



December 2, 2019

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

Re: The FTC Should Update Its Negative Option Rule

Truth in Advertising, Inc. (TINA.org) welcomes the opportunity to submit comments in conjunction with the Federal Trade Commission's ("Commission" or "FTC") October 2, 2019 request for comment.¹ These comments address the need for a modernized rule that covers negative option offers in all their forms and across all media. In particular, the rule should be updated to address the growing trend of deceptive conversion agreements – both free-to-pay and nominal-fee-to-pay – automatic renewals, and continuity agreements.

Unfortunately, deceptive negative option offers have become a multi-billion-dollar industry. On a regular basis, consumers find that they have been charged for long-forgotten subscriptions, or that they are unable to cancel a trial before being charged. Indeed, losses relating to such offers in just 14 cases the FTC has pursued over the past decade have totaled more than \$1 billion.²

Recognizing consumer vulnerability, the Commission initiated a review of its Negative Option Rule in 2009. The Commission's report, issued five-years later in 2014, concluded that amendment to the rule was not warranted at that time. The Commission reasoned that although negative option marketing was the cause of substantial consumer injury, the majority resulted from practices not covered by the Negative Option Rule, the then-recently enacted Restore Online Shoppers' Confidence Act ("ROSCA") and Telemarketing Sales Rule ("TSR") might prove adequate to address the issue.

¹ Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 191 (Oct. 2, 2019) [hereinafter, "FTC Notice"].

² See Better Business Bureau "Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements," at 2 (Dec. 2018) available at 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.

Since issuing its report, the FTC has brought 23 cases under ROSCA and several states' Attorneys General have done the same. Notwithstanding these efforts, the incidence of deceptive negative option offers continues to rise.³ Between 2015 and 2017, consumer complaints about free trials more than doubled.⁴ Over that same span, the Better Business Bureau (the "BBB") identified nearly 37,000 complaints – the average loss being \$186.⁵ The FBI's Internet Crime Complaint Center also recorded a rise in complaints about free trial offers, growing from 1,738 complaints in 2015 to 2,486 complaints in 2017, with losses totaling more than \$15 million over that time span.⁶ And these numbers are likely low because, *inter alia*, as FTC studies have found, less than 10% of fraud victims report their losses.⁷ Unsurprisingly, in 2016, one consumer survey found that unwanted fees associated with trial offers and automatically renewing subscriptions was the biggest financial complaint of consumers.⁸ Corresponding with this consumer dissatisfaction, more than 100 federal class actions have been filed on behalf of consumers complaining about various negative option terms and conditions since 2014.⁹

Further, consumers complaints (very often from senior citizens) concerning negative option offers are one of the most common types of complaint that TINA.org receives. Consumers generally complain about unwittingly being enrolled in a negative option plan and then finding it impossible to cancel the subscription. By way of example:

- “sent for the free bottle of . . . oil plus an extra one bottle they charged me \$98/93 . . . THAT IS FRAUD . . . i realize I have been scammed and as I am a pensioner [sic] they have taken my xmas money for my kids. i want to cancel the order and get my money back can you help me please as that amount for 1 bottle is outrageous there is no phone number to ring.”
- “[Company] is a Scam, you sign up online for the free trial but to cancel you must call in, when you select the option to cancel the membership you are put on hold and after about 40 minutes of being on hold their phone system disconnects the call. You can't reach anyone ever no matter what option you pick . . .”
- “Can you please help me out here. I don't know where to go [company] has ripped me off for over 4 years with multi charges for things I didn't even sign up for. The worst part is I submitted and canceled over the years and they have kept

³ This issue is likely exacerbated, in part, by increasing rates of digitization: without a physical item, like a book, arriving in the mail, or paying by writing a check, the only indication a consumer may have of a long-forgotten, converted subscription is an ambiguously labelled, recurring charge on their credit card. See Wang, Sophia, “One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation,” 26 *Cornell J. L. & Pub. Pol'y* 197, at 200 (Fall 2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Lake, Rebecca, “Report: Hidden Fees Are #1 Consumer Complaint,” mybanktracker.com, updated Oct. 16, 2018, available at <https://www.mybanktracker.com/money-tips/money/hidden-fees-consumer-complaint-253387>.

⁹ See TINA.org's Class-Action Tracker, available at <https://www.truthinadvertising.org/category/class-action-tracker/>.

charging me after it was documented canceled. At this point I literally feel like they have been stealing from me and I imagine they have done this to many other people.”

