

Supporting Statement
Trade Regulation Rule
Rule on the Use of Prenotification Negative Option Plans
16 C.F.R. Part 425
(Control Number: 3084-0104)

(1) Necessity for Collecting the Information

The Trade Regulation Rule on the Use of Prenotification Negative Option Plans (“Negative Option Rule” or “Rule”) governs the operation of prenotification subscription plans. Under these plans, sellers ship merchandise, such as books, food, or clothing, 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.¹

(2) Use of the Information

Consumers use the Rule’s required disclosures to weigh the benefits and burdens of negative option plans. These disclosures inform existing and potential subscribers of their rights under the Rule. 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 a subscriber who has not had at least ten days in which to mail a merchandise rejection form.

The failure to make these disclosures is an unfair or deceptive act or practice.

¹ The Commission recently published an Advance Notice of Proposed Rulemaking seeking comments on the need for amendments to the current Rule. 84 Fed. Reg. 52,393 (Oct. 2, 2019). The present PRA Notice is not part of that proceeding and merely seeks comment on the existing burden estimates for the current Rule, which applies only to “prenotification” negative option plans.

(3) Consideration of Using Improved Information Technology to Reduce Burden

Most of the Rule’s disclosure requirements are technology-neutral and apply to advertisements and other promotional materials regardless of format. Thus, so long as the Rule’s requirements are satisfied, an advertisement 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, 44 U.S.C. § 3504 note.

The types of products that fall within the scope of the Rule – books, food, and clothing – are tangible goods delivered to consumers by mail or some other type of non-electronic delivery method. Thus, while all consumers who participate in a prenotification subscription plan must have a physical address for the delivery of a product, there is no requirement that these consumers also have an email or other electronic method of contact. Accordingly, a non-electronic delivery method, such as by mail, to the consumer’s physical delivery address is the most effective method to assure that all consumers in the subscription plan receive the announcement identifying the selection and clearly disclosing that the subscriber will receive the selection unless the subscriber instructs the seller that the consumer does not want the selection by the date designated in the announcement. 16 CFR 425.1(a)(2).

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

The Restore Online Shoppers’ Confidence Act (“ROSCA”) relates to negative option marketing on the Internet. 15 U.S.C. §§ 8401 *et seq.* This Act makes it unlawful for Internet sellers to charge for any goods or services sold using negative option marketing, unless they: (a) disclose all material terms of sales transactions clearly and conspicuously before obtaining consumers’ billing information; (b) obtain consumers’ express informed consent before charging consumers; and (c) provide simple mechanisms for stopping recurring charges.

While there is some overlap between ROSCA and the Negative Option Rule, the Rule’s reach is broader, extending beyond Internet sales to other forms of prenotification negative option plan marketing and advertising, such as direct-mail solicitations. In addition, the Rule requires specific disclosures and certain procedures for administering prenotification negative option plans (*e.g.*, sellers must send consumers forms they can use to reject merchandise before it is shipped) that are not addressed by ROSCA.

Some states regulate negative option marketing, requiring disclosures similar to those required by the Rule. However, the primary industries using negative option plans – book, food, and clothing clubs – have nationwide customer bases that necessitate federal regulation so the Negative Option Rule prevents a proliferation of conflicting state laws.

(5) Efforts to Minimize Burden on Small Businesses

Although the Rule does not exclude small businesses, FTC staff believes that negative option plans covered by the Rule are generally – if not exclusively – offered by book, food, and

clothing clubs operated by companies that are national in scope.

(6) Consequences of Conducting Collection Less Frequently

The Rule's disclosure requirements apply only to promotional materials that contain a means to join a plan, such as an enrollment form. The intent of the disclosures required in this type of promotional material is to enable consumers to make informed purchasing decisions and protect them from incurring financial obligations for merchandise they do not want. Not requiring disclosures of material terms for this limited category of promotional materials could potentially injure consumers in that they might use enrollment forms to join negative option plans before learning that they are taking on the future obligation of needing to affirmatively reject merchandise shipped that otherwise will be shipped on a periodic basis.

Prior to a seller shipping any merchandise subject to a negative option plan, the Rule also requires the seller to send to subscribers both an announcement identifying the merchandise and a form by which consumers can reject the merchandise prior to it being shipped. If the Rule did not require sellers to mail subscribers rejection forms in advance of prospective shipments, subscribers would receive unwanted merchandise. The Rule does not require the seller to repeat the material terms of a negative option plan in the merchandise announcements or rejection forms.

(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

The Commission sought public comment in connection with its latest PRA clearance request for this Rule. *See* 85 Fed. Reg. 46,628 (Aug. 3, 2020). The Commission received one anonymous comment, which generally supported the Rule's extension but provided no information about PRA estimates.² The Commission will seek comment again contemporaneously with this submission.³

(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

² This comment was filed at the wrong public docket number and is available at <https://www.regulations.gov/document?D=FTC-2020-0049-0002>.

³ See footnote 1.

involved.

(11) Annual Hours Burden

Estimated annual burden hours: 9,750.

Based on industry input, staff estimates that approximately 75 existing clubs each require annually about 100 hours to comply with the Rule's disclosure requirements. Approximately 10 new clubs come into being each year. Industry estimates of the number of existing clubs have fluctuated significantly since the early 2000s.⁴ Industry sources also report to the Commission that a substantial portion of the existing clubs would make these disclosures absent the Rule because they help foster long-term relationships with consumers.

Over the next three years, there will be an average 85 existing firms per year (75+85+95 ÷ 3). Thus, the average annual hours of burden for existing firms is expected to be 8,500 hours (85 clubs x 100 hours). The estimated 10 new clubs entering the market per year require approximately 125 hours to comply with the Rule, including start up-time. Thus, the cumulative PRA burden for new clubs is about 1,250 hours (10 clubs x 125 hours). Combined with the estimated burden for established clubs, the total annual burden is 9,750 hours.

Estimated annual cost burden: \$572,300 (solely related to labor costs).

Based on recent data from the Bureau of Labor Statistics, the mean hourly wage for advertising managers is approximately \$69 per hour; compensation for office and administrative support personnel is approximately \$20 per hour. Assuming that managers perform the bulk of the work, and 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 information collection requirements would be approximately \$572,300 [(80 hours managerial time x 85 existing clubs x \$69 per hour) + (20 hours clerical time x 85 existing clubs x \$20 per hour) + (90 hours managerial time x 10 new clubs x \$69 per hour) + (35 hours clerical time x 10 new clubs x \$20)].

(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 start-up costs. For the few new clubs that enter the market each year, the start-up 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 comply 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. As printing and distribution expenditures

⁴ The industry estimates of existing firms subject to the Rule's disclosure requirements range from 190 (2005), 158 (2008), 45 (2011), 35 (2014) and 75 (2017). Such fluctuations have most likely derived from changes in the national economy and trends in the specific industries subject to the Rule.

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 40 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 \$7,500 representing approximately five percent of an FTC Full-time Equivalent.

(15) Changes in Burden

The estimate for annual hours of burden did not change from the 2017 estimate. The estimate for annual labor costs went up from 2017 (\$473,750) to 2020 (\$572,300) due to increased hourly estimates from the Bureau of Labor Statistics for the same occupational categories used in both years.

(16) Statistical Use of Information

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.