Michael J. O'Neill *Legislative Service Commission*

Sub. S.B. 2

123rd General Assembly
(As Passed by the Senate)

Sens. Carnes, Watts, Mumper, Oelslager, Johnson, Spada, Gardner, Armbruster

BILL SUMMARY

- Clarifies that multiple offenses of petty theft, theft, grand theft, grand theft of a motor vehicle, aggravated theft, or theft of drugs may be tried as a single offense when they involve a common course of conduct to defraud multiple victims.

- In the law that sets forth criminal prohibitions related to the solicitation of contributions for a charitable organization or charitable purpose and to the conduct of charitable sales promotions: (1) modifies one of the existing prohibitions so that it pertains to the commission of deceptive acts or practices instead of the commission of *unfair or* deceptive acts or practices, (2) defines deceptive act or practice for purposes of the prohibition, increases the penalty for a violation of that prohibition and provides a four-tiered penalty structure under which the penalty increases as the value of the solicitation involved increases, (3) provides for joinder in prosecution of multiple violations of the prohibition, and (4) specifies that a violation of this prohibition (instead of a violation of any of the existing prohibitions) is the offense of "solicitation fraud."

- In the law that sets forth criminal prohibitions related to the solicitation of contributions for a charitable organization or charitable purpose and to the conduct of charitable sales promotions, adds a new prohibition against misleading any person as to any material fact concerning the solicitation of contributions for a charitable organization or a charitable purpose or concerning a charitable sales promotion.

- In the law that sets forth criminal prohibitions related to the solicitation of contributions for a charitable organization or charitable purpose and to the conduct of charitable sales promotions, modifies two existing

prohibitions that pertain to misleading persons by replacing references to "misrepresenting" certain things to a person with references to "making or using any representation" to a person "that implies" those things to the person.

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CONTENT AND OPERATION

Multiple theft offenses

Existing law

Theft offenses contained in R.C. 2913.02. Existing law prohibits a person, with purpose to "deprive" the "owner" of "property" or "services," from knowingly obtaining or exerting control over either the property or services in any of the following ways: (1) without the consent of the owner or person authorized to give consent, (2) beyond the scope of the express or implied consent of the owner or person authorized to give consent, (3) by "deception," or (4) by threat (see **COMMENT** 1 for definitions of the terms in quotes).

A violation of the prohibition described in the preceding paragraph is named, and classified, as follows: (1) generally, a violation is petty theft, a misdemeanor of the first degree, (2) if the value of the property or services stolen is $500 or more and is less than $5,000 or if the property stolen is any property listed in R.C. 2913.71 (see **COMMENT** 2), a violation is theft, a felony of the fifth degree, (3) if the value of the property or services stolen is $5,000 or more and is less than $100,000 or if the property stolen is a firearm or dangerous ordnance, a violation is grand theft, a felony of the fourth degree, (4) if the property stolen is a motor vehicle, a violation is grand theft of a motor vehicle, a felony of the fourth degree, (5) if the value of the property or services stolen is $100,000 or more, a violation is aggravated theft, a felony of the third degree, and (6) if the property stolen is any dangerous drug, a violation is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree. (R.C. 2913.02.)

Determination of the value of property or services involved in a theft offense. Existing law provides that, if a person is charged with a theft offense, including a violation of R.C. 2913.02, involving property or services valued in a specified range that is linked to the penalties for the offense, the jury or court trying the case must determine the value of the involved property or services as of the time of the offense and, if it returns a guilty verdict, must return the finding as part of the verdict. It is sufficient for the jury or court to return a finding to the effect that the value of the property or services involved was within one of the specified ranges and is unnecessary to find the exact value. When more than one item of property or services is involved in a theft offense, the value for purposes of this provision is the aggregate value of all property or services involved in the offense. The law contains a series of criteria, and specifies types of evidence, to use in determining the value of the property or services involved in a theft offense. (R.C. 2913.61(A), (B), (D), and (E).)

