June 23, 2023

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

RE: Request for Comment on Negative Option Rule; P064202

The Interactive Advertising Bureau (IAB) welcomes this opportunity to submit this comment in response to the Federal Trade Commission's request for public comment on its Notice of Proposed Rulemaking to amend the existing Negative Option Rule ("NPRM").[1] Founded in 1996 and headquartered in New York City, the IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, the IAB develops both technical standards and best practices for our industry. In addition, the IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing. The organization is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

Autorenewal marketing has grown rapidly in the time period since the Commission last considered updating the Negative Option Rule[2], and IAB supports the Commission's efforts to consider how best to protect consumers in this important area. Crafting the right regulatory approach here is critical, because autorenewals offer substantial benefits to consumers.[3] Autorenewing subscriptions save consumers time and reduce their frustration by allowing them to make an informed choice about a product or service once, and then continue to enjoy that product or service for as long as they want without having to actively reenroll or manage their payment. Consumers also benefit from broader selection and the lower prices that businesses can offer through a subscription model. Subscriptions often offer disproportionate value to consumers compared to buying items a la carte (e.g. how customers of video or music subscriptions can access a wide library of content that would cost much more to purchase). These benefits include free trial conversions, which offer consumers the chance to try out new products and services at no cost so that they can make a more informed decision about whether to make a purchase. Businesses also benefit from these arrangements by getting the opportunity to demonstrate the value of their

[1] Negative Option Rule, 88 Fed. Reg. 24716 (Apr. 24, 2023) (hereinafter "NPRM").
[2] Rule Concerning the Use of Prenotification Negative Option Plans, 79 Fed. Reg. 44271 (July 31, 2014).
[3] Throughout this comment, IAB uses the term "autorenewal" and "subscription" to refer generally to negative options, including free trial conversions.

product or service through free trials and earn new customers. IAB has significant concerns that the NPRM, if promulgated as proposed, will inadvertently cause significant harm to both consumers and enterprises in the form of increased costs, harm to innovation, and a reduction in product and service selection. IAB's concerns also include that the NPRM fails to meet the requirements of the Magnuson-Moss Warranty – Federal Trade Commission Improvements Act ("Magnuson-Moss") and that it failed to elicit and therefore consider important implications of this rulemaking. As a result, if the NPRM is promulgated as proposed, it will stifle legitimate companies offering autorenewals that consumers enjoy, without providing meaningful consumer protection benefits.

I. Overarching Issues

While IAB welcomes the Commission's goal of providing clarity to the current legal framework governing autorenewals, IAB has significant concerns that the NPRM fails to comply with the Commission's statutory rulemaking obligations. The resulting NPRM thus fails to consider critical substantive issues that will have a major impact on legitimate industry and the consumers that have benefitted from those legitimate offers for years.

A. Magnuson-Moss Requirements

First, as the NPRM itself recognizes, the Commission is required to abide by the terms of "Magnuson-Moss" rulemaking when acting pursuant to Section 18 of the Federal Trade Commission Act.[4] In several respects explained below, the Commission's NPRM falls short of Magnuson-Moss's heightened requirements:

1. Failure to Provide Sufficient "Advance Notice of Proposed Rulemaking."

Under Magnuson-Moss, the Commission is required to "publish an advance notice of proposed rulemaking" ("ANPR") prior to issuing an NPRM.[5] While the Commission issued an advance notice on October 2, 2019, that notice was insufficient in light of the breadth and scope of the Commission's NPRM.[6] Specifically, the Commission failed to provide notice that it would propose to expand the scope of the Negative Option Rule to cover *all* material facts about an autorenewal transaction, not just those relating to the autorenewal feature itself; would require an entirely new framework for assessing consent; would propose to ban so-called "saves" before cancellation absent the consumer's consent to receive the information; and would impose a renewal reminder requirement. By failing to raise these proposals in the ANPR, the Commission deprived stakeholders of the opportunity to contribute feedback about these requirements and develop the record. This undeveloped record has resulted in flawed reasoning throughout the NPRM, including for example, by failing to consider equally effective and less costly alternatives, the potential impact of the proposal on small businesses, and the significant costs associated with complying with the proposal. If adequate notice had been provided through an ANPR, commenters would have raised these issues for the Commission's consideration before it issued the NPRM.

[4] *See* 15 U.S.C. § 57a.
[5] *Id.* § 57a(b)(2)(A).
[6] *See* Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52393-01 (Oct. 2, 2019).

2. *Failure to Identify Covered Acts or Practices "With Specificity."*

The Commission may only promulgate rules under Magnuson-Moss if those "rules . . . define *with specificity* acts or practices which are unfair or deceptive."[7] This requirement is crucial to give regulated parties notice of the types of acts or practices that are unfair or deceptive and will be punished with heightened penalties. As Congress observed when passing this provision, "the prohibitions of section 5 of the Act are quite broad, [so] trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct."[8] As further explained later in this comment, the FTC proposes to extend the Negative Option Rule to cover *all* material facts—even those that do not relate to the autorenewal feature itself. The NPRM fails, however, to identify which claims would constitute a material fact, and thus fails to identify covered acts with the requisite level of specificity.

