

June 23, 2023

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Negative Option Rule; Project No. P064202

The Marketplace Industry Association (“MIA” or “Association”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for public comments on proposed amendments to the Commission’s Negative Option Rule (or “Rule”) to combat unfair or deceptive practices that include recurring charges for products or services consumers do not want and cannot cancel without undue difficulty. 78 Fed. Reg. 24716 (Fed. Trade Comm’n April 24, 2023) (“Comment Request”).

By way of background, the Association is the first and only trade association representing technology-enabled marketplace platforms, also known as internet marketplaces, digital marketplaces, and app-based platforms. The mission of the Association is to represent, educate and advocate for the benefit of the digital marketplace industry, and to better serve those who exchange goods, services and property through such marketplaces. An important function of the Association is to represent the interests of its members in matters before courts, legislatures and agencies throughout the country. To that end, the Association engages in issues of concern to its members operating in the United States. The Association represents a wide variety of digital marketplaces and app-based platforms transacting for a multitude of goods and services, including rideshare and delivery services, home services, used goods, childcare (babysitters and nannies), senior care, information technology support, coaching, and tutoring, among many others. In all, the Association’s members have facilitated transactions for more than 300 million customers and have provided economic opportunities for more than 60 million workers.

As an initial matter, the Association understands and agrees with the Commission’s goal in combatting unfair and deceptive practices, generally, and specifically, where there are recurring charges for products or services that consumers do not want, did not intend to purchase and cannot cancel without undue difficulty. Further, the Association appreciates the Commission’s interest in clarifying certain practices with automatically renewing or recurring charges (“Subscriptions”) within one rule in order to avoid consumer confusion or, worse, deception or fraud.

As the Commission rightly stated, Subscriptions do offer substantial benefits for businesses and consumers, alike. And, as Commissioner Wilson pointed out, the Commission “know[s] that negative option marketing is used lawfully and non-deceptively in a broad array of common transactions - newspaper subscriptions, video streaming services, delivery services, etc.” For the enumerated services, among many others including some of the Association’s members, perhaps one of the biggest benefits that Subscriptions offer is convenience so that time-consuming payments do not need to be made each month for services that are regularly used. In this context, Subscriptions offer continuous, uninterrupted access to the services being provided. And now, more than ever, Subscriptions support consumer data security by dramatically limiting the number of times that sensitive personal and payment information is transmitted, including over potentially unsecure networks or public WiFi, for example. Further, Subscriptions offer consumers predictable pricing and, in many cases, cost savings when longer-term commitments are made.

It is clear that Subscriptions offer benefits to both businesses and consumers, and that these benefits are frustrated where negative option practices include inadequate disclosures, unconsented billing, and difficult or impossible cancellations. And, while the Association supports the Commission’s efforts to clarify acceptable negative option practices, generally, it wishes to provide feedback and context to help the Commission understand and refine the proposed Rule to avoid harm to both businesses and consumers.

Misrepresentations

First and foremost, the prohibition on misrepresentations is duplicative of current law, exceeds the scope of the advance notice of proposed rulemaking, conflicts with the Supreme Court’s decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), and is wholly misplaced. Misrepresentations to induce consumers are, and always should be, prohibited. Period. But reciting that well-established prohibition in connection with the Negative Option Rule may lead to claims tied to otherwise valid Subscriptions. For example, if a streaming service advertises, “movies that you will love,” but you do not “love” them, is that a violation of this rule subject to penalties? If a housekeeping service claims, “great cleaning every time,” but the resulting cleanliness is not up to the consumer’s ‘standards,’ will that trigger this provision and any resulting penalties? The examples are endless, but the application of the proposed rule should not be. The Association encourages the Commission to limit the scope of the proposed rule to that which was set forth in the October 2, 2019, Advanced Notice of Proposed Rulemaking - Rule Concerning the Use of Prenotification Negative Option Plans.

Important Information

The Association agrees with the important information requirement under the proposed Rule.

Consent

The Association agrees with the consent requirement under the proposed Rule. That said, the Association would like to differentiate goods and services that may be purchased ‘one-off’ versus those that are offered exclusively through Subscriptions. In the case of the latter, an additional consent to initiate a Subscription is unnecessary and superfluous. Take a newspaper subscription, for example. It is not possible to purchase one newspaper on a specific day from the publisher because the publisher only sells newspaper subscriptions. In order to purchase one newspaper on a specific day, a consumer would need to purchase that newspaper from, say, a newspaper stand, convenience store, grocery store, etc. In this example, the publisher only sells newspaper subscriptions. As such, provided the required important information is included with the initiation of the Subscription, there should not be an additional consent requirement.

Simple Cancellation Mechanism

The Association agrees with the simple cancellation mechanism requirement under the proposed Rule; namely, that businesses offer cancellation by the same medium through which the consumer used to initiate the Subscription. It must be said that the language of the proposed Rule, that cancellation “must be at least as easy to use as the method the consumer used to initiate the Negative Option feature,” is ambiguous and seems to suggest that cancellation should be as easy as populating a check box or otherwise with “one click.” Taken literally, this is, at best, against consumers’ best interests and, at worst, not possible. As such, the Association would encourage the Commission to focus on the medium of the cancellation such that cancellation be made available through the same medium as the Subscription initiation.

