



June 23, 2023

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

Re: Comments of News/Media Alliance on Proposed Changes to Negative Option Rule (Project No. P064202)

The News/Media Alliance (“N/MA”) respectfully submits these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for public input on proposed amendments to the Negative Option Rule.¹

N/MA supports the Commission’s efforts to review so-called “negative option marketing” and the legal framework that governs it. As the Commission notes, prenotification plans, continuity plans, automatic renewals, and free trial conversions are already heavily regulated at both the federal and state level.² N/MA encourages the Commission, therefore, to proceed cautiously, exercise regulatory restraint, and avoid upending the well-developed, comprehensive regulatory structure and effective industry practices that are already in place which provide numerous benefits to consumers and businesses. If, however, the FTC chooses to

¹ Federal Trade Commission, Proposed Amendments to Negative Option Rule, 88 FR 24716 (Apr. 24, 2023) (“Negative Option Rule Proposal”). The Negative Option Rule is codified at 16 C.F.R § 425.

² Negative Option Rule Proposal at 24717-18. While the Commission separates negative option marketing into these four categories, all involve a subscription of some form that automatically renews until cancelled. For this reason, N/MA uses the terms “subscription” and “automatic renewal” when referring to negative option marketing generally.



proceed with expanding the Negative Option Rule, it should only enact regulations that are consistent with existing best practices and established state laws. Otherwise, the Commission will risk causing consumer and industry confusion while inhibiting a widely accepted and generally advantageous form of modern commerce.

I. ABOUT N/MA

N/MA is a nonprofit organization that represents more than 2,000 diverse news media and magazine media publishers in the United States. N/MA's members include publishers ranging from large companies and international outlets to small, hyperlocal sources. N/MA's members are trusted and respected providers of quality journalism. They use a variety of platforms to provide information to consumers, including digital-only, digital-first, and print. Their business models are based on attracting and retaining long-term subscribers, most of whom purchase their products through subscriptions.

The products offered by N/MA's members are periodicals, meaning that by their very nature they are provided on a regular and recurring basis. Almost all publications provided by N/MA's members are sold by subscription, and many are offered only on a recurring subscription basis. All of N/MA's members offer subscriptions that include automatic renewal features, and in some cases one hundred percent of a publication's subscriptions automatically renew. Single issue retail sales have declined significantly over time and now amount to a small part of total circulation. Automatic renewal subscriptions are a major source of funding for the journalistic excellence N/MA's members provide. The Commission's proposals are therefore of great interest and concern to N/MA.

II. SUBSCRIPTION-BASED PRODUCTS AND SERVICES BENEFIT CONSUMERS AND BUSINESSES, INCLUDING N/MA'S SUBSCRIBERS AND MEMBERS.

The Negative Option Rule Proposal makes only passing reference to the “substantial benefits” of negative option programs.³ In fact, these benefits are extensive and widespread both for consumers and sellers. With the vast changes in consumer lifestyles in recent years, accelerated by the coronavirus pandemic; changes in how, where, and when employees work; economic uncertainty; and rising costs and inflation, Americans from all walks of life have enthusiastically embraced subscription-based products and services. As one financial services analyst summarized, “given the mutual benefits for consumers and businesses, the world is transforming into a subscription economy.”⁴ Consumers benefit from convenience, long-term cost-savings, and customization.⁵ Subscriptions with automatic renewal features allow uninterrupted service, fewer renewal notices to review and respond to, and lower pricing. Businesses benefit from greater revenue predictability, customer base continuity, and the ability to better plan in advance.⁶ This mutually beneficial relationship has resulted in unprecedented growth for the subscription economy. N/MA members report that automatic renewal subscriptions have steadily increased and are standard practice for the newspaper and magazine industry. One member notes that the number of customers on auto-renewal plans has increased

³ *Id.* at 24716.

⁴ Sundeep Gantori, et al., *Investing in Digital Subscriptions*, UBS (Mar. 10, 2021) at 7.

⁵ *Id.* at 8.

⁶ *Id.*

five percent in just the last year, and several newspaper publishers report that ninety-five to one hundred percent of their subscriptions use an auto-renewal feature. Magazine publishers report that the number of automatic renewal subscriptions has more than doubled over the last three to five years. A major reason for these increases is the simplicity and convenience of automatic renewals for consumers and publishers.

