

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1303 Consumer Protection

SPONSOR(S): Business & Consumer Affairs Subcommittee, Eisnaugle

TIED BILLS: **IDEN./SIM. BILLS:** SB 1884

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Consumer Affairs Subcommittee	13 Y, 0 N, As CS	Whittington	Creamer
2) Economic Affairs Committee			

SUMMARY ANALYSIS

CS/HB 1303 creates Part XII of Chapter 559, F.S. consisting of section 559.951 Internet sales, prohibited practices which mirrors federal law. Specifically, the bill:

- Provides definition of "Initial merchant" and "Posttransaction third-party seller"; and establishes requirements for posttransaction third-party sellers before charging consumers for any good or service sold in a transaction conducted over the internet.
- Prohibits initial merchants from disclosing consumer billing information to posttransaction third-party sellers.
- Requires posttransaction third-party sellers to provide a mechanism to consumers to stop recurring charges by telephone, email, or United States mail.
- Prohibits a posttransaction third party seller from changing its vendor code, or otherwise changing the way it is identified on consumer's accounts, more than once per year, unless it sends a notice of the change to consumers via U.S. Mail or e-mail.
- Makes a violation of the section an unfair and deceptive trade practices within the meaning of part II of chapter 501.

The bill is anticipated to have an indeterminate negative an impact on state funds.

The effective date of the bills is July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Federal Trade Commission (FTC) uses the phrase “negative option marketing” broadly to refer to a category of commercial transactions in which sellers interpret a customer’s failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services.

Federal Law

Congress, motivated by the findings below, passed S. 3386: Restore Online Shoppers’ Confidence Act (Act) in late 2010.¹ Congress found:

The Internet has become an important channel of commerce in the United States, accounting for billions of dollars in retail sales every year. Over half of all American adults have now either made an online purchase or an online travel reservation. Consumer confidence is essential to the growth of online commerce. To continue its development as a marketplace, the Internet must provide consumers with clear, accurate information and give sellers an opportunity to fairly compete with one another for consumers’ business. An investigation by the Senate Committee on Commerce, Science, and Transportation found abundant evidence that the aggressive sales tactics many companies use against their online customers have undermined consumer confidence in the Internet and thereby harmed the American economy. The Committee showed that, in exchange for “bounties” and other payments, hundreds of reputable online retailers and websites shared their customers’ billing information, including credit card and debit card numbers, with third party sellers through a process known as “data pass”. These third party sellers in turn used aggressive, misleading sales tactics to charge millions of American consumers for membership clubs the consumers did not want. Third party sellers offered membership clubs to consumers as they were in the process of completing their initial transactions on hundreds of websites. These third party “posttransaction” offers were designed to make consumers think the offers were part of the initial purchase, rather than a new transaction with a new seller. Third party sellers charged millions of consumers for membership clubs without ever obtaining consumers’ billing information, including their credit or debit card information, directly from the consumers. Because third party sellers acquired consumers’ billing information from the initial merchant through “data pass”, millions of consumers were unaware they had been enrolled in membership clubs. The use of a “data pass” process defied consumers’ expectations that they could only be charged for a good or a service if they submitted their billing information, including their complete credit or debit card numbers. Third party sellers used a free trial period to enroll members, after which they periodically charged consumers until consumers affirmatively canceled the memberships. This use of “free-to-pay conversion” and “negative option” sales took advantage of consumers’ expectations that they would have an opportunity to accept or reject the membership club offer at the end of the trial period.²

The Congressional Research Service summarized the Act:

Defines “post-transaction third party seller” as a person that: (1) sells, or offers for sale, any good or service on the Internet; (2) solicits purchases on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant; and (3) is not the initial merchant, a subsidiary or corporate affiliate of the initial

¹ Public Law No: 111-345.

² S. 3386(2).

merchant, or a successor to the initial merchant or subsidiary. Makes it unlawful for any post-transaction third party seller to charge or attempt to charge any consumer's credit card, debit card, bank account, or other such financial account in an Internet-based transaction, unless: (1) before obtaining the consumer's billing information, the seller has disclosed all material terms, including the fact that the such seller is not affiliated with the initial merchant, and a description and the cost of the offered goods or services; and (2) the seller has received the express informed consent from the consumer for the charge. Makes it unlawful for an initial merchant to disclose such financial account number or other billing information to any post-transaction third party Internet seller (sometimes referred to as a data-pass). Makes it unlawful for any person to charge or attempt to charge a consumer for goods or services sold in an Internet-based transaction through a negative option feature unless the person: (1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before charging the consumer's financial account for products or services through such transaction; and (3) provides simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's financial account. Defines "negative option feature" to mean, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. Treats a violation of this Act or any regulation thereunder as an unfair or deceptive act or practice. Requires the Federal Trade Commission (FTC) to enforce this Act. Authorizes the attorney general of a state to bring an action for injunctive relief in federal court on behalf of the state's residents.³

Violations of the Act and its regulations are treated as a violations of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. The FTC is charged with enforcement of the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) The Act allows the attorney general of a State, or other authorized State officer, alleging a violation of the Act or any regulation issued under the Act to bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found, resides, or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code, to obtain appropriate injunctive relief. However, the state must provide notice to the FTC and a copy of the complaint immediately upon instituting an action. The Act allows the FTC to intervene in the actions filed by the attorney general.

