

# House Bill 3706

Sponsored by COMMITTEE ON REVENUE

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Includes loans and extensions of credit in definition of "real estate, goods or services" for purposes of Unlawful Trade Practices Act.

Limits enforcement actions and rulemaking authority of Attorney General with respect to unlawful practices of state regulated lenders.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to application of Unlawful Trade Practices Act; creating new provisions; amending ORS  
3 646.605, 646.618 and 646.632; and declaring an emergency.

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

5 **SECTION 1.** ORS 646.605 is amended to read:

6 646.605. As used in ORS 646.605 to 646.652:

7 (1) "Appropriate court" means the circuit court of a county:

8 (a) Where one or more of the defendants reside;

9 (b) Where one or more of the defendants maintain a principal place of business;

10 (c) Where one or more of the defendants are alleged to have committed an act prohibited by  
11 ORS 646.605 to 646.652; or

12 (d) With the defendant's consent, where the prosecuting attorney maintains an office.

13 (2) "Documentary material" means the original or a copy of any book, record, report, memo-  
14 randum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or  
15 other tangible document or recording, wherever situate.

16 (3) "Examination" of documentary material shall include inspection, study or copying of any  
17 such material, and taking testimony under oath or acknowledgment in respect of any such docu-  
18 mentary material or copy thereof.

19 (4) "Person" means natural persons, corporations, trusts, partnerships, incorporated or  
20 unincorporated associations and any other legal entity except bodies or officers acting under statu-  
21 tory authority of this state or the United States.

22 (5) "Prosecuting attorney" means the Attorney General or the district attorney of any county  
23 in which a violation of ORS 646.605 to 646.652 is alleged to have occurred.

24 (6) "Real estate, goods or services" means those that are or may be obtained primarily for per-  
25 sonal, family or household purposes, or that are or may be obtained for any purposes as a result of  
26 a telephone solicitation, and includes **loans and extensions of credit, and** franchises,  
27 distributorships and other similar business opportunities, but does not include insurance. Except  
28 as provided in section 2, chapter 658, Oregon Laws 2003, real estate does not cover conduct covered  
29 by ORS chapter 90.

30 (7) "Telephone solicitation" means a solicitation where a person, in the course of the person's

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.  
New sections are in **boldfaced** type.

1 business, vocation or occupation, uses a telephone or an automatic dialing-announcing device to in-  
 2 initiate telephonic contact with a potential customer and the person is not one of the following:

3 (a) A person who is a broker-dealer or salesperson licensed under ORS 59.175, or a mortgage  
 4 banker or mortgage broker licensed under ORS 86A.106 when the solicitation is for a security  
 5 qualified for sale pursuant to ORS 59.055.

6 (b) A real estate licensee or a person who is otherwise authorized to engage in professional real  
 7 estate activity pursuant to ORS chapter 696, when the solicitation involves professional real estate  
 8 activity.

9 (c) A person licensed or exempt from licensure as a builder pursuant to ORS chapter 701, when  
 10 the solicitation involves the construction, alteration, repair, improvement or demolition of a struc-  
 11 ture.

12 (d) A person licensed or otherwise authorized to sell insurance as an insurance producer pur-  
 13 suant to ORS chapter 744, when the solicitation involves insurance.

14 (e) A person soliciting the sale of a newspaper of general circulation, a magazine or membership  
 15 in a book or record club who complies with ORS 646.611, when the solicitation involves newspapers,  
 16 magazines or membership in a book or record club.

17 (f) A person soliciting without the intent to complete and who does not complete the sales  
 18 presentation during the telephone solicitation and who only completes the sales presentation at a  
 19 later face-to-face meeting between the solicitor and the prospective purchaser.

20 (g) A supervised financial institution or parent, subsidiary or affiliate thereof. As used in this  
 21 paragraph, "supervised financial institution" means any financial institution or trust company, as  
 22 those terms are defined in ORS 706.008, or any personal property broker, consumer finance lender,  
 23 commercial finance lender or insurer that is subject to regulation by an official or agency of this  
 24 state or of the United States.

25 (h) A person who is authorized to conduct prearrangement or preconstruction funeral or ceme-  
 26 tery sales, pursuant to ORS chapter 692, when the solicitation involves prearrangement or precon-  
 27 struction funeral or cemetery plans.

