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CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF LAW  
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September 1, 2023

The Honorable President and Members  
of the Baltimore City Council  
Attn: Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 23-0424 – Unfair, Abusive, or Deceptive Trade Practices – Penalties

Dear President and City Council Members:

The Law Department has reviewed Council Bill 23-0424 for form and legal sufficiency. The bill replaces current Subtitle 4 of Article 2 of the City Code, entitled “False Advertising”, with a new Subtitle 4 of Article 2, entitled “Unfair, Abusive, or Deceptive Trade Practices.” The new Subtitle, in large part, is modeled on similar provisions in the Maryland Consumer Protection Act (“CPA”), contained in Title 13 of the State Commercial Law Article. In pertinent part, the bill prohibits a person from engaging in unfair, abusive, or deceptive trade practices in a variety of business-related endeavors in Baltimore City, and adopts relevant definitions contained in the State CPA. The bill also establishes civil and criminal penalties for violations and authorizes the City Solicitor, on behalf of the Mayor and City Council, to investigate potential violations and initiate legal proceedings for injunctive relief and the imposition and collection of civil penalties in a court of competent jurisdiction.

Authority to Enact Local Consumer Protection Laws

Among the express powers given to the Mayor and City Council of Baltimore (“City”) by the Maryland General Assembly in Article II of the Charter is the authority to “license, tax and regulate all businesses, trades, vocations or professions.” City Charter, Art. II, § (17). The City is also authorized to pass any “ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City” and to “have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City.” City Charter, Art. II, §§ (47) and (27).

Pursuant to this authority, the City has enacted a variety of legislation pertaining generally to business licensing, regulation, and consumer protection. The bill expands current City consumer

protection provisions by entirely rewriting Subtitle 4 of Article 2 of the City Code, eliminating the former “False Advertising” provisions and replacing them with new provisions covering the much more expansive category of “Unfair, Abusive, or Deceptive Trade Practices.” The bill defines “unfair, abusive, or deceptive trade practices” (and related terms) by adopting the State CPA’s definition, which includes false advertising, deception, fraud, and many other predatory practices. *See* Md. Code, Commercial Law Art. (“CL”), §§ 13-101 and 13-301. The bill appears to have inadvertently omitted the definition for the term “person.” A suggested remedial amendment is attached.

The State CPA explicitly authorizes local jurisdictions, including Baltimore City, to enact and enforce local consumer protection laws that are at least as strict as the State’s. *See* Md. Code Ann., Commercial Law Article, Sections 13-102(b) (“It is the intention of this legislation to set certain minimum statewide standards for the protection of consumers across the State, and the General Assembly strongly urges that local subdivisions which have created consumer protection agencies at the local level encourage the function of these agencies at least to the minimum level set forth in the standards of this title) and 13-103(b) (permitting the City to enact even more stringent consumer protection provisions than those in the State Consumer Protection Act).

The bill prohibits any person from engaging in unfair, abusive, or deceptive trade practices in a variety of business-related endeavors, including in: the sale, lease, rental, loan, or bailment of any consumer good, realty, or service; the offer for sale, lease, rental, loan, or bailment of any consumer good, realty, or service; the offer for sale of course credit or other educational services; the extension of consumer credit; the collection of a consumer debt; or the purchase or offer of purchase of a consumer good or realty in exchange for paying off consumer debt. These prohibitions track the State CPA’s similar prohibitions. Crucially, however, the bill limits the prohibition to activity “in Baltimore City.” This is important because the City may only enact laws with “local effect” under the home rule provisions of the Maryland Constitution. *See, e.g., Holiday Universal, Inc. v. Montgomery Cnty.*, 377 Md. 305, 308 (striking down a Montgomery County consumer protection law because of its “significant extraterritorial impact”).

The bill authorizes a civil penalty of up to \$1,000 per violation and a criminal penalty of up to \$1,000 per violation. These penalties are consistent with the City’s authority under Article II, Section (48) of the Charter, which permits the City to “provide civil and criminal fines and penalties for the violation of any ordinance . . . provided that no fine or penalty shall exceed \$1000.00.”