Procedure when an alleged offender commits a series of theft offenses under R.C. 2913.02 in the same employment, capacity, or relationship to another. Existing law specifies that, if an offender commits a series of theft offenses under R.C. 2913.02 in the offender's same employment, capacity, or relationship to another, all those offenses must be tried as a single offense. The value of the property or services involved for purposes of determining the value as described in the preceding paragraph is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense under this provision, it is not necessary to separately charge and prove each offense in the series; rather, it is sufficient to allege and prove that the offender, within a given time span, committed one or more theft offenses in the offender's same employment, capacity, or relationship to another. (R.C. 2913.61(C)(1).)

Procedure when an alleged offender commits a series of theft offenses under R.C. 2913.02 against multiple victims pursuant to a scheme or course of conduct. Existing law also specifies that, if an offender is being tried for the commission of a series of theft offenses under R.C. 2913.02 against more than one victim pursuant to a scheme or course of conduct, the value of the property or services involved, for the purpose of determining the value under the above-described valuation mechanism, is the aggregate value of all property and services involved in the series of offenses (R.C. 2913.61(C)(2)).

Operation of the bill

The bill modifies the existing provision described in the preceding paragraph, so that it specifies that, if an offender commits a series of theft offenses under R.C. 2913.02 *that involve a common course of conduct to defraud multiple victims, all the offenses may be tried as a single offense*, and, if the offenses are

tried as a single offense, the value of the property or services involved for purposes of the existing valuation mechanism is the aggregate value of all property or services involved *in all of the offenses in the common course of conduct to defraud multiple victims* (see **COMMENT** 3). In prosecuting a single offense under this provision, it is not necessary to separately allege and prove each offense in the series; rather, it is sufficient to allege and prove that the offender, within a given time span, committed one or more theft offenses in the offender's same employment, capacity, or relationship to another or that involve a common course of conduct to defraud multiple victims. (R.C. 2913.61(C)(2) and (3).)

Charitable Solicitation Law

Existing law

Existing R.C. Chapter 1716. regulates solicitations of contributions for a charitable organization, solicitations of contributions for a charitable purpose, and solicitations in connection with a charitable sales promotion. It includes provisions that generally require the filing of annual registration statements by most charitable organizations involved in charitable solicitations, require registrants to file annual financial reports, regulate fund-raising counsel, professional solicitors, and commercial co-venturers, regulate the making of direct charitable solicitations by charitable organizations, provide for enforcement of the provisions by the Attorney General, and provide criminal prohibitions against certain types of conduct.

Prohibited conduct. Existing law specifies that certain specified acts and practices are prohibited and declared unlawful as applied to the planning, conducting, or executing of any "solicitation" of "contributions" for a "charitable organization" or "charitable purpose" or to the planning, conducting, or executing of a "charitable sales promotion" (see **COMMENT** 4 for definitions of the terms in quotes). The prohibited, and unlawful, acts and practices include the following (see **COMMENT** 5 for other existing prohibited and unlawful acts not described below, none of which are modified by the bill):

(1) Operating in violation of, or failing to comply with, any of the requirements of R.C. Chapter 1716. or any rule adopted under that chapter (R.C. 1716.14(A)(1));

(2) Committing any unfair or deceptive act or practice (R.C. 1716.14(A)(2));

(3) Misleading any person in any manner in the belief, or misrepresenting to any person, that the organization on whose behalf a solicitation or charitable

sales promotion is being conducted is a charitable organization or that the proceeds of the solicitation or charitable sales promotion will be used for a charitable purpose if either of those is not the fact (R.C. 1716.14(A)(5));

(4) Misleading any person in any manner in the belief, or misrepresenting to any person, that any other person sponsors, endorses, or approves of the solicitation or charitable sales promotion when that other person has not given its consent in writing to that representation or to the use of its name for any of those purposes (R.C. 1716.14(A)(6)).