N/MA's members and customers rely on automatic renewal programs to ensure uninterrupted service, convenience, and cost savings. Automatic renewal subscriptions allow consumers to receive content they choose for as long as they wish and ensure a simple and streamlined renewal process. Customers also benefit from features such as low-price introductory offers; lower-cost, continuous 24/7 access to content; access to members-only content, custom e-mail news alerts, products, and experiences; and eligibility for gifts and other enhancements. These subscriptions also produce administrative cost savings for N/MA's members because publishers can avoid the costs of creating and disseminating multiple renewal notices, monitoring and detecting erratic changes to subscriber files, and re-enrolling customers if subscriptions lapse.⁷ For publishers and customers, ongoing subscriptions help avoid unnecessary and unintended lapses in the delivery of periodicals, which in turn helps publishers continue to provide affordably priced products. A reduction in the number of automatic renewal subscriptions would translate into higher costs for N/MA's members, which could eventually mean consumers would pay more for periodicals.

⁷ N/MA members provide reminders to consumers with longer subscriptions, in compliance with state laws. *See infra* p. 12.

The Negative Option Rule Proposal focuses heavily on “widespread deceptive practices”⁸ the FTC says are evidenced by the number of complaints it receives, and asserts that “[p]roblematic negative option practices have remained a persistent source of consumer harm for decades.”⁹ N/MA does not seek to minimize these complaints or the presence of certain bad actors in the marketplace. N/MA submits, however, that there is no credible evidence that the problems cited by the Commission are rampant throughout the subscription economy. Moreover, there is no evidence that consumers face universally deceptive practices when subscribing to all categories of products and services that provide any form of automatic renewal feature. On the contrary, the natural adoption of automatic renewal subscriptions throughout the economy, and the many successful, uneventful, and routine subscription-based transactions that occur daily, without incident or complaint, demonstrate that consumers have embraced negative option marketing and this phenomenon has not resulted in “unabated consumer harm.”¹⁰

Consumers who engage in auto-renewal transactions with newspaper and magazine publishers do not encounter deceptive practices and are not surprised or confused by the automatic renewal features that are central to the products and services they purchase. Instead, they expect and appreciate such features. As former Commissioner Wilson stated, “we know that negative option marketing is used lawfully and non-deceptively in a broad array of common

⁸ Negative Option Rule Proposal at 24720; *id.* at 24726.

⁹ *Id.* at 24716.

¹⁰ *Id.* at 24719.

transactions – newspaper subscriptions” among them.¹¹ The State Attorneys General have noted that “where a consumer has agreed to pay for a magazine subscription for a specified time period, it is arguable that the consumer would view an auto-renew feature as a convenience and may expect an offer to include it.”¹² The use of automatic renewals for newspaper and magazine subscriptions does not result in pervasive complaints and dissatisfied consumers. N/MA can attest that its members receive very few complaints, even though the number of subscriptions with automatic renewal features has risen significantly.

For industries such as newspaper and magazine publishing, the regular, recurring nature of a subscription is central to the product. The subscription is not ancillary to the periodical. The publication and its consistent, periodic delivery are inseparable. In general, there is no “non-automatic renewal” option. The very idea of newspaper and magazine subscriptions is that they are delivered periodically (daily, weekly, monthly, etc.) until a customer informs the publisher that he or she no longer wishes to receive the publication. This has been the model of newspaper and magazine publishing for decades; in fact, it is the very foundation and identity of the periodical publishing business. Moreover, as evidenced by the large increases in the number of automatic renewal subscriptions in recent years and the large percentage of media subscriptions

¹¹ Dissenting Statement of Commissioner Christine S. Wilson, Negative Option Rule Proposal at 24738.

¹² Comments of Pennsylvania Office of Attorney General (on behalf of The Attorneys General of the States of Colorado, Delaware, District of Columbia, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin), FTC Project No. P064202 (Dec. 2, 2019) at 8.

that include automatic renewals, it is clear these subscriptions are consistent with consumer expectations.

If the Commission is concerned about particular types of automatic renewal practices in specific industries, it should address those directly. For example, the Commission has expressed concern about “certain negative option enrollment methods, such as the use of retail sales receipts or check endorsements, in which the customer’s signature serves a dual purpose (e.g., negative option enrollment and promotional check cashing) . . . such practices appear to be particularly attractive to those committing fraud.”¹³ If the Commission determines that abuses are prevalent in this particular form of negative option marketing, it should address them. The Commission should not, however, enact sweeping new regulations across the entire subscription economy in order to address isolated and particularized instances that do not reflect overall industry practices and consumer experiences.

