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FEDERAL TRADE COMMISSION

16 CFR Part 425

Rule Concerning the Use of Prenotification Negative Option Plans

AGENCY: Federal Trade Commission.

ACTION: Confirmation of rule.

SUMMARY: The Federal Trade Commission has completed its regulatory review of the Trade Regulation Rule Concerning Use of Prenotification Negative Option Plans as part of the Commission's systematic review of all current Commission regulations and guides, and has determined to retain the Rule in its current form.

DATES: This action is effective as of August 1, 2014.

ADDRESSES: The notice also is available on the Internet at the Commission's website, <http://www.ftc.gov>.

FOR FURTHER INFORMATION CONTACT: Robert M. Frisby, (202) 326-2098, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

In May 2009, the Federal Trade Commission ("FTC" or "Commission") requested comments on its Rule Concerning the Use of Prenotification Negative Option Plans ("Negative Option Rule" or "Rule"), as part of its comprehensive regulatory review program.¹ Specifically,

¹ The Commission schedules its regulations and guides for review on a ten-year cycle; *i.e.*, all rules and guides are scheduled to be reviewed ten years after implementation and ten years after the completion of each review. The Commission publishes this schedule annually, with

the Commission sought comments on the Rule's costs and benefits, and on whether it should expand the Rule's scope to cover negative option features other than prenotification offers involving merchandise.

After considering the comments and recent legislative developments, the Commission has determined to retain the Rule without amendment. All commenters who addressed the issue support the Rule's current provisions. Furthermore, although commenters presented evidence of abusive negative option marketing beyond prenotification offers, the Restore Online Shoppers' Confidence Act ("ROSCA")² and the Commission's proposed amendments to the Telemarketing Sales Rule ("TSR"),³ discussed in section III.D below, likely address many of those abuses. Because the Commission has not seen the full effects ROSCA will have on the marketplace, and has yet to adopt and observe the effects of its proposed amendments to the TSR, it would be imprudent to expand the Rule's coverage at this time.⁴

This document provides background, analyzes the comments, and further explains the Commission's decision.

II. Background

This section provides background on the Commission's Negative Option Rule, its activities regarding the Rule, and ROSCA.

adjustments in response to public input, changes in the marketplace, and resource demands. For more information, see www.ftc.gov/opa/2011/07/regreview.shtm.

² Public Law 111-345 (Dec. 29, 2010).

³ *Federal Trade Commission: Telemarketing Sales Rule; Notice of Proposed Rulemaking*, 78 FR 41200 (July 9, 2013).

⁴ *E.g.*, it may take time for firms to adjust to ROSCA's requirements and find a way to operate profitably, and for consumer complaints or reports regarding ROSCA violations to reach the Commission.

(TINA.org note: The following is a section of the FTC's written decision to retain the prenotification negative-option rule in its current form, wherein a negative option is defined.)

A. The Negative Option Rule

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 action, as acceptance of an offer. The Rule regulates a specific type of negative option, the prenotification negative option plan for the sale of goods. In prenotification plans, consumers receive periodic announcements of upcoming merchandise shipments and have a set period to decline the shipment. Otherwise, the company sends them the merchandise. The periodic announcements and shipments can continue for an indefinite duration.

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. The Rule became effective on June 4, 1974.

For prenotification plans, the Rule requires sellers to clearly and conspicuously disclose the plan’s material terms before consumers subscribe.⁵ 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

⁵ The Rule enumerates seven material terms that sellers must disclose clearly and conspicuously. 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 have 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 subscribers should expect to receive during a twelve month period. 16 CFR 425.1(a)(1)(i-vii).

instructions for rejecting merchandise in announcements; and promptly honoring written requests to cancel from consumers who have met any minimum purchase requirements.⁶

The Rule does not cover continuity plans or automatic renewals, and only covers trial conversions to the extent that they also qualify as prenotification plans. In continuity plans, consumers receive regular merchandise shipments or access to services until they cancel the agreement. In trial conversions, consumers receive products or services for a trial period at no charge or for a reduced price. If the consumers do not cancel before the end of the trial period, the product shipments or provision of services continue and consumers incur charges. In automatic renewals, a magazine seller, for example, may automatically renew consumers' subscriptions when they expire, unless consumers cancel their subscriptions.