28 (i) A person who solicits the services provided by a cable television system licensed or fran-  
 29 chised pursuant to state, local or federal law, when the solicitation involves cable television ser-  
 30 vices.

31 (j) A person or affiliate of a person whose business is regulated by the Public Utility Commission  
 32 of Oregon.

33 (k) A person who sells farm products as defined by ORS 576.006 if the solicitation neither in-  
 34 tends to nor actually results in a sale that costs the purchaser in excess of \$100.

35 (L) An issuer or subsidiary of an issuer that has a class of securities that is subject to section  
 36 12 of the Securities Exchange Act of 1934 and that is either registered or exempt from registration  
 37 under paragraph (A), (B), (C), (E), (F), (G) or (H) or subsection (g) of that section.

38 (m) A person soliciting exclusively the sale of telephone answering services to be provided by  
 39 that person or that person's employer when the solicitation involves answering services.

40 (n) A telecommunications utility with access lines of 15,000 or less or a cooperative telephone  
 41 association when the solicitation involves regulated goods or services.

42 (8) "Trade" and "commerce" mean advertising, offering or distributing, whether by sale, rental  
 43 or otherwise, any real estate, goods or services, and include any trade or commerce directly or in-  
 44 directly affecting the people of this state.

45 (9) "Unconscionable tactics" include, but are not limited to, actions by which a person:

1 (a) Knowingly takes advantage of a customer's physical infirmity, ignorance, illiteracy or ina-  
2 bility to understand the language of the agreement;

3 (b) Knowingly permits a customer to enter into a transaction from which the customer will  
4 derive no material benefit;

5 (c) Permits a customer to enter into a transaction with knowledge that there is no reasonable  
6 probability of payment of the attendant financial obligation in full by the customer when due; or

7 (d) Knowingly takes advantage of a customer who is a disabled veteran, a disabled  
8 servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled  
9 servicemember or servicemember in active service. For purposes of this paragraph:

10 (A) "Disabled veteran" has the meaning given that term in ORS 408.225.

11 (B) "Disabled servicemember" means a servicemember, as defined in 50 U.S.C. App. 511 as in  
12 effect on January 1, 2010, who may be entitled to disability compensation under laws administered  
13 by the United States Department of Veterans Affairs.

14 (C) "Servicemember in active service" means:

15 (i) A servicemember called into active service under Title 10 or Title 32 of the United States  
16 Code as in effect on January 1, 2010; or

17 (ii) A servicemember on active state duty, as defined in ORS 398.002.

18 (10) A willful violation occurs when the person committing the violation knew or should have  
19 known that the conduct of the person was a violation.

20 (11) A loan is made "in close connection with the sale of a manufactured dwelling" if:

21 (a) The lender directly or indirectly controls, is controlled by or is under common control with  
22 the seller, unless the relationship is remote and is not a factor in the transaction;

23 (b) The lender gives a commission, rebate or credit in any form to a seller who refers the bor-  
24 rower to the lender, other than payment of the proceeds of the loan jointly to the seller and the  
25 borrower;

26 (c) The lender is related to the seller by blood or marriage;

27 (d) The seller directly and materially assists the borrower in obtaining the loan;

28 (e) The seller prepares documents that are given to the lender and used in connection with the  
29 loan; or

30 (f) The lender supplies documents to the seller used by the borrower in obtaining the loan.

31 **SECTION 2.** ORS 646.605, as amended by section 12, chapter 658, Oregon Laws 2003, section  
32 199, chapter 71, Oregon Laws 2007, section 32, chapter 319, Oregon Laws 2007, and section 2,  
33 chapter 215, Oregon Laws 2009, is amended to read:

34 646.605. As used in ORS 646.605 to 646.652:

35 (1) "Appropriate court" means the circuit court of a county:

36 (a) Where one or more of the defendants reside;

37 (b) Where one or more of the defendants maintain a principal place of business;

38 (c) Where one or more of the defendants are alleged to have committed an act prohibited by  
39 ORS 646.605 to 646.652; or

40 (d) With the defendant's consent, where the prosecuting attorney maintains an office.

41 (2) "Documentary material" means the original or a copy of any book, record, report, memo-  
42 randum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or  
43 other tangible document or recording, wherever situate.