Sanctions for engaging in prohibited conduct. Existing law provides that a person who violates any of the prohibitions described in the preceding part of this analysis, any other provision contained in Chapter 1716., or any rule adopted under Chapter 1716. is guilty of "solicitation fraud," a misdemeanor of the first degree. Each occurrence of a solicitation of a contribution from any person in violation of any of the above-described prohibitions, any other provision contained in Chapter 1716., or any rule adopted under Chapter 1716. is considered a separate offense of solicitation fraud. (R.C. 1716.99.)

Existing law also specifies that the act of soliciting contributions for any charitable organization or charitable purpose or engaging in a charitable sales promotion without complying with the requirements of Chapter 1716. or any rule adopted pursuant to that chapter, is a nuisance (R.C. 1716.14(B)).

Finally, existing law specifies that a person who is convicted of solicitation fraud forfeits the bond that is required under existing law, to the State Treasury to the credit of the Charitable Foundations Fund, and is prohibited from registering with the Attorney General or from serving as a fund-raising counsel or professional solicitor in Ohio for five years after the person's convictions (R.C. 1716.99(C)).

Operation of the bill

Prohibited conduct. The bill modifies some of the existing provisions that prohibit, and declare unlawful, specified acts and practices relative to the planning, conducting, or executing of a solicitation of contributions for a charitable organization or charitable purpose or to the planning, conducting, or executing of a charitable sales promotion, as described above under "***Prohibited conduct***," under "***Existing law***." The bill does the following relative to those provisions (R.C. 1716.14(A)):

(1) It relocates the prohibited conduct described in paragraph (1) under "***Existing law***" as new R.C. 1716.14(A)(12);

(2) It modifies the prohibited conduct described in paragraph (2) under "***Existing law***" so that the conduct refers to the commission of any deceptive act or practice instead of the commission of any *unfair or* deceptive act or practice (R.C. 1716.14(A)(1)). Related to this provision, the bill defines "deceptive act or practice" as knowingly misrepresenting any material fact related to the planning, conducting, or executing of any solicitation of contributions for a charitable organization or charitable purpose or to the planning, conducting, or executing of a charitable sales promotion, when the misrepresentation induces any person to make a contribution to a charitable organization, for a charitable purpose, or in response to a charitable sales promotion (R.C. 1716.01(F)).

(3) It modifies the prohibited conduct described in paragraph (3) under "***Existing law***" by replacing the existing reference to "misrepresenting to any person" with a reference to "making or using any representation to any person that implies." Under the bill, this provision reads *misleading any person in any manner in the belief, or making or using any representation to any person that implies*, that the organization on whose behalf a solicitation or charitable sales promotion is being conducted is a charitable organization or that the proceeds of the solicitation or charitable sales promotion will be used for a charitable purpose if either of those is not the fact. (R.C. 1716.14(A)(5).)

(4) It modifies the prohibited conduct described in paragraph (4) under "***Existing law***" by replacing the existing reference to "misrepresenting to any person" with a reference to "making or using any representation to any person that implies." Under the bill, this provision reads *misleading any person in any manner in the belief, or making or using any representation to any person that implies*, that any other person sponsors, endorses, or approves of the solicitation or charitable sales promotion when that other person has not given its consent in writing to that representation or to the use of its name for any of those purposes. (R.C. 1716.14(A)(6).)

(5) It enacts a provision specifying a *new type of prohibited conduct*--misleading any person as to any material fact concerning the solicitation of contributions for a charitable organization or charitable purpose, or concerning a charitable sales promotion (R.C. 1716.14(A)(2));

(6) It does not change the prohibited conduct described in **COMMENT** 5 (R.C. 1716.14(A)(3), (4), and (7) to (11)).

