

Before the
Federal Trade Commission
Washington, D.C.

In re

Negative Option Rule

Project No. P064202

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

In response to the Notice of Proposed Rulemaking released March 23, 2023,¹ the Computer & Communications Industry Association (“CCIA”)² submits the following comments and suggestions:

I. INTRODUCTION

CCIA is pleased to participate in the Commission’s review of the arrangements by which consumers obtain ongoing, or subscribed, delivery of goods and services. The record is likely to exhibit broad consensus among industry, consumers, and experts that schemes locking consumers helplessly into unending, confusing transactions are a blight on the economy and erode confidence in the nation’s commercial system.

The aim of these comments is first to ensure that the proceeding remains appropriate in scope and grounded in a strong evidentiary record. CCIA then will summarize the existing statutes, rules, and policies that govern negative option arrangements with an aim to helping the Commission ensure it does not create duplicative or inconsistent new rules that would invite confusion or uncertainty. Finally, these comments will discuss the salutary benefits of negative option arrangements, the investments made in the development and offering of these

¹ Federal Trade Commission Proposes Rule Provision Making It Easier for Consumers to “Click to Cancel” Recurring Subscriptions and Memberships (Mar. 23, 2023), published at 88 Fed. Reg. 24716 (Apr. 24, 2023) (the “NPRM”). NPRM Citations herein are to the March 23 document.

² CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.ccianet.org/members>. Legal research and summaries provided by Dalia Wrocherinsky, CCIA Law Clerk, were instrumental to these comments.

arrangements, and will provide more granular impressions of the draft amended Negative Option Rule as presented in the NPRM.

Proposed revisions to the draft rules appear in the **Addendum** hereto.

II. ASPECTS OF THE NPRM MIGHT FALL OUTSIDE THE COMMISSION'S AUTHORITY.

Before proceeding with analysis of the proposed new amendments to the Negative Option Rule, the Commission should review its past notices and guidance to ensure that its authority to adopt the amendments is intact.

A. *Standards for Rulemakings Conducted Pursuant to Section 18 of the FTC Act.*

The Commission invokes its rulemaking authority under Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(2). NPRM at 3 n.1. This rulemaking authority carries with it several procedural and substantive standards that must be met, else the resulting rule would be in excess of the Commission's authority. 15 U.S.C. § 57a(b), (d).

Section 18 requires that the Commission publish an Advance Notice of Proposed Rulemaking (ANPR), that "contain[s] a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration[.]" *Id.* § 57a(b)(2)(A). An ANPR being a statutory prerequisite to an NPRM, the parameters and proposals in the ANPR should not be appreciably different than those of the NPRM, otherwise Congress's two-part rulemaking instruction becomes meaningless.

Section 18 authorizes the Commission to proceed to publishing a Notice of Proposed Rulemaking "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are **prevalent**." *Id.* § 57a(b)(3) (emphasis added). Thus, even prior to issuing any specific, new rules, the Commission should amass and set forth considerable evidence of injurious deception or unfairness that consumers have suffered.

The instant NPRM seems out of step with these statutory requirements, particularly with regard to the newly proposed provisions regarding "**Saves**", or efforts to educate consumers about additional, reduced, or revised offers for them to consider prior to outright

cancellation of an arrangement. But the 2019 ANPR in this proceeding³ does not mention such activity as being within the bounds of this inquiry. As such, the quite stringent “Save” rules proposed in the NPRM are unexpected. Section 18 authority might not extend to these provisions.

The proposal to add a misrepresentation of “*any* material fact,” NPRM at 77 (Proposed Rule 425.3) (emphasis added), as a violation of Section 5 – even if the fact has nothing to do with the operation of the negative option arrangement – is likewise a new concept that was not presaged or discussed in the ANPR, raising the same Section 18 concerns. *See also* Section V.B., *infra*.

In addition, a question of prevalence arises – more specifically, prevalence of instances that cannot be reached by extant statutes and rules. *See* Section III., *infra*. Without demonstrable evidence of prevalence, this rulemaking might not be authorized by Section 18.

B. Parameters of the Commission’s Section 5 Authority.

The Commission has been authorized and charged by Congress to protect consumers from deceptive practices. The purpose of the NPRM is, in part, to identify acts and practices, other than prenotification plans,⁴ associated with negative option arrangements that are violations of Section 5 of the FTC Act, 15 U.S.C. § 45, which is the sum and limit of the Commission’s authority in this regard. It states:

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice 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.⁵

The NPRM seems to accord little weight to the “countervailing benefits” criterion for exercising Section 5 authority. First, though noting that negative option arrangements “can provide substantial benefits for sellers and consumers,” NPRM at 2, that proposition receives

³ *Rule Concerning the Use of Prenotification Negative Option Plans*, Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 52393 (Oct. 2, 2019), the “2019 ANPR.”

