

D R A F T

SUMMARY

Changes standard of conduct under which person may be liable for unlawful practice under Unlawful Trade Practices Act from willful conduct to knowing conduct.

A BILL FOR AN ACT

Relating to unlawful practices; creating new provisions; and amending ORS 30.138, 646.605, 646.638 and 646.641.

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

SECTION 1. ORS 30.138 is amended to read:

30.138. (1) In addition to any other remedy payable to a servicemember for the enforcement of a right under 50 U.S.C. App. 501 et seq., a court shall award a servicemember reasonable attorney fees and the amounts specified in subsection (2) of this section if the court finds that written demand as described in subsection (3) of this section was mailed to the opposing party demanding relief under 50 U.S.C. App. 501 et seq., and the opposing party failed to remedy the violation of 50 U.S.C. App. 501 et seq. within 30 days after the mailing of the demand.

(2) If a court finds that notice was mailed as required by this section, and the opposing party failed to remedy the violation of 50 U.S.C. App. 501 et seq. within the time allowed, the court shall award the servicemember:

(a) The greater of \$1,000 or actual damages, including damages for emotional distress; or

(b) If the court finds that the opposing [*party's conduct was willful, as described in ORS 646.605,*] **party knew or should have known that the**

1 **party's conduct was a violation**, the court shall award the servicemember
2 the greater of \$5,000, or three times the amount of actual damages, including
3 damages for emotional distress.

4 (3) A written demand under subsection (1) of this section must be sent
5 by certified mail, return receipt requested. The demand must include the
6 servicemember's name and address, the date on which the servicemember
7 went on active duty and a description of the alleged violation of 50 U.S.C.
8 App. 501 et seq.

9 **SECTION 2.** ORS 646.605 is amended to read:

10 646.605. As used in ORS 646.605 to 646.652:

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

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

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

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

17 (d) With the defendant's consent, where the prosecuting attorney main-
18 tains an office.

19 (2) "Documentary material" means the original or a copy of any book,
20 record, report, memorandum, paper, communication, tabulation, map, chart,
21 photograph, mechanical transcription, or other tangible document or record-
22 ing, wherever [*situate*] **located**.

23 (3) "Examination" [*of documentary material shall include inspection,*
24 *study*] **means inspecting, studying** or copying [*of any such*] **documentary**
25 **material[,] and taking testimony under oath or acknowledgment [*in respect***
26 ***of any such documentary material or copy thereof*] **about the documentary**
27 **material or a copy of the documentary material.****

28 (4) "Person" means a natural [*persons, corporations, trusts, partnerships,*]
29 **person, a corporation, a trust, a partnership, an** incorporated or unin-
30 corporated [*associations*] **association** and any other legal entity except
31 bodies or officers acting under **the** statutory authority of this state or the

1 United States.

2 (5) “Prosecuting attorney” means the Attorney General or the district
3 attorney of any county in which a violation of ORS 646.605 to 646.652 is al-
4 leged to have occurred.

5 (6)(a) “Real estate, goods or services” means *[those]* **real estate, goods**
6 **or services** that are or may be obtained primarily for personal, family or
7 household purposes, or that are or may be obtained for any purposes as a
8 result of a telephone solicitation, and includes loans and extensions of credit,
9 and franchises, distributorships and other similar business opportunities, but
10 does not include insurance.

11 (b) Notwithstanding paragraph (a) of this subsection:

12 (A) “Real estate” does not *[cover]* **mean** conduct *[covered by]* **that is**
13 **regulated under** ORS chapter 90 *[except as provided in section 2, chapter 658,*
14 *Oregon Laws 2003]*.

15 (B) “Loans and extensions of credit” does not *[include]* **mean** transactions
16 *[involving]* **that involve** a pawnbroker, as defined in ORS 726.010, that is
17 required to be licensed under ORS chapter 726.

