

**FEDERAL TRADE COMMISSION
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PRENOTIFICATION NEGATIVE OPTION RULE REVIEW
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**COMMENTS OF
MAGAZINE PUBLISHERS OF AMERICA**

The Magazine Publishers of America (MPA), the national association for consumer magazines, is pleased to comment on the Federal Trade Commission’s (FTC) review of its Trade Regulation Rule concerning “Use of Prenotification Negative Option Plans” (the Rule).

MPA, established in 1919, represents hundreds of domestic publishing companies, international publishers, and associate members. MPA members publish well over a thousand different titles, including some of the nation’s best-known and most loved magazines. Our diverse membership also includes publishers of many small, regional, and niche titles serving very diverse communities and interests. On behalf of our member companies, we thank the Commission for the opportunity to comment on the review.

In these comments, we discuss the advance consent programs used by magazine publishers, and explain the benefits of these programs for consumers and publishers. In addition, we review the strong and well-established self-regulatory foundation for advance consent programs. We conclude that the Commission’s current guidance – including guides for both businesses and consumers – and enforcement ability are sufficient to protect consumers taking advantage of advance consent programs, and that an expansion or change in the Prenotification Negative Option Rule to cover such advance consent plans is neither necessary nor warranted.

Magazines and Advance Consent Marketing – The Magazine Experience

Most magazines in the United States are sold by subscription—fully 88 percent of audited U.S. circulation in 2008.¹ As part of their subscription marketing plans, many magazine publishers offer “advance consent” programs—marketing concepts that the FTC has categorized as “negative option” marketing. In particular, both new and existing magazine subscribers are increasingly affirmatively accepting subscription agreements that contain automatic renewals, which allow uninterrupted service for readers, fewer renewal notices for publishers to print and mail and subscribers to read and respond to, decreased costs for publishers, and easy, effective customer service.

As MPA stated in both oral and written comments during the FTC’s 2007 workshop on “negative option” marketing plans, automatic renewal is a well-established renewal mechanism that consumers are comfortable with for many of their utilities and media platforms, including cable television, internet service, and newspapers – even more so now than during the last review of the Rule. Consumers and publishers have come to recognize and embrace the same simplicity and clarity with respect to magazine subscriptions. Industries utilizing automatic renewals as a matter of course are varied and many, and the evolving transition to this concept in the magazine industry has been proceeding smoothly and without consumer dissatisfaction.

Automatic Renewal Plans

Not unlike automatic billing for the daily newspaper or the credit card charge for the monthly Internet bill, the concept behind automatic renewal is simple: the consumer and the media provider have agreed to be in a relationship providing uninterrupted delivery of a particular service with the customer agreeing to automatic billing. There are significant advantages to these programs—for both consumers and media providers.

¹ Magazine Publishers of America, *The Magazine Handbook: A Comprehensive Guide 2009/10*, 14 (2009) (citing Audit Bureau of Circulation, ABC Publisher’s Statements 2008).

For consumers, automatic renewal guarantees uninterrupted service for as long as the reader wishes to keep receiving the magazine. The plan also simplifies the renewal process and reduces the number of renewal notices the consumer receives. If the consumer is enjoying the magazine, the renewal process is quick and easy. The consumer merely reviews the renewal terms included in a mailed reminder notice or on the cover wrap – a special cover put on the magazine – and makes sure she is satisfied with the terms of the renewal. With consumers facing long work hours and hectic schedules, the ease and convenience of having a simple renewal process is a tremendous benefit.

For publishers, automatic renewal provides opportunities for operating at a reduced cost – one of many reasons publisher’s use of automatic renewals has increased over the last several years. The printing and ever increasing postage costs of creating and mailing multiple renewal notices is substantial. In addition, when subscriptions are interrupted, publishers must modify their mailing lists, and once the subscription is restarted, they may need to mail out missed copies in a separate, expensive mailing. With automatic renewal, publishers realize substantial savings, enabling them to keep magazine prices affordable. Perhaps more importantly, automatic renewal offers publishers an excellent opportunity to build long-term relationships with loyal readers.

The benefits to both consumers and publishers have resulted in a growth in the use of automatic renewal for magazine subscriptions. Both new subscribers and existing customers are being given the opportunity for continuous service. In fact, we estimate that automatic renewal now accounts for approximately 20 percent of total subscriptions, and that percentage is growing.²

The Free Trial

The free trial is another advance consent marketing program that has been in long-time and broad use across many types of media, including magazines. In a free trial,

² Capell’s Circulation Report, July 2008

consumers are allowed to try a magazine for a trial period, which can be several weeks in the case of weekly magazines or several months for monthly publications. If a reader enjoys the magazine and wants to keep receiving it, he continues with the agreed-upon subscription. On the other hand, if a reader decides she does not want the magazine, she can cancel it without having to pay anything. Free trials provides substantial benefits for both consumers and publishers, particularly, in new launches, where the consumer may not be familiar with the magazine and where the magazine content and format may still be a work in progress.

