

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

Matter No: PO64202

COMMENTS SUBMITTED BY
THE PROMOTION MARKETING ASSOCIATION

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The Promotion Marketing Association, Inc. (“PMA”) respectfully submits these Comments to the Federal Trade Commission (“Commission” or “FTC”) in response to the agency’s 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”). *See* 74 Fed. Reg. 22720 (May 14, 2009).

I. Introduction and Preliminary Statement

Established in 1911, the Promotion Marketing Association, Inc (“PMA”) is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service suppliers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, PMA's objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

Today, PMA’s goal is to be the primary source for integrated marketing solutions and be the association that helps marketers achieve specific and measurable brand building goals through resources, education, networking, and community. The PMA is the industry's advocate; its voice has traditionally represented members in practically every type of situation, ranging from critical business issues, impacting how the industry does business, to legislative and regulatory matters concerning all aspects of integrated marketing. The PMA is headquartered in New York City with its affiliate, the PMA Educational Foundation, Inc.

Due to the depth of experience among the PMA membership with the use of various forms of “advance consent marketing” programs,¹ the PMA believes that it 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 impact businesses and consumers. As demonstrated by these Comments, the current regulatory structure for offers with an advance consent feature adequately balances the concerns of businesses, federal and state regulators, and consumers. Specifically, PMA submits that:

- the FTC already has all the enforcement tools necessary to address false and deceptive offers with advance consent features, including Section 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;
- guidance documents published by the FTC for businesses and consumers provide adequate concrete guidance and direction to the industry regarding the manner in which (i) the terms and conditions of advance consent marketing programs should be disclosed, (ii) affirmative consent should be obtained, and (iii) cancellation rights should be provided - - in order to ensure that all consumers who are enrolled in such programs (a) fully understand how the program works, (b) have consented to be billed or charged and (c) can cancel participation if they are dissatisfied for any reason;
- the FTC should avoid an overly prescriptive approach that will deprive marketers of the flexibility to adapt their programs to this rapidly evolving marketplace and media platforms; and
- the evidence in the record does not indicate that deception results from advertising that adequately complies with the current Negative Option Rule, other existing laws and regulations, or the FTC’s guidance.

Furthermore, the arguments presented in recent Comments by the Attorney

¹ The PMA 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 PMA’s comments.

General of the State of Washington are wrong as a matter of law and ignore commercial reality; and the State's specific recommendations for amending the Rule should be rejected.

II. Advance Consent Marketing Plans Provide Benefits to Consumers, Sellers, and Marketers.

Programs with an advance consent or negative option feature take a number of different forms. The existing Rule covers pre-notification negative option plans.² Other programs containing an advance consent feature include free-to-pay conversion or free-trial offers, continuity programs, and automatic renewal plans. 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.

As illustrated by the chart below, marketing arrangements with advance consent features are convenient and beneficial for both consumers and marketers.

<u>Program</u>	<u>Structure</u>	<u>Benefit</u>
Free Trial; Free-to-pay Conversion	The consumer is allowed to try the seller's product or service for free during a specified time period, and can cancel during the trial period without any obligation to pay for the product or service or to continue in the program.	The consumer is able to actually sample the product or service for a specified period of time before incurring any purchase obligation.
Continuity	The consumer consents in advance to receive goods or services in the future on a periodic basis and is billed or	<ul style="list-style-type: none">• The consumer knows in advance exactly what will be in each future shipment, because the contents of that

² 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.

	charged each time the goods or services are provided.	<p>shipment are selected by the consumers.</p> <ul style="list-style-type: none"> • The consumer can generally cancel future shipments at any time without any further obligation. • The consumer can be confident that he or she will have a sufficient supply of the product for as long as the consumer wishes to continue using the product.
Automatic Renewal	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 consumer is ensured that he or she will have uninterrupted delivery of a particular product or service for as long as the consumer wishes to keep receiving the goods or services.

Therefore, 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;
- 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;
- reduce 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;
- expose consumers to goods and services that are tailored to their interests and to which they may not have been exposed; and

- provide convenience and receive lower prices in exchange for agreeing to participate in an advance consent marketing plan.

For sellers, advance consent marketing programs:

- reduce marketing, operational, and transaction costs through simplifying the renewal process;
- enable sellers to build long-term relationships with consumers;
- allow sellers to more efficiently stock inventory and avoid costs associated with renewals; and
- empower lesser known businesses to better compete against better known competitors by offering consumer-friendly terms for their products and services.

III. The Current Regulatory Structure and Agency Guidance as well as the Self-Regulatory Environment Are Sufficient to Meet the Needs of Business and Consumers.

