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June 23, 2023

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

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Negative Option Rule; 88 FR 24716

To Whom It May Concern,

On behalf of the Performance Driven Marking Institute, we hereby submit the enclosed comments.

Sincerely,

Linda A. Goldstein

Comments to the Notice of Proposed Rulemaking, Federal Trade Commission; Negative Option Rule; 88 FR 24716

I. Introduction

The Performance Driven Marketing Institute ("PDMI") submits these comments regarding the Federal Trade Commission's ("FTC" or "Commission") notice of proposed rulemaking ("NPRM") to amend the Negative Option Rule ("Proposed Rule").

The PDMI is comprised of more than 130 member companies doing business in performance and direct-to-consumer marketing. The PDMI is dedicated to promoting, protecting, and advancing the needs of its members through networking, education, and advocacy programs. Founded in 2018, the PDMI operates a Government Affairs Council — one of six member councils — which has the task of keeping members up to date on regulatory efforts affecting them, as well as serving in an advisory role to PDMI leadership.

The PDMI's membership features not only companies that market their goods or services using the types and styles of marketing covered by the FTC's Proposed Rule changes, but also an array of service providers those marketing companies use to promote and sell their products: creative and media agencies; ad tech providers; publishers and media outlets; e-commerce solutions providers; measurement and research companies; payment processors; logistics companies; and more. Accordingly, to the extent that the Commission is considering potentially expanding the scope of the rules around all forms of negative option marketing, the well-being of PDMI's membership would be significantly impacted. PDMI's members are thus well-situated to address the questions raised by the Commission in this proposed action.

The PDMI has serious concerns with many aspects of the Proposed Rule. As discussed in detail below, in addition to the fact that the Proposed Rule exceeds the Commission's legal authority, many of the provisions of the Proposed Rule are vague, ambiguous, overly prescriptive, and harmful to consumers. Furthermore, while PDMI previously expressed its support, in concept, for a consolidated rule that would apply to all negative option marketing, that support was premised on the assumption that the amended rule would preempt state laws and eliminate the patchwork of inconsistent state requirements. PDMI's recommendation was that the Commission should amend the rule to "simply incorporate ROSCA's three core provisions regarding notice, consent, and cancellation." PDMI never suggested that it would support, nor can it now support, anything close to the Proposed Rule, which does nothing to preempt existing state laws and merely adds a layer of unnecessary, overly prescriptive, and draconian requirements that will be harmful to both the industry and consumers.

Given the numerous factual and legal concerns we have regarding the NPRM, we request that the Commission hold informal hearings regarding the Proposed Rule, and we further request the opportunity to present our position orally at the hearings. This comment describes the issues that we will want to discuss at the hearings, including aspects of the Proposed Rule that contain overly prescriptive requirements, which are likely to stifle innovation, impose undue and unnecessary burdens on small business, and cause actual harm to consumers.

A. Negative Option Plans Are Beneficial to Consumers, and Current Enforcement Tools Are Adequate to Address the Few Bad Actors

Negative option marketing offers numerous consumer benefits. Marketers can often offer goods or services at a lower cost because there is greater certainty regarding demand and lower transaction costs. Similarly, consumers are assured uninterrupted access to goods or services and save time renewing and paying for such services. Indeed, according to the British government's impact assessment for its 2023 Digital Markets, Competition, and Consumer Bill, only 5 percent of subscriptions are unwanted by consumers, meaning that 95 percent of all subscriptions are actively desired.[1] The impact assessment also shows that only a very small portion of these unwanted subscriptions are not canceled because customers find it difficult to terminate them, and an even smaller share can be linked to bad actors purposefully making it difficult for consumers to terminate their contracts.

The widespread benefits and consumer acceptance of negative option marketing is evidenced by the sheer number of firms that engage in such marketing. By the FTC's own estimate, there are currently more than 100,000 entities offering consumers some type of negative option program for goods or services.

Of course, there are bad actors in the marketplace, but there is no evidence that the number and characteristics of these marketers are such that the FTC lacks the tools to combat them. The FTC currently has multiple law enforcement options available to address false or deceptive negative option marketing, in addition to Section 5 of the FTC Act, which prohibits unfair or deceptive marketing in general. The Restore Online Shoppers' Confidence Act ("ROSCA") requires marketers to clearly and conspicuously disclose all material terms of any online recurring charge transaction before obtaining the consumer's billing information; obtain a consumer's express informed consent before charging the consumer's account; and provide simple mechanisms for the consumer to stop recurring charges. Similarly, the Telemarketing Sales Rule ("TSR") requires telemarketers to disclose all material terms and conditions of any negative option feature; prohibits telemarketers from misrepresenting such information, contains specific requirements related to payment authorization, and prohibits the use of certain payment methods such as remotely created checks. Finally, the Prenotification Negative Option Plan Rule ("PNOPR") governs transactions whereby, periodically, a marketer sends to subscribers an announcement identifying merchandise the marketer proposes to send, and the subscribers are billed for such merchandise unless, within a specified time, they instruct the marketer not to send the merchandise. It is this Rule that the Commission proposes renaming and amending in substantial part.

While the Commission is correct that the current PNOPR has limited applicability in today's marketplace, ROSCA and the TSR provide the Commission with jurisdiction over the two most common forms of negative option marketing. Since 2014 the FTC has brought at least 31 cases alleging ROSCA violations. It has similarly brought many negative option marketing cases under both its general Section 5 authority and the TSR. While it may be expedient to consolidate these various enforcement tools in one place, the Commission has not demonstrated an inability to

[1] *See* Dept. for Bus. and Trade, Impact Assessment of Digital Markets, Competition and Consumers Bill: Subscription measures, (Apr. 20, 2023), https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessmentAnnex2.pdf (hereinafter "Impact Assessment").

effectively combat deceptive negative option marketing, and expediency by itself is an insufficient basis for amending a Rule.

B. Overly Prescriptive Amendments Are Inappropriate Given the Diverse Nature of Negative Option Plans

In addition, the proposed amendments are wide-ranging and overly prescriptive. The amendments — including specific proposals regarding the format and methods of cancellation, annual notices to consumers, double opt-ins, and free trial conversions — are, in many cases, far more prescriptive than the statutory requirements set forth in ROSCA or the requirements under the TSR and PNOPR. Not only do such inflexible and prescriptive requirements go against decades of FTC precedent advocating for more flexible standards, but they also ignore the various types of negative option plans in the marketplace with respect to characteristics such as the categories of goods and services, nature of any introductory offer, and length and flexibility of the contract.