44 (3) "Examination" of documentary material shall include inspection, study or copying of any  
45 such material, and taking testimony under oath or acknowledgment in respect of any such docu-

1 mentary material or copy thereof.

2 (4) "Person" means natural persons, corporations, trusts, partnerships, incorporated or  
 3 unincorporated associations and any other legal entity except bodies or officers acting under statu-  
 4 tory authority of this state or the United States.

5 (5) "Prosecuting attorney" means the Attorney General or the district attorney of any county  
 6 in which a violation of ORS 646.605 to 646.652 is alleged to have occurred.

7 (6) "Real estate, goods or services" means those that are or may be obtained primarily for per-  
 8 sonal, family or household purposes, or that are or may be obtained for any purposes as a result of  
 9 a telephone solicitation, and includes **loans and extensions of credit, and** franchises,  
 10 distributorships and other similar business opportunities, but does not include insurance. Real es-  
 11 tate does not cover conduct covered by ORS chapter 90.

12 (7) "Telephone solicitation" means a solicitation where a person, in the course of the person's  
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 14 itiate telephonic contact with a potential customer and the person is not one of the following:

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21 (c) A person licensed or exempt from licensure as a builder pursuant to ORS chapter 701, when  
 22 the solicitation involves the construction, alteration, repair, improvement or demolition of a struc-  
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24 (d) A person licensed or otherwise authorized to sell insurance as an insurance producer pur-  
 25 suant to ORS chapter 744, when the solicitation involves insurance.

26 (e) A person soliciting the sale of a newspaper of general circulation, a magazine or membership  
 27 in a book or record club who complies with ORS 646.611, when the solicitation involves newspapers,  
 28 magazines or membership in a book or record club.

29 (f) A person soliciting without the intent to complete and who does not complete the sales  
 30 presentation during the telephone solicitation and who only completes the sales presentation at a  
 31 later face-to-face meeting between the solicitor and the prospective purchaser.

32 (g) A supervised financial institution or parent, subsidiary or affiliate thereof. As used in this  
 33 paragraph, "supervised financial institution" means any financial institution or trust company, as  
 34 those terms are defined in ORS 706.008, or any personal property broker, consumer finance lender,  
 35 commercial finance lender or insurer that is subject to regulation by an official or agency of this  
 36 state or of the United States.

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43 (j) A person or affiliate of a person whose business is regulated by the Public Utility Commission  
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45 (k) A person who sells farm products as defined by ORS 576.006 if the solicitation neither in-

1 tends to nor actually results in a sale that costs the purchaser in excess of \$100.

2 (L) An issuer or subsidiary of an issuer that has a class of securities that is subject to section  
3 12 of the Securities Exchange Act of 1934 and that is either registered or exempt from registration  
4 under paragraph (A), (B), (C), (E), (F), (G) or (H) or subsection (g) of that section.

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7 (n) A telecommunications utility with access lines of 15,000 or less or a cooperative telephone  
8 association when the solicitation involves regulated goods or services.

9 (8) "Trade" and "commerce" mean advertising, offering or distributing, whether by sale, rental  
10 or otherwise, any real estate, goods or services, and include any trade or commerce directly or in-  
11 directly affecting the people of this state.

12 (9) "Unconscionable tactics" include, but are not limited to, actions by which a person:

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15 (b) Knowingly permits a customer to enter into a transaction from which the customer will  
16 derive no material benefit;

17 (c) Permits a customer to enter into a transaction with knowledge that there is no reasonable  
18 probability of payment of the attendant financial obligation in full by the customer when due; or

19 (d) Knowingly takes advantage of a customer who is a disabled veteran, a disabled  
20 servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled  
21 servicemember or servicemember in active service. For purposes of this paragraph:

22 (A) "Disabled veteran" has the meaning given that term in ORS 408.225.

23 (B) "Disabled servicemember" means a servicemember, as defined in 50 U.S.C. App. 511 as in  
24 effect on January 1, 2010, who may be entitled to disability compensation under laws administered  
25 by the United States Department of Veterans Affairs.

26 (C) "Servicemember in active service" means:

27 (i) A servicemember called into active service under Title 10 or Title 32 of the United States  
28 Code as in effect on January 1, 2010; or

29 (ii) A servicemember on active state duty, as defined in ORS 398.002.