⁴ Prenotification plans, described in the NPRM as “e.g., book-of-the-month clubs” in which “sellers provide periodic notices offering goods . . . and then send—and charge for—those goods only if the consumers take no action to decline the offer,” are already covered in the existing Negative Option Rule, 16 C.F.R. § 425.1.

⁵ 15 U.S.C. § 45(n) (emphasis added).

little attention in the remaining discussion other than summarizing a few sets of comments received in response to the ANPR. Secondly, the new “Save” provisions are discussed in only an unfavorable light as “protracted” and “unnecessary and burdensome obstacles” without any mention of the benefits that these offers bring to consumers. *Id.* at 53. Very often a consumer can obtain reduced rates, additional products, and free items if they accept the offers that appear in response to a cancellation inquiry. The NPRM fails to acknowledge these beneficial practices, which are themselves prevalent, and instead makes the conclusory assertion that “Saves” “are not outweighed by countervailing benefits to consumers or competition.” *Id.* Had Congress intended that the Commission summarily dismiss any possibility of countervailing benefits from a particular practice, it would not have included that language in Section 45(n).

Unfortunately, these omissions create an imbalance in the NPRM – a presumption toward new regulations rather than the balanced consideration that Section 45(n) requires. The result might be a set of rules for which the Commission lacks authority, rendering them a nullity.

III. THE COMMISSION SHOULD AVOID ADOPTION OF DUPLICATIVE RULES GOVERNING CONSUMERS’ RIGHTS AND ABILITY TO TERMINATE NEGATIVE OPTION ARRANGEMENTS.

The Commission recognizes that it already has established “individual law enforcement cases and a patchwork of laws and regulations”⁶ governing acts and practices associated with negative option arrangements. The NPRM summarizes several federal statutes that Congress enacted in order to arm the Commission with the authority to seek redress for schemes that lock consumers into perpetual contracts and subscriptions. The question thus arises whether the answer to this legal “patchwork” would be to adopt yet another set of regulations. The Commission’s commitment to “avoiding detailed, prescriptive requirements that would impede innovation” and “establish[ing] a common set of requirements” (NPRM at 41) would not be served by further complicating the rules.

In addition, the Commission has issued detailed standards and guidelines for disclosures made online,⁷ which is undoubtedly the most common medium for the subscription

⁶ NPRM at 2; *see also id.* at 4-12.

⁷ *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), <https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising>.

practices that the NPRM wants to address. That guidance should not be forgotten in the context of negative option arrangements, but rather should be expressly incorporated if any disclosure provisions are added to the Negative Option Rule.

Businesses that rely on innovation, particularly those providing technology and digital service products, require regulatory certainty and finality in order to achieve ready compliance with applicable law while also evolving and adapting to meet the needs of consumers. The Commission thus should avoid creation of new, concededly duplicative, regulations where existing law already enables it to investigate and redress improper conduct associated with negative option arrangements.

A. *Extant Commission Authority and Enforcement Precedent Regarding Negative Option Arrangements.*

The current tools available to the Commission for combatting the harmful use of negative option marketing are sufficient to protect consumers while also allowing businesses the flexibility to provide value to consumers through subscription models. The Commission has successfully used these tools on numerous occasions as described in the NPRM, and there are further examples summarized here.

In addition to Section 5, Congress conveyed specific authority to address improper schemes in the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405 ("ROSCA"). ROSCA is self-effectuating: a violation "shall be treated as a violation of a Commission trade regulation rule under Section 18 of the FTC Act."⁸ Congress also authorized the FTC to address improper negative option arrangements via the Electronic Fund Transfer Act, 15 U.S.C. § 1693 ("EFTA"), and the Unordered Merchandise Statute (39 U.S.C. § 3009) ("UMS").

From this set of statutory authority, the Commission implemented more granular rules that include the Negative Option Rule, 16 C.F.R. Part 425, and the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR").

In combination, these mandates provide clear guidelines for companies while also

⁸ 2019 ANPR, 84 Fed. Reg. at 52395 (citing 15 U.S.C. § 8404). As noted in Section V.D. below, portions of the Commission's proposed rule duplicates the requirements of ROSCA and thus can be omitted.

serving as potent authority for enforcement.⁹ Further, in enforcement actions, courts have provided the Commission with “wide latitude” to fashion remedies for unlawful practices, and “have affirmed the power of the Commission to go beyond the specific violations found to prohibit similar practices that a respondent may attempt to use in the future.”¹⁰

1. Enforcement Pursuant to the Unordered Merchandise Statute.

The UMS provides that the mailing of unordered merchandise or a bill for such merchandise constitutes an unfair method of competition and unfair trade practice and is a *per se* violation of Section 5. Any remedy available under Section 5 of the FTC Act is available under the UMS and the Commission can also use Section 13(b) of the Act to seek injunctions in federal court pursuant to UMS claims. The UMS has been an effective resource in targeting product subscriptions.

