



June 23, 2023

Honorable April Tabor, Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex N)  
Washington, DC 20580

***Re: Negative Option Rule; Project No. P064202***

Dear Secretary Tabor:

The Attorneys General of the States of New York, Pennsylvania, Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Vermont, Washington, and Wisconsin (“State Attorneys General”) submit these comments in response to the Federal Trade Commission’s (“FTC”) Notice<sup>1</sup> concerning proposed amendments to the FTC’s Negative Option Rule<sup>2</sup> (“Rule”). The State Attorneys General support the FTC’s comprehensive efforts in stemming the tide against the “prevalent, unabated consumer harm in the marketplace”<sup>3</sup> caused by the unfair and/or deceptive use of negative option marketing.

## **I. INTRODUCTION**

### **A. Current Regulatory Framework**

Although negative option marketing generally falls into four categories, prenotification plans are the only negative option practice currently covered by the FTC’s Rule.<sup>4</sup> Continuity plans, automatic renewals, and free trial conversion offers fall outside the Rule’s focus. Pursuant to the

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<sup>1</sup> Proposed Rule, Federal Register Document No. 2023-07035, pgs. 24716-24739 (“Proposed Rule”).

<sup>2</sup> 16 C.F.R. 425.1, *et seq.*

<sup>3</sup> Proposed Rule at 24719.

<sup>4</sup> *Id.* at 24716.

Rule, prenotification plan sellers are required to disclose seven material terms before consumers subscribe, and must do so clearly and conspicuously. Those seven terms include:

- (1) how subscribers must notify the seller if they do not wish to purchase the selection;
- (2) any minimum purchase obligations;
- (3) the subscribers' right to cancel;
- (4) whether billing charges include postage and handling;
- (5) that subscribers have at least ten days to reject a selection;
- (6) that if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and
- (7) the frequency with which announcements and forms will be sent.<sup>5</sup>

In addition, the Rule requires that sellers provide particular periods during which they will send introductory merchandise, as well as give consumers a specified period to respond to announcements and provide instructions for rejecting merchandise in announcements.<sup>6</sup> Lastly, sellers must promptly honor written cancellation requests.<sup>7</sup>

As set forth in the FTC's thorough outline of negative option protections for consumers, several other statutes and regulations address abusive negative option practices, including Section 5 of the FTC Act ("Section 5"),<sup>8</sup> the Restore Online Shoppers' Confidence Act ("ROSCA"),<sup>9</sup> the Telemarketing Sales Rule ("TSR"),<sup>10</sup> the Postal Reorganization Act,<sup>11</sup> and the Electronic Fund Transfer Act ("EFTA")<sup>12, 13</sup> On November 4, 2021, with respect to the current regulatory framework, the FTC published its "Enforcement Policy Statement Regarding Negative Option

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<sup>5</sup> *Id.* at 24717, citing 16 C.F.R. 425.1(a)(1)(i) – (vii).

<sup>6</sup> *Id.*, citing 16 C.F.R. 425.1(a)(2) and (3).

<sup>7</sup> *Id.*, citing 16 C.F.R. 425.1(b).

<sup>8</sup> 15 U.S.C. 45(a).

<sup>9</sup> 15 U.S.C. 8401, *et seq.*

<sup>10</sup> 16 C.F.R. 310.

<sup>11</sup> 39 U.S.C. 3009.

<sup>12</sup> 15 U.S.C. 1693-1693r.

<sup>13</sup> Proposed Rule at 24717-24718.

Marketing” (“Policy Statement”).<sup>14</sup> The Policy Statement provided guidance on the FTC’s interpretation of these statutes and other existing law as applied to negative option marketing.<sup>15</sup>

Specifically, the FTC’s Policy Statement emphasized the following principles concerning negative option marketing:

- Sellers should disclose all material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether the term relates directly to the terms of the negative option offer;
- Sellers should obtain the consumer’s acceptance of the negative option feature offer separately from any other portion of the entire transaction; and
- Sellers should provide cancellation mechanisms at least as easy to use as the method the consumer used to initiate the negative option feature.<sup>16</sup>

Additionally, the FTC’s Policy Statement highlighted four basic Section 5 requirements that negative option marketing must follow.<sup>17</sup> Among those requirements was that “marketers must not erect unreasonable barriers to cancellation procedures, and must honor cancellation requests that comply with such procedures.”<sup>18</sup>

