

**Before the
FEDERAL TRADE COMMISSION
IN THE MATTER OF PRENOTIFICATION NEGATIVE
OPTION RULE REVIEW**

Matter No: PO64202

COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION

COMMENTS OF:

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I. Introduction

The Electronic Retailing Association (the “ERA”) welcomes this opportunity to submit comments to the Federal Trade Commission (“Commission” or “FTC”) in response to its request for public comments as part of its systematic review of the Trade Regulation Rule concerning “Use of Prenotification Negative Option Plans” (“Negative Option Rule” or “Rule”). (74 Fed. Reg 92 (May 14, 2009), p. 22720).

The ERA is the leading trade association representing the electronic retailing industry. The ERA’s mission is to foster the use of various forms of electronic media, including television, Internet, telephone, and radio to promote goods and services to consumers. The ERA has more than four hundred (400) member organizations encompassing a wide range of entities, including advertising agencies, direct response marketers, telemarketers, Internet and “brick and mortar” retailers, fulfillment service providers and television shopping channels. Last year, ERA’s member companies sold more than \$300 billion in goods and services to consumers around the world, including in the United States.

Due to the depth of experience among the ERA membership with the use of various forms of “advance consent marketing” programs,¹ including the promulgation by ERA of extensive self-regulatory guidelines in this area, the ERA is able to provide the Commission with meaningful insights into the manner in which expansion or modification of the Rule to other types of advance-consent marketing programs would

¹ The ERA uses the term “advance consent” to refer to those programs that the FTC has categorized as “negative option” because an essential element of these programs is that the consumer has consented in advance to receive future goods or services and/or to be billed in the future for the continuation of goods or services. These terms are used interchangeably in ERA’s comments.

impact businesses and consumers. The ERA believes that the FTC already has the enforcement tools necessary to address false and deceptive offers with advance consent features, including § 5 of the Federal Trade Commission Act, the Electronic Fund Transfer Act, the Negative Option Rule, the Telemarketing Sales Rule and the Unordered Merchandise Rule. Additionally, the FTC has issued several guidance documents for businesses and consumers which provide concrete guidance and direction to the industry regarding the manner in which the terms and conditions of advance consent marketing programs should be disclosed, affirmative consent should be obtained, and cancellation rights should be provided in order to ensure that all consumers who are enrolled in such programs fully understand how the program works, have consented to be billed or charged and can cancel participation if they are dissatisfied for any reason. Indeed, the FTC's recently issued five principles for marketing negative option offers online, providing industry with useful guidance for conducting such programs, while allowing marketers the flexibility to determine how to best incorporate those principles into their marketing programs.

Moreover, given the wide range of offers that include some form of a negative option or advance consent feature, and the myriad of marketing and media channels through which such programs are offered, the FTC should avoid an overly prescriptive approach that will deprive marketers of the flexibility to adapt their programs to this rapidly evolving marketplace. While the ERA supports the Commission's efforts to ensure that consumers are not deceived by advertising, the evidence in the record does not indicate that such deception is occasioned by advertising that adequately complies with the current Negative Option Rule, other existing laws and regulations, or the FTC's

guidelines. ERA strongly believes that the current regulatory structure for offers with an advance consent feature adequately balances the concerns of businesses, federal and state regulators, and consumers. Thus, ERA urges the Commission to refrain from adopting a more prescriptive approach by expanding or modifying the current Rule.

II. Advance Consent Marketing Plans: An Overview

Programs with an advance consent or negative option feature take a number of different forms. The existing Rule covers pre-notification negative option plans. Other programs containing an advance consent feature including free-to-pay conversion or free-trial offers, continuity programs and automatic renewal plans. These latter three types of advance consent marketing programs are materially different from pre-notification offers both in terms of the products or services typically involved and the manner in which such offers are structured.

In pre-notification negative option plans, the consumer gives advance consent to receive periodic notices of upcoming selections of goods or services. The seller periodically sends out notices and the consumer accepts or rejects the identified selection. As reflected by the “advance selection” notice requirement, the Pre-Notification Negative Option Rule was geared principally towards programs offered via direct mail and most of the disclosure and other requirements of the Rule contemplate direct mail communication between the seller and the consumer. These programs also typically required the consumer to purchase a minimum number of selections as part of the “contract” with the seller.