Seeking to address the problems associated with negative options, some states, cities, and even credit card companies have issued rules and legislation in an attempt to fill the gap in federal enforcement. Half of the states have laws specifically addressing negative option offers. However, much like the federal landscape, these laws differ significantly in scope, requirements, and category of products to which they apply.¹⁰ And this landscape is ever changing. In the past two years, thirteen new bills were introduced in state legislatures.¹¹ Four states – including California – and Washington D.C. enacted new negative option offer laws.¹² Two bills introduced in the U.S. House of Representatives – the Unsubscribe Act and TRUE Fees Act – sought to address aspects of negative option offers.¹³ And MasterCard and Visa established new rules to govern negative option offers.¹⁴ As a result, consumers receive different levels of protection depending on where they live geographically, or what credit card they use. The uniform protection an updated FTC rule can offer is much needed.

Though the rules relating to negative option offers vary, some noteworthy requirements should be included in any modification(s) or adoption of a new rule by the FTC. These requirements can help to protect consumers from the shifted balance of power created by negative option offers. They fall into a few different categories.

Specific and Easy Cancellation

The FTC should require companies to permit consumer cancellation of negative options in an easy and specific manner. The cancellation process should be *at least* as easy as the subscription process. At minimum, if the subscription was entered into online, then it should be able to be cancelled online.

Currently, the FTC rule states only that marketers must not impede cancellation procedures.¹⁵ ROSCA mandates only that, for goods and services offered on the internet, that there be a “simple mechanisms for a consumer to stop recurring charges,” but provides no specifics and no requirement that cancellation be online.¹⁶ This leaves consumers vulnerable to a company’s interpretation of what “simple” might mean.

¹⁰ See Laura Koewler Marion & Michael Jaeger, “State Automatic Renewal Laws,” Practical Law, W-018-7700 (2019).

¹¹ See Marion, Laura Koewler, “Automatic Renewal Laws in All 50 States,” Faegre Baker Daniels (Mar. 21, 2019), available at <https://www.faegrebd.com/-/media/files/collateral-pieces/automatic-renewal-laws-in-all-50-states-march-26-2019.pdf?la=en>.

¹² See Cal. Bus. & Prof. Code §§ 17601–17606 (California); N.D.C.C. §§51-37-01–51-37-06 (North Dakota); 9 V.S.A. § 2454a (Vermont); Va. Code Ann. §§ 59.1-207.45–59.1-207.49 (Virginia); D.C. Code §§28A-201–28A-221 (Washington D.C.).

¹³ 116 H.R. 1220 (TRUE Fees Act); 116 H.R. 2683 (Unsubscribe Act).

¹⁴ See Visa Rule, *infra* n.17; Petta, Paul, “Free Trials Without the Hassle,” MasterCard (Jan. 16, 2019), available at <https://newsroom.mastercard.com/2019/01/16/free-trials-without-the-hassle/>.

¹⁵ See FTC Notice, *supra* n.1, at 52395.

¹⁶ See 15 U.S.C. § 8403(3).

Conceivably, a letter sent by mail or a phone call would qualify, both of which may require a sufficiently substantial time-allocation to delay cancellation.

Visa's new rule offers an example of a solution. Beginning in April 2020, Visa will require merchants to provide an "easy way to cancel the subscription" online, akin to "unsubscribing" from an email distribution list."¹⁷ Similarly, California's new rule mandates that, if a consumer accepts an automatic renewal offer online, the company must provide an easy-to-use mechanism to terminate online, such as "a termination email formatted and provided by the business that the consumer can send to the business without additional information."¹⁸ Such a rule maintains a balance, preventing companies from creating more onerous processes from getting out of an agreement than from getting into one.

Notices and Reminders

Businesses should also be required to provide more reminders as part of their negative option offerings. Negative option offers flip the traditional business-to-consumer interaction on its head and assume silence or inaction is consent to be charged. When consumers relinquish control, they incur the additional burden of tracking their various subscriptions. If a consumer forgets about an expiring trial or a recurring charge, it can result in an inefficient allocation of consumer resources.¹⁹

For trial periods, notice and re-affirmance of consumer consent, prior to being charged, should be required. As it stands, both the FTC rule and ROSCA require only that a company disclose the terms of the offer and obtain the consumers consent prior to charging the consumer.²⁰ While a step in the right direction, consumers remain exposed. Consumers may forget about the trial and incur unwanted charges or enrollments at the end of the offer, particularly with long trial periods.