On January 19, 2023, the Consumer Financial Protection Bureau (“CFPB”) issued a circular explaining that those who engage in negative option marketing practices can violate the prohibitions on unfair, deceptive, or abusive acts or practices in the Consumer Financial Protection Act (“CFPA”).<sup>19, 20</sup> The CFPB explained that:

Negative option marketing practices may violate [the CFPA’s prohibition on unfair, deceptive, or abusive acts or practices] where a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers’ informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or

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<sup>14</sup> *Id.* at 24719, citing 86 FR 60822, [Enforcement Policy Statement Regarding Negative Option Marketing \(ftc.gov\)](https://www.ftc.gov/enforcement/policy-statements/2023-01-19-negative-option-marketing).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Policy Statement at 4.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> 12 U.S.C. 5481 to 5603.

<sup>20</sup> [Circular 2023-01 Unlawful negative option marketing practices \(consumerfinance.gov\)](https://www.consumerfinance.gov/circulars/2023-01-unlawful-negative-option-marketing-practices) (“CFPB Circular”)

fails to honor cancellation requests that comply with its promised cancellation procedures.<sup>21</sup>

In addition to the various federal statutes and regulations concerning negative option marketing, and as recognized by the FTC in its Notice, “a growing number of state laws address many forms of negative option features.”<sup>22</sup> According to the record before the FTC, there are currently at least eighteen state laws on the books concerning negative options, including, but not limited to, laws passed in California, the District of Columbia, Florida, Hawaii, New Mexico, New York, North Carolina, and Virginia.<sup>23</sup> There is no doubt that state enforcement authorities are on the front lines battling unscrupulous sellers deploying deceptive and unfair negative option marketing tactics.

## **B. Prior State Attorneys General Comments**

Indeed, as the chief law enforcement bodies in each of our respective states, the State Attorneys General have historically offered their insight and observations concerning the FTC’s Rule when given the opportunity. In 2009, in response to the FTC’s regulatory review of the Rule and an Advanced Notice of Proposed Rulemaking,<sup>24</sup> several State Attorneys General offered comments encouraging expansion of the Rule to cover other forms of negative option marketing.<sup>25</sup>

Despite such robust advocacy, and the FTC recognizing that “unfair, deceptive and otherwise problematic negative option marketing practices continue[d] to cause substantial consumer injury,”<sup>26</sup> the FTC declined to expand or enhance the Rule at the conclusion of its review in 2014.<sup>27</sup> However, as the FTC recently recognized, “the problems with negative options... persisted.”<sup>28</sup> In addition to state enforcement actions, the FTC filed over thirty actions involving “a range of deceptive or unfair practices, including inadequate disclosures for ‘free’ offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.”<sup>29</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Proposed Rule at 24722.

<sup>23</sup> *Id.*

<sup>24</sup> 74 FR 22720 (May 14, 2009).

<sup>25</sup> *See* Confirmation of Rule, 79 FR 44271 (July 31, 2014), at 44273-44274.

<sup>26</sup> *Id.* at 44275.

<sup>27</sup> Proposed Rule at 24719.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

In light of continued consumer abuses, the FTC issued another Advanced Notice of Proposed Rulemaking on October 2, 2019. Once again, the State Attorneys General answered the call to offer comments and observations. On December 2, 2019, the State Attorneys General of New York and Pennsylvania, joined by the State Attorneys General of Colorado, Delaware, District of Columbia, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, again urged the FTC to expand the Rule to encompass all forms of negative option marketing.<sup>30</sup>

This bipartisan coalition of twenty-three State Attorneys General detailed specific deceptive or unfair practices regularly seen by their respective offices, including a lack of informed consumer consent, lack of clear and conspicuous disclosures, failure to honor cancellation requests, and a refusal to provide refunds.<sup>31</sup> In addition, the State Attorneys General also highlighted other harmful practices, including a failure to provide consumers with a simple cancellation method and abusive free trial or trial conversion offers that are “rampant online and throughout social media.”<sup>32</sup> Lastly, the State Attorneys General detailed dozens of enforcement actions, including twenty-three settlements concerning negative option marketing by the New York Attorney General’s Office alone, which garnered over \$10 million in consumer restitution and \$14 million in penalties and costs.<sup>33</sup>

### **C. Need for Clarifying Regulation**

The State Attorneys General agree with the FTC’s observation, made several times in the Notice, that the proposed Rule is consistent with existing laws governing negative options and the FTC’s interpretation of those laws, as detailed in the Policy Statement. While we believe that the requirements under the proposed Rule are already largely required by existing law, we agree with the FTC that the proposed Rule provides more guidance and specificity on how negative option sellers can comply with the existing legal framework and that the proposed Rule will thus benefit consumers. Based upon the consumer complaints received by our respective offices, as well as the legal actions following those complaints, clarifying regulation of negative option marketing practices is warranted, and we applaud the FTC for taking a comprehensive approach to combatting all forms of negative option marketing.