#### City Solicitor’s Authority to Enforce in Court

The bill authorizes the City Solicitor, on behalf of the Mayor and City Council, to initiate injunctive or other legal proceedings in a court of competent jurisdiction to enforce the Subtitle. The Courts and Judicial Proceedings Article of the Maryland Code appears to envision this possibility.

Specifically, Sections 4-401 and 4-402, taken together, permit counties and municipalities, including Baltimore City, to file a petition for injunctive relief in either the District Court or Circuit Court “for enforcement of local health, housing, fire . . . *consumer protection*, and zoning codes for which equitable relief is provided.” Md. Code Ann., Courts and Judicial Proceedings Article (“CJP”), §§ 4-401(8) and 4-402(d)(2) (emphasis added). Additionally, even without this explicit authorization in State law, the City has implied authority to enforce the local laws it enacts under its express powers. *See, e.g.*, 87 Md. Op. Att’y Gen. 55 (2002) (“general enforcement power is ‘necessarily or fairly implied in or incident to’ the grant of express powers, for, without enforcement, local laws and ordinances would be largely meaningless.”) (internal citations omitted).

Moreover, this authority does not exceed the scope of the City Solicitor’s powers in the Charter or Code. *See* Charter, Art. VII, § 24 (“The City Solicitor shall have sole charge and direction of the preparation and trial of all suits, *actions and proceedings of every kind* to which the City, or any municipal officer or agency, shall be a party.”) (emphasis added). And this authority is not unprecedented. *See, e.g.*, City Code, Art. 15, § 46-12 (“Whenever the City Solicitor shall be notified of any violation of the provisions of this [Licensing and Regulation] article, it shall be his duty immediately to institute legal proceedings against the offender or offenders to recover from him, her, or them, the penalty or penalties prescribed by this article.”); *see also* Prince George’s County Code, § 2-158(b) (“The Office of Law may bring, in the name of the County, a body politic, any action necessary to preserve such status quo or to prevent such harm [related to alleged consumer protection violations], including the seeking of temporary restraining orders and preliminary injunctions. The County Attorney is authorized to take such actions.”).

The bill specifically authorizes the Solicitor to initiate a legal proceeding both for injunctive relief and to impose and collect civil penalties. Although the CJP permits equitable relief proceedings involving violations of local consumer protection laws to be brought in either the District Court or Circuit Court, as explained above, it also provides that the District Court has jurisdiction over a proceeding for adjudication of a violation of a City ordinance for which a civil penalty is provided. *See* CJP § 4-406(a)(2). Nonetheless, if the penalties at issue in a particular consumer protection case exceed \$5,000, the CJP arguably allows the case to be brought in either the District Court or Circuit Court, as with the injunctive relief action. *See* CJP § 4-402(d)(1)(i) (“the plaintiff may elect to file suit in the District Court or in a trial court of general jurisdiction, if the amount in controversy exceeds \$5,000.”). Thus, depending on the circumstances, it may be possible for the Solicitor to initiate a legal proceeding in the Circuit Court that covers both the equitable component and the civil penalty component. *See also, e.g., Vulcan Waterproofers, Inc. v. Maryland Home Imp. Comm’n*, 253 Md. 204, 211–12, 65–66 (1969) (a court that rightfully has equity jurisdiction over a matter typically has authority to adjudicate “all the questions which might arise out of the subject matter in controversy . . . even as to matters with regard to which equity could not originally have had jurisdiction”) (citations omitted).

City Solicitor's Investigative Authority

The bill authorizes the City Solicitor to conduct an investigation when there is reason to believe a person is engaging in or has engaged in a violation of the subtitle. As a general matter, an agency or officer provided for in the Charter may be prescribed additional duties and powers by ordinance, so long as the additional duties and powers are consistent with the Charter. *See* City Charter, Art. VII, § 2(a). As discussed above, the Solicitor, under the Charter, has “sole charge and direction of the preparation and trial of all suits, *actions and proceedings of every kind* to which the City, or any municipal officer or agency, shall be a party.” Charter, Art. VII, § 24 (emphasis added). Determining whether to bring an enforcement action in court for a violation of the local consumer protection laws would fall within this express Charter power, and authorizing an investigation to aid in this determination would be consistent with this power. *See, e.g.*, City Code, Art. 1, Subtitle 12 (establishing the Central Bureau of Investigation in the Law Department to investigate claims against the Mayor and City Council and claims by the Mayor and City Council against third parties). That said, the bill should be amended to more clearly tie the Solicitor's investigatory power here into the determination whether to initiate legal proceedings. A suggested amendment along these lines is attached.