In this regard, the Negative Option Rule could be improved in two different ways. First, the rule could require companies to re-obtain consumer consent at the end of the trial period.²¹ This route was recently taken in Washington D.C., which now requires, for free trials lasting one month or more, that the company must (1) notify the consumer of the automatic renewal between one and seven days before the expiration of the free trial, and (2) obtain affirmative consent to the renewal prior to charging the consumer.²²

¹⁷ See "Updated Policy for Subscription Merchants Offering Free Trials or Introductory Promotions," Visa Business News (June 20, 2019), at 2, available at: <https://usa.visa.com/dam/VCOM/global/support-legal/documents/subscription-merchants-visa-public.pdf> [hereinafter, "Visa Rule"].

¹⁸ Cal. Bus. & Prof. Code §17602(c).

¹⁹ 48% of consumers have had a free trial convert to a paid subscription without realizing it. See Porche, Bradley, "Poll: Recurring charges are easy to start, hard to get out of," Creditcards.com (Aug. 21, 2017), available at <https://www.creditcards.com/credit-card-news/autopay-poll.php>

²⁰ See FTC Notice, *supra* n.1, at 52395.

²¹ An even more stringent requirement, in the case of free trials, might be to prohibit companies from obtaining a consumer's billing information until the end of the trial period.

²² See D.C. Code § 28A-203. Washington D.C.'s Automatic Renewal Protections Act of 2018 applies only to contracts with an initial term of 12+ months or that will automatically renew for a term of one month. However, any new rule adopted by the FTC should not be so limited.

Alternatively, the rule could require companies to provide notice a designated period of time prior to the expiration, including instructions on how to cancel the subscription and avoid charges.²³ This route was taken by Visa in its new rules, which require that merchants send an electronic reminder with a link to an online cancellation page seven days before a trial period expires.²⁴ Either route, or a combination of both, would go a long way in protecting consumers from incurring unwanted charges when trial periods have elapsed.

For continuity plans and automatic renewals, particularly those online, companies should be required to provide regular, ongoing notice of the terms of the agreement with instructions on how to cancel. Neither FTC guidance nor ROSCA provide for such a requirement.

After initially consenting to a plan, the only reminder some consumers may receive is a single line item on their credit card statement. There are myriad reasons why this may prove insufficient: the recurring charge may be small, it may be ambiguously worded, the consumer activated the auto-pay feature on the credit card and does not regularly review statements, etc. Any one of these reasons, or a combination of multiple, can result in an inefficient allocation of consumer resources. The Unsubscribe Act provides the solution in the form of quarterly notifications. Each quarter after the introductory period of an online trial offer, or while an online continuity plan remains in effect, businesses would be required to “provide the consumer with a copy of the notification of the terms of the contract.”²⁵ Such a requirement is important to protect consumers from paying for products or services they do not want or need.

Notice of Material Changes

Companies should be required to notify consumers of any material changes to the terms of a subscription and an opportunity to cancel the subscription before the terms go into effect. As it stands, both FTC guidance and ROSCA require material terms to be disclosed at the outset of the offer, but do not specifically address instances in which the terms may change. This potentially leaves consumers subject to new terms with little to no notice.

Several states have explicitly addressed the issue. For instance, the law in Virginia, California, and Oregon requires that, if there is a material change in the terms of an automatic renewal or continuous service offer, the business “shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”²⁶ Similarly, a bill introduced into the House in 2019, the Unsubscribe Act, would have

²³ A short period of time, such as seven days, is crucial because, if too long, consumers may yet again forget to cancel. Trial periods for less than seven days could be exempt from such a rule.

²⁴ See Visa Rule, *supra* n.17 at 2.

²⁵ 116 H.R. 2683 § 2(b)(2) and (c)(2).

²⁶ Va. Code Ann. § 59.1-207.46; Cal. Bus. & Prof. Code § 17602 (same); Or. Rev. Stat. § 646A.295 (same).

required companies to “provide the consumer with a notification of the terms of the agreement as changed before the change takes effect.”²⁷ Such a requirement would ensure consumers consent to, or, at least, are aware of, any changes to their subscription.

In the end, the Negative Option Rule needs to be updated to ensure that both consumers and businesses can obtain the full benefits of negative option offers. In its current form, the rule leaves consumers vulnerable to deception, and incentives businesses to silently hope consumers forget about them. These updates to the Negative Option Rule would be minimally burdensome to companies, essentially requiring them to be forthcoming and straightforward with its customers. In the absence of an updated rule, the trend of deceptive trial offers and automatically renewing subscriptions will continue to grow.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'B-Patten', written over a horizontal line.

Bonnie Patten
Laura Smith
Michael J. Springer
Truth in Advertising, Inc.
P.O. Box 927
Madison, CT 06443

²⁷ 116 H.R. 2683 § 2(d) (introduced May 10, 2019).