

The House Committee on Banks and Banking offers the following substitute to SB 90:

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 10 of the Official Code of Georgia Annotated, relating to commerce and
2 trade, so as to add an example of an unfair or deceptive practice regarding brokerage
3 engagements and options to enter into brokerage engagements to the "Fair Business Practices
4 Act"; to provide for commercial financing disclosures; to require certain persons who provide
5 commercial financing transactions to make certain disclosures; to provide for penalties; to
6 provide for applicability; to provide for requirements and restrictions on certain unsolicited
7 written inquiries or mailings expressing an interest in buying real property; to revise
8 provisions regarding the duration of relationships between brokers and clients; to provide for
9 limitations on brokerage engagements and options to enter into brokerage engagements; to
10 provide for construction; to provide for definitions; to amend Code Section 46-5-27 of the
11 Official Code of Georgia Annotated, relating to telephone solicitations to residential, mobile,
12 or wireless subscribers, Public Service Commission to establish and maintain list of certain
13 subscribers, authorization for imposition of administrative fees, confidential nature of data
14 base, and required identification, so as to revise a definition; to provide for an effective date;
15 to provide for related matters; to repeal conflicting laws; and for other purposes.

16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

17 **SECTION 1.**

18 Title 10 of the Official Code of Georgia Annotated, relating to commerce and trade, is
19 amended in Part 2 of Article 15 of Chapter 1, relating to the "Fair Business Practices Act of
20 1975," by striking "and" at the end of paragraph (33), striking the period at the end of
21 paragraph (34) and inserting "; and" in lieu thereof, and by adding a new paragraph to
22 subsection (b) of Code Section 10-1-393, relating to unfair or deceptive practices in
23 consumer transactions unlawful and examples, to read as follows:

24 "(35) Failure to comply with the provisions of Code Section 10-6A-9 or 10-6A-10
25 regarding brokerage engagements and options to enter into brokerage engagements."

26 **SECTION 2.**

27 Said title is further amended by adding new Code sections to read as follows:

28 "10-1-393.18.

29 (a) As used in this Code section, the term:

30 (1) 'Accounts receivable purchase transaction' means a transaction in which a business
31 forwards or otherwise sells to a person all or a portion of the business's accounts, as
32 defined in Code Section 11-9-102, or payment intangibles, as defined in Code Section
33 11-9-102, at a discount to the accounts' or payment intangibles' expected value.

34 (2) 'Advance fee' means any consideration which is assessed or collected prior to the
35 closing of a commercial financing transaction by a broker.

36 (3) 'Broker' means a person who, for compensation or the expectation of compensation,
37 arranges a commercial financing transaction between a third party and a business in the
38 state that would, if executed, be binding upon that third party and communicates that
39 offer to a business located in this state. Such term excludes a 'provider,' and any
40 individual or entity whose compensation is not based or dependent upon on the terms of
41 the specific commercial financing transaction obtained or offered.

42 (4) 'Business' means a private enterprise carried on for the purpose of gain or economic
43 profit.

44 (5)(A) 'Business purpose transaction' means a transaction from which the resulting
45 proceeds that a business receives are:

46 (i) Provided to the business; or

47 (ii) Intended to be used to carry on the business.

48 (B) Such term shall not include a transaction from which the resulting proceeds are
49 intended to be used for personal, family, or household purposes.

50 (C) For purposes of determining whether a transaction is a business purpose
51 transaction, a provider may rely on a written statement of intended purpose, signed by
52 an individual authorized to sign on behalf of the business. Such written statement may
53 be contained in an application, agreement, or other document signed by an individual
54 authorized to sign on behalf of the business.

55 (6) 'Commercial financing transaction' means a business purpose transaction:

56 (A) Under which a person extends a business a commercial loan or a commercial
57 open-end credit plan; or

58 (B) That is an accounts receivable purchase transaction.

59 (7) 'Commercial loan' means a loan to a business, regardless of whether the loan is
60 secured.

