

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/SB 1884

INTRODUCER: Commerce and Tourism Committee and Senator Gaetz

SUBJECT: Consumer Protection

DATE: April 19, 2011 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|-------------|
| 1. | McCarthy | Cooper | CM | Fav/CS |
| 2. | Blizzard | Meyer, C. | BC | Pre-meeting |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill prohibits a post-transaction third-party seller from charging a consumer for a good or service sold over the Internet unless specific disclosures are made and the seller receives the informed consent of the consumer. It also requires a post-transaction third-party seller to provide a simple mechanism for a consumer to cancel a purchase of a good or service and stop any recurring charges. Finally, it prohibits an initial merchant from disclosing a consumer's

“...credit card, debit card, bank account, or other account number or other billing information to a post-transaction third-party seller for use in an internet-based sale of any good or service from that post-transaction third-party seller.”

This bill is very similar to recently enacted federal law, enacted to counter “negative option marketing,” which refers 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.

By including these same protections in our statutes, Florida has jurisdiction to enforce the consumer protections provided in the act under state law.

This bill creates an undesignated section of law in the Florida Statutes.

II. Present Situation:

Florida Law

Currently Florida law does not specifically address unfair and deceptive practices with respect to internet sales practices.

Federal Law

Congress, based on 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 "post transaction" 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

¹ Public Law No: 111-345.

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 act provides three important protections for online consumers. First, it makes it unlawful for a post-transaction third-party seller, defined as a seller who markets goods and services online through an initial merchant after a consumer has initiated a transaction, to charge a consumer for any good or service sold in an online transaction, unless:

- The seller clearly discloses to the consumer all the material terms of the transaction.
- The seller has obtained the consumer’s consent before charging their credit card, bank account, or other financial account. Importantly, as a part of that consent, such sellers must obtain directly from the consumer the full financial account number to be charged.

Second, it would make it unlawful for any online seller to transfer a consumer’s financial account number to a third party seller.

Finally, the act makes it unlawful for a seller to charge a consumer for any good or service with a negative option feature in an online transaction, unless:

- The seller clearly discloses to the consumer all the material terms of the transaction.
- The seller has obtained the consumer’s consent before charging their credit card, bank account, or other financial account.
- The seller provides a simple way for the consumer to stop charges.³

Violations of the act and its regulations are treated as unfair or deceptive acts or practices. The Federal Trade Commission (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) were incorporated into and made part of this act. 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.

² S. 3386(2).

³ Statement by FTC Chairman Jon Leibowitz Regarding House and Senate Passage of Legislation to Combat Deceptive Online Sales Tactics <http://www.ftc.gov/opa/2010/12/negoption.shtm> (last visited April 7, 2011).

III. Effect of Proposed Changes:

Section 1 creates an undesignated section of law in the Florida Statutes, to prohibit a post-transaction third-party seller from charging a consumer for a good or service sold over the Internet unless specific disclosures are made and the seller receives the informed consent of the consumer. It also requires a post-transaction third-party seller to provide a simple mechanism for a consumer to cancel a purchase of a good or service and stop any recurring charges. Finally, it prohibits an initial merchant from disclosing a consumer's:

“...credit card, debit card, bank account, or other account number or other billing information to a post-transaction third-party seller for use in an internet-based sale of any good or service from that post-transaction third-party seller.”

The bill creates the following definitions:

- “Initial merchant” means a person who has obtained a consumer's billing information directly from the consumer through an internet transaction initiated by the consumer.
- “Post-transaction third-party seller” means a person who sells, or offers for sale, any good or service on the Internet and solicits the purchase of such good or service over the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant. The term does not include the initial merchant, a subsidiary or corporate affiliate of the initial merchant, or a successor of the initial merchant.

A post-transaction third-party seller may not charge or attempt to charge any consumer's credit card, debit card, bank account, or other account for any good or service sold in a transaction effected on the Internet unless:

- Before obtaining the consumer's billing information, the post-transaction third-party seller has clearly and conspicuously disclosed to the consumer all material terms of the transaction, including:
 - A description of the good or service being offered.
 - The fact that the post-transaction third-party seller is not affiliated with the initial merchant, which must include disclosure of the name of the post-transaction third-party seller in a manner that clearly differentiates the post-transaction third-party seller from the initial merchant.
 - The cost of the good or service.
 - How and when charges will be imposed by the post-transaction third-party seller.
- The post-transaction third-party seller has received the express informed consent for the charges from the consumer whose credit card, debit card, bank account, or other account will be charged by:
 - Obtaining from the consumer the full account number of the account to be charged or other account information necessary to complete the transaction and the consumer's name and address and a means to contact the consumer.
 - Requiring the consumer to perform an additional affirmative action, such as clicking on a confirmation button or checking a box that clearly and conspicuously indicates the consumer's consent to be charged the amount disclosed.

- Sending a written notice to the consumer confirming a transaction by first-class U.S. mail or e-mail before processing the consumer's credit card, or otherwise charging the consumer, or shortly thereafter. Such notice must clearly and conspicuously disclose the following:
 - 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 post-transaction third-party seller's cancellation and refund policy.
 - A telephone number, mailing address, internet address, and e-mail address where the post-transaction third-party seller can be contacted.
 - The name or brand name of the initial merchant, if known.
 - The name or brand name of the post-transaction third-party seller.
 - That the post-transaction third-party seller is an unaffiliated and separate entity from the initial merchant.
 - That the consumer is being charged by the post-transaction third-party seller for a transaction that is separate from the consumer's transaction with the initial merchant.
- If the written notice is sent by e-mail, the only words appearing in the subject line shall be "Notice that ...(name or brand name of post-transaction third-party seller... is charging your ...(type of account)...."
- An initial merchant may not disclose a consumer's credit card number, debit card number, bank account number, or other account number, or disclose other consumer billing information, to a post-transaction third-party seller.
- A post-transaction third-party seller may not:
 - Charge a consumer without providing a simple 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; or
 - Change its vendor code, or otherwise materially change the way the post-transaction third-party seller is identified on the consumer's account, more than once per year, unless the post-transaction third-party seller provides the consumer with written notice of the change.

A person who violates this section commits an unfair and deceptive trade practice under Part II of ch. 501, F.S., and is subject to any remedies or penalties available for a violation of that part.

By including in the statutes the same protections provided in federal law, Florida has jurisdiction to enforce these consumer protections in state courts.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This will create additional cost for the post-transaction third-party seller in that they will now have to provide notice and acquire additional information directly from the consumer.

The bill should create a more consumer friendly internet experience for Florida residents knowing that the initial merchant cannot simply transfer their information to a post-transaction third-party seller.

C. Government Sector Impact:

To the extent that the Attorney General or state attorneys decide to pursue enforcement of the provisions of the bill, there will be a corresponding impact on our court system. At this time, it is not possible to estimate how many actions either entity will pursue or the resources that will be expended relating to the enforcement provisions in this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on April 12, 2011:

The CS differs from the bill as filed in the following ways:

- The CS clarifies the definition of a post-transaction third-party seller; and

- Removes a 20 day written notice required to be sent by the post-transaction third-party seller to the consumer before charging the consumer's credit card, debit card, bank account, or other account.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
