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Senate Bills 1021 and 1022 (as introduced 10-2-24)
Sponsor: Senator Sam Singh
Committee: Finance, Insurance, and Consumer Protection

Date Completed: 10-9-24

CONTENT

Senate Bill 1021 would amend the Michigan Consumer Protection Act to specify that the Act would not apply to a specific method, act, or practice that was expressly authorized under the laws of the State or the United States or an agency, board, or officer administering the laws of the State or the United States.

Senate Bill 1022 would amend the Michigan Consumer Protection Act to do the following:

- **Establish specific fines for a violation of the Act that targeted an elder or vulnerable adult.**
- **Allow the Attorney General or prosecuting attorney, before bringing an action in court, to serve a written demand to a person suspected of having information related to a violation of the Act that required the person to provide the information.**
- **Create the Consumer Protection and Antitrust Revolving Enforcement and Education Fund, require costs and proceeds from proceedings under the Act to be deposited into the Fund, and require the Attorney General to spend money from the Fund for enforcement of the Act.**

Senate Bill 1021

The bill specifies that the Act must be liberally construed to effectuate its purpose, and the remedies provided under the Act would be in addition to any other remedy provided by law.

The Act specifies that it does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of the State or the United States. Instead, under the bill, the Act would not apply to a specific method, act, or practice that was expressly authorized under the laws of the State or the United States or by an agency, board, or officer administering the laws of the State or the United States; however, this provision would not exempt a method, act, or practice from the Act solely because either of the following applied:

- The method, act, or practice was part of a general transaction that was specifically authorized under the laws of the State or the United States.
- The method, act, or practice, or the general transaction in which the method, act, or practice was part, was subject to governmental regulation.

Senate Bill 1022

Definitions

"Attorney fees, costs, and proceeds" would mean attorney fees, costs, and proceeds obtained by the Department of Attorney General from a designated action. "Damages or refunds" would

mean damages or refunds obtained by the Department of Attorney General from a designated action.

"Designated action" would mean a judgment, settlement, compromise, or assurance of discontinuance or voluntary compliance, or other agreement relating to any of the following:

- An alleged violation of the Act or any other law with a purpose of protecting persons against fraudulent or other unfair or deceptive trade practices.
- Any alleged anti-competitive conduct within trade or commerce.
- An alleged violation of law with a purpose of protecting charitable gifts or charitable assets.

"Elder" would mean an individual who is 80 years of age or older.

"Small business" would mean a business concern incorporated or doing business in the State, including an affiliate of the business concern, that is independently owned and operated and that either employs fewer than 250 full-time employees or that has gross annual sales of less than \$6.0 million.

Under the Act, "trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. Under the bill, "trade or commerce" would mean the conduct of a business providing, *directly or indirectly*, goods, property, or services that are primarily used for personal, family, household, or small business purposes. In addition to the inclusions above, the term also would include the provision of goods, property, or services for the purpose of enhancing an individual's education, income, or employability.

"Vulnerable adult" would mean any of the following:

- An individual who is 18 years of age or older and who, because of age, developmental disability, mental illness, or physical disability, requires supervision or personal care or lacks the personal and social skills required to live independently, whether or not the individual has been determined by a court to be incapacitated.
- An adult, as defined in the Adult Foster Care Facility Licensing Act: a person 18 years old or older or a person who is placed in an adult foster care family home or small group home according to the Act.
- An adult, as defined in the Social Welfare Act: a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.

Violations Against Elder and Vulnerable Adults

The Michigan Consumer Protection Act prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce that, among other things, cause a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services. If the Attorney General has probable cause to believe that a person has engaged, is engaging, or is about to engage in a method, act, or practice that is unlawfully unfair, or deceptive, and gives notice, the Attorney General can bring an action in accordance with principles of equity to restrain the defendant by temporary or permanent injunction from engaging in the method, act, or practice. The action can be brought in the circuit court of the county where the defendant is established or conducts business or, if the defendant is not established in State, in the circuit court of Ingham County. The court may award costs to the prevailing party. For a persistent and knowing violation of the Act, the court can assess the defendant a maximum civil fine of \$25,000.

In addition, the bill specifies that, for a violation of the Act by a person, each of the following would be considered a separate violation:

- Each person solicited by the person.
- Each advertisement distributed by the person.
- Each misrepresentation or deceptive statement contained in a solicitation.
- Each time that an advertisement was received or was published, broadcast, or otherwise disseminated by the person.