18 (7) “Telephone solicitation” means a solicitation *[where]* **in which** a per-
19 son, in the course of the person’s business, vocation or occupation, uses a
20 telephone or an automatic dialing-announcing device to initiate telephonic
21 contact with a potential customer and the person is not one of the following:

22 (a) *[A person who is]* A broker-dealer or salesperson licensed under ORS
23 59.175, or a mortgage banker or mortgage broker licensed under ORS
24 86A.106, *[when]* **if** the solicitation is for a security qualified for sale *[pursu-*
25 *ant to]* **under** ORS 59.055.

26 (b) A real estate licensee or a person who is otherwise authorized to en-
27 gage in professional real estate activity *[pursuant to]* **under** ORS chapter
28 696, *[when]* **if** the solicitation involves professional real estate activity.

29 (c) A person licensed or exempt from licensure as a builder pursuant to
30 ORS chapter 701, *[when]* **if** the solicitation involves *[the construction, alter-*
31 *ation, repair, improvement or demolition of]* **constructing, altering, repair-**

1 **ing, improving or demolishing** a structure.

2 (d) A person licensed or otherwise authorized to sell insurance as an in-
3 surance producer pursuant to ORS chapter 744, [*when*] **if** the solicitation
4 involves insurance.

5 (e) A person [*soliciting*] **that solicits** the sale of a newspaper of general
6 circulation, a magazine or membership in a book or record club who complies
7 with ORS 646.611, [*when*] **if** the solicitation involves newspapers, magazines
8 or membership in a book or record club.

9 (f) A person [*soliciting*] **that solicits** without the intent to complete and
10 who does not complete [*the*] **a** sales presentation during the telephone solici-
11 tation and who only completes the sales presentation at a later face-to-face
12 meeting between the [*solicitor*] **person** and the prospective purchaser.

13 (g) A supervised financial institution or parent, subsidiary or affiliate
14 [*thereof*] **of a supervised financial institution**. As used in this paragraph,
15 “supervised financial institution” means any financial institution or trust
16 company, as those terms are defined in ORS 706.008, or any personal property
17 broker, consumer finance lender, commercial finance lender or insurer that
18 is subject to regulation by an official or agency of this state or of the United
19 States.

20 (h) A person who is authorized to conduct prearrangement or precon-
21 struction funeral or cemetery sales[, *pursuant to*] **under** ORS chapter 692,
22 [*when*] **if** the solicitation involves prearrangement or preconstruction funeral
23 or cemetery plans.

24 (i) A person who solicits the services [*provided by*] **that** a cable television
25 system licensed or franchised [*pursuant to*] **under** state, local or federal law
26 **provides**, [*when*] **if** the solicitation involves cable television services.

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

29 (k) A person [*who*] **that** sells farm products as defined by ORS 576.006,
30 if the solicitation [*neither intends to nor actually results*] **is not intended**
31 **to result in or does not actually result** in a sale that costs the purchaser

1 *[in excess of]* **more than** \$100.

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

6 (m) A person *[soliciting exclusively]* **that solicits only** the sale of tele-
7 phone answering services *[to be provided by]* that **the** person or *[that]* **the**
8 person's employer **will provide, if** *[when]* the solicitation involves answering
9 services.

10 (n) A telecommunications utility with access lines of 15,000 or less or a
11 cooperative telephone association, **if** *[when]* the solicitation involves regu-
12 lated goods or services.

13 (8) "Trade" and "commerce" mean advertising, offering or distributing,
14 whether by sale, rental or otherwise, any real estate, goods or services, and
15 include any trade or commerce directly or indirectly affecting the people of
16 this state.

17 (9) "Unconscionable tactics" *[include, but are]* **includes, but is** not lim-
18 ited to, actions by which a person:

19 (a) Knowingly takes advantage of a customer's physical infirmity, igno-
20 rance, illiteracy or inability to understand the language of the agreement;

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

23 (c) Permits a customer to enter into a transaction with knowledge that
24 *[there is no]* **the customer does not have a** reasonable probability of *[pay-*
25 *ment of]* **paying** the attendant financial obligation in full *[by the customer]*
26 when due; or

27 (d) Knowingly takes advantage of a customer who is a disabled veteran,
28 a disabled servicemember or a servicemember in active service, or the spouse
29 of a disabled veteran, disabled servicemember or servicemember in active
30 service. For purposes of this paragraph:

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

1 (B) “Disabled servicemember” means a servicemember, as defined in 50
2 U.S.C. App. 511 as in effect on January 1, 2010, who may be entitled to dis-
3 ability compensation under laws administered by the United States Depart-
4 ment of Veterans Affairs.

