

April 13, 2026

The Honorable Andrew N. Ferguson  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue Northwest  
Washington, District of Columbia 20580

**RE: Comments of the Association for Competitive Technology (ACT) to the Federal Trade Commission on its Proposed Negative Option Rule**

Dear Chairman Ferguson,

The Association for Competitive Technology (ACT) respectfully submits its views to the Federal Trade Commission (FTC) regarding its Advance Notice of Proposed Rulemaking (ANPRM) on potential amendments to the FTC's Negative Option Rule.<sup>1</sup>

**I. Introduction and Statement of Interest**

ACT is a global trade association for small and medium-sized technology companies. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the value of the ecosystem ACT represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs.<sup>2</sup>

ACT does not believe that additions to the Negative Option Rule are necessary. However, if the FTC goes forward with a rulemaking process to make additions to the Negative Option Rule, ACT urges the Commission to provide flexibility in any new regulations. In general, ACT supports a clear and consistent outcome-based approach to ensure compliance and improve consumer protection without hindering the growth of the small business community. Through a flexible and outcome-driven regulatory environment, small

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<sup>1</sup> Federal Trade Commission, <https://www.federalregister.gov/documents/2026/03/13/2026-04952/rule-concerning-the-use-of-prenotification-negative-option-plansz>.

<sup>2</sup> ACT | The App Association, State of the U.S. App Economy: 2020 (7th Edition) (Apr. 2020), available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>

businesses will be able to pursue the best way for their company to adhere to requirements. By continuing to have an adaptable regulatory regime for more negative option plans, it will encourage new innovative approaches in consumer transparency.

ACT strongly urges the FTC to refrain from making additions to the requirements of the Negative Option Rule or, if the Commission continues down the rulemaking path, to conduct a rigorous analysis of the relevant activities in the marketplace to ensure that new requirements are narrowly applied to negative option-related practices with demonstrated consumer harm rather than broad applicability to the entire ecosystem.

## **II. Negative Option Rule Expansion is Unnecessary as it Would Extend to Activities that are Adequately Regulated Under Section 5 of the Federal Trade Commission Act and the Restore Online Shoppers' Confidence Act**

Existing guidance and past cases have laid a roadmap for small businesses to follow to ensure their business remains compliant. For example, the FTC has previously indicated five basic Section 5 requirements that negative option marketing must follow to avoid being considered deceptive,<sup>3</sup> which include requiring marketers disclose the material terms of a negative option offer before consumers agree to it;<sup>4</sup> requiring disclosures be clear and conspicuous; obtaining consumers' consent to receive such offers; and not impeding cancellation procedures by honoring requests that comply with such procedures. Since 2010, Congress has prohibited any post-transaction third-party seller from charging or attempting to charge consumers for goods or services sold over the internet through any negative option feature, unless the third party/marketer meets three requirements under the Restore Online Shoppers' Confidence Act (ROSCA).<sup>5</sup> Online sellers using negative option features must clearly and conspicuously divulge all "material terms of the transaction;" obtain consumers' express informed consent before charging them using online "negative option features;" and provide "simple mechanisms" allowing consumers to cancel the recurring charges.

Combined with the existing state of the Negative Option Rule, these regulations provide the FTC with the authority it needs to protect consumers from harmful practices related to negative option contracts and the small business community with the certainty it needs to continue innovating. ACT believes that expansions or additions to the Negative Option Rule are therefore unnecessary.

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<sup>3</sup> See *Negative Options: A Report by the Staff of the FTC's Division of Enforcement*, 26–29 (Jan. 2009), <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>.

<sup>4</sup> At a minimum, this includes the existence of the negative option offer; the offer's total cost; the transfer of a consumer's billing information to a third party, if applicable; and how to cancel the offer.

<sup>5</sup> 15 U.S.C. § 8401 (2010).

### **III. Small Business Tech Innovators Prioritize Transparency and Effective Communication with Consumers**

Building trust through transparency with consumers is a top priority for the small technology businesses we represent. As regulators from across key markets abroad continue to utilize regulatory approaches for the digital economy that are often heavy-handed, the United States has remained the greatest market in the world for building a startup due to its evidence-based and light-touch approach to regulating new industries. Across the world, other governments struggle to incent and sustain the digital economy growth seen only in this country because companies elsewhere often face greater barriers to bringing novel products and services to market—slowing technological innovations to the pace of government approval.

