



Electronic Retailing Association
Leaders in Direct-to-Consumer Commerce

Advance Consent Marketing Guidelines

Marketing plans and sales arrangements that allow consumers to consent in advance to receive and pay for goods or services in the future on a continuing or periodic basis are convenient and beneficial to both consumers and marketers. While Advance Consent Plans have existed in various forms for years, other forms are still evolving. The continued growth and success of Advance Consent Plans requires that marketers adhere to fair, ethical and responsible marketing practices that will promote consumer confidence in Advance Consent purchases. While Advance Consent Plans are already subject to various federal and state laws and regulations, these Guidelines are intended to establish standards and practices, which may exceed the minimum legal requirements.

OVERVIEW AND GENERAL PRINCIPLES

An Advance Consent Plan is a contractual plan or arrangement whereby the consumer consents in advance to receive and pay for goods or services in the future on a continuing or periodic basis, unless and until the consumer cancels, without the consumer having to give further consent prior to each shipment or billing event. An Advance Consent Plan does not include the sale of a fixed number of goods, or the sale of goods or services for a fixed period, provided the sale does not also include a Free To Pay Conversion or Automatic Renewal feature. While Advance Consent Plans can take a variety of forms, the following are some of the more common features which may exist alone or in combination in an Advance Consent Plan.¹

- "Free-to-Pay Conversions" – A plan or arrangement whereby a consumer initially receives a product or service for free, and, unless the consumer cancels during that period, the consumer will incur an obligation to pay for the products or services or for products or services which will continue to be automatically sent or provided to the consumer.
- "Automatic Renewal Plans" -- A plan or arrangement whereby a consumer agrees that the seller may automatically renew and/or bill the consumer's membership, subscription or participation in a plan at the end of each term, unless and until the consumer cancels.
- "Continuity Programs" – A plan or arrangement whereby a consumer agrees in advance to receive goods (or services) in the future, on a periodic basis and in which the consumer is billed or charged each time the goods or services are provided.

GENERAL PRINCIPLES

The two fundamental principles underlying all forms of Advance Consent Plans are Notice and Consent. A valid Advance Consent Sale² requires that all material terms and conditions of the offer be disclosed to the consumer in a clear, conspicuous and understandable manner (i.e., Notice), and that the consumer clearly and affirmatively consents to offer after all such material terms and conditions have been disclosed (i.e., Consent). In the realm of Advance Consent Marketing, **Silence Never Equals Consent**.

Marketers should also be aware of the federal and state laws and regulations that govern Advance Consent Plans, including the Federal Trade Commission Act, the Telemarketing Sales Rule, and the Unordered Merchandise Rule. Since the Guidelines cannot anticipate and answer all the questions that might arise due to changes in the marketplace, marketers should look to the spirit as well as the letter of these Guidelines, always striving to be fair and reasonable in their dealings with consumers.

DISCLOSURES

¹ Pre-Notification Negative Option Plans, which are also a form of Advance Consent Marketing, are not specifically addressed in these guidelines because they are already subject to specific regulation under the FTC's Prenotification Negative Option Rule. 16 C.F.R. Part 425

² An Advance Consent Sale refers to the actual transaction between the seller and consumer whereby a consumer accepts participation in an Advance Consent Plan

Sellers should clearly and conspicuously disclose all material terms and conditions of the offer, including the following, BEFORE the consumer consents to the offer:

For ALL ADVANCE CONSENT PLANS

- A description of the goods or services being offered;
- The identity of the seller, including the separate identity for the seller in any upsell;³
- The total cost or range of costs (including whether any additional costs, such as shipping and handling apply), in the manner set forth below for each particular Advance Consent Plan;
- The manner in which the consumer will be charged for the goods or services being offered (e.g., whether the consumer will be billed or whether the seller will automatically charge⁴ the consumer);
- When and/or how frequently the consumer will be billed or charged;
- The fact that the consumer must cancel in order to avoid future billing or charges or that the consumer will be billed or charged in the future unless he or she cancels;
- The method by which the consumer can cancel (e.g., by calling, e-mailing or writing to the seller);
- The fact that the seller has a policy of not offering full a refund of the cost of the goods or services, if such is the case, or if the seller makes any representation about its refund policy,⁵ all materials terms and conditions of the seller's refund policy, including whether the seller offers a full or partial refund.

For FREE-TO-PAY CONVERSIONS, the following additional disclosures:

- The fact that the goods or service will continue on a paid basis after the free period, unless the consumer cancels, and the length of the subsequent term or period;
- When billing will commence (i.e., at the end of the free period);
- The total cost or range of costs the consumer will be billed or charged upon the expiration of the free period, if the consumer fails to cancel;
- The length of the free period expressed either in terms of a length of time or a quantity of goods to be received;

For AUTOMATIC RENEWALS, the following additional disclosures:

- The total cost or range of costs for the initial term or billing period and for subsequent renewal terms or periods, if there is a known fixed rate for such renewal terms or periods, or, if there is not a known fixed rate, a statement describing how the renewal price will be determined (i.e., the rate then in effect);
- The fact that the service or membership will renew or continue, and the length of each subsequent renewal or billing period;
- The fact that the consumer will be billed or charged for renewal periods.

