U.S. Chamber of Commerce

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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)

To Whom it May Concern:

The U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to 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] This NPRM represents yet another attempt by the Commission to circumvent its existing legal authorities and Congressional intent to impose substantial and burdensome regulations on the business community. Many aspects of the NPRM are ambiguous, impractical, and harmful to consumers. Moreover, the FTC fails to conduct a fulsome cost-benefit analysis of the NPRM's impacts.

Accordingly, the Chamber urges the Commission to either withdraw or substantially revise its rule to comport with its legal authority, ensure practicality for negative option sellers, maintain consumer choice, and conduct a fulsome cost-benefit analysis that is released for public comment.

In the alternative, the Chamber recommends the following modifications:

- Modify the scope of coverage to exclude "promoting" from the definition of negative option seller and ensure the rule does not apply retroactively.
- Exclude the prohibition on misrepresentations.
- Utilize a tailored list of critical material facts for the disclosure of the negative option feature and allow all other disclosures to be in a separate location.
- Do not amend the definition of "clear and conspicuous" and retain the existing definition.

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

- Exclude the requirements for double opt-in consent, express consent for free trial conversions, and consent for underlying transactions for monthly services.
- Clarify the simple cancellation mechanism requirement to provide flexibility for negative option sellers.
- Exclude the limitation on saves.
- Modify the annual reminder requirement to exclude services that provide consumers with monthly bills, and provide flexibility in providing annual reminders, including through allowing opt-in consent to receive reminders.
- Strengthen the preemption to ensure a single federal standard to regulate negative options.
- Provide a two-year implementation period.

Negative option plans cover four main types of business practices including prenotification plans, continuity plans, automatic renewals, and free trial conversation offers.[2] Negative option plans and associated marketing practices and are responsibly utilized across numerous sectors including communications, insurance, retail, media, on-demand delivery, software, consumer goods, food and beverage, and information technology. These plans serve as an important business model to allow consumers the convenience to receive services that they desire without needing to take time to affirmatively place an order (e.g., on a monthly basis). Moreover, negative options empower consumers to explore novel product and services that may only be available in certain marketplaces and or test new products or services before purchasing. Finally, negative options empower businesses to efficiently offer discounts and bundled offers that often benefit consumers.

I. Significant Aspects of the NPRM Violate the Federal Trade Commission Act

The FTC's issuance of this NPRM violates the FTC Act in two ways. First, the NPRM's proposed use of Section 18 to address "unfair and deceptive acts or practices" falls short of the Commission's statutory requirements in many aspects contained in this rulemaking.[3] Second, the Commission lacks a statutory basis for a comprehensive and economy-wide rulemaking.

A. The Commission Has Not Shown Brevity and Specificity

Section 18 establishes several procedural requirements for the Commission to meet, including that an NPRM must provide "a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and

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[2] NPRM at 24716-24717.
[3] *See* 15 U.S.C. § 57a.

possible regulatory alternatives under consideration by the Commission."[4] The NPRM fails to meet the statute's test of brevity and specificity in several instances. First, it lacks detail as to what material facts are covered under the prohibition on misrepresentations. The NPRM outlines a few examples of material facts that could be covered, but the full scope of what is considered material is unclear, especially given that the rule sweeps broadly beyond misrepresentations regarding the negative option specifically to other aspects of the offering entirely distinct from the negative option.[5]

Thus, commenters are unable to provide a complete perspective on the specifics of the proposed misrepresentation requirement—which is of particular concern, since, as then-Commissioner Wilson noted, the issue was not raised in the Advance Notice of Proposed Rulemaking.[6] Second, another defect can be seen in the NPRM's discussion of the proposed simple cancellation mechanism which requires equivalency in the process for signing up and cancelling. The NPRM is ambiguous on how the requirement functions in practice, creating significant uncertainty for negative option sellers on how to comply with the proposed requirement.

B. <u>The Commission Has Not Shown Prevalence</u>

Under Section 18, the Commission can only initiate a rulemaking if "it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[7] Prevalence can be assessed based on previous FTC cease-and-desist orders targeting the act or practice at issue or on other information indicating a "widespread pattern" of that conduct.[8] The Commission does not meet that standard here.

