

June 23, 2023

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, District of Columbia 20580

RE: Joint Small Business Digital Economy Innovators Comments on the Federal Trade Commission's Negative Option Rule Notice of Proposed Rulemaking (88 Fed. Reg. 24716)

The undersigned small businesses respectfully submit collective views to the Federal Trade Commission (FTC) on its Notice of Proposed Rulemaking (NPRM) on proposed amendments to the Commission's Negative Option Rule.¹ We are small business software application development companies and technology firms based throughout the United States that create the technologies driving internet of things (IoT) use cases across consumer and enterprise contexts. We write to share our views about the role of subscriptions in the digital economy, and to express our concerns with aspects of the FTC's proposed regulatory updates, which would create new challenges to our growth and for the consumers who rely on our innovations, without public benefit. As we discuss below, the FTC's most advisable path forward requires a pause of its rulemaking process to conduct further consultation with our community (and others similarly impacted by it) before proceeding to make final changes to the Negative Option Rule. We focus on the practical impacts of the FTC's proposals, and do not address its legal authority for making its proposed changes to its Negative Option Rule.

As small business developers, we compete vigorously to gain and maintain consumers, including in the way that we communicate and administer customer subscriptions and recurring payments. We accomplish customer relationships in a broad range of ways, ranging from free and ad-supported approaches to a variety of subscriptions. Because the current market provides numerous alternatives that are easily available in and across platforms, we are guaranteed to lose customers (and fail to gain new customers) if we do not meet expectations for transparency, communication, and fairness. It is crucial that the FTC squarely acknowledge and support this healthy competitive dynamic that exists in the digital economy. Any changes made to the Negative Option Rule must strike the right balance between protecting consumers and preserving the ability to appropriately scale and evolve their approaches to meeting customer expectations. It is also important that FTC minimize the potential for unhelpful duplication or overlap with related state laws.

¹ 88 Fed Reg 24716.

The FTC's proposed Negative Option Rule updates contain proposals that present numerous feasibility and compliance challenges with no benefit to consumers:

- At numerous places in its proposed rule, FTC would shift from an outcome-centered regulatory approach to one that rigidly dictates how compliance should occur, eliminating the flexibility we need to most effectively communicate with consumers, and to evolve those means over time (for example, FTC would mandate where, how often, and in what sequence subscription information for consumers must be featured and consented to – even imposing which day of the month a subscriber is charged);
- The FTC proposes to put mandates in place that would prevent us from efficiently communicating truthful and accurate information to their customers (addressing, for example, cost savings and loss of hosted data);
- The FTC also employs vague language at places that would present immense difficulty to our community in operationalizing updated Negative Option Rules (e.g., FTC proposes that subscription cancellations must be “as simple as initiation” without any further detail, when initiating and cancelling subscriptions are entirely different experiences);
- The FTC's proposals would create conflicts with existing federal-level requirements (e.g., FTC's proposals would conflict with existing Restore Online Shoppers' Confidence Act [ROSCA] standards for ease of cancellation, and, since FTC's proposals do not pre-empt state law, stand to create countless conflicts with more than a dozen state-level requirements for negative options).

Ultimately, it is imperative that the Negative Option Rule protects consumers, while providing the ability for innovators to scale their methods used to meet consumer expectations in the market. Presently, FTC's proposed changes to its Negative Option Rule do not reflect these imperatives, which puts small business innovators' central role in the growth and sustainability of the U.S. digital economy, as well as its global role and influence, at risk.

Given that existing legal requirements (e.g., ROSCA, Section 5, etc.) provide much-needed consumer protections today and the record does not adequately demonstrate further systemic issues that such requirements do not already address, we urge FTC to pause its development of alterations to the Negative Option Rule. Before proceeding, FTC is encouraged to partner with our community, consumers, and others impacted by FTC's Negative Option Rule proposals to better understand the U.S. digital economy, the state of competition in the U.S. digital economy, and the role of subscriptions in meeting customer demands across the U.S. digital economy before advancing its proposals. FTC could gain this understanding through a series of public workshops that feature inclusive and open dialogues. FTC should also reorient its proposals to take outcome-based approaches that will preserve the ability for small businesses like us to find unique ways to differentiate ourselves in the market and in compliance, avoid ambiguities, and mitigate the potential for regulatory conflict with federal and state requirements for negative option offerings. Only once these further needed steps have been taken should FTC proceed to update to the Negative Option Rule.

Sincerely,

365.Training

Chalk Inc.

Colorado Technology Consultants

Computerways

Cosmusic

Dogtown Media

ForAllAbilities

Fresco Capital

Give Black App

GlobalForce Tech Consulting, LLC

Hive Medical

Homnick Systems

Ironistic

Kaura Inc.

Marshall Artist

Medical Society of Northern Virginia

Motionmobs

Pulsar Security

Rimidi

Rotteveel Consultancy LLC

SouthernDNA

Spendid

Syndesy LLC

Vemos

Well Beyond