3. *Failure to Identify "Prevalent" Issues.*

The Commission may only issue an NPRM under Magnuson-Moss where "the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*."[9] The unfair or deceptive acts or practices "which are the subject of the proposed rulemaking" are the acts or practices defined "with specificity" as described above. Accordingly, the prevalence determination should correspond to the specific acts or practices identified as deceptive or unfair —and prohibited—by the NPRM. The Commission may make the determination that an act or practice is "prevalent" only if "it has issued cease and desist orders regarding such acts or practices" or "any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices."[10] But for many of the NPRM's proposed requirements—*e.g.*, its requirement to obtain *two* separate forms of consent from a consumer before entering into an autorenewal transaction—the Commission has failed to demonstrate how the broad proposals in the NPRM are supported by corresponding prevalent deceptive or unfair practices in the rulemaking record. Instead, the "prevalent" practices identified throughout the record are narrow, while the acts or practices that the NPRM addresses sweep significantly more broadly. In many instances, which are discussed in detail below, a far narrower provision would have addressed the deceptive practices the NPRM identifies. The Commission appears to be relying upon isolated and egregious examples of conduct that clearly violates current law in order to support the issuance of regulations that will broadly prohibit legitimate autorenewal experiences. This tactic short circuits the process set forth in Magnuson-Moss, and will have significant negative consequences for businesses and consumers.

B. *Administrative Procedure Act Requirements*

Second, the NPRM fails to comply in certain respects with the requirement of reasoned decision-making under the Administrative Procedure Act ("APA"), which prohibits the Commission from taking action that, *e.g.*, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right;" "in excess of statutory

[7] 15 U.S.C. § 57(a)(1)(B) (emphasis added).
[8] H.R. Rep. No. 93-1606, 93d Cong., 2d Sess. 33, 31 (1974).
[9] 15 U.S.C. § 57a(b)(3) (emphasis added).
[10] *Id.*

jurisdiction" or "authority;" "without observance of procedure required by law;" or "unsupported by substantial evidence."[11] Among other deficiencies, explored in greater detail below, the NPRM proposes certain measures that contravene the APA because they are not in accordance with law, are substantially more burdensome than equally effective alternatives, and deviate from past agency practice without explanation.

1. Failure to Act in Accordance with Law.

The APA forbids the Commission from acting "inconsistent with" the Commission's "statutory mandate," as well as "frustrat[ing] the policy that Congress sought to implement."[12] Among other problematic provisions, the NPRM attempts to circumvent the limitations on the Commission's remedial authority that Congress drafted into the Federal Trade Commission Act ("FTCA"), and which were recently articulated by the United States Supreme Court in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). Specifically, the NPRM would grant the Commission authority to seek monetary remedies against a first-time offender for misrepresentations that would not give rise to monetary relief if made outside the context of an autorenewal agreement, in clear tension with the text of the FTCA and the Supreme Court's holding in *AMG*. The NPRM would also require cancellation of an autorenewal agreement to be "at least as simple" as the method the consumer used to sign-up, which, as explained below, is inconsistent with the Restore Online Shoppers' Confidence Act's ("ROSCA") "simplicity" standard.

2. Failure to Consider Less Burdensome Alternatives.

In promulgating rules compliant with the APA, the Commission also must consider, and explain its reasons for rejecting, narrower and less burdensome regulatory measures for accomplishing its goals.[13] In several respects, the Commission's NPRM is substantially overbroad and overly burdensome, such as "by requiring marketers to obtain consent for the negative option feature separately from the rest of the offer and other parts of the transaction," whereas the Commission's objectives could be accomplished by a far narrower provision that, *e.g.*, required clearer disclosure of the presence of the automatic renewal feature.

3. Failure to Explain Deviations from Past Practice.

As the Supreme Court explained in *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the APA requires an agency to "display awareness" when "changing position" on an issue under its regulatory authority, and to justify such a change rather than "depart[ing] from a prior policy sub silentio."[14] In the NPRM, however, the Commission would, among other things, impose a requirement that consumers not have to "take any action" to see a

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[11] *See* 5 U.S.C. § 706(2).

[12] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

[13] *See, e.g.*, *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816 (D.C. Cir. 1983) (agency's "failure to consider such alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious, in violation of section 10(e) of the APA"); *Nat'l Min. Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) ("We have no difficulty concluding that this regulation is both arbitrary and capricious because it is irrationally overbroad, and we therefore vacate it.").

[14] *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

disclosure, without explaining why the Commission has departed from its longstanding guidance, including in its Dot Com Disclosures, that scrolling and hyperlinking are permissible in certain space-constrained circumstances.

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As explained in greater detail below, IAB urges the Commission to reconsider its NPRM in light of these concerns that the Commission has failed to satisfy applicable statutory rulemaking requirements. IAB respectfully requests that the Commission instead adopt a rule that would effectively target and deter the deceptive practices employed by bad actors that negatively impact consumers, while preserving the flexibility of the current approach that has fostered innovation and enhanced consumer choice.

II. Misrepresentations

IAB has serious concerns with the Commission's proposed addition of section 425.3 on "misrepresentations," which makes it a violation for a 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*."[15] By proposing to extend the NPRM to *any* material fact about an autorenewal transaction—including the overwhelming majority of facts about a product or service that are completely unrelated to the autorenewal—this proposed section fails to satisfy the obligations imposed by Magnuson-Moss and to consider the NPRM's important consequences on consumers as well as businesses. Accordingly, IAB urges the Commission to revise this provision, so that it is limited to misrepresentations of material facts about only the autorenewal feature itself.

A. Negative Impact on Consumers and Businesses

As an initial matter, IAB is concerned that the Commission has failed to consider—and as explained below declined to elicit public input on—the significant negative impact of this provision on both consumers and any consumer-serving business that seeks to offer autorenewals. For example, because of the breadth of this provision and corresponding penalties, many subscription businesses might decide that the risks outweigh the benefits of offering an autorenewal, even if the arrangement is one that consumers would prefer and enjoy. Small businesses in particular will likely not be able to take this risk, and will be deterred from offering autorenewals at all. This proposal will thus create an arbitrary division in the marketplace between products offered on an autorenewing basis and those that are not—autorenewing subscriptions will become less common and significantly more costly because of the regulatory risks, which will deprive consumers of the option to choose this convenient and cost-effective model. Ultimately, businesses and consumers will be harmed by the loss of convenience and savings offered by autorenewal arrangements. The NPRM does not address any of these considerations, let alone any potential alternatives that might be less harmful, nor does it explain why the NPRM's extreme breadth is necessary. Thus, IAB is concerned that the Commission has failed to consider several critical aspects of this rule.