Sanctions for engaging in prohibited conduct. The bill modifies the sanctions for engaging in conduct prohibited under Chapter 1716., as follows:

(1) Under the bill, the only violation that retains the name "solicitation fraud" is a violation of the provision described in paragraph (2) of the preceding part of the analysis that prohibits a person from *committing any deceptive act or practice*. The bill also changes the penalty for a violation of that provision. Under the bill, a person who commits any deceptive act or practice in relation to the planning, conducting, or executing of any solicitation of contributions for a charitable organization or charitable purpose or in relation to the planning, conducting, or executing of a charitable sales promotion is guilty of solicitation fraud and is punished as follows (R.C. 1716.99(B)(1) and 1716.01(L)):

(a) Except as described in paragraph (1)(b), (c), or (d), below, the offense is a misdemeanor of the first degree or, if the offender previously has been convicted of that offense or a "theft offense" (see **COMMENT** 6), a felony of the fifth degree.

(b) If the value of the contribution or contributions made in the violation is $500 or more but less than $5,000, the offense is a felony of the fifth degree or, if the offender previously has been convicted of that offense or a theft offense, a felony of the fourth degree.

(c) If the value of the contribution or contributions made in the violation is $5,000 or more but less than $100,000, the offense is a felony of the fourth degree or, if the offender previously has been convicted of that offense or a theft offense, a felony of the third degree.

(d) If the value of the contribution or contributions made in the violation is $100,000 or more, it is a felony of the third degree.

(2) Under the bill, a violation of any provision described in paragraph (1), (3), (4), (5), or (6) of the preceding part of the analysis, or a violation of any other provision of Chapter 1716. other than the provisions described above in paragraph (2) of that part of the analysis, is penalized as under existing law. That is, the violation is a misdemeanor of the first degree, and each occurrence of a contribution in violation of the prohibition is considered a separate offense. (R.C. 1716.99(A).)

(3) The bill conforms the existing bond forfeiture, registration prohibition, and solicitation prohibition provisions to the changes described above by specifying that they apply to any act or omission prohibited under R.C. Chapter 1716. (R.C. 1716.99(C)).

Procedure when an alleged offender commits a series of offenses that constitute solicitation fraud against multiple victims pursuant to a common

scheme or plan to defraud. The bill specifies that, when an offender commits a series of offenses that constitute solicitation fraud under the bill (i.e., a violation of the prohibition against the commission of a deceptive act or practice) as part of a common scheme or plan to defraud multiple victims, all the offenses may be tried as a single offense. If the offenses are tried as a single offense, the value of the contributions for purposes of determining the value as required for determining the penalty for the offense is the aggregate value of all contributions involved in all offenses in the common scheme or plan to defraud multiple victims. In prosecuting a single offense under this provision, it is not necessary to separately allege and prove each offense in the series. Rather, it is sufficient to allege and prove that the offender, within a given span of time, committed one or more offenses as part of a common scheme or plan to defraud multiple victims as described in this paragraph. (R.C. 1716.99(B)(2).)

COMMENT

1. Existing law defines the following terms for purposes of R.C. Chapter 2913. that are relevant to the bill:

(a) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact (R.C. 2913.01).

(b) "Defraud" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another (R.C. 2913.01).

(c) "Deprive" means to: (i) withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration, (ii) dispose of property so as to make it unlikely that the owner will recover it, or (iii) accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration (R.C. 2913.01).

(d) "Owner" means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of,

or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful (R.C. 2913.01).

(e) "Services" include labor, personal services, professional services, public utility services, common carrier services, and food, drink, transportation, entertainment, and cable television services (R.C. 2913.01).

(f) "Property" means any property, real or personal, tangible or intangible, and any interest or license in such property; including, but not limited to, cable television service, computer data, computer software, financial instruments associated with computers, and other documents associated with computers, or copies of the documents, whether in machine or human readable form (R.C. 2901.01).

2. Existing R.C. 2913.71 specifies that, regardless of the value of the property involved and regardless of whether the offender previously has been convicted of a theft offense, a violation of R.C. 2913.02 or 2913.51 (receiving stolen property) is a felony of the fifth degree if the property involved is: (a) a credit card, (b) a printed form for a check or other negotiable instrument, that on its face identifies the drawer or maker for whose use it is designed or identifies the account on which it is to be drawn, and that has not been executed by the drawer or maker or on which the amount is blank, (c) a motor vehicle license plate, a temporary license placard or windshield sticker, or any comparable license plate, placard, or sticker as prescribed by the applicable law of another state or the United States, (d) a blank form for a certificate of title or a manufacturer's or importer's certificate to a motor vehicle, or (e) a blank form for any license listed in R.C. 4507.01 (licenses under the Drivers License Law).

