

**Comments from the
National Consumers League
Regarding Negative Option Workshop – Comment P064202
February 15, 2007**

Introduction

The National Consumers League (NCL) is a nonprofit organization founded in 1899 to protect and promote social and economic justice for consumers and workers. At NCL we hear first-hand about abusive negative option marketing through our National Fraud Information Center, a hotline and Web site that provides advice to consumers about telemarketing and Internet fraud and that transmits consumers' reports about suspected fraud to the appropriate law enforcement agencies. We were pleased to participate in the Federal Trade Commission's (FTC) recent workshop on analyzing negative option marketing and present these comments to supplement the record.

Negative options are by their very design intended to shift the burden in an interaction between two parties from one to another – that party must now go to the trouble of objecting to stop something from happening. This approach can be very beneficial in advancing social causes. For instance, New Zealand has launched a compulsory work-based program, KiwiSaver, to encourage retirement savings. The employer must automatically deposit a certain percentage of an employee's pay in a savings account unless the employee objects. Another example is the growing use of the negative option approach to promote computer security. Some software companies now automatically install upgrades and patches unless consumers set their systems not to do that.

Negative Option Complaints

However, the use of negative options for commercial purposes sometimes raises concerns. At our fraud center, we do not receive complaints from consumers about the traditional prenotification negative option plans for things like record and book clubs. These are usually situations in which consumers see advertisements and respond to them because they *want* the products. After they sign up, they receive announcements on a regular basis about the items that are available, which remind them that they have joined, and they are given the option to say "No" to shipments that they do not want. There may be a minimum purchase requirement, but essentially consumers only pay for what they consciously accept, and they can often cancel at any time.

But continuity plans, in which consumers receive goods or services automatically unless they say “Stop,” without periodic announcements or the ability to reject shipments, are the source of many complaints. These are usually situations in which the consumers were *not* seeking the goods or services to begin with. Sometimes these solicitations are made as an “upsell” when the consumer has contacted a business to buy something else. Most alarmingly, sometimes consumers’ financial account information has gone from companies they’ve done business with to other companies without their knowledge. So when company #2 offers a free trial offer for something, the consumer does not realize that the business already has that financial information from company #1 and that the account will automatically be charged or debited after the trial period ends unless he or she cancels in time.

Complaint Examples

Excerpts from two complaints we received last year illustrate the problem:

“I booked movie tickets through [company name #1] and then there was an ad by a third party [company name #2] offering me a discount coupon for future purchases if I filled out some information. I filled out the information but I never gave my credit card information to the third party. Now the third party apparently enrolled me into some kind of monthly membership and started charging my credit card. But I never released my credit card information to the third party nor authorized [company #1] to release the information...I feel that I have been cheated and deceived and been violated in a horrible way.”

“I recall perusing the online directories regarding people searches in the month of October. Then a month later I get my MasterCard bill and see that a place called [company name] has debited my account for \$9.95! What really upset me, actually SCARED me, was the fact that I don’t even recall entering that information online (my credit card info) let alone granting authorization for them to debit my account! I was furious and notified them right away, but to no avail. Obviously, they forced my registration fraudulently and aren’t going to credit my MC account without a fight.”

Need for Better Disclosure

Better disclosures, both online and offline, are clearly needed. For instance, in the online context, consumers should be clearly presented with the key information about the offers, including any negative option features, and obliged to click through that information before the transactions are completed. Pre-checked boxes should be prohibited in negative option offers because consumers may not notice them. Having to click on something is a much more effective means of documenting a consumer’s affirmative agreement.

Sharing Consumers' Financial Information for Marketing should be Prohibited

Disclosure, however, is not enough. There are some things that simply should not be allowed, such as sharing consumers' financial information for marketing purposes. In the Telemarketing Sales Rule (TSR), the FTC has attempted to curb abuses of "pre-acquired" account information used in connection with free trial offers by requiring the marketers to ask the consumers for the last four digits of the accounts, obtain their express agreement to be charged using those accounts, and make an audio recording of the entire telemarketing transaction. However, abuses still occur. Moreover, the TSR does not cover online transactions. We would prefer to see a general prohibition against the use of "pre-acquired" account information in marketing.

Negative Option Rule should be Revised

Continuity plans should be brought under the FTC Negative Option Rule and subject to specific requirements and prohibitions. One requirement should be that if there is a free trial offer, the marketer must notify the consumer at the end of the trial period and obtain that person's consent to continue.

We do not believe that this would be very difficult or costly to do. The company could call, or send a postcard or an email with instructions on how to continue if that's what the consumer wants to do. Book clubs and other types of prenotification negative option plans send consumers announcements on a regular basis and handle their rejections with no apparent problem. Why shouldn't a continuity plan send a prenotification that a trial period is ending and get the consumer's agreement to continue, or at the very least provide the consumer with a rejection form and an adequate time period to use it?

It should be easy to discontinue, and consumers should not be charged after they have done so. Furthermore, billing consumers without their explicit consent and the use of pre-acquired account information should be prohibited. In the examples we provided, the consumers' credit cards were billed, an annoying problem but one that is relatively easy to remedy because of their strong credit card dispute rights. But when their debit cards are charged or demand drafts are used to debit money from their bank accounts, which is common in these types of complaints, not only is the problem harder to resolve, but there can be costly consequences, such as bounced checks and overdraft fees.

Conclusion

The burden for consumer transactions should be placed where it belongs, on the marketers, to offer their goods and services in a straightforward manner that provides consumer with all of the information they need to make informed, conscious purchasing decisions. We appreciate the opportunity to expand on the views we presented at the January 25 workshop and look forward to continuing to work with the FTC on this important issue.

Respectfully submitted by:

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