The Commission does not even attempt to rely on cease-and-desist orders and barely cites actual judicial findings of liability. The FTC claims that harmful negative option practices fall outside of the Restore Online Shopper's Confidence Act ("ROSCA") and the Telemarketing Sales Rule's ("TSR") coverage, but only points to two cases which deal with direct mailers and radio advertisements.[9] It is unclear how prevalent negative option marketing is for products sold through direct mailers or on the radio. Moreover, a few examples of scams using negative option marketing through smaller marketing channels does not warrant a comprehensive, one-sized fits all rule to cover all negative option marketing across all mediums. A common thread,

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[4] 15 U.S.C. § 57a(b)(2)(A).
[5] NPRM at 24726.
[6] *See* CHRISTINE S. WILSON, DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON, NOTICE OF PROPOSED RULEMAKING – NEGATIVE OPTION RULE (2023).
[7] 15 U.S.C. § 57a(b)(3).
[8] *Id.*
[9] *See* NPRM at 24718; FTC and *State of Maine v. Health Research Labs.*, LLC, No. 2:17–cv–00467–JDL (D. Me. 2018) and *FTC and State of Maine v. Mktg. Architects*, No. 2:18–cv–00050 (D. Me. 2018).

however, is that almost none of those claims identify a specific act or practice that is prevalent, rather the Commission, relying on an improper level of generality, aggregates all concerns into a single identification of prevalence to justify a revised rule.[10] If the Commission seeks to demonstrate prevalence, it must be specific as to the prevalence of each individual act or practice it seeks to regulate under this rulemaking. The NPRM falls far short of that standard.

C. The Commission Has Not Shown Unfairness

The FTC cannot prohibit an act or practice as unfair unless 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."[11] The Commission has not shown unfairness for the specific acts and practices addressed by the rule. Instead, the Commission outlines how unfair or deceptive practices in negative option marketing in general may cause consumer harm.[12] And in some circumstances, the Commission fails to identify the countervailing benefits of certain negative option marketing features to consumers. For example, the Commission fails to consider how "saves" are beneficial to consumers and only focuses on perceived adverse effects, such as additional product offers or lower prices. Finally, the Commission cites that negative option marketing has generated federal class actions and consumer complaints.[13] However, the Commission has not demonstrated the merits of those class actions or consumer complaints and it noticeably does not rely to any significant extent on actual judicial authority. Without a demonstration of merit these suits and complaints cannot be used as examples of unfairness. Moreover, the Advance Notice of Proposed Rulemaking ("ANPR") does not address several of the proposals contained in the NPRM, including the prohibition on material misrepresentations, the ban on all "saves" without consent, and the renewal reminder requirement.[14]

D. There Is No Statutory Basis for a Comprehensive Negative Option Rulemaking

As discussed above, Congress has not provided authority for the Commission to pursue a broad rulemaking of negative option marketing. Instead, Congress has granted the FTC limited and tailored authority to regulate certain mediums and types

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[10] NPRM at 24725.
[11] 15 U.S.C. § 45(n).
[12] NPRM at 24720- 24721.
[13] NPRM at 24725.
[14] *See* Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52393-01 (Oct. 2, 2019).

of negative option marketing.[15] The Commission acknowledges that it is pursuing the proposed rule in part because its current remedial authority is limited due to the Supreme Court's decision in *AMG Capital Management, LLC v. FTC* and statutory limitations that inhibit the Commission's ability to obtain civil penalties.[16] But an admission that the Commission is attempting to effect an end-run around the limits to its authority cannot provide a basis for pursuing a rule. Moreover, the Commission admits it is pursuing a comprehensive rulemaking to account for the gaps in existing statutes in regulations that Congress intentionally opted not to address. Again, the lack of Congressional action in a part of the negative option marketing space is a sign that the Commission *lacks* power to act, not an invitation for it to stretch statutes beyond their plain meanings. These bases for rulemaking are illegitimate and underscore the Commission's lack of authority to pursue a comprehensive rulemaking.

II. The NPRM Implicates the Major Questions Doctrine

In 2022, the Supreme Court's *West Virginia v. Environmental Protection Agency* decision concluded that federal agencies can act only within their statutory and constitutional authority. The Court held that the "Major Questions Doctrine" requires a federal agency to possess a clear grant of authority for promulgating certain regulations.[17]

The NPRM implicates the Major Questions Doctrine given the substantial use of negative option marketing across a wide range of economic sectors, the comprehensive and expanded nature of the NPRM, the existence of a diffuse regulatory approach towards negative option marketing, and the lack of clear authorization from Congress to the Commission to pursue such a comprehensive and sweeping rulemaking.

A. An Economy and Media Rule on Negative Option Marketing Has Major Economic and Political Significance

The claims made by the Commission in the NPRM support the notion that the proposed revisions to the Rule will have major economic and political significance.

