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August 2, 2022

Honorable April Tabor, Acting Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, D.C. 20580

**Re: *Telemarketing Sales Rule (16 C.F.R. Part 310 – ANPR)*
(Project No. R411001)**

Dear Secretary Tabor:

I. Introduction

The undersigned State Attorneys General (“State AGs”) submit these Comments in response to the public notice issued by the Bureau of Consumer Protection’s Division of Marketing Practices,¹ seeking comment on the Federal Trade Commission’s (“Commission”) proposals to determine “whether to repeal all exemptions regarding telemarketing calls to businesses and inbound telemarketing of computer technical support services, and whether the Telemarketing Sales Rule (“TSR”) should provide consumers additional protections for negative option products or services.”² Consistent with recent submissions to the Commission from the National Association of Attorneys General

¹ See Advanced Notice of Proposed Rulemaking, *Telemarketing Sales Rule*, FTC Docket No. 2022-0033, June 3, 2022 (“June 2022 ANPRM”).

² *June 2022 ANPRM* at 1.

("NAAG"), we support the proposals to end the TSR exemptions for business-to-business phone calls and inbound calls. Furthermore, the State AGs support the proposal to add a cancellation provision and additional recordkeeping requirements for negative sales options.

The evidence suggests that there is widespread support for these proposals. As the Commission noted in its ANPRM, "[c]onsumers and their advocates largely argue for amendments they believe will enhance consumer protection including by closing 'loopholes' in the TSR, and for more enforcement."³ The 2,064 largely identical comments from Illinois consumers asked the Commission to "keep and strengthen" the TSR's consumer protections,⁴ and more than half of the unique individual consumer comments make a case that more enforcement is needed.⁵ Even comments from industry groups have conceded that "[t]he Rule has had an overall positive impact on consumers . . . and there is a continuing need for the majority of its protections."⁶

The time is ripe for the Commission to reassess its rules and implement the proposals set forth herein, which will provide additional tools for State AGs to allow our offices to better serve and protect consumers who depend upon us.

II. Negative Option Offers

Negative option offers often generate "confusion, misunderstanding, and outright deception" for consumers, who may not entirely grasp what sellers will consider as assent.⁷ The State AGs therefore support the Commission's proposal that negative option sellers and telemarketers provide consumers with notice and the opportunity to cancel before they are billed for negative option products. Additionally, we support the Commission's proposal to amend the TSR's

³ *Id.* at 9.

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Id.* at 12.

⁷ *Id.* at 21.

recordkeeping provisions so that they would explicitly require telemarketers and sellers to retain complete and accurate records of consumers' "express informed consent" to be charged for a particular transaction.

If the guidance offered last November is any indication, the Commission realizes that negative option offers are a growing problem for many consumers, "saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase."⁸ Industry groups may argue that consumers are benefitted by having uninterrupted access to products or services,⁹ but the Commission has also acknowledged that it has "remained a persistent source of consumer harm."¹⁰

Negative option marketing's history in the United States stretches back almost a century, but the rise in subscription services over the past decade has made them increasingly prevalent. No longer confined to wine-of-the-month clubs or streaming television providers, subscriptions are now used for a variety of services and products, especially as home delivery became more popular during the COVID-19 pandemic. As one Pennsylvania consumer told the *Washington Post*, "Subscription services are a sneaky wallet drain... [y]ou keep signing up for things and they make it really hard to cancel."¹¹

While the TSR already places several requirements on telemarketers when it comes to transactions involving pre-acquired account information,¹² the State AGs believe that the Commission should provide additional protections to consumers.

⁸ News Release, FTC, *Enforcement Policy Statement Regarding Negative Option Marketing*, https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf (Nov. 4, 2021).

⁹ *June 2022 ANPRM* at 23.

¹⁰ Nov. 2021 FTC statement.

¹¹ Heather Long and Andrew Van Dam, "Everything's becoming a subscription, and the pandemic is partly to blame" June 1, 2021. *Washington Post*.

<https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/> (June 15, 2022).

¹² *June 2022 ANPRM* at 20.

This letter echoes sentiments expressed by State AGs for more than a decade. In the fall of 2009, several State AGs informed the Commission that there was “a need for substantive regulatory provisions to ameliorate the harmful aspects of this form of negative option plan.”¹³ The 2009 letter noted that “consumers customarily do business based on the premise that they will not be bound, and incur any monetary obligations, unless and until there is a full ‘meeting of the minds’ and genuine assent between the parties,” and that negative option marketing “turns those rules on their head.”¹⁴