B. Commission Activity Relating to Regulation of Negative Options

In January 2007, the Commission hosted a workshop to analyze the marketing of goods and services through negative option offers.⁷ The workshop featured consumer representatives, academics, and industry leaders who discussed the pros and cons of negative option offers and explored ways to make effective disclosures on the Internet.

Based on the workshop, in January 2009, the Commission issued a staff report.⁸ Among other things, the report set forth five principles to guide industry in complying with Section 5 of the Federal Trade Commission Act ("FTC Act")⁹ when making online negative option offers. They

⁶ 16 CFR 425.1(a)(2) and (3); 425.1(b).

⁷ For materials and the agenda for the workshop, see <http://www.ftc.gov/bcp/workshops/negativeoption/index.shtml>.

⁸ For the report, see <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf>.

⁹ 15 U.S.C. 45.

address: (1) the disclosure of material terms; (2) the appearance of disclosures; (3) the timing of disclosures; (4) obtaining consumers' affirmative consent; and (5) cancellation procedures.

In May 2009, the Commission published an Advance Notice of Proposed Rulemaking ("ANPR") seeking comment on the Rule as part of the Commission's ongoing comprehensive regulatory review program.¹⁰ The ANPR sought comment on the Rule's overall costs, benefits, necessity, and regulatory and economic impact. The ANPR also asked for comment on whether the Commission should expand the Rule to cover other types of negative option offers.¹¹

C. ROSCA

After the Commission's second comment period closed, Congress enacted ROSCA in December 2010 to address ongoing problems with online negative option marketing. This statute prohibits any person from charging or attempting to charge any consumer for goods or services sold in an Internet transaction through any negative option feature,¹² including trial conversions, continuity plans, and automatic renewals, unless the person: (1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before charging the

¹⁰ *Federal Trade Commission: Rule Concerning the Use of Prenotification Negative Option Plans: Advance Notice of Proposed Rulemaking; Request for Comments*, 74 FR 22720 (May 14, 2009).

¹¹ At the request of several commenters, in August 2009 the Commission reopened the comment period for sixty days until October 13, 2009. *Federal Trade Commission: Rule Concerning the Use of Prenotification Negative Option Plan; Re-opening the record for submission of public comments*, 74 FR 40121 (Aug. 11, 2009).

¹² ROSCA incorporates the definition of "negative option feature" from the Commission's Telemarketing Sales Rule, 16 CFR 310.2(u).

consumer's account; and (3) provides simple mechanisms for a consumer to stop recurring charges.¹³

Another ROSCA provision addresses offers made by, or on behalf of, a third-party seller during, or immediately following, a transaction with an initial merchant.¹⁴ In connection with these transactions, ROSCA prohibits post-transaction third party sellers from charging or attempting to charge any consumer's financial account unless (1) before obtaining billing information, the seller clearly and conspicuously discloses the material terms of the offer; and (2) the seller receives the consumer's express informed consent by (A) obtaining from the consumer the full account number of the account to be charged and the consumer's name and address and a means to contact the consumer; and (B) requiring the consumer to perform an additional affirmative action indicating consent.¹⁵ The Act 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.¹⁶

ROSCA provides that a violation of the Act shall be treated as a violation of a Commission trade regulation rule under Section 18 of the FTC Act.¹⁷ Thus, the Commission may seek a wide variety of remedies for violations of ROSCA, including civil penalties under Section 5(m)(1)(A)

¹³ 15 U.S.C. 8403.

¹⁴ 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).

¹⁵ 15 U.S.C. 8402(a).

¹⁶ 15 U.S.C. 8402(b).

