

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 777 (Delegate Howard, *et al.*)
 Economic Matters

Commercial Law - Credit Card Processors - Service Agreements

This bill requires a credit card processor to send to each business with whom it has (or intends to have) a “services agreement” a summary of the agreement with specified information. A credit card processor must also provide notice about automatic renewals, including the date by which the agreement must be canceled and procedures for canceling, at least 90 days before a business must cancel to prevent renewal. The bill does not apply to a services agreement between a credit card processor and a business entity that employs 50 or more employees. The Commissioner of Financial Regulation is authorized to investigate any complaints received as a result of the bill and to use any of the investigative and enforcement powers granted under Title 2, Subtitle 1 of the Financial Institutions Article. The bill establishes civil penalties for violations.

Fiscal Summary

State Effect: Special fund expenditures increase by about \$76,800 in FY 2020 for additional personnel; future years reflect annualization and ongoing operating expenses. Potential minimal increase in general fund revenues due to the bill’s penalty provisions.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	(76,800)	(95,800)	(98,900)	(102,200)	(105,600)
Net Effect	\$76,800	\$95,800	\$98,900	\$102,200	\$105,600

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill does not materially affect local government finances or operations.

Small Business Effect: Minimal.

Analysis

Bill Summary: A “credit card processor” is a person that processes credit card or electronic commerce transactions on behalf of a business entity for a fee. A “credit card processor” includes (1) a merchant services provider; (2) a financial institution; (3) an independent sales organization; and (4) any subsidiary or affiliate of those entities.

A “services agreement” is a contract between a credit card processor and a business entity under which the business entity agrees to pay the credit card processor for processing credit card or electronic commerce transactions on behalf of the business entity.

Before entering into a services agreement with a credit card processor, the business must acknowledge the agreement by signing, dating, and returning a copy to the credit card processor.

The summary of the services agreement must include information on (1) the interest rate authorized under the agreement; (2) the amount and purpose of each fee, fine, or penalty that the credit card processor may charge or assess; (3) the expiration of the agreement; (4) the renewal date; and (5) the name and contact information of an authorized representative of the credit card processor.

A person that violates the bill’s requirements is subject to a fine of up to \$100 for each violation. A person that has been found to violate any of the bill’s provisions is subject to a maximum fine of \$500 for each subsequent violation that is the same as the prior violation. These fines are civil penalties and are recoverable by the Commissioner of Financial Regulation in a civil action or an administrative cease and desist action under § 2-115 of the Financial Institutions Article.

Current Law/Background:

Contracts, Generally

State law does not specifically address credit card processors or the services agreements between businesses and credit card processors.

However, in the absence of specific law to the contrary, the law governing the creation of contracts in arms-length transactions between parties applies. Title 2 of the Uniform Commercial Code specifies, among other things, that:

- a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract;

- an agreement to constitute a contract for sale may be found, even if the moment of its making is undetermined;
- unless otherwise unambiguously specified, an offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
- the obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract; and
- if a court, as a matter of law, finds a contract, or any clause of it, to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or enforce that portion of the contract without the unconscionable clause, or it may limit application of the contract to avoid an unconscionable result.

Commissioner of Financial Regulation – Enforcement Powers

The Commissioner of Financial Regulation has the power to vigorously investigate financial transactions to determine whether a person has violated a law, regulation, rule, or order over which the commissioner has jurisdiction. For the purposes of an investigation or proceeding, the commissioner may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, and require the production of documents and other evidence. If a person refuses to obey a subpoena from the commissioner, the commissioner may apply to the appropriate circuit court to issue an order requiring the person to appear before the commissioner and produce any requested evidence. If the court issues such an order, failure to obey it subjects the person to contempt of court.

When the commissioner determines, after notice and hearing, as specified, that a person has engaged in a violation of a law, regulation, rule, or order, the commissioner may issue a cease and desist order, suspend or revoke the license of the violator, or issue a penalty order against the person for up to \$10,000 for a first violation and up to \$25,000 for each subsequent violation.

The commissioner may also bring an action in a circuit court to either prevent an unlawful action or to remedy the outcome of an unlawful action. The commissioner may bring an action to obtain a temporary restraining order, a temporary or permanent injunction, a declaratory judgment, an order preventing access to the violator's assets, an order of rescission or restitution, or any other relief that is determined just by the court.

Federal Guidance

According to the Federal Trade Commission, each electronic payment includes certain elements, including:

- the cardholder, who uses a debit or credit card to pay for a product or service;
- the issuer, which provides a payment card to a cardholder and usually maintains the cardholder’s account;
- the merchant, which provides the product or service for a price;
- the acquirer, which provides payment card services to the merchant and maintains the merchant’s account – sometimes, the merchant or the acquirer may use a third-party processor for certain processing services;
- the payment card network (PCN), which coordinates the information routing and money transfer between issuers and acquirers – PCNs may be debit card networks, credit card networks, or both; and
- interchange transaction fees, which include fees established, charged, or received by a PCN and paid by a merchant or an acquirer to compensate an issuer for its involvement in an electronic debit transaction.

A customer who wants to buy something presents his or her card to a merchant. The merchant generates an authorization request with a dollar amount and information from the customer’s card. The request is then routed electronically along a path. The issuer gets the request, checks its file of active card accounts, and sends an electronic message authorizing or declining the transaction. The authorization process usually takes seconds to complete. Then, the issuer posts a charge for the transaction to the customer’s account, and the acquirer posts a credit for the transaction, minus fees, to the merchant’s account. The amount deducted from the transaction value is known as the “merchant discount” and includes the interchange fee and other fees for processing the transaction.

State Expenditures: The Office of the Commissioner of Financial Regulation (OCFR) anticipates a significant influx of complaints under the bill – about 1,900 complaints per year or 158 complaints per month. As a result, OCFR advises that one additional position is needed to implement the bill’s requirements. The Department of Legislative Services concurs. Accordingly, special fund expenditures increase by \$76,846 in fiscal 2020, which accounts for the bill’s October 1, 2019 effective date. This estimate reflects the cost of hiring one financial examiner to handle the additional complaints under the bill. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	\$69,642
Operating Expenses	<u>7,204</u>
Total FY 2020 State Expenditures	\$76,846

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses.

Additional Information

Prior Introductions: HB 1647 of 2018, an identical bill as amended, passed the House and received a hearing in the Senate Finance Committee, but no further action was taken.

Cross File: SB 694 (Senator Kramer, *et al.*) - Finance.

Information Source(s): Department of Labor, Licensing, and Regulation; Federal Trade Commission; Department of Legislative Services

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