



CONSUMER NEWS

SAN DIEGO CITY ATTORNEY'S OFFICE

Affiliate Marketing

May 2011

In recent years, consumers have complained to our office and to other consumer protection offices that charges have appeared on their credit cards for services they did not order. Often, these charges have been due to a form of deceptive marketing called "Affiliate Marketing." There are new Federal and state laws that prohibit the practices that constitute affiliate marketing.

DEFINING AFFILIATE MARKETING:

"Affiliate marketing" refers to the practice of online retailers sharing their customers' billing information with third-party sellers allowing these third parties to bill consumers for goods or services that the consumers do not realize they are receiving.

The typical scenario involves a consumer purchasing a product on the website of a retailer. After placing the order, the consumer expects to receive a confirmation from the company, but instead is transferred without his/her

knowledge to the website of another seller of goods or services. The website appears to still be affiliated with the original vendor, often bearing a logo of that vendor. It offers the consumer a discount on a future purchase or a coupon in exchange for signing up for a free trial offer of the second retailer's service. What is not disclosed, or is disclosed in very small print, is that the consumer will be billed for this service every month after the trial period.

Even when a consumer reads this disclaimer, he/she thinks that he/she did not give the second retailer his/her credit card information so no billing can occur. However, the first retailer shares the credit card information with the second retailer in what is called a "data pass."

Another variation of affiliate marketing involves the affiliate sending a consumer a check for a small amount. On the back, it indicates that by signing the check, the consumer agrees to sign up for a free service and will be charged if he/she fails to cancel it after the trial period. The check appears to

come from a retailer that the consumer recently dealt with.

CONSUMER HARM:

The U.S. Senate Committee on Commerce, Science and Transportation produced a report on November 19, 2009, setting forth the harm that is caused by aggressive sales tactics like affiliate marketing on the internet. The Committee studied three large marketers: Affinion, Vertrue and Webloyalty, and found:

- The three companies took over \$1.4 billion dollars from consumers using aggressive marketing tactics we define as affiliate marketing.
- More than 450 online retailers partnered with these three businesses and received \$792 million from allowing their customers to be solicited using these tactics. Classmates.com made over \$70 million from this practice.
- Most consumers who signed up for the services

offered by these companies had no idea that they had done so. One of the companies estimated 90% of its customers did not know they were customers.

To view a copy of the report online, go to

http://commerce.senate.gov/public/?a=Files.Serve&File_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a

NEW FEDERAL LAW:

The U.S. Congress passed a law called the “Restore Online Shoppers’ Confidence Act.” It was signed into law on December 29, 2010, and has the following provisions:

- Prohibits disclosing a consumer’s billing information to a third party seller for use by the seller in an online sale of goods/services from the seller.
- Provides that an online seller cannot charge a consumer for any good or service online unless the seller clearly and conspicuously discloses to the consumer all material terms of the transaction including a description and cost of the goods/or service, and its non-affiliation with the initial merchant.
- Provides that an online seller cannot charge a consumer for any good or service online unless the seller receives express informed consent from the consumer by having the consumer give it a full credit card account number and the consumer’s name and address, and having the consumer do something

affirmatively to sign up for the service (like clicking a button).

- Prohibits charging a consumer after using a “negative option” to sign him/her up. Negative options are ones where a consumer is signed up to get a service and must cancel or will be billed monthly fees until he/she cancels.

Note that this law only applies to internet transactions occurring after it became law. Consumers should check their credit card bills to make sure they are not currently being charged for services due to being a victim of an affiliated marketing scheme that happened before the law became effective.

NEW CALIFORNIA LAW:

The California legislature also passed a law to address affiliated marketing tactics. The California law became effective December 1, 2010. It prohibits businesses from making automatic renewal or continuous service offers to consumers without first complying with several requirements.

“Automatic renewal” means a plan in which a paid subscription or purchasing agreement is automatically renewed at the end of a term (e.g. month or year).

“Continuous service offers” are plans in which a subscription or purchasing agreement continues until the consumer cancels the service.

Businesses offering these plans must do the following:

- Clearly and conspicuously present the terms of the plan when asking for the consumer to consent to it;

- Obtain consumer approval before signing him/her up for an automatic renewal program;
- If there is a material change in the terms of the offer, provide the consumer notice of the change and a mechanism to cancel the service;
- Provide an acknowledgment of the offer and cancellation policy to the consumer; and
- Provide a toll-free number, email address, or postal address to make it easy for the consumer to cancel.

Unlike the Federal law, the California law applies to transactions on the internet and off the internet.

REMEDIES FOR VIOLATIONS:

These laws do not create new crimes. They are enforced by the Attorney General of California for citizens in California. Thus, to report violations of these laws, consumers should contact the California Attorney General’s Consumer Protection Division at (800) 952-5225 or www.ag.ca.gov.

**San Diego
City Attorney’s Office
Consumer and Environmental
Protection Unit
(619) 533-5600**

Newsletter written by Assistant City Attorney Tricia Pummill

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Sources: U.S. Senate Committee on commerce, Science and Transportation, Office of Oversight and Investigations Report “Aggressive Sales Tactics on the Internet and Their Impact on American Consumers (Nov. 16,

2009); Restore Online Shoppers' Confidence Act; and California Business and Professions Code sections 17600-17605.

The information provided in this newsletter is intended to convey general information and is not intended to be relied upon as legal advice.

To report violations of consumer protection laws, call the City Attorney's Hotline at **(619) 533-5600**.