¹⁷ 15 U.S.C. 8404. Section 18 of the FTC Act is 15 U.S.C. 57a.

of the FTC Act;¹⁸ injunctive and equitable monetary relief under Section 13(b) of the Act;¹⁹ and consumer redress, damages, and other relief under Section 19 of the Act.²⁰ States can enforce ROSCA as well.²¹

Although Congress charged the Commission with enforcing ROSCA, it did not provide rulemaking authority under the Administrative Procedure Act.²² Hence, the Commission would have to rely on its existing authority under Section 18 of the FTC Act to amend the Negative Option Rule. As the Commission has noted, “the current rulemaking procedures prescribed by Section 18 (often referred to as ‘Magnuson-Moss’ rulemaking) are complex, cumbersome, and time-consuming, resulting in rulemaking proceedings lasting many years.”²³

III. Regulatory Review Comments and Analysis

The Commission received 14 comments in response to the ANPR during the initial comment period and an additional 99 after the Commission reopened the comment period.²⁴ Most were filed by individuals and firms, but the Commission also received comments from state

¹⁸ 15 U.S.C. 45(m)(1)(A).

¹⁹ 15 U.S.C. 53(b).

²⁰ 15 U.S.C. 57b(a)(1) and (b).

²¹ 15 U.S.C. 8405.

²² 5 U.S.C. 552 *et seq.*

²³ *See Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers*, Before the Senate Committee on Commerce, Science, and Transportation (Feb. 4, 2010), available at <http://www.ftc.gov/os/testimony/P064814financial-services.pdf>.

²⁴ The comments are available on the Commission’s website at <http://www.ftc.gov/os/comments/prenotnegativeoprul/index.shtm> and <http://www.ftc.gov/os/comments/negoprulereopen/index.shtm>.

and local law enforcement agencies as well as trade associations. Specifically, the Commission received comments from the Attorneys General of Colorado, Florida, Pennsylvania, Washington, and Vermont (Vermont also filed on behalf of 18 other states²⁵); as well as the Permitting, Licensing, and Consumer Protection Division of Broward County, Florida (“Broward County”). The Commission also received comments from the American Association of Law Libraries (“AALL”),²⁶ Direct Marketing Association (“DMA”),²⁷ Electronic Retailing Association (“ERA”),²⁸ Promotion Marketing Association (“PMA”),²⁹ and Magazine Publishers of America (“MPA”).³⁰ Commenters agreed that the Commission should retain the current Rule, but differed on whether it should expand the Rule’s scope. Notwithstanding the evidence provided by law enforcement agencies, the Commission declines to expand the Rule because the intervening passage of ROSCA may sufficiently address the unfair and deceptive negative option practices described in the comments. Law enforcement agencies and one trade association supported

²⁵ Vermont filed on behalf of Arkansas, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee, and West Virginia. Vermont, 543809-00098. Later Connecticut, Delaware, Louisiana, Mississippi, and New Jersey joined Vermont’s comment. Vermont, 543809-00105.

²⁶ AALL is a non-profit organization with nearly 5,000 members. AALL, 543809-00102, at 1.

²⁷ DMA represents more than 3,500 companies, including a majority of the Fortune 100 companies. DMA, 541909-00011, at 2.

²⁸ ERA is the leading trade association representing the electronic retailing industry. ERA, 541909-00010, at 2.

²⁹ PMA is a not-for-profit organization and resource for research, education, and collaboration for marketing professionals. PMA, 543809-00097, at 1.

³⁰ MPA represents hundreds of domestic publishing companies, international publishers, and associate members that publish over a 1,000 different titles. MPA, 541909-00008, at 1.

expansion to cover other types of negative option features, presenting evidence of significant abuses that the Rule does not cover. Conversely, most trade associations argued against expansion, asserting that laws and guidance currently in place sufficiently protect consumers. To the extent ROSCA does not cover unfair and deceptive negative option marketing practices, the Commission can and will continue to address such practices using its other enforcement tools. In addition, the Commission will continue to look at negative option practices as the effects of ROSCA become clear.³¹

A. Support for Retaining the Rule

All the commenters addressing the issue supported the Rule's current provisions. Indeed, none of the commenters advocated repealing the Rule or narrowing its scope. For example, Broward County stated that the Rule protects consumers by requiring disclosures that make them aware of their financial obligations and imposes only nominal costs.³² The trade associations concurred. For example, DMA "believes that the current Negative Option Rule and the broader regulatory framework are working effectively, and strike the right balance between consumer protection and commerce."³³ Similarly, ERA "strongly believes that the current regulatory

