

July 27, 2009

*Via electronic filing: <https://secure.commentworks.com/ftc-NegativeOptionRuleANPR>*

Mr. Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Re: DMA's Comments on the FTC's Prenotification Negative Option Rule Review,  
Matter No. PO64202

Dear Secretary Clark:

The Direct Marketing Association (“DMA”) submits these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Advance Notice of Proposed Rulemaking (“ANPR” or “Notice”) regarding the Commission’s existing Rule Concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. Part 425 (“Negative Option Rule” or “Rule”).<sup>1</sup>

## **I. Introduction**

The DMA appreciates the opportunity to provide comments to the Commission as it conducts its review of the Negative Option Rule. We support efforts to protect consumers from unfair or deceptive acts or practices in the marketing of prenotification negative option plans and other advance consent arrangements. The DMA, however, urges the FTC to avoid unnecessary regulation that would limit consumers’ ability to learn about valuable goods and services, hinder innovation, or inhibit commerce, especially during these challenging economic times. We believe that robust industry self-regulation, coupled with existing FTC enforcement authority, is effectively meeting the needs of both consumers and businesses in the area of negative option marketing. Thus, the DMA believes that there is no need to extend the scope of the Negative Option Rule beyond prenotification sales arrangements, or to otherwise amend the Rule.

The DMA ([www.the-dma.org](http://www.the-dma.org)) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. The DMA advocates industry standards for responsible marketing, promotes relevance as the key to reaching consumers with desirable offers,

---

<sup>1</sup> Federal Trade Commission Advance Notice of Proposed Rulemaking, *Rule Concerning the Use of Prenotification Negative Option Plans*, 74 Fed. Reg. 22720 (May 14, 2009) (*hereinafter* ANPR).

and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, the DMA today represents more than 3,500 companies from dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

The DMA has long been a leader in establishing comprehensive self-regulatory guidelines for its members on important issues related to privacy and ethical marketing conduct. DMA member companies, given their track record in delivering high-quality goods and services to consumers, have a major stake in maintaining consumers' trust in business leaders. Understanding the importance of standards and best practices in building consumer confidence, the DMA requires all members to abide by our comprehensive *Guidelines for Ethical Business Practice* ("Guidelines").<sup>2</sup> We regularly update the Guidelines to address emerging issues in the marketing industry, including issues raised by technological innovation and the virtual marketplace. The Guidelines include detailed instructions for companies on advance consent offers that are consistent with the FTC's Negative Option Rule. In our experience, industry guidelines are the most effective way to address concerns that arise in the continuously changing marketplace.

## **II. The Scope of the Negative Option Rule Does Not Need to Be Expanded**

Currently, the Negative Option Rule applies specifically to prenotification negative option plans, in which customers consent to receive regular notices of upcoming merchandise offers and to respond to the offers within a set time period. If the customer elects not to reject an offer, the customer is provided with the offered merchandise. The FTC has requested comments on whether there is a basis to expand the Negative Option Rule to cover the following advance consent arrangements: continuity plans, trial conversions, and automatic renewals.

The DMA does not perceive a basis for expanding the scope of the Negative Option Rule to include advance consent arrangements. As the ANPR notes, the FTC first promulgated the Negative Option Rule in 1973 after finding that certain marketers of prenotification negative option offers had engaged in unfair and deceptive practices.<sup>3</sup> The Commission reviewed the rule in 1986 and again in 1997, retaining the Rule without substantive changes on each occasion. A wide variety of advance consent arrangements have been offered by businesses for decades, yet the Commission has never seen a need to expand the Negative Option Rule beyond the type of prenotification plan that originally spurred adoption of the Rule. We do not believe that there has been any change in circumstances since the most recent review that warrants a drastic expansion of the Commission's well-settled Rule.

---

<sup>2</sup> DMA Guidelines for Ethical Business Practice, available at <http://www.dmaresponsibility.org/Guidelines/>.

<sup>3</sup> ANPR at 22721.

