S T A T E O F N E W Y O R K

S. 392 A. 1031

2009-2010 Regular Sessions

S E N A T E - A S S E M B L Y

(PREFILED)

January 7, 2009

IN SENATE -- Introduced by Sens. BRESLIN, ADAMS, DILAN, DUANE, HASSELL-THOMPSON, KLEIN, KRUEGER, KRUGER, MONTGOMERY, ONORATO, PARKER, SAMPSON, SAVINO, SCHNEIDERMAN, SMITH, STAVISKY, VALESKY -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

IN ASSEMBLY -- Introduced by M. of A. McENENY -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to charge accounts used in the purchase of mail-order, telephone-order or internet mail-order merchandise

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 396-m of the general business law, as amended by chapter 802 of the laws of 1984, paragraphs a and e of subdivision 2 and paragraph b of subdivision 3 as amended by chapter 72 of the laws of 2007, paragraph h of subdivision 3 as amended by chapter 407 of the laws of 1987 and paragraph j of subdivision 3 as amended by chapter 16 of the laws of 2006, is amended to read as follows:

S 396-m. Mail-order [or], telephone-order OR INTERNET MAIL-ORDER merchandise. 1. This section shall apply to any mail-order business [or], any telephone order business OR ANY INTERNET MAIL-ORDER BUSINESS which is located in this state or advertises a New York state mailing address or telephone number.

2. Definitions, as used in this section:

a. "mail-order business" shall mean a business which is engaged in the solicitation of orders by advertisement or otherwise for merchandise or services connected with merchandise to be shipped to the customer through the mail or by other carrier, upon receipt of an order with payment or with charge account authorization remitted through the mail,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD03591-01-9

electronic mail or the Internet or by telephone and the merchandise by its nature is ready for use or consumption when advertised or offered for sale and can be held in stock.

b. "merchandise" shall mean tangible chattels bought for personal, family or household purposes.

c. "shipment" shall mean the act whereby the seller physically places the merchandise into the possession of the United States postal service or other carrier.

d. "telephone order business" shall mean a mail order business which accepts orders by telephone, or a business which is primarily engaged in the solicitation of orders by advertisement or otherwise for merchandise or services connected with merchandise to be shipped to the customer through the mail or by other carrier, upon receipt of an order with charge account authorization remitted by telephone and the merchandise by its nature is ready for use or consumption when advertised or offered for sale and can be held in stock.

e. "accepts orders" shall mean, in the case of a mail order, receipt of an order with payment or with charge account authorization remitted through the mail, electronic mail or the Internet, and, in the case of a telephone order, receipt of an order with charge account authorization and debiting the buyer's account.

F. "INTERNET MAIL-ORDER BUSINESS" SHALL MEAN AN INTERNET MAIL-ORDER BUSINESS WHICH ACCEPTS ORDERS VIA THE INTERNET, OR A BUSINESS WHICH IS PRIMARILY ENGAGED IN THE SOLICITATION OF ORDERS BY ADVERTISEMENT OR OTHERWISE FOR MERCHANDISE OR SERVICES CONNECTED WITH MERCHANDISE TO BE SHIPPED TO THE CUSTOMER THROUGH THE MAIL OR BY OTHER CARRIER, UPON RECEIPT OF AN ORDER WITH CHARGE ACCOUNT AUTHORIZATION REMITTED VIA THE INTERNET AND THE MERCHANDISE BY ITS NATURE IS READY FOR USE OR CONSUMPTION WHEN ADVERTISED OR OFFERED FOR SALE AND CAN BE HELD IN STOCK.

3. No person, partnership, firm, association or corporation or agent or employee thereof who conducts a mail-order business [or], a telephone order business OR AN INTERNET MAIL-ORDER BUSINESS shall:

a. advertise for sale merchandise which is not reasonably anticipated to be available for shipment within thirty days from date of publication or broadcast of advertisement or from date catalog or circular is mailed, unless a longer period of time is clearly and conspicuously stated in such advertisement. Whenever the term "thirty days" appears in this section, such term shall include a longer period of time if clearly and conspicuously stated in such advertisement.

b. accept orders for merchandise which is not reasonably anticipated to be available for shipment within thirty days from the date of receipt of the order together with payment or with charge account authorization in the case of an order remitted through the mail, electronic mail or the Internet or within thirty days from the date the seller debits the buyer's account in the case of an order placed by telephone.

c. unless the seller qualifies and elects to be governed by paragraph i OF THIS SUBDIVISION, fail to either ship ordered merchandise or issue a refund (if payment has been remitted) for ordered merchandise which is not available within thirty days of receipt of order and payment therefor.

d. unless the seller qualifies and elects to be governed by [paragraph] PARAGRAPH i OF THIS SUBDIVISION, fail to either ship ordered merchandise or issue a credit (if charge-account authorization has been given and exercised by seller) for ordered merchandise which is not available within thirty days of receipt of order and charge-account authorization therefor.

e. fail to issue a refund or credit the customer's account if promised, upon demand of the customer within thirty days from the date of receipt of request for such refund provided the merchandise has been returned, if required.

f. fail to maintain a record of each complaint alleging failure to ship merchandise or furnish services connected with merchandise solicited and ordered on a pre-paid basis and the disposition of each such complaint. Such record shall be kept for a period of at least eighteen months following the disposition of such complaint.

g. fail to maintain records showing the employment of systems and procedures designed to comply with requirements of this subdivision.

h. fail to prominently feature in all advertising or other promotional materials containing a post office box address including order blanks and forms, the legal name of the company soliciting the order, the complete street address of such company and under what conditions a refund will be issued including but not limited to whether a refund will be issued:

(i) at any time, or not beyond a point in time specified; or

(ii) in cash, or as credit or in-house credit only. This paragraph shall not apply to a mail-order business that has a policy of accepting returns, for a period of not less than twenty days after the date of delivery of merchandise to the customer and providing a cash refund for a cash purchase or providing a cash refund or issuing a credit for a credit purchase, which credit is applied to the account on which the purchase was debited, in connection with the return of its unused and undamaged merchandise. Provided, however, that nothing contained herein shall prohibit a mail-order business from applying a cash payment for returned merchandise towards a prior outstanding balance. Provided, further, that nothing contained herein shall be deemed to require a cash refund of less than one dollar where the mail-order business provides in-house credit for such sum.

i. where the seller, due to circumstances beyond his OR HER control, is unable to make shipment within the time required by this section, the provisions of paragraphs c and d of this subdivision shall not apply if the seller elects to be governed by this paragraph and does either of the following:

(i) sends to the buyer a notice of delayed shipment, stating the duration of the expected delay, providing the buyer with the opportunity to express his OR HER choice whether to: (A) cancel his OR HER order and receive a refund[,]; (B) be shipped the merchandise or be furnished the services by a specified later date, PROVIDED THAT THE SELLER: (1) DOES NOT DEBIT THE CHARGE ACCOUNT OF THE BUYER UNTIL SUCH TIME AS THE MERCHANDISE IS SHIPPED; OR (2) WHERE THE DEBIT IS ALREADY CHARGED TO THE BUYER'S ACCOUNT, CREDITS THE CHARGE ACCOUNT OF THE BUYER UNTIL SUCH TIME AS THE MERCHANDISE IS SHIPPED, AT WHICH TIME SUCH CHARGE MAY BE DEBITED TO THE BUYER'S CHARGE ACCOUNT; or (C) to accept substitute merchandise of equivalent or superior quality. If the seller proposes to substitute merchandise, he OR SHE shall describe it in detail, indicating how it differs from the goods ordered. The notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the buyer may indicate his OR HER choice, and mailed in advance of the expiration of the thirty day period, or that time stated in the solicitation. The notice shall expressly advise the buyer that the order will be immediately cancelled and a refund forwarded where the buyer does not choose otherwise by response within thirty-five days of the date of mailing by the seller of the above notice. If, prior to ship-

ment, the seller receives a response from the buyer requesting refund, such refund shall be promptly made. If no response is received prior to the expiration of the thirty-five day period after the date of the mailing by the seller of the above notice, the seller shall make a prompt refund[.];OR

(ii) send the customer substitute merchandise of equivalent or superior quality, if the customer is extended the opportunity to return the substituted merchandise and the seller promises to refund to the customer the postage cost of returning such merchandise together with any portion of the purchase price previously paid by the customer. Prior to or at the time of shipment of the substitute merchandise, a notice shall be provided to the customer stating the right to obtain a refund and reimbursement for the postage cost incurred in returning the substituted merchandise.

For purposes of subparagraphs (i) and (ii) of this paragraph, merchandise may not be considered of "equivalent or superior" quality if it is not substantially similar to the merchandise ordered, or not fit for the usual purposes for which such merchandise is used, or if the seller normally offers the substituted merchandise at a price lower than the price of the merchandise ordered.

j. (i) in the case of an order for merchandise placed by telephone or by electronic means, accept an additional fee for expedited mailing or shipping, which is in excess of the lowest charge the seller would accept, in the regular course of business, for mailing or shipping of the merchandise ordered, when the seller does not reasonably expect such merchandise to be mailed or shipped within the next three business days after the order was placed, unless:

(A) the seller notifies the buyer, at the time the order is placed but before payment is accepted, that the seller anticipates that the merchandise will not actually be mailed or shipped within the next three business days after the order is placed; or

(B) the seller contacts the buyer, by telephone or by electronic means, within the next three business days after the order was placed to inform the buyer:

(a) that the mailing or shipping of the merchandise ordered is not reasonably anticipated to occur within the next three business days after the order was placed;

(b) of the date the seller reasonably anticipates the merchandise ordered to be mailed or shipped;

(c) that, at the buyer's option, the buyer may:

(1) accept the reasonably anticipated delay in mailing or shipping; or

(2) cancel the order and refund payment to the buyer within thirty days; or

(3) elect to have the merchandise ordered mailed or shipped in the regular course of business and refund the additional fee for expedited mailing or shipping to the buyer within thirty days; and

(d) that, if the seller does not receive a response on the next business day, the seller will mail or ship the merchandise ordered, in the manner originally requested by the buyer. Provided, however, that should the buyer contact the seller before the merchandise ordered has been mailed or shipped, nothing in this section shall be construed to preclude the seller from agreeing to any modifications to the buyer's order which are agreed to by both the buyer and seller.

(ii) (A) For the purposes of this subdivision, a seller shall be considered to have mailed or shipped a buyer's merchandise when the seller causes such merchandise, and applicable postage or shipping fee,

to be physically placed in the possession of the United States Postal Service or other carrier. Nothing in this section shall impose any liability on the seller for delays solely attributable to the postal service or carrier.

(B) A statement or notice contained in the advertising material for the merchandise, in a description of the merchandise, or in a description of the mailing and shipping options available to the buyer, which advises the buyer of the approximate time the seller reasonably anticipates the merchandise to be mailed or shipped, shall satisfy the notification requirements of this section.

4. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding the court may make allowances to the attorney general as provided in section eighty-three hundred three, subdivision six of the civil practice law and rules, and direct restitution. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

S 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.