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<sup>30</sup> [AG Shapiro Urges Federal Trade Commission to Take Action against Deceptive Marketing Practices – PA Office of Attorney General; comment letter of 23 state attorneys general project no. p064202 negative option rule 16 cfr 425 12.2.19.pdf \(ny.gov\).](#)

<sup>31</sup> Proposed Rule at 24720.

<sup>32</sup> *Id.* at 24721.

<sup>33</sup> *Id.*

## *1. Consumer Experiences and Harm Since 2020*

Consumers have continued to experience harm from negative option marketing since the filing of the State Attorneys General comment on December 2, 2019. The following examples are typical:

- Consumer A received an email from a third-party company thanking her for patronizing a certain internet provider, and offering her a gift of ear bud headphones. Consumer A paid \$9.98 for shipping via her credit card. Soon after, she was charged \$109. Upon contacting the company, the company told Consumer A that the gift was just a trial offer, and since she kept the headphones, her credit card was charged.
- Consumer B signed up for a magazine subscription concerning woodworking, which renewed periodically. He called the company and requested the subscription be cancelled before being charged again, but the company told him he had to call a different number. When Consumer B called the other number, the number was out of service. He called the original number and was put on hold for eighty-two (82) minutes before hanging up. His requests to cancel sent through the company's website were also ignored.
- Consumer C attempted to cancel a subscription using the "chat" feature of the company's website. After the consumer identified himself and his intent to cancel, a customer service representative commenced a series of questions about the consumer's use of the subscription, which the consumer cut short by repeating his request to cancel. After a long wait, the representative responded by presenting the consumer with an offer, which the consumer rejected and restated his request to cancel for a third time. After another long wait, the representative asked the consumer why he rejected the offer. The consumer repeated his intent to cancel for a fourth time, and concluded the chat. Nevertheless, after another long wait, the representative proposed that the consumer take three months to reevaluate the service. The interaction lasted approximately forty (40) minutes and was not effective in cancelling the consumer's subscription.

## *2. Public State Enforcement Efforts Since 2020*

Our states have a number of ongoing investigations into negative option marketing and practices. Some of the state enforcement efforts that have been resolved since 2020 include the following:

- **Money Map Press**: On June 22, 2020, the Pennsylvania Office of Attorney General filed an Assurance of Voluntary Compliance against Baltimore-based Money Map Press, LLC, who sold deceptive investment publications. According to the Assurance, Money Map Press engaged in a broad range of misconduct, including

misrepresenting offers as “free,” when they were not. Money Map Press agreed to pay \$75,000 in consumer restitution.

- **American Mint**: In May 2021, the Pennsylvania Office of Attorney General filed a legal action against American Mint, LLC, a Pennsylvania company which allegedly advertises and sells collectible memorabilia through mail solicitations and online. It is alleged that American Mint advertises collectible items, typically coins, for substantially discounted prices. It is further alleged that American Mint fails to disclose, in a clear and conspicuous manner, that when a consumer purchases a discounted item, the consumer is enrolling in a subscription plan. American Mint is alleged to use barely legible print in its terms and conditions, among other deceptive practices.
- **Arrowmistic, LLC d/b/a Wicca Movement; and Cultured Quotes, LLC**: On October 28, 2021, the Pennsylvania Office of Attorney General entered into Assurances of Voluntary Compliance with two Pittsburgh-based companies who advertised “free jewelry,” minus shipping and handling fees. The companies failed to clearly and conspicuously disclose that accepting the “free jewelry,” would result in automatically being enrolled in a membership club, which was billed monthly until cancelled by the consumer. Wicca Movement and Cultured Quotes paid \$10,000 and \$15,000 in consumer restitution, respectively.