The Commission has induced change in the behavior of companies through the initiation of inquiries into company practices of sending unordered products to consumers. For example, after inquiries were opened into two separate companies, both revised their business practices, completely overhauling their marketing materials as well as committing to providing postage-paid envelopes with the unordered merchandise.¹¹

The Commission has also executed numerous consent decrees with companies found to engage in deceptive behavior under UMS.¹² In one example, through the UMS and Sections 5 and 12 of the FTC Act, the Commission addressed a company’s unsolicited sending of further hair loss and weight loss products to consumers after their initial purchase, as well as the automatic billing of consumers for products represented as free. Further, through these tools, the Commission also successfully addressed the misrepresentation regarding the efficacy of the products themselves. The company was forced to desist from all deceptive business practices and from making unsupported representations about the product.

⁹ The Commission’s November 2022 settlement with Vonage that resolved claims lodged pursuant to ROSCA and the TSR is an instructive example of the agency’s ability to use extant law to protect consumers from unfair and deceptive practices. *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-6435 (D.N.J. filed Nov. 3, 2022).

¹⁰ *Encyclopedia Britannica, Inc., et al.*, 87 F.T.C. 421, 503 (1976).

¹¹ Letter from James A. Kohm, Assoc. Dir., Div. of Financial Practices, FTC, to Stephen Mahinka, Counsel to Littleton Coin Co., LLC (Mar. 30, 2007); Letter from James A. Kohm, Assoc. Dir., Division of Financial Practices, FTC, to Donald Sundman, Mystic Stamp Co. (Mar. 30, 2007), 2007 WL 1549401 (F.T.C.).

¹² *CBS Inc.*, 90 F.T.C. 9 (1977); *Com. Lighting Prod., Inc.*, 95 F.T.C. 750 (1980); *Synchronal Corp., et al.*, 117 F.T.C. 724 (1994).

In addition, the Commission has succeeded in several suits under UMS both administratively and in federal court, winning permanent injunctions, rescission of contracts, and civil penalties (prior to *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021)).¹³ In fact, courts have emphasized the Commission’s authority to enforce UMS, finding no private right of action in the statute.¹⁴

2. Enforcement Pursuant to the Negative Option Rule, 16 C.F.R. Part 425.

The Negative Option Rule lays out several requirements to which sellers must adhere when offering consumers negative option plans, as well as listing a variety of practices that constitute unfair or deceptive acts for a seller using a negative option plan. The Commission has successfully enforced the Negative Option Rule on a number of occasions through a variety of methods.

For example, in *Encyclopedia Britannica*, an administrative law judge, upheld by the Commission, ordered Encyclopedia Britannica to cease and desist in their deceptive behavior within their negative option plan and take affirmative actions toward future compliance with the Negative Option Rule and others.¹⁵

Although the Rule applies to only prenotification plans, paired with ROSCA it covers other kinds of plans as well as online service transactions.¹⁶ Indeed, the choice to limit the Negative Option Rule itself was intentional, because it was meant to work in conjunction with these other statutes to fill in the gaps, which it does effectively: “The FTC decided not to expand the Prenotification Negative Option Rule to automatic renewals and other types of negative options, reasoning that ‘[ROSCA] and the Commission’s proposed amendments to the [TSR]... likely address many of these abuses.’”¹⁷

The Commission does not adequately explain why an entirely new set of rules should

¹³ See *FTC v. AI Janitorial Supply Corp.*, No. 17 C 7790, 2018 WL 7508265 at *4 (N.D. Ill. Sept. 21, 2018); *FTC v. Instant Response Sys., LLC*, No. 13 CIV. 00976 ILG, 2015 WL 1650914 at *11 (E.D.N.Y. Apr. 14, 2015); *FTC v. Think All Pub. LLC*, 564 F. Supp. 2d 663, 666 (E.D. Tex. 2008); *Sunshine Art Studios, Inc., et al.*, 81 F.T.C. 836 (1972).

¹⁴ See *Wisniewski v. Rodale, Inc.*, 406 F. Supp. 2d 550 (E.D. Pa. 2005), *aff’d*, 510 F.3d 294 (3d Cir. 2007). *But see Kipperman v. Acad. Life Ins. Co.*, 554 F.2d 377 (9th Cir. 1977).

¹⁵ *Encyclopedia Britannica, Inc., et al.*, 87 F.T.C. at 503.

¹⁶ Koren Grinshpoon, *License to Bill: The Validity of Coupling Automatic Subscription Renewals with Free Trial Offers by Online Services*, 28 *Fordham Intell. Prop. Media & Ent. L.J.* 301, 315 (2018).