61 (8) 'Commercial open-end credit plan' means commercial financing extended to a
62 business on terms under which:

63 (A) The creditor reasonably contemplates repeat transactions; and

64 (B) Subject to any limit set by the creditor, the amount of financing that the creditor
65 may extend to the business during the term of the plan is made available to the extent
66 that any outstanding balance is repaid.

67 (9) 'Motor vehicle dealer' means a dealer as defined in Code Section 40-2-39 or a used
68 motor vehicle dealer as defined in Code Section 43-47-2.

69 (10) 'Provider' means a person who consummates more than five commercial financing
70 transactions in this state during any calendar year and includes, but is not limited to, a
71 person who, under a written agreement with a depository institution, offers one or more
72 commercial financing products provided by the depository institution via an online
73 platform that the person administers.

74 (b) The provisions of this Code section shall not apply to:

75 (1) A provider that is a federally insured depository financial institution;

76 (2) A provider that is:

77 (A) A subsidiary, an affiliate, or a holding company of a federally insured depository
78 financial institution; or

79 (B) A service corporation for a federally insured depository financial institution;

80 (3) A provider that is regulated under the federal Farm Credit Act, 12 U.S.C. Section
81 2001, et seq.;

82 (4) A provider that is licensed as a money transmitter in accordance with Article 4 of
83 Chapter 1 of Title 7;

84 (5) A provider that consummates five or fewer commercial financing transactions in the
85 state during any 12 month period;

86 (6) A commercial financing transaction secured by real property;

87 (7) A commercial financing transaction that is a lease as defined in Code Section
88 11-2A-103;

89 (8) A commercial financing transaction that is a purchase money obligation as defined
90 in Code Section 11-9-103;

91 (9) A commercial financing transaction that:

92 (A) Involves a commercial loan or a commercial open-end credit plan;

93 (B) Is \$50,000.00 or more; and

94 (C) Extends the commercial loan or the commercial open-end credit plan to:

95 (i) A motor vehicle dealer or the motor vehicle dealer's affiliate; or

- 96 (ii) A motor vehicle rental company as defined in Code Section 40-2-167 or the
97 motor vehicle rental company's affiliate;
- 98 (10) A commercial financing transaction offered by a person in connection with the sale
99 or lease of a product or service that:
- 100 (A) The person manufactures, licenses, or distributes; or
101 (B) The person's parent company or any of such parent company's directly or indirectly
102 owned and controlled subsidiaries manufactures, licenses, or distributes;
- 103 (11) A commercial financing transaction of more than \$500,000.00; or
104 (12) A commercial financing product that is a factoring transaction, purchase, sale,
105 advance, or similar of accounts receivables owed to a healthcare provider because of a
106 patient's personal injury treated by the healthcare provider.
- 107 (c) For purposes of Chapter 1 of Title 7, a provider's characterization of an accounts
108 receivable purchase transaction as a purchase shall be conclusive that the accounts
109 receivable purchase transaction is not a loan or a transaction for the use, forbearance, or
110 detention of money.
- 111 (d) For purposes of Chapter 1 of Title 7, a provider extending a specific offer for a
112 commercial financing transaction on behalf of a depository institution shall not be
113 construed to mean that the provider engaged in lending or financing or originated that loan
114 or financing.
- 115 (e)(1) Before consummating a commercial financing transaction, a provider shall
116 disclose the terms of the commercial financing transaction in accordance with this Code
117 section.
- 118 (2) Only one disclosure must be provided for each commercial financing transaction, and
119 a disclosure is not required as a result of the modification, forbearance, or change to a
120 consummated commercial financing transaction.
- 121 (3) A provider shall disclose the following information in connection with each
122 commercial financing transaction:

- 123 (A) The total amount of funds provided to the business under the terms of the
124 commercial financing transaction;
- 125 (B) The total amount of funds disbursed to the business under the terms of the
126 commercial financing transaction, if less than the amount described in
127 subparagraph (A) of this paragraph, as a result of any fees deducted or withheld at
128 disbursement, any amount paid to the provider to satisfy a prior balance, and any
129 amount paid to a third party on behalf of the business;
- 130 (C) The total amount to be paid to the provider under the terms of the commercial
131 financing transaction;
- 132 (D) The total dollar cost of the commercial financing transaction, calculated by finding
133 the difference between:
- 134 (i) The amount described in subparagraph (A) of this paragraph; and
135 (ii) The amount described in subparagraph (C) of this paragraph;
- 136 (E)(i) The manner, frequency, and amount of each payment; or
137 (ii) If the amount of each payment may vary, the manner, frequency, and estimated
138 amount of the initial payment; and
- 139 (F) A statement of whether there are any costs or discounts associated with prepayment
140 under the commercial financing transaction, including a reference to the paragraph in
141 the commercial financing transaction agreement that creates each cost or discount.
- 142 (4) The commercial financing transaction agreement shall include a description of the
143 methodology for calculating any variable payment amount and the circumstances that
144 may cause a payment amount to vary.
- 145 (5) The provisions of this subsection shall apply to any commercial financing transaction
146 consummated on or after January 1, 2024.
- 147 (f) No broker shall:
- 148 (1) Assess, collect, or solicit an advance fee from a business to provide services as a
149 broker; provided, however, that nothing contained in this paragraph shall preclude a

150 broker from soliciting a potential business to pay for, or preclude a potential business
151 from paying for, actual services necessary to apply for a commercial financing
152 transaction, including, but not limited to, a credit check or an appraisal of security, where
153 such payment is made by check or money order payable to a party independent of the
154 broker;

155 (2) Make or use any false or misleading representations or omit any material fact in the
156 offer or sale of the services of a broker or engage, directly or indirectly, in any act that
157 operates or would operate as fraud or deception upon any person in connection with the
158 offer or sale of the services of a broker, notwithstanding the absence of reliance by the
159 buyer; or

160 (3) Make or use any false or deceptive representation in its business dealings.

161 (g) The Attorney General may:

162 (1) Receive and act on complaints;

163 (2) Take action designed to obtain voluntary compliance with this Code section; and

164 (3) Commence administrative or judicial proceedings on the Attorney General's own
165 initiative to enforce compliance with this Code section.

166 (h) A person who violates a provision of this Code section is subject to a civil penalty of
167 \$500.00 per violation, not to exceed \$20,000.00 for all violations arising from the use of
168 the same transaction documentation or materials.

169 (i) A person who violates a provision of this Code section after receiving written notice
170 of a prior violation is subject to a civil penalty of \$1,000.00 per violation, not to exceed
171 \$50,000.00 for all violations arising from the use of the same transaction documentation
172 or materials.

173 (j) Nothing in this Code section creates a private right of action against any person based
174 on failure to comply with the provisions of this Code section.

175 (k) A violation of this Code section shall not affect the enforceability of any underlying
176 agreement.

177 10-1-393.19.

178 (a) Any unsolicited written inquiry or mailing by any person or entity that is not licensed
179 or regulated pursuant to the provisions of Chapter 40 or Chapter 41 of Title 43 or
180 Chapter 19 of Title 15 that expresses an interest in buying real property, or an option to buy
181 real property, from the addressee or in buying the real property to which such written
182 inquiry or mailing is addressed or that offers services relating to the sale of real estate shall
183 include:

184 (1)(A) At the top of and at least two inches apart from any other text on such written
185 inquiry or mailing, the following notice in capital letters:

186 'THIS IS A SOLICITATION. THE SENDER IS CONTACTING YOU TO
187 INQUIRE AS TO YOUR INTEREST IN SELLING YOUR HOME OR OTHER
188 REAL ESTATE. YOU ARE UNDER NO OBLIGATION TO RESPOND.'

189 (B) No text contained in such solicitation shall be larger than the text required in
190 subparagraph (A) of this paragraph.

