

## Articles

### “Data Pass” and Online Negative Option Marketing Now Deceptive Trade Practices

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#### Data Pass

A “Data Pass” is the transfer of payment card data (without notification to the consumer) from one merchant to another to complete a sales transaction. In practice, as a consumer is finalizing a purchase on the Internet, he or she is prompted to click on an advertisement that promises cash back, free shipping or another benefit. When a consumer clicks on the advertisement, the initial merchant transfers the consumer’s payment card information to the advertising merchant and the consumer is automatically enrolled in (and charged for) a monthly service. It has been estimated that this practice has resulted in 30 million Americans being charged over \$1.4 billion in unauthorized charges.

#### The Restore Online Shoppers’ Confidence Act

In response to this practice, Congress passed the Restore Online Shoppers’ Confidence Act (“Act”), which prohibits any post-transaction third-party seller from charging a consumer’s payment card, bank account or other financial account (each a “Financial Account”) for any goods or service, unless the post-transaction seller has: (a) *before obtaining the consumer’s billing information*, clearly and conspicuously disclosed to the consumer all material terms of the transaction, including: (i) a description of the goods/services, (ii) the cost of the goods/services and (iii) the fact that the post-transaction seller is not affiliated with the initial seller; and (b) received the express informed consent for the charge of the Financial Account by obtaining *from the consumer* the full account number, the consumer’s name and address and requiring the consumer to click or otherwise confirm consent.

To further emphasize the requirement any post-transaction seller must get the consumer’s Financial Account information directly from the consumer, the statute makes it unlawful for any merchant conducting a transaction with a consumer on the Internet to disclose Financial Account information to any post-transaction seller which is not a corporate affiliate of the initial merchant.

Thus, unless the post-transaction seller is a subsidiary or other corporate affiliate of the online merchant, a consumer is now required to type in all of his or her billing information again to complete a post-transaction sale. While these provisions appeared sufficient to stop the shady “data pass” transactions from occurring, the Act goes even further and prohibits certain negative option transactions online.

#### Negative Option Marketing

A “negative option” is an offer or agreement to sell goods or services, under which a consumer’s silence or failure to take an affirmative action to reject the goods or services is interpreted by the seller as acceptance of the offer. This form of marketing has a long history in book clubs, magazine subscriptions and other subscription sales transactions.

Because negative options were used in connection with “data pass” transactions, the Act prohibits charging or attempting to charge a consumer for a negative option transaction effected on the Internet unless the merchant has: (a) *before obtaining the consumer’s billing information*, clearly and conspicuously disclosed to the consumer all material terms of the transaction; (b) received the express informed consent for the charge of the Financial Account; and (c) provided simple mechanisms for the consumer to stop recurring charges from being placed on the Financial Account. It is important to note that these requirements apply to all negative options marketed online, not just those associated with data pass transactions.

#### Violations

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Violations of the Act are treated as unfair or deceptive trade practices in violation of regulations promulgated under Section 18 of the Federal Trade Commission Act. The Federal Trade Commission and State Attorneys General have express authority to enforce the Act in the same manner as the Federal Trade Commission Act.

### What You Need to Do

If your client is engaged in e-commerce, you should take steps to confirm that your client's web operations are in compliance with the requirements of this Act, including:

- Consider clicking through the purchase process on your client's website to see if advertisements or offers are presented to purchasers. If so, you will need to determine if these are coming from affiliated entities or third parties. This may require you to locate and review "Joint Marketing," "Linking" and other marketing agreements. If the offers are from third parties, you should confirm that: (a) clear and conspicuous disclosure of the material terms of the transaction occurs before obtaining billing information, and (b) Financial Account information is obtained from the consumer together with the express consent of the consumer to charge the Financial Account.
- Determine if your client ever transfers payment card or other financial account information to a third-party merchant to conduct a new transaction under any circumstances. If so, this practice will have to be stopped unless the third party is a corporate affiliate of your client.
- Determine if your client offers any goods or services online via negative option marketing (whether or not such offer is made via a data pass arrangement). If so, you should confirm that: (a) clear and conspicuous disclosure of the material terms of the transaction occurs before obtaining billing information, (b) Financial Account information is obtained from the consumer together with the express consent of the consumer to charge the Financial Account and (c) there are simple mechanisms for the consumer to cancel the agreement.

The Technology Transactions Practice at Andrews Kurth LLP includes attorneys with significant experience in e-commerce, the Payment Card Industry Data Security Standards, and data privacy and security generally.

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For more information, please email [IPandTech@andrewskurth.com](mailto:IPandTech@andrewskurth.com).

[Click here to contact the author of this article regarding the Restore Online Confidence Act, or other questions relating to data privacy or security, or e-commerce.](#)

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