¹⁷ *United States v. MyLife.com, Inc.*, 499 F. Supp. 3d 757, 762-63 (C.D. Cal. 2020).

be adopted in addition to all of the authority and substantive rules already at its disposal. Duplicative regulation invites confusion and renders compliance a muddle. The Commission should, prior to moving ahead with this NPRM, consider in the first instance whether the new amendments to the Negative Option Rule would simply be additive to existing law.

3. The 2021 Policy Statement on Negative Option Marketing.

In November 2021, the Commission published its Enforcement Policy Statement Regarding Negative Option Marketing.¹⁸ “[B]ased on its enforcement history” related to negative option arrangements, the Commission used the 2021 Policy Statement to implement the requirements of the statutes identified above, including ROSCA, the UMS, and Section 5. With great clarity, the 2021 Policy Statement sets forth principles to “convey the Commission’s current views on the application of relevant statutes and regulations to negative option marketing”¹⁹ and to “help marketers in their compliance efforts” and help them “better understand how the Commission enforces the law.”²⁰ The 2021 Policy Statement, like the NPRM here, identifies several enforcement actions against unfair and deceptive negative option practices that were brought pursuant to existing law.

The 2021 Policy Statement ably sets forth the requirements and restrictions needed to protect consumers from unsavory, injurious schemes that trapped consumers in unwanted subscriptions. Its instruction is uncomplicated; for example, its states that:

Negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers’ cancellation efforts.²¹

It is not readily apparent why the Commission must replace this straightforward instruction with a lengthy, multipart rule that prescribes a rigid regime for how businesses may deal with a consumer’s intent to cancel an arrangement. Not only is there a significant risk of creating inconsistent regulation, the NPRM does not, as stated in Section II.A. above, demonstrate the prevalence required by Section 18.

¹⁸ Published at 86 Fed. Reg. 60822 (Nov. 4, 2021) (the “2021 Policy Statement”).

¹⁹ 86 Fed. Reg. at 60824.

²⁰ 86 Fed. Reg. at 60825.

²¹ 86 Fed. Reg. at 60826.

B. Extant Guidelines for Online Disclosures Generally.

The Commission's *.com Disclosures* policy statement inarguably has application to this inquiry. Developed for businesses "to ensure that they comply with the law," *id.* at i, and noting that "[t]he same consumer protection laws that apply to commercial activities in other media apply online," *id.*, it sets out in detail what the Commission finds to be appropriate methods for offers, notices, and transactions aimed at consumers in an online setting.

The aim of the Commission with regard to negative option arrangements, and indeed any transaction, is "clear and conspicuous" disclosure of material terms.²² The entire purpose of *.com Disclosures* is to show in minute detail what "clear and conspicuous" means. It thus seems more expedient for the Commission and more instructive for regulated entities to simply adopt the guidelines stated in *.com Disclosures* within any additions to the Negative Option Rule that are found to be necessary.

This course of action would also prevent inconsistencies in the Commission's rules. For example, whereas *.com Disclosures* acknowledges that many consumer devices – "computers, tablets, smartphones, and other connected devices"²³ – have inherent space constraints that require flexible, creative solutions for placing disclosures conspicuously, including the use of hyperlinks,²⁴ the proposed rule amendments would require disclosures to be "***immediately adjacent***" to the consent button and ***prohibit*** hyperlinks. NPRM at 78 (Proposed Rule 425.4(b)(2)(i), at 76 (Proposed Rule 425.2(c)(4)). By simply relying on the *.com Disclosure* standards, the Commission would avoid a great deal of confusion for tribunals, consumers, and businesses that use online sales tools.

IV. CONSIDERATION MUST BE GIVEN TO THE BENEFITS CONSUMERS ENJOY BY VIRTUE OF "SAVE" OFFERS AND THE INVESTMENT THAT COMPANIES MAKE IN OFFERING NEGATIVE OPTION ARRANGEMENTS.

As discussed in Section II.B., the Commission's legal authority to adopt new rules depends in part on a finding that a possibly improper practice has no "countervailing benefits" for consumers or competition. 15 U.S.C. § 45(n). The NPRM fails entirely to appreciate the salutary aspects of negative option arrangements, which occur in several ways.

²² *E.g.*, 16 C.F.R. § 425.1; 2019 ANPR, 84 Fed. Reg. at 52397; NPRM at 45.

²³ *.com Disclosures* at 8.

²⁴ *.com Disclosures* at 9-10.

A. Countervailing Benefits of Negative Option Arrangements.

The negative option arrangements that the Commission, despite much contrary argument in the record,²⁵ appears resolved to condemn certainly bring benefits to consumers, manufacturers, sellers, and service providers. These benefits warrant attention and include:

Convenience: Consumers simply place one order that enables them to receive regular delivery of a service or product that they consume regularly and/or in large quantities. These subscriptions make household budgeting easier and save consumers the time of re-ordering and re-consenting to delivery every week or every month.

