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ISSUE EDITORS

Stuart P. Ingis

singis@Venable.com
202.344.4613

Michael A. Signorelli

masignorelli@Venable.com
202.344.8050

ADDITIONAL CONTRIBUTORS

Emilio W. Cividanes

ecividanes@Venable.com
202.344.4414

Tara M. Sugiyama

tmsugiyama@Venable.com
202.344.4363

Julia Kernochan Tama

jktama@Venable.com
202.344.4738

1.888.VENABLE
www.Venable.com

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Heard on the Hill

Senate Commerce Committee Considers the Federal Trade Commission's Role in Consumer Protection

The Senate Committee on Commerce, Science, and Transportation ("Committee") held its first full Committee hearing of the new session on February 4, 2010 to explore the Federal Trade Commission's ("FTC" or "Commission") role in consumer protection, with a focus on the financial services and products arena. FTC Chairman Jon Leibowitz participated in the hearing as the sole witness before the Committee. This hearing is part of a larger debate concerning the scope of authority of the Commission. At the end of last year, the House passed a bill that would expand the Commission's authority as a part of H.R. 4173, the Wall Street Reform and Consumer Protection Act. That bill would grant the Commission broader powers including new rulemaking and independent litigation authorities. The Senate is expected to address these issues through FTC reauthorization legislation. It is expected that this reauthorization measure would be considered separately from the Senate's financial reform legislation. The bills would likely be married on the Senate floor at a later date.

Laying the foundation for the hearing, Committee Chairman Jay Rockefeller IV (D-WV) announced that as Chairman of the Committee he would not stop until

consumer protection has become a cornerstone of the economy. He explained that the purpose of the hearing was to explore what tools the Commission needs to further this goal. He recounted how weak protections in the financial services sector had contributed to the financial crisis. He also lamented that consumers had been overwhelmed by insufficient disclosures and fraudulent practices, and had been harmed by aggressive online sales tactics. Chairman Rockefeller opened the floor to Chairman Leibowitz to provide the Committee with his views on how the Commission could play a greater role in regulating the financial services industry to protect consumers against these practices.

Chairman Leibowitz emphasized that the Commission is the only Federal agency whose sole objective is to protect consumers. To further the Commission's mission, he asked the Committee for the following additional tools: (1) civil penalty authority; (2) Administrative Procedure Act rulemaking in place of Magnuson-Moss rulemaking procedures; (3) authority to pursue aiders and abettors; and (4) more authority to provide consumer protections in the financial services arena. When asked by Chairman Rockefeller for his views on the proposals from the House to increase FTC authority, Chairman Leibowitz again expressed his support for these additional tools as well as his support for independent litigation authority. Chairman Rockefeller did not indicate when a bill to reauthorize the Commission would be introduced in the Senate, but such a bill is expected in the upcoming months.

Federal and State Scrutiny of Post-Transaction Marketing Practices

Scrutiny of post-transaction marketing and related data pass practices continues at the federal and state levels. These practices typically involve an online merchant passing consumer billing information from a merchant's account record to a third party. Consumers provide their credit card account information in the course of a transaction with a merchant. Prior to "check-out," or shortly thereafter, the consumer is offered another product or service from a third party. If the consumer accepts the offer, the third party obtains the account information from the original merchant and bills the consumer directly, without the consumer reentering the information.

As discussed in the November issue of *The Download*, the Senate Committee on Commerce, Science and Transportation (the "Committee") held a hearing and released a staff report on November 17, 2009, examining the impact of these online sales practices on consumers. Three companies that have been a focus of the Committee investigation – Affinion Group, Webloyalty Inc., and Vertrue Inc. – announced in January 2010 that they will discontinue data pass practices and will ask consumers for 16-digit credit card account numbers to enroll in membership programs online. Nevertheless, Chairman Rockefeller (D-WV) has stated that his Committee's investigation will continue. No federal legislation has yet been introduced.