## II. FTC’S PROPOSED AMENDMENTS TO THE RULE

As set forth in the Notice, the FTC proposes to amend the current Rule “with the objective of setting clear, enforceable, performance-based requirements for all negative option features in all media. The proposed amendments are designed to ensure consumers understand what they are purchasing and allow them to cancel their participation without undue burden or complication.”<sup>34</sup> In addition, the FTC proffers that the amendments address “the most important issues related to negative option marketing, including misrepresentations, disclosures, consent, and cancellation,” and “enhance and clarify existing requirements currently dispersed in other rules and statutes.”<sup>35</sup> The State Attorneys General’s comments with respect to specific proposed amendments are set forth immediately below.

## III. STATE ATTORNEYS GENERAL COMMENTS

### A. Scope and Definitions - §§ 425.1 and 425.2

The FTC proposes a common set of requirements applicable to all types of negative option marketing, including prenotification and continuity plans, automatic renewals, and free trial

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<sup>34</sup> *Id.* at 24726.

<sup>35</sup> *Id.*

offers.<sup>36</sup> The proposed Rule defines “negative option feature” as “a provision of a contract under which the consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer.”<sup>37</sup> The proposed Rule will cover all offers made in all media, “including, but not limited to the internet, telephone, in-print, and in-person transactions.”<sup>38</sup>

Consistent with the State Attorneys General’s previous comments since 2009, we commend and support the FTC for creating this “comprehensive scheme for regulation of negative option marketing in a single rule...consolidating existing negative option-specific provisions in one location.”<sup>39</sup> The State Attorneys General agree with the FTC that the new Rule will enhance law enforcement’s ability to protect consumers from “widespread deceptive or unfair practices,”<sup>40</sup> as well as remain relevant in ever-changing markets.<sup>41</sup>

**B. The Proposed Rule Properly Accounts For the Fact that Negative Option Cases Often Involve Misrepresentations about Other Aspects of the Transaction - § 425.3**

The proposed Rule prohibits “any material fact regarding the *entire* agreement – not just facts related to a negative option feature.”<sup>42</sup> The State Attorneys General support this approach to combatting seller misrepresentations, by providing the FTC with authority to seek civil penalties and consumer redress for material misrepresentations in all types of media.<sup>43</sup>

Like the FTC, we have found that negative option marketing cases “often involve deceptive representations not only related to the negative option feature but to the underlying product (or service) or other aspects of the transaction as well.”<sup>44</sup> Accordingly, we agree that “[e]nsuring great relief against those who deceive consumers will benefit both consumers and honest sellers who must compete with those who engage in deception.”<sup>45</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 24734.

<sup>38</sup> *Id.* at 24726 and 24734.

<sup>39</sup> *Id.* at 24726.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 24726.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



**C. Consumers Must Be Provided With Key Information before Purchasing a Negative Option Feature - § 425.4**

Section 425.4 of the proposed Rule requires sellers to provide consumers with important enumerated information prior to obtaining the consumer's billing information.<sup>46</sup> To summarize, sellers will be required to disclose the following to consumers: (1) that consumer payments will be recurring, if applicable; (2) the deadline by which consumers must act to stop charges; (3) the amount or ranges of costs consumers may incur; (4) the date the charge will be submitted for payment; and (5) information about the mechanism consumers may use to cancel the recurring payments.<sup>47</sup> As proposed, it will be a violation of the Rule and an unfair or deceptive practice in violation of Section 5 for a negative option seller to fail to disclose the aforementioned information, as well as "any material term related to the underlying good or service that is necessary to prevent deception, regardless of whether that term directly relates to the negative option feature."<sup>48</sup>

Additionally, the proposed amendment requires marketers to present this important information "clearly and conspicuously," which is defined by the proposed amendment as "difficult to miss (i.e., easily noticeable) or unavoidable and easily understandable by ordinary consumers."<sup>49</sup> Regardless of the media involved, the required information "should not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the required information."<sup>50</sup> This important provision will prohibit sellers from positioning the required disclosures so as to compete with distracting text or images that are unrelated. Furthermore, the proposed amendment also contains requirements related to visual, audible, and written disclosures "consistent with the principles enunciated in the [FTC's Policy Statement]."<sup>51</sup> Moreover, "written disclosures should appear immediately adjacent to the means of recording the consumer's consent for the negative option feature."<sup>52</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 24735.