For consumers, free trials give the reader the ability to try new magazines risk free. Whether it is a new title in a magazine category they have read for years or a completely new genre for the reader, free trials offer a convenient and cost-free way for consumers to sample magazines and discover new titles to enjoy. While consumers can sample magazines by purchasing them at retail outlets, free trials allow them to take the titles for a test drive with the convenience of home delivery and without having to pay for the magazines they sample.

For publishers, free trials are beneficial because they encourage new readers to try their magazines. Consumers are more likely to try a new magazine if they can cancel without having to pay anything or buy a full subscription. If the consumer enjoys the magazine, the publisher is likely to have a new long-term reader, and long-term readers are magazine publishers' best customers.

Refunds

If a subscriber were dissatisfied with an advance consent program, the publisher would lose the very benefit it was seeking from the program. Thus, publishers offer important consumer protections for readers who use automatic renewal and free trial programs. For example, even if consumers fail to cancel before an automatic renewal date or before the end of a free trial period and receive a bill or have their credit cards charged, they can

contact the magazine, cancel the subscription, and receive a refund for the remainder of the subscription period—no questions asked.

The Role of Self Regulation

A Record of Commission Support

One of the main benefits magazine publishers realize from advance consent programs is the ability to build long-term relationships with engaged readers. This built-in incentive to keep the reader happy helps guide publisher's marketing plans, and is one reason that self-regulation continues to be highly effective and the preferred regulatory model in the advance consent arena.

Support for self regulation of advance consent plans is not without FTC precedent. In the previous review of the Negative Option Rule in 1997-98, the Commission concluded, "industry self regulation may provide an additional mechanism to police deceptive negative option marketing techniques that are not covered by the Commission's Rule. It is in the interest of the direct marketing industry to have products and services meet the consumer's expectations so that a company can establish a long standing relationship with the consumer."

Industry Educational Guides

Many of the industries utilizing advance consent marketing plans, represented not only by MPA but also the Direct Marketing Association and the Electronic Retailing Association, have created educational guides and best practices for these types of plans.³ The MPA guide, part of a series of educational guides prepared for our members on a broad array of consumer marketing topics, is available to members on the MPA website and was included in a consumer marketing handbook physically sent to each member company. As with the other Associations' guidance documents, MPA's guide recognizes the need for member flexibility to tailor marketing materials and processes to their

³ <http://retailing.org/Documents/2008ERAAAdvanceConsentMarketingGuidelines.pdf>
<http://www.dmaresponsibility.org/cgi/disppressrelease?article=367>

specific business models. At the same time, the Guide provides information on consumer protection considerations in four key areas:

- Providing clear and conspicuous disclosure of all material terms
- Ensuring that consumers have given affirmative consent to the plans
- Fully disclosing, and ensuring easy implementation of, cancellation procedures
- Communicating upcoming renewals through either a link letter or a renewal cover wrap

MPA's educational guides do not attempt to be overly prescriptive as to specific formats and consent mechanisms. Publishers' marketing techniques, styles, and formats differ, and there is more than one way to make clear and conspicuous disclosures and implement affirmative consent mechanisms. This flexibility, coupled with the built in incentive for publishers to have strong long term relationships with readers, makes self regulation a powerful tool.

The Rule as Currently Promulgated is Sufficient

Consistent with the Commission's conclusion in 1998 that the Rule appropriately balanced "the interest of both consumers and firms that are subject to it and works to effectively protect consumers without imposing undue costs on industry," MPA believes there are numerous arguments and supporting evidence to again draw the conclusion that expansion or modification of the Rule is not necessary at this time.

The Existing FTC Guidance

In the area of advance consent marketing, the FTC has provided extensive guidance for both businesses and consumers, explaining the consumer protection considerations that businesses must take into account and that help consumers understand these types of offers. In its business guides, *Advertising and Marketing on the Internet: Rules of the Road* and *Dot Com Disclosures: Information About Online Advertising*, the Commission provides useful guidance for Internet marketing, while its consumer information guides, including *Prenotification Negative Option Plans*, *Trial Offers: The Deal is in the Details*, *Continuity Plans: Coming to You Like Clockwork*, and *Unordered Merchandise*, cover

various types of negative option, or advance consent, offers. By giving industry concrete examples and direction, the FTC educational materials help to ensure that the Commission's goal to protect consumers is carried out in a way that allows business the freedom to comply in a manner that is most effective and appropriate for their business.