Negative option marketing is a frequently utilized business practice used by numerous sectors and across all types of services and products, including the insurance, communications, ecommerce platforms, media, food and beverage, and retail sellers. Moreover, negative option marketing occurs across all types of media

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[15] *See generally*, 16 CFR 310.3(a)(1)-(2) ("Telemarketing Sales Rule"); 15 U.S.C. 8402(a)(1)-(2) ("Restore Online Shopper's Confidence Act").
[16] *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).
[17] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022).

including the internet, telephone, and mail.[18] Consumers are also prolific users of negative options, with one consumer survey finding that 50% of respondents used at least one form of negative option while 35% were enrolled in three or more.[19] And consumer and businesses trends are also shifting more towards utilizing more negative options, not less.[20] Negative options are also widely regulated including in about half of the states and through several federal statutes and regulations.[21]

The Commission opted to pursue a comprehensive rulemaking to address all types of negative option features across all media. That means the rule is likely to have significant impacts on industries and sectors of the economy worth billions. Moreover, the rulemaking, as described by the Commission, aims to consolidate requirements from other federal negative option marketing statutes, establish floor preemption, and expand the aperture of the negative option regulatory framework to impose civil penalty authority.[22] All these aspects are individually significant. For example, enforcement and preemption are often key points of debate in Congress. Likewise, a unilateral comprehensive expansion of the negative option rule is at odds with Congress' current and diffuse statutory framework for negative option marketing.

B. The Breadth and History of the Asserted Authority Show the NPRM Addresses Major Questions

The breadth and history of asserted authority that the Commission claims in the NPRM implicates the Major Questions Doctrine. As noted above, the NPRM seeks to impose a comprehensive negative option marketing rule across a wide range of sectors and products and across all forms of media, implicating significant political and economic questions. The Commission has never proposed a comprehensive regulatory scheme that covers all types of negative options in all mediums.

The Commission has a long history of regulating negative options, starting with the first negative option rule in 1973, which, unlike the Commission's NPRM, solely covered pre-notification plans for the sale of goods.[23] Since then, the Commission promulgated minor updates to the Rule in 1998, concluding that significant changes to the Rule were unnecessary.[24] In response to negative options occurring in the online marketplace, Congress enacted ROSCA in 2010, which included remedies such as civil

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[18] NPRM at 24716.
[19] *Id.* at 24720.
[20] *Id.*
[21] *See*, Michael Jaeger, *Automatic Renewal State Laws*, FAEGRE DRINKER BIDDLE & REATH LLP (2020), https://www.faegredrinker.com/-/media/files/insights/pubs/2020/automatic-renewal-state-laws-w0187700.pdf?la=zh&hash=7ED3CB0E70F09E44A15107797E04F3C044917B03.
[22] NPRM at 24726.
[23] *Id.* at 24717.
[24] *Id.* at 24719.

penalty authority.[25] Most recently, the Commission updated its Enforcement Policy Statement for negative option marketing in 2021 and issued an ANPR in 2019, which serves as the basis for this NPRM.[26] Several other statutes and regulations touch on various aspects on negative option marketing, including the TSR, the Unordered Merchandise Statute, and the Electronic Fund Transfer Act.[27] As the Commission notes, each statute and regulation focus on a particular aspect of negative option marketing, tailoring regulatory obligations to the unique features of each medium, but there is not a comprehensive regulatory scheme.[28]

The breadth of the Commission's claims in the NPRM is not a simple consolidation of existing obligations under one rule for a more-streamlined regulatory environment. Rather, it is a significant expansion of existing negative option marketing rules. Never has the Commission asserted authority to expand the scope of the rule to regulate practices such as "dark patterns" (which has no clear definition), provide for a two-step consent mechanism for negative options, and limit additional offers before cancellations (also known as "saves"). Most importantly, the Commission seeks to prohibit all misrepresentations of material fact in negative option transactions.[29] Historically, the Commission has solely focused on material terms of the negative options themselves, not other aspects of the underlying transaction. *AMG Capital Management v. FTC* made it clear that the Commission does not have authority to seek consumer redress in de novo Section 5 case.[30] The proposed rule attempts to circumvent the Supreme Court's holding in *AMG* in an effort to reclaim a nonexistent power to seek redress and civil penalties for Section 5 violations unrelated to deceptive or unfair negative option practices.

C. <u>There Is No Clear Congressional Authorization for Comprehensive Negative Option Marketing Rule</u>

An agency is required to "point to 'clear congressional authorization'" when it seeks to regulate major questions.[31] In promulgating this NPRM, the Commission lacks any congressional authority—clear or otherwise—to pursue this type of rulemaking.

The NPRM notes the broad set of statutes and regulations governing negative option marketing. These include the Telemarketing Sales Rule, ROSCA, Section 5 of

[25] 15 U.S.C. 8401–8405.
[26] *Id.* at 24719.
[27] *See* 16 CFR part 310 ("TSR"); 39 U.S.C. 3009 ("Unordered Merchandise Statute"); 15 U.S.C. 1693–1693r ("Electronic Fund Transfer Act").
[28] NPRM at 24718.
[29] *Id.* at 24726.
[30] *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).
[31] West Virginia, 142 S. Ct. at 2614 (quoting Utility Air, 573 U.S. at 324).

the FTC Act, the Unordered Merchandise Statute, and Electronic Fund Transfer Act.[32] The Commission outlines the limitations of these regulations and statutes--specifically that they do not apply to all media nor cover all negative option practices.[33] Moreover, the Commission states that the objective of the rulemaking is to consolidate these requirements and expand civil penalty authority where that remedy is otherwise unavailable.[34] But even aggregating all these discrete pieces of legislation does not give the Commission the power to regulate all negative options (and all statements regarding products containing negative options) across the entire economy.

