

940 CMR: OFFICE OF THE ATTORNEY GENERAL

940 CMR 38.00: UNFAIR AND DECEPTIVE FEES

Section

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38.01: Purpose

The purpose of 940 CMR 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 CMR 38.00 also establishes standards, by defining certain unfair and deceptive acts and practices, governing Trial Offers and contracts with Negative Option Features.

940 CMR 38.00 is designed to protect consumers who are natural persons seeking to purchase, rent, lease, or barter Products for personal, family, or household use, by ensuring a fairer and more transparent marketplace. 940 CMR 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 Trial Offers and contracts with Negative Option Features.

38.02: Scope

940 CMR 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 CMR 38.00, the following terms 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.

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.

A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

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, a mobile application, 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.

When the representation or sales practice targets a specific audience, such as children or older adults, requirements for comprehension by “ordinary consumers” must be satisfied both with the general audience and then separately with the targeted group.

Government Charges. All fees or charges imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department. Government Charges shall include fees or charges imposed on the transaction by a quasi-governmental entity operating pursuant to state statute. This definition covers only fees or charges imposed by the government or quasi-governmental entity on the transaction and does not encompass

fees or charges that the government or quasi-governmental entity imposes on a seller and that the seller chooses (but is not legally required) to pass on to consumers.

Negative Option Feature. A provision of a contract under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel or non-renew an agreement is interpreted by the seller as acceptance or continuing acceptance of the offer, including, but not limited to: (1) an automatic renewal; (2) a continuity plan; (3) a free-to-pay conversion or fee-to-pay conversion; or (4) a pre-notification negative option plan.

Product. A good, whether tangible or intangible, or service available for Sale or included as part of a Sale for personal, family, or household use. For avoidance of doubt, Product shall include memberships, subscriptions, and dwelling units available for rent or lease.

Sale. The terms "Sale" or "Sell" includes lease, rent, or barter.

Shipping Charges. The fees or charges that reasonably reflect the cost a seller incurs to send physical goods to a consumer, including through the mail, private mail and shipping services, or by freight.

Targeted To. Employed to induce consumers in Massachusetts to enter into a Sale, regardless of whether a Sale is completed.

Total Price. The maximum price a consumer must pay for a Product, inclusive of all fees, charges, or other expenses. Total Price shall include the maximum price a consumer must pay for any mandatory ancillary Product offered as part of the same transaction. Total Price may exclude Government Charges or Shipping Charges.

Total Price may rely on the accuracy of information used to compute an aspect of pricing previously approved by a Commonwealth insurance or financial regulatory agency. A change in Total Price caused by a change in information used to compute an aspect of pricing previously approved by a Commonwealth insurance or financial regulatory agency will not constitute a violation of 940 CMR 38.00, as long as (1) the updated Total Price is provided to the consumer as soon as is feasible and (2) consumers are warned that there may be a change in Total Price on this basis at the time the Total Price is provided.

Trial Offer. Any offer to a consumer to participate in, acquire, 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 Total Price of any Product:
 - (a) the nature, purpose, and amount of any fees, charges, or other expenses that would be imposed on the transaction due to the purchase of that Product (excluding Shipping Charges and Government Charges);
 - (b) for any fees, charges, or other expenses disclosed pursuant to 940 CMR 38.04(2)(a) that are optional to the consumer or waivable by the seller, the fact that such fees, charges, or other expenses are optional to the consumer or waivable by the seller, as well as readily available instructions regarding how to avoid such fees, charges, or other expenses.
- (3) misrepresenting or failing to disclose Clearly and Conspicuously, in the final presentation of the price of any Product prior to the Sale of the Product:
 - (a) the final transaction amount, inclusive of the Total Price for all Products purchased as part of the transaction and any applicable Shipping Charges and Government Charges;
 - (b) the nature, purpose, and amount of any fees, charges, or other expenses that would be imposed on the transaction due to the purchase of that Product;
 - (c) for any fees, charges, or other expenses disclosed pursuant to 940 CMR 38.04(3)(b) that are optional to the consumer or waivable by the seller, the fact that such fees, charges, or other expenses are optional to the consumer or waivable by the seller, as well as readily available instructions regarding how to avoid such fees, charges or other expenses.
- (4) failing to disclose Clearly and Conspicuously 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 facilitate underwriting in connection with the Sale of the Product, determine the Product's availability, determine whether the Sale of such Product to the consumer is legal, or compute an aspect of pricing previously approved by a Commonwealth insurance or financial regulatory agency;

- (5) misrepresenting that any fees, charges, or other expenses or any portion thereof are required by law; and
- (6) failing to display the Total Price of a Product more prominently than any other pricing information any time the disclosure of the Total Price is required, except for the final presentation of prices as described in 940 CMR 38.04(3)(a), wherein the most prominent pricing information shall be the final transaction amount.

It is not a violation of this section for a food delivery platform or grocery delivery platform to Advertise the price of menu items set by a food store, restaurant, or grocery store. Food delivery or grocery delivery platforms must display Clearly and Conspicuously the maximum mandatory charges or fees that a consumer must pay to complete a transaction on their user interface any time any pricing information is displayed.

In the rental or lease of a dwelling unit, it shall not constitute a violation of 940 CMR 38.04(1) for a seller to advertise the Total Price to rent or lease the dwelling unit as a dollar amount to be paid by the consumer on a periodic basis, such as monthly or on such other term as the seller intends the rent to be paid. In such circumstances, the seller must also disclose Clearly and Conspicuously the full period covered by the rental or lease.