III. NEGATIVE OPTION MARKETING IS ALREADY HIGHLY REGULATED AND ENFORCED.

The main premise of the Negative Option Rule Proposal is that the existing “patchwork” of negative option marketing laws and regulations is generic and inadequate, and that a new set of extensive and particularized regulations is needed. The FTC posits that ongoing consumer complaints, combined with continuing enforcement actions, prove that a more restrictive, across-the-board rule is required to address pervasive unfair negative option marketing practices in all industries across all media.

¹³ Negative Option Rule Proposal at 24728.

N/MA believes that the “patchwork of laws” to which the Commission refers is, in fact, an established body of law that is well-developed, comprehensive, and sufficient to address the small segment of the subscription-based marketplace that engages in troubling practices. Besides the current Negative Option Rule, there exists a sweeping and ever-expanding landscape of state laws, the full extent, scope, and effectiveness of which are not fully acknowledged in the Negative Option Rule Proposal. Thirty-five states and the District of Columbia now have automatic renewal laws. At least twenty of these address all forms of automatic renewals. States such as California and New York, which are often followed by other states, have had several rounds of auto-renewal legislation. Under these state laws, consumers are protected through a variety of means. For example, under at least ten state laws, including those in New York and California, sellers must provide consumers written acknowledgments of the terms of the automatic renewal, cancellation policies, and instructions on how to cancel, in a manner consumers can retain. For longer-term subscriptions, sellers provide consumers renewal notices before a product or service renews containing information about the length and additional terms of the renewal period, cancellation methods, contact information for the seller, and, if sent electronically, a link to the cancellation process. As required by many states, cancellation methods must be cost-effective, timely, and easy to use; if an offer is made online, often an online cancellation option is required. While not impeding consumers’ ability to cancel, for added security for both consumers and sellers and to help combat fraud, states allow authentication of consumers prior to cancellation. If a consumer is unable to authenticate online, he or she may use other methods of cancellation.

Because many companies – including a large number of N/MA’s members – that offer goods and services on a subscription basis operate nationally, they have implemented policies and procedures for negative option sales that are based on the consensus of state automatic renewal laws. As newer state laws have been added, state legislators have liberally borrowed from other states’ laws to establish consistency.¹⁴ Many of the procedures used by N/MA members have been developed to comply with widely applicable state laws, such as California’s and New York’s, as well as requirements imposed by credit card companies for processing automatic renewal subscriptions.¹⁵ Accordingly, widely accepted, comprehensive national standards have developed and are already functioning in a manner that benefits consumers and sellers.

In addition to the multitude of comprehensive state laws that govern negative option marketing, various federal laws also address such practices. The Restore Online Shoppers’ Confidence Act (“ROSCA”) polices online negative option marketing. The Telemarketing Sales Rule (“TSR”) addresses negative option features made by telephone. The Postal Reorganization Act regulates negative option practices in direct mail. The Electronic Fund Transfer Act monitors negative option practices in debit card processing. Underpinning these laws and

¹⁴ Fully one-third of state laws use the same precise language as California for “clear and conspicuous.” Acknowledgment provisions are found in half of state laws, as is an online cancellation method if subscriptions are sold online. More than half require renewal notices for longer term subscriptions.

¹⁵ See Revised Standards for Subscription/Recurring Payments and Negative Option Billing Merchants, Mastercard, https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/subscription_recurring-payments-and-negative-option-billing-merchants.pdf; Updated Policy for Subscription Merchants Offering Free Trials or Introductory Promotions, VISA, <https://usa.visa.com/dam/VCOM/global/support-legal/documents/subscription-merchants-visa-public.pdf>.

providing the FTC with additional regulatory authority are Section 5 of the FTC Act¹⁶ and extensive FTC guidance documents and case law which elaborate on the precise requirements negative option marketing must follow under Section 5.

