

Massachusetts Attorney General Proposes Regulation Governing "Junk Fees" and Other Sales Practices

November 30, 2023 | [Thomas P. Quinn, Jr.](#)

Massachusetts Attorney General Andrea Joy Campbell has issued a [draft regulation](#) aiming the commonwealth's deceptive trade practices statute at "junk fees" practices, automatic renewal / continuous service contracts, and trial offers. The draft regulation, which was published on morning of November 30th, will be the subject to a public hearing on December 20, 2023. Comments on the draft regulation may be submitted through close of business on December 20th. Information regarding the hearing and comment period may be found [here](#).

The focus of the proposed regulation is two-fold. First, it will require certain pricing disclosures to be made in connection with the advertising and sale of products. For purposes of the regulation a "product" is broadly defined to mean any good, service or program that is the subject of a sale, lease, rental or barter transaction with a Massachusetts consumer. The draft regulation would make the following pricing related activities an unfair and deceptive act or practice ("UDAP"):

- **Misrepresenting / Failing to Disclose Product's Total Price:** The draft regulation would require the clear and conspicuous disclosure of the "total price" of a product, both when the price is initially presented and thereafter. Failure to disclose, or misrepresenting, the total price of the product would be a UDAP. For purpose of this requirement the "total price" of a product is defined to mean the all-in price, including all fees, interest, charges and other expenses (other than taxes, shipping charges and any fees required by federal, state or local law) necessary to complete the transaction.
- **Collecting Personal Information Before Total Price is Disclosed:** The draft regulation would make it a UDAP to fail to disclose the total price of any product before requiring a consumer to provide his/her personal information, including his/her billing information. This prohibition would not apply if the collection of such information is required to determine if the sale of the product is legal or if the product is available in the consumer's geographic area.
- **Failing to Prominently Display Total Price in Advertisements:** The draft regulation would require the display of the total price of a product more prominently than any other pricing information in an advertisement that discusses any amounts the consumer may pay. Failure to do so would be a UDAP.

- Misrepresenting / Failing to Disclose Fees: The draft regulation would require the clear and conspicuous disclosure of any fees, interest charges, or other expenses to be imposed on a consumer in connection with the purchase of a product (other than shipping charges, taxes and any federal, state or local fees). Similarly, the regulation would require the disclosure of whether such fees and charges are required, optional, refundable or might be waived (along with instructions of how to waive the fee). If such fees and charges might only apply under certain circumstances, those circumstances must also be disclosed. A failure to make such disclosures, or to misrepresent any such fees, would be considered a UDAP.
- Misrepresenting that Fees are Required by Law: The draft regulation would make it a UDAP to include a statement that a fee, interest, charge or other expense is required by law when that is not in fact the case.

For purposes of these requirements, the proposed regulation would apply to any advertisement, solicitation, or offer of sale that is aimed at inducing Massachusetts consumers to purchase a product, or which results in a sale in Massachusetts.

In addition to its focus on transparent pricing, the draft regulation also takes aim at certain practices associated with "automatic renewal or continuous service contracts" and "trial offers." Under the draft regulation, an "automatic renewal or continuous service contract" is an agreement or offer for a product that results in the consumer continuing to receive or participate in that product at the end of an initial term without further consumer engagement. A "trial offer" is defined to mean an offer made to a consumer to participate in, buy, or use a product without charge (or for a reduced charge, rebate, or for shipping charges only) for a limited period of time.

As currently drafted, the regulation would make the following activities in connection with automatic renewal or continuous service contracts and trial offers a UDAP violation:

- Failure to Provide Means of Cancellation: The draft regulation would require businesses entering automatic renewal or continuous service contracts and/or trial offers to provide a telephone number, email address and (if the seller directly bills the consumer) post office address for cancellation. If such agreements are entered into online, consumers must be provided a means to terminate the contract or offer online. If a telephone number is provided as the means of cancellation, the consumer must be permitted to cancel via a live person, voice message recording system or via an automated means. Failure to provide these means of cancellation would be a UDAP.
- Failure to Provide Advance Notice of Cancellation Right: For any automatic renewal or continuous service contract or trial offer that exceeds 30 calendar days, the draft regulation would require that consumers receive advance notice reminding them of their right to cancel before incurring additional charges or financial obligations. This notice must be sent no more than 10 days, but no less than 5 days, before the cancellation deadline. The notice must include the date on which the consumer will be charged for additional products or for automatic renewal. The

notice must be provided to the consumer in a manner "substantially similar" to the way the consumer accepted the trial offer. It must clearly and conspicuously disclose the means by which the consumer may cancel the trial offer. Failure to adhere to these advance notification requirements would be a UDAP.

In addition to regulating cancellation rights, the draft regulation would impose disclosure requirements in connection with trial offers. Before accepting such an offer, the regulation would require that the consumer be informed of:

- All financial obligations incurred by accepting the offer;
- All products, membership enrollments, subscriptions or other service contracts for which consumers will incur a financial obligation if they accept the trial offer;
- How consumers must indicate their rejection or cancellation of the offer;
- The deadline by which consumers must cancel in order to avoid incurring a financial obligation if they accept the trial offer; and
- The calendar date on which consumers will incur additional financial obligations if they do not cancel the trial offer by the deadline.

Failure to make these disclosures before a consumer accepts the trial offer is a UDAP violation.

The current drafting of the regulation does not prohibit any particular fees or charges. Rather, the regulation aims to combat the surprise nature of certain fees through up-front and transparent disclosure. The regulation does take more strident steps toward automatic renewal and continuous service contracts and trial offers, requiring accessible cancellation means and more fulsome disclosures.

There is room for industry comment on the proposed regulation. For example, while the regulation is aimed at protecting Massachusetts consumers in connection with these practices, the drafting of the regulation does not appear to be currently limited to consumer-purpose transactions. And while it is clear that the scope of the regulation is intended to be broad, precisely how broad is unclear. For example, while a "product" is broadly defined to mean "goods, services, and programs" each of these terms is undefined. Perhaps most challenging, however, is how to align the requirement to disclose the "total price" of a product or the fees and charges that might be associated with that product upon the "initial presentation of the price" with the reality that the ultimate price of a product might vary depending on consumer selections made during the purchase process as well as factors that may be beyond the control of either the seller of the product or the consumer. At what point must the "total price" and associated fees be "locked down" in order for an effective disclosure to be made and a violation of the regulation avoided?

These questions likely only scratch the surface. Fortunately, just under three weeks remain to further consider the proposed regulation and what it might mean for various

industries so that thoughtful comments may be provided to the Attorney General's Office. While regulation of this nature may be unavoidable, it should be crafted in a manner that balances the need for effective disclosure and the ability of the affected industries to effectively comply.

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