Florida Law

Current Florida law does not address unfair and deceptive internet sales practices.

Proposed Changes

CS/HB 1303 mirrors the Restore Online Shoppers' Confidence Act.

The bill creates part VII of chapter 559, F.S., consisting of section 559.951, F.S. The bill creates the following definitions:

"Initial merchant" means a person who obtains consumer's billing formation directly from the consumer through an Internet transaction initiated by the consumer.

"Posttransaction third-party seller" means a person who: 1. Sells or offers for sale any good or service over the internet; and 2. Solicits the purchase of such goods or services

³ Congressional Research Service, Summary of Public Law. Restore Online Shoppers' Confidence Act, *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-3386&tab=summary> (last visited March 18, 2011).

over the Internet from an initial merchant after the consumer has initiated a transaction with the initial merchant

However, the term posttransaction third-party seller does not include the initial merchant, a subsidiary or corporate affiliate of the initial merchant, or a successor of the initial merchant.

The bill provides that a posttransaction third-party seller may not charge or attempt to charge a consumer's credit card, debit card, bank account, or other account for any good or service sold in a transaction conducted over the internet, unless two conditions are met. First, before obtaining the consumer's billing information, the posttransaction third-party seller must clearly and conspicuously disclose all material terms of the transaction to the consumer, and second, the posttransaction third-party seller receives the express informed consent for the charge from the consumer whose credit card, debit card, bank account, or other account that will be charged.

The material terms the bill requires the posttransaction third-party seller to disclose to the consumer about the transaction include:

1. A description of the goods or services being offered.
2. A statement that the posttransaction third-party seller is not affiliated with the initial merchant.
3. The cost of such goods or services.
4. How and when the charges will be processed by the posttransaction third-party seller.

The bill specifies how a posttransaction third-party seller can receive express informed consent for the charge from a consumer. The posttransaction third-party seller must obtain the full account number of the account to be charged, the consumer's name and address, and a means to contact the consumer from the consumer. The consumer must be required to perform an additional affirmative action which clearly and conspicuously indicates the consumer's consent to be charged the amount disclosed. The bill suggests selecting a confirmation button or checking a box. The posttransaction third-party seller must send written notice confirming the transaction to the consumer. The notice must clearly and conspicuously disclose certain enumerated information. The notice must be sent by either first class United States Mail or by e-mail at least 20 days before charging the consumer. The notice must disclose the following information:

- The good or service purchased.
- The amount that the consumer will be charged.
- When the consumer's account will be charged.
- Whether the charges are recurring.
- A statement that the consumer may cancel at any time by calling a telephone number provided in the notice or by sending a written request to a mailing address or e-mail address provided in the notice.
- The name of the initial merchant and a statement that the posttransaction third-party seller is a separate entity from the initial merchant.
- A statement that the consumer is being charged by the posttransaction third-party seller for a transaction that is separate from the consumer's transaction with the initial merchant.
- A mechanism for a consumer to cancel the good or service, and stop any recurring charges, by phone, e-mail, or United States Mail.

If the above notice is sent by e-mail, the bill requires the only words that can appear in the subject line are "Notice that we are charging your (...type of account...) account."

In addition, a posttransaction third-party seller may not charge a consumer unless it provides a mechanism for the consumer to stop recurring charge by telephone, e-mail, or United States Mail.

An initial merchant is prohibited from disclosing a consumer's credit card number, debit card number, bank account number, or other account number, or disclosing other consumer billing information, to a posttransaction third-party seller.

In addition, a posttransaction third party seller is prohibited from changing its vendor code, or changing the way it is identified on the consumer's accounts, more than once per year, unless the posttransaction third party seller sends notice of the change to the consumer via U.S. Mail or e-mail.

Makes violations of section deemed to be an unfair and deceptive trade practices within the meaning of part II of Ch. 501, F.S. Violators will be subject to the penalties and remedies provided in part II of Ch. 501, F.S.

B. SECTION DIRECTORY:

Section 1 creating s. 559.951, F.S., relating to internet sales and prohibited practices.

Section 2 providing an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. Part II of Ch. 501, F.S. defines the enforcing authority as either the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction, or Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit. At this time, it is impossible to estimate how many actions either entity will pursue or the resources that will be expended pursuing actions under this section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Initial merchants and Posttransaction third-party sellers will be required to take additional steps when conducting internet transactions with consumers for goods or services which could result in a negative fiscal impact. However, consumers purchasing goods or services over the internet will be afforded additional security when providing their credit or debit card information, bank account or other account information. Additionally, consumers will be more in control of their immediate internet transaction as well as any future recurring charges, thus potentially saving them money.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties and municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 22, 2011, the Business & Consumer Affairs Subcommittee adopted one amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment prohibits a posttransaction third party seller from changing its vendor code more than one a year unless notice is given to the consumer, and makes a violation of the section be deemed an unfair and deceptive trade practice within the meaning of part II of Ch. 501, F.S.

This analysis is drafted to the Committee Substitute.