The Commission presents no evidence that Congress ever intended for the Commission to create a comprehensive regulatory scheme for negative option marketing that encompasses the variety of requirements proposed in the NPRM. To the contrary, there is every indication that Congress wants the Commission to address negative options only in certain industries or media and only in certain contexts where Congress perceives a need for regulation. Congress keenly is aware of negative option marketing and has enacted legislation to address new trends, such as ROSCA in 2010 to address online negative options.[35] But it has never purported to allow the Commission to cover the entire field of negative options.

The Commission claims, as justification for the rulemaking, that ROSCA is insufficient to address unfair and deceptive practices in negative option marketing. However, Congress has the ability to amend ROSCA or enact any other statute to correct any perceived deficiencies with the existing statutory and regulatory scheme. Congress has not done so. ROSCA and the other provisions on which the Commission relies, make clear that the Commission's authority over negative options is limited to the enumerated contexts in which Congress has expressly authorized it to act. Beyond those sectors, the Commission "literally has no power to act," *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022), and it certainly lacks the clear Congressional authorization it needs to pass scrutiny under the major questions doctrine.

III. The Limitation on "Saves" Implicates Commercial Speech Under the First Amendment

Certain aspects of the NPRM raise serious First Amendment implications in their regulation of commercial speech. In particular, the NPRM's Section 425.6's restrictions on "Additional Offers Before Cancellation" or "saves" prevent a negative option seller from suggesting or advertising any new or modified offers unless a

[32] NPRM at 24717-24718.
[33] *Id.* at 24718.
[34] *Id.* at 24726.
[35] 15 U.S.C. 8401–8405.

consumer provides affirmative consent.[36] This requirement implicates a commercial entity's ability to engage in commercial speech "that is neither misleading nor related to unlawful activity" by inhibiting a commercial entity's ability to advertise to consumers and note the implications of cancellation.[37] But beyond those categories, even commercial speech enjoys robust First Amendment protections; it "may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). Such restrictions on commercial speech are subject to the three-part test laid out in the Supreme Court's decision in *Central Hudson Gas Elec. v. Public Serv. Comm'n*. The "saves" requirement in the NPRM, as currently written, would likely fail all three parts of the Central Hudson test.

First, the Commission has not identified "a substantial interest to be achieved by" prohibiting sellers from making even a single save to consumers.[38] Saves often include a consumer-friendly offer like a substantial discount to continue the membership. Many consumers find such offers compelling—and accept them. The Commission has no legitimate interest (substantial or otherwise) in requiring sellers to ask consumers whether they would like to hear about other offers *in general*, rather than simply asking those consumers whether they would like to accept a *particular* save. Moreover, the Commission does not claim that saves—which suggest new or modified offers, including when a consumer is considering cancelling a product—are false or misleading inherently. Nor does it argue that, across the board, they are deceptive. In fact, it devotes almost no space to discussing them in the NPRM. But it nonetheless prohibits what companies can say and when in the context of saves.

Second, the Commission is unlikely to be able to show that "the regulatory technique" proposed is "in proportion to" whatever substantial "interest" it might have.[39] Even if the Commission might have a legitimate interest in prohibiting sellers from making so many successive "saves" to their customers as to make the cancellation process more difficult, the Commission's blanket prohibition on even a single save absent express consumer consent would in no way be proportional to that interest.

And third, the Commission has not explained how "[t]he limitation on expression" it has proposed is "designed carefully to achieve the State's goal."[40] The Commission had many less restrictive means of accomplishing its interests, such as by permitting sellers to make only a limited number of saves before a consumer

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[36] NPRM at 24729.
[37] *Central Hudson Gas Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).
[38] *Id.* at 564.
[39] *Id.*
[40] *Id.*

cancels an autorenewal agreement. The Commission's proposal to instead completely prohibit even a single save absent express consumer consent is unlikely to satisfy *Central Hudson*.

IV. The Cost-Benefit Analysis is Flawed

The Chamber is concerned that the Commission failed to conduct any adequate analysis off the costs and benefits of the NPRM under the Regulatory Flexibility Act and the Paper Reduction Act. The Commission admits that it does not have sufficient empirical data on how the proposed rule will affect the national economy and small business.[41] However, it made a preliminary determination that the effects on the national economy will not be substantial.[42] The Commission underestimates associated costs through only including recordkeeping and disclosure requirements, but not other compliance costs. Moreover, the Commission fails to identify whether the cost-benefit analysis apply to business-to-business transactions in addition to business-to-consumer transactions. The Commission should ensure the analysis accounts for both types of transactions.

