



**BILLING CODE: 6750-01-S**

**FEDERAL TRADE COMMISSION**

**Agency Information Collection Activities; Proposed Collection; Comment Request; Extension**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Federal Trade Commission (FTC or Commission) is seeking public comment on its proposal to extend for an additional three years the Office of Management and Budget (OMB) clearance for information collection requirements in its Use of Prenotification Negative Option Plans (“Negative Option Rule” or “Rule”). That clearance expires on December 31, 2020.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Request for Comments part of the SUPPLEMENTARY INFORMATION section below. Write “Negative Option Rule; PRA Comment: FTC File No. P072108” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, Attorney, Division of Enforcement, Federal Trade Commission, Room CC-9528, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-2889.

**SUPPLEMENTARY INFORMATION:**

*Title:* Use of Prenotification Negative Option Plans (Negative Option Rule or Rule), 16 CFR 425.<sup>1</sup>

*OMB Control Number:* 3084-0104.

*Type of Review:* Extension of a currently approved collection.

*Likely Respondents:* Sellers of prenotification subscription plans.

*Estimated Annual Hours Burden:* 9,750 hours.

*Estimated Annual Cost Burden:* \$572,300 (solely related to labor costs).

*Estimated Capital or Other Non-Labor Cost:* \$0 or *de minimis*.

*Abstract:* The Negative Option Rule governs the operation of prenotification subscription plans. Under these types of plans – which can include things such as a book of the month club, food of the month club, or clothing items of the month club – a seller provides a consumer with automatic shipments of merchandise unless the consumer affirmatively notifies the seller they do not want the shipment. The Rule requires that a seller notify a member that they will automatically ship merchandise to the member and bill the member for the merchandise if the subscriber fails to expressly reject the merchandise beforehand within a prescribed time. The Rule protects consumers by: (a) requiring that promotional materials disclose the terms of

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<sup>1</sup> The Commission recently published an Advance Notice of Proposed Rulemaking seeking comments on the need for amendments to the current Rule. 84 FR 52393 (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.

membership clearly and conspicuously; and (b) establishing procedures for the administration of such “negative option” plans.

Under the PRA, 44 U.S.C. 3501-3521, the FTC is requesting that OMB renew the clearance for the PRA burden associated with the proposed collection.

*Burden statement:*

**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.<sup>2</sup> 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  $(75+85+95 \div 3)$ . Thus, the average annual hours of burden for existing firms is expected to be 8,500 hours  $(85 \text{ clubs} \times 100 \text{ hours})$ . 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  $(10 \text{ clubs} \times 125 \text{ hours})$ . 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,<sup>3</sup> the mean hourly wage for advertising managers is approximately \$69 per hour; compensation for office and administrative

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<sup>2</sup> 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.

<sup>3</sup> Occupational Employment And Wages – May 2019, Table 1, at <https://www.bls.gov/news.release/ocwage.t01.htm>.

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)].

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 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 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. Because printing and distribution expenditures are incurred to market the product regardless of the Rule, adding the required disclosures results in marginal incremental expense.

### **Request for Comments**

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of

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maintaining records and providing disclosures to consumers. All comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Write “Negative Option Rule; PRA Comment: FTC File No. P072108” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website.

Due to the public health emergency in response to the COVID-19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Negative Option Rule; PRA Comment: FTC File No. P072108” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will become publicly available at <https://www.regulations.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal

information, such as your or anyone else’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. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . . is privileged or confidential” —as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) —including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](http://www.regulations.gov), we cannot redact or remove your comment unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that 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 on or before

**[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL**

**REGISTER]**. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

**Josephine Liu,**

*Assistant General Counsel for Legal Counsel.*

[FR Doc. 2020-16718 Filed: 7/31/2020 8:45 am; Publication Date: 8/3/2020]