






Business Blog

Acc-cen-tuate the negative?

By: Lesley Fair | July 29, 2014 |   

Acc-cen-tuate the positive.

Eliminate the negative.

Latch on to the affirmative.

And don't mess with Mr. In-Between.

That's how the catchy Bing Crosby-Andrews Sisters number went in the 40s. When it comes to negative options now, the message for marketers is to explain things positively.

[The FTC has a process in place for reviewing rules and guides.](#) Think of it as regulatory spring cleaning. We consider how times or technology have changed, and ask for feedback on whether a rule still serves its purpose. A while back, we asked for input on the Negative Option Rule. After considering your comments, [the FTC has decided to keep the Rule in place.](#) But if your company uses any form of negative option marketing, other developments suggest that now may be a good time for a compliance check-up.

Although people call it the Negative Option Rule, the official name – [Use of Prenotification Negative Option Plans](#) – offers insights into its applicability. Different methods fall within the negative option category, but the Rule applies only to one form: where consumers get periodic announcements of upcoming merchandise shipments, have a window of time to decline, and then get the item if they don't say no. (Book and record clubs often use this method.) If you're covered by the Rule, the FTC has decided to retain it without change.

But what about other negative option methods? There are **continuity plans**, where consumers get regular shipments of merchandise or access to a service until they cancel the agreement. Then there are **trial conversions**, where people get products or services for a short time at no charge or at a reduced rate. If they don't cancel within a set window, they start getting billed periodically at a higher

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price. Under **automatic renewals** – think magazine subscriptions, for example – companies continue to renew subscriptions until consumers affirmatively cancel.

What's known as the Negative Option Rule generally doesn't cover those methods. But don't stop reading just yet because the long-standing consumer protection principles of the FTC Act still apply in those contexts. Newer on the scene is the [Restore Online Shoppers' Confidence Act \(ROSCA\)](#). That law makes it illegal to charge a consumer for goods or services sold in an internet transaction through any negative option method – including trial conversions, continuity plans, or automatic renewals – unless the business:

1. clearly and conspicuously discloses all material terms of the transaction before getting consumers' billing information;
2. gets consumers' express informed consent before charging their accounts; and
3. offers simple ways for people to stop the recurring charges.

ROSCA also addresses offers made by or on behalf of a third party during, or just after, a transaction with an initial merchant. (You know – you place an online order and then immediately get an offer on behalf of a different seller.)

The other development of interest to companies that use negative option marketing is the [proposed change to the FTC's Telemarketing Sales Rule](#) that would ban the use of payment methods like unsigned checks and remotely created "payment orders" that are often used in questionable promotions, including deceptive negative options.

Although some of the comments received in response to the Negative Option Rule review pointed to problems with other forms of negative option marketing, the FTC concluded that ROSCA and the proposed TSR amendments will likely address some of those concerns.

So what does all this mean for your business? **First**, if you've been covered by the Negative Option Rule, [you're still covered and the text remains unchanged](#). **Second**, if you use other negative option methods, it's the law – and it's always been the law – that you must clearly and conspicuously disclose material terms up front and charge consumers only with their express consent. **Third**, in recent years, the FTC has taken law enforcement action against dozens of marketers who have engaged in illegal negative option practices. We'll continue that vigorous fight using the FTC Act, the TSR, and other law enforcement tools.

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