<sup>49</sup> *Id.* at 24727.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

The State Attorneys General support these proposed amendments to repel the abusive practices of hidden disclosures, “including those in fine print, buried in paragraphs of legalese and sales pitches, and accessible only through hyperlinks.”<sup>53</sup> We endorse the required disclosure of “the information necessary for the consumer to cancel the negative option feature,”<sup>54</sup> and respectfully recommend two amendments. First, we recommend that sellers be required to disclose all material policies concerning cancellation. Our offices have encountered cases where consumers were subject to penalties when canceling an auto-renewing subscription before the end of the subscription term. In order to better protect consumers, and to promote clear guidelines, sellers should clearly and conspicuously inform consumers of any conditions (or lack thereof) concerning cancellation. Second, with respect to cancellation procedures, we recommend that sellers be required to disclose “*all* the information necessary for the consumer to *effectively* cancel the negative option feature.” Disclosures in the form of ‘click-here-to-cancel’ icons, which lead to terms and conditions pages, confusing cancellation flows, or do not otherwise explain how to cancel online, should not be permitted. The addition of this bright-line measure will aid consumers and provide sellers with clear guidelines.

In addition, the State Attorneys General respectfully suggest the FTC amend this provision to require that the important information identified by this proposed Rule be provided to the consumer in a manner that is capable of being retained by the consumer.<sup>55</sup> This will ensure the consumer always has the necessary information on hand to make informed decisions, as well as hold sellers accountable for their business practices.

#### **D. Consumers Should Not Be Charged for a Negative Option Feature without Their Express Consent - § 425.5**

The proposed Section 425.5 requires negative option sellers to obtain the consumer’s express informed consent before charging them.<sup>56</sup> The failure to obtain such consent, which has become a pervasive problem, will be considered a deceptive or unfair practice.<sup>57</sup> In order to remove ambiguity for marketers, level the playing field for consumers, deter misconduct, and provide flexibility for innovation and change, the proposed Rule requires marketers to:

- (1) Obtain the consumer’s unambiguously affirmative consent to the negative option feature separately from any other portion of the offer;

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<sup>53</sup> *Id.*

<sup>54</sup> Proposed Rule at 24735; proposing §425.4(a)(5).

<sup>55</sup> *See for example* N.Y. GBL § 527-a(2).

<sup>56</sup> *Id.* at 24727.

<sup>57</sup> *Id.*

- (2) Refrain from including any information that interferes with, detracts from, contradicts, or otherwise undermines the consumer’s ability to provide express informed consent;
- (3) Obtain the consumer’s unambiguously affirmative consent to the entire transaction; and
- (4) Obtain and maintain, for three years or one year after cancellation (whichever is longer) verification of the consumer’s consent.<sup>58</sup>

The State Attorneys General support the FTC’s proposed consent requirements and agree that this provision is “necessary given how easily marketers can enroll consumers in negative option programs without actual consent.” However, the State Attorneys General again<sup>59</sup> respectfully encourage the FTC to require sellers offering free trials to obtain an additional round of consent before charging a consumer at the completion of the free trial. This simple, common-sense measure should not be overly burdensome to sellers, considering today’s technology, as well as the consumer’s access to such technology. In addition, consumers would be given another layer of protection from being charged for goods or services they do not actually want.

**E. Consumers Should Be Able to Easily Cancel a Negative Option Feature - § 425.6**

Section 425.6 of the proposed Rule requires that negative option sellers provide a simple mechanism for consumers to cancel a negative option subscription and sets out certain minimum requirements for what cancellation mechanisms qualify as “simple.” Paragraph (a) of this section states the requirement of a simple cancellation mechanism. Paragraph (b) provides that the simple cancellation mechanism must be “at least as simple as” the method the consumer used to sign up for the negative option feature in the first place. Paragraph (c) sets out additional minimum requirements for simple cancellation mechanisms, including in the specific contexts of cancellation by internet, telephone, and in-person. And paragraph (d) imposes reasonable limits on a negative option seller’s ability to forestall consumers’ cancellations through attempts to “Save” them as subscribers.

The State Attorneys General strongly endorse the FTC’s efforts to ensure that consumers enrolled in subscription services or other negative option plans are continuing to pay for those plans because they want to maintain their subscriptions, and not because it is too much trouble to cancel. We continue to receive voluminous complaints from consumers who go to great lengths to cancel a negative option subscription and are often still unsuccessful in doing so. We note that many provisions in the proposed Rule codify existing law and policies, including many expressed in the FTC’s Policy Statement in 2021. Incorporating these provisions into the new Rule will provide helpful clarity to businesses, consumers, and regulators alike. We also identify certain areas that would benefit from additional clarity and rulemaking.