30 (10) A willful violation occurs when the person committing the violation knew or should have  
31 known that the conduct of the person was a violation.

32 (11) A loan is made "in close connection with the sale of a manufactured dwelling" if:

33 (a) The lender directly or indirectly controls, is controlled by or is under common control with  
34 the seller, unless the relationship is remote and is not a factor in the transaction;

35 (b) The lender gives a commission, rebate or credit in any form to a seller who refers the bor-  
36 rower to the lender, other than payment of the proceeds of the loan jointly to the seller and the  
37 borrower;

38 (c) The lender is related to the seller by blood or marriage;

39 (d) The seller directly and materially assists the borrower in obtaining the loan;

40 (e) The seller prepares documents that are given to the lender and used in connection with the  
41 loan; or

42 (f) The lender supplies documents to the seller used by the borrower in obtaining the loan.

43 **SECTION 3.** ORS 646.618 is amended to read:

44 646.618. (1) **Except as provided in section 6 of this 2010 Act**, when it appears to the prose-  
45 cuting attorney that a person has engaged in, is engaging in, or is about to engage in any act or

1 practice declared to be unlawful by ORS 646.607 or 646.608, the prosecuting attorney may execute  
 2 in writing and cause to be served an investigative demand upon any person who is believed to have  
 3 information, documentary material or physical evidence relevant to the alleged or suspected vio-  
 4 lation. The investigative demand shall require such person, under oath or otherwise, to appear and  
 5 testify, to answer written interrogatories, or to produce relevant documentary material or physical  
 6 evidence for examination, at such reasonable time and place as may be stated in the investigative  
 7 demand, or to do any of the foregoing, concerning conduct of any trade or commerce which is the  
 8 subject matter of the investigation.

9 (2) At any time before the return date specified in an investigative demand, or within 20 days  
 10 after the demand has been served, whichever period is shorter, a petition to extend the return date,  
 11 or to modify or set aside the demand, stating good cause including privileged material, may be filed  
 12 in the appropriate court.

13 **SECTION 4.** ORS 646.632 is amended to read:

14 646.632. (1) **Except as provided in section 6 of this 2010 Act**, a prosecuting attorney who has  
 15 probable cause to believe that a person is engaging in, has engaged in, or is about to engage in an  
 16 unlawful trade practice may bring suit in the name of the State of Oregon in the appropriate court  
 17 to restrain such person from engaging in the alleged unlawful trade practice.

18 (2) Except as provided in subsections (5) and (6) of this section, before filing a suit under sub-  
 19 section (1) of this section, the prosecuting attorney shall in writing notify the person charged of the  
 20 alleged unlawful trade practice and the relief to be sought. Such notice shall be served in the man-  
 21 ner set forth in ORS 646.622 for the service of investigative demands. The person charged thereupon  
 22 shall have 10 days within which to execute and deliver to the prosecuting attorney an assurance  
 23 of voluntary compliance. Such assurance shall set forth what actions, if any, the person charged  
 24 intends to take with respect to the alleged unlawful trade practice. The assurance of voluntary  
 25 compliance shall not be considered an admission of a violation for any purpose. If the prosecuting  
 26 attorney is satisfied with the assurance of voluntary compliance, it may be submitted to an appro-  
 27 priate court for approval and if approved shall thereafter be filed with the clerk of the court. If an  
 28 approved assurance of voluntary compliance provides for the payment of an amount of money, as  
 29 restitution or otherwise, and if the amount is not paid within 90 days of the date the court approves  
 30 the assurance, or, if the assurance of voluntary compliance requires periodic payments and if any  
 31 periodic payment is not paid within 30 days of the date specified in the assurance of voluntary  
 32 compliance for any periodic payment, then the prosecuting attorney may submit that portion of the  
 33 assurance of voluntary compliance which provides for the payment of money to the court with a  
 34 certificate stating the unpaid balance in a form which fully complies with the requirements of ORS  
 35 18.038 and 18.042. Upon submission of an assurance of voluntary compliance under this subsection,  
 36 the court shall sign the assurance of voluntary compliance and it shall be entered in the register  
 37 of the court and the clerk of the court shall note in the register that it creates a lien. The assurance  
 38 of voluntary compliance shall thereupon constitute a judgment in favor of the State of Oregon and  
 39 may be enforced as provided in ORS chapter 18. The notice of the prosecuting attorney under this  
 40 subsection shall not be deemed a public record until the expiration of 10 days from the service of  
 41 the notice.

