



## DeHart and Darr

July 17, 2009

Office of the Secretary  
Federal Trade Commission  
Room H-135 (Annex Q)  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Re: Prenotification Negative Option Rule Review  
Matter No. P064202

Ladies and Gentlemen:

These comments are directed to the Federal Trade Commission in the matter of the review of the Rule Regarding Prenotification Negative Option referenced above (referred to below as the "Rule"). The comments are submitted by DeHart and Darr Associates. DeHart and Darr provides legislative and regulatory monitoring services to businesses including sellers who offer negative option membership plans. DeHart and Darr worked with negative option sellers when the Commission promulgated the Rule and submitted comments in 1972; and in 1986 and 1997 when the Rule was reviewed.

Our comments propose no change to the Rule. The Rule accomplishes the objectives contemplated by the Commission and serves the interests of both consumers and industry.

There is a clear need to continue regulating negative option plans. Negative option plans comprise a unique method of selling merchandise in that a consumer-member actively participates on a continuing basis by reviewing the announcement of a selection, deciding whether to accept and purchase the selection, return the selection card provided to decline the selection, or make an alternate choice. Such plans should disclose how the club works and provide an adequate response time for the consumer-member to decide about a selection.

In 36 years of unchanged operation, the Rule has regularized the practices of merchants using negative option plans. The Rule has allowed consumers to make informed choices. Changing the Rule after critical acceptance by consumers may jeopardize the established relationship between buyers and negative option sellers.

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Negative option plans offer books, musical recordings, video and other multimedia selections which provide a diffusion of culture including travel, history, archaeology, science, arts, humanities, spiritual, humor, classical and jazz music. Members receive information and expert guidance in selecting their choices.

Negative option plans work well for members, providing service and convenience, and distribution to suburban and rural areas. The first book club began in August of 1878 and The Book-of-the-Month Club and Literary Guild are approximately 83 years old. Negative option plans stimulate retail sales and foster creativity. Such plans are a principal distribution channel for classical music. Some clubs offer large print books.

We believe consumers benefit from negative option plan offerings and understand how they work because of the Rule. Many consumer-members rejoin over the years and join several clubs to reflect the changing interests of their lives. This significant rejoin and reenroll activity suggests the Rule is beneficial and adequate. The Rule has helped to ensure that there are not conflicts with federal, state, or local laws.

Any abuses, which may have been called negative option or negative billing, have been resolved under the unordered merchandise statutes. See 39 U.S.C.A. 3009.

Finally, compliance with the Rule has not been overly burdensome for industry -- something likely lost in any change in the Rule. Not only would revisions to the Rule introduce uncertainty (in that new rules must be interpreted), but the switch by industry to comply with new rules would inevitably impose a substantial burden in itself.

In providing a workable, clear touchstone by which both consumers and sellers can guide their behavior -- the Negative Option Rule has served the interests of both consumers and negative option sellers. We strongly urge Commission to continue the Rule without change.

Very truly yours,

✓  
DeHart and Darr  
by Anne Darr

Enc. Responses

Comments by DeHart and Darr  
Use of Prenotification Negative Option Plans  
Matter No. P064202

- (1) There is a continuing need for the Rule as currently promulgated because it has worked and consumers and business depend upon it.
- (2) Negative option plans offer a great wealth of cultural, educational, and entertainment for Americans to enjoy. Negative option enables the seller to make offerings that would likely not be possible through traditional sales. Club subscriptions give the businessman some assurance of a continuing market for his product. This predictive marketing enables the businessman to save money and pass along the savings to the consumer -- lower costs, wider selection, better service.

The negative option rule provides a template for how negative option plans are presented and disclosed to consumers. Further, the negative option plan provides a consistent method of operation. An example is that the seller provides the consumer with a form the consumer can use to respond to the seller regarding the featured selection and other selections.

The evidence is millions of club members and the fact that club members reenroll in the same club and enroll in other clubs. It is estimated that over 1/3 of book sales are through clubs.

- (3) No modifications suggested.
- (4) We believe that promotional material distributed by negative option clubs delivers truthful information. The evidence is millions of members.
- (5) We are unaware of significant costs the Rule imposes on consumers.
- (6) No modifications suggested.
- (7) We believe the original Rule was promulgated to regulate a negative option membership plan that operates as negative option only after the consumer has agreed to the plan. (See definition of "negative option plan" in the Rule.)

There is a difference between a

negative option offer (or feature)  
and  
negative option plan

We do not understand "trial conversions" or "automatic renewals" or negative option "features," in connection with the negative option rule. In the case of a free trial of goods or a free trial of services for a period of time, the free goods or the free service is a "premium." (Premium is a special item or bonus offered free or at very low cost to introduce new products and/or attract customers.) The consumer is purchasing goods or services with a premium (free trial) and the consumer can cancel after the free trial.

No matter what it is called, a trial offer is a sale with a premium. The premium is a sample copy or sample period -- a money-back guarantee which may include stopping the sale after the premium.

Automatic renewal or continuous service is a customer convenience so the customer will avoid service interruption. A customer's purchase of a good or service will be automatically continued or renewed after the original term expires. The customer may cancel renewal.

Continuity plans were not included in the original Rule because membership terms were and are very simple: similar special interest products (James Bond films), no minimum purchase, cancel any time.

- (8) The benefit of the negative option rule to business is the consistent model of disclosure and fair operation of the clubs. It has encouraged customer-members to reenroll and sign up for other clubs.
- (9) No modifications suggested.
- (10) Because of the cost of compliance with the negative option rule and other rules and regulations, small business may not be a good candidate for negative option.
- (11) No modifications suggested.
- (12) Negative option sellers for whom the original Rule was promulgated strive to be compliant with the letter and spirit of the law.
- (13) No knowledge of requirements that are no longer needed.
- (14) "Clearly and conspicuously" generally means: "of such size, of such type style, of such color, or of such placement as to be noticed by a reasonable person." The standard is well understood and straightforward.
- (15) Prenotification Negative Option Plans are adequately regulated.
- (16) We are not aware of unfair or deceptive practices concerning Prenotification Negative Option Plans.

- (17) The original Negative Option Rule adapts well to relevant technology and/or economic conditions.

A prechecked box can be clear and conspicuous and should not be prohibited.

Prechecked boxes have been a marketing staple for 75 years.

Example

- ✓ Please send me a 12 compartment purse for \$10.95 plus shipping and handling of \$2.25 for a total of \$13.20. I have a 30 day money-back guarantee if I am not delighted with the purse. Enclosed is my check or money order for \$13.20.

Or

- ✓ Please enter my name for a 12 month subscription to Mystery Stories. I will receive Mystery Stories every two months. I will pay your bill of \$12.00 when I receive it.

There is nothing unfair, misleading, or deceptive about the prechecked box.

The fact that we have new ways to communicate advertising should not eliminate this decades-effective message.

- (18) The Negative Option Rule does not overlap or conflict with other federal, state, or local laws or regulations.
- (19) International laws or regulations would not apply to the Prenotification Negative Option Rule.
- (20) The Rule adapts to current or impending changes in technology.