The type of the good or service can be critical as to whether a negative option plan is inadvertently renewed. For example, the delivery of physical goods is an important reminder that a negative option plan is active, whereas digital content is typically only accessed upon demand. In addition, some negative option plans involve essential, rather than non-essential, goods. For example, the parents of a newborn baby might sign up for a recurring delivery of infant formula, saving both money and time and ensuring a continuous uninterrupted supply of a good that they know they will need. This is far different than a negative option plan for a good or service that a consumer may think she or he wants but does not need.

The nature of any introductory offer can also impact the likelihood of a consumer entering an unwanted negative option plan. If an introductory offer involves a reduced fee for the introductory period, rather than a free trial period, the reduced fee charge can serve as a reminder to the consumer that the plan will renew at a significantly higher cost.

Finally, the duration of a negative option plan also varies significantly. Some may have terms that last a year or more; others may have durations a month or more in length. Some negative option plans have even shorter durations and may also offer consumers the opportunity to stop and start deliveries pursuant to their plan. The duration of any plan has obvious implications on the degree of harm incurred by a consumer who forgets to cancel before the plan renews. A consumer may also be far more likely to pause a plan whose goods or services they may temporarily not require, rather than stop the plan and go through the process of re-subscribing to a negative option plan that does not have a "pause" feature.

Given the wide diversity in negative option plans, as set forth in detail below, many of the proposed amendments are unnecessary, unworkable, or even harmful to consumers in many instances. For example, signing up for at least some negative option plans may involve a significant amount of time due to other required ancillary purchases or the provision of information required to start up the receipt of goods or services. Requiring that the means of cancellation be at least "as simple" as the means utilized by the consumers to purchase the good or service makes no sense in such context. In other instances, as described below, the proposed amendments may affirmatively harm, rather than benefit, consumers by depriving advertisers the ability to meaningfully offer consumers the ability to receive the same goods or services at a reduced cost rather than cancel.

Considering this reality, PDMI urges the Commission to not adopt such prescriptive proposed amendments. At most, if the Commission feels it would be beneficial to have some sort of overarching rule regarding negative option plans, then the Commission should adopt amendments that incorporate the existing, more flexible, provisions found in ROSCA and the TSR—both of which have proven their worth with respect to deceptive online and telemarketing negative option plans.

The overly prescriptive nature of the proposed amendments also ignores the fact that marketplaces, including current sales channels and advertising media, are constantly evolving, and today's overly prescriptive regulations may not fit tomorrow's marketplace. The PNOPR is itself the perfect example of this problem. The PNOPR contains numerous prescriptive provisions specifically written to address the Negative Option Plans that were in vogue at the time — book and record of the month clubs. Those marketing programs have almost entirely ceased to exist, and, by the Commission's own admission, the prescriptive PNOPR has largely ceased to be relevant. We urge the Commission not to make the same mistake twice and amend the overly prescriptive, and now irrelevant, provisions of the PNOPR with similarly prescriptive provisions, which will themselves likely become outdated.

Finally, we ask that the Commission be mindful of the not insignificant compliance costs associated with the proposed amendments. The Commission has estimated compliance costs of approximately $5.7 million (including about $1 million in recordkeeping costs and $4.7 million in disclosure costs). Other regulatory authorities have estimated much higher costs associated with enhanced protections regarding negative option plans. It is unclear whether the Commission's estimate includes the likely need for significant investments into IT implementation and maintenance, educating staff to familiarize themselves with the new rules, and outside counsel and services for small and medium-sized enterprises and startups that lack the in-house capacities to implement the rules. This, in turn, makes it necessary to better understand and evaluate what measures are efficient, but also proportionate, to stop bad actors while not overburdening legitimate businesses using negative options. While some companies engaging in negative option marketing are large, many companies are quite small. The costs of compliance for these companies are substantial and could represent a significant barrier to entry and resulting marketplace competition that benefits consumers and that is constantly occurring in this space.

C. The Proposed Rule Should Preempt State Laws

One of the Commission's stated purposes for the Proposed Rule is to consolidate all negative option requirements into one uniform rule. PDMI fully supports that goal. However, absent preemption of state laws, the Proposed Rule does little to accomplish that goal and serves only to impose additional burdens on sellers by requiring them to comply with the Proposed Rule as well as the patchwork of state laws that currently exist. There are currently over 27 states that regulate negative option marketing in some form, some of which have even more restrictive requirements than the Proposed Rule. Absent preemption of state laws, the financial and operational burdens to sellers in complying with the highly prescriptive requirements of the Proposed Rule along with the myriad of state requirements may be so great that many companies, particularly the many small and startup companies who offer negative option marketing, may no longer be able to offer these plans thereby lessening competition and increasing prices to consumers.

II. Legal Considerations

A. The Rulemaking Authority That Congress Provided the FTC in Section 18 of the FTC Act Does Not Allow the FTC to Promulgate the Proposed Rule.

In the Federal Register Notice, the agency observes that, "[a]lthough Congress charged the Commission with enforcing ROSCA, it did not direct the FTC to promulgate implementing regulations." That statement is accurate, and the lack of rulemaking authority in ROSCA was quite deliberate on the part of Congress. In most circumstances, when Congress has given the FTC additional consumer protection enforcement authority, it has also expressly given the agency some accompanying rulemaking authority. Congress did just that in the Children's Online Privacy Protection Act, the Telemarketing and Consumer Fraud and Abuse Prevention Act and, quite recently, in the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act.

Congress knows how to legislate and give the FTC, or other agencies, rulemaking authority when it wants the FTC to issue rules in a specific area. The fact that Congress passed ROSCA as written and did not give the agency rulemaking authority speaks volumes about Congress's position on whether the FTC should be engaging in rulemaking regarding subscription services. The absence of a rulemaking provision in ROSCA is significant and cannot be dismissed as an inconvenient fact that can be brushed aside and replaced with this pending rulemaking that is based upon an unrelated and vague provision in a different part of the agency's statute.

When Congress passed ROSCA in 2010, Congress provided its definitive views on the appropriate national law as it relates to billing and cancellation for subscription services. The FTC and the State Attorneys General were given enforcement authority but not rulemaking authority. And with this rulemaking, which would broadly address all facets of virtually all subscription services, the FTC would, in effect, be giving itself the rulemaking authority that Congress deliberately decided not to include in ROSCA.

