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Re: Negative Option Rule Proposed Rule, 16 C.F.R. 425 (FTC-2023-0033)

Dear Chair Khan, Commissioner Slaughter, & Commissioner Bedoya:

We write to express our concerns about two aspects of the proposed rule that would, as drafted, disrupt the careful balance Congress struck in crafting the Federal Trade Commission Act. If the FTC is to have the authority to impose civil penalties for ordinary misrepresentations, even for certain classes of transactions, only Congress can confer that power—and only by amending the Act.

Automatic renewals are nothing new, even if some consumers may find them surprising. How companies implement such "negative option" offerings may sometimes be unfair or deceptive. That's why Congress enacted the Restore Online Shoppers' Confidence Act.[1] A new rulemaking to consolidate existing rules on negative option marketing may well be appropriate. Unfortunately, "[t]he scope of the proposed Rule is not confined to negative option marketing," as former Commissioner Christine Wilson warned in her dissent from the issuance of the proposed amendment: "It also covers any misrepresentation made about the underlying good or service sold with a negative option feature."[2]

The proposed rule thus presents a great many companies with a difficult choice: abandon negative option marketing altogether, or risk incurring civil penalties not only for the negative option marketing itself, but also for "any material fact related to the underlying

[1] 15 U.S.C. §§ 8401-8405.

[2] Dissenting Statement of Commissioner Christine S. Wilson on Notice of Proposed Rulemaking, Negative Option Rule at 2 (Mar. 23, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissent-negative-option-rule.pdf.

good or service."[3] As former Commissioner Wilson noted, "even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple,"[4] the FTC could—for the first time—obtain civil penalties for claims involving product efficacy, national origin, how information about the consumer or the transaction is shared, used or secured, and much more.

Negative option marketing is not inherently fraudulent; it is "used lawfully and non-deceptively in a broad array of common transactions—newspaper subscriptions, video streaming services, delivery services, etc."[5] Automatic renewal provides convenience to the consumer and some degree of predictability to businesses: they can assume that subscriptions will not lapse inadvertently, that consumers will not complain about disrupted service, *etc*. In a world without negative option marketing, businesses would have to bombard consumers with reminders to renew their subscriptions, much as European websites must bombard consumers with notices about cookies. Given these transaction costs, negative option marketing will likely remain widespread among legitimate businesses.

The proposed rule would fundamentally transform the Commission's remedial powers; in effect, it would rewrite the FTC Act with respect to any product subject to negative option marketing. Congress has never empowered the FTC to impose civil penalties for ordinary misrepresentations—and for good reason. The original FTC Act gave the FTC exceptionally broad power over "unfair or deceptive acts and practices" (UDAP)[6] but authorized only injunctive relief. Only later did Congress authorize restitution and civil penalties, and only in narrow circumstances. Congress carefully "counterbalance[d]" the exceptionally "amorphous" standard of Section 5 with a "detailed framework" that ensures a defendant always has "fair notice" of what *specific* conduct *counts* as "unfair or deceptive"—before being ordered to pay money, whether in the form of restitution[7] or civil penalties.[8] Section

[3] Negative Option Rule Proposed Rule, 88 Fed. Reg. 24716, 24734 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. 425), https://www.govinfo.gov/content/pkg/FR-2023-04-24/pdf/2023-07035.pdf.

[4] Wilson, *supra* note 2.

[5] Wilson, *supra* note 2, at 3.

[6] As the FTC recognized in its 1980 Unfairness Policy Statement, Section 5 "was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion." In re International Harvester Co., 104 F.T.C. 949, 1073 (1984).

[7] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 774 (7th Cir. 2019).