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[15] 16 C.F.R. § 425.3 (emphasis added).

B. Inconsistency with AMG

In addition, IAB has concerns that the NPRM is "not in accordance with law."[16] Specifically, as Commissioner Wilson noted in dissent from the NPRM, by proposing to extend the Negative Option Rule to material facts about an autorenewal transaction that do not relate to the autorenewal itself, the NPRM represents an end run around the Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). In *AMG*, the Court held that the Commission does not have authority to seek equitable monetary relief in a civil action against a first-time offender under Section 13(b). The NPRM, however, would grant the Commission authority to seek monetary remedies against a first-time offender for misrepresentations that would not give rise to monetary relief if made outside the context of an autorenewal agreement—thus attempting to circumvent the remedial limitations on the Commission's authority articulated by the Supreme Court in *AMG*.[17] This section of the NPRM should thus be removed, because it is "not in accordance with the law,"[18] and is "inconsistent with" the Commission's "statutory mandate."[19]

C. Failure to Satisfy Magnuson-Moss Requirements

Furthermore, the section on "misrepresentations" fails to satisfy the requirements of Magnuson-Moss rulemaking—and goes far beyond the proper subject matter of this rulemaking, which should be confined to addressing the specific risks posed to consumers by deceptive or unfair marketing of automatic renewals.

First, IAB has concerns that the Commission has failed to satisfy the statutory requirement to provide "a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission" in the form of an ANPR.[20] Notably, the Commission did not disclose that it was considering dramatically expanding the scope of the Negative Option Rule by incorporating a section on misrepresentations in the ANPR published in 2019.[21] By failing to raise this topic in the ANPR, the Commission did not identify the topics it was considering for inclusion in the rule, it did not identify the objectives the Commission was seeking to achieve, nor any regulatory alternatives the Commission was considering – all requirements imposed by Magnuson-Moss. The Commission's failure to identify such a significant change resulted in a failure to solicit important public input on a major change to the regulatory framework. Without that public input, the Commission did not possess all of the relevant information in order to properly assess the costs of the proposed change for both businesses and consumers. The resulting record in response to the ANPR therefore does not support this proposed relief.

[16] 5 U.S.C. § 706(2).
[17] A court would be unlikely to accept the Commission's position that ROSCA somehow implicitly authorized the approach taken in the NPRM by requiring that a negative option provide "text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information." 15 U.S.C. § 8403(1).
[18] 5 U.S.C. § 706(2).
[19] *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32.
[20] 15 U.S.C. § 57a(b)(2)(A).
[21] 84 Fed. Reg. 52393-01.

Second, IAB has concerns that the Commission has failed to show that it has "reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*."[22] The Commission has cited no comments supporting this expansion, and the Commission's general assertion that its "enforcement experience" demonstrates that misrepresentations about the underlying product or service are prevalent does not meet the prevalence standard.[23] The cases the Commission has cited reflect a variety of cases involving an array of different underlying product/service categories, and do not demonstrate a broader pattern of unfair or deceptive practices associated with autorenewal offers.[24] Such different underlying fact patterns cannot support the broad proposition that any misrepresentation about the underlying product or service offered as part of autorenewal offers constitutes a prevalent deceptive or unfair act or practice; otherwise, the prevalence requirement would have little meaning.[25] Accordingly, IAB strongly urges the Commission to revise this section so that it does not apply to all misrepresentations about the underlying product or service.

Third, IAB has concerns that the Commission has failed to define "with specificity" the acts or practices that are unfair or deceptive.[26] The NPRM's examples of the types of claims that this provision would cover exemplify this lack of specificity: claims about "costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation, or any other material representation."[27] Such a broad provision fails to give companies notice of the sorts of practices that are prohibited, which undermines the purpose of a formal rule. And many of these examples relate to the autorenewal feature itself, not the underlying product or service, making it even less clear what types of claims the Commission plans to use this provision to prohibit.

III. Disclosures

IAB has several concerns with the newly proposed disclosure requirements.

A. Negative Impact on Consumers and Businesses

First, as a general matter, IAB cautions the Commission against adopting overly prescriptive disclosure requirements that sacrifice the flexibility that companies have grown accustomed to, based on the well-established current legal regime. The NPRM's disclosure requirements are both granular and rigid with the effect of forcing *all* businesses that offer subscriptions to their customers – regardless of the industry – to conform to a single set of content and presentation requirements. This inflexible, one-size-fits-all approach to disclosures fails to recognize that subscriptions are a familiar feature of today's Internet economy, and consumers are

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[22] 15 U.S.C. § 57a(b)(3) (emphasis added).
[23] NPRM, at 24726.
[24] *See* NPRM, at 24726 n. 65 (citing cases involving misleading claims about weight loss, endorsements, memory supplements, joint pain relief, removing wrinkles, background reports, arthritis relief, earnings, BBB ratings, government affiliation, and credit card offers).
[25] At most, these cases indicate that certain industries might be affected by a prevalence of misrepresentations, and a regulation focused on those misrepresentations might be warranted or effective at addressing the prevalent practice.
[26] 15 U.S.C. § 57a(a)(1)(B).
[27] NPRM, at 24726.