By deeming silence to be acceptance, negative options also violate the common law principle that an offeree must affirmatively accept the terms of the offer.¹⁵ The issues mentioned in 2009 have continued to plague consumers in the ensuing 13 years: deceptive use of phrases like “free trial;” an inability to cancel once consumers realize their accounts have been charged; and consumers unable to recall if they consented to being charged.¹⁶ Seventeen State AGs submitted comments in support of additional protections in 2009, and while the Commission found these comments to “argue convincingly that the unfair, deceptive and otherwise problematic negative option marketing practices continue to cause substantial consumer injury,”¹⁷ it declined to expand or enhance the Rule on Use of Prenotification Negative Option Plans.¹⁸

In 2019, a coalition of 23 State AGs general took up the issue again, signing a letter calling on the Commission to adopt stronger regulation of negative option

¹³ Comment on FTC Rule on Use of Prenotification Negative Option Plans, State of Colorado Department of Law, https://www.ftc.gov/sites/default/files/documents/public_comments/16-cfr-part-425-rule-concerning-use-prenotification-negative-option-plans-543809-00096/543809-00096.pdf (Oct. 13, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 79 Fed. Reg. 44271, 44275 (July 31, 2014).

¹⁸ See Advance Notice of Proposed Rulemaking: Request for Public Comment, *Negative Option Rule*, 84 Fed. Reg. 52393-01, Dec. 2, 2019 (“December 2019 Comment”).

marketing.¹⁹ The letter noted that “the problems observed in 2009 appear even more prevalent today,”²⁰ with the Better Business Bureau estimating in a 2018 report that more than \$1.3 billion in losses related to “free trial offer” cases were pursued by the Commission over the previous decade.²¹ Like the proposals made by the Commission this June, the 2019 letter called for making cancellation of such services easier and requiring companies to record the entire transaction to prevent misrepresentations.²²

Support for further regulation also comes from groups like the National Consumer Law Center (“NCLC”) and AARP, who both urged the Commission to require sellers to send a notice to consumers before charging them under a negative option offer.²³ The time has come to further regulate these practices. Adding a cancellation provision for negative option sales and expanding recordkeeping requirements will allow consumers to continue enjoying the benefits that a subscription-based service provides while shielding them from fraud perpetuated by unscrupulous vendors. Simply put, the ease and mechanism with which consumers enroll in these services should be the same experience when the consumer decides to cancel.

¹⁹ News Release, Pennsylvania Office of Attorney General, *AG Shapiro Urges Federal Trade Commission to Take Action against Deceptive Marketing Practices*, <https://www.attorneygeneral.gov/taking-action/ag-shapiro-urges-federal-trade-commission-to-take-action-against-deceptive-marketing-practices/> (Dec. 3, 2019).

²⁰ *December 2019 Comment* at 2.

²¹ *Id.*

²² *Id.* at 9-11.

²³ *June 2022 ANPRM* at 22.

III. Expanding TSR to Inbound Calls

In the ANPRM, it was stated that “the Commission believes the time is ripe to consider repealing the TSR exemption for inbound telemarketing of tech support services.”²⁴ We agree. The State AGs wholeheartedly support expanding the TSR to cover inbound calls in addition to outbound calls, a modification that would have a substantial effect on pervasive tech support scams. Tech support scams depend on consumers initiating inbound calls to call centers, often located overseas. Consumers make these calls in response to a deceptive “pop-up” computer alert or a scam phone number generated by an internet search. After making these inbound calls, consumers are sold alleged tech support services that provide no benefit or use to the consumer.

Under 16 CFR 310.6(b), the TSR does not apply to “[t]elephone calls initiated by a customer or donor in response to an advertisement through any medium”²⁵ or “[t]elephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s).”²⁶ There are exemptions to this – such as when the telemarketer attempts to upsell the caller – but generally these calls fall “outside of the TSR’s purview.”²⁷

Rightly regarded as a “loophole” by consumers and their advocates,²⁸ the Commission’s own report in 2013 found that almost 60% of fraud incidents were the result of offers through general media advertising rather than telemarketing.²⁹ This

²⁴ *Id.* at 34.

²⁵ 16 CFR 310.6(b)(5).

²⁶ 16 CFR 310.6(b)(6).

²⁷ *June 2022 ANPRM* at 34.

²⁸ *Id.* at 26.

²⁹ NAAG, No. 00117, at 8.

loophole is utilized by propagators of tech call support scams, which has become one of the most prevalent scams in the nation over the past few years. The scam targets consumers, particularly senior citizens, into buying costly tech support and repair services that they do not need. Online ads, some of which resemble security alerts from major technology companies, trick consumers into contacting the perpetrators of this scam, who then pressure the unsuspecting consumers into purchasing alleged tech services. In these instances, no tech support services are provided to the consumer, despite the representations made by the perpetrators. Even worse, many of these victims are targeted again by the same scammers or by others.