191 (2) On front of the envelope or, if there is no envelope, on the part of the written inquiry
192 or mailing that bears the postage stamp or postage amount, the following notice in capital
193 letters:

194 'SOLICITATION. YOU ARE UNDER NO OBLIGATION TO OPEN OR TO
195 RESPOND.'

196 (3) The notices required in paragraphs (1) and (2) of this subsection shall be:

197 (A) Of a font that is the same as the majority of the text of the written inquiry or
198 mailing;

199 (B) Of a size which is no smaller than the text of the written inquiry or mailing, and in
200 no event no smaller than 16 point font; and

201 (C) Displayed in a distinctly contrasting color.

202 (b) Failure to comply with the provisions of this Code section shall be considered an unfair
203 or deceptive act or practice which is unlawful and shall therefore be punishable by the

204 provisions of this part; provided, however, that notwithstanding Code Section 10-1-399,
205 a claim of a violation of this Code section may be brought in a representative capacity and
206 may be the subject of a class action under Code Section 9-11-23; and provided, further, that
207 damages for such violation shall be the actual damages or \$200.00 per violation, whichever
208 is greater."

209 **SECTION 3.**

210 Said title is further amended by adding a new paragraph to Code Section 10-6A-3, relating
211 to definitions relative to brokerage relationships in real estate transactions, to read as follows:

212 "(12.1) 'Option to enter into a brokerage engagement' means a written contract wherein
213 a broker pays valuable consideration or agrees that a seller, buyer, landlord, or tenant may
214 receive a valuable consideration from another in consideration of such seller, buyer,
215 landlord, or tenant granting such broker an exclusive right to enter into a brokerage
216 engagement with such seller, buyer, landlord, or tenant during the term of the written
217 contract."

218 **SECTION 4.**

219 Said title is further amended by revising subsection (a) of Code Section 10-6A-9, relating to
220 duration of relationships between brokers and clients, as follows:

221 "(a) The relationships set forth in Code Sections 10-6A-4 through 10-6A-8 and, Code
222 Sections Section 10-6A-12 and, Code Section 10-6A-13, and an option to enter into a
223 brokerage engagement shall commence at the time that the client engages the broker or
224 executes an option to enter into a brokerage engagement, and shall continue until:

- 225 (1) Completion of performance of the engagement; or
226 (2) If paragraph (1) of this subsection is not applicable, then the earlier of:
227 (A) Any date of expiration agreed upon by the parties in the brokerage engagement,
228 the option to enter into a brokerage engagement, or in any amendments thereto;

- 229 (B) Any authorized termination of the relationship; or
230 (C) If no expiration is provided and no authorized termination has occurred, then one
231 year after initiation of the brokerage engagement or one year after the date the option
232 to enter into a brokerage engagement was executed."

233 **SECTION 5.**

234 Said title is further amended by revising Code Section 10-6A-10, relating to duties of brokers
235 prior to entering into brokerage engagement relationships, as follows:

236 "10-6A-10.

237 (a) All brokerage engagements must:

238 (1) Advise the prospective client of the types of agency relationships available through
239 the broker;

240 (2) Advise such prospective client of any brokerage relationships held by such broker
241 with other parties which would conflict with any interests of the prospective client
242 actually known to the broker but excluding the fact that the broker may be representing
243 other sellers and landlords in selling or leasing property or that the broker may be
244 representing other buyers and tenants in buying or leasing other property;

245 (3) Advise such prospective client as to the broker's compensation and whether the
246 broker will share such compensation with other brokers who may represent other parties
247 to the transaction in an agency capacity; and

248 (4) Advise the prospective client of the broker's obligations to keep information
249 confidential under this chapter.