³¹ The Commission notes that 46 states and the District of Columbia recently announced a \$30 million settlement resolving allegations that Affinion Group, Inc., Trilegiant Corp., and Webloyalty.com engaged in deceptive negative option marketing practices. *See* http://www.illinoisattorneygeneral.gov/pressroom/2013_10/20131010.html. The defendants are required to comply with ROSCA. *See* <https://www.oag.state.tx.us/newspubs/releases/2013/AFJPI12.PDF>.

³² Broward County comment, 543809-00007, at 1 and 6.

³³ DMA, 541909-00011, at 3.

structure for offers with an advance consent feature adequately balances the concerns of businesses, federal and state regulators, and consumers.”³⁴

In light of these comments, the Commission concludes that a continuing need exists for the Rule, and that costs imposed on businesses are reasonable.

B. Proposals to Expand the Rule

The comments diverged sharply, however, on whether to expand the Rule. All of the state and local law enforcement agencies as well as AALL advocated expanding the Rule, while the rest of the trade associations opposed expansion as explained in section III.C below.³⁵

1. State and Local Law Enforcement

The state law enforcement agencies urged the Commission to expand the Rule to cover additional types of negative options, particularly trial conversion offers. They also favored covering the marketing of services and not just merchandise.

Mainly to expand the Rule to address all types of negative option marketing, each of these agencies also proposed adding a variety of new requirements and prohibitions, most of which would help ensure that sellers (1) disclose materials terms clearly and conspicuously;³⁶ (2) obtain informed, affirmative consent before charging or continuing to charge consumers;³⁷ or (3)

³⁴ ERA, 541909-00010, at 4.

³⁵ Pennsylvania filed a one page comment indicating that the Commission should extend the Rule to cover additional types of negative option offers. Pennsylvania, 541909-00012.

³⁶ Florida, 543809-00099, at 10; and Washington, 541909-00009, at 1. Broward County proposed defining “clearly and conspicuously” and requiring a standardized format for disclosing the terms of negative option offers and obtaining billing information from consumers on the Internet. Broward County, 543809-00007, at 7-9.

³⁷ Vermont and the 18 states joining its comment favored (1) prohibiting charges following a “free” trial without receiving the consumer’s affirmative consent at the end of the trial;

maintain practices and procedures facilitating easy cancellation so that consumers can avoid charges for unwanted merchandise or services.³⁸ The specific proposals of the agencies vary, but with a few exceptions³⁹ fall into the three categories above. In addition, several individual comments advocated for similar proposals, such as expanding the Rule to cover other types of negative options and adding disclosure and notice requirements.⁴⁰

(2) mandating periodic notification of charges in trial conversions; and (3) limiting to 18 months the duration of the time period a consumer may be charged, and requiring an affirmative “opt in” to exceed that time limit. Vermont, 543809-00098, at 7-8. Colorado favored (1) and (2) above. Colorado, 543809-00096, at 7. Florida favored requiring sellers to obtain consent at the end of the free trial and before imposing any renewal charges on a recurring term subscription. Florida, 543809-00099, at 8-9. Washington proposed requiring sellers to (1) obtain billing information directly from consumers during the transaction; (2) obtain verifiable authorization from the consumer to be billed; and (3) obtain acceptance through an affirmative act by the consumer. Washington also proposed limiting the number of months a seller can charge a consumer before obtaining new authorization to continue imposing charges. Washington suggested a limit of 18 months. Washington, 541909-00009, at 7-8. Florida favored requiring express, informed consent of the offer, and tightening requirements for third-party billing mechanisms. Florida, 543809-00099, at 1-2 and 7-9. It also favored requiring disclosure in confirmation notices following the sale at no less than six month intervals. Florida, 543809-00099, at 10.

