

# *Restore Online Shoppers' Confidence Act and Other Billing Compliance Issues*

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## Why worry about billing rules?

- No need to bother – unless you want to get paid
- Non-compliance can mean major liability
  - Legal sanctions – FTC investigations, settlements and fines, consent decrees
  - Network rule remedies – \$1000 first time offense, \$25k for fourth violation within 12 months<sup>[1]</sup>; merchant agreement termination
  - Contractual liabilities under merchant-processor agreement

[1] Visa International Operating Regulations (April 10, 2011), at 59.

## Key marketing and billing rules

- The early 1990s saw the proliferation of telemarketing fraud, including the collection and use of customer billing information
- This led to the Telemarketing Act of 1994,<sup>[1]</sup> which was intended to “combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections.”<sup>[2]</sup>

[1] Telemarketing Consumer Fraud and Abuse Prevention Act of 1994, 15 USC 1601-1608.

[2] Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4580 (Jan. 29, 2003).

## Key marketing and billing rules

- The Telemarketing Act directed the FTC to issue rules prohibiting deceptive and abusive telemarketing acts or practices
- In 2003, the FTC issued its Telemarketing Sales Rule<sup>[1]</sup>
- Although directed towards telemarketing specifically, the Telemarketing Sales Rule established certain standards that are reflected in subsequent banking and e-commerce rules

[1] 68 Fed. Reg. 4580, 4580 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

## Telemarketing Sales Rule

TSR makes it a deceptive act or practice to

- (1) fail to clearly and conspicuously disclose certain material information;
- (2) misrepresent, directly or by implication, certain material information;
- (3) bill or collect for certain payment methods without express verifiable authorization; or
- (4) make false or misleading statements to induce the payment of goods or services<sup>[1]</sup>

[1] 16 CFR 310.3(a)(1)-(4). The prohibition on billing or collecting without express verifiable authorization does not apply to credit card transactions (covered by TILA and Reg Z) or debit card transactions (covered by EFTA and Reg E).

Verifiable consent authorization “(i) Express written authorization by the customer or donor, which includes the customer’s or donor’s signature; (ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer’s or donor’s bank or other billing entity, and which evidences clearly both the customer’s or donor’s authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer’s or donor’s receipt of [specific transaction information]; or (iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer’s or donor’s billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.” 16 C.F.R 310.3(a)(3).

## Telemarketing Sales Rule

- Liability imposed on third party that provides “substantial assistance or support” when third party “knows or consciously avoids knowing” about the deceptive or abusive act or practice<sup>[1]</sup>
- Prohibition against certain credit card laundering acts and practices<sup>[2]</sup>

[1] 16 CFR 310.3(b).

[2] See 16 C.F.R. 310.3(c) (“Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for: (1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; (2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.”).

## Telemarketing Sales Rule

- It is also an abusive act or practice to, among other things:
  - (1) Disclose or receive, for consideration, unencrypted account numbers for use in telemarketing;<sup>[1]</sup>
  - (2) Fail to obtain express informed consent before submitting billing information for payment, directly or indirectly<sup>[2]</sup>

[1] 16 CFR 310.4(a)(6) (“Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer’s or donor’s billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction.”).

[2] 16 CFR 310.4(a)(7) (“Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account....”).



## Telemarketing Sales Rule

- Abusive act provisions also apply to transactions involving “preacquired account information”
- Information that enables a seller to charge an account without obtaining account information directly from customer during the transaction<sup>[1]</sup>

[1] 16 CFR 310.2(x).

## Telemarketing Sales Rule

- Express informed consent for billing that involves preacquired information and a free-to-pay conversion feature requires:
  - At least last four digits of account number to be charged
  - Express agreement to charge for goods or services using account number identified as above
  - Audio recording of entire telemarketing transaction

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[1] 16 CFR 310.4(a)(7)(i). Free-to-pay conversion means “in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.”

