# Negative Option Marketing: An FTC Workshop

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# **Negative Option Workshop:**

**■ Negative Option = Advance Consent** 

### **Negative Option Workshop:**

### Key Considerations:



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



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



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

- 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:

#### **■** 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

- **■** 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

- **■** Content/Notice: *The What* 
  - Automatic Renewal:
    - Cost for subsequent renewal period
    - Length of renewal/billing period
    - Fact that consumer will be billed or charged

- **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

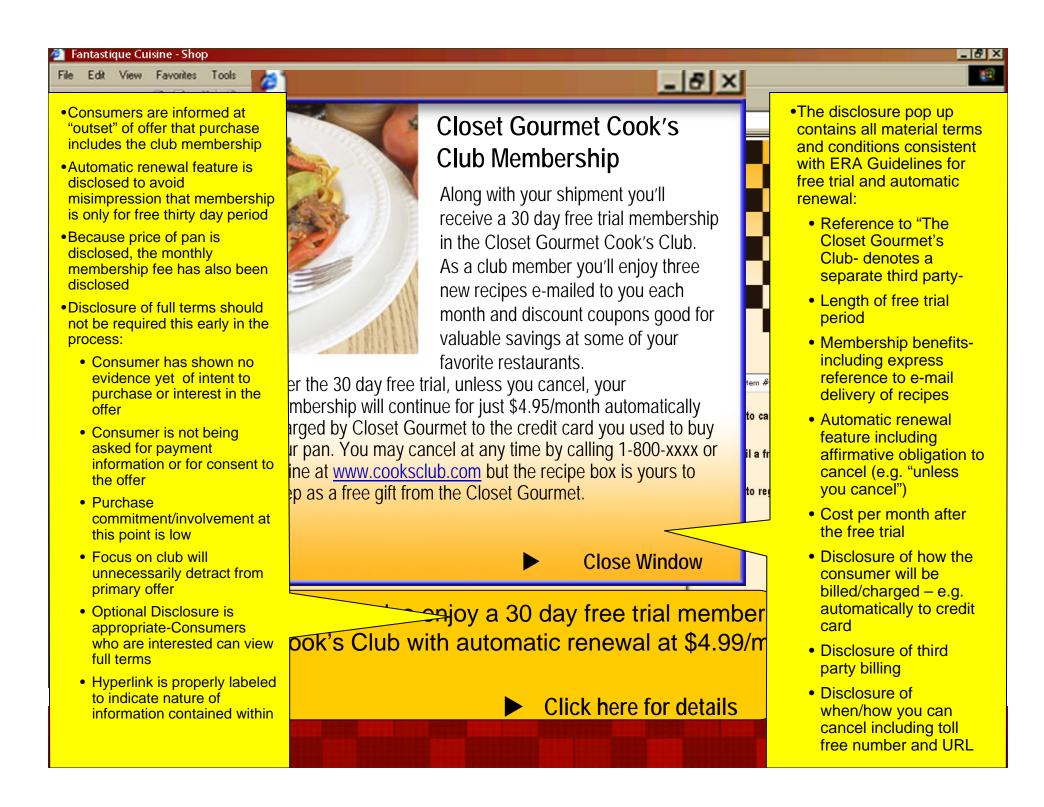
### **Negative Option Marketing/Online:**