Price Stability: Negative option plans often entail a price lock-in that inures consumers to increased costs of service and the effects of inflation.

Efficiency: Purveyors of goods and services rely on negative option arrangements to make their provisioning cycles smooth and predictable, thus putting downward pressure on costs.

Equally relevant are the significant losses that would occur if negative option arrangements became too onerous to provide. Consumers would lose the convenience and inflation-fighting price stability that these arrangements provide. For the sellers of goods and services, there is a significant risk of unrecouped investment. When these businesses offer long-term and negative option arrangements to consumers, those offers entail a careful costing analysis to ensure that sunk costs and investment will be recouped. Offering consumers competitive prices usually requires long-term cost amortization, demanding that the arrangement continue for a significant and roughly predictable period.

For this reason, a rule that prohibits a seller from communicating with the consumer, to any degree, prior to effectuating cancellation would have severe negative consequences. Consumers should know what they are losing by cancelling. And businesses should be able to offer new and extra value to the consumer as a way to retain the relationship. Foreclosing all communication after the first “click to cancel” is not in the interest of either party.

B. Countervailing Benefits of “Saves”.

As also discussed in Section II.B. above, the proposed “Save” provisions are not

²⁵ See NPRM at 23-25.

accompanied by discussion of the “countervailing benefits” of this practice, in addition to being absent from the ANPR, and thus might not be within the Commission’s authority to adopt. 15 U.S.C. §§ 45(n), 57a(b)(2)(A).

Saves create a tremendous benefit for consumers. It is a widely common practice for sellers of goods and services to sweeten the deal for a consumer who leans toward cancellation, including the offering of free or discounted items, reduced service rates, waived shipping fees, and upgraded products. “Saves” are simply a form of negotiation where both parties achieve a win: the seller keeps the account and the consumer obtains a great deal of new value. The NPRM’s antipathy toward this practice is therefore unfortunate and leads to an imbalanced treatment of the issue.

Saves also prevent sunk costs for businesses, which further enables them to grow, diversify, and innovate. As stated above, cost models rely on predictable sales cycles. A rule that requires companies to enable immediate, permanent, one-click cancellation would destroy their pricing models and impose tremendous financial losses and stranded investment. Consumers do not benefit when businesses cannot afford to continue providing quality, innovative products. And thus, though consumers’ right to terminate an arrangement should remain a paramount concern, the Commission would fail to serve its mission if a Negative Option Rule were so stringent as to cause inadvertent interruptions of service or put corporations out of business.

C. Free Trials Are a Significant Benefit for Consumers that Should Not Be Encumbered with an Unnecessary Requirement for Multiple Instances of Consent.

In contrast to its apparent bias against “Saves”, the Commission appears fully to appreciate the value of free trials to the consumer. The NPRM states that the proposed rules need not “require sellers to obtain an additional (or alternative) round of consent after the trial’s completion.” NPRM at 50. The proposed Rule 425.5 therefore does not include the conversion of free trials among the transactions that require specific “express informed consent.” *Id.* at 79. CCIA agrees with this approach, because encumbering free trials with duplicative consent requirements might dissuade sellers from providing free trials as a glide path to subscribership, which is a result that, the Commission seems to agree, would not be in the public interest. *Id.* at 50.

Free trials often carry a cost, including content acquisition costs and payments to third parties, as well as the risk that consumers will exploit and manipulate free trials in order to obtain goods or services free of charge perpetually. Thus, there is a need to balance sellers' ability to prevent abuse with the consumer's ability to terminate a free trial. In addition, sellers are much more likely to offer free trials where there is an easy and seamless way for satisfied consumers to automatically continue their subscription after the trial has ended. Without this easy continuation from a free trial to a paid subscription, the costs to sellers of providing free trials may begin to outweigh the benefits and they may be forced to stop offering them.

CCIA therefore agrees that there is also no need to require express consent when switching from a free trial to a paid service. This type of transaction 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.

V. SPECIFIC DISCUSSION OF THE PROPOSED AMENDMENTS TO THE NEGATIVE OPTION RULE.

In light of the foregoing questions regarding the substance of the NPRM vis à vis the requisite Section 5 and Section 18 analysis, CCIA suggests revisions to the proposed amended Part 425 rules.

A. *Rule 425.2 – Definitions.*

Consistent with the theme of retaining consistency with the Commission's existing rules and policy, the definitions in the Negative Option Rule should borrow from and mirror the definitions already in place for ensuring accurate, clear, and digestible communications with consumers. Specifically:

1. The definition of "**Clear and Conspicuous**" should hew closely to the Commission's guidance in its *.com Disclosures* policy in order to ensure regulatory consistency.
2. The definition of "**Save**" should not be so broad as to foreclose communication with the consumer. As stated in Section IV.B. above, the value of "Saves" to the

consumer should remain top of mind as the Commission considers what protections consumers truly need related to Negative Option arrangements.

