

Dissenting Statement of Commissioner Christine S. Wilson
Enforcement Policy Statement Regarding Negative Option Marketing
Matter No. P064202

October 28, 2021

Today the Commission issues a Policy Statement Regarding Negative Option Marketing to “provide guidance regarding its enforcement of various statutes and FTC regulations addressing negative option marketing and operating.” The Commission takes this step even though we have an open rulemaking on precisely the topics covered in the Policy Statement.¹ Prior to the arrival of new agency leadership, the FTC had issued policy guidance during the pendency of a related rulemaking on only one occasion, and in that instance noted its intention to refrain from enforcement actions in the area.² But today’s initiative marks the third time in as many months that new agency leadership has issued expansive policy directives while related rulemakings proceed.³ Publishing guidance during the pendency of a related rulemaking short-circuits the receipt of public input and conveys disdain for our stakeholders. I believe this practice does not constitute good government, so I dissent.

The FTC currently enforces several statutes that address negative option marketing,⁴ including the Restore Online Shoppers’ Confidence Act,⁵ the Telemarketing Sales Rule,⁶ the Use of Prenotification Negative Plans Rule,⁷ the Postal Reorganization Act (also known as the

¹ See 84 Fed. Reg. 52393 (Oct. 2019).

² See Enforcement Policy Statement Regarding Certain Imported Textile, Wool, and Fur Products (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/ftc-announces-enforcement-policy-statement-retailersdirectly>; see also 76 Fed. Reg. 68690 (Nov. 7, 2001); Press Release, FTC Seeks Public Input in Review of Textile Labeling Rules (Nov. 1, 2011); <https://www.ftc.gov/news-events/press-releases/2011/11/ftc-seeks-public-inputreview-textile-labeling-rules>.

³ See Christine S. Wilson, FTC Comm’r, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Policy Statement on Breaches by Health Apps and Other Connected Devices at 6 (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioner-christine-s-wilson-regarding-policy> (describing issuance of Policy Statement on Breaches by Health Apps and Other Connected Devices during a related rulemaking; also describing rescission of agency guidance on treatment of debt in pre-merger notification context during a rulemaking covering precisely that issue).

⁴ The Policy Statement Regarding Negative Option Marketing explains that while negative options can take various forms, the central feature is that “each contains a term or condition under which the seller may interpret a consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer.”

⁵ 15 U.S.C. §§ 8401-8405.

⁶ 16 C.F.R. § 310.

⁷ 16 C.F.R. § 425.

Unordered Merchandise Rule),⁸ and the Electronic Funds Transfer Act.⁹ In addition, the FTC has brought numerous cases challenging negative option practices not covered by these statutes using Section 5 of the FTC Act.¹⁰ Thus, there is a significant body of law in the form of FTC consents and litigated cases involving negative option practices.

In 2019, the Commission published a Federal Register Notice seeking comment on whether the Commission should expand its Prenotification Negative Option Rule to cover all types of negative option marketing, noting that deceptive practices persist and that the current regulatory patchwork does not provide a consistent framework for businesses.¹¹ We received 17 comments from business groups, consumer groups, and state attorneys general in response to that request for comment, representing a range of views and containing substantive and insightful information.

The Policy Statement acknowledges the ongoing rulemaking and states that the Commission “will continue to closely monitor compliance with the rules and laws applicable to negative option marketing, and is still considering various options in the rule review proceeding for the Negative Option Rule.” A good government approach would be to publish this proposed guidance in the Federal Register with a discussion of how it comports with or differs from the comments we received in the rulemaking and seek comment on the proposed guidance. Particularly given Chair Khan’s stated goal of “democratizing” the FTC, one could be forgiven for viewing this as the best way in which to proceed. Alternatively, we could assimilate the feedback we received, close the rulemaking, and then publish this guidance. But the former approach is preferable – having determined as a unanimous Commission to embark on this rulemaking, rendering it moot at this early stage is akin to the elimination of opportunities for public input that the majority undertook in its changes to the Rules of Practice.¹²

There is no question that the Commission has the authority to issue policy statements explaining its interpretation of the rules and laws it enforces. Moreover, this practice is a beneficial one: the FTC’s business guidance facilitates transparency with respect to agency priorities and policy preferences, educates the business community, and drives compliance with the law. Our Division of Consumer and Business Education has received numerous awards for its publications, and I found FTC guidance documents helpful for client counseling purposes when I was in private practice.¹³ Here, I agree that Policy Statement provides information that will be useful to

⁸ 39 U.S.C. § 3009.

⁹ 15 U.S.C. §§ 1693-1693r.

¹⁰ See 84 Fed. Reg. 52393, 52395-96 (Oct. 2019) (ANPRM describing the cases the Commission has brought under Section 5 of the FTC Act).

¹¹ 84 Fed. Reg. 52393, 52394 (Oct. 2019).

¹² 86 Fed. Reg. 38542 (July 22, 2021); see also Press Release, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

¹³ While in private practice, I also found informative the business guidance provided by expert FTC staff during speeches and panels. Unfortunately, our staff has been prohibited from delivering public remarks since Chair Khan’s arrival in June.

businesses, and I largely support the guidance contained in the document. I believe, however, that the Commission should either provide this guidance within the context of the open rulemaking or close the rulemaking and then issue the guidance.

For these reasons, I dissent.