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The Restore Online Shoppers' Confidence Act: New Obligations for Merchants

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On December 29, 2010, President Obama signed the Restore Online Shoppers' Confidence Act (ROSCA) into law. The law has received surprisingly little media attention, but it deserves a close look by any company doing business online. It targets commonly used promotional practices, including the use of negative option features, which have been enforcement priorities for the Federal Trade Commission (FTC) and state attorneys general in recent years.

In the past, the FTC has targeted allegedly deceptive negative option features pursuant to its authority under Section 5 of the FTC Act. ROSCA will make it easier for it to bring cases and, notably, gives it civil penalty authority that it does not have under Section 5: specifically, the law authorizes the FTC to obtain penalties of up to $16,000 per violation.

WHAT PROMPTED THE LAW?

ROSCA grew out of a Senate Commerce Committee investigation into so-called "data pass" transactions, which typically work as follows:

- When a consumer completes an online transaction with one merchant, he or she is presented with an offer from another, unrelated seller. The offer is usually for a free trial for a product or service, and it may be presented in a way that does not make it clear that it is from a third party; and

- If the customer agrees to the new offer, the first merchant transfers his or her billing information to the third party seller, which, upon conclusion of the free trial period, proceeds to charge the consumer on a recurring basis, until he or she cancels. This piece of the offer is referred to as a "negative option" feature, whereby a consumer's silence is deemed to be consent to continue to receive a product or service on an ongoing basis, such as monthly.[1]

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[1] ROSCA incorporates the FTC's Telemarketing Sales Rule's definition of a "negative option feature": "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).

These types of offers led to complaints by consumers that: (1) they did not know that their payment information would be transferred to a third party; and (2) they were surprised to be charged once the free trial ended. By imposing the requirements set forth below, Congress has made data passes unlawful and negative option features more transparent. While the provisions applicable to post-transaction sellers are new, those for negative option features largely codify requirements effectively imposed by the FTC via consent orders over the years.

WHAT OBLIGATIONS DOES THE LAW IMPOSE?

1. A Prohibition on Sharing Account Information

ROSCA prohibits an online merchant from sharing the billing information it used to charge its customer with a post-transaction third party seller.[2]

2. Disclosure and Other Requirements for Post-Transaction Sellers

In order to charge a consumer, a post-transaction third party seller must obtain the consumer's express informed consent to be charged. Specifically, the seller must:

- **Before obtaining the consumer's billing information, clearly and conspicuously disclose all material terms of the offer**, including: (1) a description of the goods or services offered, including their cost; and (2) the fact that the seller is not affiliated with the initial merchant;
- **Receive from the consumer the full account number of the account to be charged**, as well as his or her name and address and a means to contact him or her; and
- **Require the consumer to affirmatively indicate his or her consent to be charged a specified amount**, such as by clicking on a confirmation button or checking a box.

3. Requirements for All Negative Option Features

An online seller may not charge any consumer for goods or services sold through a negative option feature unless it complies with the requirements set forth below. It is important to note that these requirements apply to all online negative option features – not just those that are part of a post-transaction purchase.

- **The seller must clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information.** "All material terms" are not specified by ROSCA, but guidance from FTC enforcement actions indicates that they include:
  - That the customer will be charged a specified amount each payment period (*e.g.*, each month) until he or she cancels;
  - That the amount of the charge may change, if true, and the amount to which it will change, if known;
  - The date on or about which the customer will be charged each payment period;
  - How the customer may cancel, including necessary contact information, such as an email address or phone number;
  - The date by which he or she must cancel in order to avoid a subsequent charge;
  - The fact that the site has a no refund policy, if true; and
  - The minimum purchase obligation, if any.

[2] A post-transaction third party seller does not include the initial merchant or its subsidiary or affiliate.

If the offer includes a free trial, whereby the customer is automatically charged upon completion of the free trial period (commonly known as a "free-to-pay conversion"), then, in addition to the above disclosures, the seller should also disclose:

- o The length of the free trial period;
- o Exactly how to cancel (including the appropriate contact information); and
- o The date by, or time period within which, a cancellation request must be received to avoid being charged at all;

- **The seller must obtain the consumer's express informed consent before charging his or her account; and**
- **The seller must provide simple mechanisms for a consumer to stop recurring charges from being placed on his or her account.**

Negative option and free-to-pay conversion features may also implicate other laws. For example, some states impose their own requirements, including that the seller provide the customer with a written purchase acknowledgement. Others require reminder notices when the interval between charges is longer than 6 or 12 months. Moreover, if a seller accepts debit cards for recurring payments, federal law requires that it obtain the customer's signature or similar authentication.

For more information on this law and other issues related to online marketing, contact Reed Freeman or Julie O'Neill.

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