

June 23, 2023

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Negative Option Rulemaking, Matter No. P064202

To the Federal Trade Commission:

The Consumer Technology Association® (“CTA”) respectfully submits this comment in response to the Notice of Proposed Rulemaking on the Negative Option Rule (“NPRM”) issued by the Federal Trade Commission (“FTC” or “Commission”).¹ CTA is North America’s largest technology trade association. Our members are the world’s leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES®, the world’s most influential tech event. CTA and its members have operated for decades in a competitive marketplace to produce innovative products that provide enormous benefits to consumers and power the economy.

Many of CTA’s members offer products and services using subscription models, which consumers find to be convenient and efficient. CTA’s members are committed to complying with existing laws and guidance that apply to subscription models with recurring payments, and understand the importance of rules that prevent unscrupulous actors from engaging in deception involving recurring charges. Based on its members’ experience in providing consumers with innovative subscription and payment models, CTA encourages the FTC to exercise caution in substantially expanding the Negative Option Rule (the “Rule”) in a way that will discourage subscription offerings for legitimate products and services. Any amendments to the Rule must be practical, and not overly burdensome or costly for companies to implement, or companies may pull back from offering consumer-friendly subscription services. As explained below, the FTC should reevaluate certain of the NPRM’s prescriptive notice, cancellation, renewal reminder, and “saves” provisions. Further, should the FTC move forward with revisions to the Rule, it should make clear that the Rule preempts any state laws with different standards, to

¹ *Negative Option Rule*, Proposed Rule, 88 Fed. Reg. 24,716 (Apr. 24, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-24/pdf/2023-07035.pdf> (“NPRM”).

ensure that standards for nationwide service offerings are uniform, which will promote compliance and reduce confusion for companies and consumers alike.

I. SUBSCRIPTION MODELS FOR POPULAR PRODUCTS AND SERVICES YIELD SIGNIFICANT CONSUMER BENEFITS.

Consumer subscription models are rapidly growing in popularity. Streaming-media subscriptions have been popular for years, and one recent survey noted that online shoppers are now increasingly using subscription services for consumer goods.² A separate study from 2022 found that the global subscription e-commerce market is expected to reach \$904.2 billion by 2026.³ And between 2021 and 2022 alone, existing subscription brands grew their customer bases by 31 percent.⁴ Demand for consumer subscription boxes surged during the pandemic, and this momentum has continued—79 percent of consumers in 2021 expressed interest in subscription offerings.⁵

Consumers also understand subscription models with recurring charges and prefer the convenience of automatic billing. A 2021 study found that customers “appreciate the security of knowing their needs will be met through subscriptions” and “can manage the amount of product and delivery dates.”⁶ Subscribers also appreciate the flexibility that these offers provide – online streaming services “give the users the flexibility and convenience of watching a large number of TV shows, movies, news, sports, etc. from any device at any point of time.”⁷ Market research

² Tony Chen et al., *Thinking inside the subscription box: New research on e-commerce consumers*, McKinsey & Company (Feb. 9, 2018), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers>.

³ Jia Wertz, *The Growth Of Subscription Commerce*, Forbes (July 15, 2022), <https://www.forbes.com/sites/jiawertz/2022/07/15/the-growth-of-subscription-commerce/?sh=2e85f0d9b572>.

⁴ *Id.*

⁵ *Id.*

⁶ Ciara Fanlo, *The psychology behind subscriptions*, recharge (June 16, 2021), <https://rechargepayments.com/blog/the-psychology-behind-subscriptions/>.

