



June 22, 2023

Federal Trade Commission
Office of the Secretary
6600 Pennsylvania Avenue NW, Suite CC-5610 (Annex N)
Washington, DC 20580

Submitted electronically via www.regulations.gov

Re: Negative Option Rule; Project No. P064202

Dear Chair Khan,

BSA | The Software Alliance appreciates the opportunity to submit comments in response to the proposed amendments to the Federal Trade Commission's (FTC's) Negative Option Rule (Rule).

BSA is the leading advocate for the global software industry before governments and in the international marketplace.¹ Our members create the technology products and services that power other businesses. They offer tools including cloud storage services, customer relationship management software, human resources management programs, identity management services, and collaboration software. Enterprise software companies support organizations across the world, including SMEs and large companies; local and central governments; hospitals, schools and universities; and non-profits. BSA members recognize that companies must earn consumers' trust and act responsibly with their data.

We appreciate that the FTC has proposed amendments to the Rule in furtherance of its efforts to protect consumers, including in the context of automatically renewing subscriptions and free trials. However, we believe the proposed amendments to the Rule can be substantially improved and that the FTC's goals can be achieved through a rule that provides more clarity to companies implementing any new requirements. Our comments focus on three issues raised by the proposed amendments:

- The proposed amendments should be revised to state that the Rule focuses on subscriptions marketed to individual consumers and does not apply in the business-to-business context.
- The proposed amendments should reflect the benefits to individual consumers of free trials and automatically-renewing subscription programs.

¹ BSA's members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

- The proposed amendments contain vague language that should be revised, particularly around requirements about “material” practices and with respect to proposed restrictions on potential “saves.”

I. The Proposed Amendments Do Not Account for Business-to-Business Relationships

The proposed amendments would significantly expand the existing Negative Option Rule, including by applying the Rule to “all forms of negative option marketing, including prenotification and continuity plans, automatic renewals, and free trial offers.” This expansion could create significant implications for business-to-business transactions, because the proposed amendments would transform the Rule from focusing only on prenotification plans (which are seldom used in the business-to-business context) to all forms of negative option marketing, including automatically renewing subscriptions (which can often result from negotiations between two businesses).

The request for comments does not address how the proposed amendments would apply in the business-to-business context. Instead, it focuses on how the proposed changes would affect individual consumers. For example, it states that the amendments are “designed to ensure consumers understand what they are purchasing and allow them to cancel their participation without undue burden or complication.” Despite the focus on individual consumers, the text of the proposed amendments does not address the differences in negative option plans marketed to individual consumers and automatically-renewing subscriptions used in a business-to-business context. Nor does the request for comments contain substantial evidence about the prevalence of harms created by automatically-renewing subscriptions entered into in the business-to-business context. Indeed, the FTC did not solicit input on the use of automatically-renewing subscriptions in business-to-business transactions as part of the 2019 Advance Notice of Proposed Rulemaking. In contrast, many state laws governing automatic renewals are limited to consumer-facing products and services and we urge the FTC to adopt a similar approach.²

We strongly recommend revising the proposed amendments to expressly state that the amended Rule focuses on practices affecting individual consumers and is not intended to apply to business-to-business subscription renewals.

II. The Proposed Amendments Should Recognize the Benefits to Consumers of Recurring Subscriptions and Free Trials

As Congress and the FTC have long recognized, there are benefits to consumers in utilizing recurring subscriptions and free trials. We urge the FTC to consider these benefits in connection with the proposed amendments, namely:

- *Free trials.* Free trial programs are beneficial to consumers because they provide consumers with the opportunity to try a product before making a monthly or yearly commitment to pay for that product. Free trials also allow companies to reach consumers who may not want to, or are unable to, make an immediate financial commitment.
- *Automatic Renewals.* Subscription-based services that renew automatically are convenient for consumers, because they allow consumers to continue using a product for an extended

