Enforcement Policy Statement Regarding Negative Option Marketing

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unilaterally renew consumers' subscriptions when they expire, unless consumers affirmatively cancel their subscriptions by a certain date. Continuity plans allow consumers to agree in advance to receive periodic shipments of goods or provision of services (*e.g.*, bottled water delivery), which they continue to receive until they cancel the agreement. Free trial marketing (*e.g.*, free-to-pay conversions) provides consumers the opportunity to receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers can automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services. Finally, under prenotification plans[3] (*e.g.*, book-of-the-month clubs), sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely.[4]

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. At the same time, consumers suffer costs when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, unfair or deceptive negative option practices have remained a persistent source of consumer harm, often saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase.[5] To address this problem, the Commission and states regularly bring cases

[3] The Commission's Rule on the "Use of Prenotification Negative Option Plans" (16 C.F.R. Part 425) only covers this type of negative option marketing.
[4] In addition, some negative option offers include upsell or bundled offers, where sellers use consumers' billing data to sell additional products from the same seller or pass consumers' billing data to a third party for their sales. An upsell occurs when a consumer completes a first transaction and then receives a second solicitation for an additional product or service. A bundled offer occurs when a seller packages two or more products or services together so that they cannot be purchased separately.
[5] See, *e.g.*, n. 6 *infra*.

Section 5 of the FTC Act: Section 5 of the FTC Act, which prohibits unfair or deceptive

charging the consumer's account; [16] and (3) provides simple mechanisms for the consumer to stop recurring charges.[17]

ROSCA also addresses offers made by, or on behalf of, third-party sellers during, or immediately following, a transaction with an initial merchant. Specifically, ROSCA prohibits post-transaction, third-party sellers[18] from charging or attempting to charge consumers unless the seller: (1) before obtaining billing information, clearly and conspicuously discloses the offer's material terms; and (2) receives the consumer's express informed consent by obtaining the consumer's name, address, contact information, as well as the full account number to be charged, and requiring the consumer to perform an additional affirmative action indicating consent.[19] ROSCA also prohibits initial merchants from disclosing billing information to any post-transaction third-party seller for use in any Internet-based sale of goods or services.[20]

Furthermore, ROSCA provides that a violation of that Act is a violation of a Commission trade regulation rule under Section 18 of the FTC Act.[21] Thus, the Commission may seek a variety of remedies for violations of ROSCA, including civil penalties under Section 5(m)(1)(A) of the FTC Act;[22] injunctive relief under Section 13(b) of the FTC Act;[23] and consumer redress,

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[16] *See, e.g.*, *FTC v. BunZai Media Group, Inc.*; *FTC v. Health Formulas, LLC*; and *FTC v. JDI Dating, Ltd.*

[17] *See, e.g.*, *FTC v. Age of Learning, Inc.*; *FTC v. AdoreMe, Inc.*; and *FTC, State of Illinois, and State of Ohio v. One Technologies*.

[18] ROSCA defines "post-transaction third-party seller" as a person other than the initial merchant who sells any good or service on the Internet and solicits the purchase on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant. 15 U.S.C. § 8402(d)(2).

[19] 15 U.S.C. § 8402(a).

[20] 15 U.S.C. § 8402(b).

[21] 15 U.S.C. § 8404. Section 18 of the FTC Act is 15 U.S.C. § 57a.

[22] 15 U.S.C. § 45(m)(1)(A).

[23] 15 U.S.C. § 53(b).

such as damages, and other relief under Section 19 of the FTC Act.[24]

their plan's material terms before consumers subscribe. It enumerates seven material terms sellers must disclose: (1) how subscribers must notify the seller if they do not wish to purchase the selection; (2) any minimum purchase obligations; (3) the subscribers' right to cancel; (4) whether billing charges include postage and handling; (5) that subscribers have at least ten days to reject a selection; (6) 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 (7) the frequency with which announcements and forms will be sent.[29] In addition, sellers must provide particular periods during which they will send introductory merchandise, give consumers a specified period to respond to announcements, provide instructions for rejecting merchandise in announcements, and promptly honor written cancellation requests.[30]

The Prenotification Plan Rule applies only to plans like book-of-the-month clubs in which sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. These types of plans, however, account for only a small fraction of current negative option marketing. Therefore, the Rule does not reach most modern negative option marketing.[31]

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[29] 16 C.F.R. § 425.1(a)(1)(i)-(vii).

[30] 16 C.F.R. §§ 425.1(a)(2) and (3); § 425.1(b).

[31] The Prenotification Plan Rule defines "negative option plan" narrowly to apply only to prenotification plans. 16 C.F.R. § 425.1(c)(1). In 1998, the Commission clarified the Rule's application to such plans in all media, stating that it "covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies . . . ." 63 Fed. Reg. 44555, 44561 (Aug. 20, 1998). In 2017, the Commission estimated that fewer than 100 sellers ("clubs") were subject to the current Rule's requirements. 82 Fed. Reg. 38907, 38908 (Aug. 16, 2017).

Other Relevant Requirements: EFTA[32] and the Unordered Merchandise Statute[33] also

deliberately

- The date (or dates) each charge will be submitted for payment; and
- All information necessary to cancel the contract.

- The disclosure should use diction and syntax understandable to ordinary consumers and should appear in each language in which the representation that requires the disclosure appears.
- The disclosure should

disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

For all telephone and other oral offers, the disclosures should not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to understand the disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

Consent:[43] ROSCA, judicial decisions applying Section 5, and cases brought by the Commission under those laws

- obtain the consumer's unambiguously affirmative consent to the entire transaction; and
- be able to verify the consumer's consent.

Cancellation: ROSCA requires negative option sellers to provide a simple, reasonable means for consumers to cancel their contracts.[47] To meet this standard, negative option sellers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature. For example, to ensure compliance with this simple cancellation mechanism requirement, negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts.[48] In addition, negative option sellers should provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature. The negative option seller should provide, at a minimum, the simple mechanism over the same website or

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cancellation procedures, and should honor cancellation requests that comply with such procedures. In implementing effective cancellation procedures, marketers should not, among other things: hang up on consumers who call to cancel; place them on hold for an unreasonably long time; provide false information about how to cancel; or misrepresent the reasons for delays in processing consumers' cancellation requests.[49] If ROSCA applies, sellers must comply with both that statute and Section 5 of the FTC Act.

[49] *See, e.g.*, *FTC v. Universal Premium Services*; *FTC v. Remote Response*; *FTC v. Hispanexo*; *FTC v. Berkeley Premium Nutraceuticals*.