3. The bill's provisions do not apply to multiple theft offenses under R.C. 2913.02 that involve a common course of conduct to deprive multiple victims of property or services in a manner *other than by defrauding them*.

4. Existing law defines numerous terms for use throughout the law governing charitable solicitations (R.C. Chapter 1716.), including the following terms that are relevant to the bill (R.C. 1716.01):

(a) "Charitable organization" means either: (i) any person that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to Internal Revenue Code section 501(c)(3), (ii) any person that is or holds itself out to be established for any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary purpose or for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety, or (iii) any person who

in any manner employs a charitable appeal as the basis of any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation. "Charitable organization" is not limited to only those organizations to which contributions are tax deductible under Internal Revenue Code section 170.

"Charitable organization" does not include an employer not engaged in the business of soliciting contributions or conducting charitable sales promotions who incidentally solicits contributions for a charitable organization or purpose; or a compensated employee of an employer not engaged in the business of soliciting contributions or conducting charitable sales promotions, when the employee solicits contributions or conducts charitable sales promotions at the direction of his employer.

(b) "Charitable purpose" means either: (i) any purpose described in Internal Revenue Code section 501(c)(3), or (ii) any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary objective or any objective that benefits law enforcement personnel, firefighters, or other persons who protect the public safety. "Charitable purpose" is not limited to only those purposes for which contributions are tax deductible under Internal Revenue Code section 170.

(c) "Charitable sales promotion" means any advertising or sale conducted by a person who represents that the purchase or use of goods or services offered by the person will benefit, in whole or in part, any charitable organization or charitable purpose. The provision of advertising services to a charitable organization, either for compensation or as a donation, does not of itself constitute a charitable sales promotion.

(d) "Contribution" means the promise, pledge, or grant of any money or property, financial assistance, or any other thing of value in response to a solicitation. "Contribution" does not include any bona fide fees, or any dues or assessments paid by members, provided that membership is not conferred solely as a consideration for making a contribution in response to a solicitation.

(e) "Person" has the same meaning as in general use throughout the Revised Code and includes a group, foundation, or any other entity however styled.

(f) "Solicit" or "solicitation" means to request or a request directly or indirectly for money, property, financial assistance, or any other thing of value on the plea or representation that such money, property, financial assistance, or other thing of value or a portion of it will be used for a charitable purpose or will benefit a charitable organization. "Solicit" or "solicitation" includes, but is not limited to,

the following methods of requesting or securing the promise, pledge, or grant of money, property, financial assistance, or any other thing of value: (i) any oral or written request, (ii) making any announcement to the press, on radio or television, by telephone or telegraph, or by any other communication device concerning an appeal or campaign by or for any charitable organization or for any charitable purpose, (iii) distributing, circulating, posting, or publishing any handbill, written advertisement, or other publication that directly or by implication seeks to obtain any contribution, or (iv) selling or offering or attempting to sell any advertisement, advertising space, book, card, tag, coupon, chance, device, magazine, membership, merchandise, subscription, sponsorship, flower, ticket, admission, candy, cookies, or other tangible item, or any right of any description in connection with which an appeal is made for any charitable organization or charitable purpose, or when the name of any charitable organization is used or referred to in any such appeal as an inducement or reason for making the sale, or when in connection with the sale or offer or attempt to sell, any statement is made that all or part of the proceeds from the sale will be used for any charitable purpose or will benefit any charitable organization.

A solicitation is considered as having taken place whether or not the person making the solicitation receives any contribution. A solicitation does not occur when a person applies for a grant or an award to the government or to an organization that is exempt from federal income taxation under Internal Revenue Code section 501(a) and described in section 501(c)(3).