² See, e.g., Cal. Bus. & Prof. Code Sec. 17601(d) (defining a “consumer” under the California law governing automatic renewals as any “individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.”); Colorado Rev. Stat. Sec. 6-1-732 (adopting same definition as California for a “consumer” protected by the state’s law governing automatic renewals); Delaware Code Title VI, Sec. 2731 (defining a “consumer” protected by the state’s law governing automatic renewals as “an individual who purchases or leases merchandise primarily for personal, family or household purchases”).

period of time without having to continually remember to initiate and complete the subscription renewal process. Furthermore, recurring customer payments provide companies with a reliable and predictable source of revenue, allowing many companies to offer products and services at a lower price point than if they relied solely on one-time payments. By the same token, paying for a subscription service over time as opposed to through a single large up-front payment can remove a barrier to entry and allow cost-constrained consumers to purchase goods and services.

The request for comments does not explore these benefits. We urge the FTC to conduct additional analysis and seek further comments on how programs like automatically renewing subscriptions and free trials can benefit consumers.

III. The Proposed Amendments Should be Revised to Avoid Vague Terms

Several aspects of the proposed amendments also rely on vague terms. We recommend revising these portions of the proposed amendments and seeking further public comment on several aspects of the revisions. We focus on the following issues:

- **“Material” is not defined.** The term “material” is central to several parts of the proposed amendments. In Section 425.3, the proposed amendments would create a broad prohibition on misrepresenting not only “any material fact related to the transaction, such as the negative option feature,” but also “any material fact related to the underlying good or service.” However, the term “material” is not defined, making this prohibition both extremely broad and vague. That approach is in contrast to other rules, including the Telemarketing Sales Rule, which defines material to mean “likely to affect a person’s choice of, or conduct regarding, goods or services or a charitable contribution” and is further limited to specific prohibited misrepresentations.³ The FTC’s deception standard similarly defines material as “likely to affect the consumer’s conduct or decisions with regard to a product or service.”⁴

As described above, the proposed amendments do not account for the nature of negotiations over automatically-renewing subscriptions entered into between two businesses. The broad and vague requirements created by references to “material” facts illustrate these concerns, because in a business-to-business context companies will often define a set of issues that are “material” to their transactions. Companies may also negotiate specific disclosures that should be made before a business-to-business agreement is renewed, which may depart from the disclosures that would be required under Section 425.4.

In addition to amending the proposed amendments to expressly exempt business-to-business renewals, we recommend two changes:

- *First, “material” should be defined.* This would help to focus Section 425.3’s prohibition, which should be further limited to facts relating to the transaction and not every material fact relating to the underlying good or service.
- *Second, Section 425.4(a) should be limited to the specific required disclosures.* The broad requirement to affirmatively disclose, prior to obtaining billing information “any material term related to the underlying good or service that is necessary to prevent deception” is vague, onerous, and should be removed in favor of the specific disclosures enumerated in this section. Subsections (a)(1) through (a)(5) and subsection (b) already set out specific requirements about the disclosures that the rule views as “material.” These subsections contain significant detail about the required disclosures and should

³ See 16 CFR 310.2(t); 310.3(a)(2) & (d).

⁴ See FTC Policy Statement on Deception (Oct. 14, 1983), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

constitute an exhaustive list of requirements, rather than an illustrative list that creates greater uncertainty for companies attempting to implement any new requirements.

