

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:

1 Section 1. Section 396-m of the general business law, as amended by
2 chapter 802 of the laws of 1984, paragraphs a and e of subdivision 2 and
3 paragraph b of subdivision 3 as amended by chapter 72 of the laws of
4 2007, paragraph h of subdivision 3 as amended by chapter 407 of the laws
5 of 1987 and paragraph j of subdivision 3 as amended by chapter 16 of the
6 laws of 2006, is amended to read as follows:
7 S 396-m. Mail-order [or], telephone-order OR INTERNET MAIL-ORDER
8 merchandise. 1. This section shall apply to any mail-order business
9 [or], any telephone order business OR ANY INTERNET MAIL-ORDER BUSINESS
10 which is located in this state or advertises a New York state mailing
11 address or telephone number.
12 2. Definitions, as used in this section:
13 a. "mail-order business" shall mean a business which is engaged in the
14 solicitation of orders by advertisement or otherwise for merchandise or
15 services connected with merchandise to be shipped to the customer
16 through the mail or by other carrier, upon receipt of an order with
17 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 (i) sends to the buyer a notice of delayed shipment, stating the dura-
38 tion of the expected delay, providing the buyer with the opportunity to
39 express his OR HER choice whether to: (A) cancel his OR HER order and
40 receive a refund[,]; (B) be shipped the merchandise or be furnished the
41 services by a specified later date, PROVIDED THAT THE SELLER: (1) DOES
42 NOT DEBIT THE CHARGE ACCOUNT OF THE BUYER UNTIL SUCH TIME AS THE
43 MERCHANDISE IS SHIPPED; OR (2) WHERE THE DEBIT IS ALREADY CHARGED TO THE
44 BUYER'S ACCOUNT, CREDITS THE CHARGE ACCOUNT OF THE BUYER UNTIL SUCH TIME
45 AS THE MERCHANDISE IS SHIPPED, AT WHICH TIME SUCH CHARGE MAY BE DEBITED
46 TO THE BUYER'S CHARGE ACCOUNT; or (C) to accept substitute merchandise
47 of equivalent or superior quality. If the seller proposes to substitute
48 merchandise, he OR SHE shall describe it in detail, indicating how it
49 differs from the goods ordered. The notice shall be sent by first class
50 mail and accompanied by a self-addressed, postage paid device upon which
51 the buyer may indicate his OR HER choice, and mailed in advance of the
52 expiration of the thirty day period, or that time stated in the solic-
53 itation. The notice shall expressly advise the buyer that the order
54 will be immediately cancelled and a refund forwarded where the buyer
55 does not choose otherwise by response within thirty-five days of the
56 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,

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

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

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

27 S 2. This act shall take effect on the first of November next succeed-
28 ing the date on which it shall have become a law.