Much of what the FTC is proposing needs to be closely considered through the lens of the recent Supreme Court decision in *West Virginia v. Environmental Protection Agency.*[2] *West Virginia* held that an administrative agency lacks power to issue rules on "major questions" unless Congress "clearly" gave it such authority. Although the facts here differ, there are several aspects of the current rulemaking that mirror the rulemaking struck down in that decision. Based upon the rationale of *West Virginia* and the magnitude and industry impact of what the FTC is proposing to regulate, it appears that Section 18 of the FTC Act simply does not include a specific enough delegation of authority to allow the FTC to do this. Section 18 merely provides that the FTC can "prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[3]

As currently structured, it is hard to see how the Proposed Rule would not be considered a major question under *West Virginia*, thereby raising fundamental questions as to the lack of specificity reflected in Section 18 of the FTC Act. Subscription services are playing an increasingly

[2] 142 S. Ct. 2587, 597 U. S. ____ (2022).

[3] 15 U.S.C. § 57a.

significant role in the economy, and the Proposed Rule would dramatically alter how companies are able to structure their subscription services — from how people sign up, to the specifics of how they can cancel, and when services can offer consumers a savings alternative in lieu of cancellation. But what makes the proposal even more obviously questionable is the provision of the Proposed Rule that would vastly increase the FTC's authority by allowing it to seek civil penalties any time a company makes any sort of misrepresentation about a product or service that is sold via a subscription service. The language in the Proposed Rule states that:

> In connection with promoting or offering for sale any good or service with a negative option feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") for any negative option seller to misrepresent, expressly or by implication, any material fact related to the transaction, such as the negative option feature, or any material fact related to the underlying good or service.

Congress has never given the FTC such broad civil penalty authority, and it is inconceivable that the FTC can somehow grant itself such authority though the vague and non-specific language in Section 18. This Proposed Rule reflects a dramatic authority grab on behalf of the FTC. The language would extraordinarily expand the circumstances in which the FTC can seek civil penalties and would allow it to do so for any sort of statement that a company made regarding a product that is sold via a subscription service.

Further, in *West Virginia*, the Court focused a great deal on the fact that the EPA had issued rules in an area where Congress had considered and rejected proposals multiple times and that there was still active Congressional consideration on several of the issues at stake. Back in 2010, the FTC had advocated to the Senate Committee on Commerce, Science and Transportation for similarly broad authority from Congress — asking for authority to seek civil penalties for any first-time violation of the FTC Act.[4] Congress did not give the agency such authority in 2010 and has not done so since. Instead, the FTC is attempting to grant itself authority that — although not quite as broad as the 2010 request — is still exceedingly broad and contrary to congressional intent.

Additionally, Congress continues to actively consider legislative proposals, which would address specific aspects of subscription services that the FTC is attempting to regulate. Given the steady stream of congressional activity in this area, it is even more concerning that the FTC is attempting to utilize its broad and ill-defined rulemaking powers to address a specific issue that is currently active in Congress. In June 2021, Senators Brian Schatz, John Thune, Raphael Warnock, and John Kennedy introduced the Unsubscribe Act, which would require companies to be more transparent about their subscription-based business model and make it easier for consumers to cancel their subscriptions.[5] In December 2021, Senator Chris Van Hollen and Congresswoman Yvette Clarke introduced the Consumer Online Payment Transparency and Integrity Act, or Consumer OPT-IN

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[4] *See* FTC Press Release, FTC Testifies About Stepped-Up Efforts to Protect Consumers Affected by the Economic Downturn, available at https://www.ftc.gov/news-events/news/press-releases/2010/02/ftc-testifies-about-stepped-efforts-protect-consumers-affected-economic-downturn (Feb. 4, 2010). ("In addition, the FTC would like the authority to seek civil penalties for violations of the FTC Act.").

[5] *See* Press Release, *Schatz, Thune, Warnock, Kennedy Introduce New Legislation To Stop Deceptive Subscription Business Practices* (June 16, 2021), https://www.schatz.senate.gov/news/press-releases/schatz-thune-warnock-kennedy-introduce-new-legislation-to-stop-deceptive-subscription-business-practices.

Act, which would address various aspects of subscription services, and would notably give the FTC rulemaking authority over negative option contracts, automatic renewals, and dark patterns.[6] In March 2023, Senator Jack Reed and Senator Van Hollen introduced a different version of the Consumer OPT-IN Act.[7]

Accordingly, there are very real questions regarding Congressional authority here, and whether Section 18 of the FTC Act provides the agency with sufficient authority to implement the Proposed Rule that it has put forward.

B. The Proposed Rule Raises Significant First Amendment Concerns

The FTC, through many Administrations, has consistently observed the important constitutional protections for commercial speech and has advocated against its suppression. The First Amendment provides substantial protections for truthful commercial speech, and restrictions placed on commercial speech must be closely scrutinized, and narrowly tailored.

As the Supreme Court held in in *Central Hudson Gas & Elec. v. Public Svc. Comm'n*,:

> A governmental restriction on speech that proposes a commercial transaction must satisfy four criteria to survive First Amendment scrutiny: 1) the speech must concern lawful activity and not be misleading; 2) the asserted governmental interest in restricting it must be substantial; 3) the restriction must directly and materially advance the governmental interest asserted; and 4) the restriction must be no more extensive than necessary to serve that governmental interest.[8]

The NPRM made no mention of the First Amendment and solicited no specific comments on this vital consideration. The Commission must closely consider First Amendment concerns in evaluating the Proposed Rule. Specifically, PDMI members are concerned that the provision that prohibits the making of truthful Save-A-Sale ("Save") offers in the absence of express consent restricts commercial speech and limits the ability of companies to advertise to consumers. As discussed more herein, there is no indication in the record that Save offers are misleading. Accordingly, provisions that restrict such commercial speech likely fail well-established commercial speech protections.

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[6] *See* Press Release, *Van Hollen, Clarke Introduce Bicameral Bill To Protect Consumers From Online Free Trial Scams* (Dec. 1, 2021), https://www.vanhollen.senate.gov/news/press-releases/van-hollen-clarke-introduce-bicameral-bill-to-protect-consumers-from-online-free-trial-scams.

[7] *See* Press Release, *Reed, Colleagues Introduce Consumer OPT-IN Act to Make Cancelling Subscriptions Easier for All* (Mar. 30, 2023), https://www.reed.senate.gov/news/releases/reed-colleagues-introduce-consumer-opt-in-act-to-make-cancelling-subscriptions-easier-for-all.

