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Nan Shellabarger,
Director of Aviation Policy and Plans.
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FEDERAL TRADE COMMISSION

16 CFR Part 425

Rule Concerning the Use of Prenotification Negative Option Plans

AGENCY: Federal Trade Commission
 ("FTC" or "Commission").

ACTION: Advance Notice of Proposed
 Rulemaking; Request for public
 comments.

SUMMARY: As part of the Commission's
 systematic review of all current FTC
 rules and guides, the Commission
 requests public comment on the overall
 costs, benefits, necessity, and regulatory
 and economic impact of the FTC's Trade
 Regulation Rule concerning "Use of
 Prenotification Negative Option Plans."

DATES: Written comments must be
 received on or before July 27, 2009.

ADDRESSES: Interested parties are
 invited to submit written comments.
 Comments should refer to
 "Prenotification Negative Option Rule
 Review, Matter No. P064202" to
 facilitate the organization of comments.
 Please note that your comment—
 including your name and your state—
 will be placed on the public record of
 this proceeding, including on the
 publicly accessible FTC website, at
 ([http://www.ftc.gov/os/
 publiccomments.shtm](http://www.ftc.gov/os/publiccomments.shtm)).

Because comments will be made
 public, they should not include any
 sensitive personal information, such as
 an individual's Social Security Number;
 date of birth; driver's license number or
 other state identification number, or
 foreign country equivalent; passport
 number; financial account number; or
 credit or debit card number. Comments
 also should not include any sensitive
 health information, such as medical
 records or other individually
 identifiable health information. In
 addition, comments should not include
 any "[t]rade secret or any commercial or
 financial information which is obtained
 from any person and which is privileged
 or confidential," as provided in Section
 6(f) of the FTC Act, 15 U.S.C. 46(f), and
 Commission Rule 4.10(a)(2), 16 CFR
 4.10(a)(2). Comments containing
 material for which confidential
 treatment is requested must be filed in

paper form and clearly labeled
 "Confidential."¹

Because paper mail addressed to the
 FTC is subject to delay due to
 heightened security screening, please
 consider submitting your comments in
 electronic form. Comments filed in
 electronic form should be submitted by
 using the following weblink: ([https://
 secure.commentworks.com/ftc-
 NegativeOptionRuleANPR](https://secure.commentworks.com/ftc-NegativeOptionRuleANPR)) (and
 following the instructions on the web-
 based form). To ensure that the
 Commission considers an electronic
 comment, you must file it on the web-
 based form at the weblink ([https://
 secure.commentworks.com/ftc-
 NegativeOptionRuleANPR](https://secure.commentworks.com/ftc-NegativeOptionRuleANPR)). If this
 Notice appears at ([http://
 www.regulations.gov/search/index.jsp](http://www.regulations.gov/search/index.jsp)),
 you may also file an electronic comment
 through that website. The Commission
 will consider all comments that
 regulations.gov forwards to it. You may
 also visit the FTC website at [http://
 www.ftc.gov](http://www.ftc.gov) to read the Notice and the
 news release describing it.

A comment filed in paper form
 should include the "Prenotification
 Negative Option Rule Review, Matter
 No. P064202" reference both in the text
 and on the envelope, and should be
 mailed or delivered to the following
 address: Federal Trade Commission/
 Office of the Secretary, Room H-135
 (Annex Q), 600 Pennsylvania Avenue,
 N.W., Washington, D.C. 20580. The FTC
 is requesting that any comment filed in
 paper form be sent by courier or
 overnight service, if possible, because
 U.S. postal mail in the Washington area
 and at the Commission is subject to
 delay due to heightened security
 precautions.

The Federal Trade Commission Act
 ("FTC Act") and other laws the
 Commission administers permit the
 collection of public comments to
 consider and use in this proceeding as
 appropriate. The Commission will
 consider all timely and responsive
 public comments that it receives,
 whether filed in paper or electronic
 form. Comments received will be
 available to the public on the FTC
 website, to the extent practicable, at
 ([http://www.ftc.gov/os/
 publiccomments.shtm](http://www.ftc.gov/os/publiccomments.shtm)). As a matter of
 discretion, the Commission makes every
 effort to remove home contact

¹ The comment must also be accompanied by an
 explicit request for confidential treatment,
 including the factual and legal basis for the request,
 and must identify the specific portions of the
 comment to be withheld from the public record.
 The request will be granted or denied by the
 Commission's General Counsel, consistent with
 applicable law and the public interest. See
 Commission Rule 4.9(c), 16 CFR 4.9(c).

information for individuals from the
 public comments it receives before
 placing those comments on the FTC
 website. More information, including
 routine uses permitted by the Privacy
 Act, may be found in the FTC's privacy
 policy, at ([http://www.ftc.gov/ftc/
 privacy.shtm](http://www.ftc.gov/ftc/privacy.shtm)).