³⁸ Colorado, Vermont and the 18 states joining Vermont’s comment supported requiring sellers to permit consumers to cancel in the same method of communication as the solicitation to the consumer. Colorado, 543809-00096, at 7; Vermont, 543809-00098, at 8. Florida favored this too, and argued that cancellation should be acknowledged with a cancellation number. Florida also supported disclosing the requirements for cancellation in written confirmation of the offer and periodic disclosures, and providing sufficient time to cancel after the consumer receives acknowledgment of the offer and accepts the charges. Florida, 543809-00099, at 9-11. Washington proposed requiring sellers to: (1) identify themselves on billing statements; and (2) provide for easy cancellation — at a minimum by allowing consumers to cancel using the same means they used to accept the offer. Washington, 541909-00009, at 8.

³⁹ Broward County proposed some requirements beyond those categories for trial periods: requiring trial periods to start on the date the consumer receives the product and prohibiting sellers from billing consumers prior to the expiration of the trial period. Broward County, 543809-00007, at 12. In addition, Florida proposed prohibiting the marketing of negative option contracts to minors. Florida, 543809-00099, at 11.

⁴⁰ *See, e.g.*, comments 541909-00001, 541909-00007, and 543809-00004. A total of 98 individuals submitted comments. Most did not comment on any specific Rule provisions.

In support of their proposals, the agencies cited thousands of consumer complaints regarding negative options,⁴¹ their own experience,⁴² and consumer survey evidence⁴³ showing that many consumers are not aware of their enrollment in negative option plans. According to the agencies, consumers experience problems, including inadequate disclosures, the imposition of charges without the consumers' informed consent, difficult cancellation procedures, failure to honor cancellation requests, and trial offers where consumers forget they have consented to future

Instead, these comments generally either complained about the practices of a particular firm or urged greater regulation of negative option offers. Some proposed changes that the Commission lacks authority to adopt, such as requiring licenses to make negative option offers (*e.g.*, comment 541909-00003). A few individual and business comments urged the Commission not to expand the Rule (*e.g.*, comments 543809-00101 and 541909-00014).

⁴¹ The agencies reported receiving thousands of complaints. For example, Florida reported over 2,000 complaints in four of its pending negative option investigations alone. Florida, 543809-00099, at 2.

⁴² The agencies reported that they have investigated or taken enforcement action against sellers engaged in negative option marketing. For example, Florida reported handling nearly 50 investigations involving negative option marketing since 1998, the overwhelming majority of which involve free-to-pay conversions with automatic renewal or continuity features. Florida, 543809-00099, at 2 and Appendix A.

⁴³ Several states reported survey results underscoring that many consumers incur charges for memberships in negative option plans of which they are unaware and do not want. In May 2006, the Iowa Attorney General announced the results of a survey of consumers enrolled in negative option plans run by Memberworks, Inc., now known as Vertrue, Inc. Vermont, 543809-00098, at 6; Colorado, 543809-00096, at 5-6. Four hundred surveys were mailed to consumers. Of the 88 consumers who responded, 67% were unaware of their membership in the negative option plan. Almost all of the remaining consumers had never used the plan, or believed they had cancelled their membership. None expressed satisfaction with the membership. In 2007, Vermont surveyed state residents who had been billed for discount plan memberships involving a trial conversion negative option. Vermont, 543809-00098, at 6; Colorado, 543809-00096, at 6. Of the 100 respondents, 67 did not recall signing up for the plan and 53 answered expressly that they did not agree to be billed. Only six responded that they had ever used the plan. *Id.*

charges.⁴⁴ The agencies argued that this evidence demonstrates a need for an expanded Rule to better protect consumers.

