter 1, of the United States Code, and the person's registration or license is not expired, suspended, or revoked;

~~(7)~~(5) a supervised financial organization ~~or parent, subsidiary, or affiliate of a supervised financial organization;~~

~~(8)(6)~~ an insurer authorized to transact insurance under Title 33, chapter 2, part 1, a person licensed as an insurance producer under Title 33, chapter 17, part 2, or staff members, licensed or unlicensed, of the producer;

~~(9)~~ a person soliciting the sale of services provided by a satellite or cable television system or a radio or television station authorized by the federal government or this state to provide services in this state;

~~(10)~~ a telephone company or its subsidiary or agent or other business regulated by the Montana public service commission, the federal communications commission, a rural telephone cooperative or its subsidiary or agent, or a federally licensed cellular telephone or radio telecommunication service provider;

~~(11)~~ a person soliciting business from consumers that have an existing business relationship with or have previously purchased from the business enterprise for which the person is soliciting;

~~(12)~~ a person operating a retail business establishment under the same name as that used in the solicitation and:

~~(a)~~ the products or services are displayed and offered for sale at the business establishment; and

~~(b)~~ a majority of the person's business involves the consumer obtaining the products or services at the business establishment;

~~(13)(7)~~ a person soliciting for the sale of a magazine or newspaper of general circulation;

~~(14)~~ an issuer or a subsidiary of an issuer that is authorized to offer securities for sale in this state;

~~(15)~~ a book, video, record, or multimedia club, contractual plan, or arrangement:

~~(a)~~ under which the seller provides the consumer with a form that the consumer may use to instruct the seller not to ship the offered merchandise;

~~(b)~~ that is regulated by the federal trade commission regulation, 16 CFR 425, concerning the use of negative option plans by sellers in commerce; or

~~(c)~~ that provides for the sale of books, videos, records, multimedia products, or other goods that are not covered by subsection (15)(a) or (15)(b), including continuity plans, subscription arrangements, standing order arrangements, single sales, supplements, or series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive the merchandise on a periodic basis;

~~(16)(8)~~ a real estate salesperson or broker licensed by this state;

~~(17)~~ a person that has provided telemarketing sales services under the same name and derives 50% of gross telemarketing sales revenue from contracts with persons exempted under this section from registration requirements;

~~(18)~~ a person soliciting the sale of food or food products if the solicitation is not intended to and does not

~~result in a sale in excess of \$100 to a single address."~~

Section 22. Section 30-14-1406, MCA, is amended to read:

"30-14-1406. Telemarketing fraud and consumer fraud awareness program. The department shall establish and administer a telemarketing fraud and consumer fraud awareness program. The program must be funded as provided in 30-14-1407(2)."

Section 23. Section 30-14-1407, MCA, is amended to read:

"30-14-1407. Authority of department, attorney general, and county attorney. (1) The department, the attorney general, and a county attorney have the same authority in enforcing and carrying out the provisions of this part as they have under Title 30, chapter 14, part 1.

(2) All civil fines, costs, and fees received or recovered by the department pursuant to this section must be deposited into the state special revenue account to the credit of the department and must be used to defray the expenses of the department in discharging its administrative and regulatory powers and duties in relation to this section and to fund the telemarketing fraud and consumer fraud awareness program established in ~~30-14-1405~~ 30-14-1406. Any excess civil fines, costs, or fees must be deposited in the general fund.

(3) All civil fines, costs, and fees received or recovered by the attorney general pursuant to this section must be deposited into the state special revenue account to the credit of the attorney general and must be used to defray the expenses of the office of the attorney general in discharging its duties in relation to this section and to establish a telemarketing fraud and consumer fraud awareness program similar to the program authorized in ~~30-14-1405~~ 30-14-1406. Any excess civil fines, costs, or fees must be deposited in the general fund.

(4) All civil fines, costs, and fees received or recovered by a county attorney must be paid to the general fund of the county where the action was commenced."

Section 24. Section 30-14-1413, MCA, is amended to read:

"30-14-1413. Civil remedies -- venue -- burden of proof. (1) The sale of any goods or services by an unregistered seller or telemarketer that is required to register is void. A person obtaining a judgment for damages, attorney fees, or costs against a seller or telemarketer pursuant to this section has the right to be reimbursed for those damages, attorney fees, or costs from any bond or security posted by the seller or telemarketer pursuant to the provisions of 30-14-1404.

(2) A person that suffers a loss or harm as a result of an unfair and deceptive act or practice or a

prohibited act or practice is entitled to recover actual damages or \$500, whichever is greater, attorney fees, court costs, and any other remedies provided by law.

(3) In addition to the remedies provided in subsection (2), a person that suffers harm as a result of an abusive act or practice is entitled to receive injunctive or declaratory relief.

(4) (a) The department, the attorney general, or a county attorney, on behalf of state residents who have suffered a loss or harm as a result of a violation of this part, may seek any remedy provided by Title 30, chapter 14, part 1.

(b) The proper place for trial for an action based on a claim of a violation of this part is the district court of Lewis and Clark County or the district court or justice's court in the county in which the alleged violation occurred.