⁷ *Global Subscription E-commerce Market: Analysis By Application Type, By End User, By Mode of Payment, By Region Size and Trends with Impact of COVID-19 and Forecast up to 2028*, Research and Markets (Jan. 2023), <https://www.researchandmarkets.com/reports/5148407/global-subscription-e-commerce-market-analysis>; Mike Mabey & Brady Silva, *Product subscriptions: 3 surprising reasons behind consumer choices*, Skim (Apr. 11, 2022), <https://skimgroup.com/blog/product-subscriptions-reasons-behind-consumer-choices-research/>; Tony Chen et al., *Thinking inside the subscription box: New research on e-commerce consumers*, McKinsey & Company (Feb. 9, 2018), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers>.

confirms that the subscription e-commerce services market continues to grow, giving consumers an array of options to choose from.⁸

II. THE FTC SHOULD MODIFY CERTAIN PARTS OF THE PROPOSED RULE.

As explained in more detail below, certain parts of the FTC’s proposals in the Rule are overly prescriptive, threaten to stifle legitimate commerce, and should therefore be rejected. Critically, the FTC already has rules and a framework for addressing problematic negative option practices and bad actors, and the FTC must consider whether *even more* prescriptive rules are necessary. As the NPRM notes, the Rule,⁹ the Restore Online Shoppers’ Confidence Act (“ROSCA”),¹⁰ and Section 5 of the FTC Act¹¹ all “address harmful negative option practices.”¹² Congress specifically enacted ROSCA “to address ongoing problems with online negative option marketing.”¹³ In 2021, the FTC issued an “Enforcement Policy Statement Regarding Negative Option Marketing” (“Enforcement Policy Statement”) that describes the FTC’s authority to bring enforcement actions against companies engaging in certain negative option practices, and provides guidance on the FTC’s view of adequate disclosures, consent, and cancellation practices for companies to follow “[g]iven the number of applicable statutory and regulatory requirements. . . .”¹⁴

Particularly in the context of internet transactions, which are covered by ROSCA, the NPRM does not reveal evidence of violations that are not enforceable under the FTC’s existing authority. And as explained in greater detail below, new rules are only justified if there are unfair or deceptive practices that are prevalent. However, the NPRM does not evidence any unfair or deceptive subscription practices not covered by existing rules. To the contrary, the NPRM notes that both the FTC and states “continue to bring cases regularly that challenge negative option practices, including more than 30 recent FTC cases” spanning a range of deceptive or unfair practices.¹⁵ While the Commission reports a “high volume of complaints” regarding certain subscription practices, the NPRM provides no evidence indicating that the

⁸ *Global Subscription E-commerce Market: Analysis By Application Type, By End User, By Mode of Payment, By Region Size and Trends with Impact of COVID-19 and Forecast up to 2028*, Research and Markets (Jan. 2023), <https://www.researchandmarkets.com/reports/5148407/global-subscription-e-commerce-market-analysis>.

⁹ 16 C.F.R. § 425.1.

¹⁰ 15 U.S.C. §§ 8401-8405.

¹¹ *Id.* § 45(n).

¹² NPRM at 24,717.

¹³ *Id.* ROSCA prohibits sellers from charging or attempting to charge consumers for goods or services sold on the internet through negative option programs unless the seller: takes specific steps to provide the consumer clear and conspicuous notice of the material terms of the transaction; obtains consumer express informed consent before charging the account; and provides simple opt-out mechanisms. 15 U.S.C. 8403.

¹⁴ Enforcement Policy Statement Regarding Negative Option Marketing, FTC, at 9 (Nov. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf (“Enforcement Policy Statement”).

¹⁵ NPRM at 24,719.

proposed additional requirements will address the issue. The FTC should therefore continue to focus on using its existing authority to prevent unfair or deceptive subscription service practices.

Any Rule Amendments Should Avoid Prescriptive Notice Requirements. CTA supports rules that establish reasonable requirements that companies provide consumers with material information about product and service subscriptions. However, the proposed requirements are too prescriptive and would establish one-size-fits-all requirements that increase compliance costs and consumer confusion. Specifically, Proposed Rule Section 425.4 mandates the precise screen placement for material information about a subscription service offer.¹⁶ However, consumers are increasingly using smartphones to shop online, and a rigid, one-size-fits-all policy would produce impractical results for shoppers using small screens.¹⁷ The proposed language is also unnecessarily specific, because the FTC Act already prohibits deceptive practices in connection with providing material information to consumers purchasing a good or service. The proposal therefore may deter companies from offering recurring subscriptions in certain circumstances, and consumers may be forced to give consent to new terms for the same goods and services numerous times, resulting in consent fatigue.