## Telemarketing Sales Rule

- All other telemarketing transactions involving preacquired information must:
  - Identify account with sufficient specificity for consumer to understand what account will be charged
  - Obtain express agreement to charge for goods or services using account number identified as above

[1] 16 CFR 310.4(a)(7)(ii).

## Telemarketing Sales Rule

The Telemarketing Sales Rule also addresses negative options by:

- Requiring clear and conspicuous disclosure of all material terms and conditions of negative options feature<sup>[1]</sup>
- Prohibiting misrepresentation of any material aspect of a negative option feature<sup>[2]</sup>

[1] 16 C.F.R. 310.3(a)(1)(vii) (“If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer’s account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).”).

[2] 16 C.F.R. 310.3(a)(2)(ix) (“Any material aspect of a negative option feature including, but not limited to, the fact that the customer’s account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).”).

## Financial Privacy Rule

- In 1999, Gramm-Leach-Bliley Act further limited the sharing of billing information by prohibiting a “financial institution” from disclosing card or access account information to unaffiliated entities for “telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer”<sup>[1]</sup>
- FTC codified this prohibition in its Privacy Rule<sup>[2]</sup>

[1] See 15 U.S.C. 6802(d) (“A financial institution shall not disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.”).

[2] See 16 C.F.R. 313.12:

§ 313.12 Limits on sharing account number information for marketing purposes.

(a) *General prohibition on disclosure of account numbers.* You must not, directly or through an affiliate, disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a consumer’s credit card account, deposit account, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

(b) *Exceptions.* Paragraph (a) of this section does not apply if you disclose an account number or similar form of access number or access code:

(1) To your agent or service provider solely in order to perform marketing for your own products or services, as long as the agent or service provider is not authorized to directly initiate charges to the account; or

(2) To a participant in a private label credit card program or an affinity or similar program where the participants in the program are identified to the customer when the customer enters into the program.

## Restore Online Shoppers' Confidence Act

- In the 2000s, a practice, known as “data pass,” emerged that utilized customer billing information obtained from the original transaction merchant without the consumer’s knowledge
- Immediately following the original transaction, consumers would be prompted to sign up for membership clubs with a third party, but without re-entering billing information (resulting in “post-transaction” sales that confused consumers)

## Restore Online Shoppers' Confidence Act

- Senate Commerce Committee investigation initiated in May 2009 at behest of Sen. Jay Rockefeller (D-WV) resulted in a Nov. 2009 report on “data pass” tactics
- The report found that Affinion, Vertrue, and Webloyalty, with partnering retailers, misled 30 million consumers into signing up for membership clubs
  - \$1.4 billion collected from consumers
  - Retailers got up to a 50% cut <sup>[1]</sup>

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[1] See Press Release, *Breaking News: Rockefeller Releases New Investigative Report on Aggressive Sales Tactics on the Internet and Their Impact on American Consumers*, Nov. 17, 2009, available at [http://rockefeller.senate.gov/press/record.cfm?id=320116&&year=2009&&search\\_field=webloyalty](http://rockefeller.senate.gov/press/record.cfm?id=320116&&year=2009&&search_field=webloyalty).

Aggressive Sales Tactics on the Internet and their Impact on American Consumers, Staff Report for Chairman Rockefeller, Nov. 16, 2009, available at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a](http://commerce.senate.gov/public/?a=Files.Serve&File_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a).

See also Supplemental Report on Aggressive Sales Tactics on the Internet, Staff Report for Chairman Rockefeller, May 19, 2010, available at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=439184c5-0965-4bb9-aa98-4a114b00a42e](http://commerce.senate.gov/public/?a=Files.Serve&File_id=439184c5-0965-4bb9-aa98-4a114b00a42e).

