

June 23, 2023

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

I. Executive Summary

The six undersigned consumer and public interest advocacy organizations strongly support the Federal Trade Commission's ("FTC" or "the Commission") proposal to strengthen its Negative Option Rule. We applaud the Commission for its continued diligence in ensuring that its rules reflect the realities faced by consumers and other market actors.

In addition to the FTC's proposed amendments, to best protect individuals from unfair and deceptive practices regarding negative option subscriptions, consumer commenters urge the FTC to require sellers to obtain consumers' consent to recurring charges within six days before a free trial converts into a paid subscription. This would ensure that consumers can begin free trials with the understanding that they will not be automatically charged upon the end of the trial period, but rather will have the ability to expressly choose whether or not to continue using a product or service after the conclusion of the trial.

Furthermore, the FTC should require sellers to provide notice to their subscribers prior to each recurring charge. Regular reminders that include information such as price and cancellation methods will provide consumers greater transparency and control over

their negative option plans. The Commission should adopt the remaining amendments to the Negative Option Rule as proposed.

II. Free Trial Conversions and Recurring Subscription Services Cause Substantial Consumer Harm.

Free trial conversions and recurring subscription services cost consumers hundreds of millions of dollars each year, as a conservative estimate. A Better Business Bureau analysis of just 14 FTC cases involving misleading free trials found that victims lost \$1.3 billion to these practices.¹ These unwanted or unintended purchases are often the result of sellers obscuring the conversion of a free trial to a paid-for service,² sellers making the trial difficult to cancel,³ or consumers simply forgetting to cancel a service they do not intend to keep using due to the length of time between when they signed up for the free trial and when the trial period converted to a paid subscription.⁴

¹ Better Business Bureau, *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, BETTER BUSINESS BUREAU (Dec. 13, 2018), <https://www.bbb.org/article/investigations/18929-subscription-traps-and-deceptive-free-trials-scam-millions-with-misleading-ads-and-fake-celebrity-endorsements>.

² *See, e.g., id.* (describing various methods by which free trial scams obscure the amount of money consumers will pay for the service).

³ *See, e.g.,* Jose Colon, Comments to the Federal Trade Commission regarding proposed amendments to the Negative Option Rule (May 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0049> (“I have tried numerous times to cancel a subscription from Paramount + and no number to call and got the runabout with emails...”); *see also, e.g.,* Anonymous, Comments to the Federal Trade Commission regarding proposed amendments to the Negative Option Rule (May 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0046> (“Norton is nearly impossible to unsubscribe or cancel.”); *see also* Anonymous, Comments to the Federal Trade Commission regarding proposed amendments to the Negative Option Rule (May 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0033-0062> (“I tried to cancel Amazon prime, because they were overcharging me for services I don't want or need. Every month I see Amazon taking money out of my account for nothing that I ordered, but fee's[sic] for Amazon prime membership keeps draining my account...I have called them many times and no one listens...”)

⁴ *See, e.g.,* *Subscription Service Statistics and Costs*, C+R RESEARCH BLOG (May 18, 2022), <https://www.crresearch.com/blog/subscription-service-statistics-and-costs/> (finding that surveyed consumers on average underestimated their monthly spending on subscriptions by over \$100 and that nearly half of all surveyed consumers had forgotten they were paying for a subscription service they no longer used).

These deceptive practices are an increasingly common problem for consumers across all ages, income, and education levels.⁵ These unexpected charges are especially harmful to low-income consumers. On average, consumers underestimate the amount they spend per month on recurring subscription services by \$133.⁶ This amount of money spent on unwanted, unknown, or unaccounted for subscriptions can be detrimental for consumers without a large amount of disposable income, as 18 percent of surveyed American adults in 2022 indicated the largest emergency expense they could cover using just their savings was less than \$100.⁷ Further, unexpected charges can lead to more adverse effects upon low-income consumers, who are subject to overdraft fees and other negative financial consequences when money is taken out of their bank accounts unexpectedly or without their knowledge.⁸

Currently, sellers are able to obtain consumers' consent before the start of a free trial to charge them for a service after a free trial is over. This can be as far ahead as 30 days or three months later.⁹ Too many businesses rely on their customers forgetting to cancel the free trial, knowing that they already have permission to charge the consumers.

⁵ See, e.g., *id* (finding that at least a quarter of consumers across age ranges forgot about subscriptions they were still paying for or planned to cut back on the number of subscriptions they had); see also Steve Baker, *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, BETTER BUSINESS BUREAU (Dec. 2018), <https://www.bbb.org/content/dam/0734-st-louis/free-trial-offer-scam/bbb-study-free-trial-offers-and-subscription-traps.pdf> (explaining that complaints made to the Better Business Bureau regarding free trial offer scams spanned all income levels, ages, and education levels).