[8] 447 U.S. 557, 566 (1980).

III. Concerns With Specific Proposed Rule Provisions

A. The Proposed Rule's Consent Provisions Are Impermissibly Vague and Overly Prescriptive.

Section 425.5 of the Proposed Rule would require that the seller obtain the consumer's "express informed Consent" before charging the consumer. PDMI has no objection to the general requirement that sellers obtain a consumer's consent to a transaction containing a negative option feature, as that requirement is consistent with current requirements under ROSCA and other state laws. However, PDMI has serious concerns about the specific provisions of the Proposed Rule, regarding (i) the manner in which such consent must be obtained and (ii) the requirement that consent to the negative option feature be obtained separately from consent to the remainder of the transaction.

Ironically, although the Commission states in the comments to the NPRM that the Proposed Rule "eliminates ambiguity" and "provides flexibility to allow for innovation," the consent requirements of the Proposed Rule do exactly the opposite. The provisions relating to consent contain impermissibly vague standards and are so highly prescriptive and rigid in nature that they will essentially deprive marketers of any flexibility in the design of marketing materials, make it impossible for marketers to adapt to the rapidly evolving changes in media channels and marketing formats, and preclude marketers from employing new technologies that might be more effective in achieving the intended goals. The consent requirements also suffer from the same "one size fits all" approach that plagues the entire Proposed Rule.

Section 425.1 of the Proposed Rule would require that the seller "obtain the consumer's unambiguously affirmative consent to the negative option feature offer *separately from any other portion of the transaction*," and Section 425.3 of the Proposed Rule would require that the seller "obtain the consumer's unambiguously affirmative consent *to the rest of the transaction*" (emphasis added). These two provisions suggest that the Commission intends to require a "double opt-in" for all transactions involving a negative option feature—one for the negative option feature itself and one for the "rest" of the transaction. This proposed "double-opt-in" requirement is extremely problematic for several reasons.

First, anecdotal evidence received from several PDMI members demonstrates that any time an additional choice or check box is offered to a consumer during a single transaction, such extra steps are likely to cause consumer confusion. In most transactions today, consumers are already required to provide consent multiple times—to terms and conditions, to privacy policies, and, of course, to the transaction itself. Requiring an additional consent to what is essentially a single transaction will likely cause additional confusion with no commensurate benefit to the consumer. Requiring an additional check box may actually be an impediment to consumers who legitimately want to purchase the products or services being offered. Without understanding why they are being asked to check another box, consumers may either not check the boxes or abandon the purchase altogether due to confusion.

Second, requiring merchants to implement a double opt-in would impose an extraordinary financial and resource burden on sellers. PDMI believes that the Commission's estimate of only 160,000 merchants currently offering goods or services on a negative option basis is likely low.

However, even if that estimate were accurate, each of those 160,000 merchants would have to completely overhaul their current systems. Available data estimates that the cost of implementing pre-contractual information alone would be between $80 and $127 million, and this estimate does not even include the IT changes necessary to operationalize a double-opt in. Many of the current providers of negative option-based goods and services are small, entrepreneurial, and/or startup companies who will simply not be able to afford the costs of compliance and will either abandon their current business models entirely or exit the business completely. This requirement will most certainly have the effect of reducing competition, increasing prices to consumers, and depriving consumers of the many benefits of negative option offerings without providing any demonstrated commensurate benefit to consumers.

The Commission has stated in the NPRM that it believes the double opt-in requirement is necessary because consumers may not pay attention to the terms of the negative option feature separate from the rest of the transaction. However, it has offered no evidence to support that conclusion. None of the cases cited supports this conclusion, as those cases generally involved situations in which the disclosures of the negative option terms were non-existent or wholly inadequate. The law is clear that, in exercising its rulemaking authority, the Commission should tailor its requirements to what is necessary to achieve the intended goal. Existing laws already require that the terms and conditions of the negative option feature be clearly and conspicuously disclosed, and PDMI would not object to codifying that requirement in the Proposed Rule. Further, as discussed below, while PDMI believes certain disclosure provisions associated with obtaining express informed consent and the way such consent must be obtained are too rigid and draconian, it does not oppose requiring the consent disclosures to appear in close proximity to where the consent is obtained. PDMI believes these requirements would be more than sufficient to ensure that consumers fully understand the terms to which they are agreeing without imposing undue burdens on the industry that are also likely to result in a poor customer experience, if not actual confusion.

In addition to PDMI's overall concerns with *any* double opt-in requirements, such a requirement makes absolutely no sense, where, as is often the case, there is no transaction separate from the negative option transaction. The Proposed Rule appears to be based on the highly flawed assumption that there is some separation between the negative option feature of the transaction and the rest of the transaction. However, in many, if not most, instances, that is unlikely to be the case. Indeed, if the Commission were simply to consider the most basic services that the average consumer purchases—electricity, mobile telephone, television streaming, and internet—each is offered as a negative option, with recurring billing on a fixed interval. How would the providers of these services comply with the Proposed Rule's double opt-in requirement? As these services are sold only with a negative option feature, would the Proposed Rule require the sellers to obtain the consumer's consent *twice* to the exact same transaction?[9] If so, not only does the requirement make no sense, but it improperly imposes an additional burden on sellers that has no demonstrable benefit.

Further, such a requirement is highly likely to cause consumer confusion. Since there is no logic to requiring consumers to consent twice to the same transaction, consumers are likely to be misled

[9] A representative of the PDMI reached out to FTC staff a few years ago when a similar provision was included in the FTC Guide to Negative Option Marketing and was told that this provision was not intended to apply where the entire transaction was on a negative option basis.

into believing that they are being asked to pay twice for the same products or services or to make two purchases of the same products or services. As such, they may decline to consent the second time, which will result in the loss of a purchase they may have wanted. Candidly, PDMI does not see how marketers could reasonably comply with such a provision. Certainly, given the lack of any evidence in the record showing the need for such a requirement, and the bizarre nature of the requirement itself, the Commission should not even consider imposing such a requirement unless it has determined that such a requirement would not cause consumer confusion and would provide a meaningful benefit. The Commission has done neither. Accordingly, while PDMI does not believe that a double opt-in should be required under any circumstances, if the Commission declines to eliminate this provision, it should, at a minimum, make clear that such provisions do not apply where the offer to purchase goods or services is provided on a negative option basis only.