The Negative Option Rule Proposal suggests that because the Commission and the states regularly bring cases challenging negative option practices, current laws are not adequate or extensive enough. N/MA believes that, on the contrary, the fact that these cases are brought regularly shows that the current legal framework is working as designed, and adequate enforcement tools already exist. As evidenced by the collection of millions of dollars in fines,¹⁷ the FTC and the states aggressively and systematically police violations using the current laws.¹⁸

Expanding the Negative Option Rule as proposed will not synthesize or standardize the current “patchwork” of laws. It will impose an additional and inconsistent layer on top of it that will disrupt the effective standardized practices businesses have put into place to comply with state laws. No matter how extensively the FTC might expand the rule, it cannot “consolidate all

¹⁶ Negative Option Rule Proposal at 24717.

¹⁷ See, e.g., *FTC, DOJ Obtain Ban on Negative Option Marketing and \$21 Million for Consumers Deceived by Background Report Provider MyLife*, Press Release, Federal Trade Commission, <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-doj-obtain-ban-negative-option-marketing-21-million-consumers-deceived-background-report> (Dec. 16, 2021); *Children’s Online Learning Program ABCmouse to Pay \$10 Million to Settle FTC Charges of Illegal Marketing and Billing Practices*, Press Release, Federal Trade Commission, <https://www.ftc.gov/news-events/news/press-releases/2020/09/childrens-online-learning-program-abcmouse-pay-10-million-settle-ftc-charges-illegal-marketing> (Sept. 2, 2020) (“*ABCMouse Settlement*”).

¹⁸ Just two days before these Comments were filed, the FTC filed suit against Amazon.com, Inc. under Section 5 of the FTC Act, alleging deceptive auto-renewal practices. See *Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and Other Equitable Relief*, Civil Action No. 2:23-cv-0932, Jun. 21, 2023 (W.D. Wash.) (“*Amazon Complaint*”). Clearly, if the FTC can bring a suit under Section 5 against a retail giant like Amazon, it already has the requisite authority and enforcement mechanisms to combat alleged unfair negative option marketing practices.

requirements, such as those in the TSR, specifically applicable to negative option marketing”¹⁹ into a “one-stop-shop” rule. ROSCA, TSR, and the host of other federal laws that police negative option marketing will continue to exist, with their own approaches to the specific issues they are designed to address. Moreover, the Commission’s proposals conflict with existing state laws in areas such as the need for post-sale confirmatory e-mails. Rather than “consolidate” the “patchwork” of laws, the proposed Negative Option Rule would add another layer of regulation to a field that is already well-policed, and risk upending the well-established regulatory system and practices that are already in place and working effectively. The FTC’s proposed rule would discourage the use of automatic renewals, despite their clear benefits.

IV. IF IT PROCEEDS, THE COMMISSION SHOULD ALTER SOME OF ITS PROPOSALS.

If the Commission decides to proceed with expanding the Negative Option Rule to all subscription-based products and services in all media – despite evidence that consumers are not universally harmed by negative option marketing of all forms, and that states and the FTC already have the necessary tools to address bad actors in the subscription economy – it should enact a rule that is consistent with well-established state negative option requirements and industry practices.²⁰ This approach will advance the Commission’s policy goals of ensuring that consumers receive detailed information about transactions and have the ability to cancel subscriptions easily online or using the same method they used to activate the service.

¹⁹ Negative Option Rule Proposal at 24726.

²⁰ The Commission should also clearly and unambiguously identify the source of its authority to expand the rule in such a manner. None of the existing federal laws that addresses negative option marketing, *see supra* p. 9-10, provides authority for such a broad expansion of the rule to all products, services, and media.

Moreover, it will avoid creating an additional layer of federal rules that in certain key respects are significantly different than state laws and will likely cause consumer and industry confusion.²¹

The practices which N/MA members currently use for marketing automatic renewal subscription offers include: (1) clearly describing all components of a transaction, including the length of a subscription, the method and type of payment required, the timing of payments, including any free or low-fee periods, and the automatic renewal/negative option component; (2) obtaining the consumer's consent to all terms of the transaction; (3) sending a confirmation which includes the material terms of the sale, including the automatic renewal/negative option feature and instructions on how to cancel the subscription; and (4) for longer subscriptions, sending reminders to consumers with the terms of the transaction, including the automatic renewal date and instructions on how to cancel prior to that date.²²

N/MA respectfully requests that the FTC revise certain aspects of the Negative Option Rule Proposal to be consistent with the above-described practices and to enable publishers to continue using the proven and consumer-accepted practices they now employ. The Commission's proposal to require a separate consent to the automatic renewal component of a subscription offer is inconsistent with the vast body of state law requirements. In addition, it

²¹ The Commission should be cognizant that if businesses are faced with multiple layers of confusing and conflicting requirements, some may choose to stop offering subscription services altogether. This would not serve the interests of consumers, sellers, or the economy as a whole.