5 (C) “Servicemember in active service” means:

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

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

9 *[(10) A willful violation occurs when the person committing the violation*
10 *knew or should have known that the conduct of the person was a violation.]*

11 *[(11)]* (10) A loan is made “in close connection with the sale of a manu-
12 factured dwelling” if:

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

16 (b) The lender gives a commission, rebate or credit in any form to a seller
17 who refers the borrower to the lender, other than payment of the proceeds
18 of the loan jointly to the seller and the borrower;

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

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

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

24 (f) The lender supplies documents to the seller [*used by*] **that** the bor-
25 rower **uses** in obtaining the loan.

26 **SECTION 3.** ORS 646.605, as amended by section 12, chapter 658, Oregon
27 Laws 2003, section 199, chapter 71, Oregon Laws 2007, section 32, chapter 319,
28 Oregon Laws 2007, section 2, chapter 215, Oregon Laws 2009, and section 2,
29 chapter 94, Oregon Laws 2010, is amended to read:

30 646.605. As used in ORS 646.605 to 646.652:

31 (1) “Appropriate court” means the circuit court of a county:

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

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

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

6 (d) With the defendant's consent, where the prosecuting attorney main-
7 tains an office.

8 (2) "Documentary material" means the original or a copy of any book,
9 record, report, memorandum, paper, communication, tabulation, map, chart,
10 photograph, mechanical transcription, or other tangible document or record-
11 ing, wherever [*situate*] **located**.

12 (3) "Examination" [*of documentary material shall include inspection,*
13 *study*] **means inspecting, studying** or copying [*of any such*] **documentary**
14 **material[,] and taking testimony under oath or acknowledgment [*in respect***
15 ***of any such documentary material or copy thereof*] **about the documentary**
16 **material or a copy of the documentary material.****

17 (4) "Person" means **a natural** [*persons, corporations, trusts, partnerships,*]
18 **person, a corporation, a trust, a partnership, an** incorporated or unin-
19 **corporated** [*associations*] **association** and any other legal entity except
20 **bodies or officers acting under the** statutory authority of this state or the
21 **United States.**

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

25 (6)(a) "Real estate, goods or services" means [*those*] **real estate, goods**
26 **or services** that are or may be obtained primarily for personal, family or
27 household purposes, or that are or may be obtained for any purposes as a
28 result of a telephone solicitation, and includes loans and extensions of credit,
29 and franchises, distributorships and other similar business opportunities, but
30 does not include insurance.

31 (b) Notwithstanding paragraph (a) of this subsection:

1 (A) “Real estate” does not [*cover*] **mean** conduct [*covered by*] **that is**
2 **regulated under** ORS chapter 90.

3 (B) “Loans and extensions of credit” does not [*include*] **mean** transactions
4 [*involving*] **that involve** a pawnbroker, as defined in ORS 726.010, that is
5 required to be licensed under ORS chapter 726.

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9 contact with a potential customer and the person is not one of the following:

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12 86A.106, [*when*] **if** the solicitation is for a security qualified for sale [*pursu-*
13 *ant to*] **under** ORS 59.055.

14 (b) A real estate licensee or a person who is otherwise authorized to en-
15 gage in professional real estate activity [*pursuant to*] **under** ORS chapter
16 696, [*when*] **if** the solicitation involves professional real estate activity.

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18 ORS chapter 701, [*when*] **if** the solicitation involves [*the construction, alter-*
19 *ation, repair, improvement or demolition of*] **constructing, altering, repair-**
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27 or membership in a book or record club.

28 (f) A person [*soliciting*] **that solicits** without the intent to complete and
29 who does not complete [*the*] **a** sales presentation during the telephone solici-
30 tation and who only completes the sales presentation at a later face-to-face
31 meeting between the [*solicitor*] **person** and the prospective purchaser.