## Restore Online Shoppers' Confidence Act

- At the same time, New York State AG investigated same companies, resulting in multi-million dollar settlements and agreements by companies to obtain full card numbers:
  - Webloyalty: \$5.2 million settlement
  - Webloyalty retail partners (incl. TicketMaster, Pizza Hut, Orbitz): \$3.3 million
  - Affinion Group (Trilegiant): \$10 million<sup>[1]</sup>

[1] Tanzina Vega, *Online Marketer Settles With New York For \$5.2 Million*, Sept. 21, 2010, at <http://www.nytimes.com/2010/09/22/business/22cuomo.html?ref=business> (other Webloyalty retail partners included Shutterfly, and MovieTickets).



## Restore Online Shoppers' Confidence Act

- Following these events, Sen. Rockefeller introduced ROSCA in May 2010 “to protect consumers from certain aggressive sales tactics on the Internet,” *i.e.*, “data pass”
- ROSCA was signed into law on December 29, 2010<sup>[1]</sup>
- ROSCA provisions mirror many of the standards set forth in the Telemarketing Sales Act

[1] Public Law 111-345, codified at 15 USC 8401-8405.

## Restore Online Shoppers' Confidence Act

ROSCA contains two major restrictions for online merchants

- Data pass<sup>[1]</sup>
  - Applies to both third party sellers and the initial merchant
  - Adopts a “belt and suspenders” approach
- Negative option marketing<sup>[2]</sup>
  - Applies to all negative option campaigns, not just those associated with data pass

[1] 15 USC 8401.

[2] 15 USC 8403.

## Restore Online Shoppers' Confidence Act

### Data pass restrictions (third-party seller)

- Third party seller may not charge customer unless:
  - (1) Seller provides clear and conspicuous disclosure of material terms before obtaining billing information, including (i) description of goods or services, (ii) notice of unaffiliation with initial merchant, (iii) cost of goods or services

## Restore Online Shoppers' Confidence Act

### Data pass restrictions (third-party seller)

(2) Seller obtains express informed consent to charge the customer, including (i) full account number for credit or debit card, (ii) customer name, address and contact information (iii) additional affirmative act, *e.g.*, clicking confirmation button or checking a box

## Restore Online Shoppers' Confidence Act

### Data pass restrictions (initial merchant)

- Flat prohibition on disclosure of card or account information to post-transaction third party seller for use in online sale of goods or services
- Applies broadly to credit cards, debit cards, bank accounts, "other financial account number," or "other billing information" used in initial transaction (e.g., prepaid cards)

## Restore Online Shoppers' Confidence Act

### Data pass exceptions

- Third party seller does not include
  - Initial merchant
  - Subsidiary or corporate affiliate of initial merchant
  - Successor entity of the above

## Restore Online Shoppers' Confidence Act

### Online negative option marketing restrictions

- Last minute addition to ROSCA
- Adopts definition of “negative option” from Telemarketing Sales Rule
  - “[C]ustomer’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”<sup>[1]</sup>

[1] See 16 C.F.R. § 310.2(u) (“[I]n 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”).

## Restore Online Shoppers' Confidence Act

ROSCA makes online negative option marketing unlawful unless:

- (1) Clear and conspicuous text<sup>[1]</sup> disclosing “all material terms” before obtaining billing info;
- (2) “Express informed consent” before charging customer card or account;
- (3) “Simple mechanisms” for consumer to stop recurring charges to customer card or account
  - No further explanation of “simple mechanisms” for cancellation

[1] The FTC's Dot Com Disclosures (May 2000) (available at <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>) provides guidance on appropriate “clear and conspicuous disclosures” for online advertising and marketing.

The FTC recently initiated a proceeding to revisit the Dot Com Disclosures in order to update the guidance to reflect changes to Internet commerce. See Press Release, *FTC Seeks Input for Revising Its Guidance to Businesses About Disclosures in Online Advertising*, May 26, 2011, available at <http://www.ftc.gov/opa/2011/05/dotcom.shtm>. The comment period has closed, and the FTC has indicated that it does not anticipate issuing revised guidance until 2012.



