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To: ABIA Members

From: Chrys D. Lemon
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Re: The Restore Online Shoppers' Confidence Act

As we mentioned in this week's ABIA Insurance News e-mail, the *Restore Online Shoppers' Confidence Act* was signed into law December 29, 2010.¹ The Act grew out of Congress's concern that companies obtaining a consumer's billing information as part of an Internet transaction often pass that billing information to third party sellers, for a fee, to sell another product or service during the same Internet transaction. It is said that the undisclosed passing of billing information is problematic, and amounts to a deceptive marketing tactic, because consumers are led to believe a later unrelated transaction is part of the initial purchase, as opposed to a new transaction with a new seller.

Under the new law, the company that first obtains the consumer's billing information is referred to as the "initial merchant."² The company that wants to use that information in a subsequent transaction is referred to as a "post-transaction third party seller."³

The Act addresses Congress' concerns from both sides of an information-sharing deal. First, it prohibits initial merchants from *sharing* billing information with post-transaction third party sellers. Second, it prohibits the third party seller from engaging in a transaction with the consumer unless it obtains billing information directly from the consumer after providing certain disclosures. The Act also establishes requirements for "negative option" marketing on the Internet.

Ban on Sharing Information

¹ Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345 (2010).

² Pub. L. No. 111-345 § (3) (d) (1) ("The term 'initial merchant' means a person that has obtained a consumer's billing information directly from the consumer through an internet transaction initiated by the consumer."). The term "internet transaction" is not defined by the law but it should be limited to "online commerce," as described in the law's "Declaration of Policy."

³ Pub. L. No. 111-345 § (3) (d) (2) (A post-transaction third party seller "means a person that... solicits the purchase of ... goods or services on the internet through an initial merchant after the consumer has initiated a transaction with the initial merchant."). Subsidiaries and affiliates of an initial merchant are not considered post-transaction third party sellers.

The Act bans initial merchants from sharing billing information “for use in an Internet-based sale of any goods or services” by a post-transaction third party seller.⁴

Requirements for Post-Transaction Third Party Seller to Charge a Consumer

A post-transaction third party seller is prohibited from charging a consumer referred by an initial merchant unless the post-transaction third party seller satisfies each element of the safe harbor outlined below:

- 1) Disclose that the post-transaction third party seller is not affiliated with the initial merchant;
- 2) Provide a description of the product or service for sale and its cost;
- 3) Obtain, *directly from the consumer*, his or her full account number to be charged, name, address, and means of contact; and
- 4) Require the consumer to “perform an additional action, such as clicking on a confirmation button or checking a box that indicates the consumer’s consent to be charged the amount disclosed.”⁵

Requirements for Use of Negative Options in Online Transactions

Negative option features⁶ are prohibited in *all* internet transactions unless the seller satisfies each element of the safe harbor outlined below:

- 1) Clearly and conspicuously disclose all material terms of the negative option agreement;
- 2) Obtain the customer’s express informed consent before charging the account; and
- 3) Provide a “simple mechanism” for the consumer to stop recurring charges.

Enforcement

This Act can be enforced by the FTC as an unfair or deceptive act. If the FTC has not brought a claim to enforce the Act, a state attorney general may also enforce the Act, though they are required to apprise the FTC of their action, and the FTC retains a right to be heard in the case and to file an appeal.

⁴ Pub. L. No. 111-345 § (3) (b).

⁵ Pub. L. No. 111-345 § (3) (a) (2) (C).

⁶ 16 C.F.R. § 310.2 (u) (2010) (A “negative option feature [is,] in 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.”).