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2 *[thereof]* **of a supervised financial institution.** As used in this paragraph,
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4 company, as those terms are defined in ORS 706.008, or any personal property
5 broker, consumer finance lender, commercial finance lender or insurer that
6 is subject to regulation by an official or agency of this state or of the United
7 States.

8 (h) A person who is authorized to conduct prearrangement or precon-
9 struction funeral or cemetery sales¹, *[pursuant to]* **under** ORS chapter 692,
10 *[when]* **if** the solicitation involves prearrangement or preconstruction funeral
11 or cemetery plans.

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13 system licensed or franchised *[pursuant to]* **under** state, local or federal law
14 **provides,** *[when]* **if** the solicitation involves cable television services.

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16 Public Utility Commission of Oregon.

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18 if the solicitation *[neither intends to nor actually results]* **is not intended**
19 **to result in or does not actually result** in a sale that costs the purchaser
20 *[in excess of]* **more than** \$100.

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

25 (m) A person *[soliciting exclusively]* **that solicits only** the sale of tele-
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28 services.

29 (n) A telecommunications utility with access lines of 15,000 or less or a
30 cooperative telephone association, **if** *[when]* the solicitation involves regu-
31 lated goods or services.

1 (8) “Trade” and “commerce” mean advertising, offering or distributing,
2 whether by sale, rental or otherwise, any real estate, goods or services, and
3 include any trade or commerce directly or indirectly affecting the people of
4 this state.

5 (9) “Unconscionable tactics” [*include, but are*] **includes, but is** not lim-
6 ited to, actions by which a person:

7 (a) Knowingly takes advantage of a customer’s physical infirmity, igno-
8 rance, illiteracy or inability to understand the language of the agreement;

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

11 (c) Permits a customer to enter into a transaction with knowledge that
12 [*there is no*] **the customer does not have a** reasonable probability of [*pay-*
13 *ment of*] **paying** the attendant financial obligation in full [*by the customer*]
14 when due; or

15 (d) Knowingly takes advantage of a customer who is a disabled veteran,
16 a disabled servicemember or a servicemember in active service, or the spouse
17 of a disabled veteran, disabled servicemember or servicemember in active
18 service. For purposes of this paragraph:

19 (A) “Disabled veteran” has the meaning given that term in ORS 408.225.

20 (B) “Disabled servicemember” means a servicemember, as defined in 50
21 U.S.C. App. 511 as in effect on January 1, 2010, who may be entitled to dis-
22 ability compensation under laws administered by the United States Depart-
23 ment of Veterans Affairs.

24 (C) “Servicemember in active service” means:

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

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

28 [*(10) A willful violation occurs when the person committing the violation*
29 *knew or should have known that the conduct of the person was a violation.*]

30 [*(11)*] **(10)** A loan is made “in close connection with the sale of a manu-
31 factured dwelling” if:

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

4 (b) The lender gives a commission, rebate or credit in any form to a seller
5 who refers the borrower to the lender, other than payment of the proceeds
6 of the loan jointly to the seller and the borrower;

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

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

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

12 (f) The lender supplies documents to the seller [*used by*] **that** the bor-
13 rower **uses** in obtaining the loan.

14 **SECTION 4.** ORS 646.638 is amended to read:

15 646.638. (1) Except as provided in subsections (8) and (9) of this section,
16 [*any*] a person who suffers any ascertainable loss of money or property, real
17 or personal, as a result of [*willful use or employment by another person of*]
18 **another person's knowingly employing** a method, act or practice [*declared*
19 *unlawful by*] **that is unlawful under** ORS 646.608, may bring an individual
20 action in an appropriate court to recover actual damages or statutory dam-
21 ages of \$200, whichever is greater. The court or the jury[, *as the case may*
22 *be,*] may award punitive damages and the court may provide [*the*] equitable
23 relief the court considers necessary or proper.

