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# New Limits for Online Data-Pass and Negative Option Marketing Expected

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Many affiliate marketers and lead generators engage in advertising and marketing for affiliates and customers that rely upon easy access to personal financial information and the sale of goods or services through negative option marketing. But, now online advertisers, marketers and merchants will have to comply with a new set of requirements under the "Restore Online Shoppers' Confidence Act," S. 3386 (the "Act"). The Act, which was championed by Senator Jay Rockefeller (D-WV) and supported by the Federal Trade Commission (the "FTC"), and was signed into law by President Obama on December 29, 2010.

The Act addresses online "data-pass" of billing information to post-transaction sellers, requirements for obtaining billing information, and restricts the use of negative-option marketing. Further, the obligations in the Act are on top of rules that the federal banking agencies, credit card associations and payment processors have already in place related to online advertising. As a result, lead generators and affiliate marketers will need to review their advertising and revenue sources carefully under the new regime.

The Act imposes three new obligations for online sellers:

**1. Post Transaction Data-Pass Prohibition.** The Act prohibits merchants from sharing financial account numbers and "other billing information" used to charge the customer with "third-party sellers" – a seller who markets goods and services online through an initial merchant after a consumer has initiated a transaction. The Act does not specify the types of "other billing information" that will be covered by the law, but does limit the scope to data used to bill consumers. This data pass prohibition will not apply to information shared by the initial merchant with its corporate subsidiaries or affiliates.

**2. Requirements for Internet Transactions Prior to Obtaining Consumer's Billing Information.** The Act requires a "third-party seller" before it obtains a consumer's billing information, to clearly and conspicuously disclose to the consumer all material terms of the transaction including:

- a description of the goods or services being offered;
- the fact that the third party seller is not affiliated with the initial merchant; and
- the cost of such goods or services.

In addition, the third-party must obtain the consumer's express informed consent for the charge by:

- receiving from the consumer the full account number of the account to be charged and the consumer's name and address and means to contact the consumer; and
- requiring the consumer to perform an additional affirmative action, such as clicking on a confirmation button or checking a box that indicates the consumer's consent to be charged.

**3. Restrictions on Online Negative Option Marketing.** The Act creates specific new requirements for negative option marketing. Negative option marketing is defined as an offer or agreement to sell or provide goods or services where the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. Before charging a consumer in an Internet-based transaction, negative option marketers must:

- clearly and conspicuously disclose all material terms;
- obtain the consumer's express informed consent to be charged; and
- where there is a recurring charge, provide the consumer with a simple mechanism to stop such charges.

## Enforcement

The FTC and state Attorneys General are authorized to bring enforcement actions against violators of the Act. Although there is no private cause of action, private plaintiffs' attorneys may seek through litigation to make the Act's requirements the de facto standard for online transactions under state unfair and deceptive trade practices acts that allow for private lawsuits.

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