Subject to the provisions described below, a person that used or had used a method, act, or practice that targeted an elder or vulnerable adult in violation of the Act would be subject to a maximum civil fine of \$25,000 per violation, unless the violation that targeted an elder or vulnerable adult was persistent and knowing, in which case the person would be subject to a maximum civil fine of \$50,000 per violation.

For a violation of the Act by a person that used a method, act, or practice that targeted an elder or vulnerable adult, each of the following would be considered a separate violation:

- Each elder or vulnerable adult solicited by the person.
- Each advertisement distributed by the person.
- Each misrepresentation or deceptive statement contained in a solicitation.
- Each time that the advertisement was received or was published, broadcast, or otherwise disseminated by the person.

In determining the amount of the civil fine under the bill, the court could consider any of the following:

- Whether the violation was made in good or bad faith.
- The injury to the public.
- The person's ability to pay.
- The public's interest in eliminating the benefits to the person that were derived from the violation.
- The necessity of vindicating the authority of this state and the strong need to deter any future violation.

The bill's civil fine would be in addition to any other civil fine or relief available under the Act or any other law of the State.

Written Demand

If the Attorney General or a prosecuting attorney had reason to believe that a person had information or was in possession, custody, or control of any documentary material or tangible object that was relevant to an investigation of a violation of the Act, the Attorney General, or a prosecuting attorney with the permission of or at the request of the Attorney General, could, before bringing an action under the Act, serve the person with a written demand to do one or more of the following:

- Appear and be examined under oath.
- Answer interrogatories.
- Produce any documentary material or tangible object for inspection and copying.

The written demand would have to contain all the following:

- A description of the nature of the conduct constituting the violation of the Act that was under investigation.
- If the demand required the appearance of the person, a reasonable time and place for the appearance.
- If the demand required written interrogatories, a copy of the interrogatories and a reasonable time within which the person would have to answer the written interrogatories.
- A notice that the person could file an objection to or reason for not complying with the written demand with the serving entity on or before the return date.
- A summary of petition process prescribed by the bill and described below.

Additionally, if the demand required the production of any documentary material or tangible object, the written demand would have to contain all the following:

- A description of the documentary material or tangible object with sufficient definiteness to permit the documentary material or tangible object to be fairly identified by the person.
- A reasonable time and place for production of the documentary material or tangible object.
- The name of the person that would be the custodian of the documentary material or tangible object.

At any time before the return date or not later than 10 days after receiving the written demand, whichever was earlier, a person subject to the written demand could petition the circuit court of Ingham County for a protective order, stating good cause, to do any of the following:

- Extend the return date for a reasonable time.
- Modify the demand.
- Set aside the demand.

If a person filed a petition for a protective order, the person would have to give the serving entity at least 10 days' notice of the hearing on the petition and the serving entity would have to be given an opportunity to respond to the petition.

If a person did not secure a protective order and did not comply with the written demand by the return date, the serving entity, upon notice to the person, could apply to a court for an order compelling the person's compliance with the written demand.

If a court contemplating the order found there was reasonable cause to believe that the Act was being, had been, or was about to be violated, that the person that was committing, had committed, or was about to commit the violation possessed information, documentary material, or a tangible object that was relevant to the investigation by the Attorney General or prosecuting attorney, that the person had left the State or was about to leave the State, and that an order was necessary for the enforcement of the Act, the court could do either or both of the following:

- Require the person to comply with the written demand.
- Forbid the removal, concealment, withholding, destruction, mutilation, falsification, or alteration of any documentary material or tangible object identified as such that was in the possession, custody, or control of the person.

A person subject to a written demand or a court order that, with the intent to avoid, evade, or prevent compliance, in whole or in part, removed, concealed, withheld, destroyed, mutilated, falsified, or by any other means altered any documentary material or tangible object identified as such in the possession, custody, or control of the person would be subject to a maximum civil fine of \$10,000 per violation.

The Attorney General or a prosecuting attorney could disclose any testimony, answer, documentary material, or tangible object in any of the following circumstances:

- If the disclosure were to a law enforcement official.
- If the Attorney General or prosecuting attorney considered the disclosure necessary to enforce the Act.
- If disclosure were ordered by a court.
- If the disclosure were after confidentiality was waived by the person subject to the written demand and the person that had testified, answered interrogatories, or produced material.