B. Rule 425.3 – Misrepresentation.

Misrepresentation in the context of negative option arrangements should be limited to information about the arrangement. To expand the rules' scope by including misrepresentations of "any material fact" about the product would needlessly duplicate existing FTC rules about misrepresentations in commerce generally. This rule amendment also was not raised in the ANPR. *See* Section II.A., *supra*.

C. Rule 425.5 – Consent.

The proposed Rule 425.5 would require a negative option seller "to obtain the consumer's express informed consent before Charging the consumer," NPRM at 79, in a manner that is separate from the rest of the transaction. In effect, this rule would require two instances of consent for the same transaction. From a consumer experience standpoint, this requirement is 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 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. Alternatively, requiring the negative option to be distinguished in some way from other disclosure terms (*e.g.*, bold, underline, separated) would provide consumers with sufficient information to understand the transaction in full.

The requirement to retain records of consumers' "Express Informed Consent" for three years, if not longer, puts an onerous storage and security burden on businesses in exchange for a relatively small benefit: the value of verifiable consent diminishes with time, such that years-long retention is unnecessary. This record retention rule also seems to be at odds with key principles of consumer privacy, namely the need to minimize the amount of consumer data that businesses hold and to enable customers to request deletion of any data in possession of a third party. A shorter mandatory retention period is more appropriate for both businesses and consumers.

D. *Rule 425.6 – Simple Cancellation (“Click to Cancel”).*

As the 2019 ANPR acknowledged, ROSCA provides a clear and unambiguous standard for the disclosures that online sellers must provide to consumers, prior to obtaining billing information, regarding a negative option arrangement.²⁶ ROSCA is enforceable under the FTC Act.²⁷ The question thus arises whether a new, separate FTC rule is needed beyond the clear statutory standards that can already be enforced.

In addition, the Commission’s 2021 Policy Statement has adopted a straightforward instruction: sellers should “provide a simple, reasonable means for consumers to cancel their contracts.”²⁸ Mechanisms for cancellation should be simple, but should not be so automatic as to cause consumers to cancel unintentionally. Businesses should be permitted (1) to confirm that the consumer knows what they are losing by cancelling an arrangement, and (2) to offer the consumer an incentive to retain the arrangement. Plainly it is improper to trap consumers in a series of webpages or voice prompts in a way that prevents them from cancelling. But to prevent any form of pre-cancellation communication with the consumer will create negative consequences for both parties.

The Commission’s 2021 Policy Statement already requires a simple cancellation mechanism, and thus it is unclear what consumer harm the newly proposed restriction on “Saves” is intended to prevent. If the Commission’s intention is that subscription providers have simple and reasonable cancellation flows, the additional restriction on what type of content could be surfaced to consumers in those flows is unnecessary. Under the proposed amendment, consumers would have to affirmatively decline to see offers – which adds yet another step to the cancellation flow (and friction to the user experience) – whereas businesses could instead just show the actual offers in a manner the user can tap out of or ignore. The Commission should consider clarifying that “Saves” are permitted if they do not materially complicate or delay the cancellation process once it is initiated by a user, permitting offers to be shown on the same page as the cancellation button.

²⁶ 84 Fed. Reg. at 52395.

²⁷ *Id.*

²⁸ 86 Fed. Reg. at 60826.

E. Rule 425.7 – Annual Reminders for Negative Option Features Not Involving Physical Goods.

Apprising consumers of their right to terminate an ongoing subscription arrangement is certainly an obligation that any legitimate business should undertake. Supplying consumers with information is perhaps the best means of ensuring consumer protection. There does arise, however, a risk of causing information fatigue if the rule adopts a consumer-reminder provision that is too prescriptive or too frequent. For example, if an annual reminder is required for month-to-month subscriptions, such messaging could cause confusion: these consumers are able to cancel or renew their subscriptions *each month*. The worst outcome for any rule is when consumers tune out the protection that the government intended for them simply because they are overburdened with alerts, emails, and obligations to continue verifying their own decisions.

To the extent that any temporal frequency for these reminders is necessary, a biannual obligation (every two years) for longer-term subscriptions where consumers are locked in for longer periods (such as multi-annual subscriptions) strikes an appropriate balance between helpful and burdensome.

F. Rule 425.8 – Relation to State Laws.

The degree of federal preemption for a Negative Option Rule must be as expansive as lawfully allowed. The best regulatory regime is consistent and predictable. Industries, like the digital services industry, whose hallmark is innovation are particularly vulnerable when the scope, substance, and enforcement of regulation varies state to state and as between state and federal law. Though existing state regulations governing the provision of subscription arrangements should not be merely swept aside if a federal Negative Option Rule is adopted, that Rule should as much as possible ensure that federal law is presumed to supersede state law absent a compelling showing that the state law truly governs the same conduct and is superior. Indeed, it was the State Attorneys General who “urged the Commission to expand the existing [Negative Option] Rule,”²⁹ and so it would be somewhat anomalous to meet the AGs’ request without ensuring that the rules would in fact apply in these states.