The DMA believes that the current Negative Option Rule and the broader regulatory framework are working effectively, and strike the right balance between consumer protection and commerce. The Rule targets a specific type of negative option plan that was previously identified by the Commission as an area where unfair and deceptive practices occurred. However, the principles set forth in the Rule, and reiterated in FTC policy statements and in consent agreements in cases brought under Section 5 of the Federal Trade Commission Act – most notably, the requirement to disclose all material terms and conditions prior to obtaining consumer consent – have become the foundation of industry self-regulation in the broader advance consent marketing arena, as described below. The DMA believes that this self-regulatory framework is effectively protecting consumers from unfair or deceptive advance consent marketing, and we are concerned that additional formal regulation in this arena would trammel companies' ability to offer valuable benefits to consumers.

Moreover, the types of advance consent plans mentioned in the ANPR are distinct from each other and from the prenotification negative option plans currently covered by the Rule. Adapting the existing Negative Option Rule, which addresses one specific type of arrangement, would be extremely challenging given the differences among the types of plans identified in the ANPR and the fact that this area of marketing is complex and constantly evolving. If the Commission were to attempt to expand the Rule to encompass advance consent plans, it would likely need to devise generalized standards, rather than adopting specific or inflexible rules. However, this type of "one size fits all" regulation would be less desirable than the current framework, in which both the Commission and self-regulatory programs retain the flexibility to respond to new types of advance consent arrangements with additional guidance or enforcement.

### **III. Advance Consent Plans Benefit Both Consumers and Businesses**

The current regulatory framework provides clear direction for companies to avoid unfair or deceptive practices, while preserving some leeway for businesses to develop an array of advance consent plans that meet the needs of consumers. The advance consent arrangements mentioned in the ANPR – continuity plans, trial conversions, and automatic renewals – have proven convenient and efficient for consumers and businesses alike. Such plans offer consumers significant benefits, such as being able to try out an unfamiliar good or service for a limited period of time before making a decision to purchase it. Consumers also find advance consent agreements convenient for acquiring services over time, such as a magazine subscription or cable television access. With an advance consent plan, consumers can enjoy uninterrupted service for a set or indefinite time period. Other types of advance consent plans give consumers the ability to purchase goods at lower prices than the general public in exchange for participating in the plan. As long the terms of advance consent arrangements are clearly and conspicuously disclosed prior to consumers' agreement to a plan, as required by DMA's Guidelines, these arrangements provide valuable advantages to consumers.

Businesses also benefit from the ability to offer goods and services through advance consent arrangements. Such plans can create administrative efficiencies and provide more predictability to businesses in stocking inventory, allowing businesses to pass these efficiencies on to consumers through lower prices. Trial offers can be a valuable way for businesses to expose consumers, without obligation, to products that may interest them. Automatic renewal arrangements, in particular, may afford businesses a level of certainty that permits them to invest in activities that provide further value to consumers. For example, magazine publishers may budget and plan their journalistic activities based on subscription income.

The advance consent plans mentioned in the ANPR and discussed above are covered by industry self-regulation programs that are consistent with the FTC's positions on negative option marketing. The flexibility and adaptability of self-regulation, supported by existing FTC enforcement authority, has allowed innovation to flourish, realizing efficiencies for businesses and providing consumers with access to a host of advance consent offers that both benefit them and satisfy ethical marketing principles.

#### **IV. Industry Self-Regulation Is Effectively Addressing the Use of Advance Consent Plans**

Industry leaders are protecting consumers with robust self-regulation programs that address advance consent marketing of all forms, including the types of arrangements cited in the Commission's ANPR. Article 12 of the DMA's *Guidelines for Ethical Business Practice*, with which all DMA members are required to comply, addresses advance consent marketing arrangements in detail. Consistent with the FTC's Negative Option Rule, the Guidelines state that marketers should clearly and conspicuously disclose the material terms and conditions of an offer before obtaining a consumer's consent. The Guidelines list specific terms that are material and should be disclosed, such as the fact that a consumer must take affirmative action to avoid being charged, how to take such action, and the deadline for avoiding the charge. The Guidelines emphasize that marketers should obtain the verifiable informed consent of consumers to participate in any advance consent marketing plan, and should remind consumers in any offer and renewal notice of their right to cancel their participation.

The DMA employs meaningful mechanisms to enforce the Guidelines. If the DMA becomes aware that a member company is not complying with the Guidelines, it will first work with the member to bring the company back into compliance. If this process fails, the member company is subject to expulsion from the DMA and may be publicly reported to government regulators, such as the FTC. Because all DMA members agree to comply with the Guidelines as a condition of membership, DMA membership constitutes a representation by each member company about their practices. Thus, failure to abide by the Guidelines can expose a member company to liability for deceptive practices under Section 5 of the FTC Act.