Two other aspects of the NPRM’s proposals require clarification. *First*, Proposed Rule Section 425.4(a)(4) requires companies offering subscriptions to, in their initial offer disclosures, and “prior to obtaining the consumer’s billing information,” state “the date (or dates) **each** charge will be submitted for payment. . . .”¹⁸ While the NPRM explains that this provision does not include subscription plan renewal dates,¹⁹ it is unclear from the text what the phrase “each charge” means. CTA recommends that the FTC clarify that the rule provision requires companies to disclose the date of the initial charge, plus the date of the next charge or the recurring billing period, to avoid “a long list of prescriptive disclosures. . . .”²⁰ CTA also urges the FTC to clarify, consistent with the Enforcement Policy Statement, that Proposed Rule Section 425.4(a)(4) would not require consumers to re-enter their billing information each time they are presented with a new subscription service offer as this would eliminate consumer-friendly features such as “one-click” purchasing that can only be implemented with billing information stored on file.²¹

Second, Proposed Rule Section 425.5(a)(1) requires companies to obtain express informed consent before charging the consumer, and such consent to the Negative Option feature

¹⁶ *Id.* at 24,735, Proposed Rule 16 C.F.R. § 425.4(b)(2).

¹⁷ Kate Fu, *Top 10 smartphone uses: New consumer report reveals why we're at the point of no return [EmpowerQ]*, Qualcomm (Apr. 7, 2023), <https://www.qualcomm.com/news/onq/2023/04/top-10-smartphone-uses-new-consumer-report-reveals-why-were-at-the-point-of-no-return>.

¹⁸ NPRM at 24,735, Proposed Rule 16 C.F.R. § 425.4(a)(4) (emphasis added).

¹⁹ *Id.* at 24,727.

²⁰ *Id.*

²¹ The Enforcement Policy Statement specifically discusses permitted negative option offers “where sellers use consumers’ billing data to sell additional products from the same seller or pass consumers’ billing data to a third party for their sales.” Enforcement Policy Statement at 2, n.4.

must be obtained “separately from any other portion of the transaction. . . .”²² It is unclear whether this proposal would require companies to obtain consumer consent separate from, for example, making a discounted pricing offer or free trial offer for the product or service which is itself related to subscription feature. At a minimum, Proposed Rule Section 425.5(a)(1) should instead clarify that consent may be obtained in connection with Negative Option disclosures “separately from any other portion of the transaction for goods or services that are unrelated to the Negative Option feature.” Alternatively, to advance the same goal, and given that the Proposed Rule already requires clear and conspicuous disclosure of material terms, the FTC could instead require subscription service providers to prominently disclose subscription terms in a manner that differentiates them from other disclosures, such as in bolded or underlined font, in the course of obtaining consumer consent to the transaction.

The Rule Should Not Address Marketing Representations Unrelated to Subscription Terms. Proposed Rule Section 425.3 would make it “a violation of this Rule and an unfair or deceptive act or practice . . . for any negative option seller to misrepresent, expressly or by implication, any material fact . . . related to the underlying good or service.”²³ The NPRM does not provide any evidence that misrepresentations regarding underlying goods and services *unrelated* to the subscription feature are a prevalent source of consumer harm.²⁴ Such a broad rule is unnecessary given that the FTC Act already prohibits material misrepresentations concerning consumer goods and services, regardless of whether a subscription feature is involved. CTA urges the FTC not to adopt this unnecessary and overbroad mandate, and to instead rely on its ample authority to police misrepresentations.