Unless disclosed, any testimony, answer, documentary material, or tangible object received by the Attorney General or a prosecuting attorney in accordance with a written demand or order under the bill would be confidential until the time that an enforcement action was brought by the Attorney General or prosecuting attorney under the Act.

The Act allows the Attorney General to bring a class action on behalf of persons residing in or injured in the State for the actual damages for unlawful acts under the Act. The bill would require the damages to be at least \$250 for each class member.

Consumer Protection and Antitrust Revolving Enforcement and Education Fund

The bill would create the Consumer Protection and Antitrust Revolving Enforcement and Education Fund in the State Treasury. The State Treasurer would have to deposit attorney fees, costs, and proceeds in the Fund. The State Treasurer could deposit damages and refunds in accordance with the bill and money or assets received from any other source in the Fund. The State Treasurer would have to direct the investment of money in the Fund and credit interest and earnings from the investments to the Fund. Money in the Fund at the close of the fiscal year would remain in the Fund and would not lapse to the General Fund. The Department of the Attorney General would be the administrator of the Consumer Protection and Antitrust Revolving Enforcement and Education Fund for audits.

Except as otherwise directed by a court or agreed to by the parties, attorney fees, costs, and proceeds would be deposited into the Fund as follows:

- If the amount of the attorney fees, costs, and proceeds were not more than \$500,000, 100% of the amount of attorney fees, costs, and proceeds would have to be deposited into the Fund.
- If the amount of the attorney fees, costs, and proceeds were more than \$500,000 but not more than \$1.0 million, 100% of the first \$500,000 of attorney fees, costs, and proceeds and 50% of the remainder would have to be deposited into the Fund.
- If the amount of the attorney fees, costs, and proceeds were more than \$1.0 million, 100% of the first \$500,000 of attorney fees, costs, and proceeds, 50% of the next \$500,000 of attorney fees, costs, and proceeds, and 10% of the remainder would have to be deposited into the Fund.

Except as otherwise directed by a court or agreed to by the parties, the following damages or refunds would have to be deposited into the Fund:

- Any de minimus amount of damages or refunds.
- Any amount of the damages or refunds that relate to persons that could not be identified by the Department of the Attorney General.

The Department of the Attorney General would have to spend money from the Fund on appropriation only to fund positions and pay expenses incurred by the Attorney General related to the enforcement of any of the following:

- The Michigan Consumer Protection Act.
- A law relating to anti-competitive conduct within trade or commerce.
- A law with a purpose of protecting charitable gifts or charitable assets.

The Attorney General also could appropriate money from the Fund at the Attorney General's discretion to educate the public regarding consumer protection matters.

MCL 445.904 (S.B. 1021)
445.902 et al. (S.B. 1022)

Legislative Analyst: Nathan Leaman

FISCAL IMPACT

The bill likely would have a negative but minimal fiscal impact on the Department of Treasury. Under the bill, the newly-created Consumer Protection and Antitrust Revolving Enforcement and Education Fund could accrue a significant balance, depending on the magnitude of the attorney fees, costs, and proceeds that were designated for deposit. Money in the Fund would remain in the Fund at the close of the fiscal year and would not lapse to the General Fund. Directing the investment and managing interest and earnings to a Fund with a balance in excess of \$1.0 million could result in administrative costs for Treasury, but it is unlikely that these costs would require a notable increase in appropriations. The Department of Attorney General would be the primary administrator of the Fund.

The bills would not likely increase costs for the Attorney General. While the bills would create additional pathways for the Attorney General to pursue criminal activity under the Act, the language to do so is permissive. Additionally, increased enforcement under the Act could be covered partially or entirely by the Consumer Protection and Antitrust Revolving Enforcement and Education Fund created by the bills.

The bill could have a positive fiscal impact on the State and local units of government. The bill would impose a civil fine of varying amounts from \$10,000 to \$50,000. Additional provisions proposed in the bill could increase the number of civil fines imposed; however, the amount of additional revenue is indeterminate and dependent on the number of fines imposed.

Revenue collected from civil fines is used to support local libraries. Additionally, \$10 of the civil fine would be deposited into the State Justice System Fund. This Fund supports justice-related activities across State government in the Departments of Corrections, Health and Human Services, State Police, and Treasury. The Fund also supports justice-related issues in the Legislative Retirement System and the Judiciary. The amount of revenue to the State or for local libraries is indeterminate and dependent on the actual number of violations.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.