

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of the Negative	:	Negative Options Workshop - Comment
Options Workshop	:	FTC File No. P064202
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**COMMENTS OF THE ELECTRONIC RETAILING ORGANIZATION FOLLOWING
THE COMMISSION’S JANUARY 25, 2007 NEGATIVE OPTIONS WORKSHOP**

I. Introduction

The Electronic Retailing Association (“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 over 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 \$300 billion in goods and services to consumers around the world, including consumers in the United States.

ERA thanks the Commission for the opportunity to participate in the Commission’s January 25, 2007 Negative Options Workshop (the “Workshop”), and is pleased to submit this Comment as a follow-up to the information presented at the Workshop. As noted during the Workshop, ERA strongly believes that the current regulatory structure for advance consent

offers¹ represents a balanced approach which addresses relevant concerns raised by businesses, federal and state regulators, and consumers. Consequently, and for the reasons outlined below, we urge the Commission to refrain from issuing additional regulations or guidelines that would upset the current efficiency and equilibrium of the marketplace.

II. The Current Regulatory Structure is Properly Balanced.

As an initial matter, ERA believes that advance consent offers generally fall into four major categories. The first category involves pre-notification negative option plans, in which a consumer gives advance consent to receive periodic notices of upcoming selections of goods or services. The seller sends out such notices, and the consumer accepts or rejects the identified selection. Such plans are usually subject to the Commission's Pre-Notification Negative Option Plan Rule, 16 C.F.R. 425, as well as to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a).

The second category involves free-to-pay conversion plans, in which the consumer agrees to receive a product or service for free, and unless the consumer cancels during that period, to incur an obligation to pay for the products or services or for products or services which will continue to be automatically sent or provided to the consumer. The third category involves automatic renewal plans, where a 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 and until the consumer cancels. The fourth category involves continuity plans, where a consumer agrees to receive goods or services in the future, on a periodic basis and in which the consumer is billed or charged each time the goods or services are provided.

¹ The industry term for an offer in which the consumer consents in advance to receive and pay for goods or services in the future on a continuing or periodic basis, until the consumer cancels, without the consumer having to give further consent for each shipment or billing event, is an "advance consent" offer. Although the Commission appears to refer to such offers as "negative option offers," we have used the industry term in this Comment.

The latter three categories of advance consent offers (free-to-pay conversions, continuity programs, and automatic renewals) are subject to stringent existing laws, regulations and self-regulatory guidelines. For example, such offers are subject to (a) the deception and unfairness standards of Section 5 of the FTC Act, 15 U.S.C. § 45(a); (b) the Telemarketing Sales Rule, 16 C.F.R. 310, if they involve a telemarketing component; and (c) for ERA members, the ERA’s Advance Consent Marketing Guidelines.² ERA believes that this regulatory structure, combined with appropriate enforcement activities by federal and state authorities, reasonably balances the relevant interests of consumers, regulators, and businesses. Indeed, as described below, the interests of consumers and businesses are often shared - both benefit when consumers have the opportunity to select from a wide variety of business offers. Moreover, when consumers have as many choices available to them as possible, the marketplace works efficiently, and rewards businesses who offer what consumers want to buy.

A. Advance Consent Offers Benefit Businesses and Consumers.

The Commission has requested information about whether and to what extent advance consent programs benefit businesses and consumers. In evaluating the current regulatory structure for advance consent offers, the Commission must bear in mind that such offers provide substantial benefits to consumers. From the earliest moments of modern society, advance consent offers have allowed U.S. consumers to enjoy the convenience of goods and services that they need or want on a recurring basis – from paper (and electronic) newspaper subscriptions, to cable television services, to consumer savings programs. One of the greatest benefits that advance consent products and services offer for consumers is the ability to say “stop” at any time with no further obligation. Advance consent offers allow consumers the opportunity to try a product or service for free or for a reduced cost. In many cases, consumers need not pay for a

² A copy of the ERA’s Advance Consent Marketing Guidelines is attached to this Comment as Attachment A.

product or service offered through an advance consent program until the consumer has tried the product or service and decided to keep or continue with the product or service. For sellers, advance consent programs result in lower marketing, operational, and transaction costs, simplify renewal processes and offer the opportunity to build long-term relationships with consumers. Businesses take advantage of these efficiencies by presenting a wider variety of offers to consumers and allowing consumers to pay a reduced price for products and services.

Advance consent offers presented on an automatic renewal basis further offer consumers the convenience of uninterrupted service. A consumer is guaranteed service as long as he or she wish to receive the requested product(s) or service(s). Automatic renewal offers also reduce the number of notices the consumer receives. A consumer who wishes to continue with the program only needs to read the reminder notice provided by the seller, and confirm that the stated terms are acceptable.