Most of the advance consent programs being offered today afford the consumer much greater flexibility and have much stronger inherent consumer protection benefits built into the program. These programs are also presented in a variety of media formats with different space and format constraints.

In a free-trial or free-to-pay conversion plan the consumer is allowed to try the seller's product or service for free during a specified time period. The consumer can cancel during the trial period without any obligation to pay for the product or service or to continue in the program. The free trial offer thus affords the consumer the benefit of being able to actually sample the product or service for a specified period of time before incurring any purchase obligation.

In a continuity program, the consumer consents in advance to receive goods or services in the future on a periodic basis and the consumer is billed or charged each time the goods or services are provided. Unlike the traditional pre-notification negative option program, the consumer knows in advance exactly what will be in each future shipment, because the contents of that shipment are selected by the consumers. Moreover, in a continuity program the consumer can generally cancel future shipments at any time without any further obligation. Within the ERA membership, continuity programs are an important marketing vehicle for products like skin care, health and beauty aids and similar types of products which are a part of the consumer's daily regimen. The continuity program ensures that the consumer will have a sufficient supply of the product for as long as the consumer wishes to continue using the product.

In the automatic renewal plan, the consumer agrees that the seller may automatically renew and/or bill the consumer's membership, subscription, or participation in a plan at the end of each term unless the consumer cancels. The automatic renewal plan ensures that the consumer will have uninterrupted delivery of a particular product or service for as long as the consumer wishes to keep receiving the goods or services.

Marketing arrangements with advance consent features are convenient and beneficial for both consumers and marketers. Such programs allow for simple, convenient, and continuous access to goods and services that the consumer can stop at any time with no further obligation, assuming the consumer has met any applicable minimum purchase requirements. Some programs enable the consumer to try a product for free or at a reduced cost for a specified period of time, reducing the risk for uncertain buyers. Automatic renewal plans – for instance, automatic renewal of magazine subscriptions or cable television service – reduces the number of notices the consumer receives and allows the consumer to enjoy uninterrupted service without expending time and effort to renew the service or subscription. Buyers of other products – e.g., book of the month and music clubs, which often tailor the products to meet the buyers' interests – can purchase goods to which they otherwise may not have been exposed. Furthermore, consumers may enjoy convenience and receive lower prices in exchange for agreeing to participate in an advance consent marketing plan. For example, consumers may prefer to receive certain personal care products on an automatic, recurring basis for a discounted price rather than pay full-price for just one supply.

For sellers, advance consent marketing programs reduce marketing, operational, and transaction costs through simplifying the renewal process and enabling them to build long-term relationships with consumers. They enable sellers to more efficiently stock inventory and avoid costs associated with renewals. For services such as magazine subscriptions or cable internet, automatic renewal plans enable a seller to avoid the substantial cost of sending numerous renewal notices and processing payment checks. By utilizing automatic renewal programs, magazine and newspaper publishers can also reduce the costs of modifying mailing lists due to service interruptions or cancellations and avoid the processing costs of mailing out missed copies. Advance consent features also enable lesser known businesses to better compete against better known competitors by offering consumer-friendly terms for their products and services. For example, a free introductory offer may convince a cautious consumer to try a product that he or she may not have otherwise purchased due to lack of familiarity with a brand.

Programs with advance consent features thus offer important direct benefits for both sellers and consumers. Like any business model, certain sellers of advance consent marketing plans will engage in unfair or deceptive business practices. The solution to such practices, however, is not expanding existing regulations on negative option plans. Rather, as discussed below, the solution lies in the various, existing tools the FTC has to eliminate unfair and deceptive business practices. The FTC has regularly utilized those tools against advance consent marketing plans. New regulations would increase transaction costs for sellers and buyers alike, increasing the costs to administer such programs and reducing the very efficiencies that make them beneficial. Because a comprehensive regulatory framework already exists, it is unnecessary for the

Commission to impose new regulations of programs with advance consent features or expand the Negative Option Rule to encompass a wide array of activity that the Rule is fundamentally not designed to cover.

