

Dear Retail Clients and Friends,

President Obama recently signed into law the Restore Online Shoppers' Confidence Act. The act restricts sales and data sharing by online retailers, particularly limiting post-sale transactions by third parties and imposing limits on sales and billing procedures that use so-called "negative option features." This edition of ***Morgan Lewis Retail Did You Know?*** describes the act and how it applies to online merchants.

Background

The Restore Online Shoppers' Confidence Act (ROSCA) focuses on certain sales and data-sharing practices by online retailers. The declaration of policy accompanying ROSCA indicates that Congress was primarily motivated by "data pass" practices whereby online retailers and websites provide their customers' billing information to third-party sellers. The third-party sellers then use that information to charge the customer for additional goods and services, such as "membership clubs," offered at the conclusion of the initial transaction—without ever directly obtaining the customers' billing information. These kinds of marketing practices have been previously challenged in class actions and consumer fraud investigations by the New York Attorney General.

ROSCA

ROSCA addresses the data-pass problem directly by banning online merchants from disclosing billing information obtained from their customers "to any post-transaction third party seller for use in an Internet-based sale."

ROSCA also imposes certain requirements on third parties engaging in post-transaction sales. Post-transaction or add-on sales by a third party must (1) "clearly and conspicuously" disclose to a customer the material terms of the transaction, such as a description of the goods or services, the fact that the post-transaction third-party seller is not affiliated with the initial merchant, and the cost of the goods or services; (2) obtain the customer's billing information directly from the customer; and (3) require the customer to perform an additional affirmative action, such as clicking on a confirmation link that indicates the customer will be charged the disclosed amount.

Finally, ROSCA imposes limits on online sales made using a "negative option feature." The term "negative option feature" is defined by the Federal Trade Commission (FTC) as "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 an acceptance of the offer." One example is a billing plan where the customer agrees to receive a service for an initial trial period, after which the customer is charged without giving additional consent and until the customer affirmatively cancels the service. Under the new requirements, retailers can only use negative option features if the following conditions are met: (1) the online retailer discloses the material terms of the transaction and obtains express informed consent "before obtaining the customer's billing information"; and (2) the retailer provides a simple mechanism that allows the customer to stop recurring charges from being placed on the consumer's credit card, debit card, or bank account.

Violations of the act will be enforced by the FTC or state attorneys general and are treated as a violation of the FTC rules against unfair and deceptive practices. ROSCA is effective immediately.

Practical Advice

The use and sharing of personal information obtained from customers is always a challenging area, but online retailers should be particularly careful to review their marketing and sales relationships to be sure they comply with the new requirements under ROSCA. Retailers should also review their online sales and billing practices generally to determine whether they rely on any negative option features, and if so, should revise those practices to meet ROSCA's requirements.

How We Can Help

Morgan Lewis can assist retailers with an efficient review of their Internet sales practices, recommending changes necessary to comply with ROSCA and related state and federal rules. We apply our experience and up-to-date knowledge of retail industry "best practices."

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 22 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

About *Morgan Lewis Retail Did You Know?* This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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