Mandates Prescribing Specific Cancellation Methods and Annual Reminders Are Overly Prescriptive and Not Justified. Proposed Rule Sections 425.6 and 425.7 create prescriptive cancellation method requirements and annual reminder requirements that are arbitrary, vague, and not justified by the FTC’s limited authority under Section 5 of the FTC Act. Proposed Rule Section 425.6 requires companies to create a cancellation mechanism that is “at least as easy to use as the method the consumer used to initiate the negative option feature.”²⁵ This requirement is arbitrary, given that cancellation procedures may be logistically different than sign-up processes, particularly given the ease with which consumers often can initiate transactions online, and the need to authenticate consumers making cancellation requests to ensure they are legitimate. For example, even if a customer can sign up for a subscription service during a purchase process, the cancellation page is reasonably likely to be located in an account settings page for practical purposes. At the same time, the “at least as easy to use” standard is vague and does not provide sufficient guidance regarding permissible cancellation methods.

This proposal is also not grounded in the FTC Act or any record evidence that it is an “unfair” practice to have a cancellation process that is distinct from the sign-up process, either in

²² NPRM at 24,735, Proposed Rule 16 C.F.R. § 425.5(a)(1).

²³ *Id.* at 24,734, Proposed Rule 16 C.F.R. § 425.3.

²⁴ *Id.* at 24,737 (Dissenting Statement of Commissioner Christine S. Wilson).

²⁵ *Id.* at 24,735, Proposed Rule 16 C.F.R. § 425.6(b).

terms of consumer harm or in showing a lack of countervailing benefits. The FTC’s trade regulation rule authority under Section 18 of the FTC Act does not give the Commission the ability to issue blanket rules—such rules must be limited to “specific[] acts or practices which are *unfair or deceptive* acts or practices in or affecting commerce.”²⁶ The NPRM also fails to explain how consumers are harmed by cancellation methods that differ from the subscription signup process. There is no harm, for example, in requiring consumers to cancel their subscriptions over the phone as opposed to in-person, and telephone cancellation may be more efficient for all parties. Additionally, even if an act or practice is unfair or deceptive, the Commission may not issue a trade regulation rule unless it “has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking *are prevalent*.”²⁷

Likewise, Proposed Rule Section 425.7 requires annual subscription reminders that are “provided through the same medium (such as internet, telephone, or mail) the consumer used to consent to the negative option feature.”²⁸ This proposal is similarly arbitrary, as reminders can be effectively transmitted over a number of online mediums, including email, mobile applications, and website accounts. The NPRM also does not cite a basis to conclude that the lack of such reminders generally is an “unfair” practice at all based on any evidence of actual consumer harm. Nor does it explain how consumers are harmed merely because reminders are sent in a different medium, particularly if that medium is one typically used to communicate with the consumer regardless of the sign-up method. Indeed, the proposed requirement would also complicate the use of convenient annual reminder methods integrated into the product or service itself.²⁹

The Proposed Limitation on “Saves” Should be Revised. The NPRM defines a “save” as “an attempt by a seller to present any additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel a negative option feature.”³⁰ Proposed Rule Section 425.6(d) would require sellers to “immediately cancel the negative option feature upon request from a consumer, unless the seller obtains the consumer’s unambiguously affirmative consent to receive a Save prior to cancellation.”³¹ Similar to the proposed rules highlighted in the section above, however, the NPRM’s definition of “save” and Proposed Rule Section 425.6(d) are not warranted under Section 5 of the FTC Act because the NPRM does not provide evidence that “saves” are unfair or deceptive practices that harm consumers and are prevalent. Instead, “saves” as broadly defined by the NPRM can, in many cases, help consumers identify better deals by informing them of cost savings, present them with better options, or avoid unwanted or unanticipated data

²⁶ 15 U.S.C. § 57a(a)(1)(B) (emphasis added). A practice is “unfair” under the FTC only if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* § 45(n).

²⁷ *Id.* § 57a(b)(3) (emphasis added).

²⁸ NPRM at 24,735, Proposed Rule 16 C.F.R. § 425.7.

²⁹ For example, this proposal could conceivably prohibit an email newsletter subscription from only providing an annual reminder via email if the customer signed up for the newsletter on a website.

³⁰ NPRM at 24,734, Proposed Rule 16 C.F.R. § 425.2(f).

