SB 1098

Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 1098 (Senator Reilly)
Finance

Commercial Law - Credit Card Processors - Service Agreements

This bill prohibits a services agreement contract between a credit card processor and a business entity from (1) including a provision authorizing liquidated damages for the termination of the agreement or (2) specifying a fee for the termination of the agreement that is more than $99. In addition, the bill prohibits a credit card processor from debiting or accessing the bank account of a business entity after 60 days if the processor has received a written notice of termination. The Commissioner of Financial Regulation is authorized to investigate any complaints received as a result of the bill and to use any of the investigative enforcement powers granted under Title 2, Subtitle 1 of the Financial Institutions Article. A person who violates the bill's requirements is subject to a fine of up to $1,000 for each violation, or up to $5,000 for repeat violations.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues due to the bill's penalty provisions. The Office of the Commissioner of Financial Regulation can handle the bill's requirements with existing budgeted resources.

Local Effect: The bill does not materially affect local government finances or operations.

Small Business Effect: Meaningful.

Analysis

Bill Summary: A "credit card processor" is a person who processes credit card or electronic commerce transactions on behalf of a business entity for a fee. A credit card processor includes (1) a merchant services provider; (2) a financial institution; (3) an independent sales organization; or (4) any subsidiary or affiliate of those entities.

A "services agreement" is a contract between a credit card processor and a business entity under which the business entity agrees to pay the credit card processor for processing credit card or electronic commerce transactions on behalf of the business entity.

The fines established by the bill are civil penalties and are recoverable by the Commissioner of Financial Regulation in a civil action or an administrative cease and desist action under § 2-115 of the Financial Institutions Article.

Current Law/Background:

Contracts, Generally: State law does not specifically address credit card processors or the services agreements between businesses and credit card processors.

However, in the absence of specific law to the contrary, the law governing the creation of contracts in arms-length transactions between parties applies. Title 2 of the Uniform Commercial Code specifies, among other things, that:

- A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract.
- An agreement to constitute a contract for sale may be found, even if the moment of its making is undetermined.
- Unless otherwise unambiguously specified, an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.
- The obligation of the seller is to transfer and deliver, and that of the buyer is to accept and pay in accordance with the contract.
- If a court, as a matter of law, finds a contract, or any clause of it, to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or enforce that portion of the contract without the unconscionable clause, or it may limit application of the contract to avoid an unconscionable result.

Commissioner of Financial Regulation – Enforcement Powers: The Commissioner of Financial Regulation has the power to vigorously investigate financial transactions to determine whether a person has violated a law, regulation, rule or order over which the commissioner has jurisdiction. For the purposes of an investigation or proceeding, the commissioner may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, and require the production of documents and other evidence. If a person refuses to obey a subpoena from the commissioner, the commissioner may apply to the appropriate circuit court to issue an order requiring the person to appear before the commissioner and produce any requested evidence. If the court issues such an order, failure to obey it subjects the person to contempt of court.

When the commissioner determines, after notice and hearing, as specified, that a person has engaged in a violation of a law, regulation, rule, or order, the commissioner may issue a cease and desist order, suspend or revoke the license of the violator, or issue a penalty order against the person for up to $1,000 for a first violation and up to $5,000 for each subsequent violation.

The commissioner may also bring action in a circuit court to either prevent an unlawful action or to remedy the outcome of an unlawful action. The commissioner may bring action to obtain a temporary restraining order, a temporary or permanent injunction, a declaratory judgment, an order preventing access to the violator's assets, an order of rescission or restitution, or any other relief that is determined just by the court.

Federal Guidance: According to the Federal Trade Commission, each electronic payment includes certain elements, including:

- the cardholder, who uses a debit or credit card to pay for a product or service;
- the issuer, which provides a payment card to a cardholder and usually maintains the cardholder's account;
- the merchant, which provides the product or service for a price;
- the acquirer, which provides payment card services to the merchant and maintains the merchant's account. Sometimes, the merchant or the acquirer may use a third-party processor for certain processing services;
- the payment card network (PCN), which coordinates the information routing and money transfer between issuers and acquirers. PCNs may be debit card networks, credit card networks, or both; and

- interchange transaction fees, which include fees established, charged, or received by a PCN and paid by a merchant or an acquirer to compensate an issuer for its involvement in an electronic debit transaction.

A customer who wants to buy something presents his or her card to a merchant. The merchant generates an authorization request with a dollar amount and information from the customer's card. The request is then routed electronically along a path. The issuer gets the request, checks its file of active card accounts, and sends an electronic message authorizing or declining the transaction. The authorization process usually takes seconds to complete. Then, the issuer posts a charge for the transaction to the customer's account, and the acquirer posts a credit for the transaction, minus fees, to the merchant's account. The amount deducted from the transaction value is known as the "merchant discount" and includes the interchange fee and other fees for processing the transaction.

State Fiscal Effect: The Department of Labor, Licensing, and Regulation (DLLR) advises that, to the extent the bill applies retroactively, retroactive application results in the need for at least six additional staff and a significant expenditure of general funds. Otherwise, DLLR advises it can likely handle the bill with existing resources. The Department of Legislative Services advises that, as the bill does not require retroactive application, the Commissioner of Financial Regulation can implement the bill's provisions with existing resources.

Small Business Effect: Small businesses that rely on credit card processors as defined under the bill benefit from the establishment of new protections. The bill caps any service termination fee at $99 and also prohibits contractual provisions that authorize liquidated damages for the termination of the services agreement. In addition, the bill prohibits credit card processors from debiting or accessing the bank account of a business entity after 60 days if the processor has received a written notice of termination from the business entity. Given the widespread use of electronic transactions, the bill's protections are likely to have a meaningful impact on small businesses. However, if credit card processors increase prices for businesses as a result of the bill's protections, benefits could be offset.

Additional Information

Prior Introductions: None.

Cross File: HB 1400 (Delegate S. Howard, *et al.*) **-** Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Department of Labor, Licensing, and Regulation; Federal Trade Commission; Department of Legislative Services

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