HB 777

Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

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

Commercial Law – Credit Card Processors – Merchant Processing Agreements

This bill prohibits a credit card processor from assessing or charging a fee, fine, or penalty of more than $500 if a business entity cancels a "merchant processing agreement" *before* the expiration of the initial term. Additionally, a credit card processor may not assess a fee, fine, or penalty if a business entity terminates the merchant processing agreement *after* the expiration of the initial term (unless the parties enter into a separate renewal agreement). The bill requires a merchant processing agreement to disclose specified information. 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 applies only prospectively and has no effect on merchant processing agreements entered into or renewed before the bill's October 1, 2019 effective date.

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 imposition of existing 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: Potential meaningful.

Analysis

Bill Summary:

Definitions

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 "merchant processing 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.

Applicability Provisions

The bill does not apply to a merchant processing agreement between a credit card processor and a business entity (1) that may be terminated without assessment of fees, fines, penalties, or liquidated damages or (2) if at the time of entry into the agreement, the business entity employs 50 or more employees or reasonably estimates that it will generate more than $2.0 million in credit card or electronic commerce transactions annually.

Disclosure Requirements

A merchant processing agreement must disclose clearly and conspicuously the following information:

- the amount of any early termination fee, fine, penalty, or liquidated damages that may be assessed by the credit card processor for termination of a merchant processing agreement before the expiration of the initial term;
- the expiration and renewal dates of the merchant processing agreement; and
- the customer service contact information of the credit card processor (including telephone number, mailing address, and email address).

The information must be provided on the signature page of an agreement and be initialed separately by the business entity. In addition, the credit card processor must provide a copy of the merchant processing agreement in electronic or paper form to the business entity at the time the business entity signs the agreement.

Current Law/Background:

Contracts, Generally

State law does not specifically address credit card processors or merchant processing 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	7,204
Total FY 2020 State Expenditures	**$76,846**

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

Small Business Effect: Any small businesses that enter into merchant processing agreements as identified by the bill may benefit due to the bill's limitations on the amount of fees, fines, or other penalties that a credit card processor may charge if such an agreement is canceled.

Additional Information

Prior Introductions: None.

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

Fiscal Note History: First Reader - February 19, 2019
sb/kdm Third Reader - March 25, 2019
Revised - Amendment(s) - March 25, 2019

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