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**FEDERAL TRADE COMMISSION
16 CFR Part 425**

Rule Concerning the Use of Prenotification Negative Option Plans

AGENCY: Federal Trade Commission (“FTC” or “Commission”).

ACTION: Advance Notice of Proposed Rulemaking; Request for public comments.

SUMMARY: As part of the Commission’s systematic review of all current FTC rules and guides, the Commission requests public comment on the overall costs, benefits, necessity, and regulatory and economic impact of the FTC’s Trade Regulation Rule concerning “Use of Prenotification Negative Option Plans.”

DATES: Written comments must be received on or before July 27, 2009.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to “Prenotification Negative Option Rule Review, Matter No. P064202” to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at <http://www.ftc.gov/os/publiccomments.shtm>.

Because comments will be made public, they should not include any sensitive personal information, such as an individual’s Social Security Number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any “[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or

confidential,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form and clearly labeled “Confidential.”¹

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink:

<https://secure.commentworks.com/ftc-NegativeOptionRuleANPR> (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink <https://secure.commentworks.com/ftc-NegativeOptionRuleANPR>. If this Notice appears at <http://www.regulations.gov/search/index.jsp>, you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the “Prenotification Negative Option Rule Review, Matter No. P064202” reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex Q), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight

¹ The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (“FTC Act”) and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at

<http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

FOR FURTHER INFORMATION CONTACT: Robin Rosen Spector, (202) 326-3740 or Matthew Wilshire, (202) 326-2976, Attorneys, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A “negative option” is any type of sales term or condition that allows a seller to interpret the customer’s silence or failure to take an affirmative step as acceptance of an offer. One common “negative option” is the prenotification negative option plan. In such a plan, consumers receive periodic announcements of upcoming merchandise and have a set period to contact the company and decline the item. If they remain silent, the company sends them the merchandise.

The Rule Concerning the Use of Prenotification Negative Option Plans (“Negative Option Rule” or “Rule”) regulates prenotification negative option plans for the sale of goods. The Commission first promulgated the Rule (then titled the “Negative Option Rule”) in 1973 under the FTC Act, 15 U.S.C. 41 et seq., after finding that prenotification negative option marketers had committed unfair and deceptive marketing practices violative of Section 5 of the Act. 15 U.S.C. 45.² In 1986, the Commission reviewed the Rule pursuant to Section 610 of the Regulatory Flexibility Act, 5 U.S.C. 610, to determine the impact of the Rule on small entities. The Commission concluded that the Rule had not had a significant impact on a substantial number of small entities and should not be changed.³ In 1997, the Commission reviewed the Rule again and solicited comments on whether there was a continuing need for the Rule and whether it should be changed to increase its benefits or reduce its costs or other burdens.⁴ Based on the response, in August 1998, the Commission concluded that the Rule “continue[d] to be of value to consumers and firms, and [was] functioning well in the marketplace at minimal cost.”⁵ The Commission retained the Rule but announced three technical, non-substantive amendments to clarify it and conform its language to amendments in the FTC Act.⁶

² The Rule became effective on June 4, 1974.

³ 51 FR 42087 (Nov. 21, 1986).

⁴ 62 FR 15135 (Mar. 31, 1997).

⁵ 63 FR 44555 (Aug. 20, 1998).

⁶ The Commission: deleted a Note that had become obsolete; amended two paragraphs to read “in or affecting commerce” in lieu of “in commerce” to conform the Rule to the FTC Act; and changed the title from “Negative Option Rule” to “Use of Prenotification Negative Option Plans” to better describe the Rule’s coverage.

The Rule requires sellers to clearly and conspicuously disclose the material terms of a prenotification negative option plan to consumers before they subscribe and to follow certain procedures in operating the plan. The Rule enumerates seven material terms that sellers must disclose clearly and conspicuously.⁷ In addition, the Rule requires sellers to follow certain procedures, including: abiding by particular time periods during which sellers must send introductory merchandise and announcements identifying merchandise the seller plans to send; giving consumers a specified time period to respond to announcements; providing instructions for rejecting merchandise in announcements; and honoring promptly written requests to cancel from consumers who have met any minimum purchase requirements.⁸

II. Regulatory Review Program

The Commission reviews its rules and guides periodically. These reviews seek information about the costs and benefits of the rules and guides as well as their regulatory and economic impact. These reviews assist the Commission in identifying rules and guides that warrant modification or rescission. Therefore, the Commission now solicits comments on, among other things, the economic impact of, and the continuing need for, the Negative Option Rule; the benefits of the Rule to consumers purchasing goods through prenotification negative option plans; and the burdens the Rule places on firms subject to its requirements. The

⁷ These terms are: the aspect of the plan under which subscribers must notify the seller if they do not wish to purchase the selection; any minimum purchase obligations; the subscribers' right to cancel; whether billing charges include postage and handling; that subscribers will be given at least ten days to reject a selection; that if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and the frequency with which announcements and forms will be sent, and the maximum number of announcements subscribers should expect to receive during a twelve-month period. 16 CFR 425.1(a)(1)(i-vii).