PDMI also has concerns with Section 425.5(c) of the Proposed Rule, which purports to provide a safe harbor to companies for complying with the express informed consent requirement if: (1) the seller obtains the consent "through a check box, signature or other substantially similar method which the consumer must affirmatively select or sign to accept the negative option feature and no other portion of the transaction"; and (2) "the consent request [is] free of any information not directly related to the consumer's acceptance of the negative option feature."

First, the fact that the consent mechanisms are limited to a check box, signature, or substantially similar method, which the consumer must select or sign, again runs contrary to the FTC's stated goal of avoiding overly prescriptive requirements that would stifle innovation. Given the rapidly changing nature of technology and forms of digital, biometric, or other consent, it is impossible to predict today what methods or technologies may be available to obtain consumer consent in the future. Indeed, it is likely that in the not-too-distant future, check boxes and signatures will be obsolete and replaced by far more effective and consumer friendly mechanisms. To limit the safe harbor to a check box, signature, or a method that is substantially similar to a check box or signature would deprive sellers of the opportunity to take advantage of new technologies as they develop. While we recognize that this portion of the Proposed Rule is a safe harbor, and sellers could theoretically adopt other measures, using an alternative method that has not been specifically sanctioned by the Proposed Rule would be a risky proposition for any marketer, as the Commission is well aware. If the Commission is truly committed to embracing innovation in the future and affording sellers flexibility, then PDMI would recommend deleting the words "substantially similar" from this provision and instead adopting the following language: "a check box, signature, or other method which the consumer must affirmatively use to accept the negative option feature."

PDMI also has concerns with the requirements prohibiting the consent request from containing any information not directly related to the consumer's acceptance of the negative option feature and prohibiting use of the consent mechanism to obtain consent for any other portion of the transaction. While we assume that the Commission has included these provisions to ensure that disclosures relating to the negative option feature are not buried within other disclosures, these requirements are far more restrictive than necessary to achieve the intended goal and are likely to have unintended consequences that will result in consumer harm rather than benefit.

As noted above, many of today's consumer transactions require the consumer to provide consent to multiple provisions including terms of use and privacy policy. In addition, even the negative option transaction itself may have several other conditions to which the consumer must agree as part of the sale, which are just as important as the recurring billing arrangement. For example, certain transactions may be non-refundable, or may be subject to an ETF for early cancellation, or to other fees and charges. Requiring the consumer to consent multiple times to multiple conditions would be overly burdensome on sellers who would be required to implement multiple consent mechanisms and would likely result in additional confusion for consumers. If the terms of the negative option feature are clearly disclosed to consumers in close proximity to the consent mechanism, there is no reason why a seller should be precluded from including other material terms of the transaction and obtaining a single consent. Indeed, rather than enhancing consumer understanding of the transaction, such a requirement may have the unintended consequence of forcing sellers to place other equally material information in less conspicuous locations or to be accessible only via a hyperlink. To be clear, PDMI fully supports requiring clear and conspicuous disclosure of the material terms in close proximity to the consent mechanism, but believes it is shortsighted for the Commission to assume that the negative option features are the only or most important terms of a transaction.

B. The Proposed Rule's Cancellation Provisions Are Impermissibly Vague and Overly Prescriptive

Section 425.6 of the Proposed Rule requires that there be "a simple mechanism for the consumer to cancel the negative option feature." While this provision is consistent with ROSCA and is more than sufficient to ensure that consumers can easily cancel a negative option feature, the Proposed Rule goes beyond ROSCA and requires that the "simple mechanism" be "at least as easy to use as the method the consumer used to initiate the negative option feature" and through the same medium that the consumer used to consent to the negative option feature.

These requirements are highly problematic for several reasons.

First, there is no evidence in the record supporting the need for more prescriptive requirements than what is already required under ROSCA. To the contrary, an impact assessment study conducted in the United Kingdom showed that only 8 percent of consumers stated they were delayed in canceling their subscriptions because they did not know how to cancel, and only 12 percent of consumers said that they were unsuccessful in canceling their subscriptions.[10] The Commission's overly prescriptive proposals thus appear to be aimed at a problem that does not really exist.

Second, these provisions are fraught with ambiguity on multiple levels. Whether one method is "as easy" to use as another is inherently subjective. The Proposed Rule offers no guidance or specificity as to how "ease" of use will be measured, and what is easy for one consumer may not be as easy for another. This vague standard is exacerbated by the even more ambiguous requirement that the mechanism must be as easy as the method the consumer used to "initiate" the negative option. There are a variety of ways in which consumers enroll in a negative option program, and every consumer transaction is unique. Accordingly, it is virtually impossible to pinpoint exactly when enrollment in a negative option plan is initiated by the consumer or the

[10] *See* Impact Assessment, *supra* note 1, at 35.

corresponding method used to initiate that enrollment, as those will ultimately depend on the consumer's individual behavior and the manner in which the offer is presented.

For example, it is common for consumers to visit a cell phone carrier store to purchase a cell phone and, during the same visit, enroll in a subscription-based program for cell phone service. Alternatively, it is also common for consumers to visit a cell phone manufacturer store to purchase a cell phone and, during the same visit, enroll in a subscription-based program for cell phone service with a specific carrier. In fact, in both situations the customer service representative helping the customer assists not only with the cell phone purchase but with the enrollment in the subscription plan. In both scenarios, it takes a significant amount of time between when the consumer enters the store to purchase a phone and leaves with an operable cell phone. In this situation, PDMI must ask: What does it mean to offer a method of cancellation at least as simple as the method used to initiate the negative option feature? From the consumer's perspective the goal was to walk out of the store — either store — with an operable cell phone. In this scenario, the consumer cannot easily slice and dice the experience into easily digestible pieces such that enrolling for subscription-based cell phone service is viewed as simple, especially when the entire process entails far more effort than one click of a button.

Similarly, there are many stores selling physical goods and offering annual fee-based memberships that automatically renew unless the consumer cancels. For example, a seller of indoor and outdoor furniture and other home décor items, offers a membership for an annual fee of $175. In exchange for the $175 annual membership fee, a consumer receives a 25 percent discount on full-priced items and an additional 20 percent discount on sale items. Limited exclusions apply, and the consumer, if viewing this offer on the store website, must click through to read the terms and conditions to learn more about these limited exclusions. Assuming money is an object to the average consumer, it would be reasonable to conclude that these consumers calculate how much their purchases will cost and whether the 20 or 25 percent discounts are enough to make paying the $175 annual fee worthwhile. They likely will also want to ascertain what is being excluded from the discount, which will require them to click through and learn about the exclusions (this is only assuming that consumers are enrolling via the store website).

