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## COMMERCE AND TRADE

### *Promotional Contests: Compliance With Fair Business Practice Act Requirements*

CODE SECTIONS:	O.C.G.A. §§ 10-1-392 (amended), 10-1-393 (amended), 16-12-36 (amended), and 44-3-188 (amended)
BILL NUMBER:	HB 1439
ACT NUMBER:	1620
SUMMARY:	The Act regulates promotional giveaways and contests under the Fair Business Practices Act by requiring disclosure of the value and chance of receiving the prizes, gifts, or awards.

#### *History*

In 1982, the Criminal Code sections prohibiting gambling activities and lotteries were amended to legalize and regulate the use of promotional contests in sales campaigns.<sup>1</sup> In addition to criminal penalties, the 1982 amendments provided that failure to comply with the regulations set forth in O.C.G.A. §§ 16-12-20 and 16-12-36 was a violation of the Fair Business Practices Act of 1975 (FBPA).<sup>2</sup> O.C.G.A. § 16-12-36(f) allowed the administrator of the FBPA to file suit and enjoin the operations of promotions. However, sales promoters adopted practices which exposed loopholes in this statute and avoided the consequences of violating O.C.G.A. § 16-12-36.<sup>3</sup> Georgia residents were being subjected to high pressure sales and empty promises of valuable gifts which in reality were items of little value.<sup>4</sup> Community opinion indicated that the law was inadequate to effectively control unscrupulous sales tactics of promoters.

The Governor's Office of Consumer Affairs recommended HB 1439 to the Georgia General Assembly's Subcommittee on Small Business of the House Industry Committee to close loopholes which permitted promotional sales abuses.<sup>5</sup>

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1. 1982 Ga. Laws 1661 (codified at O.C.G.A. §§ 16-12-20, 16-12-36 (1984)).

2. O.C.G.A. § 16-12-36(f) (1984). For the Fair Business Practices Act see O.C.G.A. §§ 10-1-390—10-1-407 (1982 & Supp. 1986).

3. Interview with James S. Hurt, Governor's Office of Consumer Affairs, in Atlanta (May 13, 1986).

4. Telephone interview with Representative George Hooks, House District No. 116 (Mar. 26, 1986) [hereinafter cited as Hooks Interview].

5. *Id.*

*HB 1439*

The Act moves regulation of promotional giveaways and contests out of the lottery statutes,<sup>6</sup> places it under the FBPA<sup>7</sup> and tightens the disclosure requirements.<sup>8</sup>

The Act renumbers the existing text and inserts a new subsection (8) to O.C.G.A. § 10-1-392(a) to define "promotional giveaway or contest" which broadens the range of activities allowed under the previous definition of permissible promotional contests in O.C.G.A. § 16-12-36.<sup>9</sup> The definition limits applicability of the Act to consumer transactions, and specifically excludes contests or giveaways in which receipt of prizes is conditioned upon purchase, if such condition is clearly stated in the advertising or literature.<sup>10</sup>

The Act further adds a new subsection (16) to O.C.G.A. § 10-1-393(b) which sets forth compliance requirements for promotional giveaways. The new requirements are similar to those under the lottery law<sup>11</sup> with the following differences: 1) notification of opportunity to participate may be personally delivered in advance rather than by mail only; 2) the promotion may advertise goods and services as well as real estate; and 3) each mailing must name the sponsor and promoter.<sup>12</sup>

The new O.C.G.A. § 10-1-393(b)(16)(C) provides that recipients are not required to pay any consideration for prizes or awards received, "other than the consideration of traveling to the place of business or to the presentation or of allowing the presentation to be made in the participant's home." O.C.G.A. § 10-1-393(b)(16)(D) requires the mailing to include the "verifiable retail value" of the giveaway instead of the "actual cash value."<sup>13</sup> "Verifiable retail value" is the lesser of the documented retail price or three times the price the promoter paid for the item. This requirement eliminates false claims of gifts valued at hundreds of dollars which are actually of little value. This subsection also requires that the odds of winning be included in the mailing.