informed and active participants in this marketplace.[28] Consumers benefit from these offers in terms of convenience and cost savings, and it does not serve their interests to restrict the ability of businesses to adapt their offers to the needs and interests of their customers. Furthermore, new technology is almost certainly going to affect the way consumers interact with businesses in the future; the NPRM fails to anticipate these changes by only contemplating a specific type of consumer-device interaction. A consumer's ability to comprehend important information is inherently tied to the user experience commonly used for the particular device type (e.g., scrolling is common for smart watches), and thus imposing such a prescriptive set of a requirements will constrain consumer choice and convenience with respect to future technologies. This approach thus contradicts the Commission's stated goal of providing for flexibility to allow for innovation.[29]

In addition, the disclosure requirements imposed by the NPRM will be especially difficult to navigate and costly to implement given the pre-existing patchwork of state laws that govern automatic renewals across the country. Those state laws frequently have their own defined set of required disclosures, which do not match the Commission's proposal.[30] The NPRM does not discuss this issue or the potential implications for businesses or consumers.[31] Accordingly, companies that operate across multiple states will be forced to compile this collection of varying requirements and apply all of them to their sign-up and cancellation experiences, to ensure they comply in every jurisdiction. Consumers will end up overloaded with information, presented in an ineffective manner, as businesses attempt to satisfy the NPRM and numerous other state laws simultaneously.[32] Moreover, attempting to comply with this patchwork of requirements will increase costs for companies, making it more difficult to offer these types of services. Companies will have to invest in costly compliance programs that cover numerous jurisdictions, rather than investing in and developing better products for their customers. These costs will disproportionately impact small businesses, which are unlikely to have the resources to dedicate to a large-scale and complicated compliance program. These costs will ultimately be passed on to consumers, lead to a reduction in the goods and services that are currently offered via subscription arrangements, and create a barrier for small businesses seeking to enter the marketplace.

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[28] *Compare, e.g., Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (agency action arbitrary and capricious where agency "eschew[ed]" one "rigid, one-size-fits-all rule" approach with "a different—but equally inflexible—metric"), *with Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 234 (D.D.C. 2012) (agency action not arbitrary and capricious where agency recognized that, "[b]ecause a one-size-fits-all approach does not always work," regulated parties could "petition for tailored rules as an alternative to the 2001 nationwide Roadless Area Conservation Rule").

[29] NPRM, at 24727.

[30] *See* Cal. Bus. & Prof. Code § 17601(b) (defining the "automatic renewal offer terms" to include "that the subscription or purchasing agreement will continue until the consumer cancels;" "the description of the cancellation policy that applies to the offer;" "the recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known;" "the length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer;" and "the minimum purchase obligation, if any").

[31] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("An agency action is arbitrary and capricious if the agency has 'entirely failed to consider an important aspect of the problem[.]'").

[32] *See*, *e.g.*, *Improving online disclosures with behavioural insights*, OECD (Apr. 2018), available at https://www.oecd.org/sti/consumer/policy-note-improving-online-disclosures-behavioural-insights.pdf ("Consumers can be subject to information overload…put off a decision or make the wrong decision if confronted with long or complex information…Important disclosures need to be as simple as possible.").

B. *Disclosure Content*

The disclosure content requirements in section 425.4 are not supported by the Commission's reasoning. Specifically, the Commission has not explained how providing such an extensive amount of information to the consumer at sign-up will provide them with "the information they need to understand the terms of their enrollment" without mandating a "long list of prescriptive disclosures, such as renewal dates or business contact information."[33] The NPRM itself acknowledges that more information is not necessarily better, stating that "[t]here is an inherent tradeoff between providing consumers with additional information and ensuring they see and understand the information they need. . . ."[34] But the NPRM appears to take precisely the approach it intends to avoid. For example, the NPRM requires disclosure of "the information necessary for the consumer to cancel the negative option feature."[35] But lengthy cancellation instructions all disclosed at sign-up are not necessary for the consumer to cancel, nor has the Commission explained why they are likely to be helpful or effective. On the contrary, such lengthy instructions are unhelpful at that moment in the consumer journey. A consumer cannot cancel a subscription they have not yet signed up for. A more effective strategy would be to make clear but concise disclosures of where that information can be found, so consumers can find that information if and when it is relevant to them.[36] Similarly, the "deadline . . . by which the consumer must act in order to stop all charges" and the "date . . . each charge will be submitted for payment" vary on an individual consumer basis and are thus not only impractical to disclose at sign-up, but are so specific and technical that they could create confusion rather than improve clarity, if disclosed on the sign-up page alongside other, more important, information.[37] The NPRM is also inconsistent. It requires disclosure of the "date . . . each charge will be submitted for payment" but at the same time states that nearly identical information, "renewal dates," would not be helpful information.[38] The Commission has not explained why it has taken this approach and as such, has failed to engage in reasoned decision-making.

C. *Disclosure Placement and Presentation*

Moreover, in terms of disclosure placement and presentation, the NPRM poses significant practical concerns and does not appear designed to achieve the goals the Commission has set forth in the NPRM. For example, rather than preserving flexibility, one of the Commission's stated goals, the NPRM proposes to dictate exactly how and where to make a disclosure across all media and subscription types.[39] Attempting to follow all of the Commission's new requirements would