²² N/MA notes that the Commission's proposed § 425.7 would require sellers to provide annual reminders to some customers by telephone. Given consumers' aversion to unsolicited phone calls and their hesitancy to answer calls from unknown numbers, this would seem to be unworkable. N/MA encourages the Commission to revise this proposal to allow customers who have subscribed by phone to be contacted by other means, or at least to allow sellers to obtain customers' consents to receive such notices by alternate means.

does not comport with how N/MA members now provide information to consumers or, most importantly, with consumer expectations. The FTC's proposal implies that there are various separate and negotiable elements to automatic renewal subscription offers, which is incorrect. When N/MA members offer subscriptions that feature an automatic renewal element, they provide an offer that describes all components of the proposed transaction: the product, the method and type of payment, the timing of payments, and the automatic renewal feature. These components form a single, unitary offer, and are not separable into component parts that can be individually accepted or rejected. As an example, a publication may offer a one-year subscription that includes a three-month introductory low-price trial period and a nine-month period at a standard price, which renews annually unless the consumer cancels prior to the renewal date. The automatic renewal is an integrated and inseparable part of this single offer, as are the manner and timing of recurring payments.

It is unclear how requiring separate consents would work in practice with subscriptions to periodicals, where automatic renewals are fundamental to product offers, not ancillary add-ons. If a consumer accepts the "other" parts of the offer but not the automatic renewal component, does this halt the transaction altogether? If so, this may lead to increased consumer frustration and a new type of consumer complaints. Requiring sellers to separate a single unified offer into separate components is not only unnecessary, it risks creating consumer confusion and fatigue. If there are too many check boxes, too many clicks, and too many disclosures to parse, consumers may become perplexed, tune out, and simply abandon the transaction. Requiring a

separate consent will be problematic to implement, burdensome for sellers, and confusing for buyers.

N/MA recommends that any revisions to the Negative Option Rule be consistent with current practices and recognize the important role played by acknowledgments in which sellers send confirmation e-mails summarizing the transaction and containing information about how to cancel a subscription. Many states require such acknowledgements. When a customer accepts a subscription offer, he or she receives a follow-up e-mail confirmation that contains full details of the transaction, including specific information about how to cancel the subscription. Not only does this allow the customer to verify the details of the transaction, but it gives them a written record that can be retained and referred to later if questions arise, including how to cancel the subscription. N/MA's members follow this practice and generally send confirmations immediately if they have an e-mail address for a subscriber, or otherwise within 24 hours, or as soon as possible for mail or telephone subscriptions. This customary practice is preferable to the FTC's proposal in which consumers' only opportunity to review the details of a transaction is at the time of purchase, through a series of detailed, simultaneous recitations on-screen, in print, or by voice, without written memorialization of the terms of the subscription. The FTC's proposal "front loads" the information process, meaning the consumer will see every detail of the transaction at the time of purchase – but never again. Confirmation emails that summarize the terms of the transaction and include instructions on how to cancel also ensure that consumers who purchase subscriptions through third-party agents, which is a practice magazine publishers

use occasionally, have information they can retain from the third-party seller, including instructions on how to contact the seller and how to cancel.²³

As the Commission noted in the Negative Option Rule Proposal, “consumers may miss important information if the important points are surrounded by useful but less critical information.”²⁴ The Commission’s approach risks overwhelming consumers with too much information, critical and not, by burdening them with a series of simultaneous disclosures that will be difficult and impracticable to remember. The current process, which includes clear disclosure of all material terms which once affirmatively accepted by the consumer, is followed by a written acknowledgment restating those material terms, including how to cancel, is a more effective and reasonable way to ensure that consumers receive complete and transparent information about their subscriptions. Acknowledgments also serve to inform consumers, in retainable form, about what will happen at the end of a free trial or introductory pricing period, ensuring that consumers have a record of how to terminate a subscription at the end of the trial period should they wish to do so. This supports the Commission’s conclusion that requiring an additional consumer consent at the end of a trial period is not necessary.