In addition, many agencies noted the increasing frequency of Internet negative option marketing. For example, Florida provided information about 47 negative option investigations from 1997 to 2009. Most of these involved Internet negative option marketing, including 18 that involved solely Internet marketing. In addition, 25 of the 28 investigations since 2005 involved Internet marketing. Sixteen of the 25 involved solely Internet marketing.⁴⁵ Washington noted that sellers frequently make free-to-pay offers on the Internet, and that previously such offers were made most frequently in telemarketing and direct mail.⁴⁶ Similarly, Broward County stated that most free trial conversion negative option sales transactions occur on the Internet.⁴⁷

2. AALL Proposals

AALL advocated expanding the scope of the Rule in several respects and adding a number of prohibitions and requirements, many of which resemble the proposals described above. Like the law enforcement agencies, it supported expanding the Rule to cover other types of negative

⁴⁴ Colorado, Vermont, and the 18 states joining Vermont's comment contended that the problem with trial conversions stems less from the failure to make up-front disclosures and obtain consent than from the fact that consumers enticed by a free trial offer are unlikely to remember their spur-of-the-moment assent to periodic charges and therefore unlikely to scrutinize their accounts for unwanted charges. Colorado, 543809-00096, at 6; Vermont, 543809-00098, at 7. Florida agreed that free trial offers can lure consumers into a state of forgetfulness. Florida, 543809-00099, at 9.

⁴⁵ Florida, 543809-00099, at Appendix A. Florida reported that this appendix is not an exhaustive list of its negative option investigations. For example, it does not include non-public investigations. *Id.* at 2.

⁴⁶ Washington, 541909-00009, at 5.

⁴⁷ Broward County, 543809-00007, at 13.

option offers. It also advocated expanding the Rule to protect institutional consumers, such as law libraries, as well as individuals, and to cover online subscriptions and digital materials, such as e-books, podcasts, and applications.

AALL favored adding some of the same prohibitions and requirements favored by the state and local law enforcement agencies as well as a host of others to address negative option marketing by firms selling legal publications. For example, AALL urged the Commission to impose a maximum duration of no more than five years on negative option plans.⁴⁸ It also proposed a number of provisions to address the shipment of unordered publications and facilitate cancellation of unwanted negative option plans.⁴⁹

In support of its numerous proposals, AALL cited the experience of its members who have received unordered and unwanted legal publications. It also cited two Florida law enforcement actions involving negative option marketing practices affecting libraries.

C. Opposition to Expanding the Rule

Unlike AALL, the other four trade associations opposed any expansion. All argued that existing Commission authority and guidance, along with industry guidance, protect consumers adequately. They also argued that prescriptive regulation would harm consumers.

DMA urged the Commission “to avoid unnecessary regulation that would limit consumers’ ability to learn about valuable goods and services, hinder innovation, or inhibit commerce,

⁴⁸ AALL, 543809-00102, at 5.

⁴⁹ For example, AALL proposed that the Commission prohibit sellers from: (1) sending unordered books unless they are clearly marked as such; (2) sending invoices or dunning notices for unordered books; and (3) commanding payment for or the return of unordered books. These practices violate the Postal Reorganization Act of 1970, 39 U.S.C. 3009. AALL, 543809-00102, at 4.

especially during these challenging economic times.”⁵⁰ It stated that robust industry self-regulation, coupled with existing FTC enforcement authority, effectively meets the needs of both consumers and businesses in this area. DMA also explained that its members are required to comply with Article 12 of its *Guidelines for Ethical Business Practice*, which addresses negative option marketing in detail. Non-complying members that fail to come into compliance face expulsion and may be reported to government regulators.⁵¹

Similarly, ERA and PMA contended that (1) the Commission already possesses the enforcement tools necessary to protect consumers, including Section 5 of the FTC Act, the Postal Reorganization Act of 1970 (“PRA”),⁵² the Electronic Fund Transfer Act (“EFTA”),⁵³ the Negative Option Rule, and the TSR; (2) guidance documents published by the Commission provide adequate concrete guidance and direction to the industry; (3) the Commission should avoid a prescriptive approach that will deprive marketers of the flexibility to adapt to the rapidly evolving marketplace; and (4) the record does not indicate that deception results from advertising that complies with the above laws and guidance.⁵⁴ They also noted the existence of various industry self-regulatory programs that help prevent deception.⁵⁵ ERA pointed to its Advance

⁵⁰ DMA, 541909-00011, at 1.

⁵¹ *Id.* at 4-5.

⁵² 39 U.S.C. 3009.

⁵³ 15 U.S.C. 1693-1693r.

