FINAL BILL ANALYSIS

BILL #: CS/SB 1884

FINAL HOUSE FLOOR ACTION: 116 Y's 1 N's

SPONSOR: Sen. Gaetz (Rep. Eisnaugle)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/HB 1303

SUMMARY ANALYSIS

CS/SB 1884 passed the House on May 4, 2011. The bill was approved by the Governor on June 17, 2011, chapter 2011-156, Laws of Florida, and becomes effective October 1, 2011. The bill creates s. 559.95, F.S., entitled Internet sales, prohibited practices. This section mirrors federal law with additional consumer protections.

Specifically, the bill:

- Provides a 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 U.S. 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 practice within the meaning of part II of ch. 501, F.S.

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

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Negative option marketing is a commercial marketing tool by which sellers interpret a customer's failure to take an affirmative action, such as reject an offer or cancel an agreement, as the customer's agreement to pay for goods or services. In Internet commerce, the tool has been used by third party sellers to bind customers who are completing an unrelated purchase from an unrelated seller to an agreement for goods or services, such as membership clubs.

Federal Law

Congress passed the Restore Online Shoppers' Confidence Act (Act) in late 2010 to address concerns with the use of negative option marketing in e-commerce.[1] The Act found that online retailers were sharing their customers' billing information with third party sellers, who were using misleading sales tactics to charge millions of American consumers for membership clubs the consumers did not want.[2]

Specifically, the Act defines "post-transaction third party seller" as a person that:

- sells, or offers for sale, any good or service on the Internet;
- solicits purchases on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant; and
- is not the initial merchant, a subsidiary or corporate affiliate of the initial merchant, or a successor to the initial merchant or subsidiary.

The Act 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 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.
- 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).
- 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

[1] S. 3386; Public Law No: 111-345.
[2] *Id.*

consumer to stop recurring charges from being placed on the consumer's financial account.

The Federal Trade Commission is required to enforce the Act. Violations of the Act are treated as unfair or deceptive acts or practices under the Federal Trade Commission Act.[3]

The Act also allows the attorney general of a state, or other authorized state officer, alleging a violation of the Act to seek an injunction on behalf of the residents of the state in any U.S. district court for the district in which the defendant is found, resides, or transacts business, or wherever venue is proper.

Florida Law

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

Effect of the Bill:

CS/SB 1884 mirrors the federal Restore Online Shoppers' Confidence Act, with additional consumer protection.

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 information 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 good or service 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 to 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 good or service being offered.
2. A statement that the posttransaction third-party seller is not affiliated with the initial merchant.

[3] 15 U.S.C. 57a

3. The cost of such good or service.
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 U.S. Mail or by e-mail before charging the consumer. The notice must disclose the following information:

- The good or service purchased.
- The amount that the consumer will be charged.
- The timing and frequency of charges.
- A short and plain statement disclosing the posttransaction third-party seller's cancellation and refund policy.
- A telephone number, mailing address, Internet address, and e-mail address where the posttransaction third-party seller can be contacted.
- The name of the initial merchant or fictitious name under which the initial merchant is doing business, if known.
- The name of the posttransaction third-party seller or fictitious name under which the posttransaction third-party seller is doing business.
- That the posttransaction third-party seller is an unaffiliated and separate entity from the initial merchant.
- 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.

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 (name of third-party seller) is charging your (…type of account…) account."

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 may not charge a consumer unless it provides a mechanism for the consumer to cancel the good or service and stop charges, within a reasonable time after delivery of the written notice confirming the transaction.

Further, a posttransaction third-party seller is prohibited from changing its vendor code, or materially changing the way it is identified on the consumer's accounts, more than once per year, unless the posttransaction third-party seller provides the consumer with written notice of the change.

The bill makes a violation of this section an unfair and deceptive trade practice 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.

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.