(5) In a civil proceeding alleging a violation of this part, the burden of proving an exemption under 30-14-1405 or an exception to a definition contained in 30-14-1403 is on the person claiming the exemption or exception."

Section 25. Section 61-4-501, MCA, is amended to read:

"61-4-501. Definitions. For purposes of this part, the following definitions apply:

(1) "Collateral charge" means all governmental charges, including but not limited to sales tax, property tax, license and registration fees, and fees in lieu of tax.

(2) "Consumer" means the purchaser, other than for purposes of resale, of a motor vehicle that has not been brought into nonconformity as the result of abuse, neglect, or unauthorized modifications or alterations by the purchaser, any person to whom the motor vehicle is transferred during the duration of an express warranty applicable to the motor vehicle, or any other person entitled by the terms of the warranty to the benefits of its provisions.

(3) "Incidental damage" means incidental and consequential damage as defined in 30-2-715.

(4) "Manufacturer" has the meaning ~~applied to that word~~ provided in 61-4-201.

(5) (a) "Motor vehicle" means a vehicle, including the nonresidential portion of a motor home as defined in 61-1-130, propelled by its own power, designed primarily to transport persons or property upon the public highways, and sold in this state.

(b) The term does not include:

(i) a truck with 10,000 pounds or more gross vehicle weight rating ~~or a motorcycle as defined in 61-4-105;~~ or

(ii) ~~Motor vehicle does not include~~ components, systems, fixtures, appliances, furnishings, accessories, and features that are designed, used, and maintained primarily for residential purposes.

(6) "Reasonable allowance for use" is an amount directly attributable to use of the motor vehicle by the consumer and any previous consumers prior to the first written notice of the nonconformity to the manufacturer or its agent and during any subsequent period when the vehicle is not out of service because of nonconformity. The reasonable allowance for use ~~shall~~ must be computed by multiplying the total contract price of the vehicle by a fraction having as its denominator 100,000 and having as its numerator the number of miles that the vehicle traveled prior to the manufacturer's acceptance of its return.

(7) "Warranty period" means the period ending 2 years after the date of the original delivery to the consumer of a new motor vehicle or during the first ~~48,000~~ 30,000 miles of operation, whichever is earlier."

Section 26. Section 61-4-516, MCA, is amended to read:

"61-4-516. ~~Composition of arbitration panel~~ Selection of arbitrator. An ~~arbitration panel hearing arbitrator~~ for a grievance under this part ~~must consist of three members~~ must be chosen by the department of administration. ~~One member must be chosen by the consumer, one member must be chosen by the manufacturer, and one member must be chosen by mutual agreement of the parties.~~ The department of administration ~~may~~ shall maintain a list of persons willing to serve ~~on panels from which the third member may be chosen~~ as an arbitrator."

Section 27. Section 61-4-518, MCA, is amended to read:

"61-4-518. Arbitration -- role of department of administration -- expert. (1) The department of administration shall investigate, gather, and organize all information necessary for a fair and timely decision in each dispute. The department of administration may, on behalf of the ~~arbitration panel arbitrator~~, issue subpoenas to compel the attendance of witnesses and the production of documents, papers, and records relevant to the dispute.

(2) If requested by the ~~panel arbitrator~~, the department of administration may forward a copy of all written testimony and documentary evidence to an independent technical expert certified by the national institute of automotive excellence. The expert may review the material and be available to advise and consult with the ~~panel arbitrator~~. The expert, at the arbitrator's request, ~~may sit as a nonvoting member of the panel~~ be present whenever oral testimony is presented."

Section 28. Section 61-4-519, MCA, is amended to read:

"61-4-519. Action by ~~arbitration panel~~ arbitrator -- decision. (1) The ~~arbitration panel~~ arbitrator shall, as expeditiously as possible, but not later than 60 days after the department of administration has accepted a complaint, render a fair decision based on the information gathered and disclose ~~its~~ the arbitrator's findings and ~~its~~ reasoning to the parties.

(2) The decision must provide appropriate remedies, including but not limited to:

- (a) repair of the vehicle;
- (b) replacement of the vehicle with an identical vehicle or a comparable vehicle acceptable to the consumer;
- (c) refund as provided in 61-4-503(2);
- (d) any other remedies available under the applicable warranties or 15 U.S.C. 2301 through 2312, as in effect on October 1, 1983; or
- (e) reimbursement of expenses and costs to the prevailing party.

(3) The decision must specify a date for performance and completion of all awarded remedies. The department of administration shall contact the prevailing party within 10 working days after the date for performance to determine whether performance has occurred. The parties shall act in good faith in abiding by any decision. In addition, if the decision is not accepted, the parties shall follow the provisions of Title 27, chapter 5. If it is determined by the court that the appellant has acted without good cause in bringing an appeal of an award, the court, in its discretion, may grant to the respondent costs and reasonable attorney fees."

NEW SECTION. **Section 29. Repealer.** Sections 30-14-210, 30-14-211, 30-14-212, 30-14-214, 30-14-215, and 30-14-225, MCA, are repealed.

NEW SECTION. **Section 30. Effective date.** [This act] is effective on passage and approval.

- END -