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[33] NPRM, at 24727; *see also State Farm*, 463 U.S. at 43 (agency action arbitrary and capricious if it "offer[s] an explanation for its decision that runs counter to the evidence before the agency").
[34] *See* NPRM, at 24727.
[35] 16 C.F.R. § 425.4(a)(5).
[36] *See* Bureau of Economics Staff Report, FTC, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, at ES-4 (June 2007) (describing how a disclosure form designed for a study that focused on "key mortgage costs that consumers need to understand when obtaining a loan" and excluded "information that is less important or confusing" improved customer understanding over the current form).
[37] 16 C.F.R. § 425.4(a)(2), (4).
[38] NPRM, at 24727.
[39] NPRM, at 24731 ("In developing these proposals, the Commission has sought to minimize prescriptive requirements and provide flexibility to sellers in meeting the Rule's objectives."). *Cf. Inv. Co. Inst. v. U.S.*
(continued…)

create a cumbersome and confusing consumer experience. For example, the "immediately adjacent" requirement appears to mandate where disclosures must appear in relation to the consent mechanism, without regard for context or the net impression of the experience. Exacerbating this inflexibility, some of the NPRM's requirements are ambiguous. For instance, the NPRM does not explain what makes a disclosure "unavoidable." As drafted, "unavoidable" could be reasonably interpreted as having a variety of different meanings, from requiring that a disclosure appear on the same page as the request for consent to requiring a pop-up that incorporates the disclosures that consumers cannot bypass until they click through it. This ambiguity is exacerbated by the rule's other requirements, including for instance that consumers not be required to "take any action" to reveal the disclosures, which make it unclear what the "unavoidable" requirement adds above and beyond the other requirements. The NPRM also suffers from a lack of clarity on how these requirements would be implemented together. For instance, the "immediately adjacent" and "unavoidable" requirements could be read to require that disclosures be presented immediately above the autorenewal consent mechanism in all circumstances, notwithstanding the fact that businesses can disclose information in a clear and prominent manner without adhering to this inflexible requirement. This level of granularity and rigidity in the NPRM is unworkable, and will undercut consumer clarity, rather than improve it.

IAB also has significant concerns with the requirement that consumers not have to "take any action" to see a disclosure. Among other things, this requirement is inconsistent with longstanding Commission guidance, including in the Dot Com Disclosures, which indicates that scrolling and hyperlinking are permissible in certain space-constrained circumstances.[40] Industry has relied on this well-established and practical guidance in developing their consumer facing experiences over the past decade, and this flexibility has enabled businesses to tailor their online interfaces in space-constrained contexts such as mobile devices, tablets, and voice-activated devices. The NPRM would contradict that guidance without explaining why the change is necessary or helpful to consumers.[41] The change would also further subject autorenewal offers to arbitrarily higher requirements as compared to the rest of the market, without adequate explanation.

Finally, this provision fails to consider the variety of devices and surfaces where autorenewal offers are presented to consumers, as well as the variety of consumers who interact with such offers. For many small-screened devices, it is not possible to comply with this requirement. This problem is exacerbated given the Commission's proposal to mandate a long list of required disclosures, which will likely serve to obfuscate the actual material terms of the offer. Moreover, the NPRM ignores the accessibility issues that are implicated by this provision. Scrolling, for instance, might be necessary for consumers that seek to enlarge text on their screen. This provision does not consider these important issues, making it unworkable and unhelpful given

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Commodity Futures Trading Comm'n, 891 F. Supp. 2d 162, 180 n.17 (D.D.C. 2013) ("The Commission was sensitive to the potential regulatory burden of the proposed new Section 4.27 and eschewed a one-size-fits-all reporting requirement.").

[40] .com Disclosures: How to Make Effective Disclosures in Digital Advertising, at ii (2013).

[41] *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

the variety of media and devices through which diverse consumers engage with autorenewal offers in today's marketplace.

D. Disclosure Timing

IAB also recommends that the Commission revise the requirement that all disclosures be provided "prior to obtaining the consumer's billing information."[42] Since ROSCA's passage in 2010, businesses have widely adopted the convenient and consumer-friendly practice of storing consumers' payment information with their consent to facilitate future purchases. The Commission has offered no explanation for why this requirement should be extended to all material disclosures about the underlying product or service offered with the autorenewal, nor has it explained how this requirement would work in practice. The requirement appears to be impossible to satisfy where a company, at the customer's direction, has previously saved a customer's payment information, or could potentially be read to require that companies force these customers to re-enter their payment information every time they seek to sign-up for an autorenewal service, rather than permitting them to take advantage of conveniently stored payment methods. Beyond convenience, payment information may serve as eligibility criteria for customer discounts or rewards. The proposed requirement would make it difficult for companies to provide customers those discounts or incentives if the company has to remain ignorant of the customer's preferred payment method until after presenting them the subscription offer. The NPRM does not acknowledge any of these problems, let alone weigh these concerns in its analysis.

Moreover, this broad requirement does not address the concerns that prompted ROSCA's passage in 2010. ROSCA addressed Congress's concerns with the practice of third parties enrolling consumers in autorenewal plans without consumer consent, in large part because consumers were not aware their payment information had been shared with the third parties.[43] The disclosure of all material terms of the autorenewal before collection of billing information was intended to address that specific problem. The same concerns are not raised in this case, and the Commission has cited no evidence in the record suggesting otherwise. Furthermore, it is not clear why broadly requiring disclosure of every material term about the product or service before a consumer's billing information is collected addresses any of the Commission's identified concerns about disclosures that are difficult to find or understand. Rather than providing clarity about how ROSCA applies with respect to stored payment methods, this proposal will impose new burdens on businesses while undercutting consumer convenience—without corresponding benefits to consumer protection.

E. Failure to Satisfy Magnuson-Moss Requirements

To the extent the Commission is attempting to impose specific placement requirements for disclosures across all media and industries, IAB has concerns that these requirements are not supported by the rulemaking record and the Commission has thus not satisfied its obligations under Magnuson-Moss.[44] The specific deceptive disclosure presentation practices identified in the

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[42] 16 C.F.R. § 425.4(a).

[43] 15 U.S.C. § 8401(6) (Congress's findings state, among other things, that "[b]ecause third party sellers acquired consumers' billing information from the initial merchant through 'data pass', millions of consumers were unaware they had been enrolled in membership clubs.").