Accordingly, the Chamber recommends that the Commission should collect data on the impact on small entities, study business to business transactions, estimate the potential costs and release that information for public comment before moving forward.

V. Substantive Concerns and Suggested Alternatives

The NPRM's expansive set of requirements raises significant concerns on a number of issues, including on coverage, misrepresentation prohibition, information disclosures, definition of clear and conspicuous, consent, the simple cancellation mechanism, saves, annual reminders, preemption, and the implementation period.

As discussed above, the FTC fails to provide sufficient legal authority to pursue many aspects of the NPRM so the Chamber respectfully request that the Commission withdraw the NPRM. If the Commission moves forward with the rule, the Chamber urges the Commission to substantially revise its rule to comport with its legal authority, ensure practicality for negative option sellers, maintain consumer choice, and conduct a fulsome cost-benefit analysis. A discussion of the Chamber's recommended revisions follows.

A. The NPRM's Coverage Sweeps Too Broadly

[41] NPRM at 24371.
[42] *Id.*

The Commission should narrow the scope to exclude "promoting" from the definition of a negative option seller as well as ensure the rule does not apply retroactively. The NPRM proposes to expand the scope of the rule to cover all forms of negative option marketing and all forms of media, such as the Internet, in person, telephone, and printed materials.[43] The NPRM then defines a "Negative Option Seller" to include a person "promoting . . . or otherwise marketing goods or services with a negative option feature."[44] The rule's obligations are then imposed on any negative option seller as defined here. The Commission should strike "promoting" from the definition of "Negative Option Seller." Promoting could encompass a wide range of activities including advertising that ensnare legitimate business practices and unnecessarily expand liability. It is not just the seller of a good or the provider of a service, after all, that "promot[es]" or "market[s]" it to consumers; marketing and advertising companies, web designers, entities in the supply chain, and many others could, under a broad conception of those words, get swept in. And yet many of those participants in the promotion process may not actually play an active role in determining how the negative option is presented to the consumer. All would potentially be on the hook.

The Commission should also clarify that the rule does not apply retroactively and does not apply to either negative option contracts or long-term fixed contracts that can transition into negative options (those longer than one year) in existence before the effective date of the final rule. Basic fairness countenances against pulling existing contracts into the scope of the rule.

B. The Prohibition on Misrepresentations is Unlawful and Ambiguous

The Commission should strike the unlawful and ambiguous prohibition on material misrepresentations. The proposed Section 425.3 of the NPRM would prohibit "any Negative Option Seller to misrepresent, expressly or by implication, any material fact related to the transaction, such as Negative Option Feature, or any material fact related to the underlying good or service."[45] The Commission notes that practices covered under this requirement would include misrepresentations of product efficacy, processing or shipping fees, deadlines, cancellation, and a panoply of other aspects of a transaction.[46]

As noted earlier, this provision raises significant questions relating to the Commission's authority to impose such a requirement. The prohibition includes both material facts related to the negative option feature as well as material facts not

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[43] NPRM at 24726.
[44] *Id.* at 24734.
[45] *Id.*
[46] *Id.* at 24726.

specific to the negative option feature but connected to the underlying product or service. This is an overly broad and ambiguous provision that has substantial ramifications on a wide range of business activity. Moreover, the NPRM neglects to define materiality and instead outlines a list of aspects of a transaction that may or may not be subject to deceptive activities.[47] The full scope of obligations is thus unclear. Could a privacy policy, for example, be considered a material representation covered under this requirement?

While the scope of the requirement is ambiguous, its likely impact is not. The ambiguity and consequential legal risk emanating from this requirement will disincentivize the use of negative option features by businesses. If the price of employing a negative option is having the Commission watching every statement the company makes and imposing civil penalties based on any misrepresentations, many entities may forgo negative options altogether. This decreases consumer choice in the marketplace given the clear popularity and use of negative option features across the economy. For businesses that opt to continue using negative option features, this ambiguity could also trap legitimate business activities where a material misrepresentation was made that is either inadvertent or causes minimal or concrete harm to consumers.

C. The Scope of Disclosure of Important Information Should Be Tailored

The Commission should clearly outline a tailored list of material facts most critical for disclosure of a negative option feature and then allow sellers to place the remainder of the disclosure to a separate page(s) accessible by hyperlink or similar mechanism. Such a list should consist solely of the terms outlined in the Commission's 2021 Enforcement Policy Statement, which include existence of the negative option offer, the offer's total cost, and how to cancel the offer.[48] The proposed Section 425.4 of the NPRM would require negative option sellers to "to disclose to a consumer, prior to obtaining the consumer's Billing Information, any material term related to the underlying good or service that is necessary to prevent deception, regardless of whether that term directly relates to the Negative Option Feature."[49] This disclosure requirement presents several concerns for consumers and negative option sellers.