III. The Current Regulatory Structure is Sufficient to Meet the Needs of Business and Consumers

The FTC's current Negative Option Rule was adopted in 1973 to address the deceptive and unfair marketing practices of some marketers who utilized pre-notification negative option marketing. The Negative Option Rule requires clear and conspicuous disclosure of seven material terms both at the time of enrollment and in operating the pre-notification negative option plan. These material terms include disclosure of minimum purchase obligations, right to cancel, whether the consumer will be billed separately for shipping, the appropriate procedures for offering merchandise and allowing the customer to reject merchandise after enrollment, and the number of announcements customers should expect to receive. The Negative Option Rule specifies a minimum of ten days to allow a customer to reject a selection and requires the seller to honor written cancellation requests from customers who have met minimum purchase requirements. There is no evidence on the record indicating that the Negative Option Rule is not working. Companies that use pre-notification negative option offers do not merely accept the Negative Option Rule. They support the Rule in its current form.

For pre-notification negative option plans and other types of offers that have a negative option or advance consent feature, the Commission cautions retailers that "companies should be careful to clearly disclose the terms and conditions of the plan

before billing consumers or charging their credit cards.”² This and other guidance falls squarely within the compliance requirements of § 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), which is one of the many tools the FTC can use to regulate unfair or deceptive marketing that includes an advance consent feature. Section 5 of the FTC Act gives the Commission broad authority to institute proceedings against any entity engaging in unfair or deceptive acts or practices affecting commerce. Failure to clearly and conspicuously disclose the material terms and conditions of an advance consent feature would violate § 5.

Where an offer is subject to the Telemarketing Sales Rule (“TSR”), the FTC requires that the seller or telemarketer disclose “all material terms and condition of the negative option feature, including, but not limited to, the fact that the consumer’s account will be charged unless the consumer takes an affirmative action to avoid the charge(s), the date(s) the charges will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).”³ In certain free-to-pay conversions, where pre-acquired account information is used (including, for example, “card-on-file” transactions), the seller or telemarketer must obtain from the consumer the last four digits of the account number to be charged and the consumer’s express agreement to be charged using the account number provided.⁴ All offers subject to the TSR must disclose the total cost to purchase goods or services and any material restrictions, limitations, or conditions to purchase, receive, or use the goods or services.⁵ The FTC follows certain elements of

² See “Advertising and Marketing on the Internet: Rules of the Road,” available at <http://www.ftc.gov/bcp/edu/pubs/business/e-commerce/bus28.shtm>; See also “Frequently Asked Questions: A Guide for Small Business,” available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.shtm>

³ 16 C.F.R. § 310.3(a)(vii).

⁴ 16 C.F.R. § 310.4(a)(6)(i)-(ii).

⁵ 16 C.F.R. § 310.3(a)(1)(i)-(ii).

the TSR as guidance when determining whether other business practices not subject to the TSR violate § 5 of the FTC Act.⁶

The Commission has actively used its § 5 authority to institute actions against entities engaged in deceptive marketing involving a negative option feature, regardless of the program structure. The FTC has utilized this enforcement power numerous times against such marketers. Between Fiscal Year 1999 and Fiscal Year 2006, the FTC brought forty-five United States District Court cases involving allegedly unlawful marketing involving negative option features against 208 corporate defendants and 106 individual defendants.⁷ Only eleven of the charged violations were brought under the Negative Option Rule. Instead, the vast majority of charged violations were brought under the FTC Act (140), with a sizable number of violations of the Telemarketing Sales Rule (64). A smaller number were brought under the Unordered Merchandise Statute, which prohibits companies from billing consumers for merchandise they did not order, and the Electronic Funds Transfer Act or “Reg E,” which prohibits unauthorized electronic transfers of funds.