[44] 15 U.S.C. § 57a.

NPRM include practices such as disclosures presented in "fine print, buried in paragraphs of legalese and sales pitches, and accessible only through hyperlinks."[45] But the proposal in the NPRM goes far beyond addressing these discrete practices to the point where it appears to mandate one specific presentation of the material disclosures for all written offers (*i.e.*, directly above the request for consent). The NPRM does not explain this approach, or even address how the requirements would work together in practice. Furthermore, the specific disclosure requirements in the NPRM will likely have the opposite effect of addressing these deceptive practices by increasing the amount of legalese in disclosures, as companies attempt to comply with the NPRM. Given the disconnect between the practices the Commission asserts are "prevalent" and the NPRM's overly broad proposal, IAB strongly recommends that the Commission retain the existing disclosure framework.

IV. Consent

The NPRM's proposed consent requirements in section 425.5 also raise both significant legal and practical concerns. The NPRM presently states that in order to obtain express informed consent, a business must "obtain the consumer's unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction" and "obtain the consumer's unambiguously affirmative consent to the rest of the transaction."[46] IAB strongly urges the Commission to remove this section.

A. Negative Impact on Consumers and Businesses

First, this provision fails to adhere to the Commission's own purported goal of "provid[ing] flexibility to allow for innovation and change over time."[47] This proposal sacrifices flexibility in favor of a one-size-fits-all approach that is out of step not only with the current approach to autorenewals taken by industry, but also the state law landscape and current consumer expectations. Only one state (Vermont) has adopted such a requirement, and only for annual subscriptions.[48] Furthermore, consumers are familiar with subscription sign-up experiences and do not expect to have to consent a second time once they choose to purchase an autorenewal plan. By forcing businesses to adhere to this requirement, the NPRM will increase the length of *all* subscription sign-up experiences, regardless of the surrounding circumstances, or potential benefits to protecting consumers. This experience would be particularly burdensome for customers of subscription bundles, potentially requiring them to check an additional box for each subscription in the bundle without any corresponding benefit to clarity or disclosure. Not to mention that this requirement will be significantly costly, as subscription businesses will need to overhaul their sign-up processes to comply with this requirement. Businesses seeking to offset this increased cost will be forced to pass this cost to consumers or avoid offering subscriptions at all, leading to fewer choices for consumers. Ultimately, this approach to consent will prevent companies offering subscriptions from being able to create experiences tailored to the expectations of their customers, and thus will not preserve flexibility, as the Commission asserts, but will instead impose a rigid and costly framework for consent on the entire industry.

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[45] NPRM, at 24727.
[46] 16 C.F.R. § 425.5.
[47] NPRM, at 24727.
[48] 9 Vt. Stat. Ann. § 2454a(a).

B. Failure to Satisfy Magnuson-Moss Requirements

Next, this requirement, like several other sections of the NPRM, is far broader than necessary to address the specific unfair or deceptive practices that the Commission has asserted are "prevalent" in the rulemaking record, and thus does not satisfy the requirements under Magnuson-Moss.[49] The Commission reasons that "by requiring marketers to obtain consent for the negative option feature separately from the rest of the offer and other parts of the transaction, [this will ensure that] consent is informed."[50] But the three cases that the Commission has cited as support for this reasoning all involved autorenewal offers that failed to disclose the presence of the autorenewal feature.[51] The facts of these cases indicate that a far narrower provision—for instance, one that requires clearer disclosure of the presence of the automatic renewal feature—would be the most effective measure to address the specific deceptive or unfair practices identified in the rulemaking record. The Commission's reasoning in the NPRM supports this alternative approach, which states that "consumers can easily focus solely on the aspects of an offer that mirror the offers they regularly encounter . . . . but miss the unusual price term—the negative option feature."[52] To facilitate consumers focusing on the negative option feature and address the problematic practices in its prior cases, the Commission should instead adopt a narrower provision focusing on these particular concerns.[53]

The Commission also describes two examples of deceptive practices from the comments in the NPRM as support for its position, but these are isolated, egregious practices that are not exemplary of the vast majority of autorenewal sign-up experiences that will be impacted by this provision. Specifically, the NPRM describes how the proposal will address the following two practices: (1) sellers using a consumer's signature from an in-person transaction on the entire purchase as consent for an autorenewal; and (2) the use of check endorsements where a consumer's signature serves a dual purpose of promotional check cashing and autorenewal enrollment.[54] These problematic practices could be addressed through a specific provision that addresses deceptive in-person autorenewal transactions. These narrow deceptive practices identified by commenters are not adequate to support the NPRM's proposal, which would uproot the industry standard for obtaining consent to autorenewal offers across all media.

Finally, IAB notes that the "double opt-in" consent requirement proposed in the NPRM was never raised in the Commission's 2019 ANPR. The ANPR mentions enrollment without consumer consent as an ongoing problem with negative option marketing, but it does not identify anything resembling this proposal as a "possible regulatory alternative[] under consideration by the Commission."[55]

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[49] 15 U.S.C. § 57a.
[50] NPRM, at 24728.
[51] *Id.* at 24727 n. 72.
[52] *Id.* at 24728.
[53] The Commission's failure to at least consider, and explain its reasons for rejecting, a more tailored approach would violate its obligations under the APA. *See, e.g.*, *International Ladies' Garment Workers' Union*, 722 F.2d at 816 (agency's "failure to consider such alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious, in violation of section 10(e) of the APA").
[54] NPRM, at 24728.
[55] 15 U.S.C. § 57a(b)(2)(A).

V. Cancellation

IAB has several concerns with the proposed cancellation provisions in the NPRM, which fail to satisfy the requirements of Magnuson-Moss, reasoned decision-making under the APA, and the First Amendment.