42 (3) The prosecuting attorney may reject as unsatisfactory any assurance:

43 (a) Which does not contain a promise to make restitution in specific amounts or through arbi-  
 44 tration for persons who suffered any ascertainable loss of money or property as a result of the al-  
 45 leged unlawful trade practice; or

1 (b) Which does not contain any provision, including but not limited to the keeping of records,  
 2 which the prosecuting attorney reasonably believes to be necessary to ensure the continued cessa-  
 3 tion of the alleged unlawful trade practice, if such provision was included in a proposed assurance  
 4 attached to the notice served pursuant to this section.

5 (4) Violation of any of the terms of an assurance of voluntary compliance which has been ap-  
 6 proved by and filed with the court shall constitute a contempt of court.

7 (5) The prosecuting attorney need not serve notice pursuant to subsection (2) of this section  
 8 before filing a suit if, within two years of the filing of such suit, the person charged with the alleged  
 9 unfair trade practice submitted to any prosecuting attorney an assurance of voluntary compliance  
 10 which was accepted by and filed with an appropriate court. The prosecuting attorney shall in such  
 11 case serve notice on the defendant in the manner set forth in ORS 646.622 for the service of inves-  
 12 tigative demands, on the 10th or earlier day previous to the filing of suit.

13 (6) If the prosecuting attorney alleges that the prosecuting attorney has reason to believe that  
 14 the delay caused by complying with the provisions of subsection (2) or (5) of this section would cause  
 15 immediate harm to the public health, safety or welfare, the prosecuting attorney may immediately  
 16 institute a suit under subsection (1) of this section.

17 (7) A temporary restraining order may be granted without prior notice to the person if the court  
 18 finds there is a threat of immediate harm to the public health, safety or welfare. Such a temporary  
 19 restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as  
 20 the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a  
 21 like period or unless the person restrained consents that it may be extended for a longer period.

22 (8) The court may award reasonable attorney fees to the prevailing party in an action under this  
 23 section. If the defendant prevails in such suit and the court finds that the defendant had in good  
 24 faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior  
 25 to the institution of the suit or that the prosecuting attorney, in a suit brought under subsections  
 26 (5) and (6) of this section, did not have reasonable grounds to proceed under those subsections, the  
 27 court shall award reasonable attorney fees at trial and on appeal to the defendant.

28 **SECTION 5. Section 6 of this 2010 Act is added to and made a part of ORS 646.605 to**  
 29 **646.652.**

30 **SECTION 6. (1) For purposes of this section, "state regulated lender" means:**

- 31 **(a) A banking institution as defined in ORS 706.008; or**
- 32 **(b) A credit union as defined in ORS 723.006.**

33 **(2) A prosecuting attorney may not take action under ORS 646.618 or 646.632 with respect**  
 34 **to an alleged unlawful practice under ORS 646.607 or 646.608 when the conduct was engaged**  
 35 **in by a state regulated lender unless requested to do so by the Director of the Department**  
 36 **of Consumer and Business Services. In any action requested to be taken by the director**  
 37 **under this subsection, the director may elect to be named as a party to the proceeding or**  
 38 **suit.**

39 **(3) The Attorney General may not adopt rules under ORS 646.608 (4) with respect to**  
 40 **conduct engaged in by a state regulated lender except with the prior review and approval of**  
 41 **the proposed rules by the director. The Attorney General may not adopt rules under ORS**  
 42 **646.608 (4) with respect to conduct engaged in by a state regulated lender except as provided**  
 43 **in this subsection.**

44 **(4) As soon as practicable upon receipt, the Attorney General shall provide the director**  
 45 **with copies of any complaint or other initial pleading or any judgment received under ORS**

1 **646.638 when the action involves the conduct of a state regulated lender.**

2 **SECTION 7. This 2010 Act being necessary for the immediate preservation of the public**  
3 **peace, health and safety, an emergency is declared to exist, and this 2010 Act takes effect**  
4 **on its passage.**

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