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New Trials (and Tribulations) for Negative Option Marketers

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On February 9, 2009 the Federal Trade Commission issued a staff report broadly defining "negative option marketing" as a "category of commercial transactions in which sellers interpret a customer's failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services." FTC staff identified five principles to guide online marketers in complying with Section 5 of the FTC Act. Full details are at www.ftc.gov.

First, marketers should disclose the offer's material terms clearly. The terms include: the existence of the offer, the total cost, the transfer of a consumer's billing information to a third party (if applicable), and how to cancel.

In addition, marketers should make the appearance of disclosures conspicuous. Place them in locations on the Web site where they are likely to be seen, label the disclosures to indicate the importance of the information and use text that is easy to read on the screen.

Disclosure of the offer's material terms must come before consumers incur a financial obligation. And marketers should also obtain consumers' affirmative consent to the offer. Clicking a button such as "I agree" is a sufficient affirmative step to demonstrate consent.

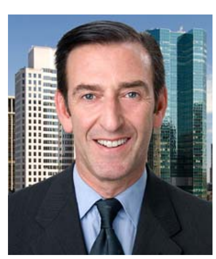
Lastly, marketers should not impede the effective operation of promised cancellation procedures. Cancellation procedures should not be burdensome for consumers, such as those requiring consumers to wait on hold for unreasonably long periods of time.

These principles do not have the force of law and are intended merely to guide industry in complying with Section 5. However, online marketers of negative option offers should take careful note of these FTC principles, as noncompliance may be the basis for an investigation.

Indeed, since the FTC issued these guidelines over a year ago, the FTC has taken both law enforcement and regulatory actions addressing the issue of allegedly deceptive marketing practices using negative option features. In July 2009, the FTC announced "Operation Short Change", a sweep of law enforcement actions alleging deceptive efforts to take advantage of the economic downturn to bilk vulnerable consumers through offers such as work-from-home jobs, business opportunities, and government grants. Some of these offers contained negative option features that allegedly failed to adequately disclose that consumers would be enrolled in a costly monthly membership program.

And in fall 2009, the FTC reopened the public comment period for the review of its Prenotification Negative Option Rule [which now covers only certain plans where consumers receive periodic announcements that merchandise will be delivered unless they decline the items within a set time]. In its request for comments, the FTC clearly signaled that they were interested in whether this Rule should be broadened to cover additional types of offers marketed with negative option features.

Finally, state AGs have been more aggressive than ever before in pursuing online marketers who allegedly employ deceptive trial offers, especially in the dietary supplement area. Careful attention to the drafting of negative option offers with the requisite disclosures is now more important than ever, in order to avoid unwanted regulatory scrutiny down the road.



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