O.C.G.A. § 10-1-393(b)(16)(E) retains the requirement that the participant be informed immediately if he or she wins a prize.<sup>14</sup> However, the Act expands the requirement of immediately awarding the prize to in-

6. O.C.G.A. §§ 16-12-20, 16-12-36 (1984).

7. O.C.G.A. §§ 10-1-390—10-1-407 (1982 & Supp. 1986).

8. See O.C.G.A. § 10-1-393(b)(16) (Supp. 1986); *Promotional Contest Requirements: Hearings on HB 1439 Before the House Industrial Comm.* 1986 Ga. Gen. Assem. (Feb. 4, 1986) (statement of Barry W. Reid, Administrator of the Governor's Office of Consumer Affairs).

9. Compare O.C.G.A.) § 10-1-392(a)(8) (Supp. 1986) with O.C.G.A. § 16-12-36(b) (1984).

10. O.C.G.A. § 10-1-392(a)(8) (Supp. 1986).

11. O.C.G.A. § 16-12-36(c) (1984).

12. O.C.G.A. § 10-1-393(b)(16)(A) and (B) (Supp. 1986).

13. Compare O.C.G.A. § 10-1-393(b)(16)(D) with O.C.G.A. § 16-12-36(c)(4) (1984).

14. See O.C.G.A. § 16-12-36(c)(5) (1984).

clude "other evidence of obligation in lieu of the prize." The participant is not required to participate in a sales presentation unless such a requirement was disclosed in the mailing or delivery in bold type. Notifying the participant after he or she has been informed of whether or not he or she won a prize and received the prize does not satisfy the statutory requirement.<sup>15</sup>

The Act adds several new requirements in subsections (G) through (L) of O.C.G.A. § 10-1-393(b)(16). The requirements are: 1) the notice must clearly disclose if the gift is conditioned on a purchase (G); 2) the notice must clearly disclose any limitation as to eligibility of participants (H); 3) if a prize or gift is unavailable the participant must be given a thirty-day certificate or a check of equal value (I); 4) the promoter is responsible for the certificate (J); 5) the geographical area of the mailing must be conspicuously stated and any limitations explained (K); and 6) the promoter must provide information on gift recipients to the administrator of the FBPA within ten days of such request (L).

The removal of O.C.G.A. § 16-12-36(a) and (b) has caused some concern that contest-sponsoring companies such as grocery stores will be in violation of the lottery and promotional giveaway statutes.<sup>16</sup> However, the Act does not include activities by these groups when there is no element of chance.<sup>17</sup> Their promotions, which involve an element of chance, may be interpreted to require compliance with the regulations of promotional giveaways under the new O.C.G.A. § 10-1-392 which are similar to the regulations under the new O.C.G.A. § 16-12-36.<sup>18</sup>

Subsections (b)-(h) of O.C.G.A. § 16-12-36 are eliminated entirely and replaced with subsection (b) which retains the illegality of all promotional contests not specifically exempted or within the requirements of the new O.C.G.A. § 10-1-393.

A related statute, O.C.G.A. § 44-3-188 makes it unlawful to offer a prize or gift time-share project with the intent to offer a sales presentation without making enumerated disclosures. This code section specifically applies to O.C.G.A. § 16-12-36.<sup>19</sup> In conclusion, the substantive portion of the Act tracks O.C.G.A. § 16-12-36 but expands it to allow promotional giveaways to cover seminars as well as personalty and real estate. The Act specifies the requirements which must be met by sponsors of promotional giveaways to require more clarity in disclosures to the public and distribution of gifts which fairly meet the expectations of the general public. It further extends the remedy of the FBPA Administrator.

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15. O.C.G.A. § 10-1-393(b)(16)(F) (Supp. 1986).

16. See Hooks Interview, *supra* note 4.

17. *Id.*

18. *Id.*

19. O.C.G.A. § 44-3-188(b) (Supp. 1986).