



AG REQUEST LEGISLATION – 2009 SESSION

SAFEGUARDING CONSUMERS: PRIZES, PROMOS AND PRIVACY

BACKGROUND:

- The Washington Attorney General's Consumer Protection Division has brought more than a dozen cases involving Internet advertising since 2005 alone.
- In April 2007, the Attorney General's Office reached a settlement with Digital Enterprises of West Hills, doing business as Movieland.com; AccessMedia Networks, of Los Angeles; and Innovative Networks, of Woodland Hills, that resolved allegations they installed software that took control of a consumer's computer by launching aggressive and persistent pop-ups that demanded payment for a movie download service. The software was installed after users signed up for a seemingly anonymous free trial for the service.
- In June 2007, the office reached a settlement with the Consumer Digital Services, JSE Direct and their subsidiaries concerning allegations that the defendants sold the personal information of thousands of consumers and billed consumers for services they did not want. While promoting their Privasafe and SurfSafe products, the defendants advertised that they would "protect your computer and privacy" and guard you from "unscrupulous marketers." The Attorney General's Office alleged the defendants lured Washington consumers with online offers for "free" gift cards and merchandise including flat-screen monitors; the products were promoted through pop-up ads, Web site banner ads and e-mail messages. Consumers submitted their personal information including their address, e-mail address, telephone and birth date, believing they would receive the "free" product. They were subsequently charged \$14.95 charge on their monthly phone bills for defendants' Internet-related service. At the time we filed the suit, more than 13,000 Washington consumers had been billed for PrivaSafe and SurfSafe since January 2004 to a tune of more than \$750,000 and only one Washington consumer received the advertised 'free' item. We alleged that many consumers who discovered the charges on their phones bills had no idea what they were paying for and who was billing them.
- In April 2008, the office settled a case with SubscriberBASE Holdings, Inc., and SubscriberBASE, Inc., accused of promising consumers "free" big-ticket items but requiring them to pay for trial offers and subscriptions. Our suit alleged SubscriberBASE misled consumers into believing that they would receive free high-definition televisions, digital cameras and laptops. To qualify, consumers first had to provide personal information which the defendants then leased to other online marketers. Consumers were then presented with a series of offers that required increasingly more expensive purchases in order to qualify for the "free" item. The vast majority dropped out of the qualification process, but only after they had spent significant money.
- The Attorney General's Office also has seen a growing number of businesses using "free trials" to promote products or services. Frequently, the consumer is required to affirmatively cancel the service to avoid being automatically billed after the trial has expired. The office has seen this practice in a wide variety of areas including the sale of memberships in discount buying clubs, tooth whitening products, posters, skin care products, roadside assistance services and more. Sellers sometimes charge consumers a renewal for subscription services at the end of the initial agreement period. Consumers are surprised when the charge appears, because they have not affirmatively renewed the service. Frequently, the "free trial" offer does not adequately disclose that failure to cancel within a trial period will result in automatic billing. In some cases, sellers don't even obtain the consumer's affirmative consent to the free trial.

The Prizes and Promotions Act, RCW 19.170, currently does not regulate these types of abuses. The statute's original intent was to address the award of "free" prizes in the context of timeshare and vacation offerings. At that time, consumers complained about receiving promotional offers by mail that promised prizes if they attended a sales presentation.

THE PROBLEM:

Internet businesses lure consumers with offers for "free" gifts and software trial services. Sometimes, their promotions are simply a means to collect consumers' information that they then sell to marketers. Both traditional and online marketing campaigns may use negative-option sales, where a customer's silence is interpreted by the seller as an acceptance of an offer. Washington's existing laws do not specifically address these sorts of solicitations.



LEGISLATION:

HB 1192/SB 5210:

The Attorney General's Office has requested legislation to update the state's Prizes and Promotions Act (RCW 19.170) and Unsolicited Goods Act (RCW 19.56) to address Internet promotions and "free trials." The proposed legislation would:

- Extend the disclosure requirements of written prize offers to analogous Internet "incentive programs," such as requiring disclosure of the name and address of the promoter and advertiser; the verifiable retail value of the gift, odds of winning and any conditions.
- Clarify that sellers can't charge for unsolicited goods or services. Sellers must obtain a customer's express agreement to receive and pay for goods prior to seeking payment.
- Prohibit sellers from requiring a person to do any of the following as a condition of receiving a gift or free incentive:
 - Enter into an agreement to purchase a product or service.
 - Obtain the agreement of others to participate in the promotion.
 - Provide personal information – unless the recipient has the right to opt out of having the information shared with third parties. Personally identifiable information may include any of the following: last name in combination with first name or first initial; address; e-mail address or credit, debit or bank account number.
 - Participate in a trial service or subscription – unless the individual has consented to paying for any goods or services that require payment after the conclusion of the trial.
- Clarify that offers or incentive programs that require recipients to do any of the above can't be labeled as a prize, gift, award, premium or any other term that implies the item is free.
- Require that a gift actually be awarded, or that cash or an item of equal value be given if the gift isn't available.

A violation of these provisions would be considered a violation of the state Consumer Protection Act.

HOW THE SUBSTITUTE BILL HAS BEEN REVISED TO ADDRESS STAKEHOLDER CONCERNS:

The Revised Substitute Bill contains a number of changes as a result of valuable input from a variety of stakeholders. The AGO conferred with representatives of the advertising industry, the banking industry, credit unions, Internet marketers and others who have made constructive suggestions that do not subvert the original intent of the legislation and assure the law will be workable for industry while still protecting consumers.

A summary of the major changes are below:

- Specifies that if the marketer cannot give a specific date when the consumer will be charged for a product or service at the time the offer is made, the marketer may describe its billing practices in broader terms.
- 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 personal information to third parties or share such information with third parties but do not apply to those who use personal information for their own purposes.
- Clarifies that preacquired 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.
- Clarifies the bill only covers transactions that occur all on the internet, as opposed to in-store solicitations.
- Creates a safe harbor for promotions that are actually a "bonus with purchase."
- 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 10 days.
- Clarifies that simply viewing internet advertisements should not be considered "consideration" for purposes of determining whether an internet promotion exists.
- Clarifies the parameters of making an item truly "free."