



June 22, 2023

Federal Trade Commission
Ms. April Tabor
Office of the Secretary
400 7th St. SW, 5th Floor, Suite 5610
Washington, D.C. 20024

Re: Negative Option Rule; Project No. P064202

Dear Ms. Tabor,

On behalf of the Center for Data Innovation (datainnovation.org), I am pleased to submit the following comments to the Federal Trade Commission (FTC) in response to a Notice of Proposed Rulemaking (NPRM) to significantly expand legal requirements for sellers that use negative option offers.¹

The Center for Data Innovation studies the intersection of data, technology, and public policy. The Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends, such as open data, artificial intelligence, and the Internet of Things. The Center is part of the Information Technology and Innovation Foundation (ITIF), a nonprofit, nonpartisan think tank.

SUMMARY

Negative option marketing is a business practice where sellers interpret a customer's silence or inaction as acceptance of an offer.² The Commission promulgated the Negative Option Rule in 1973 after finding sellers used "prenotification plans" to engage in deceptive sales practices. Sellers would send products by mail to consumers, without providing information on how to return or cancel

¹ Federal Trade Commission, "Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Memberships," news release, March 23, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>.

² Gibson Dunn, "FTC's Latest Proposed Rulemaking Would Impose Significant New Requirements and Risks on Sellers Using Negative Option Offers," April 12, 2023, <https://www.gibsondunn.com/ftc-latest-proposed-rulemaking-would-impose-significant-new-requirements-and-risks-on-sellers-using-negative-option-offers/>.



the item, and then bill the consumer. The Negative Option Rule requires sellers using prenotification plans to clearly disclose their terms before billing consumers for a service. Required disclosures include the consumers' right to cancel; how consumers should notify the seller if they do not wish to purchase the selection; any minimum purchase obligations; whether billing charges include shipping and handling; the length of time to cancel; the seller's obligations if they fail to provide a sufficient cancellation window; and the frequency with which announcements and forms will be sent.³

However, despite their prevalence, the rule does not cover other types of negative option marketing, including continuity plans (where businesses send consumers periodic shipments of goods), automatic renewals (where businesses automatically renew subscriptions), and free trial conversions (where businesses charge a fee for goods or services unless consumers affirmatively cancel or return the product). Most notably, the rule does not cover most online subscriptions. This means unscrupulous businesses can and do use shady business practices to make canceling subscriptions online difficult for consumers. In addition, since online subscriptions do not usually result in the delivery of any physical goods, some consumers may be unaware of recurring subscriptions.

The Commission proposes updating the rule to reflect new types of subscription services and simplifying the cancellation process by creating a "click to cancel" option. The Center for Data Innovation supports the Commission's goals and offers the following comments.

1. The Commission should expand the negative option rule to include automatic renewals, continuity plans, and free trials in addition to prenotification plans.
2. The Commission should create a working group featuring industry experts and consumer protection advocates to define a "simple cancellation mechanism" before enacting the rule. The Commission should publish best practices and guides to help businesses adhere to the rule.
3. The Commission should alter the definition of "save" in the proposed rule to refer directly to additional offers or benefits that may be added to or altered in a plan to persuade a consumer from canceling. The Commission should also include an exception for information about permanent, relevant, or irreparable harms resulting from the cancellation.
4. The Commission should remove the phrase "any material fact related to the underlying good or service" and change the language to "any material fact related to the underlying

³ Negative Option Rule, 88 Fed. Reg. 24716 (proposed April 24, 2023).



negative option feature.”⁴ This will limit the liability for misrepresentations to just misrepresentations about the negative option marketing practice and negative option feature, as outlined in Commissioner Wilson’s dissent.⁵

Please find extended answers below.

Best,
Becca Trate
Policy Analyst
Center for Data Innovation

Rule Modernization

The Commission proposes expanding the rule’s scope to protect consumers from common negative option marketing practices. This includes expanding the definition of negative option features to include automatic renewals, continuity plans, and free-to-pay conversion or fee-to-pay conversions. With these changes, the rule will better reflect modern subscription services, which are now the primary uses of negative option marketing. Overall, the Center supports modernization to make the rule more relevant to modern consumers and the current market.

425.6 Simple Cancellation Mechanism (“Click to Cancel”):

Consumers have long struggled with unclear and difficult processes to cancel subscription services. A 2017 Survey by CreditCards.com found approximately half of the respondents complained about the “difficulty companies [create] for the contract/service cancellation process,” and several state attorneys general noted that current practices often require consumers to cancel using a different method than they used to sign up.⁶ For this reason, the Center supports the need for a simple mechanism to cancel subscriptions.