The process of determining whether to become a member is hardly a "no brainer," and the consumer is not likely to view the process of deciding to enroll as "simple," since it requires a mathematical analysis as well as a review of the terms and conditions. Perhaps the actual clicking on the enrollment button on the website is simple, but the analysis is not, and many consumers will be undertaking this analysis after they've gone to a store location to look at the furniture in person, and, in that case, the customer service representative will be handling the enrollment process in person in the store. Does this mean a member who enrolled in a store should go to a store to cancel? Is that the simple mechanism, to have the customer service representative handle it?

Even in sales channels with more standardized buy flows, it is impossible to ascertain at what point the consumer has actually initiated enrollment in the negative option plan. Suppose, for example, a consumer is offered a recurring subscription to a box of cosmetics that the consumer can customize. The consumer initiates the enrollment by indicating that he or she wants to purchase the subscription box. The consumer must then go through the process of selecting the frequency and contents of the box and may also be requested to answer a variety of questions to assist in the customization process. Even after those selections are made, the consumer will be required to input shipping, delivery, and payment information—all of which will take additional time. At what point in that scenario should the consumer be deemed to have "initiated" the enrollment? When they began customizing the box? When they began entering their information? Certainly, the click of the button to "consummate" the transaction cannot be deemed to be the "initiation" of the transaction. And even if one could determine when enrollment was "initiated," how does one measure whether the cancellation method is "as easy" as the enrollment method? Should ease be measured by the amount of time, the number of clicks, or some other metric? The lack of guidance and specificity in this area will be a nightmare for sellers who will not only be required to make these decisions without any guidance, but will be doing so at their peril, given the consequences of non-compliance.

The ambiguity in the Proposed Rule is exacerbated by the reference to "Click to Cancel" that appears next to the paragraph heading "Simple Cancellation" in Section 425.6. Notably, there is no further discussion in the Proposed Rule as to how that would be interpreted or applied.

PDMI has no issue if the "Click to Cancel" reference is intended to convey that such a method could be but one way to effectuate cancellation; however, it certainly cannot be the only method because enrollment in most negative option plans is not as simple as clicking a button. It instead requires the consumer to navigate through several web pages or screens, to review product information, terms and conditions, and privacy policies, to make product or service selections, to select the terms of the negative option plan, and then, finally, to input personal, billing, and, in some cases, shipping information. This is not a simple process, and it requires much more time and effort than the click of a button. If the goal of the Commission is to create parity between the enrollment and cancellation processes, all of these steps must be taken into account.

A "Click to Cancel" cancellation method for websites and mobile applications is further problematic because it does not allow companies to authenticate consumers and is likely to lead to a high number of accidental cancellations for multiple reasons. First, one-click cancellation causes accidental cancellations because consumers do not expect to lose their purchasing history, loyalty offers, and discounts in one step. For example, a consumer may merely seek to change the frequency of subscription product shipments or see if it is possible to get a better deal by threatening to cancel so as to trigger a Save attempt by the company. If an accidental cancellation relates to essential items such as medication or food — especially for the elderly who may not be as digitally adept as the younger generations — consumers will be forced to re-enroll when they become aware of the accidental cancellation, which may only be after the essential shipment does not arrive as expected.

Mobile applications are even more likely to generate accidental cancellations. Unlike websites, which are designed to help customers administer their accounts and make important decisions about their subscriptions, mobile applications are far less comprehensive due to the limited interface. Figuring out how to pause or modify, rather than cancel, a subscription on a mobile app may be challenging for consumers confronted with a prominent, misleadingly simple one-click cancellation mechanism. In today's world, most consumers who can run a mobile app on their phone have the technical means to visit a website. According to data provided by one of PDMI's members, 93 percent of its customers are using their website and mobile app or only their website; a very small percentage of customers use only an app. Given the higher likelihood of accidental cancellations on mobile apps, sellers should be permitted to direct app users to the seller's website to cancel or make other changes to a consumer's negative option plan. Such an approach is not only easier for sellers to implement, but beneficial for consumers as well.

A "Click to Cancel" cancellation method would also preclude businesses from obtaining any information as to why a consumer is canceling. Companies have legitimate business reasons for wanting to determine why their customers have cancelled. It is considered good business practice to ask customers why they are cancelling, so that companies can improve problematic aspects of their business and retain customers. Customers are far less motivated to respond to survey questions post-cancellation. That is why most human resource departments conduct exit interviews when employees give notice rather than after they have departed.

Unfortunately, in this case, the Commission's effort to provide more specificity to the general requirement that there be a "simple" cancellation method will have precisely the opposite effect. It will inject concepts that are inherently vague, subjective, and impossible to measure. In this case, "simple" really is better. The Commission should stick with the "simple" method of cancellation requirement that exists in ROSCA and afford sellers the flexibility to implement that requirement in ways that best serve their business and consumers.

C. The Proposed Rule's Provisions Requiring Consent to Save Offers Are Unnecessary, Improper, and Harmful to Consumers

PDMI also has grave concerns with Section 425.6(d), which would effectively prohibit sellers from attempting to "Save" a sale by presenting additional offers or modifications when a consumer attempts to cancel unless the seller first obtains the consumer's "unambiguously affirmative consent" to receive a Save prior to cancellation.

This provision imposes an unprecedented and draconian restriction on sellers that has no basis in the record and is not beneficial to consumers. While PDMI understands and supports the Commission's desire to ensure that consumers can easily cancel a negative option, there are less restrictive ways to achieve this goal that would provide consumers the ability to avoid such offers yet not unduly impede the seller's ability to make them. Contrary to the Commission's conclusions in the NPRM, requiring sellers to obtain a consumer's "unambiguously affirmative consent" to receive a Save offer and maintain documentation of that consent for three years imposes a significant burden on sellers.

As an initial matter, there is no evidence in the record demonstrating that a Save is misleading or deceptive, or that such offers in any way interfere with a consumer's ability to cancel a negative option feature. To the contrary, Save offers, by their nature, are a considerable benefit to the consumer because they allow a consumer to continue receiving products and services the consumer actually wants at a lower price or on more favorable payment terms that better suit the consumer's budget. Industry evidence demonstrates that a significant percentage of consumers who attempt to cancel a transaction do so, not because they do not want the product or service, but because of financial considerations. By restricting a seller's ability to make such Save offers, the Proposed Rule is thus likely to cause more consumer harm than good because it may actually prevent a significant percentage of consumers from enjoying the financial benefits such offers typically provide.