Of course, these direct benefits to consumers exist when advance consent offers are made in accordance with existing legal and self-regulatory standards. ERA's Advance Consent Guidelines require that consumers be given appropriate notice of the key terms of any advance consent offer. Such notice should be provided where it will be most meaningful to consumers – namely, before the consumer agrees to pay for any good or service. Businesses must also be required to obtain the consumer's consent to the key terms of the transaction by requiring an affirmative action by the consumer, such as clicking on an "I agree" or "Submit" button on a website after full disclosure of key terms. For the reasons outlined below in Section II(B) of these Comments, requiring additional affirmative action by the consumer would impose an additional burden on the consumer, but provide no corresponding additional benefit to the consumer, the business, or the marketplace.

B. Advance Consent Offers Enhance Marketplace Efficiency.

As noted during the Workshop, advance consent offers reduce transaction costs in the marketplace. Businesses take advantage of this cost reduction by presenting a wider variety of offers to consumers. This wider variety of offers enables the marketplace to work more efficiently because only those offers that best meet consumers' needs will be accepted and will be successful for the businesses who offer them.

In addition, the reduced transaction costs presented by advance consent offers provide an avenue that less well-known businesses can use to compete fairly in the marketplace against their better-known (and often better-funded) competitors. A consumer may well choose a free trial offer from a less-known business than a prepayment-required offer from a better-known business.

If the Commission imposes greater transaction costs upon advance consent offers by, for example, requiring a second consumer opt-in upon the expiration of a free trial offer, the lower transaction costs associated with advance consent offers will be significantly reduced or eliminated. If that happens, such offers will be presented in the marketplace less often, and all of the attendant benefits to consumers and to competition outlined above in this Comment will also be significantly reduced or removed from the marketplace. We strongly urge the Commission to avoid creating such an outcome by imposing further regulations or guidelines upon advance consent offers.

III. Marketers Should Be Allowed Flexibility in Presenting Advance Consent Offers to Consumers

As the examples and testimony from the Workshop made clear, advance consent offers can take a variety of forms, and adequate disclosure of the material terms of the offer can be made in a variety of ways. Indeed, panelists at the Workshop who were asked to incorporate

“clear and conspicuous” disclosures in a mock online advertisement demonstrated that there is no single “right” way to make such disclosures. Attempting to follow fixed rules about font type, size, color, placement, or other criteria becomes even more difficult considering screen size limitations and other aspects of some of the newer marketing channels, including mobile marketing.

While ERA fully supports the proposition that disclosure of material terms and conditions of the advance consent offer must be made to the consumer before the consumer provides their consent to the transaction, ERA believes that there are numerous ways in which such disclosure can be accomplished. ERA believes that the Commission’s current approach – which is to follow a flexible performance standard consistent with the general requirements of Section 5 of the Federal Trade Commission Act and in accordance with various Commission guidelines and policy statements – is the proper one. This approach balances the Commission’s consumer protection goals with the needs of the marketplace. Accordingly, ERA urges the Commission to avoid requiring that such disclosures be made in any specific location. In this regard the Commission should remain mindful of the unique features that the Internet offers in terms of disclosure. Specifically, unlike other media, the consumer is entirely in control of the presentation of information on their computer—the consumer can take as much time as he or she desires to read the information, can move backwards and forwards on the website, and can review the information entirely at his or her own leisure.

Similarly, ERA urges the Commission to avoid imposing any additional requirements for obtaining affirmative consent beyond the act of clicking on the button necessary to transmit the order. In particular, ERA strongly believes that the Commission should reject the proposal for a second opt-in at the conclusion of a free trial suggested by National Consumers League Vice

President Susan Grant during the Workshop. The imposition of such an obligation would virtually eliminate the convenience that a free trial offer provides. Once the consumer has received clear and conspicuous notice of the material terms and conditions of the offer and has expressly consented to these terms, there is no reason to follow the consumer's express informed consent with a secondary and potentially confusing mechanism to double-check that the consumer is sure about his or her purchasing decision. Such additional steps would significantly reduce the transaction efficiencies associated with advance consent marketing. ERA strongly believes that existing law provides a more appropriate approach by requiring full disclosure at the outset, and thus ensuring that individual consumers have the ability to make optimal choices for themselves.

In addition, we note that the growth and expansion of online retailing has been due in large part to the ease and convenience of the medium. To impose requirements that are more onerous and burdensome than those that exist in traditional brick-and-mortar retail stores will severely hinder the continued growth and consumer acceptance of the internet as a retail channel.

III. Conclusion

Advance consent offers, which offer numerous benefits to consumers and the marketplace, are already subject to several layers of regulation and enforcement. ERA strongly believes that additional regulations and/or regulatory guidance are not needed, and we therefore urge the Commission to recognize that the current regulatory structure for advance consent marketing strikes the right balance among the interests of businesses, regulators, and consumers.

Respectfully Submitted,

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