The advance consent marketing principles embodied in the DMA Guidelines and described above are longstanding, straightforward, enforceable, and well entrenched in

industry practices. We believe that these industry guidelines are working effectively and remain the most appropriate device to address marketing practices in the area of advance consent arrangements. Such guidelines are more flexible than formal regulation and can be promptly adapted to address changes in markets, business practices, and technology. Moreover, legitimate and ethical business leaders have a strong incentive to set and abide by meaningful standards that will help to maintain consumer confidence.

## **V. Existing FTC Enforcement Tools Are Sufficient**

As in any industry, certain unscrupulous advance consent sellers may not be deterred from engaging in unfair or deceptive business practices. To combat such bad practices, the Commission has strong enforcement tools already at its fingertips, which it has regularly and successfully employed. Most notably, the Commission can institute enforcement proceedings against a marketer of advance consent plans under Section 5 of the Federal Trade Commission Act, which broadly prohibits unfair or deceptive acts or practices.<sup>4</sup> The Telemarketing Sales Rule also requires marketers to disclose all material terms and conditions related to a negative option plan.<sup>5</sup> The FTC has exercised its powers under Section 5 and the Telemarketing Sales Rule on numerous occasions to challenge negative option marketing practices.<sup>6</sup>

In addition, the FTC has issued several guidance documents and other public statements to assist marketers in ensuring that their practices meet the Commission's expectations. For example, in January 2009, an FTC staff report entitled "Negative Options" set forth five key principles for online negative option marketing: (1) disclosures of material terms that are (2) clear and conspicuous and (3) made prior to when the consumer incurs an obligation to pay; (4) requiring consumers to take an affirmative step to consent to participation in the plan; and (5) effective cancellation procedures.<sup>7</sup> The FTC may and does issue this type of policy statement as frequently as it sees fit, to guide the development of self-regulatory programs and to put businesses "on notice" about what practices the FTC views as unfair or deceptive.

Given the Commission's existing enforcement authority and ability to offer ongoing guidance to marketers, the DMA does not believe that it would be productive or desirable to expand the scope of the Negative Option Rule. Indeed, it is likely that the primary effect of expanding regulation to certain forms of advance consent plans would be to increase compliance costs for legitimate actors and to inhibit innovation in the types of purchase arrangements offered to consumers. Moreover, the small minority of companies that is not deterred by existing robust measures from engaging in unfair and deceptive practices is also unlikely to respond to additional regulation.

---

<sup>4</sup> 15 U.S.C. § 45(a).

<sup>5</sup> 16 C.F.R. § 310.3(a)(1)(vii).

<sup>6</sup> See, e.g., *Federal Trade Commission v. JAB Ventures LLC*, Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief (C.D. Cal. 2008) (No. CV08-4648-SVW(RZx)).

<sup>7</sup> Negative Options: A Report by the Staff of the FTC's Division of Enforcement (January 2009), available at <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf> (last visited July 22, 2009).

## VI. Conclusion

Strong industry self-regulation, accompanied by the threat of FTC enforcement, has proven to be an effective and efficient approach to protecting consumers from unfair and deceptive practices in the area of advance consent offers. When isolated instances of wrongdoing do occur, the Commission has ample existing authority to address them under Section 5 of the Federal Trade Commission Act. The DMA is convinced that this existing framework for regulation of advance consent arrangements strikes the appropriate balance between protecting consumers from unfair and deceptive practices and preserving latitude for legitimate companies to provide consumers with offers that they value. Thus, we urge the Commission not to amend the Negative Option Rule.

\* \* \*

On behalf of DMA, I thank you for the opportunity to submit these comments. We look forward to continuing to work closely with the Commission on these important issues. Please do not hesitate to contact me at (202) 861-2444 with any questions.

Sincerely,

/s/

Linda Woolley  
Executive Vice President,  
Government Affairs  
1615 L Street, NW Suite 1100  
Washington, DC 20036

Cc: Stuart Ingis, Venable LLP  
Julia Kernochan Tama, Venable LLP