While the Commission may believe that simply requiring the seller to ask permission before presenting the Save offer will not make a material difference, the Commission fails to appreciate the dynamics of a Save offer. First, requiring the seller to first ask permission before presenting a Save offer will disrupt the natural flow of interaction between the seller and the consumer. In addition, the fact that the seller will need to retain documentation of the consent means that the consent will need to be provided in a way that can be retained, which may inject yet an additional step in the process. In the case of telephone sales, for example, where Save offers are most common, the seller will need to record the conversation or any other affirmative act taken by the consumer. This means that, in addition to asking for permission to present the offer, the seller will also need to ask for permission to record the request and consent. The likelihood is that many consumers will be annoyed by this disruption and simply say no to the seller.

The Commission's proposal is further flawed as it requires the consumer to make a choice without the benefit of information that may be material to that choice. In particular, the Proposed Rule would prevent sellers from providing important information to consumers regarding the consequences of canceling their negative option plan. In many cases, cancellation of a negative option plan may have consequences that the consumer may not have thought of, such as access to information, data, or other benefits. Sellers should have the ability to inform consumers of the consequences of cancelling their subscriptions or other negative option plans before the consumer makes the decision to cancel. Providing such information is not intended to scare or dissuade consumers from canceling; rather it is essential to ensuring that consumers make informed choices about whether they wish to cancel and ensure they fully understand the consequences of that decision. There can be no consumer harm to giving sellers the unrestricted ability to provide that information to their customers.

The Proposed Rule would also require the consumer to decide whether he or she wishes to hear about an offer without knowing what the offer entails. Given the Commission's well-established view that consumers should not be asked to make decisions without the benefit of full information, it is ironic that the Commission now asks consumers to decide if they want to hear an offer without any information as to what the offer is about. When asked by a seller if they can present another offer, most consumers will likely say no simply because they believe the seller is attempting to sell them something else, perhaps something they don't want. However, consumers would likely react very differently if they knew that the seller intended to present an offer that would save the consumer money or would make it easier to pay for the consumer's purchase. In its report on Dark Patterns, the Commission identified as a dark pattern the suggestion to consumers that, if they chose not to take advantage of an offer, it meant they did not like saving money.[11] The Commission is thus well aware of the fact that if given the choice, most consumers will choose to save money. The Proposed Rule will likely preclude many consumers from being able to make that informed choice because that offer will never be presented to them. This proposal thus has the potential to cause significant consumer harm without any countervailing benefit. This proposal will also cause significant harm to legitimate sellers who will be stymied in their efforts to accommodate a consumer's financial needs, thereby resulting in unnecessary business losses. Further, the requirement that the seller retain the records of consent will impose significant

[11] FTC, Staff Report, Bringing Dark Patterns to Light (Sept. 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.

additional costs on businesses that will be forced to implement significant changes to cancellation mechanisms and record retention policies that will likely require significant investments in IT and other operational mechanisms.

PDMI's concerns with requiring consent to receive a "Save" are exacerbated by the fact that the Commission's proposed definition of a "Save" would apply not only to alternative offers, but to the ability of consumers to pause, modify, or change existing orders as well. Specifically, under the Proposed Rule, the definition of Save includes "additional offers or modifications." Many sellers offer their subscribers the ability to pause, skip, or modify their existing offers. This is a consumer-friendly feature of many negative option plans that affords the consumer the flexibility to continually adapt their negative option plan to meet their changing needs. Sellers who offer these features to their customers should be able to immediately discuss these options with their customers without having to ask for permission, particularly because it is often impossible to distinguish customers who truly want to cancel from those who simply want to modify the terms of their current plan.

Like many of the Commission's other proposals, this provision of the Proposed Rule imposes far greater restrictions than necessary to achieve the intended purpose. If the purpose of this proposal is to prevent sellers from using Saves to make it difficult for consumers to cancel, there are several less restrictive ways that the Commission can accomplish this purpose.

First, the Commission could simply require, as it has in prior Consent Orders,[12] that if a consumer affirmatively indicates he or she does not want to hear the Save offer, the seller must immediately discontinue the offer and process the cancellation. This would allow consumers to make informed decisions about whether to accept the Save offer while giving the consumer the complete power to cut off the seller's Save efforts.

Second, if the Commission were to retain a consent requirement, it should be limited to new offers for other products or services that are unrelated to the transaction the consumer is attempting to cancel. The Commission should expressly clarify that the consent requirement does not apply to information about the consequences of canceling an order and does not apply to offers to modify, pause, skip, or otherwise alter the terms of the existing negative option plan. Restricting the provision of such information not only raises serious First Amendment issues but also has the potential to cause significant consumer harm.

D. The Proposed Rule Must Include Exemptions for Negative Option Plans Sold Through Third-Party Platforms

As the Commission is well aware, many of today's negative option plans are sold through third-party platforms. These third-party platforms are the entities that charge consumers for their purchases on the platform either through an account that the consumer has with the platform, or a credit card provided by the consumer. Unfortunately, because the seller is not the entity that is actually charging the consumer, the seller typically has little to no control over how the offer is presented to the consumer or how the transaction is initiated and consummated. In most cases,

[12] *See, e.g. FTC v. One Technologies, LP*, Case No. 3:14-CV-05066-JSC (N.D. Cal. 2014) (stipulated order), *available at* https://www.ftc.gov/system/files/documents/cases/141121onetechstip.pdf.

cancellation is also effectuated through the third-party platform. Accordingly, it is imperative that the Proposed Rule exempt sellers from compliance with those provisions that are not under their direct control. At a minimum, this would include exemptions in Sections 425.4 through 425.7. The Proposed Rule should also exempt the seller from any misrepresentations made by a third-party platform and from the annual notice requirement in the event that the seller does not have the information that would be required to send such notices.

E. The Proposed Rule's Provision Covering All Misrepresentations Is Overbroad, Unsupported, and Unlawful.

Congress passed ROSCA to address the issue of billing disclosures that are made in the context of negative option product offerings. There is no suggestion in the legislative history that through ROSCA, Congress intended to give the FTC broad civil penalty authority regarding any misrepresentations beyond the negative option aspect of the transaction. And, certainly, something that significant would have been called out in the legislative history.

