

Negative Option Marketing: An FTC Workshop

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Negative Option Workshop:

- **Negative Option = Advance Consent**



Negative Option Workshop:

■ Key Considerations:

WHEN

When during the Ordering Process do various disclosures need to be made

WHAT

What terms and conditions need to be disclosed for Advance Consent Offers

HOW

How do the disclosures need to be made

FTC Guidance

■ Section 5 of the Federal Trade Commission Act:

- ◆ Prohibits Unfair and Deceptive Acts or Practices Standard

Broad

Flexible

Appropriate

- ◆ Requires Clear and Conspicuous Disclosure of Material Terms and Conditions-Failure to disclose material terms-violates Section 5

FTC Guidance

■ Dot Com Disclosures:

- ◆ Online disclosure must be unavoidable

AND

- ◆ Presented prior to the consumer incurring any financial obligation
- ◆ Use of hyperlinks may be appropriate when properly labeled

ERA Advance Consent Guidelines:

■ Two fundamental principles

◆ Notice And Consent

Notice

- ◆ All material terms and conditions of the offer must be disclosed in a clear and understandable manner


Consent

- ◆ The consumer must clearly and affirmatively consent to the offer **after** all material terms and conditions have been disclosed:



ERA Advance Consent Guidelines:

■ **Content/Notice:** *The What*


- ◆ Identity of seller-including separate identity for up-sells
 - ◆ Cost of goods/services
 - ◆ Manner in which consumer will be charged
 - ◆ When/how frequently the consumer will be charged
 - ◆ Affirmative obligation to cancel- e.g. consumer will be charged unless canceled
 - ◆ Instructions on how to cancel
- 



ERA Advance Consent Guidelines:

■ Content/Notice: *The What*

◆ Free To Pay:

- Fact that service will continue unless consumer cancels
 - Length of subsequent renewal/billing term
 - Cost after free trial period
 - Length of free trial period
- 



ERA Advance Consent Guidelines:

■ Content/Notice: *The What*

◆ Automatic Renewal:

- Cost for subsequent renewal period
- Length of renewal/billing period
- Fact that consumer will be billed or charged





ERA Advance Consent Guidelines:

■ Consent: *The When and How:*

- ◆ Consumer must clearly and affirmatively consent to the offer
- ◆ All material terms and conditions must be disclosed ***before the consumer provides consent/incurs financial obligation***



Negative Option Marketing/Online:

■ Important Considerations/Caveats:

- ◆ Existing laws and regulations are sufficient – no additional regulation is necessary
- ◆ Section 5 of FTC Act, Telemarketing Sales Rule, Dot Com Disclosure Guidelines and Consent Decrees provide Adequate Guidance
- ◆ There is no one size fits all approach-Strict performance standards will undermine the inherent flexibility of the medium
- ◆ Pop-ups and hyperlinks when properly used and labeled provide unique vehicles for disclosure
- ◆ Regulation should encourage rather than discourage innovative uses of the medium

Negative Option Marketing: Unique Online Considerations

- Web pages are not distinct solicitations but part of a continuous ordering processing
- Entire order stream must be viewed in its entirety
- Clicking the “Continue” button on a web page is akin to turning a page in direct mail
- Key point of disclosure is point at which consent is provided/financial obligation is incurred
- Consent is provided/obligation is incurred when consumer transmits the order
- Consumer Hitting the “Submit” button constitutes affirmative act of consent
- Pop-ups are an effective means of disclosure where their use is “unavoidable”
- Important Distinctions from Telephone Sales
 - ◆ No sales pressure
 - ◆ Consumer can review terms at leisure
 - ◆ Nature of media inherently requires affirmative action—assumptive content is not possible

- Consumers are informed at “outset” of offer that purchase includes the club membership
- Automatic renewal feature is disclosed to avoid misimpression that membership is only for free thirty day period
- Because price of pan is disclosed, the monthly membership fee has also been disclosed
- Disclosure of full terms should not be required this early in the process:
 - Consumer has shown no evidence yet of intent to purchase or interest in the offer
 - Consumer is not being asked for payment information or for consent to the offer
 - Purchase commitment/involvement at this point is low
 - Focus on club will unnecessarily detract from primary offer
 - Optional Disclosure is appropriate-Consumers who are interested can view full terms
 - Hyperlink is properly labeled to indicate nature of information contained within



Closet Gourmet Cook's Club Membership

Along with your shipment you'll receive a 30 day free trial membership in the Closet Gourmet Cook's Club. As a club member you'll enjoy three new recipes e-mailed to you each month and discount coupons good for valuable savings at some of your favorite restaurants.

