

# Client Alert

A report  
for clients  
and friends  
of the firm     June 2004

## FTC Settles With Tower Records for On-line Privacy Policy Misrepresentations

The Federal Trade Commission ("FTC") recently agreed to a consent order with Tower Records for the inclusion of allegedly false information in the company's on-line privacy policy. Following an announcement of the agreement on April 21, 2004, the FTC approved the final consent order on June 2, 2004. The settlement serves as a reminder to businesses that the Commission remains inclined to enforce the Federal Trade Commission Act's "unfair or deceptive trade practices" provisions against companies that fail to live up to the promises contained in their privacy policies. As a result, the settlement illustrates that while a sweeping federal privacy policy law has yet to gain approval in Congress, the federal government has effective methods at its disposal for enforcing privacy breaches.

### Background of the FTC Enforcement Action

Tower Records ("Tower") sells music and video recordings, books, and various other entertainment products through retail stores and its on-line store at TowerRecords.com. Through its privacy policy, Tower made representations to users of its Web site that their personal information was secure, protected, and confidential. However, in December 2002 the company redesigned the "checkout" portion of its Web site, which allowed customers to view the status of their order. According to the FTC, the redesigned order status page contained a security flaw that allowed any user who entered the site with only a valid order number to view the personal information and order history of a customer who placed the order. The available information included name, e-mail address, billing address, shipping address, telephone number, and items ordered since 1996. This was the

case despite the fact that Tower's on-line privacy policy assured customers that it took reasonable steps to safeguard customer personal information, and that customer account information was password-protected and thus only available to individual customers. Upon learning of this, the FTC conducted an investigation of Tower on the grounds that the alleged privacy policy violations constituted "unfair or deceptive trade practices" under Section 5(a) of the FTC Act. This is the Commission's fourth such case involving companies that misrepresent the scope and effectiveness of consumers' personal information through company privacy policies.

### Terms of the Settlement Agreement

As with prior settlements with other companies, the consent order prevents Tower from falsely representing the level of maintenance and protection of the privacy, confidentiality, and security of personal information it collects about customers. The order requires Tower to establish and maintain a comprehensive written information security program. Specifically, Tower must designate an employee or employees to coordinate and administer the information security program; identify material internal and external risks to the security, confidentiality, and integrity of consumers' personal information; assess the sufficiency of any current safeguards in effect to control these risks; design and implement reasonable safeguards to control risks for areas that do not currently have adequate safeguards in place; and regularly test or monitor the effectiveness of all safeguards. In addition, Tower must evaluate and adjust its information security program in accordance with any testing or monitoring results, material changes to its business arrangements or operations, or any other factors that may have a material impact on the company's information security program.

Within one year, and biannually for the next ten years, Tower must obtain an assessment and report from an independent third-party professional certifying that the company's security program meets or exceeds the

requirements of the consent order. Additionally, the assessment and report must certify that the program is running in a sufficiently effective manner that ensures the security, confidentiality, and integrity of consumers' personal information. Tower must also retain major documents related to compliance and assessment for a period of three to five years. Finally, Tower is required to notify the FTC of any changes in corporate status and submit compliance reports to the FTC.

### **Impact of the Settlement on Businesses**

The Tower Records settlement confirms, as did prior settlements with companies such as Microsoft Corp. and Guess, Inc., that the FTC is determined to aggressively pursue businesses that fail to deliver on the assurances contained in their on-line and off-line privacy policies. Businesses should take proactive measures to ensure that they have effective information security mechanisms in place. As the Tower Records consent order illustrates, establishing and maintaining an accurate privacy policy is only part of that equation. As business services and functions change, companies should continually monitor and test their overall information security programs to prevent inadvertent privacy breaches before they occur.

For further information on this latest regulatory action and how to comply, contact Chris Wolf in Proskauer's Washington office at [cwolf@proskauer.com](mailto:cwolf@proskauer.com) or 202-416-6818.

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**Proskauer's Computer Security Practice Group** counsels clients on their obligations in the event of a computer security breach and the steps that may be taken to avoid or limit legal liability from potential computer intrusions. The following individuals serve as the contact persons who would welcome any questions you might have.

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