



**entertainment<sup>®</sup>  
software  
association**



**Internet Association**

December 2, 2019

*Via Electronic Filing*

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Washington, DC 20580

**Re: 16 CFR Part 425 – Negative Option Rule, Project No. PO64202  
Comments of the Entertainment Software Association and Internet Association**

Dear Secretary Tabor,

The Entertainment Software Association (“ESA”) and Internet Association (“IA”) submit these comments in response to the Federal Trade Commission’s (“FTC” or Commission”) advance notice of proposed rulemaking and request for public comment (“Notice”) regarding the Commission’s Rule Concerning the Use of Prenotification Negative Option Plans, 16 CFR Part 425 (“Negative Option Rule or “Rule”).<sup>1</sup>

ESA is a trade association for companies that publish computer and video games for video game consoles, personal computers, and the Internet. Its nearly three dozen member companies include many of the world’s largest video game producers. Playing video games today is mainstream entertainment. Over 164 million adults in the United States play video games and three-quarters of all Americans have at least one gamer in their household.

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<sup>1</sup> Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52,393 (October 2, 2019).

IA represents over forty of the world's leading technology companies. Its members include a broad array of Internet companies ranging from travel sites and online marketplaces to social networking services and search engines. IA advances public policy solutions that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public.

Members of ESA and IA offer numerous types of subscriptions and other “negative option” plans that provide abundant benefits to consumers, including the ability to test an unfamiliar product or service, the convenience and certainty of recurring products and services, and access to greater product and services offerings, often at lower prices. ESA and IA believe that deceptive or abusive negative option practices can be addressed adequately and effectively by current law enforcement mechanisms rather than by creating a new regulation that overburdens commerce and innovation. Congress, the FTC, and the states have provided marketers with an abundance of laws, regulations, and case precedents to provide consumers with clear and conspicuous disclosures about the terms of a negative option offer, obtain affirmative consent to the offer, and provide an easy and simple means to cancel the arrangement.

The FTC has ample law enforcement tools to use against marketers who fail to meet these standards. Indeed, the FTC's Notice references dozens of cases brought against marketers and other companies involved in negative option marketing under these various laws. New regulations would likely impose levels of standardization that would be unworkable across all industries, media, and technology supporting negative option offers in a burgeoning marketplace where consumers are willing and sophisticated participants. As such, ESA and IA are concerned

that any such new regulations would be counterproductive to the FTC's competition and consumer protection goals.

**I. Negative option offers are mainstream and beneficial to consumers.**

In a 2018 study, McKinsey & Company reported that the subscription e-commerce market had grown by more than 100 percent a year over the previous five years, including both established consumer brands and start-ups in the marketplace.<sup>2</sup> The subscription market enables consumers to transact with a variety of companies across numerous industries – from food and entertainment to apparel and home goods – and access product variety, services, billing frequencies, price points, and other benefits. Subscriptions allow consumers to replenish commodity items (such as personal care products), enjoy new items or personalized items at designated intervals (such as clothing and food), and obtain access to products or services at discounts or with members-only benefits (such as entertainment and content services).<sup>3</sup>

Subscriptions have been offered in the Internet marketplace for over a decade from both established producers and newer, niche services. Subscriptions may be offered for career networking, online real estate listings, software services, music steaming services, travel planning, and social networking, among many others, across various mediums. In the video game industry, for example, subscriptions may be available for multiplayer PC games, game console networks, or mobile apps. Subscription game services provide consumers with access to game streaming services, a catalog of games (some of which may be free for subscribers), and a

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<sup>2</sup> See McKinsey & Company, *Thinking Inside the Subscription Box: New Research on E-Commerce Consumers* (February 2018), available at <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers> (hereinafter “McKinsey Report”).

<sup>3</sup> McKinsey Report at 3.

host of game-related services, including online features, unlimited downloads, access to premium content, saved progress, synching across multiple devices, multiplayer gameplay and chat.

Many consumers find substantial value in the ability to enjoy additional features or access a wide variety of products and services through a cost-effective subscription rather than separately pay for individually priced, stand-alone products or services. New technologies and access mechanisms combined with cross-platform connectivity and improved network performance have advanced the availability and quality of products and services available by subscription. Thus, subscription services are an optimal way to enhance consumers' enjoyment of and access to hundreds of Internet-based services.<sup>4</sup>

Subscriptions make transactions easier for consumers, without having to be concerned that they will miss an opportunity to receive products or services or will be required to renew an agreed-upon arrangement to receive continuous products or services. The level of sophistication of buyers, who have become used to subscription offers in today's environment, is high.<sup>5</sup> The use of subscription programs saves businesses from spending substantial monies on repeat offerings to consumers who want to continue the product or service, and the savings are reflected in the subscription price. There are virtually limitless variations of subscription arrangements and distribution such that additional, more specific regulations could not be appropriately tailored to promote economic growth and benefit consumers.