After the 30 day free trial, unless you cancel, your membership will continue for just \$4.95/month automatically charged by Closet Gourmet to the credit card you used to buy your pan. You may cancel at any time by calling 1-800-xxxx or online at www.cooksclub.com but the recipe box is yours to keep as a free gift from the Closet Gourmet.



Close Window

...enjoy a 30 day free trial member
...ook's Club with automatic renewal at \$4.99/m



Click here for details

- The disclosure pop up contains all material terms and conditions consistent with ERA Guidelines for free trial and automatic renewal:
 - Reference to “The Closet Gourmet’s Club- denotes a separate third party-
 - Length of free trial period
 - Membership benefits-including express reference to e-mail delivery of recipes
 - Automatic renewal feature including affirmative obligation to cancel (e.g. “unless you cancel”)
 - Cost per month after the free trial
 - Disclosure of how the consumer will be billed/charged – e.g. automatically to credit card
 - Disclosure of third party billing
 - Disclosure of when/how you can cancel including toll free number and URL

http://www.fantastiquecuisine.com/shoppingcart



Home Shop Gift Registry Store Locator Contact Us



You have added the following item(s) to your shopping cart:

All-Purpose Saute Pan (cobalt blue)*.....	1
Gift Wrap?	<input checked="" type="checkbox"/>

Total: \$89.95
+ (S&H) 7.95

\$97.90

▶ Change Order
▶ Cancel Order

Checkout

*Includes 30 day free trial membership in Closet Gourmet Cook's Club with automatic renewal at \$4.99/month. [Click here for details.](#)

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- Disclosure of fact that pan includes Club Membership has been made to avoid “misimpression” that consumer is purchasing the pan alone
- Disclosure of monthly fee after thirty day free trial has been made because the consumer will incur additional costs if membership is not cancelled
- Optional disclosure of remaining offer terms is appropriate at this stage of the process as consumer is not being asked to consent and clicking on “checkout” does not result in any financial obligation



Three Alternatives to Ordering Sequence



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- We have included full disclosure of offer terms because payment information is being requested
- Placement of disclosure is in immediate proximity of payment information and unavoidable
- In addition to disclosure of full offer terms we have included explicit “authorization” language for the third party billing
- Note: although consumer is providing billing information no financial obligation is incurred.
- While we have elected to disclose full offer terms here, it would also be appropriate to split the disclosure between this and the order page.
 - ◆ Cancellation details —e.g. toll free number, URL could be moved to next page

Fantastique Cuisine

Shop Gift Registry Store Locator Contact Us

Shipping Information

Ship my order to:

Name*

Address*

City* State* Zip Code*

Daytime Phone*

Evening Phone

Email*

Confirm Email*

Shipping Method* The shipping address is also my billing address.

Payment Information

Expiration Month Year Verification Number [What is this?](#)

[Change Order](#)
[Cancel Order](#)

You understand that your purchase includes a 30 day free trial membership in the Closet Gourmet Cook's Club and a free recipe box. As a club member you'll enjoy three new recipes emailed to you each month and discount coupons good for valuable savings at some of your favorite restaurants. After your free trial, unless you cancel, your membership will automatically continue for just \$4.95 each month which you authorize the Closet Gourmet Cook's Club to charge to the credit card you are providing. You can cancel anytime by calling 1-800-xxxx or online at www.cooksclub.com but keep the recipe box as a free gift from Closet Gourmet

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Home Shop Gift Registry Store Locator Contact Us

Place Order

Ship to:

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D 20580
(202) 326-0123

Shipping Method: Standard
 Billing address: Same as Shipping address

Item	Price	Quantity	Total
All-Purpose Saute Pan (cobalt blue) with Closet Gourmet Cook's Club Free Trial Membership Gift wrap: Yes	\$89.95	1	\$89.95
Shipping & Handling:			7.95
Tax:			9.05
Total:			\$98.95

[Review Club Details](#)

[Place My Order](#)
 Click button **ONCE** to prevent duplicate orders

► Change Order
 ► Cancel Order

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- We believe this page should more appropriately be labeled, PLACE ORDER since this is the point at which the transaction is consummated
- We believe it is appropriate to remind consumers that their purchase includes the club membership.
- Since full disclosure of offer terms was made on the preceding page, further disclosure is not required
- Consumer has been given the option to review the club terms again by clicking button at the bottom containing a link to full disclosure terms.
- Clicking Place My Order after full disclosure has been made is sufficient to evidence consent.