The bill authorizes the Solicitor's investigation if there is “reason to believe” a person has violated or is violating the subtitle. The “reason to believe” standard requires “specific articulable facts that would justify belief by a reasonable person” that a person has or is violating the law. *See Comptroller of Treasury v. PHH Corp.*, 123 Md. App. 214, 232 (1998). Accordingly, this legal standard for “reason to believe” should constrain the Solicitor's discretion in deciding when to investigate a potential violation of the Subtitle.

In the course of an investigation authorized by the Subtitle, the bill permits the Solicitor to issue a subpoena for the production of documents or for the taking of testimony. The bill also permits the Solicitor to enforce any such subpoena in court. It is well-settled that a City ordinance can confer subpoena power upon a City administrative agency that possesses quasi-judicial functions. *See, e.g.*, 60 *Solicitor Opinions* 169 (1968) (“there is abundant precedent for an ordinance of the mayor and City Council conferring subpoena power upon an administrative agency of the City which possesses quasi-judicial functions.”); City Code, Art. 8, § 3-22 (providing City Ethics Board with subpoena power); City Code, Art. 4, § 2-4 (providing Community Relations Commission with subpoena power); 87 Md. Op. Att'y Gen. 55 (2002) (“a local government with home rule powers may confer subpoena power.”). However, the subpoena power is not limited to quasi-judicial functions or quasi-judicial agencies. Instead, it can also attach where an agency or official has been given only *investigative* duties. *See Banach v. State Commission on Human Relations*, 277 Md. 502, 511 (“an agency charged with investigatory duties to ferret out violations of the law can issue subpoenas and make such investigations, *even though no formal administrative hearing be pending.*”) (emphasis added) (citations omitted). Thus, the Finance Director and the Fire Marshall have been granted subpoena power by City ordinance to investigate tax fraud and fires,

respectively. *See* City Code, Art. 28, § 17-12 and Fire Code, § 104.10.6. Indeed, the Solicitor, too, has already been given investigatory and subpoena power in at least one context. *See* City Code, Art. 5, § 40-12 (permitting the Solicitor to issue and seek judicial enforcement of a subpoena requiring testimonial or documentary evidence whenever “the City Solicitor reasonably believes that a person may have information or may possess or have custody of or control over any potential evidence, wherever situated, that the City Solicitor believes is relevant to an investigation [concerning Board of Estimates debarment]”). *See also, e.g., City & Cnty. of San Francisco v. Uber Techs., Inc.*, 36 Cal. App. 5th 66, 73–74 (2019) (“The [San Francisco] City Attorney has a broad right to investigate, including the use of subpoenas, when it suspects an entity operating within its jurisdiction is violating the law.”)

Accordingly, because the bill confers on the Solicitor the authority to enforce the Subtitle in court and, pursuant to that determination, to investigate potential violations, the subpoena authority is proper. Of course, any subpoena issued under the Subtitle must only seek information that is relevant to the inquiry and be sufficiently definite and not overbroad. *See, e.g., Banach*, 277 Md. at 506. The bill’s reference to the Maryland Rules is misplaced because the subpoena power contemplated here is investigatory/administrative in nature and not pursuant to a civil or criminal proceeding. A suggested amendment is attached.

If the minor suggested amendments are adopted, the bill can be approved for form and legal sufficiency. Additionally, attached is a statement in support of the bill from the Chief of the Law Department’s Affirmative Litigation Division.