Now more than ever, the small business and startup innovators we represent rely on a clear and consistent legal and regulatory landscape to foster a trustworthy and secure environment to reach millions of potential users across consumer and enterprise sectors so they can continue to grow their businesses and create new jobs. Driven by U.S. small businesses, the hyper-competitive app economy continues to grow, offering immense opportunity to small business developers. Our members recognize that transparency and communication are crucial ingredients to success in this environment, and work to find new and innovative ways to meet consumer expectations. Should a small business fail to meet customer expectations with respect to transparency or communication, the market provides numerous alternatives for those customers, a well-recognized characteristic of a competitive marketplace.

ACT urges the FTC to recognize the highly competitive nature of the app economy and its benefits, and to further ensure that any regulatory changes made to the Negative Option Rule do not disrupt its pro-consumer benefits.

### **IV. An Improperly Scoped Rule Would Divide the Digital Ecosystem, Impeding Small Businesses from Effectively Communicating with Consumers and Navigating the Market**

As the entrepreneurs who lead these small businesses face many obstacles in their day-to-day business operations, expanding the current Negative Option Rule creates an unreasonably high bar for them to reach, drastically increasing liability risks. Already, about 43 percent of small business owners reported having been threatened with or involved in a civil lawsuit.<sup>6</sup> In the past decade, the FTC has aggressively enforced the law, bringing more than 30 enforcement actions over the past few years alone. In these cases, the FTC has

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<sup>6</sup> U.S. Chamber of Commerce Institute for Legal Reform, *International Comparisons of Litigation Costs: Canada, Europe, Japan, and the United States*.

sued not only the companies, but also the individual owners and officers of the companies. Roughly 20 percent of startups fail in the first year, largely due to scarcity in financial resources;<sup>7</sup> for small business owners who strive to do the right thing for their customers, even the threat of costly litigation is a serious deterrent to engaging in a model that has proven beneficial for businesses and consumers.

As the FTC considers potential changes to its rules, we urge for the avoidance of overly prescriptive approaches to cancellation disclosures and procedures. By allowing marketers to decide how to implement their own notification system to stop reoccurring charges, there is a flexibility to the system that gives businesses needed discretion to efficiently scale, adapt, and measure their approaches based on consumer expectations and needs. ACT advocates for an approach that provides for flexibility in compliance and rewards good actors seeking to enhance consumer transparency.

ACT also urges the FTC, before proceeding with a new rulemaking if it so decides, to conduct a thorough and rigorous economic analysis of the relevant marketplace to ensure any new requirements are narrowly applied to demonstrated consumer harms rather than hypothetical ones. As the Commission is aware, the prior attempt to expand the Negative Option Rule was vacated by the Eighth Circuit Court of Appeals for failure to conduct a preliminary regulatory analysis as required by Section 22 of the FTC Act. But the necessity of such analysis goes beyond simple statutory compliance; the previous effort to expand the Negative Option Rule could have applied requirements broadly and forced small business developers to undertake costly re-engineering of their customer intake flows. Before applying such broadly applicable requirements and their associated compliance costs, the FTC should be certain that such costs will be justified by the mitigation of real consumer harms. Only a rigorous market analysis before proposing new rules can achieve this important balance.

In addition, ACT recommends that any changes made to the Negative Option Rule provide flexibility to account for the constantly changing technological environment and new technologies entering the marketplace over time. It is imperative that any updates made to the Negative Option Rule strike the right balance between protecting consumers with the ability to scale and measure approaches in meeting consumer expectations through outcome-driven guidelines that provide for flexibility in compliance, as well as to minimize the potential for unhelpful duplication or overlap with related state laws.

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<sup>7</sup> Camberato, Joe, 2019 Small Business Failure Rate: Startup Statistics by Industry, National Business Capital (Jan. 24, 2020).

**V. Conclusion**

ACT appreciates the opportunity to comment on this ANPRM and commits to assisting the FTC in its efforts to protect consumers and enhance competition.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Scarpelli", written in a cursive style.

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