5. The other prohibited and unlawful acts are the following (R.C. 1716.14(A)(3), (4), and (7) to (11)):

(a) Using any representation that implies that the contribution is for or on behalf of a charitable organization, or using any emblem, device, or printed matter belonging to or associated with a charitable organization, without first having been authorized in writing to do so by the charitable organization;

(b) Using a name, symbol, or statement that is so closely related or similar to that used by another charitable organization, public official, or public agency in such a manner that the use of the name, symbol, or statement tends to confuse or mislead a person being solicited for contributions, except that the name, symbol, or statement may be used if written permission is obtained from the other charitable organization, public official, or public agency and filed with the Attorney General prior to any solicitation for a charitable purpose or prior to engaging in any charitable sales promotion;

(c) Using or exploiting the fact of registration in such a manner as to lead any person to believe that the registration in any manner constitutes an endorsement or approval by the state;

(d) Representing directly or by implication that a charitable organization will receive a fixed or estimated percentage of the gross revenue from a solicitation campaign that is greater than that set forth in the contract filed with the Attorney General pursuant to existing law, or that a charitable organization will receive an actual or estimated dollar amount or percentage per unit of goods or services purchased or used in a charitable sales promotion, that is greater than that agreed to by the commercial co-venturer and the charitable organization;

(e) Filing false or misleading information in any document required to be filed with the Attorney General under Chapter 1716.;

(f) Filing false or misleading information in response to a request from the Attorney General under a specified provision of existing law;

(g) Failing to provide complete and timely payment to a charitable organization of the proceeds from a solicitation campaign or a charitable sales promotion.

6. Existing R.C. 2913.01, not in the bill, defines "theft offense" as any of the following:

(a) Aggravated robbery (sec. 2911.01), robbery (sec. 2911.02), aggravated burglary (sec. 2911.11), burglary (sec. 2911.12), breaking and entering (sec. 2911.13), safecracking (sec. 2911.31), tampering with coin machines (sec. 2911.32), petty theft (sec. 2913.02), theft (sec. 2913.02), grand theft (sec. 2913.02), grand theft of a motor vehicle (sec. 2913.02), aggravated theft (sec. 2913.02), theft of drugs (sec. 2913.02), unauthorized use of a vehicle (sec. 2913.03), unauthorized use of property (sec. 2913.04), unauthorized use of computer property (sec. 2913.04), possession of an unauthorized device (sec. 2913.041), sale of an unauthorized device (sec. 2913.041), passing bad checks (sec. 2913.11), misuse of credit cards (sec. 2913.21), forgery (sec. 2913.31), forging identification cards or selling or distributing forged identification cards (sec. 2913.31), criminal simulation (sec. 2913.32), making or using slugs (sec. 2913.33), trademark counterfeiting (sec. 2913.34), Medicaid fraud (sec. 2913.40), tampering with records (sec. 2913.42), securing writings by deception (sec. 2913.43), personating an officer (sec. 2913.44), defrauding creditors (sec. 2913.45), insurance fraud (sec. 2913.47), receiving stolen property (sec. 2913.51), cheating (sec. 2915.05), corrupting sports (sec. 2915.05), theft in office (sec.

2921.41), the former offense of insurance fraud (former sec. 2913.47), or the former offense of workers' compensation fraud (former sec. 2913.48);

(b) A violation of an existing or former municipal ordinance or law of Ohio, any other state, or the United States, substantially equivalent to any section listed in clause (a) or defrauding a livery or hostelry (former sec. 2913.41), denying access to a computer (sec. 2913.81), or corrupting sports (sec. 2915.06) as those offenses existed prior to July 1, 1996;

(c) An offense under an existing or former municipal ordinance or law of Ohio, any other state, or the United States, involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deceit, or fraud;

(d) A conspiracy or attempt to commit, or complicity in committing any offense identified in clause (a), (b), or (c).

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	01-20-99	p.	25
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