Nationwide, various tech support scams garnered almost 150,000 complaints in 2018,³⁰ making it one of the most prolific scams in the country. That same year, consumers reported more than \$55 million lost to tech support scams, for an average individual loss of \$400.³¹ Based on these complaints, the scams disproportionately affect the country's senior population: between 2015 and 2019, elder adults filed more reports of a loss on tech support scams than "in any other Sentinel fraud category," and their median loss of \$500 per complaint was 25% higher than the median reported by younger people.³²

At the state level, the Pennsylvania Office of Attorney General received nearly 500 complaints related to a tech support scam in 2018 alone and obtained more than \$31,000 in refunds, thanks to a collaborative sweep with state and federal law enforcement.³³

³⁰ See FTC Consumer Sentinel Network Databook 2020, at 86, (Feb. 2021), available at https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book2020/csn_annual_data_book_2020.pdf (last visited June 15, 2022)

³¹ See FTC Data Spotlight, available at <https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams> (last visited Jan. 31, 2022).

³² *Id.*

³³ News Release, Pennsylvania Office of Attorney General, *Attorney General Shapiro Takes on Tech Support Scams*, <https://www.attorneygeneral.gov/taking-action/attorney-general-shapiro-takes-on-tech-support-scams/> (Mar. 7, 2019).

Further, many of these tech support scams include negative options.³⁴ Tying into this issue, both the NCLC and NAAG called for TSR requirements in the form of disclosures, and the use of pre-acquired information in negative options to apply equally to inbound calls, rather than just outbound ones.³⁵ The Commission itself notes that a growing number of goods and services “are marketed through general media or direct mail and induce inbound telemarketing sales that often include a negative option feature.”³⁶

Expanding the TSR to include inbound calls enjoys support from both consumers and advocacy groups. Comments from 2,064 Illinois consumers called for, among other amendments, “stronger consumer protection against inbound telemarketing calls placed in response to advertisements.”³⁷

IV. Business-to-Business Calls

The current exemption from the TSR for business-to-business (“B2B”) calls is the relic of a bygone era. In the past, consumers had separate phone numbers for their homes and for their place of work. In the age of cell phones, this demarcation was already beginning to blur, as the “same phone often handles both personal and business calls.”³⁸ The Commission has considered expanding the TSR to cover business-to-business calls in the past but has declined to do so,³⁹ and consumers have been harmed as a result. The State AGs believe that the time is ripe to end the exemption for B2B phone calls.

In the years since the Commission last considered implementing the amendment in 2015, both the marketplace and the way people conduct business

³⁴ *June 2022 ANPRM* at 28.

³⁵ *Id.* at 26.

³⁶ *Id.* at 28.

³⁷ *Id.* at 11.

³⁸ *West Italian*, No. 00113, at 3.

³⁹ *June 2022 ANPRM* at 38-40.

have substantially changed.⁴⁰ In the past, industry proponents claimed that proposals to end the B2B exemption would “harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.”⁴¹ In reality, such advertising opportunities like online listings have become a pervasive source of scams, with law enforcement bringing numerous cases against fraudulent telemarketers selling directory listings, web designs, search engine optimization services, market-specific advertising opportunities and government imposter scams.⁴²

Additionally, the way consumers use their phones has undergone major changes in the past 20 years, changes that have only accelerated due to the COVID-19 pandemic. In 2004 – one year after the last time the Commission considered making substantive changes to the B2B exemption⁴³ – more than 90% of U.S. adults lived in households that had an operational landline phone.⁴⁴ Cell-phone-only households outnumbered landline households for the first time in 2016, and as of 2020 more than 62% of U.S. adults live in a household without a landline.⁴⁵ The vast majority of Americans – 97% – own a cell phone of some kind,⁴⁶ while only 26% of U.S. workers have employer-provided mobile phones, the lowest percentage of any country.⁴⁷ Combined with the decline in landlines, this suggest that many millions of

⁴⁰ *Id.* at 40.

⁴¹ 2003 TSR Amendments, 68 FR at 4663.

⁴² *June 2022 ANPRM* at 41.

⁴³ *Id.* at 42.

⁴⁴ Felix Richter, “Landline Phones Are a Dying Breed” Mar. 17, 2021. Statista. <https://www.statista.com/chart/2072/landline-phones-in-the-united-states/> (June 15, 2022).

⁴⁵ *Id.*

⁴⁶ “Mobile Fact Sheet.” Apr. 17, 2021. Pew Research Center. <https://www.pewresearch.org/internet/fact-sheet/mobile/> (June 15, 2022).

⁴⁷ “Engagement and the Global Workplace” Steelcase. https://cdn2.hubspot.net/hubfs/1822507/2016-WPR/Americas/Final_Digital_PDF.pdf?__hssc=130454992.2.1510683412095&__hstc=130454992.443e21f9d8c0777617ef60bc67f67630.1510683412094.1510683412094.1510683412094.1&__hsfp=1850619963&hsCtaTracking=7f761c46-6062-436e-824a-e3a1a252b89c%7C6ccb9a82-f9ce-4b49-9afb-f030459d27b9 (June 15,2022).

