Good morning, your honor.

My name is Thomas Haire. I'm co-founder and chief content officer of the Performance-Driven Marketing Institute, a non-profit trade association representing more than 120 member companies doing business in performance and direct-to-consumer marketing. I'd like to thank the commission for giving the PDMI the opportunity to testify today, as well as my fellow speakers and Judge Foelak for making today's hearing a valuable forum.

The PDMI is dedicated to promoting, protecting, and advancing the needs of its members through networking, education, and advocacy programs. Our membership includes brands across a variety of products and services for whom subscription marketing is an integral part of their business. The association also counts media companies — including Paramount, NBCUniversal, and Warner Bros. Discovery — ad tech companies, creative agencies, and more as members. The PDMI's members are not engaged in the types of practices identified as problematic in the Notice of Proposed Rulemaking, yet all of them would suffer from the chilling effect these proposed regulations would have.

In our prior written comments to the Commission, the PDMI has detailed member concerns about the harmful impact of specific provisions. Subscription programs effectively and efficiently allow brands to develop a deeper relationship with their consumers and make it possible for them to innovate and provide products and services of interest to those consumers. These programs also reduce administrative costs, resulting in lower costs for consumers. They help businesses build customer loyalty, reducing acquisition costs, and — again — resulting in lower costs for consumers.

The fact is that many of the practices the FTC deems harmful to consumers are beneficial. Subscription programs allow consumers to gain access to goods or services at a lower price. And free-trial subscriptions allow consumers the opportunity to try out a product before there's any obligation to purchase. There also is a clear convenience for consumers to not have to renew subscriptions for products and services they need and value without the stress of unintended interruptions of service: think of mobile phone plans, home internet service, streaming TV and audio services, and other day-to-day needs in 2024.

Beyond the many troubling provisions of the NPRM, the PDMI shares other speakers' alarm with the FTC's procedural approach to this rulemaking, including:

- The Advanced Notice of Proposed Rulemaking was wholly deficient from a Mag Moss perspective because it did not contain — or even suggest the FTC was considering — many proposals found in the NPRM. Instead, the FTC said in the ANPR that

it was focused on harmonizing regulations that address subscription services. What was NOT included in the ANPR that IS included in the NPR? New rules for double opt-in, click-to-cancel, a ban on save-a-sale offers, and expansion of the rule to cover all misrepresentations. All are unprecedented and potentially harmful, and there has been no public discussion of them nor consideration by the FTC of any regulatory alternatives.

- For the commission to contend that there are no disputed issues of fact in this rulemaking is disingenuous at best. The comments in the record have identified — with specificity — many disputed issues of fact, none of which have been addressed by the commission. The FTC also has failed to meet its burden of showing prevalence of the alleged unfair and deceptive practices it says require action — and that its proposed rule is narrowly tailored to address them. Rather than delving into these issues and developing a more fulsome and accurate record, the FTC simply contends its existing "evidence" in the record is sufficient to meet its significant burdens in a Mag Moss rulemaking. This is, simply, not true. For instance:

    - For the double opt-in proposal, the cases cited involve a failure to make any disclosures at all. There is no evidence from these egregious cases of wrongdoing that a clear and conspicuous disclosure of terms paired with a requirement of clear and affirmative consumer consent — used by nearly all marketers — is not sufficient.

    - For the save-a-sale proposals, the FTC provides no evidence of any deceptive save-a-sale practices or evidence that it interferes with a consumers' ability to cancel. This is particularly harmful to consumers since most save-a-sale efforts result in savings for them.

    - For the click-to-cancel proposals, the FTC has provided no evidence supporting the need for a more prescriptive requirement than ROSCA's "simple method of cancellation." There is ample evidence, though, that a click-to-cancel requirement may cause inadvertent cancellation — yet another disputed issue of fact the FTC has failed to address.

    - Finally, in its effort to expand the rule to cover any misrepresentations in marketing — even if unrelated to the negative option feature — we refer to former Commissioner Christine Wilson's dissent during this process, calling the effort an end-run around ROSCA and an attempt to circumvent the U.S. Supreme Court's decision in the AMG Capital case.

- The final area of the FTC's procedural misdeeds is its failure to perform a true cost/benefit analysis. Businesses would have to overhaul their entire consumer experience

to comply with these proposed rules, increasing costs, which would be passed along to consumers. For small businesses, this could mean possibly ceasing operations, thereby decreasing competition and — yes — resulting in higher consumer costs. Final confirmation of these rules as drafted would mean many marketers would abandon these business models, resulting in less convenience and higher costs for consumers.

While the PDMI takes issue with many of the provisions in the NPRM, our members are most broadly concerned about three.

- The "save a sale" provisions are troubling. Requiring a seller to obtain a consumer's "unambiguously affirmative consent" to receive such an offer would cause more consumer harm than good by depriving consumers of information necessary to make an informed choice on whether to hear such an offer. As a result, many consumers would be precluded from receiving offers that would result in additional savings. Certainly, there are more narrowly tailored requirements that could ensure a consumer's simple ability to cancel without disrupting this common practice that is beneficial for both businesses and consumers.

- Second, the requirement that the cancellation method be "as simple" as the method the consumer used to initiate the negative option goes beyond what is necessary to address any deception or unfairness and is improperly vague. The question must be asked: As simple as what? Whether one method is "as simple" to use as another is inherently subjective, and the NPRM offers no guidance about how this might be judged.

- Finally, our members are concerned by the proposal to expand the scope of the negative option rule to cover any false or misleading statements in an ad, even if unrelated to the negative option feature. The proposal would put every advertisement containing a negative option feature at risk of becoming subject to a rule violation and significant civil penalties.

On behalf of its member companies, the PDMI asks Judge Foelak to require the FTC to adhere to the requirements of Mag Moss in this rulemaking process. The current NPRM should be viewed as an ANPR, and there should be both additional periods of time for consumers and businesses to comment, as well as additional public hearings.

Congress put Mag Moss in place specifically to prevent the FTC from doing what it's trying to do here: move forward quickly without adequately demonstrating a sufficient record to support these overly prescriptive and counterproductive proposals.

Again, on behalf of the PDMI's members, thank you again for the opportunity to speak today.