May 21, 2010

SPECIAL NEWS ALERT
The Restore Online Shoppers' Confidence Act

On May 19, 2010, Senator Rockefeller's Commerce Committee released its long-awaited proposed legislation regarding post-transaction marketing online. The legislation, titled the "Restore Online Shoppers' Confidence Act," was brought following an investigation and hearings by the Committee concerning the online marketing practices of three membership clubs, Affinion, Vertrue, and Webloyalty, which engaged in post-transaction marketing of their membership club services on numerous online retail sites.

The Commerce Committee has claimed that these companies engaged in allegedly deceptive sales tactics which resulted in consumers being charged for membership clubs and services they were unaware they had purchased.

The proposed legislation sets forth broad prohibitions and restrictions for all online post-transaction offers, but also targets all online negative option offers even if the negative option is not presented in a post-transaction marketing context.

The following are some of the key highlights of the legislation:

Post-Transaction Third-Party Sales

The proposed legislation would impose a complete ban on the passage of data from one merchant to another in a post-transaction marketing sale. More specifically, the bill would prohibit an online merchant from passing account information obtained during the initial transaction to an unaffiliated third-party post-transaction seller. While this ban applies only to account information or "other billing information that is used to charge a customer," it should be noted that in order to obtain a consumer's consent for a post-transaction sale, as described below, third-party sellers must still obtain the consumer's name and contact information themselves. Thus, it will not be sufficient to simply require a consumer to reenter his or her 16 digit account number to accept a post-transaction offer. The proposed legislation requires that all material terms and

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conditions of the transaction be disclosed before obtaining the consumer's billing information. These disclosures include a description and cost of the goods or services being offered and the fact that the post-transaction third-party seller is not affiliated with the initial merchant, which may include disclosure of the name of the post-transaction third-party in a manner that clearly differentiates the post-transaction seller from the initial merchant.

The bill requires the post-transaction marketer to obtain the consumer's express informed consent to the transaction. This consent can only be obtained by collecting the consumer's name, address, and full account number directly from 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.

Negative Option Sales

Surprisingly the proposed bill would impose stringent regulations on all negative option sales offered online. The proposed bill adopts the definition of a "negative option feature" from the FTC's Telemarketing Sales Rule, as follows: "an offer or agreement to sell or provide any goods or services, a provision under which 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." 16 C.F.R. §310.2(t).

The proposed bill includes detailed disclosure, consent and cancellation requirements for all negative option sales offered online. Specifically, the bill would require a merchant to clearly and conspicuously disclose its name, a description and cost of the goods or services, when billing will begin and at what intervals the charges will occur, and the length of any trial period, including a statement that the consumer's account will be charged unless the consumer takes action to cancel and the steps the consumer must take to avoid the charge. The merchant must also obtain the consumer's express informed consent in the same manner as described for a post-transaction sale, as described above.

The proposed bill would also require merchants to provide a cancellation method that is available via the Internet and the telephone. Finally, the proposed bill would require the seller to send an e-mail to the consumer, not less than 10 days prior to the initiation of each charge, clearly and conspicuously disclosing that the charge will be made, the amount of the charge and a description of the goods and services, and instructions for stopping the recurring charges (by Internet and telephone). These cancellation and e-mail notification requirements would likely impose severe administrative burdens on most online marketers.

It should also be noted that the proposed bill expressly authorizes the FTC to enforce the law and to promulgate additional regulations.

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Accordingly, as was the case with the Telemarketing Sales Rule, it is highly probable that the FTC will utilize this rulemaking authority to impose further restrictions on these marketing methods. The states are also empowered to enforce this law upon prior notice to the FTC.

Why it matters: If enacted as currently drafted, the Restore Online Shoppers' Confidence Act would have a profound effect on online marketers that currently pass or receive consumer data for post-transaction sales. The post-transaction seller would now be required to collect a consumer's full information rather than receiving it from the underlying seller. Further, the Act would require these sellers to have consumers take an affirmative action demonstrating their agreement to the transaction. With regard to the negative option selling requirements, all online companies that sell products or services with recurring charges will now be obligated to send its customers a notice before each charge. Further, they must also provide an online and telephonic means for customers to cancel. These requirements have broad implications for all online services that periodically bill for their products or services.

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