The Negative Option Rule, adopted to address the deceptive and unfair marketing practices of some marketers who utilized pre-notification negative option marketing, requires clear and conspicuous disclosure of seven key terms both at the time of enrollment and in operating the plan. It also gives a consumer at least ten (10) days to reject a selection, and requires the seller to honor written cancellation requests from customers who have met minimum purchase requirements.

In addition to the Rule, the Commission has instructed retailers that “companies should be careful to clearly disclose the terms and conditions of the plan before billing consumers or charging their credit cards.”³ And, just a few months ago, 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:⁴

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;

³ 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>

⁴ 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>

4. Require consumers to take an affirmative step to demonstrate their consent; and
5. Honor cancellation requests and allow for effective operation of cancellation procedures.

To be sure, as set forth in presentations during the 2007 Workshop, the FTC has provided other forms of meaningful industry guidance and reinforcement through (1) “Dot Com Disclosures” - - which include the requirements that disclosures set forth all material terms and conditions and are presented prior to a consumer incurring any financial obligation and (2) the “clear and conspicuous” standard - - which entail the principles of prominence, presentation, placement, and proximity.

Furthermore, 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).”⁵ 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.⁶ 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.⁷ The FTC follows certain elements of

⁵ 16 C.F.R. § 310.3(a)(vii).

⁶ 16 C.F.R. § 310.4(a)(6)(i)-(ii).

⁷ 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 Section 5 of the FTC Act.⁸

There is no evidence in the record indicating that these regulatory standards and the publications of business guidance are not working. Indeed, as demonstrated by the staff at the 2007 Workshop, the Commission has not been shy to institute actions against entities engaged in deceptive marketing involving a negative option feature, regardless of the program structure: between Fiscal Year 1999 and Fiscal Year 2006, the FTC brought forty-five (45) cases involving allegedly unlawful marketing involving negative option features against 208 corporate defendants and 106 individual defendants.⁹

Moreover, the industry itself has been highly proactive in adopting comprehensive self-regulatory guidelines consistent with the FTC Act, enforcement actions, and guidance; and numerous trade associations have developed their own guidelines for advance consent marketing, in accordance with existing legal standards.

⁸ 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).

⁹ 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>

IV. The Diversity of Advance Consent Plans Makes A “One Size Fits All” Approach Untenable.

In 1973, when the Commission adopted the Negative Option Rule, media outlets were limited. It is an understatement to say that since then, media outlets have rapidly evolved and consumer sophistication and awareness has increased. Thus, any attempt to impose fixed standards to continually evolving marketing channels and media platforms could create impractical constraints and could create unnecessary burdens on industry and stifle innovation - - without any corresponding consumer benefit. Simply put, marketers need the flexibility to adjust disclosures and design elements based on the needs of the consumer, the nature of the claims being advanced, the nature of the program being offered, and the media through which the offer is being presented. For consumers, the ability to enroll in an advance consent marketing program should be user-friendly, seamless, and efficient.

During the Workshop in 2007, Commission staff and other industry officials acknowledged that complying with 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. As Leslie Fair, an attorney with the Division of Consumer and Business Education, correctly observed:

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 your 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.

The PMA agrees with the observations by Ms. Fair. If the FTC decides to rewrite the Negative Option Rule to encompass a wider range of advance consent programs, the Commission should adopt general principles rather than prescriptive standards so that marketers have the appropriate flexibility to develop innovative programs that balance consumer protection interests with the efficiency benefits of advance consent marketing.

V. The Specific Proposals Submitted by the State of Washington for Free Trial Offers are Overly Burdensome and Unnecessary

The Comments submitted by the Attorney General of Washington (“the State”) provide (1) arguments concerning the legality and integrity of advance consent programs, (2) observations concerning complaints the State has received from consumers, and (3) specific suggestions or recommendations for amending the Rule with respect to Free Trial or Free to Pay Conversion offers. While PMA agrees with certain of the general principles embodied in the State of Washington’s recommendations, PMA believes that these general principles have already been covered in the recent guidance issued by the FTC for online negative option marketing and is concerned that certain of the more restrictive proposals submitted by the State of Washington are overly prescriptive and would impose an unnecessary burden on legitimate marketers who offer such programs honestly and fairly to consumers.

A. Advance Consent Programs Are Legal, As Silence Can Constitute Acceptance.

At the outset of its presentation, the State sweepingly argues that “disclosures alone have been insufficient to adequately protect consumers from inadvertently enrolling in programs for which they incur continuing automatic charges.” (Washington Comments at 1.) The State supports this assertion by initially citing to Washington state law that stands for the obvious proposition that a binding contract requires offer and acceptance, *id.* at 2, but then claiming that “[o]rdinary consumers govern their behavior based on the idea that they must in effect say “yes” before a deal is made. *Negative option marketing ignores this economic reality by deeming silence to be acceptance.*” (*Id.* at 2)(emphasis added).