Sincerely,



Jeffrey Hochstetler  
Chief Solicitor

cc: Ebony Thompson, Acting City Solicitor  
Nina Themelis, Mayor’s Office of Government Relations  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Hilary Ruley, Chief Solicitor  
Ashlea Brown, Chief Solicitor  
Michelle Toth, Special Solicitor  
Teresa Cummings, Assistant Solicitor

Law Department Amendments to Council Bill 23-0424

(1<sup>st</sup> Reader Copy)

1. On page 1, after line 28, between “(9) ‘MERCHANT’” and “(10) ‘SALE’”, insert “(10) ‘PERSON’” and number the remainder of the list accordingly.
2. On page 4, at the beginning of line 12, add “IN DETERMINING WHETHER TO INITIATE LEGAL PROCEEDINGS UNDER THIS SUBTITLE,”. On that same page, in line 13, strike the words “OF A MERCHANT”. On that same page, beginning in line 16 and continuing to line 17, strike the words “AND PURSUANT TO THE MARYLAND RULES,”.
3. On page 5, in line 2, strike “SUBJECT TO THE MARYLAND RULES,”. On that same page, in line 3, substitute the word “this” for the word “THE”.

To: Rules and Legislative Oversight Committee  
City Council President and Members of City Council  
From: Sara Gross, Affirmative Litigation Practice Group Chief, Department of Law  
Re: Council Bill 23-0424  
Date: September 1, 2023

The Department of Law supports Council Bill 23-0424 and respectfully asks that you vote in favor of the bill. This bill represents a standalone law against Unfair, Abusive, and Deceptive Trade Practices, which was also part of Council Bill 23-0347. That bill additionally created a new Department of Business Licensing and Consumer Protection. However, because Bill 23-0347 is being held for additional discussion and input, it is in the City's interest to pass a standalone consumer protection bill in order to penalize unfair and deceptive conduct as soon as possible. If the City Council chooses to move forward with the other bill, 23-0347, it can be easily reconciled with this standalone bill, with minor amendments.

Baltimore City is in need of a local consumer protection bill. The State of Maryland provides local governments with the opportunity to regulate in the consumer protection space, but the City has yet to take advantage of this authorization. Currently, the only City consumer protection ordinance is a 1970s era provision that provides criminal penalties for false advertising, which does not appear to have been utilized in modern times, if ever.

As a result, the City can only pursue legal action against companies when they harm the City directly, as we have with our lawsuits against Big Oil, the opioid industry, et cetera. We have no current recourse against companies who harm our citizens through unfair and deceptive trade practices. The State has the ability to pursue fines and other relief under the Maryland Consumer Protection Act, and authorizes local governments to do so as well, but the City to date has not enacted any such powers. As a result, we have missed out on opportunities to participate in major consumer protection litigation, such as the lawsuit that the City of Chicago brought in 2021 against DoorDash and GrubHub for charging consumers deceptive and misleading fees. The aggregated financial penalties for each violation, if sustained, total in the millions of dollars. Washington, DC, for example, has successfully fined Instacart (\$1.8 million in 2022) and Doordash (\$2.8 million in 2020) for engaging in conduct designed to deceive consumers. Further, a local consumer protection ordinance would have allowed us to request fines for consumer protection violations as part of our pending lawsuit against ghost gun kit manufacturer Polymer80. In 2022, DC was awarded over \$4 million against Polymer80 for local consumer protection violations alone.

In addition, this proposed ordinance will allow us to pursue injunctions against companies to prohibit their ongoing bad conduct, as DC also was able to do in its case against Polymer80. While the City itself cannot pursue remedies on behalf of the consumers themselves (although consumers themselves already have avenues to recover their own damages), obtaining an injunction or

settlement that halts the deceptive conduct and discourages future bad actors will benefit all consumers.

Thus, this proposed ordinance will allow us to hold businesses who harm our citizens through unfair, deceptive, and abusive practices accountable for their actions. The bill benefits both consumers, by allowing us to bring a stop to bad conduct, and the City, through the collection of fines. It is imperative that Baltimore joins major cities and counties around the country that already have local consumer protection ordinances, like Chicago, DC, and New York City, as well as Howard and Montgomery Counties here in Maryland. Accordingly, the Law Department strongly support this legislation and respectfully ask that you do the same.