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<sup>58</sup> *Id.*

<sup>59</sup> *See* Letter of Vermont Office of Attorney General, October 13, 2009, pg. 2.

**1. *Simple Mechanism at Least As Simple As Initiation - § 425.6(b)***

Paragraph (b) requires that the cancellation mechanism be at least as easy to use as the mechanism the consumer used to sign up for the negative option feature in the first place. We endorse this requirement and note that the “at least as” formulation clearly sets a *floor*, not a ceiling. The FTC’s 2021 Policy Statement included similar language,<sup>60</sup> and we have encountered negative option sellers that defend burdensome cancellation procedures by invoking their burdensome sign-up procedures. However, under the proposed Rule, a cancellation mechanism clearly would not be exempt from the other requirements even if it were *easier* than the sign-up mechanism. For example, the cancellation mechanism still must be simple and efficient, without unreasonable barriers.

**2. *Minimum Requirements for Simple Mechanism - § 425.6(c)***

Paragraph (c) sets out certain minimum requirements for simple cancellation mechanisms. We strongly endorse these requirements, because they identify important areas that will benefit from the additional clarity about what qualifies as “simple” in the context of a cancellation mechanism. Furthermore, by setting these as *minimum* requirements, the proposed Rule properly accounts for the fact that negative option plans come in all shapes and sizes, and there are some cancellation mechanisms that, in context, are not simple despite meeting all of the “minimum” requirements. Nevertheless, even accounting for this important measure of flexibility, there are certain additional requirements that, in our experience, should be included in setting a floor for cancellation mechanisms that are “simple,” and we respectfully recommend that the FTC include them in the Rule.

The FTC itself has already identified some of these additional requirements. For example, in the 2021 Policy Statement, the FTC interpreted Section 5 of the FTC Act to require that negative option sellers “not erect unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures, and must honor cancellation requests that comply with such procedures.”<sup>61</sup> We recommend that the FTC include this as one of the minimum requirements for simple cancellation mechanisms. The prohibition on “unreasonable barriers” is particularly important in our experience, because it recognizes that negative option sellers sometimes add obstacles to cancellation that make little or no business sense other than as a means of creating friction that makes it harder for consumers to cancel.

We also urge the express adoption of a requirement along the lines of New York’s statute, which provides that simple cancellation mechanisms must be “cost effective, timely, and easy to use.”<sup>62</sup> The requirement of “timely” mechanisms is especially important because it recognizes that sellers sometimes create a cancellation process that is lengthy or understaffed, forcing consumers to devote significant time to achieve a desired cancellation.

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<sup>60</sup> Policy Statement at 14.

<sup>61</sup> Policy Statement at 5.

<sup>62</sup> NY GBL 527-a(2).

Paragraph (c) also sets out certain additional requirements for cancellation by internet, telephone, and in-person. These properly recognize the unique qualities of consumer interactions in each of these contexts. We recommend the addition of a fourth category: cancellation by chat message or text message. Chat and text are increasingly common as a means of cancellation. Although chat messages take place on the internet – and so subparagraph (1) of the proposed Rule would seem to apply – they share some of the same distinct qualities and potential problems as cancellation by telephone, because they require interactions with a live customer service representative (or a chatbot mimicking a live representative<sup>63</sup>). It is important to clarify that where cancellation is available through chat or text messaging, negative option sellers are required to answer and handle messages promptly within normal business hours (as with telephone cancellations). We also recommend clarifying that where consumers are able to purchase a negative option feature via a website or web-based application – and where they can do so without interacting with a live representative or chatbot – they should not be forced to interact with a live representative or chatbot in order to cancel. We have also seen negative option sellers require cancellation by email; we believe that the rule would properly ensure that sellers provide other cancellation means in addition to email, because cancellation by email would not qualify as cancellation “over the same website or web-based application.”