⁶ *Subscription Service Statistics and Costs*, C+R RESEARCH BLOG (May 18, 2022), <https://www.cresearch.com/blog/subscription-service-statistics-and-costs/>.

⁷ Alicia Lloro, et al., *Economic Well-Being of U.S. Households in 2022*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (May 2023), <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf>.

⁸ See Sally Greenberg, *Capital One eliminates predatory overdraft charges*, NCL (Jan. 6, 2022), https://nclnet.org/overdraft_fees/ (noting that a \$5 charge can result in a \$40 cost, for each \$5 charge); see also Joe Valenti, *Overdraft fees can price people out of banking*, CFPB (Mar. 30, 2022), <https://www.consumerfinance.gov/about-us/blog/overdraft-fees-can-price-people-out-of-banking/> (“One customer noted last September that they were charged \$400 in overdraft fees in the span of just two months,” “an unpaid overdraft may lead to a financial institution closing the customer’s account and reporting to a specialty credit reporting agency (CRA) that provides bank account screening”).

⁹ See, e.g., *Apple TV+ Promo Terms and Conditions*, APPLE, https://www.apple.com/promo/pdf/EN_US_ATV+_Promo_TandCs.pdf (“Get three months of Apple TV+ when you buy a new iPhone, iPad, Apple TV, or Mac.”) (last updated June 13, 2023).

In fact, by consenting to a charge in the future before trying the product, the purpose of a free trial (to test a service before paying for it) is nearly obviated.

It is worth noting that undesired recurring charges are a greater problem for younger consumers, with Generation Z and Millennial respondents much more likely to report unwanted payments than Baby Boomer and Silent Generation respondents.¹⁰ This aligns with data showing that members of Generation Z spend the most money on subscription payments (\$377 a month, compared to Baby Boomers' \$200 a month and the average of \$242 a month).¹¹ Younger consumers' vulnerability to negative option plans should inform any consumer outreach, educational initiatives, or other actions the FTC may undertake.

III. The Commission's Proposed Rule Will Significantly Improve Consumers' Protections from Unwanted Recurring Charges.

Consumer commenters appreciate the FTC's attention to the harms stemming from negative option subscriptions and the consideration of the commenters' suggestions in previous public comment periods. The undersigned organizations strongly support the Commission's amendments to the Negative Option Rule.

One of the most significant provisions of the Commission's proposed amendments is the "Click to Cancel" requirement. While the FTC's enforcement guidance under the Restore Online Shoppers' Confidence Act ("ROSCA") includes a simple cancellation requirement, this does not apply to sellers operating offline. For example, one of the largest gym franchises in the country currently does not allow simple cancellation (even for subscribers who purchased their membership online, which is likely a ROSCA violation).¹² Regardless

¹⁰ Allie Johnson, *Poll: Majority of subscribers experience unwanted charges*, BANKRATE (Feb. 6, 2022) <https://www.bankrate.com/finance/credit-cards/subscription-service-charges-survey/>.

¹¹ Eric Griffith, *Boomer vs. Gen Z: These Are the Most Popular Subscription Services by Generation* PCMAG (Jan. 17, 2022) <https://www.pcmag.com/news/boomer-vs-gen-z-most-popular-subscription-services-by-generation>.

¹² See *Enforcement Policy Statement Regarding Negative Option Marketing*, FEDERAL TRADE COMMISSION (Nov. 4, 2021)

of how the consumer initiated their subscription, the seller requires them to cancel in person or via physical mail, the two most burdensome options.¹³ The Commission’s proposed Click to Cancel provision would make it clear to sellers across the economy that onerous cancellation methods are unacceptable when doing business.

The other amendments, including thorough consent, disclosure, and annual notice requirements, will also mitigate many consumer harms stemming from negative option plans. 71 percent of consumers lose more than \$50 each month—over \$600 a year—on unwanted subscription payments.¹⁴ By requiring sellers to obtain consumers’ unambiguous affirmative consent to both the negative option feature and the rest of the transaction, there will be fewer subscribers who are unaware that their transaction involves a recurring charge. Similarly, the proposed disclosure and annual notice will clearly inform consumers of the terms of the contract and how they may terminate the agreement.