#### **■ 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



http://www.fantastiquecuisine.com/shoppingcart

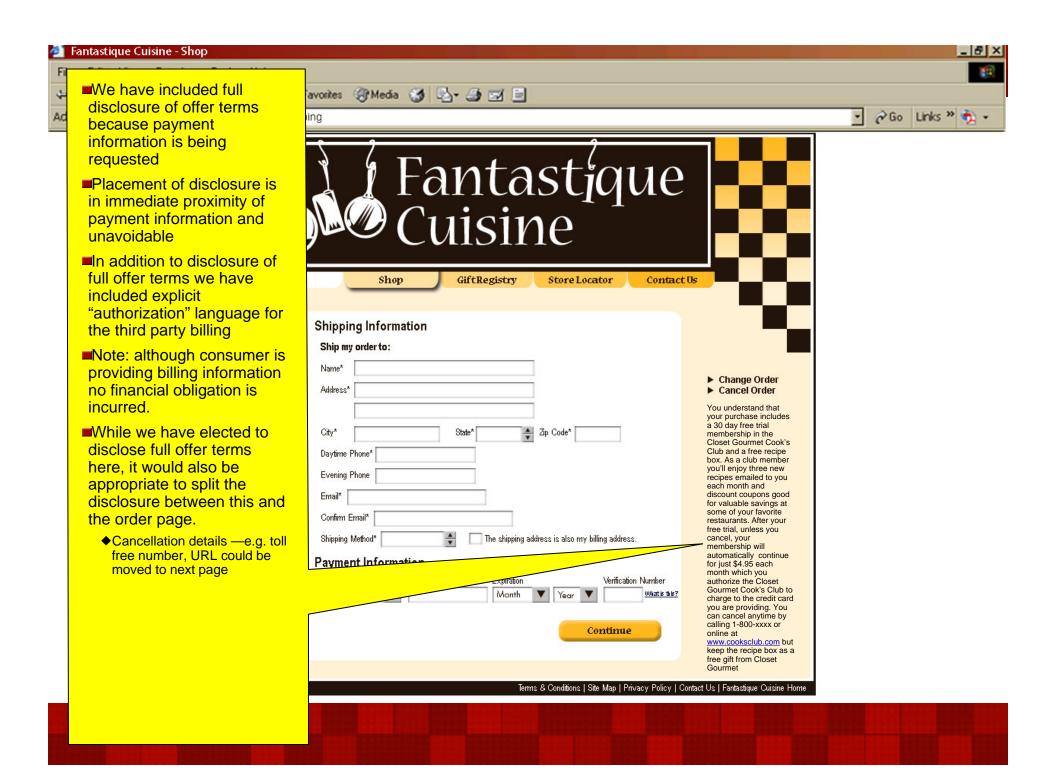


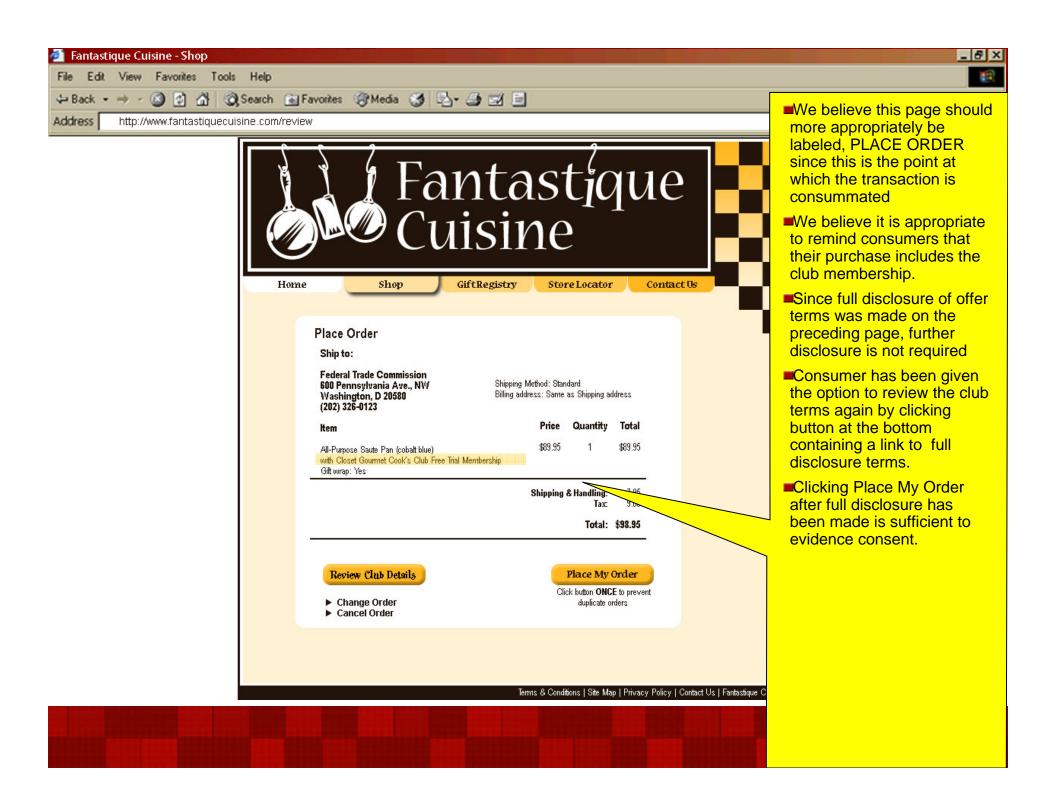
- Disclosure of fact that pan includes Club Membership has been made to avoid "misimpression" that consumer is purchasing the pan alone
- •Disclosure of monthly fee after thirty day free trial has been made because the consumer will incur additional costs if membership is not cancelled
- Optional disclosure 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

