

# FTC Charges Online Negative Option Marketing Scheme with Deceiving Shoppers

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## The Bottom Line

- *The FTC's complaint, and the district court's response, highlight the continuing regulatory scrutiny into negative option marketing practices and the importance of disclosing the material terms of an offer in a clear and conspicuous manner to consumers before they pay or incur a financial obligation.*
- *Online marketers should keep firmly in mind federal laws, regulatory guidance as well as state-specific laws applicable to such negative option marketing programs when considering whether to adopt such a program and how to implement a consumer experience that will comply with such laws and regulations.*

The Federal Trade Commission (FTC) has charged an online marketing operation involving about 80 companies with deceptively luring consumers into expensive negative option plans by using an initial low-cost "trial" offer. A federal district court in Nevada has preliminarily enjoined the operation at the request of the FTC.

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## The FTC's Complaint

The FTC's complaint alleges that, since the mid-2000s, the defendants have sold personal care products, including tooth-whitening products, online and subsequently obtained consumers' credit card information by "enticing" them to sign up for a low-cost "trial product." The defendants then used such billing information to charge consumers for unauthorized subscriptions with recurring charges.

According to the FTC, the defendants drove traffic to their trial offer websites through "affiliate networks" of advertisers that linked to their website from blog posts, banner advertisements and surveys. In particular, several of the defendants used surveys that appeared to be from well-known retailers such as Kohl's and Amazon – but that were not affiliated with these retailers – and offered "rewards" to consumers who participated in a survey and visited the defendants' websites.

Subsequently, in numerous instances, consumers who clicked on a tooth-whitening or other promised reward were directed to offers on the defendants' websites for a low-cost (e.g., \$1.03, plus shipping and handling) "trial" offer for tooth whiteners and other products.

When consumers signed up for the \$1.03 trial and clicked "Complete Checkout" on the payment page, the defendants collected the consumers' billing information and then enrolled the consumers in a negative option plan. The defendants allegedly used "deceptive claims, hidden fine-print disclosures and confusing terms" to trick consumers into providing this billing information and then began charging them about \$100 a month unless consumers cancelled within eight days. According to the FTC, many consumers who clicked "Complete Checkout" to obtain a trial product did so without realizing that they would incur monthly charges.

Moreover, the FTC stated in its complaint, consumers were also often deceived into clicking a second “Complete Checkout” button that initiated a new transaction and enrolled them in a second monthly billing program for an identical product. According to the FTC, because of this “double-deception,” the defendants charged consumers, who reasonably believed they had agreed to a single shipment for \$1.03 plus shipping costs, about \$200 a month until they cancelled both unauthorized subscriptions.

The FTC contends that the defendants, by fraudulently collecting consumers’ billing information, failing to disclose to consumers the amount and nature of recurring charges and engaging in deceptive marketing practices, violated the FTC Act and the federal Restore Online Shoppers’ Confidence Act (ROSCA), which prohibits companies from charging any consumer’s billing account in an internet transaction unless they have first disclosed clearly all material terms of the transaction and have obtained the consumer’s express informed consent to the charges.

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## **The District Court’s Order**

The Nevada district court granted the FTC’s request for an order preliminarily restraining the defendants from continuing their operations and freezing their assets. The district court also appointed a permanent receiver for the corporate defendants.

The district court found that the FTC had demonstrated a likelihood of success of showing that, in numerous instances, the defendants had misrepresented the charges in connection with trial offers, charged consumers for products they had not ordered or had not wanted and enrolled consumers into negative option plans without their consent. It found good cause to believe that the defendants had engaged in and were likely to engage in acts or practices that violated Section 5(a) of the FTC Act and Section 5 of ROSCA, and that the FTC was likely to prevail on the merits of its action.

The district court may take further action in this case in the future.

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