⁴ Ibid.

⁵ Christine Wilson, “Dissenting Statement of Commissioner Christine S. Wilson regarding the Negative Option Rule NPRM,” Federal Trade Commission, March, 23, 2023, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-negative-option-rule-nprm>.

⁶ Brady Porche, Poll: Recurring charges are easy to start, hard to get out of, Creditcards.com (Aug. 22, 2017), <https://www.creditcards.com/credit-card-news/autopay-poll.php> and Pennsylvania Office of Attorney General (on behalf of The Attorneys General of the States of Colorado, Delaware, District of Columbia, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin) (“State AGs”), Advanced Notice of Proposed Rulemaking, #0082–0012.



The proposed rule requires that sellers provide a simple cancellation mechanism for consumers to immediately stop recurring charges.⁷ The rule states the method consumers use to cancel should be as easy as the method used to initiate a charge. In addition, consumers should be able to use the same medium to cancel as they used to initiate the charge. For example, if a seller allows consumers to sign up using a website or app, they should be able to cancel using the same website or app.⁸ But the Commission does not specify what the simple mechanism should be.

The Commission should provide additional guidance on simple mechanisms. Before enacting the rule, the Commission should commence a working group with industry experts and consumer advocates to define a “simple mechanism” for online subscriptions, mobile subscriptions, subscriptions started over the phone, and more. The working group should create best practices and produce a series of guides directed at businesses that demonstrate the proper steps to engage a simple cancellation mechanism. Additionally, any guides should focus on the least disruptive and most feasible mechanism for consumers and businesses.

425.2 Definition of “Save” Before Cancellation

Before consumers cancel services, businesses often pitch extensions or additional offers that may sway the consumer. These are known as “saves.” Under the proposed rule, sellers must receive consent from the consumers to present saves, offers, or modifications.⁹ If consumers decline this invitation, the seller must cancel the negative option arrangement immediately without providing the consumer with additional information or offers.¹⁰

The Commission should clarify what information sellers can provide to their consumers during this stage, and what constitutes a “save”. Many subscription products have benefits that should be communicated to the consumer prior to the cancellation. For example, Apple, Inc. offers cloud storage for a fee, and consumers who cancel storage may permanently lose access to their information, such as documents or photos, that are stored in the cloud.¹¹ It is important that businesses can communicate relevant information to the consumer at the time of cancellation, even if that information does sway them to not cancel.

The Commission should amend the proposed definition of “save” to refer exclusively to additional benefits that may be added to a negative option plan. Under the proposed rule, save is defined as an

⁷ Negative Option Rule, 88 Fed. Reg. 24716 (proposed April 24, 2023).

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Apple, “iCloud+ plans and pricing”, <https://support.apple.com/en-us/HT201238>.



“attempt by a seller to present any additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel a negative option feature.”¹² The Commission should exclude information about permanent, irreparable harms that may result from cancellation, and is relevant to the current subscription or product plan.

425.3 Misrepresentations

It is important for the Commission to protect consumers from misrepresentations about the negative option features, such as cost or frequency. But, as Commissioner Wilson notes in her dissent, the provision on misrepresentations is not confined to negative option features and could lead to a very broad reading of the rule.¹³ The proposed language states it is a “violation.... for any 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.”¹⁴ The phrase “any material fact related to the underlying good or service” opens the door for almost any consumer complaint to result in a violation under the rule, even if the complaint is completely unrelated to the rule.¹⁵ For example, consumers could argue that the dish detergent they received through a subscription service did not clean dishes as advertised. While this is a legitimate consumer complaint about the product, the misrepresentation is not related to the negative option model, but rather the product itself. However, the proposed language could mean that the company has violated the negative option rule, even if all other requirements, such as those related to a simple cancellation mechanism, are met.

To correct this, the Commission should narrow the provision on misrepresentations to refer to only misrepresentation of the negative option marketing practice and features. The Commission should remove the phrase “any material fact related to the underlying good or service” and change the language to “any material fact related to the underlying negative option feature.” Doing so would remove concerns about potential violations for product efficacy, product defects, product misrepresentations, and other consumer concerns that are unrelated to negative option features.

¹² Negative Option Rule, 88 Fed. Reg. 24716 (proposed April 24, 2023).

¹³ Christine S. Wilson, “Dissenting Statement of Commissioner Christine S. Wilson regarding the Negative Option Rule NPRM,” Federal Trade Commission, March, 23, 2023, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-negative-option-rule-nprm>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*