CCIA urges the Commission to establish a federal framework that will prevent an evolving patchwork-quilt of state-federal regulation in this field. The Negative Option Rule

²⁹ NPRM at 28-29; *see also id.* at 32, 35 36.

should comport with prevailing jurisprudence instructing when federal law must give way to state law. The Rule should make clear that its scope is pervasive and that it constitutes the most stringent level of regulation to which businesses are subject. State laws and regulations adopted after the contemplated Rule should be of no effect if they conflict with or impose restrictions and requirements that are more stringent than the federal law established here.

VI. CONCLUSION

The Commission should (1) review the NPRM to ensure it comports with applicable procedure and the bounds of its statutory authority, and (2) consider issuing an amended NPRM with a new proposed Negative Option Rule, if demonstrably necessary, that reflects the pro-consumer benefits of Negative Option arrangements and the substantial investments devoted to these offerings.

Respectfully submitted,

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ADDENDUM
Suggested Revisions to Draft Negative Option Rule
16 C.F.R. Part 425

As demonstrated in these Comments, CCIA does not support, for several reasons, moving forward with a rulemaking based on the NPRM as presented. The following edits are provided in order to demonstrate how the foregoing analysis applies to the proposed rules.

425.1 Scope.

This Rule contains requirements related to any form of negative option plan in any media, including, but not limited to, the Internet, telephone, in-print, and in-person transactions.

425.2 Definitions.

(a) *Billing Information* means any data that enables any person to access a customer's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(b) *Charge, Charged, or Charging* means any attempt to collect money or other consideration from a consumer, including but not limited to causing Billing Information to be submitted for payment, including against the consumer's credit card, debit card, bank account, telephone bill, or other account.

(c) *Clear and Conspicuous* means that a required disclosure is easily noticeable (*i.e.* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through means that are easily accessed by the consumer and may include the same means through which the initial communication is presented. In any communication made

through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must be reasonably obvious, which may include use of ~~stand-out from any~~ accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the Internet, phone app, or software, the disclosure must be clear and conspicuous ~~unavoidable. A disclosure is not Clear and Conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.~~

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children,

the elderly, or the terminally ill, “ordinary consumers” includes members of that group.

(d) *Negative Option Feature* is a provision of a contract under which the consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer, including, but not limited to:

- (1) an automatic renewal;
- (2) a continuity plan;
- (3) a free-to-pay conversion or fee-to-pay conversion; or
- (4) a pre-notification negative option plan.

(e) *Negative Option Seller* means the person selling, offering, promoting, charging for, or otherwise marketing goods or services with a Negative Option Feature.

(f) *Save* means an attempt by a seller to present any additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information that has the effect of unreasonably delaying ~~when~~ a consumer’s attempt ~~attempts to cancel~~ to cancel a Negative Option Feature.

425.3 Misrepresentations.

In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”) for any Negative Option Seller to misrepresent, expressly or by implication, any material fact related to the transaction, such as the Negative Option Feature, ~~or any material fact related to the underlying good or service.~~

425.4 Important Information.

(a) *Disclosures.* In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for a Negative Option Seller to fail to disclose to a consumer, prior to charging the consumer ~~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~~ related to the Negative Option Feature, and including but not limited to:

(1) That consumers will be Charged for the good or service, or that those Charges will increase after any applicable trial period ends, and, if applicable, that the Charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such Charges;

(2) The deadline (by date or frequency) by which the consumer must act in order to stop all Charges;

(3) The amount (or range of costs) the consumer will be Charged and, if applicable, the frequency of such Charges a consumer will incur unless the consumer takes timely steps to prevent or stop those Charges;

~~(4) The date (or dates) each Charge will be submitted for payment; and~~

~~(5) The information necessary for the consumer to cancel the Negative Option Feature.~~

(b) *Form and Content of Required Information.*

(1) Clear and Conspicuous: Each disclosure required by paragraph (a) of this section must be Clear and Conspicuous.

~~(2) Placement:~~

~~(i) If directly related to the Negative Option Feature, the disclosures must appear immediately adjacent to the means of recording the consumer's consent for the Negative Option Feature; or~~

~~(ii) If not directly related to the Negative Option Feature, the disclosures must appear before consumers make a decision to buy (e.g., before they "add to shopping cart").~~

~~(3) Other Information: All communications, regardless of media, must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures, including any information not directly related to the material terms and conditions of any Negative Option Feature.~~

425.5 Consent.

(a) *Express Informed Consent.* In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for a Negative Option Seller to fail to obtain the consumer's express informed consent before Charging the consumer. In obtaining such expressed informed consent, the Negative Option Seller must:

- (1) Obtain the consumer's unambiguously affirmative consent to the Negative Option Feature offer separately from any other portion of the transaction;
- (2) Not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the Negative Option Feature;
- (3) Obtain the consumer's unambiguously affirmative consent to the rest of the transaction; and
- (4) Keep or maintain verification of the consumer's consent for ~~at least three years, or~~

one year after the contract is otherwise terminated, ~~whichever period is longer.~~

(b) Requirements for Negative Option Features Covered in the Telemarketing Sales Rule.