■ This technique demonstrates that a Pop Up window can be used effectively to make requisite disclosures

■ In this case, the Pop-Up window and the disclosures are unavoidable and occur:

- Before the consumer provides billing information
- Before the consumer incurs any financial obligation



Closet Gourmet Cook's Club Membership

Your shipment includes a 30 day free trial membership in the Closet Gourmet Cook's Club and free recipe file box. As a club member you'll enjoy three new recipes each month emailed to you and discount coupons for savings at your favorite restaurants.

After the free trial, unless you cancel, your membership will continue for just \$4.95 automatically billed to your credit card by Closet Gourmet. You can cancel anytime by calling 1-800-xxxx or online at www.cooksclub.com but the recipe box is yours to keep for free just for trying Cook's Club.

▶ Close Window

▶ Change Order
▶ Cancel Order

Continue



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Place Order

Ship to:

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D 20580
(202) 326-0123

Shipping Method: Standard
 Billing address: Same as Shipping address

Item	Price	Quantity	Total
All-Purpose Saute Pan (cobalt blue) Gift wrap: Yes	\$89.95	1	\$89.95
Shipping & Handling:			7.95
Tax:			9.00
Total:			\$98.95

Payment Information

Payment Type Card Number Expiration Verification Number

Month Year 10/16/12 12/12

By clicking "Place My Order" below, you agree to the following:

- Your purchase includes a 30-day free trial membership in Closet Gourmet Cook's Club
- You authorize Cook's Gourmet to obtain your account information from Fantastique Cuisine and to charge your card \$4.95/month after the free trial unless you cancel.

[Change Order](#)
[Cancel Order](#)

[Place My Order](#)
 Click button **ONCE** to prevent duplicate orders

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- Although full terms have been previously disclosed on pop-up, clear consumer authorization is required
- Disclosure includes clear authorization for third party recurring billing.
- Clicking the Place My Order button is sufficient to evidence consent





Fantastique Cuisine

Home Shop Gift Registry Store Locator Contact Us

Shipping Information

Ship my order to:

Name*

Address*

City* State* Zip Code*

Daytime Phone*

Evening Phone

Email*

Confirm Email*

Shipping Method* The shipping address is also my billing address.

Shipment includes the 30 day free trial membership in the Closet Gourmet Cook's Club with automatic renewal at \$4.95 month

▶ Change Order
▶ Cancel Order

[Continue](#)

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Place Order

Ship to:

Federal Trade Commission
600 Pennsylvania Ave. NW

Shipping Method: Standard

- Full disclosure has been moved to the page at which the payment information is obtained and consent is provided.
- The disclosure language includes express authorization for third party billing.
- Clicking on “Submit my Order” is sufficient in light of the disclosure to evidence consent to the transaction.

I understand that my purchase includes a free 30 day trial membership in Closet Gourmet Cook's Club and free recipe box. As a club member, I'll enjoy three new recipes emailed to me each month and discount coupons for savings at my favorite restaurants. After the free trial unless I cancel, my membership will automatically continue for just \$4.95 month which I authorize Closet Gourmet to charge to the credit card I'm providing. I can cancel at anytime by calling 1-800-xxxx or online at www.cooksclub.com, but no matter what I decide the recipe box is mine to keep.

Payment Information

Payment Type Card Number Expiration Verification Number

Month Year

What's this?

I understand that my purchase includes a free 30 day trial membership in Closet Gourmet Cook's Club and free recipe box. As a club member, I'll enjoy three new recipes emailed to me each month and discount coupons for savings at my favorite restaurants. After the free trial unless I cancel, my membership will automatically continue for just \$4.95 month which I authorize Closet Gourmet to charge to the credit card I'm providing. I can cancel at anytime by calling 1-800-xxxx or online at www.cooksclub.com, but no matter what I decide the recipe box is mine to keep.

Change Order
Cancel Order

Place My Order

Click button ONCE to prevent duplicate orders

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Some Final Thoughts:

- There is no one size fits all approach
- It's the NET IMPRESSION that counts
- In determining net impression full order sequence must be viewed in its entirety- and all disclosures must be viewed together
- **Key Guiding Principles:**
 - ◆ Full disclosure of all material terms and conditions
 - ◆ Disclosures can be made at any time BEFORE consumer consents and incurs a financial obligation
 - ◆ Clicking a SUBMIT button constitutes affirmative informed consent provided disclosures have been previously made

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