⁵⁴ ERA, 541909-00010, at 3-4; PMA, 543809-00097, at 3.

⁵⁵ PMA, 543809-0097, at 10.

Consent Guidelines, which cover the full range of negative option programs currently offered in the marketplace, including free trial offers, continuity plans, and automatic renewals.⁵⁶

Finally, MPA argued that the Commission's current guidance and enforcement ability sufficiently protect consumers.⁵⁷ Like DMA and ERA, MPA has developed guidance for its members on negative option marketing.⁵⁸ It too touted the benefits of negative option plans and the need for flexibility in responding to a rapidly changing marketplace.

D. Analysis

The comments advocating expansion of the Rule argue convincingly that unfair, deceptive, and otherwise problematic negative option marketing practices continue to cause substantial consumer injury, despite determined enforcement efforts by the Commission and other law enforcement agencies. Indeed, negative option arrangements not covered by the Rule, such as trial conversions and continuity plans, have accounted for most of the Commission's recent enforcement activity in this area.⁵⁹ The record also indicates that Internet marketing represents a

⁵⁶ ERA, 541909-00010, at 13-14.

⁵⁷ MPA, 541909-00008, at 1.

⁵⁸ *Id.* at 5-6.

⁵⁹ Over the last few years, the Commission has filed a number of law enforcement actions challenging negative option marketing practices, including, for example, *FTC v. Process America, Inc.*, No. 14-0386-PSG-VBKx (C.D. Cal. Jan. 16, 2014) (processing of unauthorized charges relating to negative option marketing), <http://www.ftc.gov/news-events/press-releases/2013/11/ftc-settlements-crack-down-payment-processing-operation-enabled>; *FTC v. Willms*, No 2:11-cv-00828 (W.D. Wash. May 16, 2011) (Internet free trials and continuity plans), <http://www.ftc.gov/opa/2011/05/jessewillms.shtm>; *FTC v. Moneymaker*, No. 2:11-cv-00461-JCM-RJJ (D. Nev. Mar. 28, 2011) (Internet trial offers and continuity programs), <http://www.ftc.gov/opa/2011/04/moneymaker.shtm>; *FTC v. Johnson*, No. 2:10-cv-02203-RLH-GWF (D. Nev. Dec. 21, 2010), (Internet trial offers), <http://www.ftc.gov/opa/2010/12/iworks.shtm>; and *FTC v. John Beck Amazing Profits, LLC*, No. 2:09-cv-04719 (C.D. Cal. June 30, 2009) (infomercial and telemarketing trial offers and continuity

large and growing share of negative option marketing, particularly that involving free trial conversions.⁶⁰

Congress reached the same conclusion and, as a result, enacted ROSCA to protect consumers from deceptive online negative option practices. The additional enforcement tools provided by ROSCA likely will assist the Commission in stopping unlawful negative option practices in the significant and growing slice of the market involving the Internet. Due to the availability of these promising new tools and uncertainty regarding how ROSCA will affect the marketplace, the Commission declines to propose amendments to the Negative Option Rule at this time.

ROSCA addresses many of the concerns raised in the comments by requiring Internet sellers of any negative option type, including trial conversions, to disclose material terms, obtain informed consent, and provide simple mechanisms for consumers to stop recurring charges.⁶¹ ROSCA also provides the Commission with civil penalty authority, thereby bolstering the Commission's enforcement tools in this area.⁶²

programs), <http://www.ftc.gov/opa/2009/07/shortchange.shtm>; see also "An Overview of the FTC's Enforcement Actions Concerning Negative Option Marketing," a presentation delivered during the Commission's 2007 "Negative Options: An FTC Workshop Analyzing Negative Option Marketing," available at www.ftc.gov/bcp/workshops/negativeoption/presentations/Ashe.pdf.

⁶⁰ See discussion in section III.B.1 above.

⁶¹ ROSCA also furthers the principles to guide negative option marketers set forth in the Commission's 2009 report on its negative option workshop, including adequate disclosures, informed consent, and reasonable cancellation procedures.

⁶² Civil penalty authority is particularly useful in cases where it is difficult to calculate consumer injury, administer a redress program, or prove that the violator made substantial gains from its unlawful conduct.

