

## PROPOSED REGULATIONS 940 C.M.R. 38.00: UNFAIR AND DECEPTIVE FEES

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### 38.01: Purpose

The purpose of 940 C.M.R. 38.00 is to establish standards, by defining certain unfair and deceptive acts and practices, governing the imposition of fees in connection with marketing, solicitation, and Sale of Products.

940 C.M.R. 38.00 also establishes standards, by defining certain unfair and deceptive acts and practices, governing Automatic Renewal or Continuous Service Contracts and Trial Offers.

940 C.M.R. 38.00 is designed to protect consumers seeking to purchase, rent, lease, or barter Products, by ensuring a fairer and more transparent marketplace. 940 C.M.R. 38.00 addresses misrepresentations to consumers in connection with the presentation of prices, as well as misleading and deceptive practices that occur when consumers enter into Automatic Renewal or Continuous Service Contracts and Trial Offers.

### 38.02: Scope

940 C.M.R. 38.00 applies to acts or practices performed in connection with any Advertising or marketing, solicitation, or offer of Sale that is Targeted To or results in a Sale in Massachusetts.

### 38.03: Definitions

As used in 940 C.M.R. 38.00, the following words shall have the following meanings:

Advertisement, Advertising, Advertise. Any representation a) made in a newspaper, in a magazine, or other publication; or b) contained in any notice, handbill, sign, billboard, banner, poster, display, circular, pamphlet, catalog, or letter; or c) printed on or contained in any tag or label which is attached to or accompanies any Product; or d) presented through or during the use of any electronic device or the use of a software application, including via telephone, text message, radio, television, or the internet. Advertisement includes any representation disseminated within Massachusetts if the advertisement is directed to consumers in Massachusetts.

Automatic Renewal or Continuous Service Contract. A contract, agreement, or offer for a Product which a consumer continues receiving or participating in after the expiration of the prior contract, agreement, or offer period without requiring further engagement from the consumer.

Clearly and Conspicuously. Readily noticeable and readily understandable by ordinary consumers, including in all of the following ways, without limiting any other provisions of law:

In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television Advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

For a visual disclosure, the disclosure must be of such size, color contrast, location, appearing for such a length of time, and so placed as to be readily noticeable to purchasers or prospective purchasers who are reading Advertising, sales promotional literature, or invoices containing same, or who are reading any representation as to content on the container in which the product is packed.

For an audible disclosure, including an audible disclosure that is accompanied by video or visual media, the disclosure must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to readily hear and understand it.

For any communication using an interactive electronic medium, such as through the internet or software, the disclosure must be unavoidable.

For any communication, the disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication to consumers.

The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

Product. Any item available for or as part of a Sale, including but not limited to goods, services, and programs.

Sale. The terms “Sale” or “Sell” includes lease, rent, or barter.

Shipping Charges. The fees or charges that reasonably reflect the amount a business incurs to send physical goods to a consumer through the mail, including private delivery services.

Targeted To. Employed to induce consumers in Massachusetts to make a purchase, regardless of whether a purchase is made.

Total Price. The entire price to be paid by the consumer, inclusive of all fees, interest, charges, or other expenses necessary or required in order to complete the transaction. Total Price may exclude taxes, Shipping Charges, or any fees required by federal, state, or local law.

Trial Offer. Any offer to a consumer to participate in, buy, or use a Product without charge to the consumer, or at a reduced charge, for a rebate, or for only incidental costs such as Shipping Charges, for a limited time.

#### 38.04: Unfairness and Deception in Connection with Marketing/Solicitation/Sale

In connection with any Advertising or marketing, solicitation, or offer of Sale that is Targeted To or results in a Sale in Massachusetts, the following shall constitute an unfair and deceptive practice under G.L. c. 93A, § 2:

- 1) misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter, the Total Price of that Product;
- 2) misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter:
  - a. the existence and nature or purpose of any fees, interest, charges, or other expenses that would be imposed on the consumer due to the purchase of that Product (excluding Shipping Charges, taxes, and any fees required by federal, state, or local law);
  - b. whether fees, interest, products, or services are optional, required, refundable, or waivable, and when and under what circumstances any fees, interest, charges or other expenses would apply (excluding Shipping Charges, taxes, and any fees required by federal, state, or local law), including, when a fee is waivable, readily available instructions regarding how to waive the fee;
- 3) failing to disclose the Total Price of any Product prior to requiring a consumer to provide any personal information, including billing information, unless said information is collected specifically, and only to the extent necessary, to determine whether the Sale of such Product to the consumer is legal, or whether the Product is available in the consumer's geographic location;
- 4) misrepresenting, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter, that any fees, interest, charges, or other expenses or any portion thereof are required by law, when they are, in fact, not required by law; and
- 5) failing, in any offer, display, or Advertisement that contains an amount a consumer may pay, to display the Total Price more prominently than any other pricing information.

### 38.05: Recurring Fees & Trial Offers

In connection with any Advertising or marketing, solicitation, or offer of Sale that is Targeted To or results in a Sale in Massachusetts, the following shall constitute an unfair and deceptive practice under G.L. c. 93A, § 2:

- 1) For any business that enters an Automatic Renewal or Continuous Service Contract or Trial Offer with a consumer, failing to provide a telephone number, electronic mail address, and, if the seller directly bills to the consumer, postal address for cancellation. Telephone numbers must connect to one of the following, which must be able to effectuate cancellation: a live person, a voice message recording system, or an automated feature.
- 2) For any business that enters an Automatic Renewal or Continuous Service Contract or Trial Offer with a consumer, failing to allow a consumer who enters the contract or offer online to terminate it online.
- 3) Failing to disclose Clearly and Conspicuously certain terms of any Trial Offer for a Product prior to the consumer's acceptance of the offer, including at a minimum,
  - a. Any and all financial obligations that may be incurred as a result of accepting the Trial Offer;
  - b. Identification of all Products or enrollments in a membership, subscription or other service contract that the consumer will receive for which the consumer will incur a financial obligation as a result of accepting the Trial Offer;
  - c. Instructions as to the means by which the consumer is to indicate the consumer's rejection or cancellation of the offer;
  - d. The time period during which the consumer must cancel in order to avoid incurring a financial obligation as a result of accepting the Trial Offer; and
  - e. The calendar date on which the consumer will incur any additional financial obligation if the consumer fails to cancel the Trial Offer within the relevant time period.
- 4) Failing to provide the consumer additional notice within no more than ten (10) and no fewer than five (5) calendar days prior to the date upon which the consumer must cancel the Automatic Renewal or Continuous Service Contract or Trial Offer in order to avoid incurring an additional financial obligation, if the contract or offer exceeds thirty (30) calendar days. The notification shall include the calendar date on which the consumer will be charged for additional Products or for automatic renewal. The notification shall be provided in a manner substantially similar to that by which the consumer accepted the Trial Offer and shall Clearly and Conspicuously disclose the means by which the consumer may cancel the offer.

38.06: Severability

If any provision of 940 C.M.R. 38.00 or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of 940 C.M.R. 38.00 and the applicability of such provision to other persons or circumstances shall not be affected thereby.

38.07. Preemption

In the event any conflict exists between the provisions of 940 C.M.R. 38.00 and the provisions of any Federal statute or regulation, such Federal law shall control.