## Restore Online Shoppers' Confidence Act

“Material terms” undefined, however, FTC has identified five principles to follow when employing negative option marketing:

- (1) Disclose material terms in understandable manner, including existence of offer; total cost; transfer of billing information to third party; cancellation process;
- (2) Clear and conspicuous disclosures;
- (3) Disclosure of material terms before payment or agreement to purchase;

## Restore Online Shoppers' Confidence Act

(4) Obtain consumer's affirmative consent through affirmative step to demonstrate consent to an online negative option offer;

- Pre-checked box is not evidence of consent

(5) Do not impede effective operation of cancellation procedures<sup>[1]</sup>

[1] Negative Options: A Report by the staff of the FTC's Division of Enforcement, FTC, January 2009, available at <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf>.

## Restore Online Shoppers' Confidence Act

### ROSCA Violations

- FTC may enforce violation of ROSCA “or any regulation prescribed under” ROSCA as an unfair and deceptive act or practice under FTC Act<sup>[1]</sup>
- Penalties are severe – up to \$16,000 per violation<sup>[2]</sup>
- State AGs authorized to enforce ROSCA with prior notice to FTC, unless FTC has already initiated suit

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[1] 15 USC 8404.

[2] See 15 U.S.C. 45(m)(1); 16 C.F.R. 1.98

## Network rules and “data pass”

- “Data pass” also violates VISA and MasterCard rules
- During Senate Committee investigation, evidence showed that Affinion, Vertrue and Webloyalty were placed on networks’ fraud/chargeback monitoring programs, but companies still permitted to charge cards<sup>[1]</sup>
- MasterCard confirmed that “data pass” was a violation of, e.g., Rule 5.10.2, regarding fraudulent or unauthorized use of account number of cardholder information

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[1] See Report of the Committee on Commerce, Science and Transportation on S.3386, Report No. 111-240, 111th Cong., 2d Sess. (Aug. 2, 2010), at 65-68 (citing *Supplemental Report on Aggressive Sales Tactics on the Internet*, Staff Report for Chairman Rockefeller, May 19, 2010).

## Network rules and “data pass”

- Visa testified that “data pass” violated at least four regulations, including prohibition against sharing of account information with an entity not directly involved in transaction
- In April 2010, Visa revised its regulations to specifically address “data pass” by prohibiting sharing of account information with other companies without the consumer’s knowledge or consent<sup>[1]</sup>

[1] Visa Int’l Operating Regulations (April 10, 2011), at 685, “Cardholder and Transaction Information Disclosure Prohibitions”

### Cardholder and Transaction Information Disclosure Prohibitions - U.S. Region

Except as specified in "Cardholder and Transaction Information Disclosure Limitations - U.S. Region," a U.S. Merchant must **not** disclose a Cardholder Account Number, personal information, or other Visa Transaction Information to any entity other than to a registered Third Party, the Acquirer, or the Acquirer's Agent. This disclosure must be for the sole purpose of:

- Assisting the Merchant in completing the initial Merchant Transaction
- As specifically required by law

If the Merchant undertaking the initial Transaction has an agreement with another Merchant that allows the other Merchant to initiate a subsequent Transaction with the Cardholder, the subsequent Transaction (after the initial Transaction has been completed) must be initiated as a new Transaction such that:

- A separate Transaction process is initiated
- The Cardholder is required to enter their Primary Account Number separately for the subsequent Transaction
- All other Transaction requirements comply with the applicable sections of the U.S. Regional Operating Regulations

A U.S. Agent must **not** disclose a Cardholder Account Number, personal information, or other Visa Transaction Information to third parties, other than:

- For the sole purpose of completing the initial Merchant Transaction
- As required by local law
- With the permission of the Issuer, Acquirer, or Visa, as specified in the *Visa International Operating Regulations*

## Recurring charges and subscriptions

- Sources of rules on recurring charges
  - Electronic Fund Transfer Act/Regulation E
    - Debit cards, electronic checking
  - National Automated Clearing House Association
    - Electronic checking
  - Network rules
    - Branded signature debit, credit, prepaid cards
    - PIN debit networks

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[1] See Telemarketing Sales Rule, definition of negative option, 16 C.F.R. 310.2(u).

