UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter
and Commissioner Alvaro M. Bedoya
Regarding the Notice of Proposed Rulemaking on the Negative Option Rule
Commission File No. P064202

March 22, 2023

Today the Commission has voted out a proposal for a much-needed update to the FTC's nearly 50-year-old Negative Option Rule. As the Commission knew when the rule was passed in 1973, companies too often manipulate consumers into paying for subscriptions for goods and services that they don't want. The problem has only gotten worse. Today, we are proposing to not only lay out clear rules of the road for marketing negative option plans, but also to mandate that companies make it as easy to cancel as they make it to sign up in the first place.

Negative option plans refer to any situation where the customer is presumed to continue to accept an agreement or offer unless they affirmatively decline it. This structure can be harmless, and can even benefit consumers, when properly disclosed. Problems arise when businesses manipulate consumers away from taking that affirmative step, which can result in customers paying for things they don't want or need. Where consumer protection laws are inadequate, or inadequately enforced, dishonest companies will keep developing ways to make it easier to inadvertently subscribe, and ever harder to cancel, harming consumers and honest competitors along the way.

The original Negative Option Rule addressed what we call "prenotification plans." These are where sellers provide consumers with notice of the product, send the product, and then charge for it unless the consumer affirmatively declines. Since then, the Commission has gained other authorities to help address deceptive negative options, including the Telemarketing Sales Rule and the Restore Online Shoppers' Confidence Act. The Commission has actively enforced these rules and laws, including in over 30 cases from just the past few years.[1] In 2021, we issued a policy statement articulating the Commission's various existing authorities.[2]

But these authorities have left major gaps. TSR applies only to telemarketing, ROSCA only to online shopping, and the existing Negative Option Rule only to prenotification plans. Meanwhile, even as we've been busy enforcing these laws, negative option marketing has only increased, along with abuses. Some companies are using ever more sophisticated dark patterns to thwart consumer efforts to cancel a product or service. Some consumers report thinking they've successfully canceled, only to find out later that they didn't notice a nearly invisible button that they needed to click in order to finalize their decision.

Accordingly, today's proposed rulemaking draws on Section 5's prohibition against unfair or deceptive practices. Specifically, it proposes to amplify ROSCA's simple-cancellation mandate and applies it across the full universe of negative option marketing. As the Commission has found in case after case, companies can make it easy to sign up—sometimes inadvertently—for an ongoing good or service and make it difficult to leave. Many gyms reportedly require members to cancel in person or via certified or notarized mail.[3] You might sign up for a cell phone plan online, but to cancel, you have to call an 800 number, wait on hold for a customer service representative, and then speak to that representative, who will keep you on the line to try to convince you to stay. These companies are betting that customers will be too impatient, busy, or confused to jump through every hoop.

Canceling a subscription should be easy. That's why the proposed update to the Negative Option Rule sets forth clear standards on what we call "click-to-cancel": the obligation to make cancellation simple and easy. For example, the proposed rule requires any cancellation to be offered through the same medium as the subscription. Most importantly, it "must be at least as easy to use as the method the consumer used to initiate the Negative Option feature." To take a simple example, this would put an end to companies requiring you to call customer service to cancel an account that you opened on their website.

The proposed rule contains other proposed consumer protections, as well. Businesses marketing negative option products and services must clearly and conspicuously disclose key material terms—including when any trial period ends, the deadline to cancel, the frequency of

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[1] Examples of these matters include: *FTC v. Triangle Media Corp.*, 3:18-cv-01388-LAB-LL (S.D. Cal. 2019); *FTC v. Credit Bureau Ctr., LLC*, No. 17-cv-00194 (N.D. Ill. 2018); *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2018); *FTC, Illinois, and Ohio v. One Techs., LP*, No. 3:14-cv-05066 (N.D. Cal. 2014); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC v. Nutraclick LLC*, No. 2:16-cv-06819-DMG (C.D. Cal. 2016); *FTC v. XXL Impressions*, No. 1:17-cv-00067-NT (D. Me. 2018); *FTC v. AAFE Products Corp.*, No. 3:17-cv-00575 (S.D. Cal. 2017); *FTC v. Pact Inc.*, No. 2:17-cv-1429 (W.D. Wash. 2017); *FTC v. Tarr*, No. 3:17-cv-02024-LAB-KSC (S.D. Cal. 2017); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. DOTAuthority.com, Inc.*, No. 0:16-cv-62186-WJZ (S.D. Fla. 2018); *FTC v. Bunzai Media Group, Inc.*, No. CV15-04527-GW(PLAx) (C.D. Cal. 2018); and *FTC v. RevMountain, LLC*, No. 2:17-cv-02000-APG-GWF (D. Nev. 2018).
[2] Fed. Trade Comm'n, Enforcement Policy Statement Regarding Negative Option Marketing (2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.
[3] *See, e.g.,* Jeremy Glass, *I Tried to Quit Three Gyms in 1 Day and Ended Up a Stronger Man*, MEN'S HEALTH (Apr. 14, 2020) https://www.menshealth.com/fitness/a32085243/how-i-canceled-gym-memberships/.

charges, the date of payments, and cancellation information—before collecting any billing information from the customer. The Commission also proposes a requirement that businesses get the consumer's unambiguously affirmative consent to the negative option feature of the transaction, separate from any other agreement. The proposal would still allow a business to try to persuade customers to stay, such as by offering perks or discounts. But it would have to get the customer's express consent before doing so.

These are some of the key components of today's Notice of Proposed Rulemaking, which seeks comment on the proposal to update and modernize the Commission's existing authority around negative option plans.

If adopted, this rule would enable more efficient enforcement. It would create a more powerful deterrent by introducing the risk of civil penalties. And it would allow the Commission to return money to wronged consumers.

The proposed rule would also provide clarity across industries about sellers' obligations when engaging in negative option marketing. The click-to-cancel section of the proposed rule would give companies clear and specific instructions around making it at least as easy to cancel their products and services as it is to register for them.

We invite members of the public to weigh in on these proposed amendments to the Negative Option Rule. As we move forward with the rulemaking process, we will carefully review public comments when deciding whether and how to craft a rule that would protect consumers from these potentially unfair or deceptive practices.

This proposed rulemaking is part of a broader effort at the Commission to examine how we can deploy our scarce resources to achieve maximum impact. Using our rulemaking tools to clarify the law for market participants across the board and activate civil penalties and redress is a key part of this effort.

Finally, we thank the FTC team for their terrific work in this area. Whether it's unwanted subscription or hidden junk fees, ending exploitative business practices will continue to be a focus of this Commission.

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