

**Supporting Statement  
Trade Regulation Rule  
Negative Option Plans by Sellers in Commerce  
16 C.F.R. Part 425  
(Control Number: 3084-0104)**

**(1) Necessity for Collecting the Information**

On June 7, 1974, the Federal Trade Commission issued a Trade Regulation Rule on the Use of Negative Option Plans by Sellers in Commerce (“Negative Option Rule” or “Rule”) (16 C.F.R. Part 425). The Negative Option Rule governs the operation of prenotification subscription plans. Under these plans, sellers ship merchandise, such as books, compact discs, or tapes, automatically to their subscribers and bill them for the merchandise if consumers do not expressly reject the merchandise within a prescribed time. The Rule protects consumers by: (a) requiring that promotional materials disclose the terms of membership clearly and conspicuously; and (b) establishing procedures for the administration of such “negative option” plans.

**(2) Use of the Information**

As indicated above, the information disclosures required by the Rule are used by consumers to weigh the benefits and burdens of negative option plans. These disclosures inform subscribers and potential subscribers of their substantive rights under the Rule. In this respect, the Negative Option Rule requires sellers to disclose that the subscriber must affirmatively decline merchandise by notifying the seller not to send the featured merchandise. Specifically, the seller must disclose the following information:

- that the subscriber will have at least ten days in which to decline the merchandise;
- the subscriber's minimum purchase obligation;
- the subscriber's right to cancel the membership after meeting the minimum obligation;
- the frequency with which the seller will send announcements and the maximum number of announcements that will be sent in a 12-month period;
- whether billing charges will include postage and handling; and
- that the seller will give full credit, and guarantee return postage, for merchandise returned by subscribers who have not had at least ten days in which to mail a merchandise rejection form.

The Rule defines the failure to make these disclosures as an unfair or deceptive act or practice.

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**(3) Consideration to Use Improved Information Technology to Reduce Burden**

The Rule's disclosure requirements are technology-neutral, and apply to advertisements, coupons, and other promotional materials regardless of format. Thus, so long as the Rule's requirements are satisfied, an advertisement, coupon, or other promotional material would not violate the Rule merely because it is disseminated in electronic form (e.g., Internet, e-mail). In this way, the Rule leaves regulated entities free to take advantage of improved information technology and is consistent with the Government Paperwork Elimination Act, Pub. L. 105-277, § 1704, 44 U.S.C. § 3504 note.

**(4) Efforts to Identify Duplication/Availability of Similar Information**

No other federal regulation in this area exists. Some states regulate negative option marketing, requiring disclosures similar to those required by the Rule. Nonetheless, the Rule's disclosures are not needlessly duplicative with regulation at the state level. The primary industries that use negative option plans - book, music, and video clubs - have a nationwide customer base that necessitates federal regulation, and the Negative Option Rule has prevented a proliferation of conflicting state laws.

**(5) Efforts to Minimize Burden on Small Businesses**

Although the Rule does not exclude small businesses, negative option plans covered by the Rule are generally - if not exclusively - offered by book and record clubs that are operated by large, national companies. The Commission's review of the Rule in 1997 under its systematic rule review program found that the Rule imposed no significant economic impact on small businesses. See 63 Fed. Reg. 44555 (August 20, 1998).

**(6) Consequences of Conducting Collection Less Frequently**

The frequency of the disclosures is determined by how often a company solicits customers. The Rule ensures that these disclosures are provided so that consumers have the information necessary to make informed purchasing decisions.

**(7) Circumstances Requiring Collection Inconsistent with Guidelines**

The collection of information in the Rule is consistent with guidelines contained in 5 C.F.R. 1320.5(d)(2).

**(8) Consultation Outside the Agency**

In 1997, the Commission sought, as part of its systematic ten-year review of all current regulations and guides as resources permit, public comment about the overall costs and benefits and the continuing need for the Negative Option Rule. Comments indicated that the Rule is working effectively in regulating prenotification negative option plans for the sale of goods.

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Most of the comments supported retaining the Rule without change. The comments stated that both consumers and the industry benefit from the Rule because the disclosures required by the Rule educate consumers about their responsibilities under prenotification negative option plans and other Rule requirements ensure that operators of the plans follow procedures that help protect consumers. Consumer and industry members alike believe that the Rule fosters long-term relationships between consumers and sellers. At the conclusion of its review, the Commission decided to retain the Rule without substantive change and made only minor, technical amendments that did not impose any additional information collection requirements.

