June 23, 2023

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Negative Option Rule; Project No. P064202 (88 Fed. Reg. 24,716-24,739, April 24, 2023)

The undersigned organizations, representing businesses across a wide range of sectors, submit these comments regarding the Federal Trade Commission's ("FTC" or "Commission") notice of proposed rulemaking ("NPRM") to amend the Negative Option Rule ("Rule").[1] While we have many concerns with the NPRM, at the forefront, the FTC has insufficient legal authority to move forward with the NPRM in in its current form. Furthermore, the cost-benefit analysis is insufficient and fails to provide commentors with sufficient information to analyze the impacts of the NPRM. Moreover, we express strong concerns that many aspects of the NPRM are ambiguous, impractical, and harmful to consumers.

Consequently, we respectfully request that the FTC withdraw the NPRM in its current form. If the FTC decides to continue its current path, at a minimum, the FTC should conduct a new cost-benefit analysis for interested parties to comment on and we would request that other issues, outlined in this letter, be addressed.

I. Negative Option Programs are Beneficial for Consumers and Businesses

Negative option marketing serves as a critical tool to offer novel and innovative services and products to consumers and these services are responsibly utilized across numerous sectors including communications, insurance, retail, media, on-demand delivery, and information technology. Negative option marketing provides substantial benefits allowing consumers to receive products and services on a consistent, convenient, and cost-effective basis. Businesses benefit by getting the opportunity to demonstrate the value of their product or service through a free trial and earn new customers. Furthermore, as this type of marketing has been used, on a widespread and growing basis, for decades, consumers are familiar with the operation of negative options.

II. The NPRM Exceeds the Commission's Legal Authority

[1] Negative Option Rule, Notice of Proposed Rulemaking, 88 Fed. Reg. 24716 (April 24, 2023) ("NPRM").

The NPRM, as currently crafted, raises significant legal concerns including implicating the Major Questions and Non-Delegation Doctrines, the Federal Trade Commission Act, and the U.S. Constitution.

A) The NPRM Implicates the Major Questions and Non-Delegation Doctrine

First, the FTC's intent to restructure and expand the scope of the regulatory framework for negative option marketing is not clearly authorized by Congress. This raises issues of the Major Questions and Non-Delegation Doctrines. The NPRM discusses the various statutes and regulations addressing negative options including the Telemarketing Sales Rule, Restore Online Shoppers Confidence Act, Section 5 of the Federal Trade Commission Act, and numerous other statutes.[2] While these statutes illustrate Congress' attention to negative option marketing, it also demonstrates the unwillingness of Congress to expand powers and authorities of the FTC in this area. Congress clearly has not done so.

The FTC Act does not provide explicit authority for the Commission to pursue a broad rulemaking of negative option marketing. Instead, Congress has granted the FTC with limited and tailored authorities to regulate certain mediums and types of negative option marketing, but not all mediums and types as the NPRM encompasses.[3] Moreover, the NPRM attempts to circumvent Congress's clear mandate that the FTC lacks civil penalty authority for de novo Section 5 cases. The United States Supreme Court stripped the FTC of its authority to obtain monetary remedies pursuant to Section 13(b) in the *AMG Capital* decision.[4] But this NPRM seeks to hold marketers using negative option features liable for civil penalties or redress for misrepresentations even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple.

B. The NPRM Violates the Federal Trade Commission Act

The NPRM likely violates the Federal Trade Commission ("FTC") Act. As the NPRM itself recognizes, the Commission is required to abide by the terms of "Magnuson-Moss" rulemaking when acting pursuant to Section 18 of the Federal Trade Commission Act.[5] In several respects, the Commission's NPRM falls short of Section 18's heightened requirements. First, the NPRM fails to provide sufficient "Advance Notice of Proposed Rulemaking." Under Section 18, the Commission is required to "publish an advance notice of proposed rulemaking" ("ANPR") prior to

[2] *See* NPRM at 24717-18.
[3] NPRM at 24718.
[4] *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).
[5] *See* 15 U.S.C. § 57a.

issuing an NPRM.[6] While the Commission issued an ANPR on October 2, 2019, that notice did not cover the entirety of the proposed rule.[7] Specifically, the ANPR failed to provide notice that the FTC would propose to expand the scope of the Negative Option Rule to cover *all* material facts about a negative option transaction, not just those relating to the autorenewal feature itself; would require an entirely new set of rules related to consent; would propose to ban so-called "saves" before cancellation absent the consumer's consent to receive the information; and would impose a renewal reminder requirement.

By failing to raise these proposals in the ANPR, the Commission deprived the public of the opportunity to comment on these requirements and develop the record. This deficient record has resulted in a flawed NPRM, including for example, the failure to consider equally effective and less costly alternatives, the potential impact of the proposal on small businesses, and the significant costs associated with complying with the proposal. If these proposals would have been discussed in the ANPR, commenters would have raised these concerns before the Commission issued the NPRM.

Second, the NPRM fails to identify acts or practices "with specificity." The Commission may only promulgate rules under Section 18 if those "rules . . . define *with specificity* acts or practices which are unfair or deceptive."[8] This requirement provides parties with notice of the types of acts or practices that are unfair or deceptive and will be punished with heightened penalties. The FTC proposes to extend the Negative Option Rule to cover *all* material facts—even those that do not relate to the autorenewal feature itself.[9] The NPRM fails, however, to identify which claims would constitute a material fact, and thus fails to identify covered acts with the requisite level of specificity. Moreover, the Commission fails to explain how information such as product efficacy claims, advertising claims, or facts about underlying goods and services will improve a consumer's understanding of negative option programming transaction terms like total cost, renewal date, and cancellation terms.