## Recurring charges and subscriptions

- For electronic fund transfers (EFTs), federal Regulation E (12 CFR part 205) requires specific authorization and notice requirements for “preauthorized” or recurring transfers
- EFTs defined as:
  - Transfer of funds initiated through electronic terminal, telephone, computer or magnetic tape to order, instruct, or authorize a financial institution to debit or credit a consumer’s checking, savings or other asset account<sup>[1]</sup>

[1] 12 CFR 205.2(b)(1), 205.3(b).



## Recurring charges and subscriptions

Authorization for a recurring EFT or “preauthorized transfer” requires all of the following:

- (1) Authorization by a “writing signed or similarly authenticated” (E-Sign compliance)
- (2) Evidence of the consumer’s identity and assent to the authorization
- (3) Authorization readily identifiable as such
- (4) Clear and readily understandable terms<sup>[1]</sup>

[1] 12 CFR part 205, Official Staff Interpretation, 205.10, Comment 10(b).

## Recurring charges and subscriptions

### Regulation E (cont'd)

- Identity: Must confirm consumer's identity using appropriate verification techniques
- Assent: Cases have highlighted redundant entry of email addresses, affirmative clicks (e.g., YES button), but such actions must be accompanied by compliant authorizations and disclosures<sup>[1]</sup>

[1] See, e.g., *Berry v. Webloyalty.com, Inc.*, 2011 WL 1375665 (S.D. Cal., Apr. 11, 2011) (unreported); *Vistaprint Corp. Marketing and Sales Practices Litigation*, 2009 WL 2884727 (S.D. Texas, Aug. 31, 2009) (unreported); *Affinion Benefits Group LLC v. Econ-O-Check Corp.*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2011 WL 1100080 (M.D. Tenn., March 22, 2011); *O'Brien v. Landers*, 2011 WL 221865 (N.D. Ill., Jan. 24, 2011) (unreported); *Friedman v. 24 Hour Fitness USA, Inc.*, 2009 WL 3053711 (C.D. Cal., Sept. 17, 2009) (unreported).

## Recurring charges and subscriptions

### Regulation E (cont'd)

- If transfer will vary from previous transfer or the preauthorized amount, requires 10-day notice
- Consumer has right to receive notice of all varying transfers, or only when transfer falls outside specified range or differs from most recent transfer by more than agreed-upon amount

## Recurring charges and subscriptions

### NACHA Rules<sup>[1]</sup>

- Applies to exchange and settlement of EFTs through the ACH network
- “WEB” entries to ACH network based on authorization via Internet or Wireless network (other than oral)
- Recurring WEB entries can include transfers set to occur at regular intervals, or multiple entries originated each time upon specific instructions from account holder

[1] National Automated Clearing House Association (NACHA) Operating Rules, at OR 6, 20-21; Operating Guidelines, at OG 209-214.

## Recurring charges and subscriptions

### NACHA Rules (cont'd)

- WEB authorization requirements similar to Regulation E authorization for preauthorized transfers<sup>[1]</sup>
- For recurring transfers, provide method for revoking authorization

[1] Writing signed or similarly authenticated; Authorization readily identified as ACH debit authorization; Clear and readily understandable terms.

See *also* NACHA Operating Guidelines, OG 214, discussing Federal Financial Institution Examination Council (FFIEC) authentication guidance to financial institutions.

In June 2011, the FFIEC released an update to its Guidance on Authentication in an Internet Banking Environment, available at [ffiec.bankinfosecurity.com/whitepapers.php?wp\\_id=492](http://ffiec.bankinfosecurity.com/whitepapers.php?wp_id=492).

## Recurring charges and subscriptions

### Network rules provide similar guidance

- Under VISA Operating Regulations (@ 514-516), must obtain written consent for recurring charges; disclose transaction details like amount, frequency, duration of consent, obtain electronic signature or similar authentication
- Must provide “simple and easily accessible” online cancellation procedure
- New authorization upon subscription renewal

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Visa International Operating Regulations, at 514-516.