First, the requirement will force negative option sellers to provide overly detailed disclosures to consumers. This will make it more challenging for businesses to present, and for consumers to understand, the most important material terms of a

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[47] *Id.*

[48] *See* Enforcement Policy Statement Regarding Negative Option Marketing, Federal Trade Commission, 86 Fed. Reg. 60822 (Nov. 4, 2021).

[49] NPRM at 24735.

negative option offering and may have the opposite effect on the disclosure goals proffered by the Commission. Too much information, after all, often means that none is actually consumed; information overload when a consumer just wants to get through the sales process will impose huge compliance burdens on all manner of regulated entities without actually improving consumers' user experiences.

Second, the requirement is also ambiguous considering it does not clearly outline the specific material terms that need to be disclosed, which is particularly important considering the requirement applies not just to the negative option feature, but all terms in the transaction. The Chamber is concerned that negative option sellers would be subject to substantial liability on the proper level of disclosure. As explained above, failing to address the ambiguity could simply drive companies out of the negative option space altogether, depriving users of what is typically an efficient option for ease of payment.

D. The Commission Should Not Adopt a New Definition of Clear and Conspicuous

The Commission should retain the existing definition of "clear and conspicuous" and strike the revised definition from any final rule. The proposed Section 425.4 of the NPRM also requires that disclosures are clear and conspicuous and adopts the definition used in California and the District of Columbia.[50] The requirements that disclosure on the internet or mobile applications be "unavoidable" and "immediately adjacent" raise practical concerns. Many sign-ups occur on mobile devices and applications where space is constrained and challenging to provide detailed disclosures in that setting.[51] Moreover, in some contexts, such as voice purchases, it is unclear how a requirement like immediately adjacent would apply given that it is intended for a physical document or a desktop webpage. Again, overloading consumers with overly long and detailed disclosures may damage the user experience and dissuade companies from offering consumers all the benefits of negative options.

E. Proposed Consent Requirements Are Too Burdensome

The Commission should exclude the double opt-in consent requirement from any final rule. Section 425.5 of the NPRM directs a negative option seller "to obtain the consumer's express informed consent before Charging the consumer."[52] The

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[50] *Id.*
[51] *See generally*, Ying Lin, *10 Mobile Usage Statistics Every Marketer Should Know in 2023*, OBERLO (Jan. 1, 2023), https://www.oberlo.com/blog/mobile-usage-statistics.
[52] NPRM at 24735.

consent must also be separate from the rest of the transaction, which in effect requires consent twice for the same transaction.[53]

Consumers understand negative options given their common occurrence across the economy. There is little to no evidence to suggest, nor does the record indicate, that a double opt-in will create any consumer benefit. The opposite is more likely to be true because it will increase consumer consent fatigue and add unnecessary friction to the transaction. From a consumer experience standpoint, this requirement seems largely unnecessary if businesses are also required under the proposed amendment (and existing state subscriptions laws) to clearly and conspicuously disclose the material terms of the user's agreement in purchase flows. Adding too much additional information or too many required actions in a purchase cart, for example, has diminishing returns for consumer comprehension and attention, and can increase the cognitive load for consumers to the point that they simply stop reading or give up on the purchase. Consumer contracts already contain numerous different requirements, and it is unclear how a negative option feature merits its own separate requirement compared with other contractual terms.

Nonetheless, the Chamber agrees that a negative option feature is important to disclose given that it is a key term of the transaction. As an alternative, we recommend that a negative option term clearly stands out (e.g. bold, underlined) from other disclosures terms either in the contract or in an alternative location easily visible to a consumer (e.g. a check-out webpage) so a consumer will be provided with sufficient information to understand they are signing up for a good or service with a negative option feature. To the extent the Commission nonetheless decides to adopt a separate consent requirement for negative option plans, it should not require a seller to separately retain a record of consent where the seller's purchase process does not allow a customer to proceed to make a purchase without accepting the terms of the negative option feature.

Further, the Commission should clarify either that the definition of negative option features under proposed rule 425.2(d) or the separate consent requirements for negative option features and the underlying transaction under proposed rule 425.5(1) and (3) do not apply to underlying transactions for monthly subscription services. For example, unless there is a negative promotional option, service providers should not be required to have a separate consent for monthly billing and the underlying transaction when the underlying transaction is for a monthly service.