³ For purposes of these guidelines the " identity of the Seller" can be either the party making the offer or the party providing the products or services, an identifiable brand name or trade name, or such other description as will reasonably enable the consumer to contact the party who will be billing or charging the consumer.

⁴ For purposes of these Guidelines a Charge may include (i) any amount charged or debited to a consumer's credit card debit card checking against savings or similar account, or (ii) any amount charged to a utility bill, telephone bill, mortgage loan account or similar account for the goods or services of a third party

⁵ Representations such as "Satisfaction Guaranteed," "Money-back Guarantee" or similar representations indicating opportunity for a refund are covered by this provision

For CONTINUITY PROGRAMS:

- The total cost or range of costs the consumer will be billed or charged each time the goods or services are provided.
- A description of the goods or services to be included in each shipment;
- The fact that periodic shipments or the periodic provision of services will occur;
- Minimum purchase obligations, if any;
- For shipment of goods, the approximate interval between shipments or the approximate number of shipments during a twelve month period.

AFFIRMATIVE CONSENT

- Sellers must obtain the consumer's affirmative consent to an Advance Consent Sale. Silence never equals consent.
- Affirmative Consent may be given orally, electronically or in writing; however, the consumer must be required to perform some affirmative act, (e.g., return a document, check a box, affix a seal or stamp, make an oral response or push a number or button on a telephone keypad or computer keyboard etc.) which clearly evidences acceptance of the Advance Consent Sale.
- All material terms and conditions of the Advance Consent Sale must be disclosed to the consumer before the consumer's affirmative consent is provided.
- In telephone solicitations, this means that the material terms and conditions of them offer must be disclosed before the consumer is asked whether he or she consents to the offer.
- For online solicitations, disclosure of material terms and conditions must be unavoidable by the consumer and must be presented prior to the consumer incurring any financial obligation (i.e., by clicking a "submit order" or "I agree" button). If pop-ups or hyperlinks are used to provide these disclosures, such pop-ups and hyperlinks should comply with the FTC's Dot Com Disclosure guidelines (<http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.shtml>). The fact that the online offer contains an advance consent feature should be disclosed on the initial page of the online order sequence to avoid creating an initial misimpression on the part of the consumer as to the nature of the offer.
- The consumer's affirmative consent must be solicited and provided in a manner which clearly evidences that the consumer is consenting to the terms of the Advance Consent Sale.

BILLING PRACTICES

- Billing practices of sellers should accurately reflect the terms agreed to in advance by the consumer.
- Billing descriptors should, to the extent feasible and permissible, disclose the identity of the seller or product and a customer service telephone number. Where the disclosure of all of the information described is not feasible or permissible, priority should be given to disclosing a customer service telephone number. It is appropriate to disclose a URL in lieu of a telephone number if either the sale to which the charge relates occurred online or if the consumer agreed in advance to communicate online with the seller.

RENEWAL REMINDERS

Frequency

For Automatic Renewal Plans, a Renewal Reminder should be provided at least once during each consecutive twelve month period (a "year"), provided, however, that if a consumer has consented in advance to a definite

term or billing period in excess of twelve months, the Renewal Reminder may be provided prior to each such renewal period or billing event.

For Automatic Renewal Plans which bill or charge at least once a month or more frequently, Sellers may be excused from providing an annual Renewal Reminder if either (1) the seller can demonstrate that it has otherwise communicated with the consumer at least once during the year, or (2) the seller can demonstrate that the consumer has actually used the seller's products or services at least once during the year.

The Renewal Reminder should be provided in reasonable proximity to the first billing event which will occur during the renewal term⁶ to which the Renewal Reminder relates so that it is received by the consumer sufficiently in advance of that billing event to enable the consumer a reasonable opportunity to cancel without being billed or charged.

Content

Renewal Reminders should disclose the consumer's right to cancel, sufficient information to enable the consumer to cancel, either the deadline by which the consumer must cancel to avoid being billed or charged, or a disclosure of when the next renewal term or billing period begins, and the amount the consumer will be billed or charged on the next billing event if the consumer does not cancel.

Notice of Material Changes

Sellers should not make any material changes to the goods or services being offered pursuant to an Advance Consent Plan without first providing the consumer written notice of the change and obtaining the consumer's affirmative consent to the change in accordance with these Guidelines.⁷ A change in price shall not be considered a material change requiring the consumer's affirmative consent if, before the consumer consented to the Advance Consent Sale, the seller reserved the right to change the price. However, in the event of a price increase, the seller should still send a notice to the consumer indicating the new price so that it is received by the consumer sufficiently in advance of the first billing event incorporating the price change, to allow the consumer a reasonable opportunity to cancel. The notice incorporating the price change should disclose the consumer's right to cancel sufficient information to enable the consumer to cancel, and either the deadline by which the consumer must cancel to avoid being billed or charged the new price or a disclosure of when the new price goes into effect.