Furthermore, ROSCA provides additional protections for consumers who receive an offer from a third-party seller immediately after making an Internet purchase. Specifically, it requires that third-party sellers provide adequate disclosures and obtain affirmative consent and billing information directly from the consumer before imposing charges rather than charging the consumer using billing information obtained from the initial seller.⁶³

The Commission recognizes that ROSCA does not apply to negative option marketing in media other than the Internet. However, as noted above, the record indicates that Internet marketing represents a large and growing share of negative option marketing. Accordingly, the Commission can and will continue to challenge deceptive or unfair negative option practices as needed under the Negative Option Rule, Section 5 of the FTC Act, the TSR, EFTA,⁶⁴ and the PRA,⁶⁵ and will consider whether changes in the marketplace warrant reevaluation of the Commission's rules as they apply to negative option marketing in specific contexts.

The TSR, like ROSCA, addresses many of the negative option abuses identified by the comments. For example, the Commission previously addressed trial conversions and other

⁶³ This provision applies to all Internet marketing, including negative option marketing.

⁶⁴ Among other things, EFTA prohibits imposing recurring charges on a consumer's bank account without written authorization. EFTA provides that the Commission shall enforce its requirements, except to the extent that enforcement is specifically committed to some other Government agency, and that a violation of any of its requirements shall be deemed a violation of the FTC Act. Accordingly, the Commission has authority to seek the same injunctive and monetary equitable relief for EFTA violations that it can seek for other Section 5 violations.

⁶⁵ The PRA provides that mailing unordered merchandise, or a bill or dunning communications for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of Section 5 of the FTC Act. Accordingly, the Commission has authority to seek the same remedies for PRA violations that it can seek for other Section 5 violations. For example, the Commission can seek civil penalties pursuant to Section 5(m)(1)(B) of the FTC Act from violators who have actual knowledge that the Commission has found mailing unordered merchandise unfair.

negative option marketing in the context of outbound telemarketing by amending the TSR in 2003.⁶⁶ In addition, the Commission recently proposed amending the TSR to prohibit the use of payment methods often used in deceptive marketing, including of negative options, such as unsigned checks and remotely created “payment orders.”⁶⁷ Furthermore, in May 2013, the Commission announced that it plans to initiate a regulatory review of the TSR.⁶⁸ Commenters in that review can raise issues related to negative option marketing.

If the Commission concludes that ROSCA and its other enforcement tools do not provide adequate protection for consumers, it can then consider, based on a more complete record, whether and how to amend the Rule. The Commission can also consider whether to recommend that Congress amend ROSCA or take some other action.⁶⁹

By direction of the Commission.

Donald S. Clark,
Secretary.

⁶⁶ See *Federal Trade Commission: Telemarketing Sales Rule; Final Amended Rule*, 68 FR 4580, 4594-97 (Jan. 29, 2003) (codified at 16 CFR 310.2(p), 310.2(u), 310.3(a)(1)(vii), and 310.6(b)(4)-(6)) (telemarketers must disclose all material terms and conditions of negative option offers, including “free-to-pay conversion” offers, in outbound telemarketing calls and upsells).

⁶⁷ *Federal Trade Commission: Telemarketing Sales Rule; Notice of Proposed Rulemaking*, 78 FR 41200 (July 9, 2013). The TSR Notice of Proposed Rulemaking noted negative option cases where the defendants used unauthorized remotely created checks. *E.g.*, *FTC v. FTN Promotions, Inc.*, Civ. No. 8:07-1279 (M.D. Fla. Dec. 30, 2008) (Stip. Perm. Inj.) (defendants allegedly caused more than \$171 million in unauthorized charges to consumers accounts for bogus travel and buyers’ clubs in part by using unauthorized remotely created checks).

⁶⁸ *Federal Trade Commission: Notice of Intent to Request Public Comments*, 78 FR 30798 (May 23, 2013).

⁶⁹ For example, the Commission could seek authority to conduct a rulemaking using more expeditious procedures than those set forth in Section 18.