For many years, the FTC's ROSCA enforcement was consistent with the congressional intent, and it exclusively challenged companies that did not adequately provide the required ROSCA information about the pricing of their negative option offerings. After the Supreme Court decision in *AMG*,[13] however, the FTC, not surprisingly, took stock of all its legislative authority to seek every pathway to potential monetary recovery. In 2020, the FTC — for the first time — brought a different kind of ROSCA case that relied upon a somewhat ambiguous provision in the statute.

The provision in ROSCA at issue states that "[i]t shall be unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature . . . unless the person . . . provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information."

After *AMG*, the Commission began to interpret ROSCA more broadly, in a way that exceeded Congress' intent, but perhaps reflects a colorable approach based upon the overly broad drafting of the ROSCA text set forth above. In the *MoviePass* case in 2021, the Commission did not challenge the underlying subscription disclosures but instead alleged — for the first time — that the company had violated ROSCA by failing to disclose limitations on the underlying nature of the MoviePass service before obtaining consumer billing information.[14]

In the NPRM, however, the FTC proposes a rule that goes all in on the *MoviePass* logic and then goes even further, proposing that it can seek civil penalties against any company that, in connection with the marketing of a product that is sold via a subscription, misrepresents any material fact

[13] *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

[14] FTC Press Release, *Operators of MoviePass Subscription Service Agree to Settle FTC Allegations that They Limited Usage, Failed to Secure User Data* (June 7, 2021), *available at* https://www.ftc.gov/news-events/news/press-releases/2021/06/operators-moviepass-subscription-service-agree-settle-ftc-allegations-they-limited-usage-failed. *See also* Dissenting Statement of Commissioner Noah Joshua Phillips (June 7, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1590712/moviepass_statement_phillips_final.pdf .

related to the underlying good or service. This language is not supported by the evidence and lacks the specificity required for a Mag-Moss rule.

The NPRM is noticeably vague on its justification for this provision.[15] In a Mag-Moss rulemaking, however, the agency needs to show that all aspects of the rule it is proposing will address *specific* deceptive or unfair practices that are prevalent in the market. Citing a few cases where a subscription product has been marketed in a deceptive manner in a wide range of areas and industries is vastly different from what the agency needs to show.[16] Further, there is a complete lack of specificity with respect to the "misrepresentation" provision that renders it overly vague and unlawful.

Not surprisingly, the FTC has taken a vastly different approach in virtually every other Mag-Moss rule that the agency has promulgated, specifically because the FTC cannot just issue a broad rule that prohibits misrepresentations about anything. The Business Opportunity Rule does not prohibit any misrepresentation in connection with business opportunities. It prohibits specific misrepresentations about earnings claims. The Funeral Rule does not prohibit any misrepresentation made in that industry but rather, focuses on the narrow category of areas where there was a record of misrepresentations. The Retail Food Store Advertising and Marketing Practices Rule does not cover any misrepresentation in that area. And the Used Car Rule does not cover any deceptive statement made in connection with the sale of used cars. The breadth and scope of this proposed provision is, thus, both unprecedented and unlawful.[17]

Additionally, even if the language were somehow appropriate in a rule, the FTC lacks the factual support to justify such broad all-encompassing language. In effect, the FTC approach here is that Mag-Moss allows the agency to promulgate rules regarding deceptive practices, and, therefore, it

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[15] The NPRM provides: "Section 425.3 of the proposed Rule prohibits any person from misrepresenting, expressly or by implication, any material fact regarding the entire agreement—not just facts related to a negative option feature. FTC enforcement experience demonstrates misrepresentations in negative option marketing cases continue to be prevalent and 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. Such deceptive practices may involve misrepresentations related to costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation, or any other material representation (footnote omitted)."

This provision falls within the Commission's Section 5 authority and its separate authority under ROSCA. The proposed provision provides the FTC with the ability to seek civil penalties and consumer redress for material misrepresentations in media other than telemarketing or the internet. The record demonstrates this type of provision is necessary. Specifically, despite the Commission's current authority to obtain redress and injunctions under ROSCA and injunctive relief under Section 5 of the FTC Act, the Commission's many enforcement actions over the past several years have failed to stem the tide of deceptive negative option practices online and in person. Ensuring great relief against those who deceive consumers will benefit both consumers and honest sellers who must compete with those who engage in deception.

[16] This point is made quite clear in the Dissenting Statement of Commissioner Christine S. Wilson, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_commissioner_wilson_dissent_negative_option_rule_finalrevd_0.pdf.

[17] Promulgating such language would be akin to the FTC decreeing that there is deception in telemarketing and now it can seek penalties for any deceptive statements that are made through telemarketing. That is not the type of rule that the FTC can promulgate through Mag Moss – it requires Congressional action. And of course, Congress did give FTC specific telemarketing authority many years ago and the agency has engaged in telemarketing rulemaking pursuant to that authority and not under Mag Moss. That is proper and appropriate rulemaking.

can promulgate a rule that it is unlawful to engage in deceptive practices in connection with subscription services. By that logic, the FTC could promulgate a rule that it is also unlawful to engage in deceptive practices in the hospitality industry or in the gaming industry or in the auto manufacturing industry. This is simply not how rulemaking works, and such a provision completely lacks the specificity that is required for such a rule to be valid and enforceable. Only Congress can give the FTC such authority; but Congress has not done so either directly or through Mag-Moss, and, certainly, the FTC cannot grant itself this authority independently.

IV. Conclusion

PDMI appreciates the opportunity to provide the Commission with these comments regarding the proposed changes to the Negative Option Rule. While PDMI fully supports a consolidated rule that would require proper disclosure of material terms, affirmative consent to the negative option feature, and an easy method of cancellation, the Proposed Rule is far more prescriptive than is necessary to achieve the intended goals. These highly prescriptive requirements are likely to stifle innovation, impose undue and unnecessary burdens on small business, and yield unintended consequences that may actually be harmful to consumers. The Commission's consumer protection goals can be just as easily achieved by taking the core principles set forth in ROSCA and incorporating them into a unified rule that would also preempt state laws. At a minimum, PDMI would urge the Commission to refrain from imposing many of the prescriptive requirements currently proposed without first holding additional hearings that would allow industry stakeholders an opportunity to more fully explain the negative impact such proposals may have on their businesses and on consumers. Accordingly, we request that the Commission hold informal hearings regarding the NPRM, and we further request the opportunity to present our position orally at the hearings.

Respectfully submitted,

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