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<sup>4</sup> In an August 2019 report, IA found that at the start of 2019, the average person spent \$94.48 per month on all Internet-based goods and services including subscriptions, apps, games, shopping, music, and movies, an increase of over 5% over the last quarter of 2018 and nearly 9% over the previous year. Internet Association, *IA Industry Indicators, Data and Analysis for the U.S. Internet Economy* (August 2019), available at [https://internetassociation.org/wp-content/uploads/2019/08/IA\\_Industry-Indicators-Report\\_Q3-2019\\_digital.pdf](https://internetassociation.org/wp-content/uploads/2019/08/IA_Industry-Indicators-Report_Q3-2019_digital.pdf).

<sup>5</sup> See, e.g., McKinsey Report at 2-3, noting among other things that 46% of consumers subscribed to an online streaming media service, such as Netflix; and, the median number of subscriptions held by an active subscriber was two, but 35% of subscribers had three or more subscriptions.

ESA and IA are concerned that additional regulations aimed at addressing concerns with certain negative marketing options would not balance the Commission's consumer protection goals with the interests of legitimate businesses in the subscription marketplace. ESA and IA recognize that recent FTC law enforcement against negative option marketers indicates that some consumers may be duped into a subscription program by unfair or deceptive practices. However, the challenge with a regulation designed to address bad behavior by a small segment of the marketplace is that the regulation's application to the broader marketplace could impede beneficial consumer experiences.

**II. Existing laws provide a clear and consistent legal framework beneficial to consumers and businesses across all mediums and offers.**

ESA and IA respectfully disagree with the FTC's conclusion in the Notice that "[t]he existing patchwork of laws and regulations does not provide industry and consumers with a consistent legal framework across different media and types of plans."<sup>6</sup> To the extent there is a patchwork of laws, it arises from the various and growing number of state laws, some of which have imposed unique and inconsistent requirements that are costly and burdensome in interstate commerce. If FTC regulations in the negative option space could have a preemptive effect, ESA and IA would be interested in exploring a uniform regime that allows for growth and flexibility in the industry, much as the current framework permits

The current legal framework specifies that sellers must (1) clearly and conspicuously disclose the material terms of the offer; (2) obtain the customer's express, informed consent to the offer; and (3) provide an easy mechanism to cancel so that customers can avoid future charges. Those three principles define the prongs of the legal requirements for negative option

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<sup>6</sup> 84 Fed. Reg. at 52,396.

offers made via the Internet under the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405 ("ROSCA").<sup>7</sup> In addition to ROSCA, the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR"), covers each of these elements for outbound and inbound upsell calls covered by the TSR.<sup>8</sup> The FTC's application of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("Section 5"), to negative option offers has directed marketers to make clear and conspicuous disclosures regarding the material terms of the offer before the consumer agrees to make a purchase, obtain the consumer's consent to the offer, and honor all cancellation requests that comply with specified cancellation procedures.<sup>9</sup> Other federal and state laws operate to impose similar requirements.<sup>10</sup>

The existing standards are thorough and allow businesses the flexibility to craft messages and operational procedures based on the sophistication of its typical customer, the medium through which the offer is made, available technologies or methodologies for garnering consent, and cost-effective ways to receive cancellation requests and provide other customer service. In addition to these laws, the numerous guidance documents published by the FTC on general compliance requirements and the dozens of negative option cases brought by the FTC in the past decade demonstrate how to effect disclosures, consent, and cancellation mechanisms in negative option offers. That said, as the marketplace grows and technologies evolve, or if the FTC is

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<sup>7</sup> In enacting ROSCA, Congress observed that "the practices outlined in [ROSCA's negative option requirements] are already used by most legitimate e-commerce companies selling goods and services through negative option sales." S. Rep. No. 111-240, at 3 (2010).

<sup>8</sup> The TSR requires truthful, clear and conspicuous disclosures of the material terms of a negative option feature including, without limitation, that the customer must affirmatively act to avoid charges, the dates of the charges, and the steps the customer must take to cancel. 16 C.F.R. §§ 310.3(a)(1)(vii) and (a)(2)(ix).

<sup>9</sup> See 84 Fed. Reg. at 52,395; Rule Concerning the Use of Prenotification Negative Option Plans, 79 Fed. Reg. 44,271, 44,272 (July 31, 2014) (setting forth principles for complying with Section 5 of the FTC Act when making negative option offers, including disclosure of material terms, the appearance of disclosures, the timing of disclosures, obtaining consumer's affirmative consent, and cancellation procedures).

<sup>10</sup> See, e.g., the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693(r); the Postal Reorganization Act, 39 U.S.C. § 3009; Cal. Bus. & Prof. Code § 17602.

concerned that there is confusion about how to apply its negative option rules in new media, the FTC could provide industry with updated business guidance and FAQs, similar to how the FTC has addressed compliance in other areas that it regulates.

