

Notice of Penalty Offenses Concerning Misuse of Information Collected in Confidential Contexts

The Federal Trade Commission has determined that the following practices related to the misuse of information are deceptive or unfair and are unlawful under Section 5(a)(1) of the Federal Trade Commission Act.

1. It is an unfair or deceptive trade practice to use information collected in a context where an individual reasonably expects that such information will remain confidential (“Confidential Context”)¹ for any purpose not explicitly requested by the individual unless the individual first provides affirmative express consent for such use.² For example:
 - a. It is an unfair or deceptive trade practice to use information collected in a Confidential Context to obtain a financial benefit that is separate from the benefit generated from providing the product or service requested by the individual unless the individual first provides affirmative express consent for such use.³
 - b. It is an unfair or deceptive trade practice to use information collected in a Confidential Context to advertise, sell, or promote products or services unless the individual first provides affirmative express consent for such use.⁴
2. It is an unfair or deceptive trade practice to make false, misleading, or deceptive representations or omissions concerning the use or confidentiality of information

¹ Expectations of confidentiality are context specific. *In re: Beneficial Corp.*, 86 F.T.C. 119, 172 (1975) (finding a “basic ethical consideration which by its nature is equally applicable to anyone in a position to abuse the confidence of a client”), *aff’d in relevant part*, 542 F.2d 611 (3rd Cir. 1976).

² *Id.* at 173, 175-77 (“Because the fault we have found lies in the undisclosed use of confidential data, the law judge was correct in entering an order provision requiring full disclosure and consent before loan solicitation may begin. Under the order, Beneficial may not use any information given by a tax customer unless the customer has signed a consent form detailing, *inter alia*, the specific purpose for the consent, the exact information to be used, and the particular use intended. The lack of just this information is what makes the present [consent] form inadequate.”).

³ *Id.* at 173 (noting that “the confidential relationship is breached whenever the customer’s information is used for the financial gain of the [business] . . . [w]hether or not [the business] brokered confidential information to other businesses, or simply capitalized on it themselves...”).

⁴ *Id.* at 173, 177 (determining that using customers’ tax information to market loans was an unfair practice, but permitting the use of names and contact information of individuals for the purpose of communication with such customers solely concerning the particular service requested by the individual).

collected in a Confidential Context.⁵ For example, it is an unfair or deceptive trade practice to misrepresent, explicitly or by implication, that an individual's information will: (i) be used solely to provide the specific product or service requested by the individual and not for any unanticipated uses; and (ii) not be used to obtain a financial benefit that is separate from the benefit generated from providing the product or service requested by the individual.⁶

⁵ *Id.* at 173-77 (determining that it is a deceptive practice to “convert[] tax data for [a business’s] own profit” and fail to “guard tax information from unauthorized use” where a consumer expects such information to remain private).

⁶ *Id.* at 173-174 (adding that “[s]ince Beneficial’s tax advertising was designed to attract customers with an alluring offer and the tax service was designed to switch the customers unwittingly to Beneficial’s regular loan service, we find as an additional ground of deception that the loan solicitation practices were part of a pattern of conduct akin to bait and switch”).