⁸ 16 CFR 425.1(a)(2)(3); 425.1(b).

Commission also solicits comment on whether it should expand the Rule to cover additional types of negative option offers.

The Rule covers only a subset of negative option offers – prenotification negative option plans. There are, however, several other types of commonly used negative option offers. One such offer is called a continuity plan. In this type of offer, consumers receive regular shipments of merchandise until they cancel the agreement. A second common offer is the trial conversion. Consumers who accept such an offer agree to receive products or services for a trial period at no charge or for a reduced price. If the consumers do not cancel their agreement before the end of the trial period, the product shipments or provision of services continue and they incur charges. A third familiar negative option is the automatic renewal. In an automatic renewal, a magazine seller, for example, may automatically renew consumers’ subscriptions when they expire and charge for them, unless the consumers cancel their subscriptions.

The Commission seeks comment on whether there is a basis to expand the Rule to cover these additional offers, and, if so, what requirements the Rule should include. The Commission’s goal in seeking comment is to determine the best way to protect consumers from deceptive or unfair practices in negative option marketing. Possible alternative and/or additional methods of achieving that goal include consumer education campaigns, industry guidance, and continued law enforcement actions.

III. Request for Comment

The Commission solicits comments on the following specific questions related to the

Negative Option Rule:

- (1) Is there a continuing need for the Rule as currently promulgated? Why or why not?
- (2) What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?
- (3) What modifications, if any, should the Commission make to the Rule to increase its benefits to consumers?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses, particularly small businesses?
- (4) What impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers? What evidence supports the asserted impact?
- (5) What significant costs has the Rule imposed on consumers? What evidence supports the asserted costs?
- (6) What modifications, if any, should be made to the Rule to reduce the costs imposed on consumers?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses, particularly small businesses?
- (7) Please provide any evidence that has become available since 1998 concerning consumer perception of, or experience with, negative option offers, including offers for prenotification negative option plans, continuity plans, trial

conversions, or automatic renewals. Does this new information indicate that the Rule should be modified? If so, why, and how? If not, why not?

- (8) What benefits, if any, has the Rule provided to businesses, and in particular to small businesses? What evidence supports the asserted benefits?
- (9) What modifications, if any, should be made to the Rule to increase its benefits to businesses, particularly small businesses?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses?
- (10) What significant costs, including costs of compliance, has the Rule imposed on businesses, particularly small businesses? What evidence supports the asserted costs?
- (11) What modifications, if any, should be made to the Rule to reduce the costs imposed on businesses, particularly small businesses?
 - (a) What evidence supports your proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers?
 - (c) How would these modifications affect the costs and benefits of the Rule for businesses?
- (12) What evidence is available concerning the degree of compliance with the Rule? Does this evidence indicate that the Rule should be modified? If so, why, and how? If not, why not?
- (13) Are any of the Rule's requirements no longer needed? If so, explain. Please provide supporting evidence.
- (14) Should the Rule define "clearly and conspicuously," given that it requires marketers to make certain disclosures clearly and conspicuously? If so, why, and how? If not, why not?
- (15) What potentially unfair or deceptive practices concerning the marketing of prenotification negative option plans, if any, are not covered by the Rule?

- (a) What evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrates whether there is widespread existence of such practices? Please provide this evidence.
 - (b) What evidence demonstrates that such practices cause consumer injury? Please provide this evidence.
 - (c) With reference to such practices, should the Rule be modified? If so, why, and how? If not, why not?
- (16) What potentially unfair or deceptive practices concerning the marketing of negative option plans, not covered by the Rule, are occurring in the marketplace?
- (a) What evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrates whether there is widespread existence of such practices? Please provide this evidence.
 - (b) What evidence demonstrates that such practices cause consumer injury? Please provide this evidence.
 - (c) With reference to such practices, should the Rule be modified? If so, why, and how? If not, why not?
- (17) What modifications, if any, should be made to the Rule to account for changes in relevant technology or economic conditions?
- (a) What evidence supports the proposed modifications?
 - (b) How would these modifications affect the costs and benefits of the Rule for consumers and businesses, particularly small businesses?
- (18) Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?
- (a) What evidence supports the asserted conflicts?
 - (b) With reference to the asserted conflicts, should the Rule be modified? If so, why, and how? If not, why not?
 - (c) Is there evidence concerning whether the Rule has assisted in promoting national consistency with respect to the marketing and operation of prenotification negative option plans? If so, please provide that evidence.

- (19) Are there foreign or international laws, regulations, or standards with respect to negative option plans that the Commission should consider as it reviews the Rule? If so, what are they?
- (a) Should the Rule be modified in order to harmonize with these international laws, regulations, or standards? If so, why, and how? If not, why not?
 - (b) How would such harmonization affect the costs and benefits of the Rule for consumers and businesses, particularly small businesses?
- (20) Do current or impending changes in technology affect whether and how the Rule should be modified?

List of Subjects in 16 CFR Part 306

Negative Options, Trade practices.

Authority: 15 U.S.C. 41-58.

By direction of the Commission.

Donald S. Clark,
Secretary