

June 23, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue Northwest
Washington, District of Columbia 20580

RE: Comments of ACT | The App Association to the Federal Trade Commission on its Proposed Negative Option Rule

Dear Chair Khan,

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) regarding its Notice of Proposed Rulemaking (NPRM) on potential amendments to the FTC's Negative Option Rule.¹

I. Introduction and Statement of Interest

The App Association 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 the App Association represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.² Therefore, the App Association supports a clear and consistent outcome-based approach to ensure compliance and improve consumer protection, without hindering the growth of the small business community.

The App Association urges the FTC to provide flexibility in any new regulations for the Negative Option Rule. Through a flexible and outcome-driven regulatory environment, small businesses will be able to pursue the best way for their company to adhere to requirements, complying with the Restore Online Shoppers' Confidence Act (ROSCA)

¹ Federal Trade Commission, *Negative Option Rule*, Advanced Notice of Proposed Rulemaking, 88 Fed. Reg 24716 (April 24, 2023). ("Negative Option Rule" NPRM)

² 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>

and the FTC's related regulations. By continuing to have an adaptable regulatory regime for more negative option plans, it will encourage new innovative approaches in consumer transparency.

The small tech community appreciates the FTC's efforts to clarify the regulatory landscape to benefit consumers. However, the proposed rule does not simply condense requirements into one rule but includes an improperly expanded scope that would go beyond the negative option proposals cited in the FTC's Advanced Notice of Proposed Rulemaking (ANPRM). Effectively, the proposed Rule would adversely impact the growth of the small technology community that utilizes continuity plans, automatic renewals, and free (or partially free) trials that convert to paid subscriptions, without any public benefit. The App Association strongly urges the FTC to withdraw its proposed rule and undertake meaningful and inclusive outreach to our diverse community of small business developers, along with other impacted stakeholders, to inform its next steps and whether FTC's existing authority provides it with the tools it needs to address demonstrated harms stemming from negative option practices.

II. 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. However, the proposed rule presents an additional regulatory barrier to effectively running their business. As regulators from across key markets abroad continue to utilize regulatory approaches for the digital economy which 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 opportunities 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.

The App Association 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.

III. The Proposed Rule Extends 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,³ which include requiring marketers disclose the material terms of a negative option offer before consumers agree to it;⁴ 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 ROSCA.⁵ 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.

As we discuss below, the FTC's proposed rule changes give rise to authority issues on several fronts, and warrant this proposed rule being withdrawn in its current form. Specifically:

- **The FTC's proposed Negative Option Rule's expanded scope raises issues with Major Questions and Non-Delegation Doctrines** because the FTC does not have explicit authority to pursue broad *ex ante* rules in the context of negative option behavior. The App Association also has concerns that the FTC's proposed updates to its Negative Option Rule would not align with the Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), which clarified that the FTC lacks authority to obtain monetary remedies pursuant to Section 13(b), as FTC is now proposing to impose civil penalties on organizations for negative option features.

³ 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>.

⁴ 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.

⁵ 15 U.S.C. § 8401 (2010).

- **The NPRM appears to violate the FTC Act** as the FTC’s proposed rule expansion fails to adhere to Section 18 requirements, including that Notices of Proposed Rulemaking (NPRM) must hew to a scope that is strictly limited to proposals previously made in a prior ANPRM. For example, the NPRM proposes to expand FTC regulation to all material facts about a negative option transaction, and would impose new rules for consent, neither of which were vetted in the ANPRM. Because these possibilities were not raised in its ANPRM, the FTC cannot benefit from public input that would inform their evaluation of less burdensome alternatives. Further, the FTC’s proposal to sweep in all material facts, including those unrelated to renewals, runs counter to the requirement that FTC identify acts or practices with specificity per Section 18.⁶ And the NPRM does not identify widespread prevalence with any specificity⁷ of the issues it is seeking to address per Section 18.
- **The FTC’s proposal also gives rise to First Amendment concerns by regulating commercial speech.** For example, the FTC proposes to prohibit the communication of information to a consumer about additional offers before cancelling and the implications of a cancellation. The FTC’s proposal appears to clearly fail the standard set in *Central Hudson Gas Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980), which protects commercial speech that “is neither misleading nor related to unlawful activity.”

IV. If Adopted, the Proposed 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.⁸ 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 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;⁹ for small business owners that 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.

⁶ 15 U.S.C. § 57(a)(1)(B).

⁷ 15 U.S.C. § 57a(b)(3).

⁸ U.S. Chamber of Commerce Institute for Legal Reform, International Comparisons of Litigation Costs: Canada, Europe, Japan, and the United States.

