

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 709
Finance

(Senator Madaleno, *et al.*)

Consumer Protection - Negative Option Feature - Restrictions

This bill prohibits a merchant from using a negative option feature in connection with the sale or free trial of consumer goods or services unless a written disclosure is provided to the consumer.

Violation of the bill is an unfair or deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA's civil and criminal penalty provisions.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the bill's imposition of existing penalty provisions. If the Consumer Protection Division of the Office of the Attorney General receives fewer than 50 complaints per year stemming from the bill, the additional workload can be handled with existing resources.

Local Effect: Potential minimal increase in revenues and expenditures due to the bill's imposition of existing penalty provisions.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The bill defines "negative option feature" to mean a feature, in connection with an offer or agreement to sell or provide consumer goods or consumer services, under which a consumer's silence, failure to affirmatively reject the goods or services, or otherwise cancel the agreement is interpreted by the merchant as acceptance of the goods or services. The bill prohibits a merchant from using a negative option

feature unless the consumer is provided with a written description of the terms and conditions, including:

- a statement that the consumer will be charged for the consumer goods or consumer services unless the consumer takes affirmative action to reject the consumer goods or services or cancel the agreement; and
- the specific steps the consumer must take to reject the consumer goods or services or cancel the agreement.

A negative option feature used in connection with a sale of consumer goods or services or in connection with a free trial offer is unenforceable unless the consumer expressly accepts the terms of the negative option feature in writing as evidenced by a written or electronic signature.

Current Law: An unfair or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, hold a public hearing, seek an injunction, or bring an action for damages. A merchant who violates MCPA is subject to a fine of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Background: An example of “negative option” marketing occurs where a merchant assumes a consumer has purchased a good or service, for instance, after the expiration of a free trial. Unless the consumer cancels the order within a specified period of time, charges may be incurred.

Additional Information

Prior Introductions: HB 726 of 2010 received a hearing in the House Economic Matters Committee, but no further action was taken.

Cross File: HB 1212 (Delegate Frick, *et al.*) - Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division), Department of Legislative Services

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mc/kdm

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