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New Limits on Online Marketing: The Implications for Nonprofit Organizations

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Many nonprofit organizations that market online may rely upon recurring charges for enrollment in membership offers, and other subscription programs, as well as online processing of payment transactions. 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 was signed into law by President Obama on December 29, 2010. As a result, nonprofit organizations with online sales – especially ones with third-party marketing relationships or that sell "continuity" programs (*e.g.*, recurring periodic billing) – will need to review their online activities carefully under the new law to ensure compliance.

Overview

The Act was championed by Senator Jay Rockefeller (D-WV) and the Federal Trade Commission (the "FTC") as a means to combat allegedly deceptive online sales tactics that resulted in recurring charges for consumers for membership clubs and other continuity programs. The Act addresses online "data-pass" of billing information to post-transaction sellers, imposes requirements for obtaining billing information, and restricts the use of negative-option marketing. The obligations in the Act are on top of rules that credit card associations and payment processors already have in place relative to online transactions.

Obligations for Online Sellers

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 the 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, the FTC generally does not have jurisdiction over *bona fide* charitable, educational and similar organizations, it does have jurisdiction over most trade and professional associations. Also, while there is no private cause of action under the Act, 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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Nonprofit organizations are advised to look carefully at the provisions of the Act, as well as general online advertising and marketing requirements, to determine whether their organizations should make changes in order to comply with the law.

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