### Merchant Requirements for Recurring Transactions - U.S. Region

In the U.S. Region, a Recurring Services Merchant must:

- Obtain from the Cardholder a completed Order Form containing a written request for the goods or services to be charged to the Cardholder's account. The Order Form must include, but is not limited to, the following:
  - Transaction amount, unless the Recurring Transactions are for varying amounts
  - Frequency of the recurring charges
  - Duration of time for which Cardholder permission is granted
- Retain a copy of the Order Form for the duration of the recurring services and provide it upon Issuer request
- Write the words "Recurring Transaction" on the signature line of the Transaction Receipt
- Provide a subsequent Order Form when a Recurring Transaction is renewed
- Obtain the Cardholder signature, or an electronic signature or other similar authentication, that is effective under applicable law

For an Electronic Commerce Transaction, the Recurring Services Merchant must also:

- Include on the Transaction Receipt the frequency and duration of the Recurring Transaction, as agreed to by the Cardholder
- Provide a simple and easily accessible online cancellation procedure, if the Cardholder request for goods or services was initially accepted online

## Recurring charges and subscriptions

### VISA Regulations (cont'd)

- For variable charges, consumer may establish minimum or maximum charges unless prior notice of each charge provided; also right to receive 10-day notice prior to each charge
- Consumer may receive prior notice (i) before each recurring charge, (ii) when charge falls outside set range, or (iii) when charge differs from most recent charge by more than set amount

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Visa International Operating Regulations, at 514-516.

#### Notification Requirements for Recurring Transactions - U.S. Region

In the U.S. Region, for Recurring Transactions of varying amounts, the:

- Order Form must allow the Cardholder to specify a minimum and maximum Transaction amount to be charged, unless the Cardholder will be notified of the amount and date of each charge, as specified below
- Merchant must inform the Cardholder of their right to receive, at least 10 calendar days before each scheduled Transaction Date, written notification of the amount and date of the next charge

The Cardholder may choose to receive the notification:

- For every charge
- When the Transaction amount does not fall within the range of amounts specified on the Order Form
- When the Transaction amount will differ from the most recent charge by more than an agreed upon amount

## Certain state laws on billing

California law passed in October 2010 (effective December 1, 2010) establishes disclosure and consent standards for “automatic renewal” or “continuous service” offers:

- Clear and conspicuous disclosure of offer terms
- Affirmative consumer consent
- Acknowledgment with offer terms, cancellation policy and procedure
- Appears to apply to online merchants (“...any business...”)

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Cal Bus. and Prof. Code 17600 *et seq.*

17601. For the purposes of this article, the following definitions shall apply: (a) "Automatic renewal" means a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term. (b) "Automatic renewal offer terms" means the following clear and conspicuous disclosures: (1) That the subscription or purchasing agreement will continue until the consumer cancels. (2) The description of the cancellation policy that applies to the offer. (3) The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known. (4) The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer. (5) The minimum purchase obligation, if any. (c) "Clear and conspicuous" or "clearly and conspicuously" means in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language. In the case of an audio disclosure, "clear and conspicuous" and "clearly and conspicuously" means in a volume and cadence sufficient to be readily audible and understandable. (d) "Consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes. (e) "Continuous service" means a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service.

17602. (a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following: (1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer



conveyed by voice, in temporal proximity, to the request for consent to the offer. (2) Charge the consumer's credit or debit card or the consumer's account with a third party for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms. (3) Fail to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, the business shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services. (b) A business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a). (c) In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in this state, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer. (d) The requirements of this article shall apply only prior to the completion of the initial order for the automatic renewal or continuous service, except as follows: (1) The requirement in paragraph (3) of subdivision (a) may be fulfilled after completion of the initial order. (2) The requirement in subdivision (c) shall be fulfilled prior to implementation of the material change.