Americans use their phones for both business and personal uses. The Commission wrote that “unscrupulous telemarketers could take advantage of this rising trend to assert that the B2B exemption should apply if a person does have a dual purpose phone.”⁴⁸

In addition, 36% of U.S. workers had a gig work⁴⁹ arrangement in some capacity as of 2018.⁵⁰ The Commission wrote that given “the nature of gig work, it is likely that gig workers utilize their personal phones for business purposes rather than relying on separate phone lines dedicated for business purposes” and would be unable to avoid unwanted calls through call-blocking technology or by having their number placed on the Commission’s Do Not Call registry.⁵¹ The COVID-19 pandemic resulted in millions of Americans working from home, and while that number has decline since April 2020, a significant number of consumers continue to work from home – 7% of all employees as of April 2022.⁵² Yet remote work remains popular with workers⁵³ and an estimated 40.7 million American professionals are expected to be fully remote in the next five years.⁵⁴

⁴⁸ *June 2022 ANPRM* at 44.

⁴⁹ ‘Gig work’ or ‘gig economy’ is a phrase used to describe offering temporary workers short term work. Examples of gig workers include freelancers, independent contractors, and temporary or part-time hires.

⁵⁰ Shane McFeely and Ryan Pendell, “What Workplace Leaders Can Learn From the Real Gig Economy” Aug. 16, 2018. Gallup. <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx> (June 15, 2022).

⁵¹ *June 2022 ANPRM* at 44.

⁵² Joe Murphy, “Chart: Remote work is disappearing as more people return to the office” May 12, 2022. NBC News. <https://www.nbcnews.com/data-graphics/data-remote-workers-declining-may-2022-rcna28499> (June 15, 2022).

⁵³ Kim Parker, Juliana Menasce Horowitz and Rachel Minkin, “COVID-19 Pandemic Continues To Reshape Work in America” Feb. 16, 2022. Pew Research Center. <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> (June 15, 2022).

⁵⁴ Adam Ozimek, “Future Workforce Report 2021: How Remote Work is Changing Businesses Forever” Upwork. <https://www.upwork.com/research/future-workforce-report> (June 15, 2022).

With these changes in consumer phone use and work habits, along with a proliferation of scams through B2B calls, it is long overdue for the Commission to eliminate the exemption for business-to-business telemarketing calls.

V. Conclusion

The undersigned State AGs commend the Commission for taking steps to address several of the issues that have continued to cause harm to consumers. By adding a cancelation provision for negative option sales and eliminating TSR exemptions for inbound calls and business-to-business calls, the Commission will provide enhanced protection to consumers and better tools for law enforcement to prevent scams. Although it is understandable that the industry has concerns over how these rule changes will affect them, the minor inconveniences they may encounter will be outweighed by the benefits to consumers we are entrusted to protect.

Respectfully Submitted,



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Ohio Attorney General



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Pennsylvania Attorney General



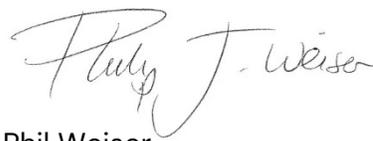
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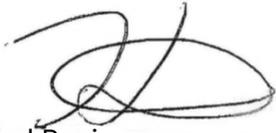
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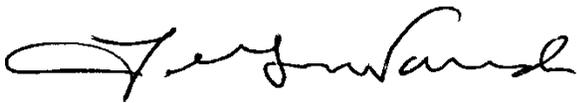
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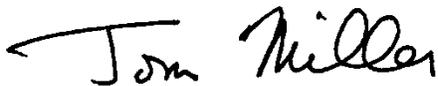
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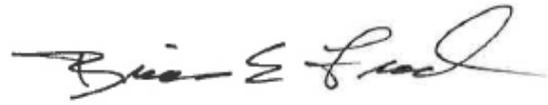
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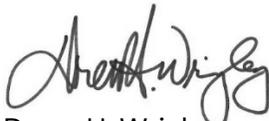
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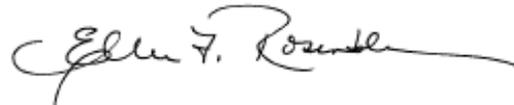
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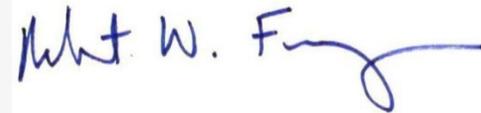
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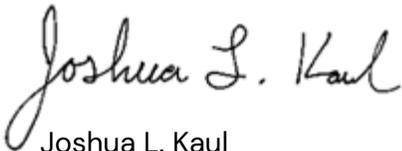
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