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online advertising alert

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Congress Passes S. 3386 Restore Online Shoppers' Confidence Act

In a move to combat allegedly deceptive online sales tactics that result in recurring charges for consumers for membership clubs until cancelled by consumers, Congress passed the "Restore Online Shoppers' Confidence Act." The bill, introduced by Senator Rockefeller (D-WV), now awaits President Obama's signature to enact it into law.

This law is the product of an investigation started in May 2009 by the Senate Commerce Committee. The focus of the investigation was on membership club enrollment offers that are presented as a free trial and convert to a subscription program after the initial free period. These offers were made by "third-party sellers" after the consumer initiated a transaction with another merchant. In November 2009, the Senate Commerce Committee issued a staff report that found: (1) consumers are not aware at the time of accepting the additional offer that their credit card, debit card, bank account, or financial account information are passed through to a "third-party seller" to be used for subsequent billing, and (2) consumers are surprised to be charged once the free trial has ended, without further communication with the seller of the second product or service.

The law will impose three new obligations for online sellers:

1. Prohibition against data pass (Section 3(b)).

The law will prohibit 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 bill 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. Restrictions on Internet transactions (Section 3(a)).

The law will require 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.

We note that corporate subsidiaries and affiliates of the initial merchant are not "third-party sellers" and are not subject to these obligations.

3. Restrictions on online negative option marketing (Section 4).

The law will create 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.[1] 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.

Unlike prior drafts that specified the means by which consumers could cancel recurring changes, the passed law is more general and should allow for cancellation via telephone.

Enforcement

The Federal Trade Commission and state Attorneys General would be authorized to enforce against violations of the Act. There is no private cause of action or rulemaking authority granted to the Federal Trade Commission.

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1. 16 CFR 310.2(u).