## Certain state laws on billing

- On the other hand, a California state superior court recently ruled that the California Song-Beverly Credit Card Act, which prohibits collecting and recording “personal identification information” in connection with a credit card transaction, does not apply to online transactions<sup>[1]</sup>
- *Gonor v. Craigslist, Inc.*, No. CGC-11-511332 (Aug. 24, 2011)<sup>[2]</sup>

[1] Cal. Civ. Code 1747 *et seq.* “Personal identification information” defined as “information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder’s address and telephone number.”

[2] See also *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323 (C.D. Cal. 2009) (pre-*Pineda* federal case finding that B-S Credit Card Act does not apply to online transactions).

## Certain state laws on billing

- Other states with laws similar to the CA Song-Beverly Credit Card Act prohibit the collection of certain personal information in connection with a credit card transaction, including MA, KS, RI, NV, MD and DE<sup>[1]</sup>
- Other state laws prohibit or restrict surcharging for credit, sometimes debit (reflected in network rules as well)

[1] See *Absher v. AutoZone*, 164 Cal.App.4<sup>th</sup> 332, 339 (noting that the Song-Beverly Credit Card Act was modeled after a NY consumer protection statute, NY Gen. Bus. 520-a, and citing similar laws in MA, KS, RI, NV, MD, and DE).

The MA law (MGL c. 93 s. 105) prohibits “writing” or requiring the cardholder to “write” PII on the credit card transaction form, thus, there may be an argument that this MA law does not apply to internet transactions. No MA court has addressed this particular question.

Section 105. (a) No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder’s address or telephone number. The provisions of this section shall apply to all credit card transactions; provided, however, that the provisions of this section shall not be construed to prevent a person, firm, partnership, corporation or other business entity from requesting information is necessary for shipping, delivery or installation of purchased merchandise or services or for a warranty when such information is provided voluntarily by a credit card holder.

## What's next?

- In-app virtual buys, often initiated by children
  - In Feb. 2011, Rep. Markey requested FTC investigation into in-app purchases<sup>[1]</sup>
  - Apple revised its in-app purchasing policy, but CA class action filed in April 2011<sup>[2]</sup>
- FTC Dot Com Disclosures review<sup>[3]</sup>
- FTC recently announced plans to revise COPPA; Comments due Nov. 28<sup>[4]</sup>

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[1] See Jacqui Cheng, *FTC says it will look into Apple's marketing of in-app purchases to kids*, March 2011, at <http://arstechnica.com/apple/news/2011/02/ftc-says-it-will-look-into-apples-marketing-of-in-app-purchases-to-kids.ars>; Cecilia Kang, *FTC to review Apple iPhone in-app purchases*, Feb. 22, 2011, at [http://voices.washingtonpost.com/posttech/2011/02/ftc\\_chairman\\_to\\_probe\\_apple\\_ip.html](http://voices.washingtonpost.com/posttech/2011/02/ftc_chairman_to_probe_apple_ip.html).

[2] Chris Foreman, *Apple facing class-action lawsuit over kids' in-app purchases*, April 2011, at <http://arstechnica.com/apple/news/2011/04/apple-facing-class-action-lawsuit-over-kids-in-app-purchases.ars>.

[3] The FTC recently initiated a proceeding to revisit the Dot Com Disclosures in order to update the guidance to reflect changes to Internet commerce. See Press Release, *FTC Seeks Input for Revising Its Guidance to Businesses About Disclosures in Online Advertising*, May 26, 2011, available at <http://www.ftc.gov/opa/2011/05/dotcom.shtm>. The comment period has closed, and the FTC has indicated that it does not anticipate issuing revised guidance until 2012.

[4] Press Release, *FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule*, Sept. 15, 2011, at <http://www.ftc.gov/opa/2011/09/coppa.shtm>.

## What's next?

- Mobile payments
  - Compliant disclosures and authorizations that are appropriate for mobile devices under relevant rules

## Questions?

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