N/MA agrees that consumers should be provided a simple way to cancel a recurring subscription. Regarding the method of cancellation, however, N/MA suggests that any revisions to the Negative Option Rule provide that customers can choose to cancel using not only the

²³ This would address the Commission’s concern about “magazine[s] say[ing] that people must speak to a different company” when consumers try to cancel. *How to Stop Subscriptions You Never Ordered*, Consumer Alert, Federal Trade Commission, <https://consumer.ftc.gov/consumer-alerts/2023/05/how-stop-subscriptions-you-never-ordered> (May 19, 2023).

²⁴ Negative Option Rule Proposal at 24727.

medium they used to initiate their subscriptions, but also by methods they may find more convenient. For example, subscribers who sign up by mail may prefer to cancel online or by telephone, and consumers who subscribe by telephone may prefer to cancel online. There may be instances where the original method of signing up for a subscription may no longer be available when a consumer wants to cancel. For example, a consumer might sign up for a subscription at a trade fair or show, or in a retail environment. Returning to the in-person venue where the initial sale occurred may be inconvenient, or even impossible, for the consumer. Further, over time, a consumer may change the method used to access the product, perhaps moving from a print subscription to a digital one. It may not make sense to offer a mail cancellation method if a publication goes digital only. Ensuring flexibility in the method of cancellation will be consistent with state law requirements and consumer expectations.

The FTC should also clarify that the “Click to Cancel” proposal applies only to the negative option portion of a subscription and not to the entire subscription. Cancelling a subscription in its entirety may necessarily require more than just a single click, because a seller may need to gather and/or verify contact information, credit card information, and other details. A “one click” cancellation requirement for an entire subscription, especially absent some form of authentication, could also lead to accidental and/or malicious cancellations.

As part of good business cancellation procedures and to help combat fraud, sellers need the ability to authenticate requests to cancel subscriptions by either requiring sellers to set up an online account which can be authenticated, or if cancelling by telephone, by providing an email address which they can be asked to confirm. This will ensure the right subscription is cancelled

and avoid the possibility of individuals falsely cancelling subscriptions on behalf of others. Many state laws allow sellers to authenticate cancellation requests. For example, under California law, prior to cancellation a seller may require a consumer to enter account information or otherwise authenticate online if the consumer has an account with the business. If a consumer cannot authenticate online, the consumer may authenticate using an alternate method. If the FTC moves forward with the proposed rule, it should recognize that there needs to be a mechanism provided by which a customer can be identified – such as logging into an online account or providing identification information by phone – in order to identify the account to be cancelled. Unless a user logs in to an account or provides identifying information by phone, the seller has no way of verifying the identity of the customer or what accounts are active.²⁵ Authentication also allows businesses to confirm the method to be used for any refund and the correct mailing address or credit card information.

Also with regard to cancellation, the Commission’s proposal of an outright ban on a business’s effort to “save” a customer who wants to cancel a subscription, absent a consumer’s express consent to receive alternative offers, is unnecessary and will hurt both consumers and businesses. It also implicates sellers’ First Amendment right to engage in lawful commercial speech, which is protected from “unwarranted governmental regulation.”²⁶ N/MA understands that it is frustrating for consumers if they are required to go through an unreasonable number of

²⁵ Cancellation by mail presents unique challenges. If a consumer does not provide relevant information such as an account identifier, the seller may not be able to execute the cancellation, even though the consumer may think he or she has successfully cancelled. Sellers should be permitted to follow up with customers in such instances and to authenticate such requests.

²⁶ *Mo. Broad. Ass’n v. Schmitt*, 946 F.3d 453, 460 (8th Cir. 2020) (internal quotations and citations omitted).

steps to cancel an ongoing subscription, and it supports the requirements embodied in many state laws that require simple cancellation processes. But rather than requiring sellers to obtain express consent from a consumer before offering any form of information about alternative offers, N/MA recommends that the rule be consistent with publishers' current practices which permit a seller to offer alternatives as long as the customer does not have to take additional actions to proceed directly to cancellation. This change would strike the appropriate balance. It would ensure that consumers are able to cancel expeditiously, without, for example, having to click through multiple prompts and screens, but also that sellers can summarize the benefits of current subscriptions and/or present alternative offers that may be of interest to consumers. It would also ensure that consumers can be provided accurate, complete, and useful information about how their cancellation will affect points and rewards programs, joint and gift subscriptions, and gifts and other extras that accompany certain subscriptions. Under the Commission's proposal, this information presumably could not be provided to consumers once they indicate they do not wish to consider alternative offers or modifications. It would also allow sellers to offer optional surveys to consumers regarding their experiences with the product or service and their reason for cancelling.