[8] 15 U.S.C. § 45(l) (violation of a final order); 15 U.S.C. § 45(m)(1)(B). "Where the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission. To accomplish this, the Commission must show that the violator had 'actual knowledge that such act or practice is unfair or deceptive and is unlawful' under Section

5(m)(1)(b) authorizes the FTC to ask federal courts to impose civil penalties for violations of FTC rules committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."[9]

The FTC would invoke this provision in seeking civil penalties for misrepresentations not only about negative option marketing, but about "any material fact related to the underlying good or service."[10] Under the proposed rule, it would be as if the FTC had taken a red pen to the Act and inserted an arrow pointing up from Section 5(m)(1)(b) (authorizing penalties for rules) to Section 5(b)'s "amorphous" standard of deception. If the FTC can do this with respect to products subject to negative option marketing, it can do so more broadly. Increasingly, it will seek civil penalties in first-time deception cases by codifying more and more kinds of misrepresentations in trade regulation rules.

True, the FTC would still have to show that the company had "actual knowledge or knowledge fairly implied" that its representation about a product was deceptive.[11] But this is not the only part of the statutory framework that matters. What "counterbalances the FTCA's amorphous 'unfair or deceptive practices' standard" is, as the Seventh Circuit made explicit, the *combination* of Section 5(m)(1)(b)'s knowledge requirement with Section 18(a)'s "requir[ement that] the Commission . . . . give defendants fair notice . . . through . . . rules that 'define with specificity' prohibited acts."[12] Section 5 is the anthesis of "specific,"[13] so its prohibition on deception cannot form the basis for a rule whose violation can lead to civil penalties. The knowledge requirement alone cannot ensure that defendants have fair notice before being subjected to civil penalties, as the Constitution requires.[14]

5(a)(1) of the FTC Act." *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

[9] 15 U.S.C. § 45(m)(1)(A).

[10] Negative Option Rule Proposed Rule, 88 Fed. Reg. 24716, 24734 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. 425), https://www.govinfo.gov/content/pkg/FR-2023-04-24/pdf/2023-07035.pdf.

[11] 15 U.S.C. § 45(m)(1)(A).

[12] 937 F.3d at 774, quoting 15 U.S.C. § 57a(a)(1)(B) ("the Commission may prescribe. . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices. . .").

[13] The FTC commonly bars companies from engaging in further unfair or deceptive acts and practices in orders issued after a violation of the Act, then imposes civil penalties when companies engage in such acts or practices. But unlike Section 18(B), Section 5(b) does not require "specificity" in such issuing orders, nor does Section 5(l) require specificity or even knowledge before the FTC may obtain civil penalties in enforcing such orders.

[14] Although "elementary notions of fairness" always "dictate a person receive fair notice" of what conduct to avoid, the "strict[er] constitutional safeguards" around "judgments without notice" are "implicated by civil penalties." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 & n.22 (1996); see also FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which

We urge two changes. First, the proposed rule must focus only on negative option marketing. Specifically, the proposed misrepresentation rule (§ 425.3) should be revised as follows:

> In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") for any Negative Option Seller to misrepresent, expressly or by implication, any material fact related to ~~the transaction, such as~~ the Negative Option Feature~~, or any material fact related to the underlying good or service~~.

Yet a rule thus focused on negative option marketing would still be far too general to provide the specificity required by Section 18(a). The Commission has never issued a trade regulation rule as general and far-reaching as this one. Trade regulation rules promulgated under Magnuson-Moss illustrate the kind of specificity the FTC has previously provided. For example, the Business Opportunity Rule prohibits no fewer than 21 different kinds of misrepresentation regarding business opportunities.[15] This specificity is typical of trade regulation rules.[16] The Commission has usually been similarly specific even when it issues "guides" even though these, being only non-binding guidance and not triggering civil penalties, are not subject to Section 18(a)'s specificity requirement (violations of which cannot be the basis for obtaining civil penalties under Section 5(m)(1)(B)).[17]

Only in such guides has the Commission included language that is un-specific in a way that might resemble the proposed rule. Even here, we could find only two examples. Neither

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regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.").

[15] 16 C.F.R. § 437.6.