A. FTC Guidelines Assist Sellers in Developing Unfair or Deceptive Negative Option Plans

In addition to the FTC’s numerous enforcement tools under § 5 of the FTC Act, the Negative Option Rule, and the Telemarketing Sales Rule, as the marketplace has

⁶ See, e.g., Stipulated Final Judgment and Order for Permanent Injunction, *FTC v. Epixtar Corp. et al.*, Case No. 03-CD-8511(S.D.N.Y. Nov. 29, 2006), available at <http://www.ftc.gov/os/caselist/0323124/0323124.shtm> (ordering defendants, in connection with the offer or sale of services by telephone, through the Internet, or otherwise in commerce, to make certain disclosures about any “negative option feature” or “free-to-pay conversion” consistent with TSR requirements).

⁷ See Presentation of Gregory Ashe, FTC Staff Attorney, “Negative Options: An Overview of the FTC’s Enforcement Actions Concerning Negative Option Marketing,” January 25, 2007, available at <http://www.ftc.gov/bcp/workshops/negativeoption/presentations/Ashe.pdf>

evolved, the FTC has routinely issued guidance to aid both sellers and consumers engaged in or contemplating making offers with advance consent features. The FTC has cautioned consumers to read and understand disclosures when enrolling in buying clubs, continuity plans, or when accepting free and trial offers.⁸ The guidelines explain to consumers how the various types of programs work and explain the possible terms and conditions that a seller may provide in connection with such programs.

Furthermore, the Commission has developed guidelines to assist retailers in developing negative option features with acceptable disclosures. On February 9, 2009, the FTC issued a report summarizing a workshop regarding negative option marketing with a specific focus on internet shopping. In the report, the FTC identified five principles to guide online negative option marketing:⁹

1. Disclosure of material terms – including the existence of a negative option offer, the total cost, any transfer of billing information to a third party, and how to cancel – in an understandable manner
2. Clear and conspicuous placement and labeling of negative option disclosures
3. Disclosure of material terms before the consumer pays or incurs a financial obligation
4. Require consumers to take an affirmative step to demonstrate their consent
5. Honor cancellation requests and allow for effective operation of cancellation procedures

Although the guidelines are not regulations, they provide to sellers and consumers

⁸ See e.g. “Facts for Consumers: Prenotification Negative Option Plans,” available at <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro09.shtm>; “Continuity Plans: Coming to You Like Clockwork,” available at <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro07.shtm>; and “Trial Offers: The Deal is in the Details,” available at <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro16.shtm>

⁹ See Negative Options: A Report by the Staff of the FTC’s Division of Enforcement, Federal Trade Commission (January 2009), available at <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf>

alike clear information about acceptable business practices. Such guidance enables scrupulous sellers to clearly and conspicuously disclose material information to consumers when offering advance consent plans and to obtain the consumer's clear affirmative consent to enrollment in the plan. Furthermore, the guidelines encourage sellers to adopt consumer friendly cancellation procedures and to properly honor cancellation requests so that consumers have an easy mechanism through which they can terminate their participation in these programs. Where sellers do not clearly and conspicuously disclose the terms and conditions of an advance consent program, notwithstanding the clear guidance provided by the FTC, the FTC is free to utilize enforcement tools such as § 5 of the FTC Act.

B. Trade Associations Encourage Self-Regulation

Additional regulations and/or regulatory guidance are not needed, as the current structure provides the FTC with adequate tools to address abusive practices while FTC guidelines and self-regulation enable businesses to develop appropriate programs with advance consent features. In addition to the Commission's robust enforcement regime and guidance related to such programs, the industry itself has been highly proactive in adopting comprehensive self-regulatory guidelines consistent with the requirements of the FTC Act and with the FTC enforcement actions and guidance. . Numerous trade associations have developed their own guidelines for advance consent marketing, in accordance with existing legal standards.

The ERA and its members vigorously oppose deceptive advertising, fraudulent conduct and abusive practices, which harm consumers as well as ethical sellers.

Accordingly, the ERA has devised its own Advance Consent Guidelines (“ERA Guidelines”) in order to promote honest advertising and responsible business practices among sellers who utilize negative options marketing.¹⁰ The ERA Guidelines specifically cover the full range of advance consent marketing programs currently being offered in the marketplace today including free trial offers, continuity programs and automatic renewals. The ERA Guidelines provide extensive guidance to the industry regarding proper disclosure of material terms and conditions of advance consent offers including the content and manner of appropriate disclosure.

