

SENATE BILL REPORT

SB 5210

As Reported by Senate Committee On:
Labor, Commerce & Consumer Protection, February 23, 2009

Title: An act relating to unsolicited goods and the promotional advertising of prizes.

Brief Description: Concerning unsolicited goods and the promotional advertising of prizes.

Sponsors: Senators Berkey, Holmquist, Kohl-Welles, Fairley, Regala, Honeyford and Shin; by request of Attorney General.

Brief History:

Committee Activity: Labor, Commerce & Consumer Protection: 1/26/09, 2/23/09 [DPS, w/oRec].

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Majority Report: That Substitute Senate Bill No. 5210 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Holmquist, Ranking Minority Member; Franklin, Honeyford and Kline.

Minority Report: That it be referred without recommendation.

Signed by Senator King.

Staff: Alison Mendiola (786-7483)

Background: Unsolicited Goods Act. Unsolicited goods or services may be accepted, used, or disposed of by the person receiving them without any obligation to pay for or return them. They are gifts unless the person receiving them specifically requested the receipt of the goods or services according to the terms under which they are being offered. Failure to respond to an invitation to purchase the goods or services does not make the gifts solicited. A violation of these provisions is a violation of the Consumer Protection Act.

Promotional Advertising of Prizes Act. Restrictions are placed on the content of written notices and procedures associated with the use of prizes in advertising. Any written notice offering goods or services to an individual based upon a representation that the person will receive a prize must contain the name and address of the promoter and sponsor. The notice must disclose the retail value and any odds associated with receiving a prize. This disclosure

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must be at least as large as the standard text of the offer. If the offer is part of a collective promotion with more than one sponsor, this must be disclosed.

If an individual is required or invited to attend a sales presentation in order to claim the prize, this must be disclosed along with any other restrictions or qualifications to receive or use a prize. No prize may be represented as being free if the individual must pay to receive the prize, including shipping or handling fees. At the beginning of any sales presentation, the consumer is to be informed of the prize to be received. A promoter may not include a prize in an offer unless the prize will be available in a sufficient quantity to meet the reasonably anticipated response to the offer. Provisions governing the availability or replacement of prizes are enumerated. The offer must include a clear statement of the consumer's rights concerning the substitution of prizes.

A person is authorized to bring an action against a sponsor or a promoter for damages. Damages may include the value of the prize and any fees paid. A court also may award the greater of \$500 or three times the actual damages (up to \$10,000) sustained by the person, equitable relief, attorney's fees, and any other remedy deemed proper. A knowing violation of this act is a gross misdemeanor, which is punishable by a fine up to \$5,000 or imprisonment for one year, or both. A violation of these provisions is also a violation of the Consumer Protection Act.

Summary of Bill (Recommended Substitute): Unsolicited Goods Act. A seller is prohibited from billing or charging a person for unsolicited goods or services. This prohibition does not apply to telemarketers. For goods or services to be considered solicited, a seller must have obtained the customer's prior express agreement to receive and pay for the goods according to the terms and conditions under which they are being offered. An express agreement does not include acceptance by a pre-checked box next to a statement indicating the customer's request for, and acceptance to pay for, the specific goods and services being offered.

The following requirements are established for offers of goods or services that include a negative option feature, including free-to-pay conversions and automatic renewals:

- A "negative option feature" is an offer or agreement to sell or provide any goods or services with a provision that 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.
- A "free-to-pay conversion" is an offer or agreement to sell or provide any goods or services with a provision that a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if the customer does not take affirmative action to cancel before the end of that period.

Prior to charging for goods or services that include a negative option, the seller must obtain an express agreement from the customer to be charged for the goods and services. An offer for goods or services that include a negative option feature must clearly and conspicuously disclose the material terms of the negative option feature. The disclosure must include:

- the fact that the customer will be billed or the customer's account will be charged unless the customer takes an affirmative action to avoid the charge;

- when the initial charge will occur or what event triggers the charge, and date of automatic renewal;
- total cost of the initial charge;
- total cost or range of costs of each subsequent payment; and
- specific steps the customer must take to avoid the charge.

If a transaction involves pre-acquired account information, a seller must also comply with certain requirements. For example, the seller must:

- obtain from the customer at least the last four digits of the account number to be charged at the time of express agreement;
- obtain from the customer prior to consummation of the sale the customer's express agreement to be charged for the goods and services using the account number identified by the customer;
- notify the customer at least five days before the first charge will be submitted for payment; and
- provide the customer with specific steps to avoid the charge.

Promotional Advertising of Prizes Act. The regulation of promotional advertising is extended to incentive programs and promotional advertising over the internet. An "incentive program" is an advertisement, advertising program sweepstake, contest, direct giveaway, or solicitation that includes the award of or opportunity or chance to be awarded an incentive. An "incentive" is a prize offered on the internet in a commercial context, with or without involvement of the element of a chance, as an enticement to purchase, to use a product or service, or provide information.

A seller is prohibited from requiring a person to agree to any of the following as a condition of receiving a gift or incentive:

- enter into an agreement to purchase products or services;
- obtain the agreement of another to participate in the promotion;
- participate in any trial services or subscription without meeting certain requirements;
- or
- provide personal information that will be sold or shared with others, unless the promoter follows certain procedures for permission to do so.

Various definitions are added to describe aspects of internet transactions.

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & CONSUMER PROTECTION COMMITTEE (Recommended Substitute): Removes language that required merchants to wait until the expiration of the trial period before obtaining the consumer's agreement to convert from a trial offer to a paid service. Clarifies that certain provisions of the bill only apply to marketers who sell to, or share, personal information with third parties and not to those who use personal information for their own purposes. Clarifies that pre-acquired account information must only be obtained in the first transaction as opposed to all transactions. Clarifies that personal information obtained for shipping, administration, or delivery purposes does not trigger coverage by the bill and that the bill only covers transactions that occur all on the internet, as opposed to in-store solicitations.

Requires the promoter to display the final four digits of a consumer's credit card to confirm its use for the free-to-pay conversion promotion, rather than having the consumer specifically disclose the digits. Permits the consumer to be notified five days prior to the first charge in a free-to-pay conversion, rather than ten days. Clarifies that simply viewing internet advertisements should not be considered "consideration" for purposes of determining whether an internet promotion exists.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: This bill proposes to bring the law up-to-date with the proliferation of internet advertising and deceptive marketing through "free" and free-to-pay offers. The deception has resulted in millions of dollars of loss for Washington's consumers. This bill would require additional disclosure when personal information is taken, when a free service converts to a fee service, and otherwise addresses issues that have come up with deceptive internet marketing.

CON: Movie studios do advertising online and want to iron out some of the language and will be working with the Attorney General's Office.

OTHER: There are concerns about the language in Sec. 6 (3)(a) which addresses email addresses located in Washington. Also regarding the "pre-checked box language," it would be helpful if there was affirmative language clarifying that unchecked boxes are an acceptable way for a consumer to provide expressed consent.

Persons Testifying: PRO: Paula Sellis, Office of the Attorney General.

CON: T.K. Bentler, Motion Picture Association of America.

OTHER: Lew McMurrin, Washington Technology Industry Association.