New York Attorney General Andrew Cuomo has also launched an investigation of 22 online merchants that partner with third parties to present incentive offers that are completed through data passes of credit card information. On January 27, 2010, Attorney General Cuomo announced that his office had reached an agreement with online ticket seller Fandango.com. Among other steps, Fandango agreed to pay \$400,000 into a consumer redress fund and to cease data pass practices that sent credit and debit account information to third parties. Attorney General Cuomo had previously intervened in a lawsuit against Webloyalty, seeking access to larger refunds for plaintiff consumers.

Around the Agencies

Federal Trade Commission Hosts Second Privacy Roundtable

The Federal Trade Commission (“FTC” or “Commission”) hosted a second roundtable discussion on privacy on January 28, 2010, in Berkeley, CA. The FTC has been hosting a series of privacy roundtables. The first of these events occurred on December 7, 2009 in Washington, DC, at which FTC Chairman Jon Leibowitz announced that the purpose of the series was to explore new approaches to consumer privacy. He commented that the current notions concerning notice, choice, and a “harm-based regime” have not worked as well as the Commission would like.

At the most recent privacy roundtable, Director of the FTC Bureau of Consumer Protection David Vladeck highlighted three lessons he learned from the first privacy roundtable: (1) consumer education is vital; (2) traditional privacy policies are ineffective; and (3) consumers care about privacy. He said the Commission would be focusing on how best to provide meaningful disclosures to consumers. FTC Commissioner Pamela Jones Harbour also participated in the conference. In her introductory remarks, she questioned the reliability of anonymization techniques and encouraged industry to find ways to build privacy safeguards into the designs of new products and services.

To build on the lessons learned from the discussion in December 2009, the Commission focused the second roundtable discussion on the benefits and risks created by technology and the privacy considerations associated with social networking, cloud computing, and mobile marketing. During panel discussions on social media, industry groups generally espoused the benefits of social networks while consumer groups underscored the need to educate consumers about information sharing on such networks. The panel on cloud computing addressed privacy issues arising from the migration of data to the cloud, debated the need for greater transparency, and also discussed issues associated with access, control, and authentication. During a panel on mobile marketing, panelists spoke of the unique challenges presented by mobile devices, such as how their small size impacts the efficacy of disclosures.

The third and final roundtable is scheduled to take place on March 17, 2010 in Washington, DC at the FTC Conference Center. This last roundtable will focus on privacy issues associated with health data and other sensitive information, as well as on identity management and accountability approaches to privacy.

Federal Communications Commission Seeks to Amend Its Prerecorded Message Rule

The Federal Communications Commission (“FCC”) is proposing to harmonize its prerecorded message rule with the Federal Trade Commission’s (“FTC”) rule.¹ The FCC and FTC are both authorized by Congress to regulate prerecorded messages. Currently, several material differences exist between the FCC and FTC rules, which the FCC is seeking to reconcile. The amendments would apply the FTC’s more stringent standards to those entities under the sole jurisdiction of the FCC, such as common carriers (including telephone companies and

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 10-18 (January 2010).

airlines), banks, and insurance companies.

In 2008, the FTC amended the Telemarketing Sales Rule (“TSR”) to eliminate its “established business relationship” exemption and require prior express, written authorization to deliver prerecorded messages. The FCC is seeking comment on whether it should conform its rules to the FTC’s TSR by taking the following steps:

1. Requiring sellers and telemarketers to obtain telephone subscribers’ express written consent (including electronic methods of consent) to receive prerecorded telemarketing calls even when an established business relationship exists between the caller and the consumer;
2. Exempting certain federally-regulated healthcare-related calls from the general prohibition on prerecorded telemarketing calls to residential telephone lines;
3. Requiring that prerecorded telemarketing calls include an automated, interactive mechanism by which a consumer may “opt out” of receiving future prerecorded messages from a seller or telemarketer; and
4. Adopting a “per campaign” standard for measuring the maximum percentage of live telemarketing sales calls that a telemarketer lawfully may drop or “abandon” as a result of the use of automated dialing software or other automated dialing equipment.²

In addition, the Commission is seeking comment on whether it should extend the “prior express, written authorization” requirement to autodialed or prerecorded or artificial calls to cellular services.

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² *Id.* at para. 2.

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