



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement

November 17, 2011

Via Email and Overnight Mail

L. Jean Noonan
Hudson Cook, LLP
1020 19th Street, N.W., 7th Floor
Washington, DC 20036

Dear Ms. Noonan,

This staff advisory opinion responds to your August 19, 2011, letter seeking an informal staff opinion regarding the application of the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 USC § 8401, *et. seq.*, to the proposed online business practices of your client, the National Railroad Passenger Corporation (Amtrak). The views expressed in this letter are those of the staff assigned to enforce ROSCA. In accordance with Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 1.3(c), this is a staff opinion only and has not been reviewed or approved by the Commission or by an individual Commissioner. It is not binding upon the Commission and is given without prejudice to the right of the Commission later to rescind the advice and, when appropriate, to commence an enforcement proceeding. In conformance with Section 1.4 of the Commission's Rules of Practice, 16 C.F.R. § 1.4, this letter and Amtrak's request, are being placed on the public record. The opinions expressed in this letter are based on the factual scenario you described in your letter.

As described in your letter, Amtrak allows its customers to purchase train tickets on its website. Prior to the enactment of ROSCA, Amtrak also offered travel-related products and services from trusted third party partners. When ROSCA went into effect, Amtrak ceased offering consumers the opportunity to purchase third party products and services on Amtrak's website. The central issue raised in your letter is whether Amtrak's prior practice of offering third party products and services, with certain modifications, would violate ROSCA. As described below, we conclude that under the specific factual scenario presented in your letter, staff would not recommend an enforcement action against Amtrak for violations of ROSCA.

ROSCA PROVISIONS

Section 3(b) of ROSCA provides that “[i]t shall be unlawful for an initial merchant to disclose a credit card, debit card, bank account, or other financial account number, or to disclose other billing information that is used to charge a customer of the initial merchant, to any post-transaction third party seller for use in an Internet-based sale of any goods or services from that post-transaction third party seller.” ROSCA § 3(d)(1) defines initial merchant as “a person that has obtained a consumer’s billing information directly from the consumer through an Internet transaction initiated by the consumer.” A post-transaction third party seller is “a person that (A) sells, or offers for sale, any good or service on the Internet; (B) solicits the purchase of such goods or services on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant; and (C) is not (i) the initial merchant; (ii) a subsidiary or corporate affiliate of the initial merchant; or (iii) a successor of an entity described in clause (i) or (ii).” ROSCA § 3(d)(2).

DISCUSSION

According to your letter, when a consumer seeks to purchase a train ticket on Amtrak’s website, the consumer must enter itinerary details, including the city to which the consumer seeks to travel, the class of service desired, and the date(s) and time(s) of travel. The consumer is then provided with ticket options. Once a ticket is selected, the consumer must add the ticket to a “cart” that is clearly displayed on the side of the consumer’s computer screen as an itinerary. Prior to ROSCA, Amtrak would next offer consumers travel-related products such as rental cars, hotels, and activities provided by third party partners. The consumer could then decide whether to add third party products to their Amtrak shopping cart. The consumer could also proceed with the booking process without reviewing any other products by clicking the “Enter Passenger Information” box located above the third party products. Only after the consumer finished shopping for tickets and other travel-related products and services, was the consumer sent to a passenger information page that asked the consumer to log in to Amtrak’s website or enter passenger contact information. The consumer was then directed to a payment information page where they could enter financial account information and finalize the purchase. Finally, consumers were sent to a purchase confirmation page. Amtrak ultimately passed consumers’ financial data to the third party partners from whom a product or service was purchased.

For ROSCA to apply in these circumstances, Amtrak must be an “initial merchant” under Section 3(d)(1) and Amtrak’s third party partners must be “post-transaction third party seller[s]” under Section 3(d)(2). Because Amtrak obtains billing information directly from customers that initiate an Internet transaction on its website, it is an initial merchant. ROSCA § 3(d)(1). If Amtrak’s proposed third party partners meet the three criteria set forth in Sections 3(d)(2)(A)-(C), they would be “post-transaction third party seller[s].” Per your letter they clearly meet two of the criteria: the third party

partners sell goods or services over the Internet, Section 3(d)(2)(A), and are not the initial merchant, Section § 3(d)(2)(C).

Therefore, the key issue is whether Amtrak's third party partners would solicit the purchase of goods or services after consumers have initiated a transaction with Amtrak under Section 3(d)(2)(B). ROSCA does not define "initiate a transaction" and no courts have addressed this issue. One interpretation of Section 3 is that a transaction is initiated after a consumer proceeds to a website's checkout page. Under this interpretation, ROSCA would not apply because the solicitation for third party products occurs before consumers go to Amtrak's checkout or payment submission page. Another interpretation is that a transaction is initiated when a consumer places products or services in a website's shopping cart. Under this interpretation, Amtrak's third party partners would be "post-transaction third party seller[s]" and ROSCA would apply.

Even if the second interpretation is correct, staff would not recommend an enforcement action because the business practices you describe are unlikely to result in consumer confusion or injury and, therefore, staff would not recommend an enforcement action. There are four aspects of Amtrak's proposed marketing that should prevent any consumer injury were Amtrak to resume offering third party products and services by way of the clear and conspicuous marketing described in your letter.

First, consumers will be required to affirmatively select and add desired third party products and services to their shopping cart. In stark contrast to the aggressive, misleading tactics described in ROSCA § 2 (4) that caused consumers to be charged for products that they do not want, Amtrak's proposed practices enable consumers to select only the specific products and services they want. Likewise, Amtrak's proposed practices are designed to make consumers aware of what they are purchasing. *Contra* ROSCA § 2 (6) (millions of consumers were unaware that they had been enrolled in membership clubs).

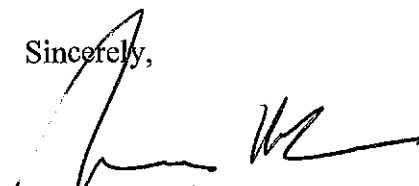
Second, when offering third party products, Amtrak will prominently display the names and logos of its third party partners, including rental car companies and hotels. Such clear and conspicuous disclosures make it unlikely that consumers will erroneously conclude that products are being offered by Amtrak itself or that the third party partners are affiliated with Amtrak. *Contra* ROSCA § 2 (4) and (5).

Third, Amtrak will clearly and conspicuously disclose the total cost of each third party product. Thus, consumers will know exactly what products or services they are purchasing as well as how much they will be charged and by whom. Because Amtrak's proposed business practices do not obfuscate the existence or financial obligations of the third party transactions, the concerns identified in ROSCA §§ 2 (5) and (7) (that offers were designed to make consumers think they were part of the initial purchase, rather than a new transaction with a new seller, and that consumers do not expect to be charged when they have not submitted their billing information) are minimized.

Finally, Amtrak will constantly display a shopping cart, which details the consumer's entire itinerary and itemizes both train tickets and ancillary products. The website will allow consumers to remove ancillary products from the shopping cart through a simple one-click mechanism, enabling consumers to reconsider whether to do business with Amtrak's third party partners before completing the initial transaction. In contrast to the findings of ROSCA § 2 (8), Amtrak provides consumers with multiple opportunities to reject the third party transactions.

As discussed above, Amtrak's proposed marketing does not rely on the problematic marketing tactics addressed in the ROSCA findings. Moreover, Amtrak's intended marketing will enable consumers to make informed purchasing decisions and minimize the risk of consumer harm. Accordingly, given your factual description of Amtrak's proposed marketing, we would not recommend an enforcement action under ROSCA.

Sincerely,



James A. Kohm
Associate Director
Division of Enforcement