250 (b) A brokerage engagement or an option to enter into a brokerage engagement shall not:

251 (1) Purport to be a covenant running with the land or to be binding on future owners of
252 interests in the subject property, except for rights solely applicable to commercial real
253 estate as set forth in Code Section 44-14-602;

254 (2) Allow for assignment of the right to provide service without notice and agreement
255 of the owner of the subject property, except for such rights of assignment for commercial
256 real estate as set forth in Code Section 44-14-602 or as part of the sale or merger of a
257 brokerage firm; or

258 (3) Purport to create a recordable lien, encumbrance, or other real property security
259 interest. Any such lien, encumbrance, or other real property security interest, if recorded,
260 shall be void and unenforceable and no release or voiding of such lien, encumbrance, or
261 other real property security interest shall be required; provided, however, that this
262 subsection shall not be applicable to lien rights solely applicable to commercial real estate
263 as set forth in Code Section 44-14-602.

264 (c) This Code section shall not apply to:

265 (1) A home warranty, building warranty, or other similar product that covers the cost of
266 maintenance of a home's or other building's system or systems for a prescribed period of
267 time from the date such home or building is sold;

268 (2) An insurance contract;

269 (3) An option to purchase, a put requirement to purchase, a right of first offer, or a right
270 of refusal;

271 (4) A declaration created in the formation of a common interest community or an
272 amendment thereto;

273 (5) A maintenance or repair agreement entered into by a homeowners' or property
274 owners' association in a common interest community;

275 (6) A loan or a commitment to make or receive a loan secured by real estate;

276 (7) A security agreement under the Uniform Commercial Code relating to the sale or
277 rental of personal property or fixtures;

278 (8) Water, sewer, electrical, telephone, cable, or other regulated utility service providers;

279 or

280 (9) A property management agreement by which the owner of the real property shall
281 contract with a party to provide management services for the maintenance, ownership,
282 operation, or lease of real property, provided that the real estate that is the subject of the
283 property management agreement is either for commercial real estate as defined by Code
284 Section 44-14-601 or is for residential one- to four-family real estate that is otherwise not
285 occupied by the owner or owner's family members as their principal place of residence
286 and place of abode as of the date of inception of such property management agreement.
287 (d) This Code section shall not be construed to impair the rights granted by Code
288 Sections 44-14-361, 44-14-361.1, 44-14-602, and 9-12-80.
289 (e) This Code section shall not be construed to create any statutory lien right or statutory
290 right to create a cloud on title that is not otherwise created elsewhere in the Official Code
291 of Georgia Annotated."

292 **SECTION 6.**

293 Code Section 46-5-27 of the Official Code of Georgia Annotated, relating to telephone
294 solicitations to residential, mobile, or wireless subscribers, Public Service Commission to
295 establish and maintain list of certain subscribers, authorization for imposition of
296 administrative fees, confidential nature of data base, and required identification, is amended
297 by revising paragraph (3) of subsection (b) as follows:

298 "(3) 'Telephone solicitation' means any voice communication over a telephone line for
299 the purpose of encouraging the purchase or rental of, or investment in, personal property,
300 real property, goods, or services, but does not include communications:

301 (A) To any residential, mobile, or wireless subscriber with that subscriber's prior
302 express invitation or permission;

303 (B) By or on behalf of any person or entity with whom a residential, mobile, or
304 wireless subscriber has a prior or current business or personal relationship; or

305 (C) By or on behalf of a charitable organization which has filed a registration statement
306 pursuant to Code Section 43-17-5, is exempt from such registration under
307 paragraphs (1) through (6) of subsection (a) of Code Section 43-17-9, or is exempt from
308 such registration as a religious organization or agency referred to in paragraph (2) of
309 Code Section 43-17-2; or

310 (D) By any person who is licensed or regulated pursuant to Chapter 40 or Chapter 41
311 of Title 43 or Chapter 19 of Title 15.

312 Such communication may be from a live operator, through the use of ADAD equipment
313 as defined in Code Section 46-5-23, or by other means."

314 **SECTION 7.**

315 This Act shall become effective on January 1, 2024.

316 **SECTION 8.**

317 All laws and parts of laws in conflict with this Act are repealed.