Many N/MA members present customers seeking to cancel online with a special offer to continue their subscription at a lower price. The page describing this offer contains a link that says "No Thanks," "Proceed with Cancellation," or something similar. These links are prominent and clearly visible on the same page as the special offer. Customers who click these links proceed immediately to complete the cancellation process. The experiences of many

N/MA members demonstrate that substantial numbers of consumers anticipate and take advantage of lower pricing or other offers which meet their needs rather than cancelling. Forcing sellers to stop offering “saves” in this manner would hurt consumers who may simply want the same or similar subscription for a lower price or with different benefits, and would have a substantial negative impact on publishers’ businesses.

Finally, N/MA encourages the Commission to address a potential area of confusion when the purchase of a subscription with a negative option feature is made through a third party, such as Google's Google Play Billing or Apple's in-app payment system. As the FTC knows, when a purchase with a negative option feature is made through a third party, the third party controls the payment processes, including the means by which a subscriber can cancel the transaction. The FTC should make clear that when a sale with a negative option feature is made through a third party that controls the process of purchasing and/or cancelling a subscription with a negative option feature, any new requirements would apply to the third party only, and not to the company that fulfills the subscription.

V. THE COMMISSION SHOULD NOT EXTEND THE CURRENT PROCEEDING TO ISSUES INVOLVING PRODUCT CLAIMS.

The Negative Option Rule Proposal includes a proposal to apply the proposed rule to misrepresentations regarding claims about underlying products or services, rather than just to misrepresentations regarding the negative option feature of a subscription.²⁷ N/MA opposes this proposal.

²⁷ Negative Option Rule Proposal at 24726.

When this proceeding was initiated in 2019 with the Advance Notice of Proposed Rulemaking, there was no mention or even suggestion of such a proposal. Commenters were not aware that it was being considered, and, to N/MA’s knowledge, no parties submitted comments or opinions on such a proposal.²⁸ Before promulgating a new rule such as the one proposed, the Commission must find “reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”²⁹ The Commission has provided no information or evidence on the “prevalence” of alleged misrepresentations related to underlying products and services offered with negative options or why it has decided to attempt to extend the proposed rule to misrepresentations in general. It also has cited no authority that would permit it to expand the Negative Option Rule to any claim about any aspect of an underlying product or service.³⁰

This proceeding should remain focused directly on negative option marketing – which is the subject of the current rule the Commission is seeking to extend, and the subject of the Advance Notice of Proposed Rulemaking – and not veer into issues like the validity of claims about product features and efficacy. Misrepresentations about products and services should be left to enforcement by the FTC under its existing authority in the FTC Act, or addressed in a separate rulemaking in which interested parties are given the appropriate opportunity to comment during the first stages of a proposal.

²⁸ The Negative Option Rule Proposal does not mention any such comments.

²⁹ 15 U.S.C. § 57a(b)(3).

³⁰ More generally, the Commission has not identified the source of its authority to expand the Negative Option Rule to all subscription-based products and services in all media. *See supra* p. 11 n.20.

In addition, expansion of the rule to general misrepresentations would be redundant. The FTC has other mechanisms to police misrepresentations about products or services that are sold through subscriptions with negative option components. For example, the FTC can investigate and prosecute unfair and deceptive products and features under its Section 5 authority, as it has done in previous cases.³¹

N/MA thanks the FTC for its consideration of these comments.

Respectfully Submitted,

NEWS/MEDIA ALLIANCE

By: /s/ Danielle Coffey
Danielle Coffey
President & CEO
4401 North Fairfax Drive
Suite 300
Arlington, Virginia 22203

³¹ See, e.g., *FTC Targets Weight-Loss Marketers Allegedly Bogus Free Sample Offers*, Press Release, Federal Trade Commission, <https://www.ftc.gov/news-events/news/press-releases/2009/02/ftc-targets-weight-loss-marketers-allegedly-bogus-free-sample-offers> (Feb. 9, 2009).