As an initial matter, IAB has concerns that the proposed changes in general do not satisfy Magnuson-Moss because they are significantly overbroad in relation to the asserted "prevalent" unfair or deceptive acts or practices the Commission has identified in the rulemaking record. These practices include sellers refusing to honor cancellation requests from consumers, consumers being forced to wait through lengthy phone hold times or listen to multiple upsells, and sellers imposing burdensome verification requirements before allowing consumers to cancel, all of which are already prohibited by ROSCA.[56] In the cited enforcement actions that the Commission asserts to demonstrate a prevalence of deceptive practices, the challenged cancellation practices included, for instance, refusals to honor consumer cancellation requests, consumers being rebilled despite being told their accounts were cancelled, forcing consumers to call to cancel and failing to staff phone lines, forcing consumers to complete quizzes or listen to multiple upsells over the phone before being allowed to cancel, or requiring consumers to return products by mail in order to cancel a free trial.[57]

These allegations are concerning and have been addressed by the Commission under existing law. The proposed cancellation provisions in the NPRM, however, are not crafted to address these practices. Instead, they sweep in a wide swath of cancellation mechanisms that, unlike the practices described in the NPRM, satisfy ROSCA's longstanding simplicity standard. As such, the FTC appears to be using egregious violations of existing law to support a proposal that has at best a tangential relationship to the record. This approach is not consistent with the process set forth in Magnuson-Moss and thus, IAB has significant concerns that this approach will unnecessarily prohibit cancellation processes that already strike the right balance between simplicity and the provision of important information to consumers considering cancellation.

A. "As Simple As" Requirement

Turning to the specific cancellation subsections, the first problematic provision is section 425.6(b), which requires that cancellation be "at least as simple" as the method the consumer used to sign-up.[58] As an initial matter, this requirement appears to be inconsistent with ROSCA's "simplicity" standard. The simplicity standard reflects Congress's view of the right standard for assessing the legality of a cancellation mechanism, and the Commission has failed to adequately explain why this standard should be changed.[59] Second, IAB is concerned that the Commission's enforcement history and the deceptive practices it cites in the NPRM as demonstrating the prevalence of unfair or deceptive acts or practices do not support the Commission's proposed approach. For example, the practices explicitly described in the NPRM as support for this

[56] NPRM, at 24720-21, 24724-25, 24728-29.
[57] *Id.* at 24719 n. 31.
[58] 16 C.F.R. § 425.6(b).
[59] *See, e.g.*, *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32 (agency action arbitrary and capricious if it "frustrate[s] the policy that Congress sought to implement").

requirement—unreasonable hold times and verification requirements—could be addressed by narrower requirements that phone cancellation lines be adequately staffed and that consumers only be required to satisfy a reasonable authentication procedure prior to cancellation.[60] The latter requirement has already been adopted at the state level.[61] The Commission has also failed to explain how this requirement (or any of the cancellation provisions) will resolve several of the deceptive practices cited in the rulemaking record, including for instance that sellers fail to honor cancellation requests or continue to bill consumers despite confirming cancellation.[62] IAB has significant concerns that this NPRM will ultimately hinder legitimate companies acting in good faith that offer simple cancellation mechanisms, but have failed to make their cancellation mechanism symmetrical to their sign-up experience. The NPRM would thus have the bizarre impact of outlawing cancellation experiences that satisfy ROSCA's "simple" requirement solely because they are not "as simple as" sign-up.

The NPRM also fails to address—or apparently even consider—certain practical concerns posed by this provision.[63] As an initial matter, it is not clear how the Commission intends to measure simplicity. Without that guidance, the new requirement fails to provide businesses with the tools needed to comply with the NPRM while drastically increasing the consequences of a violation. Furthermore, sign-up and cancellation are entirely different experiences that serve different purposes. Comparing their simplicity is not only illogical, but it is not helpful to consumers. For example, businesses might seek to offer their subscriptions to consumers who are in the process of purchasing other products on their websites. Those businesses might ask those consumers if they are interested in savings or benefits provided by a subscription in the process of checking out, because that is the point at which sign-up is most relevant to the customer. Such experiences clearly and conspicuously provide the material terms of the offer and seek the customer's express informed consent, but the cancellation mechanism might appear in the user's account profile, or elsewhere on the company's website. This is a commonplace, reasonable, and simple cancellation journey that is consistent with consumer expectations, but appears to be prohibited by the new requirement because it is not symmetrical to the sign-up experience. This new requirement would also appear to reward companies that have constructed poor and unnecessarily arduous consumer sign-up experiences by making it permissible for them to construct longer and more frustrating cancellation experiences. The NPRM asserts that these provisions "afford businesses flexibility in meeting the proposed NPRM's simple cancellation standard" but in reality, the NPRM takes the opposite approach by tying the permissible length of cancellation and sign-up experiences together, which will have the effect of preventing businesses from designing each experience to fit the needs of their customers in each specific part of the consumer journey.

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[60] NPRM, at 24728.

[61] *See* Cal. Bus. & Prof. Code § 17602(d) (allowing a subscription business to require customers to authenticate before cancelling if they have an account with the business).

[62] *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (agency must articulate "rational connection between the facts found and the choice made").

[63] *See State Farm*, 463 U.S. at 43 ("An agency action is arbitrary and capricious if the agency has 'entirely failed to consider an important aspect of the problem[.]'").