38.05: Recurring Fees & Trial Offers

In connection with any Advertising, 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 Trial Offer, failing to disclose Clearly and Conspicuously and in writing, prior to the consumer's acceptance of the Trial Offer, the following information:
 - (a) any financial obligations that may be incurred as a result of accepting the Trial Offer;
 - (b) identification of all Products for which the consumer may incur a financial obligation as a result of accepting the Trial Offer;
 - (c) instructions as to the means by which the consumer may reject or cancel the Trial Offer before the consumer incurs a financial obligation;
 - (d) the calendar date by which the consumer must reject or cancel the Trial Offer in order to avoid incurring a financial obligation; and
 - (e) the calendar date on which the consumer will incur any financial obligation if the consumer fails to reject or cancel the Trial Offer.
- (2) for any Product with a Negative Option Feature, failing to disclose Clearly and Conspicuously and in writing, prior to the consumer's purchase of the Product, the following information:
 - (a) that the consumer will be charged for the Product, or that charges will increase after any applicable trial period ends;
 - (b) if applicable, that the charges will occur on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges; and
 - (c) instructions as to the mechanism by which the consumer may cancel the Negative Option Feature and avoid being charged for the Product, which shall comply with the requirements of 940 CMR 38.05(3).
- (3) for any Product with a Negative Option Feature, failing to provide a simple mechanism for a consumer to cancel the Negative Option Feature and avoid being charged for the Product and immediately stop any recurring charges.
 - (a) The simple mechanism required by this section must be at least as easy to access and use as the method the consumer used to initiate the Negative Option Feature.

- (b) The simple mechanism required by this section must, at a minimum, be available through the same medium (such as Internet, telephone, mail, or in-person) the consumer used to initiate the Negative Option Feature, and:
 - 1. for Internet cancellation, the simple mechanism must be available through the same website or web-based application the consumer used to initiate the Negative Option Feature.
 - 2. for telephone cancellation, the simple mechanism must be available through a telephone number, and all calls to this number must be answered promptly during normal business hours and not be more costly than the telephone call the consumer used to initiate the Negative Option Feature.
 - 3. for in-person sales, the simple mechanism must be available through the Internet or through a telephone number in a manner compliant with 940 CMR 38.05(3)(b)(1) – (2) in addition to, where practical, an in-person method similar to that used by the consumer to initiate the Negative Option Feature.
- (4) for any Negative Option Feature exceeding thirty-one (31) days, failing to provide the consumer written notice within no more than thirty (30) and no fewer than five (5) calendar days prior to the date upon which the consumer must cancel in order to avoid incurring a subsequent financial obligation, which discloses Clearly and Conspicuously:
 - (a) any financial obligations that may be incurred if the consumer fails to cancel the Negative Option Feature;
 - (b) all Products for which the consumer may incur a financial obligation if the consumer fails to cancel the Negative Option Feature;
 - (c) the mechanism by which the consumer may cancel the Negative Option Feature, which shall comply with the requirements of 940 CMR 38.05(3);
 - (d) the calendar date by which the consumer must cancel the Negative Option Feature in order to avoid incurring a financial obligation; and
 - (e) the calendar date on which the consumer will incur any financial obligation if the consumer fails to cancel the Negative Option Feature.
- (5) for any Negative Option Feature exceeding thirty-one (31) days, failing to provide the written notice required under section 940 CMR 38.05(4) through a medium substantially similar to that used by the consumer to initiate the Negative Option Feature, or through a commonly-used medium that is reasonably calculated to be seen and understood by an ordinary consumer, and that is affirmatively chosen by the consumer to be their preferred method of contact. Where the consumer initiated the Negative Option Feature through an in-person transaction, the written notice required

under section 940 CMR 38.05(4) must be provided through a commonly-used medium that is reasonably calculated to be seen and understood by an ordinary consumer, and that is affirmatively chosen by the consumer to be their preferred method of contact.

(6) for any contract with a Negative Option Feature that is thirty-one (31) days or less in duration, failing to provide written notice through a medium substantially similar to that used by the consumer to initiate the Negative Option Feature, or through a commonly-used medium that is reasonably calculated to be seen and understood by an ordinary consumer:

(a) as required under 940 CMR 38.05(4); or

(b) which discloses Clearly and Conspicuously, at least as frequently as the consumer is charged, the amount the consumer has been charged at auto-renewal and instructions as to the mechanism by which the consumer may cancel the Negative Option Feature and avoid incurring additional charges for the Product.

38.06: Relation to Other Laws and Regulations

- (1) Compliance with 940 CMR 5.02, 5.03, & 5.04 by any Manufacturer or Motor Vehicle Dealer as defined by 940 CMR 5.01 shall constitute compliance with 940 CMR 38.04(1)-(4) & (6).
- (2) Compliance with G. L. c. 111, § 228, by any health care provider, as defined by G. L. c. 111, § 1, pertaining to any admission, procedure, or service covered by G.L. c. 111, § 228, shall constitute compliance with 940 CMR 38.00.
- (3) Regarding the Advertisement, Sale, or renewal of credit, compliance with G.L. c. 140D, 209 CMR 32.00, 15 U.S.C. § 1601 et seq., and 12 CFR 1026 by any Creditor, as defined by 12 CFR 1026.2(a)(17), shall constitute compliance with 940 CMR 38.00.
- (4) Regarding the Advertisement, offer, Sale or purchase of securities, compliance with G.L. c. 110A and 950 CMR 10.01-14.413, by a person required to be licensed or registered under G.L. c. 110A and/or federal securities law, shall constitute compliance with 940 CMR 38.04(1)-(4) & (6) and 940 CMR 38.05.

38.07: Severability

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

38.08: Preemption

The provisions of 940 CMR 38.00 apply to the conduct specified herein unless preempted by federal law.

38.09: Enforcement Date

940 CMR 38.00 shall apply to acts committed or practices in force as of September 2, 2025.