

OFFICE OF THE ATTORNEY GENERAL
GUIDANCE WITH RESPECT TO UNFAIR AND DECEPTIVE FEES (940 CMR 38.00)

The Office of the Attorney General has issued regulations concerning unfair or deceptive fees in the purchase, lease, or rental of products by Massachusetts consumers. The regulations will take effect on September 2, 2025. The Office of the Attorney General issues this guidance to facilitate compliance with the regulations and answer expected questions from the public.

38.01: Purpose; 38.02: Scope

Are any industries not covered by these regulations?

The Office of the Attorney General has determined that these regulations shall not apply in the following circumstances:

- 940 CMR 38.00 does not apply to air transportation provided by air carriers, as those terms are used in 49 U.S.C. § 41713.
- Sales or purchases of securities via a licensed securities professional are not subject to 940 CMR 38.04(1) - (4) & (6). Any consumer agreement with a licensed securities professional to engage in automatic periodic purchases or Sales of securities are not subject to 940 CMR 38.05(1).
- Products insuring property or liability are covered by 940 CMR 38 and must meet all of its requirements, with the exception that a written notice required by 940 CMR 38.05(4), sent in combination with a policy renewal proposal, will be in compliance with the timing requirements of that section if it is sent no more than fifty (50) and no fewer than five (5) calendar days prior to the policy renewal effective date. For other insurance products which are subject to Massachusetts statutory or regulatory requirements concerning the advertisement, offer, solicitation, sale, or renewal of such products, compliance with said requirements shall constitute compliance with 940 CMR 38.
- A restaurant, as defined by G.L. c. 138, § 1, does not violate 940 CMR 38.04(1), (2), & (6) by imposing a mandatory service charge, as defined by G.L. c. 149, § 152A, based on the size of the party, so long as such service charge is exclusively remitted to wait staff employees, service employees, or service bartenders in compliance with G.L. c. 149, § 152A(d). The fact and circumstances under which a restaurant may impose a mandatory service charge based on the size of the party must be Clearly and Conspicuously disclosed whenever pricing information is provided, and may be displayed

as a percentage. A disclosure in the following form complies with 940 CMR 38.04(1), (2), & (6):

Appetizers	
French fries -----	\$6.00
Ceasar salad -----	\$8.00
Chicken wings -----	\$9.00

Entrées	
Pepperoni Pizza -----	\$18.00
Cheese Pizza -----	\$16.00
Hamburger -----	\$12.00
Cheeseburger -----	\$13.00

*For parties of 8 or more, the restaurant will impose a 20% service charge on the bill.

Additionally, for those entities specified in the regulations, 940 CMR 38.06, compliance with specific statutes or regulations shall constitute compliance with all or part of these regulations.

This guidance should not be interpreted to mean that G. L. c. 93A, or the Attorney General’s regulatory authority, does not apply to these types of businesses or transactions. Instead, the Attorney General, as a matter of regulatory discretion, has determined not to apply the aforementioned regulatory provisions to these entities as part of this regulatory promulgation, without waiving any authority or right to promulgate future regulations to cover such conduct.

38.03: Definitions

What constitutes “charges imposed on consumers by a quasi-governmental entity operating pursuant to state statute” under the definition of “Government Charges”?

The Office of the Attorney General anticipates that some sellers may pass on a surcharge to consumers through a Tourism Destination Marketing District (TDMD) as established by Section 14 of Chapter 29 of the Acts of 2021. These surcharges are defined as “Government Charges” by 940 CMR 38.00 and therefore are exempt from the other requirements for disclosing the “Total Price.” Sellers that do levy a

surcharge through a TDMD must still disclose the fee to consumers in the final presentation of the price prior to Sale, as they would state, local, or federal taxes.

38.04: Unfairness and Deception in Connection with Marketing/Solicitation/Sale

In the final presentation of the price to the consumer prior to Sale, do these regulations dictate the form in which Government Charges must be disclosed?

Sellers are not required to display the "Government Charges" associated with the purchase of each individual Product in a Sale of multiple Products. A seller may display the total amount to be paid for each category of "Government Charges" applicable to the Sale across all Products included in one transaction at the final presentation of the price prior to Sale.

Where these regulations require the disclosure of the "nature, purpose, and amount" of fees and charges, how much detail are sellers required to show?