- **Save requirements increase uncertainty.** Section 425.6(d) creates a set of rules around when companies may offer “saves” in connection with negative option plans. Given the expansive reach of the proposed amendments, these rules would apply to a wide range of automatically renewing subscriptions. As written, however, this provision creates both: (1) a requirement for a seller to “immediately cancel” the negative option plan, and (2) an exception allowing a consumer to consent to receive a save offer prior to cancellation. The tension between those requirements would raise a range of practical concerns for companies seeking to implement these obligations. We raise four concerns:
 - First, we agree that it is important to ensure that consumers can easily and quickly cancel their subscriptions while being able to take advantage of beneficial saves. However, asking the consumer first to consent to a save adds an unnecessary step in that process. In most cases, the same step could constitute the save itself, instead of requiring both consent and then a save. Instead of using this approach it would be preferable, for example, to limit companies to offering one save to each individual prior to cancellation. This approach would ensure that consumers can both benefit from a potentially helpful offer (e.g., preferable pricing or payment terms) and expect a streamlined cancellation process.
 - Second, as with other portions of the proposed amendments, this provision does not function in the business-to-business context. Business customers with automatically renewing contracts will often want to discuss the types of alternative products that may meet their needs and fall within a specific budget. To the extent the save requirement were applied to business-to-business renewals, it may inadvertently limit the ability of companies to offer alternative products and services to their business customers. These arrangements should not be upended or infringed by the proposed amendments. We strongly recommend ensuring business-to-business contracts are not subject to the proposed amendments and their limitations on saves.
 - Third, the requirement to “maintain verification of the consumer’s consent to receiving a Save prior to cancellation” can create meaningful privacy risks. For example, the current language could be read to require a company to retain for three years the records of a customer who signed up for a free trial but cancelled before the trial ended — and was therefore never a paying customer. The requirement to maintain verification of a consumer’s consent appears in both the proposed amendments on saves and in the separate proposed amendments focused on consent, in Section 425.5(a)(4). We strongly recommend revising these provisions to recognize that a company does not need to keep a record of the consumer’s actual consent — i.e., by recording a phone call or video meeting, save chats and emails — or otherwise store communications they otherwise would not. Requiring such recordkeeping would create privacy and security risks by expanding the amount of personal data companies would keep. Further, we recommend creating an exception to these requirements when a consumer has exercised her right to delete her account or to have her personal information deleted, because requiring retention in those scenarios would create tension with a consumer’s decision to exercise her privacy rights.
 - Fourth, the proposed amendment should make clear that legitimate save offers are permissible. Where saves are implemented in a clear and fair way that does not unduly burden a consumer seeking to cancel her subscription, the benefits to consumers can outweigh the additional time or steps added to the cancellation process. Consumers may prefer to adjust their plan or switch to a different product, but not be aware of opportunities to do so until presented with a save offer. Companies, too, have a legitimate interest in trying to retain customers whose current

plan may not be a good fit but who may be well suited to other offerings. The Proposed Amendments do not address these benefits.

- **Click to cancel.** Section 425.6(a) creates a “click to cancel” mechanism. The proposed amendments incorporate ROSCA’s requirement of “simple” cancel mechanisms, but without resolving ambiguities around that existing standard. Section 425.6(b) incorporates prior FTC guidance by requiring “[t]he simple [cancel] mechanism required by [Section 425.6(a)] to be at least as easy to use as the method the consumer used to initiate the Negative Option feature.” This concept is helpful to some degree, by recognizing that complex products may require more nuanced sign-up and cancellation processes. But the process of signing up for a subscription and the process of cancelling one are fundamentally different and the proposed amendments do not explain what it means for a cancellation process to be “as easy as” enrollment. A more useful approach would be providing a non-exhaustive list of items that companies should consider when creating cancellation mechanisms, which would include but not be limited to the admonition to avoid cancellation processes that are more complicated than the corresponding sign-up process.

In addition, the language in this provision creates confusion around how it is to be applied in practice. Under the proposed amendments, it is a violation of Section 5 of the FTC Act for a negative option seller to “fail to provide a simple mechanism for a consumer to cancel the negative option feature and avoid being charged for the good or service and immediately stop any recurring charges.” We suggest revising this language to clarify the intended result by stating the obligation is “to cancel the negative option feature and immediately stop any recurring charges for the good or service.”

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BSA appreciates the opportunity to provide these comments. We welcome the opportunity to further engage with the FTC on these important issues.

Sincerely,



Kate Goodloe
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BSA | The Software Alliance