

Congress of the United States
Washington, DC 20515

November 21, 2019

The Honorable Joseph J. Simons
Chairman
U.S. Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: *Negative Option Rule (16 CFR part 425) (Project No. P064202)*

Dear Chairman Simons:

I am writing on the need to amend the Commission's "Rule Concerning the Use of Prenotification Negative Option Plans," or "Negative Option Rule."

As you know, negative option transactions are regulated chiefly in two ways: FTC's Negative Option Rule, which was first promulgated in 1973; and the Restore Online Shoppers' Confidence Act of 2010 (ROSCA), a law that established requirements for online merchants regarding disclosure, consent, and cancellation mechanisms. In 2014, the FTC decided not to update its existing Negative Option Rule and opted to "wait and see" if the ROSCA law coupled with other standing rules prove to be satisfactory enough to protect consumers.¹ While ROSCA was a sincere first step to police negative option deals sold online, it remains inadequate to curb abuse by various types of deals currently flourishing on the internet, like free trial offers that auto-enroll consumers into costly recurring payment plans, for example.²

I am encouraged that the Commission is now moving to consider necessary changes to the Negative Option Rule. It is government's role to ensure that consumer protections keep pace with today's online marketplace, and this latest proposed rulemaking is one effort toward that end.

Deceptive online marketing and unclear recurring payment plans are leaving too many consumers on the hook for products they may not want or even know they purchased. Deals like these have duped consumers out of more than \$1.3 billion during the last decade. Additionally, between 2015 and 2017, related complaints to the Federal Trade Commission (FTC) have more than doubled.³

Companies that advertise free or discounted products while simultaneously locking consumers into costly contracts rely on a sales tactic known as "negative option billing." This sort of transaction is confusing because it effectively reverses the structure of a typical purchase by

¹ United States, Federal Trade Commission. (2014, July). *79 FR 44271*. Retrieved from <https://www.federalregister.gov/documents/2014/07/31/2014-17978/rule-concerning-the-use-of-prenotification-negative-option-plans#h-12>

² Greenfield, R., & Bhasin, K. (2016, April). *The Future of Shopping: Trapping You in a Club You Didn't Know You Joined*. *Bloomberg*. Retrieved from <https://www.bloomberg.com/features/2016-adore-me/>

³ Baker, C. S. (2018, December). *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*. Retrieved from https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st_louis_mo_142/studies/bbb-study-free-trial-offers-and-subscription-traps.pdf

allowing businesses to interpret a customer's lack of action to reject an offer as approval to be charged for goods or services. With transparency and shared understanding, it can be mutually beneficial for buyers and sellers. However, consumers are vulnerable if businesses fail to meet adequate disclosure standards or intentionally take advantage of the contrariwise nature of negative option deals. Obligations can go misunderstood or unnoticed for months while costs pile up, and even cause harm to a person's credit standing. Furthermore, these damaging outcomes are exasperated when companies make their refund or cancellation process needlessly cumbersome and confusing.⁴

In Congress, I have worked to address negative option billing by introducing H.R. 2683, *the Unsubscribe Act*. This bill seeks to hold companies accountable for deceptive marketing and ensure that buyers are less vulnerable to the confusing nature of online negative option agreements.

My bill establishes or enhances three consumer protections for online shoppers by requiring a straightforward cancellation process, prevent consumers from unwanted and costly contracts, and ensure consumers remain fully informed of all costs and cancellation terms. Specifically, my bill would:

- **Require a straightforward cancellation process:** businesses are required to provide a cancellation mechanism that mirrors the customers' method of enrollment.
- **Prevent consumers from unwanted and costly contracts:** in addition to receiving affirmed consent from the customer at the onset of the negative option deal, the seller must receive an additional notice of consent at the end of the trial period, before any additional payment is collected. That means if a customer only intended on making a single purchase, but inadvertently enrolled in a pricey "membership" plan, the business cannot continue charging them unless they receive clear approval from the customer.
- **Ensure consumers remain fully informed of all costs and cancellation terms:** the bill mandates that consumers receive periodic notification of any and all obligations or changes to their contracts. Proactively reminding buyers of recurring charges, reenrollment details, and agreement changes will help decrypt the complex nature of negative option agreements.

The *Unsubscribe Act* will protect consumers from getting ripped off by expensive and misleading online deals, and will hold companies accountable for false advertisement. While my bill will give the Federal Trade Commission (FTC) additional flexibility, I believe the FTC must take steps to address this issue on their own and I am encouraged by the FTC's efforts today to do just that.

I believe it is time we update the tools and policies designed to ensure companies no longer profiteer through these deceptive practices. Consumers must have the option to opt-out of services the same way they opted in. In the spirit of protecting and educating consumers, policies

⁴ United States, Federal Trade Commission. (2009, January). *Negative Options*. Retrieved from <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>

that regulate negative option billing practices must be swiftly implemented with the consumer in mind.

I am encouraged to see the FTC is considering changes to the “Negative Option Rule” and I hope the principals of *the Unsubscribe Act* can serve as a roadmap to any meaningful updates to the rule.

Sincerely,



MARK TAKANO
Member of Congress