⁹ Camberato, Joe, 2019 Small Business Failure Rate: Startup Statistics by Industry, National Business Capital (Jan. 24, 2020).

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. The App Association urges for an approach that provides for flexibility in compliance and rewards good actors seeking to enhance consumer transparency.

The App Association also reiterates its request for the FTC to clarify that any information that does not fall under the material categories of price, duration, and disclosure to be designated as post-sign-up disclosures that are permitted to be communicated to the consumer post-sale in order to enable clear and concise disclosures. By providing this clarification, small businesses can have more certainty that providing critical negative option subscription information (e.g., automatic renewal information) will comply with FTC regulations as they grapple with state-level requirements on the same. Such an approach would significantly benefit the small businesses in the digital economy that seek to communicate with consumers most effectively and that have relatively less resources for legal compliance.

We provide further specific feedback on various provisions of the proposed rule below:

Section 425.3 of the proposed rule not only expands civil penalties for sellers that may "misrepresent, expressly or by implication, any material fact related to the transaction" including the Negative Option Rule, it extends monetary penalties to misrepresentation of any material fact related to the underlying good or service. Essentially, under this provision a company could adhere to the negative option portion (relating to automatic renewals, free-to-pay and fee-to-pay conversions, prenotification plans, and continuity programs) of the new rule to the letter, while simultaneously violating the new rule if, for example, the company misrepresents or omits any other aspect of service or product being sold to the consumer. Notwithstanding best efforts, tech startups' ability to flawlessly adhere to the vague and broad language used in this rule is unrealistic.

Section 425.4 of the proposed rule requires sellers to disclose "any material terms related to the underlying good or service that is necessary to prevent deception, regardless of whether the terms relate to the negative option feature," including mandates on where, when, and how to make these required disclosures. Mandating that consent be separately attained as an additional step is inefficient, with no tangible benefit to the consumer. Subscription and membership-based business models are becoming more popular because they allow businesses to innovate and establish sustainable revenue streams, while building a direct relationship with their customers. Nearly two-thirds of subscribers feel more connected to companies with which they have a direct subscription experience compared to companies whose products they purchase in a one-off transaction.¹⁰ This direct access to customers enables small

¹⁰ <https://www.businesswire.com/news/home/20210303005291/en/Subscription-Business-Revenue-Grows-437-Over-Nearly-a-Decade-as-Consumer-Buying-Preferences-Shift-from-Ownership-to-Usership>

businesses to bypass some of the gate-keeping challenges of the internet, including algorithms, third-party cookies in ads, and competition with large players in an already crowded space.¹¹ For consumers, subscriptions serve as a convenient, predictable, and recurring monthly cost, which streamlines budgeting efforts and allows them to obtain services and content for less.¹²

Section 425.6 of the new proposed rule adds confusion to negative option requirements above because it (1) fails to define “simple mechanisms” and (2) adds elusive language requiring cancellation of a service to be “as simple as initiation.” The only description of the “click to cancel” provision is that it must be offered through the same medium as the subscription. This ambiguity denies businesses clarity about how to evade deceptive negative option behavior and could trigger a constitutional challenge for its vagueness. The new proposed rule would present an insurmountable amount of additional compliance issues, legal costs, and requirements, especially for small businesses utilizing subscription, continuity, free (or partially free) trial models that convert to a paid subscription, or other recurring payment plans. Moreover, forcing consumers to read through arduous terms of service to provide “express informed consent” thorough enough to remain in compliance would create a bad experience for both the consumer and business, ultimately agitating consumers that were expecting a speedy and seamless process and deterring them from using products on IoT devices.

Section 425.7 of the proposed rule requires sellers to provide a yearly reminder to customers enrolled in negative option plans involving anything other than physical goods. The rule dictates that the reminder must identify the product or service, the frequency and amount of charges, and the means to cancel. As acknowledged in the NPRM, the proposal here is not preemptive of state laws and inadvertently introduces an additional layer of reminders with no benefit to the consumer. If the FTC moves forward with mandating sellers provide an annual reminder, we urge the FTC to at least adopt a less prescriptive process so that the same medium could be used to comply with both federal and state requirements. A “patchwork of laws and regulations” creates a difficult landscape for small app developers to navigate and will not adequately address new modalities or practices utilized across the IoT ecosystem.

The App Association recommends that any changes made to the Negative Option Rule provide flexibility to account for this 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.

¹¹ <https://www.forbes.com/sites/jiawertz/2022/07/15/the-growth-of-subscription-commerce/?sh=147ef958b572>

¹² Id.

V. Conclusion

The App Association appreciates the opportunity to comment on this NPRM and commits to assisting the FTC in its efforts to protect consumers and enhance competition.

Sincerely,



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