Negative Option Sellers covered by the Telemarketing Sales Rule must comply with all applicable requirements provided in part 310 of this title, including, for transactions involving preacquired account information and a free-pay-conversion, obtaining from the customer, at a minimum, the last four (4) digits of the account number to be charged and making and maintaining an audio recording of the entire telemarketing transaction as required by part 310. *(c) Documentation of Unambiguously Affirmative Consent for*

Written Offers. Except for transactions covered by the preauthorized transfer provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693e) and Regulation E (12 CFR 1005.10), a Negative Option Seller will be deemed in compliance with the requirements of paragraph (a)(3) of this section for all written offers (including over the Internet or phone applications), if that seller obtains the required consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature and no other portion of the transaction. The consent request must be presented in a manner and format that is clear, unambiguous, non-deceptive, and free of any information not directly related to the consumer's acceptance of the Negative Option Feature.

425.6 Simple Cancellation (“Click to Cancel”).

(a) Simple Mechanism Required for Cancellation. In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for the Negative Option Seller to fail to provide a simple mechanism for a consumer

to cancel the Negative Option Feature and avoid being Charged for ~~the~~ any undelivered good or service and immediately stop any recurring deliveries and Charges therefor.

~~(b) *Simple Mechanism at Least as Simple as Initiation.* The simple mechanism required by paragraph (a) of this section must be at least as easy to use as the method the consumer used to initiate the Negative Option Feature.~~

(c) *Minimum Requirements for Simple Mechanism.* At a minimum, the Negative Option Seller must provide the simple mechanism required by paragraph (a) of this section through the same medium (such as Internet, telephone, mail, or in-person) the consumer used to consent to the Negative Option Feature, and:

(1) For Internet cancellation, in addition to the requirements of paragraphs (a) and (b) of this section, the Negative Option Seller must provide, at a minimum, the simple mechanism over the same website or web-based application the consumer used to purchase the Negative Option Feature.

(2) For telephone cancellation, in addition to the requirements of paragraphs (a) and (b) of this section, the Negative Option Seller must, at a minimum, provide a telephone number, and assure that all calls to this number are answered promptly during normal business hours and are not more costly than the telephone call the consumer used to consent to the Negative Option Feature.

(3) For in-person sales, in addition to the requirements of paragraphs (a) and (b) of this section, the Negative Option Seller must offer the simple mechanism through the Internet or by telephone in addition to, where practical, an in-person method similar to that the consumer used to consent to the Negative Option Feature. If the simple mechanism is offered through the telephone, all calls must be answered during normal business hours

and, if applicable, must not be more costly than the telephone call the consumer used to consent to the Negative Option Feature.

(d) *Saves*: A seller should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts. The seller may, after receiving a request to cancel from a consumer, ~~must immediately cancel the Negative Option Feature upon request from a consumer, unless the seller obtains the consumer's unambiguously affirmative consent to receive a~~ attempt one (1) Save prior to effectuating the cancellation. ~~Affirmative~~Such consent must be obtained from the consumer for any ~~apply only to the cancellation attempt in question and not to~~ subsequent Save attempts made prior to effectuating the cancellation. The Negative Option Seller must keep or maintain verification of the consumer's consent to receiving a subsequent Save prior to cancellation for ~~at least three years, or~~ one year after the contract is otherwise terminated, ~~whichever period is longer.~~

§ 425.7 Biannual ~~Annual~~ Reminders for Negative Option Features Not Involving Physical Goods.

In connection with sales with a Negative Option Feature that do not involve the automatic delivery of physical goods, it is a violation of this Rule and an unfair act or practice in violation of Section 5 of the FTC Act for a Negative Option Seller to fail to provide consumers reminders, at least ~~biannually~~annually, identifying the product or service, the frequency and amount of charges, and the means to cancel. At a minimum, such reminders must be provided through the same medium (such as Internet, telephone, or mail) the consumer used to consent to the Negative Option Feature. For in-person sales, the Negative Option Seller must provide the reminder through the Internet or by telephone in addition

to, where practical, an in-person method similar to that the consumer used to consent to the Negative Option Feature.

§ 425.8 Relation to State Laws.

(a) *In General.* This part shall not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to negative option requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

~~(b) *Greater Protection under State Law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.~~