PRIVACY

Sellers should be sensitive to the privacy concerns of consumers and regulators in connection with the use and disclosure of consumer's account billing information. Sellers should maintain and require their telemarketing or other service providers to maintain account-billing information in compliance with applicable laws and regulations.

Sellers and their agents or service providers should not transfer a consumer's account billing information to any unaffiliated third party other than a billing or processing agent without the consumer's express authorization.

If the seller already possesses the consumer's account billing information and the seller did not obtain that information directly from the consumer, the seller: (i) must disclose that it already possesses the consumer's account billing information; (ii) must obtain the consumer's affirmative consent to charge that account; and (iii)

⁶ For automatic renewal plans that operate on a continuous service basis and accordingly, do not have a "renewal term," the Renewal Reminder should be sent in close proximity to the first billing event, which will occur during the billing period to which the Renewal Reminder relates.

⁷ For purposes of these guidelines, "Account Billing Information" shall mean a credit card, debit card, checking, savings or similar account number, utility, telephone, mortgage loan or similar account number or identifier which the seller will use to charge the consumer.

must provide the consumer with sufficient information to enable the consumer to reasonably identify which specific account will be charged.

If the advance consent seller will obtain the consumer's account billing information from another marketer rather than directly from the consumer, then offer must include disclosure of the identity of the advance consent seller that will be charging the consumer, the fact that the advance consent seller will obtain the account billing information from the other marketer, and the identity of the account to be billed sufficient specificity for the consumer to understand what account will be charged (e.g., your Visa/MasterCard account ending in XXXX). Such disclosure must be made before the consumer provides consent to the offer.

CANCELLATION POLICIES / CUSTOMER SERVICE

Consumers should have a method of canceling an Advance Consent Sale that is reasonably accessible and easy to use and requires no payment to the seller.

For Free to Pay Conversions, consumers should be given a telephone number for canceling. Sellers may provide a URL in lieu of a telephone number; however, Sellers should not employ e-mail as the sole method for consumers to cancel unless either (i) the sales transaction occurred online or (ii) the consumer consented in advance to communicate online with the seller.

Consumers should be given sufficient information to enable the consumer to cancel and the deadline for canceling reasonably in advance of the deadline by which the consumer must cancel in order to avoid being billed or charged.

Sellers should promptly make any refunds due upon cancellation

Sellers should provide prompt, effective and readily accessible customer service and strive towards maximizing customer satisfaction. At a minimum, Sellers should provide consumers with reasonable access to customer service during normal business hours. If customer service is not available on a 7 day/24 hour basis, there should be a recording on the customer service number during those hours when customer service is not available advising consumers of the time period during which they can contact customer service.

While sellers may make a reasonable attempt to dissuade consumers from canceling, cancellation procedures and any scripts or IVR recordings used by customer service to respond to cancellation requests should not be so burdensome as to make it difficult or cumbersome for the consumer to cancel.

Customer service representatives should be trained so that they are knowledgeable about and have an understanding of the terms and conditions of the offer.

VERIFICATION OF TELEPHONE SALES

Sellers should obtain affirmative consent from consumers before billing or charging the consumer.

For telemarketing calls, if a consumer alleges that he or she did not authorize a charge, and the seller cannot produce a taped recording or otherwise demonstrate the consumer's affirmative consent, the consumer shall be entitled to an automatic (e.g., no questions asked) refund, unless the Seller can demonstrate fraud or abuse on the part of the consumer.

"FREE" and "FREE TRIAL" OFFERS

The use of the word "free" is subject to various federal and state laws and regulations. Marketers should conduct such offers in compliance with all applicable laws and regulations.

"Free Trial Offers" refers to promotions in which consumers have the opportunity to receive and examine products or services for some specified "trial period" without being charged or obligated to pay during the free

trial. Unlike "free" goods or services,⁸ sellers can bill or charge for services offered on a free trial basis after the free trial period has expired, if the consumer does not cancel. Free trial periods should never begin until the consumer has complete access to the services or has begun to receive the goods, which are the subject of the free trial. Sellers should never charge a consumer's credit card or otherwise deduct funds from a consumer's account prior to the expiration of a free trial period. Sellers may bill consumers during the free trial period as long as the bill is not payable until the free trial has expired.

COMPLIANCE RESPONSIBILITIES

Members engaged in Advance Consent Marketing should comply with all applicable laws and regulations implicated by their offers and these Guidelines for Advance Consent Marketing. Members should not provide assistance to or accept it from anyone that they know is violating applicable laws or regulations or these Guidelines.

⁸ There are other distinctions between "free offers," "free trial offers" and "risk free offers" which are outside the scope of these guidelines.