The nature or purpose of any fee or charge, as disclosed to the consumer, must accurately reflect the purpose for which the seller uses the money collected from such fee or charge. Many fees could be disclosed using a concise phrase, such as a "cleaning fee," provided the amount charged is reasonably reflective of the cost the seller incurs for cleaning. There may be instances where an ordinary consumer would require more information to understand the nature and purpose of a fee. Sellers may use concise language combined with commercially reasonable and accessible means to provide additional information that Clearly and Conspicuously discloses the nature and purpose of such fees for the benefit of consumers. Commercially reasonable means may, for example, include information buttons or links in electronically presented Advertisements, marketing materials, solicitations, or offers of Sale.

Do these regulations require sellers to separately identify or describe any particular component of the price of a Product?

These regulations do not require sellers to individually identify and describe particular components of the Total Price. Where sellers *choose* to identify part of the Total Price as a fee, charge, or other expense, they must describe the nature and purpose of that fee, charge, or other expense in accordance with 940 CMR 38.04(2). These regulations do not prevent a seller from presenting the price of a Product as one all-in price.

Below is an example of two compliant Advertised prices and two non-compliant Advertised prices under 940 CMR 38.04:

Compliant Disclosures	Noncompliant Disclosures
Total Price: \$148.86	Price: \$143.86 *Seller will add a \$5.00 surcharge to cover the cost of processing your online transaction.
Total Price: \$148.86 *Includes a \$5.00 surcharge to cover the cost of processing your online transaction.	Total Price: \$148.86 *Includes a \$5.00 surcharge

How do these regulations address fees that depend on consumer choices?

Total Price under these regulations concerns the maximum amount that a consumer *must pay*. Fees that depend on optional consumer behavior that occurs after the purchase – such as fees incurred for smoking or causing damage to a hotel room – are not mandatory and need not be included in the Total Price.

Similarly, if the issuance of a fee or charge depends on choices a consumer makes prior to or during a transaction, the seller need not include that fee in the Total Price prior to the choice being made. For example, when booking a hotel room, consumers may select from several optional features that impact the final amount of payment. The hotel may Advertise a room's lowest available price as the Total Price so long as consumers are actually able to book the Advertised room at that price, and the pricing information is not otherwise misleading. But once a consumer selects a feature that increases the price, the seller must update the Total Price to reflect such choices.

There may also be fees or charges that are not presented as mandatory, but where a seller's failure to include them in the Total Price would be deceptive. Sellers must include in the Total Price all fees or charges that meet the following conditions (other than Government Charges and Shipping Charges):

- Fees consumers cannot reasonably avoid, such as credit card processing fees when there is no other viable payment option, or fees that are

effectively “built-in” because the seller employs practices such as default billing, pre-checked boxes, or opt-out provisions. For example, a seller may not treat as optional—and must include in the Total Price—a fee that will be automatically charged and can be removed only if a consumer notices and challenges it.

- Fees that consumers must incur in order to make the underlying good or service fit for its intended purpose, which reasonable consumers would expect to be part of the purchase. For example, if a hotel requires guests to pay a fee to use towels, the hotel must include the towel fee in the Total Price.

How must a seller display the “Total Price” when the price of the Product is determined by the consumer’s use of the Product for a specific period of time?

When the price of the Product is determined by the consumer’s use of the Product for a specific period of time (e.g., a nightly or daily rate), sellers may display that rate, inclusive of all fees, charges, or other expenses, as the Total Price, until such time as the seller is made aware of the duration or dates of the consumer's intended use. Once the seller is made aware of the duration or dates of the consumer's intended use, the seller must display the price for the entire duration as the Total Price, but may also display the applicable rate.

For example, sellers offering lodging accommodations may display a room's price as a nightly rate until the consumer indicates the duration or dates of the stay, at which point the seller must display the price for the entire duration, but may also continue to display the applicable nightly rate.

Where these regulations require the disclosure of readily available instructions for avoiding optional or waivable fees, how may sellers present this information?

Sellers may use commercially reasonable and accessible means to provide instructions for how consumers may avoid such fees, provided such information is readily available. Commercially reasonable means may, for example, include information buttons or links in electronically presented Advertisements, marketing materials, solicitations, or offers of Sale.

What must be included in an Advertisement of a rental listing, like an apartment for rent?

The regulations provide that a seller Advertising a rental listing for a dwelling unit may, at the time of the initial presentation of the price of the dwelling unit, Advertise the Total Price as an amount that the seller intends for the tenant to pay on a monthly basis. For example, a landlord who is seeking a tenant for a yearly lease with the rent paid in monthly installments need not Advertise the total

amount to be paid by prospective tenants over the course of the entire lease in the initial presentation of the price. To comply with 940 CMR 38.04(1), it is sufficient for landlords or their agents to Advertise the Total Price, inclusive of all fees, to be paid monthly by the tenant in such initial presentation of the price.