Third, the NPRM fails to identify "prevalent" issues as required under a Section 18 rulemaking.[10] The prevalence determination should correspond to the specific acts or practices identified as deceptive or unfair —and prohibited—by the NPRM. The Commission may make the determination that an act or practice is "prevalent" only if

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[6] *Id.* § 57a(b)(2)(A).

[7] *See* Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52393-01 (Oct. 2, 2019).

[8] 15 U.S.C. § 57(a)(1)(B).

[9] NPRM at 24726.

[10] 15 U.S.C. § 57a(b)(3).

"it has issued cease and desist orders regarding such acts or practices" or "any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices."[11] The NPRM fails to demonstrate how the broad proposals in the rule are supported by corresponding prevalent deceptive or unfair practices in the rulemaking record. Instead, the "prevalent" practices identified throughout the record are narrow, while the acts or practices that the NPR addresses sweep significantly more broadly. The Commission appears to be relying upon the most egregious (and infrequent) examples of conduct to support regulations that will broadly prohibit legitimate negative option experiences. This process short circuits Section 18 requirements and will have significant negative consequences for businesses and consumers.

C. The NPRM Raises Significant First Amendment Concerns

Certain aspects of the NPRM raise serious First Amendment implications in its regulation of commercial speech. In particular, the NPR's Section 425.6's restrictions on "Additional Offers Before Cancellation" or "saves" prevents a negative option seller from suggesting or advertising any new or modified offers unless a consumer provides affirmative consent.[12] This requirement implicates a commercial entity's ability to engage in commercial speech by inhibiting a commercial entity's ability to advertise to consumers and note the implications of cancellation. This would apply to commercial speech that "is neither misleading nor related to unlawful activity" and accordingly is subject to the three-part test laid out in the Supreme Court's decision in *Central Hudson Gas Elec. v. Public Serv. Comm'n,* 447 U.S. 557 (1980). The NPRM, as currently written, would likely fail all three parts of the *Central Hudson* test.

III. Many of the Proposed Requirements are Unworkable

Negative option marketing serves as a critical tool to offer novel and innovative services and products to consumers and are responsibly utilized across numerous business sectors including communications, insurance, retail, media, on-demand delivery, and information technology. Many aspects of the NPRM are unworkable for negative option sellers given their ambiguity. For example, the prohibition on material misrepresentations covers products and services not tied to the negative option and creates ambiguity stemming from lack of clarity on what constitutes a material fact as well as what is misrepresented by implication.[13] Also, Section 425.6's "simple cancellation mechanism" is ambiguous given that the obligation making the cancellation at least as easy to initiate is a subjective standard and thus presents a compliance challenge to follow such a standard. In addition, many of the NPRM's

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[11] *Id.*
[12] NPRM at 24729.
[13] *Id.* at 24726.

requirements increase significant compliance obligations that raise practical challenges. For example, the proposed "clear and conspicuous" requirement in Section 425.4 may be impractical in some contexts such as on mobile devices with limited space and for voice purchases, the "immediately adjacent" requirement may not be appropriate given the medium.

IV. The NPRM Fails to Adequately Address the State Patchwork

While we appreciate that the Commission notes the importance of preemption, the imposition of solely floor preemption maintains a convoluted negative option marketing scheme. More than a dozen states regulate negative options, and the NPRM does not preempt requirements that exceed the FTC's proposed rules.[14] This means that negative option sellers will continue to have to abide by a patchwork of negative option rules that place significant burdens on interstate commerce as well as adhere to a novel and comprehensive federal regulation.

V. The NPRM Harms Consumers and Reduces Consumer Choice

The NPRM is harmful to consumers and consumer choice. The limitations on "saves" will impede the ability of negative option sellers to offer modified and more favorable services and products to consumers. Similarly, the general expansion of regulation on negative option marketing will disincentivize companies from offering subscription products despite the clear benefits for consumers. Outside of reducing consumer choice, other requirements may be detrimental to consumers such as over-disclosure of information that will overload consumers with too much information and make their decision-making process more difficult. This includes requirements such as enhanced disclosures at the point of sale, the second checkbox for negative options, as well as annual reminders.

VI. The Commission's Economic Analysis Is Flawed

The FTC failed to conduct any adequate analysis off the costs and benefits of the NPRM under the Regulatory Flexibility Act.[15] The FTC admits it lacks data on how the NPRM will impact small businesses and the overall economy.[16] Yet, the FTC concludes the effects are minimal.[17] Given the widespread use of negative options across numerous products and services, this unsupported assumption seems dubious. The proposed rule, if enacted, will likely cause significant harm to both industry and consumers in the form of increased costs, harm to innovation, and fewer

[14] NPRM at 24730.
[15] *See generally*, 5 U.S.C. 601–612 ("Regulatory Flexibility Act")
[16] NPRM at 24371.
[17] *Id.*

autorenewal offers. Moreover, the FTC only estimated record-keeping and disclosure costs, and did not include other compliance costs including website and process design changes, dedicating staffing for the collection and monitoring of consent information, and consumer costs such as increased time reading disclosures. We recommend that the FTC conduct a robust cost-benefit analysis and publish it for public comment before pursuing any final rule revising negative option marketing.

VII. Conclusion

The undersigned parties are concerned that the general expansion of regulation on negative option marketing will disincentivize companies from offering negative options despite the clear benefits of this model for consumers. Given the substantial legal, practical, and cost-benefit implications of this NPRM, we urge the FTC to withdraw the NPRM. We appreciate the FTC's consideration of our views. If you have any questions, please do not hesitate to reach out to Matt Furlow at mfurlow@uschamber.com.

Sincerely,

Computer & Communications Industry Association
Direct Selling Association
Information Technology Industry Council
Interactive Advertising Bureau
Software & Information Industry Association (SIIA)
U.S. Chamber of Commerce