FOR FURTHER INFORMATION CONTACT:

Robin Rosen Spector, (202) 326-3740 or
 Matthew Wilshire, (202) 326-2976,
 Attorneys, Division of Enforcement,
 Bureau of Consumer Protection, Federal
 Trade Commission, 600 Pennsylvania
 Avenue, N.W., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Background

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 step as
 acceptance of an offer. One common
 "negative option" is the prenotification
 negative option plan. In such a plan,
 consumers receive periodic
 announcements of upcoming
 merchandise and have a set period to
 contact the company and decline the
 item. If they remain silent, the company
 sends them the merchandise.

The Rule Concerning the Use of
 Prenotification Negative Option Plans
 ("Negative Option Rule" or "Rule")
 regulates prenotification negative option
 plans for the sale of goods. 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. 45.² In 1986, the
 Commission reviewed the Rule
 pursuant to Section 610 of the
 Regulatory Flexibility Act, 5 U.S.C. 610,
 to determine the impact of the Rule on
 small entities. The Commission
 concluded that the Rule had not had a
 significant impact on a substantial
 number of small entities and should not
 be changed.³ In 1997, the Commission
 reviewed the Rule again and solicited
 comments on whether there was a
 continuing need for the Rule and
 whether it should be changed to
 increase its benefits or reduce its costs
 or other burdens.⁴ Based on the
 response, in August 1998, the
 Commission concluded that the Rule
 "continue[d] to be of value to
 consumers and firms, and [was]
 functioning well in the marketplace at

² The Rule became effective on June 4, 1974.

³ 51 FR 42087 (Nov. 21, 1986).

⁴ 62 FR 15135 (Mar. 31, 1997).

minimal cost.”⁵ The Commission retained the Rule but announced three technical, non-substantive amendments to clarify it and conform its language to amendments in the FTC Act.⁶

The Rule requires sellers to clearly and conspicuously disclose the material terms of a prenotification negative option plan to consumers before they subscribe and to follow certain procedures in operating the plan. The Rule enumerates seven material terms that sellers must disclose clearly and conspicuously.⁷ 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 instructions for rejecting merchandise in announcements; and honoring promptly written requests to cancel from consumers who have met any minimum purchase requirements.⁸

II. Regulatory Review Program

The Commission reviews its rules and guides periodically. These reviews seek information about the costs and benefits of the rules and guides as well as their regulatory and economic impact. These reviews assist the Commission in identifying rules and guides that warrant modification or rescission. Therefore, the Commission now solicits comments on, among other things, the economic impact of, and the continuing need for, the Negative Option Rule; the benefits of the Rule to consumers purchasing goods through prenotification negative option plans; and the burdens the Rule places on firms subject to its requirements. The Commission also solicits comment on

whether it should expand the Rule to cover additional types of negative option offers.

The Rule covers only a subset of negative option offers—prenotification negative option plans. There are, however, several other types of commonly used negative option offers. One such offer is called a continuity plan. In this type of offer, consumers receive regular shipments of merchandise until they cancel the agreement. A second common offer is the trial conversion. Consumers who accept such an offer agree to receive products or services for a trial period at no charge or for a reduced price. If the consumers do not cancel their agreement before the end of the trial period, the product shipments or provision of services continue and they incur charges. A third familiar negative option is the automatic renewal. In an automatic renewal, a magazine seller, for example, may automatically renew consumers' subscriptions when they expire and charge for them, unless the consumers cancel their subscriptions.

The Commission seeks comment on whether there is a basis to expand the Rule to cover these additional offers, and, if so, what requirements the Rule should include. The Commission's goal in seeking comment is to determine the best way to protect consumers from deceptive or unfair practices in negative option marketing. Possible alternative and/or additional methods of achieving that goal include consumer education campaigns, industry guidance, and continued law enforcement actions.

III. Request for Comment

The Commission solicits comments on the following specific questions related to the Negative Option Rule:

(1) Is there a continuing need for the Rule as currently promulgated? Why or why not?

(2) What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?

(3) What modifications, if any, should the Commission make to the Rule to increase its benefits to consumers?

(a) What evidence supports your proposed modifications?

(b) How would these modifications affect the costs and benefits of the Rule for consumers?

(c) How would these modifications affect the costs and benefits of the Rule for businesses, particularly small businesses?

(4) What impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers? What evidence supports the asserted impact?

(5) What significant costs has the Rule imposed on consumers? What evidence supports the asserted costs?

(6) What modifications, if any, should be made to the Rule to reduce the costs imposed on consumers?

(a) What evidence supports your proposed modifications?

(b) How would these modifications affect the costs and benefits of the Rule for consumers?

(c) How would these modifications affect the costs and benefits of the Rule for businesses, particularly small businesses?

(7) Please provide any evidence that has become available since 1998 concerning consumer perception of, or experience with, negative option offers, including offers for prenotification negative option plans, continuity plans, trial conversions, or automatic renewals. Does this new information indicate that the Rule should be modified? If so, why, and how? If not, why not?

(8) What benefits, if any, has the Rule provided to businesses, and in particular to small businesses? What evidence supports the asserted benefits?

(9) What modifications, if any, should be made to the Rule to increase its benefits to businesses, particularly small businesses?

(a) What evidence supports your proposed modifications?

(b) How would these modifications affect the costs and benefits of the Rule for consumers?