Finally, the Commission should exclude a requirement for express consent for free trial conversions. The Commission seeks comment on whether Section 425.5 should be further modified to require sellers of free trials to obtain an additional round

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[53] *Id.*

of consent before charging a consumer at the completion of the free trial.[54] The Commission was right to exclude such a requirement from its proposed rules. Free trials are beneficial to consumers but have costs to sellers (e.g. through content acquisition costs and payments to third parties).[55] Thus, the Commission must balance a seller's ability to prevent abuse with the consumer's ability to acquire a free trial. Sellers are also much more likely to offer free trials – which are beneficial to consumers – where there is a seamless way for satisfied consumers to automatically continue their subscription after the free trial has ended. Without this efficient continuation from a free trial to a paid subscription, the costs to sellers of providing free trials may begin to outweigh the benefits and may stop offering them.

Consumer consent for converting from free trials to paid subscriptions is sufficiently addressed under existing state laws which require businesses to clearly and conspicuously disclose material information about the subscription offer, including any free trial terms and cancellation rights. Free trial periods are a voluntary offer from sellers that allow consumers to ensure that the service meets their expectations. For smaller businesses in particular, additional regulation is likely to result in fewer trials being offered, meaning that consumers may have to pay for a service they could not try out first for free.

F. The Simple Cancellation Mechanism Is Too Inflexible

The Commission must provide additional flexibility for the simple cancellation mechanism. Section 425.6 of the NPRM directs Negative Option Sellers to provide a "simple mechanism for a consumer to cancel the Negative Option Feature and avoid being Charged for the good or service…"[56] The click to cancel option must be at least as simple as initiation and through the same medium as was used to accept the negative option feature. The proposed mechanism offers a seemingly simple solution but is in fact an ambiguous and hard to implement requirement.

First, the requirement that the mechanism must be at least as simple as initiation is a subjective standard and thus challenging for a business to implement. The Chamber appreciates the Commission's goal of flexibility in meeting this requirement, but we are concerned that businesses may be subject to liability for a "simple" cancellation method if that method is deemed to be insufficiently simple by the Commission.

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[54] NPRM at 24728.
[55] *See Offering free trials: Everything you need to know*, PADDLE, https://www.paddle.com/resources/free-trial.
[56] NPRM at 24735.

Second, "simplicity" as compared to the sign-up process is not the appropriate metric to determine the efficacy of cancellation and does not account for the fact that customers often subscribe to multiple products or services that afford them valued discounts. This requires more time and personal assistance to address when a customer seeks to cancel only one of such related products or services.

Third, sign-up and cancellation serve different purposes, are located in different places on a website, and have different customer contexts. Sign-ups provide important information about the offer, such as the price terms and conditions. Cancellations on the other hand offer information about what a consumer loses when they opt to cancel as well as for some products and services crucial information on obligations and consequences that flow from cancellation (e.g., equipment returns, understanding exactly what will be canceled and its impact). For these reasons, the Commission should also make clear that a web-based chat qualifies as an appropriate cancellation mechanism where a customer signed up for a service online. Fourth and relatedly, businesses' existing cancellation methods tend to be tailored to the specific products and services they offer and requiring one-size-fits-all changes to those methods would be enormously burdensome and would risk confusing customers and diminishing their customer experience.

In sum, demanding that companies create a false equivalency between the two processes will only confuse and create complexities for consumers with little redeeming value.

G. The Proposed Limitation on Saves Harms Consumers

The Commission should exclude the saves limitation entirely from a final rule. Section 425.6 of the NPRM also directs a seller 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."[57] A "save" is defined to encompass additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information.[58] The Chamber expresses strong concern with this limitation on saves. The Commission's limitation on saves would inhibit this pro-consumer business practice, which the record fails to demonstrate is anything but beneficial for consumers in the vast number of cases.

First, mandating consumer consent for saves could decrease simplicity for consumers, contrary to the intent of the NPRM. For example, in the online context, a company would be prohibited from offering a save on the same page as the

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[57] *Id.*

[58] 16 C.F.R. § 425.2(f).

cancellation, but a company could offer an option for a customer to view saves before they move to cancellation, which would be a two-step process instead of a one step process. This contradicts the Commission's goal of ensuring a simple cancellation mechanism.

Second, saves serve an important function of providing consumers with alternative offers and important information that ultimately benefit consumers such as additional product offerings and/or a lower price. The broad definition of a "save" limits the ability for companies to offer these benefits or provide useful, consumer-friendly details about the subscription before they cancel it. For example, the definition is so broad that it appears to prohibit a seller from informing a consumer before completing cancellation what the consumer will lose by cancelling, even if those losses are irreversible (e.g., loss of accumulated credits or saved photos, documents or other content) and meaningful to the consumer at that point in the experience.