In addition to requiring clear and conspicuous notice of the terms and conditions of an advance consent offer, under the ERA Guidelines, sellers must obtain the consumer’s consent, either orally, electronically, or in writing, through an affirmative act such as returning a document, checking a box, or affixing a stamp. For automatic renewals, the ERA Guidelines require a renewal reminder at least one time during a twelve month period or prior to the renewal period if the consumer has agreed to a longer term. Additionally, the right to cancel should be disclosed with a clear deadline and a disclosure that the consumer will be billed if he or she does not cancel. The ERA Guidelines also require that proper notice should be given of any material changes to the goods or services and cancellation policies for the various types of programs with negative option features.

Industry self-regulation is beneficial to businesses and consumers. In a rapidly-evolving marketplace, industry trade groups such as the ERA can more quickly and easily address changing business practices and develop guidelines to address problematic

¹⁰ See ERA Advance Consent Marketing Guidelines, available at <http://www.retailing.org/node/502>.

practices as they arise. Organizations such as the ERA have institutional knowledge that can translate into developing current principles to guide business practices and more effectively protect the interests of business and consumers alike. The ERA Guidelines discourage dishonest or unethical business practices by its members and promote consumer confidence in retailers. Other industry self-regulation surrounding advance consent marketing has the same effect. Accordingly, the availability of FTC regulation and robust industry guidelines effectively balances the interests of the FTC in protecting consumers with the interest of businesses in developing innovative and efficient marketing programs with advance consent features.

IV. The Wide Array of Existing Advance Consent Plans Makes It Difficult To Develop Specific Rules

In 1973, when the Commission adopted the Negative Option Rule, it focused on the prenotification negative option plan, which is a distinct type of program in which the consumer agrees to receive periodic notices of upcoming selections of goods or services which they will purchase unless they decline before a certain date. At that time, media outlets were limited. Since then, media outlets have rapidly evolved and are continuing to evolve. Attempting to impose fixed rules about font type, size, color placement or other criteria to continually evolving marketing channels and media platforms will create unnecessary constraints and burdens on industry and stifle innovation without any corresponding consumer benefit. The FTC's current approach, which is to follow a flexible performance standard consistent with the general requirements of Section 5 of the FTC Act is the proper one. This approach balances the Commission's consumer protection goals with the needs of a rapidly changing marketplace.

Placing additional regulatory constraints would be contrary to the interests of marketers and consumers alike. Marketers need the flexibility to adjust disclosures and design elements based on the nature and complexity of the offer and the media through which the offer is being presented. Similarly, for consumers, the ability to enroll an advance consent marketing program should be seamless and efficient.

During the FTC's Advance Consent Marketing Workshop in 2009, Commission staff and other industry officials acknowledged that meeting the "clear and conspicuous" standard can be accomplished in a variety of ways and that adopting an overly prescriptive approach can sometimes result in unintended consequences. Specifically, during that workshop, Leslie Fair, an attorney with the Division of Consumer and Business Education stated as follows:

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 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 its 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.

The ERA agrees with the general principles articulated by Ms. Fair. If the FTC decides to expand the Negative Option Rule to encompass a wider range of advance consent programs, notwithstanding the existing regulations and enforcement options, the Commission should be careful to develop general standards rather than specific performance principles so that marketers have flexibility to develop innovative programs that balance consumer protection interests with the efficiency benefits of advance consent

marketing. A 'one size fits all' approach risks homogenizing choices, rather than giving sellers the latitude to develop programs that benefit both consumers and business.

V. Conclusion

Advance consent marketing offers, which offer numerous benefits to consumers and marketers alike, are already subject to several layers of regulation and enforcement. Not only does the FTC have effective tools to protect consumer interests, self-regulation is also robust, and encourages sellers to develop responsible business practices. ERA strongly believes that additional regulations are not needed and therefore urges the Commission to recognize that the current regulatory structure for advance consent/negative option marketing strikes the proper balance among the interests of businesses, regulators, and consumers.

Respectfully Submitted,

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