



Office of Commissioner
Noah Joshua Phillips

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Concurring Statement of Commissioner Noah Joshua Phillips

Enforcement Policy Statement Regarding Negative Option Marketing

October 28, 2021

I support the Commission’s decision to issue an enforcement policy regarding negative option marketing. Negative option marketing – a ubiquitous feature of businesses from newspapers to water bottle delivery to video streaming – is currently covered by a patchwork of laws and regulations: Section 5 of the FTC Act, the Restore Online Shoppers’ Confidence Act, the Telemarketing Sales Rule, the Rule on the Use of Prenotification Negative Option Plans, the Electronic Fund Transfer Act, and the Unordered Merchandise Statute. This policy statement sets forth a framework to explain what the Commission expects of participants in this space, apprising marketers of their obligations and informing consumers of their rights.

Drawing upon decisions by federal courts and the Commission about negative options, the policy statement lays out expectations concerning disclosures, consent from consumers, and how marketers must handle the consumer’s ability to cancel. ROSCA, for example, requires that a seller provide “simple mechanisms for a consumer to stop recurring charges”.¹ The policy statement explains how the Commission interprets that, including a cancellation mechanism that is as easy to accomplish as signing up, whilst preserving the opportunity for a business to make an offer to induce a consumer to stay.² If you have ever signed up for something online but had to wait on hold on the telephone to cancel, this policy is for you.

Commissioner Wilson takes no issue with the substance of the policy statement itself, but instead is concerned about superseding the rulemaking process. Where the issuance of a statement supplants the rulemaking process effectively to declare a new “rule” solely by guidance and without notice and comment, I share that reservation.³ Where, as here, the Commission is

¹ 15 U.S.C. § 8403.

² The moment at which a consumer is about to cancel may be the moment when they can get the best deal. *Cf.* A. O. Hirschman, *Exit, Voice, and Loyalty* (1970).

³ *See* Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), at <https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioner-noah-joshua-phillips-regarding-policy>. The Health Breach Notification Rule is governed by Administrative Procedures Act rulemaking requirements, and the FTC’s ongoing rulemaking efforts are directed to an existing rule. The policy statement subverted the rulemaking process by declaring something illegal where the Commission had never done so before, in a situation where I do not believe the underlying statute applies. The circumstances here are different, in part because, in the negative option marketing space, there is no comprehensive rule that covers all marketing in all media. In the HBNR context, my

explaining its view of obligations under existing authorities, I think it better to pursue a lighter, less “regulatory” touch in the first instance. The Commission can pursue rulemaking later, if, and when, we determine that a rule change is necessary.

Negative option marketing rulemaking implicates the requirements of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. Even though the Commission has begun this process,⁴ this kind of rulemaking sensibly includes regulatory guardrails that have certain timing constraints and could require the consumption of substantial agency resources. The policy statement provides immediate guidance to industry, without the wait. If followed, there may be no need for a new rule. Apprising industry of its obligations, and saving consumers money that they might otherwise lose because of problematic negative option marketing practices, is a win for both.

concern was heightened by a policy statement that, *inter alia*, undermined two rulemaking processes and contradicted standing guidance from the agency.

⁴ Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 52393 (Oct. 2, 2019) (seeking comment on need for amendments to the Rule Concerning the Use of Prenotification Negative Option Plans (16 CFR Part 425)) to help consumers avoid recurring payments for products and services they did not intend to order and to allow them to cancel such payments without unwarranted obstacles).