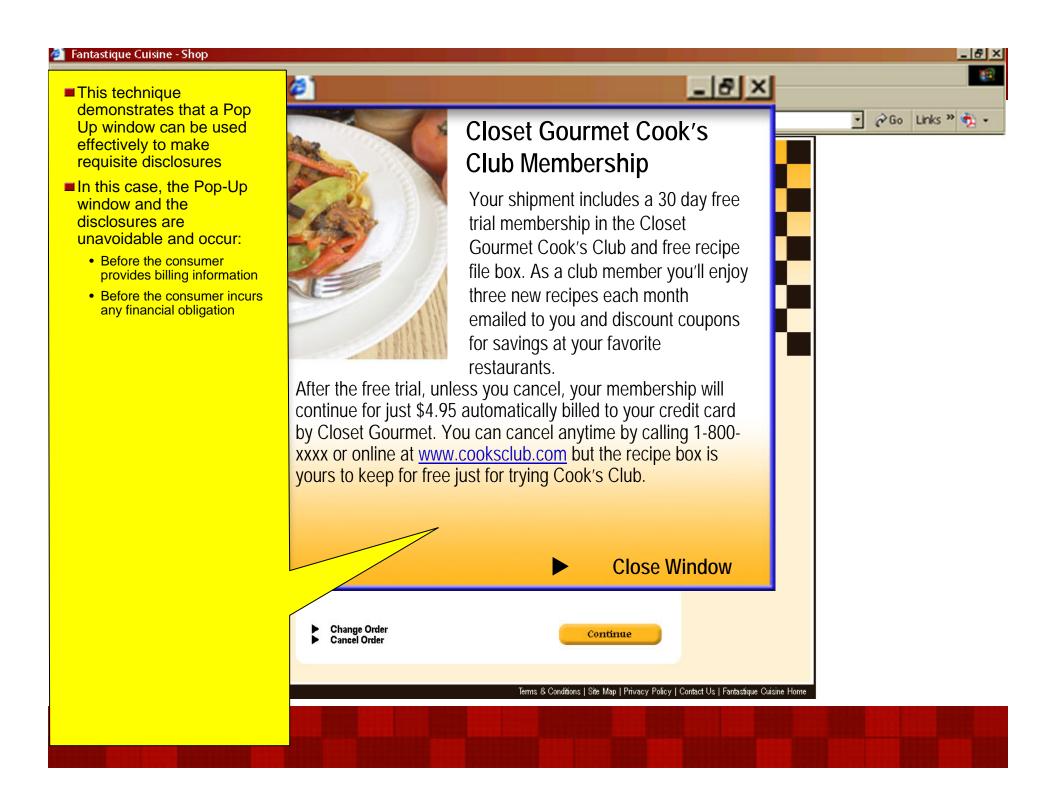
# Three Alternatives to Ordering Sequence

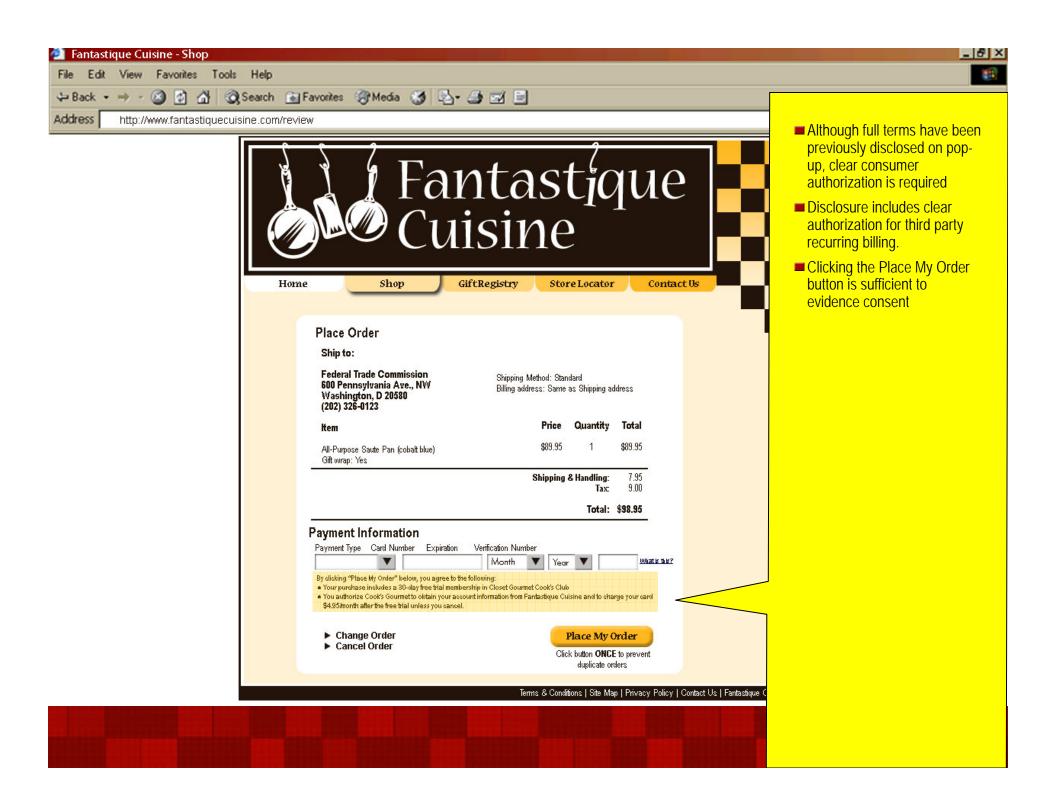


















I understand that my purchase includes a free 30 day trial membership in Closet Gourmet Cook's Club and free recipe box. As a club member, I'll enjoy three new recipes emailed to me each month and discount coupons for savings at my favorite restaurants. After the free trial unless I cancel, my membership 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.



## **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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