For telephone cancellations, the proposed Rule requires that all calls must be “answered promptly during normal business hours.” The FTC’s Policy Statement identifies additional minimum requirements for telephone cancellations, and we suggest that including them expressly in the Rule would provide helpful clarity. For example, the Policy Statement requires negative option sellers to “ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature,” and prohibits negative option sellers from “among other things: hang[ing] up on consumers who call to cancel; plac[ing] them on hold for an unreasonably long time; provid[ing] false information about how to cancel; or misrepresent[ing] the reasons for delays in processing consumers’ cancellation requests.”<sup>64</sup>

Finally, the proposed Rule requires that for all cancellations, “the negative option seller must provide the simple mechanism . . . through the same medium (such as internet, telephone, mail, or in-person) the consumer used to consent to the negative option feature.” We respectfully suggest requiring sellers to allow *all* consumers to cancel through *any* medium that the seller uses to sell subscriptions or memberships, regardless of the medium through which that particular consumer signed up. For example, consumers often sign up for gym memberships in person after taking a tour of the gym. If that gym also sells memberships online – and therefore must, under the proposed Rule as currently written, provide a mechanism for cancellation online as well – the consumer who signed up in person should also be able to cancel online.

### 3. *Saves - § 425.6(d)*

Paragraph (d) imposes reasonable limits on a negative option seller’s ability to forestall consumers’ cancellations through attempts to “Save” them as subscribers. In particular, the paragraph requires the seller to obtain “unambiguously affirmative consent to receive a Save prior

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<sup>63</sup> See also [Issue Spotlight, Chatbots In Consumer Finance \(consumerfinance.gov\)](#).

<sup>64</sup> Policy Statement at 14-15.

to cancellation,” and that the consent “must apply only to the cancellation attempt in question and not to subsequent attempts.” In our experience with negative option sellers, the “saves” process continues to be a significant obstacle to many consumers seeking to cancel a subscription. Certainly, there are consumers who, while expressing a desire to cancel, retain an interest in continuing their subscription at a discount – and the “saves” process can be beneficial to those consumers. The proposed Rule affords companies a natural and obvious way of distinguishing between consumers who may want to hear about a better deal, and consumers who just want to cancel: they can ask the consumer. Accordingly, we strongly endorse this paragraph of the proposed Rule.

In addition, we identify a couple of areas that would benefit from further clarity. By incorporating an express statement that the consent to receive a Save is only valid if obtained within the cancellation interaction, the Rule would make clear that negative option sellers cannot obtain such consent prospectively, such as during enrollment. In addition, we have seen instances where companies use various “dark patterns” to steer consumers unwittingly toward “save” offers, when the option to cancel is technically also available. Accordingly, we recommend including an express requirement in the Rule that the option to consent to receive a Save must be presented in a manner that is no more prominent than the option to decline, and it must be unambiguously clear that the latter option allows the consumer to proceed directly to cancellation.

Finally, although the proposed Rule would close the door on the type of repeated, unwanted Save attempts we have seen in the past – and continue to see today – some negative option sellers may interpret it as leaving the door open to repeated attempts to obtain consumers’ *consent to receive* a Save. For example, there are negative option sellers that currently, as part of a Saves sequence: (1) offer to change the subscriber’s membership plan, (2) offer to change the subscriber’s billing cycles, (3) offer to add benefits to the subscriber’s existing plan, and finally (4) offer the subscriber a discount on their current plan. It is not hard to imagine such a seller making a simple update to its cancellation sequence: (1) ask the subscriber if they want to hear about a different membership plan, (2) ask if they want to hear about different billing cycles, (3) ask if they want to hear about additional benefits, and then (4) ask if they want to hear about discounts on their current plan. Such a scenario would force consumers to confront repeated barriers to cancellation that are similar to those they face today. We think that would be inconsistent with what the FTC is looking to address with the proposed Rule, and recommend that the FTC incorporate language that avoids a potential loophole.

#### **F. Consumers Should Receive Regular Reminders about Negative Option Features They Are Paying For - § 425.7**

Section 425.7 of the proposed Rule requires negative option sellers who sell products or services that do not involve the automatic delivery of physical goods to provide consumers reminders, at least annually, identifying the product or service, the frequency and amount of charges, and the means to cancel. The reminders must be provided through the same medium the consumer used to consent to the negative option feature. For in-person sales, the reminder must be provided through the internet or by telephone in addition to, where practical, an in-person method similar to that the consumer used to consent to the negative option feature.