IV. The Commission Should Require Sellers to Obtain Consumers’ Consent for a Free Trial Conversion in a Timely Manner.

We urge the FTC to strengthen the proposed rule in two significant ways. First, we urge the FTC to rule that it is an unfair and deceptive practice for entities to convert a free trial into a paid contract without obtaining the consumer’s express consent for the conversion no more than six days prior to the conversion of a free trial into a paid subscription. While the FTC’s proposed disclosure and consent requirements will greatly reduce consumer harm stemming from free trial conversions, consumer commenters urge

https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf

¹³ *Frequently Asked Questions: How do I cancel my membership?* PLANET FITNESS

<https://www.planetfitness.com/en-au/about-planet-fitness/customer-service> (“You can fill out a cancellation form at the front desk of your home club, or send a letter (preferably via certified mail) to your club requesting cancellation. Memberships can’t, unfortunately, be cancelled by email or phone”).

¹⁴ *Survey from Chase Reveals That Two-Thirds of Consumers Have Forgotten About At Least One Recurring Payment In The Last Year* CHASE (Apr. 1, 2021) <https://media.chase.com/news/survey-from-chase-reveals>.

the Commission to require sellers to obtain consumers' consent right before the conversion takes place.

This upfront protection would help prevent consumers from getting trapped in recurring charge contracts that, once commenced, become difficult for consumers to cancel and obtain refunds. It would also help prevent consumers from paying for a service they only intended to try for a certain period of time and have no intention of continuing. Consumers should not pay unwanted charges due to confusing trial terms or because they were required to provide consent to be charged money weeks or months in advance to receiving the product or service.

When obtaining consumers' consent for a free trial conversion, sellers should be required to follow the disclosure and consent requirements the Commission proposes in §§425.4 and 425.5. This consent requirement should also be separate from consent simply to begin a free trial such that an agreement to begin a free trial does not equate to consent to be charged upon the end of the trial, even if the trial length is six days or fewer. This will ensure there is an appropriate temporal connection between consent to be charged and actually making payments consistent with how most consumer transactions occur in the marketplace.

The content and delivery method requirements for these consent requests should also adhere to the requirements the Commission proposes for the annual reminder (including an identification of the product or service, the frequency and amount of charges, and the means to cancel, as described in §425.7). This request for consent prior to paid conversion should occur regardless of whether the subscription involves physical goods.

V. The Commission Should Require Sellers to Provide Notice Prior to Each Recurring Charge

The second way in which we urge the FTC to strengthen the proposed rule is by requiring notice to the consumer prior to each recurring charge. In the FTC's 2019

Advanced Notice of Proposed Rulemaking, many consumers commented that they only remembered their enrollment in a negative option plan when the money was automatically withdrawn from their bank accounts or charged to their credit cards. This is not an uncommon sentiment. One study found that unwanted automatic renewals and unintended subscriptions cost consumers over \$1 billion each year.¹⁵

While the FTC's proposed annual reminder seeks to address this problem, a notice once a year is too infrequent. In that time, a consumer could be hit with 12 unwanted and unnoticed charges, potentially leading to hundreds of dollars in losses. To better combat unwanted charges, the Commission should require sellers to provide notice no more than six days and no later than three days prior to a recurring charge. Such notices would contain the same content as proposed for the annual notice, including an identification of the product or service, the frequency and amount of charges, and the means to cancel. Notably, these notices would be informational only, they would not include a request for consent after the consent requirement of the initial charge.

Sellers should be required to ask how customers would like to receive notice of recurring charges, e.g. whether the consumer would prefer to receive notice via email, postal mail, text message, or other means. This request for preferred method of contact should be separate from any request for consent to receive promotional messages from the seller.

Consumers deserve to know when they are about to be charged automatically, with a chance to opt out. Pre-authorizing a recurring charge should not shift the burden to consumers to review their records to identify and track the charges each month. Under our proposal, the negative option feature of the subscription would remain intact as the automatic charge would still occur even if the consumer does not respond to the notice. This way, consumers and businesses alike can continue to enjoy the convenience of

¹⁵ *The Economic Impact of Grey Charges on Debit and Credit Card Issuers, Report Summary*, AITENOVARICA (July 25, 2013) <https://aite-novarica.com/report/economic-impact-grey-charges-debit-and-credit-card-issuers>.

negative option subscription services while informing consumers about what they are paying for.

VI. Conclusion

The undersigned consumer advocacy organizations appreciate the opportunity to provide input to the Commission in its efforts to mitigate harms from unfair and deceptive practices regarding negative option programs. Consumer commenters strongly support the FTC's endeavor to update and strengthen its Negative Option Rule.

For questions or further information regarding these comments, please contact Eden Iscil at edeni@nclnet.org (202-835-3323 x821) or Shennan Kavanagh at skavanagh@nclc.org (617-542-8010).

Sincerely,

Consumer Action

Consumer Federation of America

Demand Progress Education Fund

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

National Consumers League