May a seller accept an offer from a consumer that is lower than the Advertised price?

Yes. These regulations require sellers to disclose the “maximum price a consumer must pay for a Product.” These regulations do not prohibit sellers from accepting offers that are lower than the Advertised price.

Can sellers still Advertise discounts – for example, “half price after 4pm,” without stating a price?

Yes, if otherwise allowed by law. These regulations prohibit Advertising a price that is less than what a consumer will have to pay for a good or service. Advertisements that mention discounts – but not a price – do not violate these regulations. These regulations do not preempt or supersede any other obligation sellers may have under the law regarding truthful and non-misleading Advertising, including but not limited to 940 CMR 3.00.

Is an Advertising medium through which a seller Advertises liable for misrepresentations made by the seller that violate these regulations?

These regulations do not supersede, limit, or expand the liability of Advertising mediums for misrepresentations made by sellers through the medium’s platform.

How must the “Total Price” be disclosed in the context of an auction?

Where an auction has a “buy it now” price, or otherwise allows a Product to be purchased directly from the seller, the buy it now price must comply with these Regulations with respect to displaying the Total Price. For any auction that has not ended, sellers may display the current bid, inclusive of fees, charges or other expenses (but exclusive of Shipping Charges and Government Charges), when they display pricing information. In such situations, the seller must Clearly and Conspicuously disclose that the Sale is part of an auction.

At the conclusion of an auction, the initial presentation of the price of the Product to the winning bidder must be the Total Price of that Product.

If a Product that includes a Negative Option Feature includes recurring charges as well as mandatory one-time fees, how can the Total Price be disclosed?

For Products that include a Negative Option Feature, the Total Price for the Negative Option Feature may be displayed as the Total Price for a single negative option term. If particular terms, e.g., the first month, include additional fees or expenses, the Total Price for that term must include those fees or expenses. These regulations do not prohibit a seller from also accurately displaying the price for other or subsequent terms.

Below is an example of such a complaint price disclosure:

Payment Summary

<u>First Month Payment</u> \$150.00 Due July 1st	<u>Ongoing Monthly Payment</u> \$100.00 Due each month starting August 1st
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38.05: Recurring Fees & Trial Offers

For telephone cancellations, how must a seller comply with 940 CMR 38.05(3) if they do not have someone available to answer the phone during regular business hours?

Sellers that allow consumers to sign up for a Product with a recurring charge via telephone must allow consumers to cancel via telephone. However, a seller will not automatically be in violation of the regulations if the consumer calls to cancel and a person is unavailable to take the call, provided that the seller either employs an automated system that allows consumers to effectuate cancellation or includes an adequate voicemail system. An adequate voicemail system will identify the information a consumer must provide in a voicemail left with the seller to effect cancellation. Where the consumer leaves a voicemail indicating an interest in cancellation, but does not provide complete information, sellers should return calls promptly allowing a consumer to effect cancellation before a recurring charge occurs.

How is the duration of a Negative Option Feature determined?

For the purposes of determining whether a Negative Option Feature exceeds 31 days, these regulations consider the time interval between acceptance of a Negative Option Feature and the date upon which a consumer must cancel to avoid incurring a new or additional charge.

For any Negative Option Feature that is 31 days or less in duration, if a seller already provides consumers with a monthly bill that complies with these regulations regarding notices for Negative Option Features, does 940 CMR 38.05(6) require such companies to generate an additional notice?

No. If a seller already provides consumers with a bill, invoice, receipt, or other form of notice that complies with 940 CMR 38.05(6), no additional notices must be generated or provided to consumers.

Are residential leases with an auto-renewal feature subject to the negative option provisions of 940 CMR 38.05?

Yes. Rental agreements include a Negative Option Feature where, for example, a renter's silence or failure to take affirmative action to cancel the agreement would be interpreted by the lessor as a continuing acceptance of the offer. This could include month-to-month rentals, or rentals for a defined term that convert to month-to-month at the conclusion of the term. As such, if the lease provisions require a tenant to give notice to the lessor by a certain date to avoid auto-renewal, the lessor must provide the tenant the notices required by 940 CMR 38.05(4)-(6), depending on the duration of the lease.

Where a Product with a Negative Option Feature is marketed or sold in conjunction with another party's Product (e.g., recurring charges for device protection sold with the device), which party must provide the notices required by 940 CMR 38.05?