To the extent consumer harm continues to persist, it is not likely the result of inadequate or insufficient regulations for negative option marketing. Indeed, a prior Commission concluded that “[i]f sellers adequately disclose the terms and conditions of continuity and service plans to consumers, and if consumers agree to these terms and conditions – including the receipt of merchandise or the performance of services without prenotification – it is unlikely that any consumer injury will result.”<sup>11</sup> ESA and IA recognize that not everyone will approach subscription marketing in the same way, and some sellers may fail to do what is necessary to make adequate disclosures, obtain consent, and enable cancellation. However, the FTC Act, the TSR, ROSCA, and other laws and regulations provide adequate tools for the FTC to bring actions against marketers that the agency believes have not followed the rules. The dozens of cases brought by the FTC under existing negative option laws and regulations, as referenced in the Notice, provide numerous examples of how the FTC has successfully used these tools.

### **III. Prescribing content, placement, and procedural standards for negative option offers is unjustified.**

The Notice suggests that more specificity could be provided through regulation about how to avoid making deceptive subscription offers.<sup>12</sup> It would be impractical and unreasonable to mandate specific disclosure standards – beyond the existing, well-developed “clear and conspicuous” standard – that take into account all of the various iterations of a subscription offer

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<sup>11</sup> Trade Regulation Rule Regarding Use of Negative Option Plans by Sellers in Commerce, 63 Fed. Reg. 44,555, 44,559 (Aug. 20, 1998).

<sup>12</sup> 84 Fed. Reg. 52,396 (suggesting, for example, that “ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures”).

or the medium through which an offer may be made. For example, the multi-media environment of games makes subscription enrollment and management possible through various account management features included in game console networks, portable handhelds, web-based online games, and mobile applications. Each of these platforms offers different capabilities and user experiences based on network speeds, screen size, graphic presentation, sound, user control, and other factors. Similarly, customers of other Internet-based services engage with subscription offers through multiple devices, including phones, tablets, TVs, and voice assistants. These devices also provide various experiences for enrolling in and managing subscriptions.

While a legal standard to provide clear and conspicuous disclosure of subscription terms already exists, dictating exactly how to make such a disclosure – in terms of design, placement, content, and other factors – is unjustified and unprecedented. The FTC previously reasoned that marketers know best how to convey clear and conspicuous disclosures using “the tools at their fingertips – text, sound visuals, contrast, or color, to name just a few – to convey information effectively.”<sup>13</sup> There is no evidence to suggest that this long-standing policy should change now.

Businesses should be allowed flexibility in determining the most effective ways that they can provide customer service to consumers, including cancellation mechanisms used by consumers. In the interest of ensuring the highest customer satisfaction possible, many ESA and IA members have invested heavily in a wide array of customer service technologies and capabilities. Under the current, flexible framework, game publishers can tailor their account management features (such as the ability to cancel a subscription) to what is intuitive and easy for the consumer in that particular context. For example, with a game console network, players

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<sup>13</sup> See, e.g., *Full Disclosure*, Posting of Lesley Fair to FTC Business Blog, <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/full-disclosure> (Sept. 23, 2014, 11:32 AM) (noting that “clear and conspicuous” is “a performance standard, not a font size” and that “[the FTC] think[s] it would be a mistake to impose a one-size-fits-all approach” to making clear and conspicuous disclosures).



typically interact with the operator through the account management features available through the device or network (such as an online web portal). Maintaining this flexibility benefits consumers because they can control their subscription through a channel they are familiar using in other aspects of their experience with the product or service.

### **Summary and Conclusion**

The subscription marketplace has grown tremendously since the FTC last addressed the Negative Option Rule in 2014, and subscriptions are now undoubtedly mainstream. Consumers seek them out for their convenience and benefits, and businesses gain economic benefits that can be passed on to their customers. ESA and IA recognize the Commission's concern that some marketers may fail to make adequate disclosures, bill consumers without their consent, or make cancellation unnecessarily difficult. However, existing laws provide the Commission with ample law enforcement tools to use against marketers that violate those principles while retaining much needed flexibility for other businesses to meet consumer demands and expectations by offering a wide array of products and services on a negative option basis.

Thus, we urge the FTC not to amend the existing Rule to cover additional negative option plans or impose new rules for negative options. Instead, we recommend that the FTC can further the aim of protecting consumers by providing updated guidance to industry and by educating consumers about deceptive practices in the realm of negative option marketing practices.

Office of the Secretary, Federal Trade Commission  
December 2, 2019

ESA and IA thank you for the opportunity to submit these comments. We look forward to continuing to work closely with the Commission on these important issues. Please do not hesitate to contact us with any questions.

Sincerely,

**Entertainment Software Association**



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