(c) How would these modifications affect the costs and benefits of the Rule for businesses?

(10) What significant costs, including costs of compliance, has the Rule imposed on businesses, particularly small businesses? What evidence supports the asserted costs?

(11) What modifications, if any, should be made to the Rule to reduce the costs imposed on businesses, particularly small businesses?

(a) What evidence supports your proposed modifications?

(b) How would these modifications affect the costs and benefits of the Rule for consumers?

(c) How would these modifications affect the costs and benefits of the Rule for businesses?

(12) What evidence is available concerning the degree of compliance with the Rule? Does this evidence indicate that the Rule should be modified? If so, why, and how? If not, why not?

(13) Are any of the Rule's requirements no longer needed? If so, explain. Please provide supporting evidence.

(14) Should the Rule define “clearly and conspicuously,” given that it

⁵ 63 FR 44555 (Aug. 20, 1998).

⁶ The Commission: deleted a Note that had become obsolete; amended two paragraphs to read “in or affecting commerce” in lieu of “in commerce” to conform the Rule to the FTC Act; and changed the title from “Negative Option Rule” to “Use of Prenotification Negative Option Plans” to better describe the Rule's coverage.

⁷ 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 will be given 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 of announcements subscribers should expect to receive during a twelve-month period. 16 CFR 425.1(a)(1)(i-vii).

⁸ 16 CFR 425.1(a)(2)(3); 425.1(b).

requires marketers to make certain disclosures clearly and conspicuously? If so, why, and how? If not, why not?

(15) What potentially unfair or deceptive practices concerning the marketing of prenotification negative option plans, if any, are not covered by the Rule?

(a) What evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrates whether there is widespread existence of such practices? Please provide this evidence.

(b) What evidence demonstrates that such practices cause consumer injury? Please provide this evidence.

(c) With reference to such practices, should the Rule be modified? If so, why, and how? If not, why not?

(16) What potentially unfair or deceptive practices concerning the marketing of negative option plans, not covered by the Rule, are occurring in the marketplace?

(a) What evidence, such as empirical data, consumer perception studies, or consumer complaints, demonstrates whether there is widespread existence of such practices? Please provide this evidence.

(b) What evidence demonstrates that such practices cause consumer injury? Please provide this evidence.

(c) With reference to such practices, should the Rule be modified? If so, why, and how? If not, why not?

(17) What modifications, if any, should be made to the Rule to account for changes in relevant technology or economic conditions?

(a) What evidence supports the proposed modifications?

(b) How would these modifications affect the costs and benefits of the Rule for consumers and businesses, particularly small businesses?

(18) Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?

(a) What evidence supports the asserted conflicts?

(b) With reference to the asserted conflicts, should the Rule be modified? If so, why, and how? If not, why not?

(c) Is there evidence concerning whether the Rule has assisted in promoting national consistency with respect to the marketing and operation of prenotification negative option plans? If so, please provide that evidence.

(19) Are there foreign or international laws, regulations, or standards with respect to negative option plans that the Commission should consider as it reviews the Rule? If so, what are they?

(a) Should the Rule be modified in order to harmonize with these international laws, regulations, or

standards? If so, why, and how? If not, why not?

(b) How would such harmonization affect the costs and benefits of the Rule for consumers and businesses, particularly small businesses?

(20) Do current or impending changes in technology affect whether and how the Rule should be modified?

List of Subjects in 16 CFR Part 306

Negative Options, Trade practices.

Authority: 15 U.S.C. 41-58.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9-11226 Filed 5-13-09; 8:45 am]

BILLING CODE 6750-01-S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2009-0139]

RIN 1625-AA11

Regulated Navigation Area; Gulf Intracoastal Waterway, Inner Harbor Navigation Canal, New Orleans, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes for a rule to prohibit all floating vessels from being within an area in the Inner Harbor Navigation Canal from Mile Marker 22 (west of Chef Menteur Pass) on the Gulf Intracoastal Waterway, west through the Gulf Intracoastal Waterway and Inner Harbor Navigation Canal out to Lake Ponchartrain and the Mississippi River in New Orleans, LA. This regulated navigation area would also apply to part of the Harvey Canal, between Lapalco Boulevard Bridge and the intersection of the Harvey Canal and the Algiers Alternate Route of the Intracoastal Waterway. This action is necessary to protect the high-risk areas in the flood protection for New Orleans. The proposed rule will protect the floodwalls in the designated areas of the Inner Harbor Navigation Canal and the Harvey Canal from damage caused by drifting vessels by excluding vessels from the area under certain weather conditions.

DATES: Comments and related material must be received by the Coast Guard on or before June 15, 2009. Requests for public meetings must be received by the Coast Guard on or before June 15, 2009.

ADDRESSES: You may submit comments identified by docket number USCG-2009-0139 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand Delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Lieutenant Commander (LCDR) Eva Van Camp, Coast Guard; telephone (504) 846-5923; e-mail Eva.VanCamp@uscg.mil. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2009-0139), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via <http://www.regulations.gov>) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via <http://www.regulations.gov>, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by