The party responsible for billing the consumer for the Product with a Negative Option Feature is responsible for providing the notices required by 940 CMR 38.05. In the context of insurance premiums where an insurance broker or producer, instead of the insurer, is responsible for providing billing notices to or receiving premiums from the consumer, the broker or producer is responsible for the notices required under 940 CMR 38.05. The payment of insurance premium through a mortgage escrow account does not transfer the notice obligation to the mortgage lender or servicer.

However, Products provided to consumers as an employee benefit are not subject to the notice requirement of 940 CMR 38.05 if the Product is established,

maintained, or actually sold to, through, or by the employer or the employee benefit plan.

How does a Negative Option Feature differ from an installment contract?

Contracts having Negative Option Features are distinct from other continuing agreements such as installment contracts. In an installment contract, consumers are obligated for the entire contractual period for the entire contract. An example of this type of transaction is a contract for purchasing a vehicle, which outlines terms, such as price, interest rate, and payment schedule. The contract thus allows the consumer to pay the purchase price of the vehicle over time. In a Negative Option Feature, by contrast, a seller may continue to provide and charge for Products unless the consumer takes affirmative action to cancel the agreement. 940 CMR 38.05 only governs Negative Option Features.

A contract could have both installment and Negative Option Features. For example, a consumer might purchase a software license for a year, in which the consumer is obligated for the entire year, payable monthly, to renew automatically at the conclusion of the year unless the consumer cancels the agreement. Canceling the agreement during the first year would not void a consumer's obligation to pay for the whole first year, but it would terminate the consumer's responsibility for the next year.

How do Products Insuring Property or Liability Comply with 940 CMR 38.05(4)?

For insurance Products, contract renewals that are based on a consumer's silence or lack of affirmative action are Negative Option Features. The subsequent financial obligation referenced in 940 CMR 38.05(4) and financial obligations referenced in 940 CMR 38.05(4)(a) are for the contract renewal term, regardless of whether premium is earned throughout the contract term.

Additionally, a contract renewal facilitated by a payment made under an auto debit/auto payment agreement with the insurance company, absent affirmative action by the consumer, is a Negative Option Feature.

Below is a potential template for a 940 CMR 38.05(4) notice for Products insuring property and liability:

Your policy [POLICY NUMBER] is scheduled to renew on [DATE]. If you do not take action to prevent this renewal by [DATE], charges for the renewal policy will begin to accrue on [DATE].

If you do not want your policy to renew, please [LIST ACTIONS]. If the policy renews as scheduled, you may incur a financial obligation of [PREMIUM INCLUSIVE OF FEES] over the policy term.

Insurers may include additional language reminding policyholders about Massachusetts state laws regarding insurance and/or potential consequences of being uninsured.

38.06: Relation to Other Laws and Regulations

How do these regulations apply to the telecommunications industry?

For entities that provide broadband Internet access service, on its own or part of a bundle as defined by 47 C.F.R. § 8.1(b) and must comply with the broadband consumer label regulations under 47 C.F.R. § 8.2(a), cable operators and direct broadcast satellite (DBS) providers that comply with the pricing requirements of 47 CFR § 76.310, and telecommunications companies that comply with the requirements of 47 CFR § 64.2401, compliance with these respective federal regulations and their implementing orders shall constitute compliance with 940 CMR 38.04.

Are other parties to a credit transaction, which do not fit the definition of “Creditor” under TILA, subject to these regulations?

The Office of the Attorney General has determined that if certain assignees of a “Creditor” engage in the Advertisement, Sale, or renewal of credit, or act as a Lessor as defined by 12 CFR 1013.2(h), the assignee’s compliance with M.G.L. c. 140D, 209 CMR 32.00: Truth in Lending, 15 U.S.C. § 1601 *et seq.*, 12 CFR 1026, 15 U.S.C. § 1667 *et seq.*, and 12 CFR 1013 shall constitute compliance with 940 CMR 38.00. This limitation shall apply only to assignees that have substantial involvement in the lease transaction, regularly participate in a credit decision, including setting the terms of the credit, or who influence the credit decision by indicating whether or not they will purchase the obligation if the transaction is consummated.

This guidance shall not be interpreted to exclude from compliance with 940 CMR 38.00 any person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third-party for collection or an attorney for litigation in order to collect the debt.

In the context of rental housing, how must a landlord disclose water and sewer charges?

To the extent an owner, as defined by 940 CMR 3.01, or anyone acting on their behalf, chooses to charge the tenant, as defined by 940 CMR 3.01, for water and sewer usage as measured by a submeter, compliance with all laws regulating such

imposition, including but not limited to G.L. c. 186, § 22, shall constitute compliance with 940 CMR 38.04, for purposes of disclosure of such charges.