³¹ *Id.* at 24,735-36, Proposed Rule 16 C.F.R. § 425.6(d).

loss that may result from cancelling a subscription, such as the loss of photos, videos, or other important data. As written, Proposed Rule Section 425.6(d) may prevent subscription sellers from providing helpful, consumer-friendly information about the services they will lose if they cancel a subscription. The Rule should not restrict the flow of truthful and informative information for a consumer. Indeed, current FTC guidance under ROSCA already requires that subscription sellers not “subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers’ cancellation efforts.”³² At a minimum, the Rule should exempt any communications that explain either the beneficial cost savings of the subscription offering, or provide material information about the consequences of cancellation (such as the potential data losses discussed above) which consumers may not otherwise know about or understand, but would be important in their decision.

III. ANY RULE SHOULD PREEMPT STATE LAWS WITH DIFFERING REQUIREMENTS.

The current proposal expressly does not preempt stricter state negative option laws, but this threatens to complicate compliance and make consumer-friendly subscription offers more difficult to offer.³³ Record commenters observe that there are at least 18 state laws governing subscription practices.³⁴ These laws have inconsistent applicability and necessitate complex compliance efforts—for example, Florida’s law applies to subscriptions in effect more than six months after the date of contract initiation,³⁵ Hawaii’s law applies to subscriptions with a term of more than one month,³⁶ and New Mexico’s law applies to subscription contracts with renewal terms of greater than two months.³⁷ As another example, there is an existing array of state negative option laws that mandate renewal reminders with varying temporal requirements.³⁸

³² Enforcement Policy Statement at 14.

³³ NPRM at 24,736, Proposed Rule 16 C.F.R. § 425.8(b) (“For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.”).

³⁴ *Id.* at 24,722.

³⁵ Fla. Stat. § 501.165(1)(a).

³⁶ Haw. Rev. Stat. § 481-9.5(a).

³⁷ N.M. Stat. Ann. § 59A-58-2(B).

³⁸ *See, e.g.*, N.C. Gen. Stat. §75-41(a)(3) (“Any person engaged in commerce that sells, leases, or offers to sell or lease, any products or services to a consumer pursuant to a contract, where the contract automatically renews unless the consumer cancels the contract, shall . . . [f]or any automatic renewal exceeding 60 days, provide written notice to the consumer by personal delivery, electronic mail, or first-class mail, at least 15 days but no earlier than 45 days before the date the contract is to be automatically renewed, stating the date on which the contract is scheduled to automatically renew and notifying the consumer that the contract will automatically renew unless it is cancelled by the consumer prior to that date.”); Fla. Stat. § 501.165(2)(b) (“A seller that sells or offers to sell any service to a consumer pursuant to a service contract the term of which is a specified period of 12 months or more and that automatically renews for a specified period of more than 1 month, unless the consumer cancels the contract, shall provide the consumer with written or electronic notification of the automatic renewal provision. Notification shall be provided to the consumer no less than 30 days or no more than 60 days before the cancellation deadline pursuant to the automatic renewal provision.”); D.C. Code § 28A-203(b)(1) (requiring a 30-60-day renewal notice for “[a] person who sells a good or service to a consumer pursuant to a contract with an initial term of 12 months or more, that will automatically renew for a term of one month or more unless the consumer cancels the contract”).

Should the Commission move forward with its proposed revisions to the Rule, CTA encourages the agency to amend its proposal to preempt state laws with differing requirements. Such preemption would promote compliance and reduce consumer confusion that is likely to arise from divergent and varied state approaches.

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CTA shares the FTC's commitment to protect consumers from fraudulent negative option practices. However, this effort does not need to burden legitimate offerings that provide consumers greater choice and convenience. The FTC has existing regulatory tools at its disposal to investigate and deter unfair or deceptive subscription practices. Should the Commission decide to promulgate revisions to the Rule, any amendments must preserve flexibility for companies to implement reasonable consent, notice, cancellation, and renewal reminder practices that are tailored to their particular product or service offering.

Respectfully submitted,

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