24 (2) [*Upon commencement of any action brought*] **After bringing an action**
25 under subsection (1) of this section, a [*the*] party [*bringing the action*] shall
26 mail a copy of the complaint or other initial pleading to the Attorney Gen-
27 eral and, upon entry of any judgment in the action, shall mail a copy of the
28 judgment to the Attorney General. [*Failure*] **Failing** to mail a copy of the
29 complaint [*shall not be*] **is not** a jurisdictional defect, but a court may not
30 enter judgment for the plaintiff until proof of mailing is filed with the court.
31 Proof of mailing may be by affidavit or by return receipt of mailing.

1 (3) The court may award reasonable attorney fees and costs at trial and
 2 on appeal to a prevailing plaintiff in an action under this section. The court
 3 may award reasonable attorney fees and costs at trial and on appeal to a
 4 prevailing defendant only if the court finds [*there was no*] **that an** objec-
 5 tively reasonable basis for bringing the action or asserting the ground for
 6 appeal **did not exist**.

7 (4) The court may not award attorney fees to a prevailing defendant under
 8 the provisions of subsection (3) of this section if the action under this section
 9 is maintained as a class action [*pursuant to*] **in accordance with** ORCP 32.

10 (5) Any permanent injunction or final judgment or order of the court
 11 made under ORS 646.632 or 646.636 is prima facie evidence in an action
 12 brought under this section that the respondent used or employed a method,
 13 act or practice [*declared unlawful by*] **that is unlawful under** ORS 646.608,
 14 but an assurance of voluntary compliance, whether or not approved by the
 15 court, [*shall not be*] **is not** evidence of the violation.

16 (6) Actions brought under this section [*shall be commenced*] **must be**
 17 **brought** within one year [*from*] **after** the discovery of the unlawful method,
 18 act or practice. However, whenever [*any complaint is filed by*] a prosecuting
 19 attorney **files a complaint** to prevent, restrain or punish violations of ORS
 20 646.608, [*running of*] the statute of limitations **does not run** with respect to
 21 every private right of action under this section [*and*] **that is** based in whole
 22 or in part on any matter complained of in [*said*] **the** proceeding [*shall be*
 23 *suspended during the pendency thereof*] **while the proceeding is pending**.

24 (7) Notwithstanding subsection (6) of this section, in any action brought
 25 by a seller or lessor against a purchaser or lessee of real estate, goods or
 26 services, the purchaser or lessee may assert any counterclaim the purchaser
 27 or lessee has [*arising*] **that arises** out of a violation of ORS 646.605 to
 28 646.652.

29 (8) A class action may be maintained under this section. In any class
 30 action under this section:

31 (a) Statutory damages under subsection (1) of this section may be recov-

1 ered on behalf of class members only if the plaintiffs in the action establish
2 that the members have sustained an ascertainable loss of money or property
3 as a result of a [*reckless or*] **defendant's** knowing use or employment [*by the*
4 *defendant*] of a method, act or practice [*declared unlawful by*] **that is un-**
5 **lawful under** ORS 646.608;

6 (b) The trier of fact may award punitive damages; and

7 (c) The court may award appropriate equitable relief.

8 (9) This section does not apply to any method, act or practice described
9 in ORS 646.608 (1)(aa). Actions for violation of laws relating to odometers
10 are provided under ORS 815.410 and 815.415.

11 **SECTION 5.** ORS 646.641 is amended to read:

12 646.641. (1) Any person injured as a result of [*willful use or employment*
13 *by another person of*] **another person's knowingly using or employing** an
14 unlawful collection practice may bring an action in an appropriate court to
15 enjoin the practice or to recover actual damages or \$200, whichever is
16 greater. The court or the jury may award punitive damages, and the court
17 may provide [*such*] equitable relief [*as it*] **the court** deems necessary or
18 proper.

19 (2) In any action [*brought by*] a person **brings** under this section, the
20 court may award reasonable attorney fees to the prevailing party.

21 (3) Actions brought under this section [*shall*] **must** be commenced within
22 one year [*from*] **after** the date of the injury.

23 **SECTION 6.** The amendments to ORS 30.138, 646.605, 646.638 and
24 646.641 by sections 1 to 5 of this 2013 Act apply to actions brought on
25 or after the effective date of this 2013 Act.

26