The State Attorneys General strongly endorse the requirement for negative option sellers who provide non-physical products and services to provide consumers regular reminders of their subscriptions. Subscription-based products and services have become so widespread that consumers are having difficulty keeping track of them all. One study concluded that consumers underestimate how much they pay to maintain their subscriptions by an average of \$133/month (or \$1,596 per year), and 42% of the consumers in that study had forgotten about a subscription for which they continued to pay.<sup>65</sup> Subscription management has become an entire industry; consumers can choose from a variety of companies that offer to monitor their recurring subscriptions.<sup>66</sup> We believe that consumers should not have to sign up for yet another service—one that comes with privacy and security risks, as subscription monitoring services require sharing financial account and other sensitive information<sup>67</sup>—in order to effectively manage their subscriptions.

Even annual reminders may be insufficient in many situations. We have seen cases where consumers believed they had cancelled a subscription, only to discover months later that the negative option seller was continuing to charge them. We have also seen cases where a negative option seller continued to charge consumers despite not being able to provide the service consumers had paid for during a particular billing period. And we have also seen cases where recurring charges were applied to consumers for subscriptions they did not even realize they had signed up for. Although the proposed Rule already contemplates the possibility of more frequent reminders—by requiring reminders “at least” annually—we suggest that sellers be required to send consumers all of the information required by the rule (i.e., identification of the product or service, the frequency and amount of charges, and the means to cancel) in a communication concurrent with each billing cycle, prior to the charge being applied. Consumers should be given the option to opt out of a monthly reminder in favor of an annual one.

Finally, we also suggest that the reminders be provided not only through the same medium that the consumer used to consent to the negative option feature but also through any other medium that the seller uses to communicate with the consumer. For example, a consumer who signed up for a gym membership in person should be provided reminders through the same medium that the gym typically uses to communicate with that member (e.g., email). A consumer who called a seller to cancel a subscription but ended up accepting a save offer to continue the subscription at a reduced price should be provided reminders through the medium that is typically used by the seller to communicate with the consumer, even though the consumer accepted the new negative option feature over the phone.

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<sup>65</sup> <https://www.forbes.com/advisor/personal-finance/manage-subscriptions> (July 13, 2022).

<sup>66</sup> *Id.*; <https://money.usnews.com/money/personal-finance/saving-and-budgeting/articles/track-and-manage-subscriptions-with-these-apps> (May 9, 2023).

<sup>67</sup> <https://www.forbes.com/advisor/personal-finance/manage-subscriptions> (July 13, 2022).

**G. The Proposed Rule Properly Preserves State Authority to Regulate in this Area - § 425.8**

Section 425.8 of the proposed Rule provides that the Rule “shall not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to negative option requirements, except to the extent that such...is inconsistent with the provision of this part, and then only to the extent of the inconsistency.”<sup>68</sup> Furthermore, under the proposed Rule, state law “is not inconsistent with the provisions of this part if the protection such [state law] affords any consumer is greater than the protection provided by this part.”<sup>69</sup>

This section properly recognizes and preserves the interest that individual states have in combatting unfair and/or deceptive acts or practices committed in our respective jurisdictions. It also expressly preserves states’ ability to enact greater protections than those afforded by the proposed Rule. As technology and consumer-facing business practices continue to evolve, it is essential that states retain the ability and flexibility to address unfair and deceptive negative option sales practices, just as many of our states have done in recent years.<sup>70</sup> We agree with the FTC’s observation that the FTC Act “does not explicitly preempt state law” and that Congress did not intend for the FTC to regulate consumer protection on its own.<sup>71</sup>

**IV. CONCLUSION**

For the foregoing reasons, the undersigned State Attorneys General strongly endorse the FTC’s effort to clarify the legal requirements on negative option sellers through this proposed Rule. We respectfully urge the Commission to consider our proposed clarifications and additions, which stem from our wide-ranging experience with deceptive and misleading practices and onerous cancellation mechanisms in connection with negative options. We look forward to continuing our partnership with the FTC in our shared mission of protecting consumers, which will only be strengthened by a rule that ensures consistent standards for all negative option marketing.

**BY THE UNDERSIGNED STATE ATTORNEYS GENERAL:**



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<sup>68</sup> Proposed Rule at 24736.

<sup>69</sup> *Id.*

<sup>70</sup> *See for example* N.Y. GBL § 527-a.

<sup>71</sup> *Id.* at 24730.





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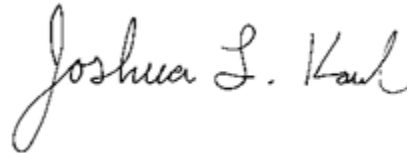
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