The Commission already requires a simple cancellation mechanism, and as such it is unclear what consumer harm the omission of saves is intended to prevent. If subscription providers must have simple and reasonable cancel processes, the additional restriction on what type of content could be surfaced to consumers in those processes is unnecessary.

H. Additional Flexibility for Annual Reminder Requirement (Section 425.7)

The Commission should provide additional compliance options for the annual reminder requirement, including allowing the use of opt-ins, exemptions, and flexibility in the use of medium. Section 425.7 of the NPRM directs negative option sellers of sales of non-physical goods to provide "consumers reminders, at least annually, identifying the product or service, the frequency and amount of charges, and the means to cancel."[59] The reminders must also be in the same medium the consumer used to originally consent to the negative option feature. The Chamber appreciates that the intent of this proposal is to provide clear information to the consumer on the negative option feature.

However, the Commission should consider several unintended consequences. One, the average consumer is subscribed to a high volume of marketing communications from a wide range of services, some of which include consent to a negative option feature.[60] Given that more than a third of consumers consent to three

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[59] NPRM at 24736.

[60] Shelby Jordan, *23% of Consumers Receive Marketing Emails from Companies They Never Subscribed To*, THE MANIFEST (Feb. 21, 2021), https://www.prnewswire.com/news-releases/23-of-consumers-receive-marketing-emails-from-companies-they-never-subscribed-to-301234484.html.

or more products and services with negative option features, an annual reminder may be disregarded by the consumer given the preexisting volume of email communications. Two, particularly for negative option services and products that are month to month, consumers are already reminded through billing that they subscribe to a negative option product or service, and thus an annual reminder would be redundant. Three, the annual reminder requirement that the reminder must be in the same medium limits consumer choice. A customer who subscribes over the telephone may prefer to receive information by email (and may not even provide a telephone number to the seller) given the panoply of robocalls and other unwanted telephone calls faced by consumers on a regular basis. Also, in the context of texting and telephone calls, a business that is required to provide an annual reminder by telephone may run afoul of the Telephone Consumer Protection Act.[61] These nuances should be reflected and accounted for in any final rule.

The Chamber recognizes that some consumers may find annual reminders helpful. Should the Commission nonetheless move forward with adopting rules in this regard, it should make several revisions to the proposed rules. First, services that provide consumers a monthly bill should be exempt from this requirement, provided the bill includes information such as the product or service, frequency and specific charges, and instructions for how to cancel or contact customer service. Customers that are sent a monthly bill are already effectively receiving reminders of service. Second, for the reasons described above, sellers should have flexibility in the medium through which they provide annual reminders to customers. Third, sellers should be permitted to seek customers' opt-in consent to receiving annual reminders.

I. The Scope of Preemption Is Insufficient

The Commission should strengthen the preemption contained in this rule to minimize regulatory burdens on negative option sellers. The proposed Section 425.8 of the NPRM limits the preemptive effect of this rule to conflicts between this rule and a state rule or where state laws would frustrate the objectives of this rule.[62] The Chamber appreciates that the Commission considers the important role of preemption in regulating interstate commerce, especially when such commerce implicates transactions over mediums such as the telephone and the Internet. However, the floor preemption established in the NPRM is insufficient. Practically, more than a dozen states regulate negative options in some form, and the imposition of additional, more substantive requirements would create a burden on businesses that sell to consumers in multiple states.[63]

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[61] *See* 47 U.S.C. § 227.
[62] NPRM at 24736.
[63] NPRM at 24722.

The Chamber encourages the Commission to explore alternatives to strengthen the preemption contained in this rule, especially if the rulemaking objective is to facilitate a comprehensive regulatory framework for negative option marketing. A floor just creates an increased federal burden without actually ensuring consistency of overall regulation on entities in the different states. Stronger preemption can limit the discrepancies that could form if state legislatures respond differently to heightened federal regulation. If the Commission is unable to find an alternative path, the Commission should reduce the overall burden of this regulatory framework and set a low floor to minimize the impacts on interstate business activity, leaving it to the states—which have long been regulating in this space—to do most of the work in shaping rules for negative options.

J. Any Final Rule Requires a Sufficient Implementation Period

The Commission must implement at minimum, a two-year implementation period for this year to ensure effective compliance. The NPRM does not propose a specific implementation period for these requirements to be implemented. Depending on the scope and specific requirements of a final rule, implementation of a final rule's requirements will be time-consuming and costly considering a business will likely have to modify its information technology systems, consumer facing websites and apps, customer service training materials, and other software and systems.

VI. Conclusion

In conclusion, for the foregoing reasons, the Chamber recommends that the Commission withdraw the rule and issue a new cost-benefit analysis for public comment. We stand ready to discuss these issues, our suggested changes, and other concerns in greater detail. If you have any questions, please reach out to Matt Furlow (mfurlow@uschamber.com).

Sincerely,

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