We anticipate initiating the next periodic review of the Negative Option Rule during 2009. *See* 73 Fed. Reg. 11844 (March 5, 2008). The Commission plans to request public comments on, among other things, the economic impact of, and the continuing need for, the Rule; possible conflict between the rules and state, local, or other federal laws or regulations; and the effect on the Rule and guide of any technological, economic, or other industry changes.

Finally, the Commission sought public comment in connection with its latest PRA clearance request for this Rule. *See* 73 Fed. Reg. 39700 (July 10, 2008) (no comments were received), and is doing so again contemporaneously with this submission.

**(9) Payments or Gifts to Respondents**

Not applicable.

**(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature**

No confidentiality issues and no issues involving questions of a sensitive nature are involved.

**(12) Annual Hours Burden**

**Estimated annual hours burden:** 13,000 hours rounded to the nearest thousand.

Staff estimates that approximately 158 existing clubs each require annually about 75 hours to comply with the Rule's disclosure requirements, for a total of 11,850 hours (158 clubs × 75 hours). These clubs should be familiar with the Rule, which has been in effect since 1974, with the result that the burden of compliance has declined over time. Moreover, a substantial portion of the existing clubs likely would make these disclosures absent the Rule because they have helped foster long-term relationships with consumers.

Approximately 7 new clubs come into being each year. These clubs require approximately 120 hours to comply with the Rule, including start up-time. Thus, the cumulative PRA burden for new clubs is about 840 hours. Combined with the estimated burden for established clubs, the total burden is 12,690 hours or 13,000, rounded to the nearest thousand.

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**Estimated annual cost burden:** \$511,000, rounded to the nearest thousand (solely related to labor costs).

Based on recent data from the Bureau of Labor Statistics, the average compensation for advertising managers is approximately \$44 per hour. Compensation for office and administrative support personnel is approximately \$15 per hour. Assuming that managers perform the bulk of the work, while clerical personnel perform associated tasks (e.g., placing advertisements and responding to inquiries about offerings or prices), the total cost to the industry for the Rule's paperwork requirements would be approximately \$510,510 [(65 hours managerial time x 158 existing clubs x \$44 per hour) + (10 hours clerical time x 158 existing clubs x \$15 per hour) + (110 hours managerial time x 7 new clubs x \$44 per hour) + (10 hours clerical time x 7 new clubs x \$15)].

**(13) Estimated Annual Capital and/or Other Non-labor Related Costs**

Because the Rule has been in effect since 1974, the vast majority of the negative option clubs have no current start-up costs. For the few new clubs that enter the market each year, the costs associated with the Rule's disclosure requirements, beyond the additional labor costs discussed above, are *de minimis*. Negative option clubs already have access to the ordinary office equipment necessary to achieve compliance with the Rule. Similarly, the Rule imposes few, if any, printing and distribution costs. The required disclosures generally constitute only a small addition to the advertising for negative option plans. Because printing and distribution expenditures are incurred to market the product regardless of the Rule, adding the required disclosures results in marginal incremental expense.

**(14) Estimate of Cost to Federal Government**

The Rule has been in existence for 24 years and businesses covered by the Rule already generally comply. Accordingly, the estimated cost to the Federal government of enforcing the Rule is minimal and is generally confined to reviewing advertisements to ensure that the required disclosures are made. Staff may also answer inquiries about the Rule. Staff estimates that the annualized cost to the Commission (per year over the 3-year clearance renewal being sought) to administer the disclosure requirements will be approximately \$15,500 representing approximately one-tenth of an attorney/economist work-year, inclusive of incidental benefits.

**(15) Changes in Burden**

There has been an adjustment of 1,890 hours (going from 14,850 hours in 2005 to 12,960 hours in 2008), reflecting the decreased number of existing clubs (going from 190 in 2005 to 158 in 2008) and the increased number of new clubs formed (going up from 5/year in 2005 to 7/year in 2008).

**(16) Statistical Use of Information**

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There are no plans to publish any information for statistical use.

**(17) Failure to Display the Expiration Date for OMB Approval**

Not applicable

**(18) Exceptions to the Certification for Paperwork Reduction Act Submissions**

Not applicable.