[16] *E.g.*, Unfair Credit Practices, 16 C.F.R. § 444.2 (1984); Misrepresentations, 16 C.F.R. § 453.3 (1994); General Duties of a Used Car Dealer, 16 C.F.R. § 455.1 (2016); Separation of Examination and Dispensing, 16 C.F.R. § 456.2 (1992); Labeling and Advertising of Home Insulation, 16 C.F.R. § 460 (1979).

[17] The Guides for the Jewelry, Precious Metals, and Pewter Industries prohibit "misrepresent[ing] that an industry product contains silver, or to misrepresent an industry product as having a silver content, plating, electroplating, or coating," and provides five specific examples, including "Use of the words 'solid silver,' 'Sterling Silver,' 'Sterling,' or the abbreviation 'Ster.' to mark, de-scribe, or otherwise represent all or part of an industry product unless it is at least 925/1,000ths pure silver." 16 C.F.R. § 23.5. The FTC's Guides for Private Vocational and Distance Education Schools declare it deceptive for an "Industry Member to misrepresent, directly or indirectly, expressly or by implication, in advertising, promotional materials, recruitment sessions, or in any other manner, the size, location, services, facilities, curriculum, books and materials, or equipment of its school or the number or educational qualifications of its faculty and other personnel," and provides no fewer than eleven concrete examples, including misrepresenting "the qualifications, credentials, experience, or educational background of its instructors, sales representatives, or other employees." 16 C.F.R. §§ 254.4(a), (a)(1).

could have been issued as trade protection rules because both clearly lacked the specificity required by Section 18(a).[18]

We urge the Commission to follow the example of its past Magnuson-Moss rulemakings and focus on specific, concrete examples of acts or practices related to negative option marketing that may be deceptive. The proposed rule provides plausible examples of what these might be in its discussion of prevalence, including "lack of informed consumer consent, lack of clear and conspicuous disclosures, failure to honor cancellation requests and/or refusal to provide refunds to consumers who unknowingly enrolled in plans"; "failure to provide consumers with a simple cancellation method"; "deny[ing] consumers refunds and forc[ing] them to pay to return the unordered goods"; "require[ing] consumers to cancel using a different method than the one used to sign up for the program"; and "forc[ing] consumers to listen to multiple upsells before allowing cancellation."[19] These examples are specific and concrete in much the same way as the practices prohibited by past trade regulation rules.

To craft a rule that will be both effective in protecting consumers and capable of withstanding judicial challenge, the Commission must hold a hearing to explore how the rule should, as Section 18(a) requires, "define with specificity acts or practices which are unfair or deceptive acts or practices."[20] Congress provided for hearings precisely because the Magnuson-Moss Act requires specificity, and only a full discussion of concrete examples can lead to specific rules. As drafted, courts will invalidate the FTC's negative option rule, which will benefit no one.

Sincerely,

[18] Under the Guides for Private Vocational and Distance Education Schools, "[i]t is deceptive for an Industry Member to misrepresent, directly or indirectly, expressly or by implication, the nature of the school, its Accreditation, programs of instruction, methods of teaching, or *any other material fact* through the use of any trade or business name, label, insignia, or designation, or in any other manner." 16 C.F.R. § 254.2(a). Clearly, the highlighted language would not provide the specificity required by Section 18(a). At least that guide was narrow in its application, covering only members of a small industry, whereas the rule proposed here would cover countless companies across the economy. The Commission's Endorsement Guide says "[a]dvertisers are subject to liability for false or unsubstantiated statements made through endorsements. . . ."16 C.F.R. § 255.1(d). As a guide rather than a trade regulation rule, this provision does not declare all such statements unlawful; rather, it says that they may be, depending on the specific circumstances of the case.

[19] Negative Option Rule Proposed Rule, 88 Fed. Reg. 24716, 24720-21 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. 425), https://www.govinfo.gov/content/pkg/FR-2023-04-24/pdf/2023-07035.pdf.

[20] 15 U.S.C. § 57a(a)(1)(B).

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