As a matter of hornbook law, this argument is without merit. Silence or inaction on the part of an offeree constitutes an acceptance in several circumstances, such as (i) when the offeree takes the benefit of products or services; or (ii) where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction; or (iii) where because of previous dealings, the offeree has given the offeror reason to understand that the silence or inaction is intended as a manifestation of assent; or (iv) where the offeree exercises dominion over things which are offered to him. *See, e.g.*, RESTATEMENT OF CONTRACTS § 72 (1932); 1 A. Corbin, Contracts §§ 72, 73 (1953); 1 S. Williston, Contracts § 91 (3rd ed. 1957).

B. Advance Consent Programs Provide Benefits to Consumers and Are Amenable to Consumer On-Line Shopping Behavior.

As a matter of commercial reality, certain of the State's proposals regarding Free Trial or Free to Pay Conversion offers would amount to an unwarranted defacto ban on these types of programs.

As previously set forth, advance consent programs, and Free Trial or Free to Pay Conversion offers in particular provide meaningful benefits to consumers because they allow the consumer to sample the product or service for a specified period of time before incurring any purchase obligation. In the event that the consumer elects to continue using the product, the continuous nature of the arrangement provides the consumer with the comfort and convenience of knowing that he or she will have uninterrupted delivery of the product for as long as the consumer desires.

Second, with proper disclosures that would be provided under the current regulatory regime and guidance, "reasonable consumers" are not as unsophisticated as the State would like the Commission to believe - - especially in connection with their on-line

activities. When consumers shop on-line, an entire order stream is involved-- where clicking on “continue” on a web page is just like the turning of a page in a magazine, and clicking on “submit” constitutes the user’s affirmative act of consent.

C. The State’s Reference to the Number of Consumer Complaints Does Not Evidence a Regulatory Failure.

The State refers to the number of consumer complaints as evidence that the programs are fundamentally flawed. Yet, such a quantitative lens does not support the proposition that a marketing or business practice is fundamentally flawed or requires additional regulation. If that were the case, the Commission would have either abolished the debt collection business years ago or sought to prescribe electronic fixes for harassing and unfair treatment of consumers by collectors - - as complaints concerning debt collection agencies have ranked amongst the highest number of complaints received by the agency in years. No matter what the marketing practice, there will unfortunately always be unscrupulous regulators who will take advantage of consumers. Such conduct is appropriately dealt with through enforcement action rather than overly prescriptive measures that will impose undue burdens on legitimate marketers who operate such programs fairly, honestly and with adequate disclosures.

D. The State’s Specific Recommendations Are Unduly Prescriptive.

The State concludes its presentation by providing several “specific suggestions,” for regulating Free Trial or Free to Pay Conversion Offers. For the reasons set forth above, PMA does not believe that any additional regulation is necessary or warranted. Moreover, many of the State’s proposals such as requiring that the consumer provide “verifiable authorization” or “affirmative, unambiguous consent” are already embodied in

the FTC's recently issued guidance concerning online negative option marketing. Other of the State's proposals, however, such as the requirement that the seller obtain information "directly from the consumer for each individual transaction," (Washington Comments at 7), or that the FTC impose "an outer time limit on charges for a trial conversion continuity plan." (*Id.*) are overly prescriptive would impose far more onerous burdens on marketers of such programs than is necessary to achieve the intended goal. The State of Washington's proposal would essentially prohibit the use of preacquired account information entirely which goes well beyond what the FTC deemed necessary when it promulgated the Telemarketing Sales Rule. There is no basis for imposing a more restrictive regulatory framework for online marketing of trial conversion offers than is provided for in the Telemarketing Sales Rule, particularly since in the online environment, unlike on the telephone, the disclosures appear in a static format and the consumer is free to review and browse the terms and conditions of the offer at his or her leisure. Similarly the proposal to impose an outside limit of eighteen months on Free Trial or Free to Pay Conversion offers seems counterintuitive. Presumably consumers who have elected to remain in a program for this length of time are among the marketer's most loyal and satisfied customers.

Indeed, many of the State of Washington's proposals go well beyond ensuring that the terms of a negative option offer are properly disclosed to the consumer and would severely regulate the manner in which such programs can be operated and conducted. Accordingly, we would urge the FTC to reject the specific recommendations proposed by the State of Washington and rely instead on the established body of law and regulatory guidance that has already been established.

VI. Conclusion

Advance consent marketing offers, which offer numerous benefits to consumers and marketers alike, are subject to effective and meaningful regulation, guidance, self-regulatory standards, and law enforcement that strike the proper balance among the interests of businesses, regulators, and consumers. Accordingly, PMA submits that additional regulations are not needed.

DATED: October 12, 2009

Respectfully Submitted,

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