The FTC's Existing Enforcement Authority, Current Laws, and Regulations

In addition to market guidance, MPA believes that the FTC already has the necessary enforcement tools to deal with false and deceptive negative option marketing offers, a position supported by FTC Staff Attorney Gregory Ashe at the 2007 Workshop on "Negative Option Marketing". Mr. Ashe noted the FTC enforcement authority under the Federal Trade Commission Act, the Electronic Fund Transfer Act, the Negative Option Rule, and the Telemarketing Sales Rule.

Enforcement statistics presented by Mr. Ashe support the argument that advance consent marketing in general—and magazine advance consent marketing in particular—are not major consumer protection problems. For instance, of the 707 federal district court enforcement cases during the 1996-2006 study period, only 45 involved allegedly unlawful negative option marketing. Of those 45 cases, only four involved books or magazines.

Need for Flexibility

A Changing Market Online and Offline

Nowhere is the need for flexibility greater than in the ever-evolving online world. Every year, a growing number of subscribers use the Internet to sign up for subscriptions. In fact, a survey conducted by MPA showed a growth in online subscriptions from 12% in 2006 to 21% in 2008 among publishers responding. From Facebook and Twitter, to YouTube and the iPhone, as technology has evolved, magazine marketing has been forced to evolve along with it. The great technological advances that occur on a seemingly yearly basis mean that publishers and other advance consent marketers need to

be able to adjust design elements on the web page or mobile screen without constraining burdens that could potentially be outdated just a short time later.

The goal of building relationships and facilitating the consumer experience does not change online. Digital subscribers generally represent a different type of user than the traditional magazine subscriber. These new “digital” subscribers, who live in a world that moves at a rapid pace, value timeliness and ease of renewal; putting in potential regulatory roadblocks to their online activities may actually be contrary to the consumer’s interest. With growth in the use of advance consent plans online and in the number of digital subscribers, there has not been an uptick in consumer complaints.

Online marketing is not the only marketplace in which publishers need flexibility. Offline, over the last ten years, the way in which publishers use advance consent plans has changed significantly as well. Driven by a host of factors, including competing mediums, a recession-driven decrease in advertising revenues, and changing consumers, publishers have refocused on their strongest asset – subscribers. More changes in marketing techniques and plans are likely in the next few years.

One size does not fit all

At the 2007 FTC workshop, Division of Consumer and Business Education Attorney Leslie Fair, along with other industry officials, highlighted that different consumer protection approaches can be effective in ensuring customers receive the information they need when using advance consent programs, and an overly prescriptive approach can cause unintended negative consequences.

For example, during the 2007 FTC workshop, one of the panels included a mock ad for Closet Gourmet Cook’s Club, in which the panelists were asked to evaluate mock disclosures. One was relatively short, the other included a more thorough explanation of the material terms. The panelists pointed out that the shorter disclosure was more likely to be read and understood by the consumer, illustrating clearly that sometimes less is more.

MPA agrees with the position taken by Fair when she said that, while advance consent disclosures must follow the FTC’s “clear and conspicuous” standard, the Commission should not be overly prescriptive in promulgating regulations and issuing guidance. As Ms. Fair stated with regard to the clear and conspicuous standard:

It is not a one size fits all standard simply because we realize that the experts in clear and conspicuous aren’t attorneys at the Federal Trade Commission. The experts in how to make information clear and conspicuous to consumers are marketers, advertisers, and the attorneys who represent them. We appreciate [that] you know how to make information clear, clean, understandable, and accessible to consumers, which is why you’re not going to find an FTC ruling on a preferred font face [or] a minimum type size. Generally speaking, all we want is that it’s clear and conspicuous, and advertisers and marketers are free to use their many tools of creativity to figure out the best way to convey that information.

Conclusion

The advance consent marketing programs used by magazine publishers are popular with subscribers. Over the last decade, that popularity has led to a wide ranging acceptance of what is now a common marketing technique. Both automatic renewal plans and free trial offers give magazine readers convenient ways to enjoy their favorite magazines and try new titles. As these programs have become more popular, MPA has sought to help publishers include best consumer protection practices in their advance consent marketing plans, and consumer reaction has been good.

Since the Rule was promulgated more than 30 years ago, a time span that includes several reviews, the FTC has consistently opted not to expand the rule to other types of advance consent plans until “if and when consumer complaints justified Commission attention.”⁴ Given the considerable evidence presented, the current transparent and self regulating state of advance consent marketing, and evolution in marketing platforms, MPA believes that at this juncture, no expansion of the Rule is needed. We look forward to working with the FTC on this matter going forward.

⁴ 63 FR 4455 (Aug. 20, 1998)