In the context of online marketplaces, the consumers should be able to cancel the Subscription online. That said, it is important that the Association provide context for practically what is required to both initiate a Subscription and cancel a Subscription. In order to initiate a Subscription, generally, a consumer is required to create an account or profile, which requires entering basic information (eg, first name, last name, address, email and/or phone), create a

username and password, select a product or service, and enter payment information (eg, name on payment card, payment card number, expiration date, CVV and zip code or address associated with payment card). All of these steps are required in order to ensure the security of the consumer and the purchase. So, when it comes to canceling a Subscription, the mechanism being “at least as simple as the one used to initiate” the Subscription will require at least some of these steps in order to ensure the security of the consumer’s personal and financial information. In other words, the “Click to Cancel” will still require the consumer to authenticate their credentials to access the account or profile in order to cancel the Subscription. Apart from that, the Association proposes that, at least in the case of online marketplaces, consumers be able to cancel the Subscription within the account or profile created to initiate the Subscription. In most cases, this can be found in the consumer’s account or profile settings. The Association urges the Commission to clarify that these required steps and cancellation mechanism be acceptable under the “Click to Cancel” requirement, and that the Commission is not proposing a literal “one-click” cancellation due to the harm that such a requirement would cause to consumers.

Additional Offers Before Cancellation (“Saves”)

The Association disagrees with the Commission’s proposed Save provision because it is, in practice, worse for the consumer. Specifically, under the Commission’s proposed provision, the consumer would have to jump through an additional hoop before receiving the Save, thus frustrating the cancellation process. There are various Save scenarios, including where (1) the business offers the consumer an incentive to maintain the Subscription; (2) the consumer is presented the benefits of the Subscription that will be lost if the Subscription is cancelled; and (3) the consumer is presented a survey to better understand the reason why the consumer is cancelling the Subscription. In all cases, the immediate presentation of the Save to the consumer is a one-step process that the consumer can decline and proceed to cancellation. However, under the Commission’s proposed provision, the consumer would have to jump through an additional step before receiving the Save, thus frustrating the cancellation process.

Under the Commission’s proposal, if the consumer declines to receive the incentive to maintain the Subscription, declines to be presented with the lost benefits of the Subscription, or declines to provide survey feedback about their cancellation, it is the exact same as if the business served the consumer the Save and the consumer declined it. Further, it is inefficient and more complicated to summarize the benefits that will be lost in the event the Subscription is canceled prior to presenting the benefits of the Subscription prior to cancellation. Finally, surveys are used to collect data in order to improve the underlying services and products, which surveys ultimately benefit consumers in the form of better services and products. So, the Association urges the Commission to remove the consent requirement before offer Saves because, in practice, it will complicate the cancellation of the Subscription.

Reminders and Confirmations

The Association agrees with the reminders and confirmations requirement that Subscription renewal notifications be provided by the same medium that the consumer used to initiate the Subscription. However, the additional requirement to provide consumers annual reminders is less restrictive than various current state laws and is superfluous at best. For example, many states require businesses to provide consumers with notice of Subscription renewals monthly in the event of a monthly Subscription. Instead, the Association encourages the Commission to adopt notification requirements that comply with state autorenewal laws, which generally require notification thirty (30) days prior to any Subscription renewal. If the Subscription renews annually, then notification would be required thirty (30) days prior to the annual renewal. If the Subscription renews quarterly, then notification would be required thirty (30) days prior to the quarterly renewal. And, if the Subscription renews monthly, then notification would be required thirty (30) days prior to each monthly renewal - monthly notification. This would streamline all notification requirements and benefit consumers more than a single, annual notification. It would also help businesses to streamline notification practices.

Additional Comments

The Association requests that the Commission clarify that where there are third-party payment platforms managing Subscriptions on behalf of businesses, as in the case of Google Play or the Apple App Store (collectively, “Third Party Subscription Managers”), that such Third Party Subscription Managers be legally responsible and legally liable for compliance with the proposed Rule. As is the case with Third Party Subscription Managers, businesses that offer Subscriptions have zero control over such Subscriptions, including the initiation of Subscriptions or the cancellation of Subscriptions. Said another way, it is impossible for businesses to comply with the proposed Rule where there are Third Party Subscription Managers. As such, the Association requests that the Commission make clear that Third Party Subscription Managers be responsible for compliance with the proposed Rule, including any penalties for noncompliance.

Finally, the Commission points out that “many consumers reasonably forget they enrolled” in Subscriptions. It must be said that consumer complaints about automatically renewing Subscriptions that have been “forgotten” by consumers do not equate to unfair and deceptive practices. In fact, many businesses go far beyond what is being proposed in the Rule in terms of providing clear and conspicuous notice of the renewing Subscription and regular notifications of the impending charge for that Subscription. Even in these cases, often businesses face chargebacks and disputes from consumers who “forgot” about the automatic renewing nature of the Subscription that they clearly intended to initiate or simply failed to cancel despite being provided clear and conspicuous notice of the automatically renewing Subscription and regular reminders of impending renewals. Further, according to the Consumer Financial Protection Bureau, over half of consumers don’t even review their credit card statements when they receive them. So, even if consumers “forget” about the Subscriptions in which they are enrolled, they receive monthly reminders by way of their credit card or bank statements. So, while the Association does acknowledge that there are bad actors who prey upon unsuspecting consumers, any action by the Commission must be balanced with consumer behavior and responsibility.

On behalf of the Association, I want to commend the Commission for its efforts in combatting unfair and deceptive practices that include recurring charges for products or services consumers do not want and cannot cancel without undue difficulty. To that end, the Association urges the Commission to modify the proposed Rule to be more in line with the practical and actual nature of the benefits of Subscriptions for consumers and businesses, alike. And, if the Association can be helpful to the Commission in furtherance of its efforts, please do not hesitate to contact us at info@marketplaceassociation.org.

Respectfully Submitted,

A handwritten signature in black ink that reads 'Jeremy H. Gottschalk'.

Jeremy H. Gottschalk
Executive Director