B. "Same Medium" Requirement

Next, the NPRM incorporates a requirement that cancellation be offered through the same "medium" as the consumer signed up.[64] For Internet cancellation, the NPRM specifies that this means the cancellation mechanism must be provided "over the same website or web-based application the consumer used to purchase the Negative Option Feature."[65] As with the first provision, this requirement would sweep in significantly more conduct than the "prevalent" deceptive or unfair practices that the Commission has identified in the rulemaking record.[66] According to the NPRM and Chair Khan, the specific prevalent deceptive conduct in this context is sign-up processes that can be completed easily online but that impose a cancellation procedure through an entirely different medium, such as phone cancellation.[67] But the NPRM does not stop at simply requiring online cancellation, and adds that cancellation must be available "over the same website or web-based application" as sign-up.

Companies should not be required to go a step further than offering online cancellation and be forced to ensure that the precise web-based mechanism used for sign-up is also available for cancellation. The Commission has cited no cases demonstrating that this requirement addresses a prevalent deceptive or unfair practice. Instead, the cases indicate that failure to offer an online cancellation mechanism, and requiring consumers to call or mail their cancellation request, can result in cancellation experiences that violate ROSCA. In IAB's experience, consumers have come to expect to find the cancellation ingress point on the subscription business's website. This cancellation method is adequately simple for every situation in which the sign-up occurs "online," regardless of the more specific online mechanism or "website or web-based" application the consumer used to sign-up, and is consistent with the expectations of consumers, as well as state law.[68] IAB thus urges the Commission to modify this provision in the final rule to simply require that online cancellation be offered when consumers can sign-up online.

C. Ban on "Saves"

Finally, proposed section 425.6(d) states that sellers must allow consumers to cancel "immediately" upon request, unless the consumer affirmatively consents to receiving a "save."[69] A "save" is defined to encompass additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information.[70] IAB has several concerns with this proposal. Most significantly, the definition of "save" is overly broad and would prohibit the presentation of useful, consumer-friendly details about a consumer's subscription before they cancel it. For example, the definition is so broad that it appears to prohibit a seller from informing a consumer before completing cancellation what the consumer will lose by cancelling, even if

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[64] 16 C.F.R. § 425.6(c).

[65] *Id.* § 425.6(c)(1).

[66] *See, e.g.*, *Nat'l Min. Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) ("We have no difficulty concluding that this regulation is both arbitrary and capricious because it is irrationally overbroad, and we therefore vacate it.").

[67] *See* NPRM, at 24736 ("You might sign up for a cell phone plan online, but to cancel, you have to call an 800 number, wait on hold for a customer service representative, and then speak to that representative, who will keep you on the line to try to convince you to stay.").

[68] *See* N.Y. Gen. Bus. Law § 527-a(3); 815 Ill. Comp. Stat. § 601/10(b-5); Tenn. Code Ann. § 47–18–133(c); 9 Vt. Stat. Ann. § 2454a(b).

[69] 16 C.F.R. § 425.6(d).

[70] *Id.* § 425.2(f).

those losses are irreversible (e.g., loss of accumulated credits or saved photos, documents or other content) and meaningful to the consumer at that point in the experience. Requiring consent to present this information is not consumer-friendly, as it risks confusing consumers who likely expect to see summary details or offers related to their subscription before cancellation. The Commission has cited no cases indicating that this sort of information presented during cancellation constitutes a prevalent deceptive practice. Instead, the cited cases indicate that the current legal framework is the more effective and consumer-friendly approach, as it prohibits "saves" that render a cancellation mechanism not "simple," but would permit the presentation of helpful information to consumers before they cancel. The Commission's own prior reasoning supports this approach, as it previously acknowledged that "a request to consider an offer or discount would not amount to an unreasonable delay" of a consumer's attempt to cancel.[71]

Even if the definition of "save" were narrower, the NPRM ignores the crucial differences between online cancellation processes and phone or in-person cancellation. Online saves are rarely overly burdensome because consumers can easily choose to bypass them. For example, consumers can bypass offers with a single click, or, when the "save" is presented on the same page as the cancellation option, by simply opting to cancel. In contrast, telephone saves are different in kind, as they involve businesses forcing "uninterested customers to listen to multiple upsells before allowing cancellation."[72] The evidence in the rulemaking record does not support the Commission's position that there is a prevalence of deceptive "save" practices across *all* media—at most, the Commission has demonstrated these practices exist where sellers require consumers to listen to live upsells on the phone or in-person. Accordingly, IAB recommends that this provision be limited to addressing those identified practices, instead of imposing unnecessary and burdensome requirements on all companies providing subscription offers to consumers.[73]

IAB also notes that the new requirement prohibiting all "saves" proposed in the NPRM was not raised in the Commission's 2019 ANPR. The ANPR references difficulty with cancellation as an ongoing problem with negative option marketing, but it does not identify a ban on "saves" absent additional consent as a "possible regulatory alternative[] under consideration by the Commission."[74] IAB thus has concerns that the Commission has not satisfied its procedural obligation under Magnuson-Moss with respect to this requirement.

Finally, the Commission's proposed approach also poses serious First Amendment concerns. Because the proposed prohibition on sellers offering even a single "save" to consumers, absent their express consent, would apply to commercial speech that "is neither misleading nor related to unlawful activity," it is subject to the three-part test laid out in the Supreme Court's decision in *Central Hudson Gas Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The NPRM, as currently written, would likely fail all three parts of the *Central Hudson* test.

First, the Commission has not identified "a substantial interest to be achieved by" prohibiting sellers from making even a single save to consumers with whom it is already in a

[71] Enforcement Policy Statement Regarding Negative Option Marketing, at 14 n. 48.
[72] *See* NPRM, at 24729.
[73] *See, e.g.*, *State Farm*, 463 U.S. at 43 (agency action arbitrary and capricious where agency "offered an explanation for its decision that runs counter to the evidence before the agency").
[74] 15 U.S.C. § 57a(b)(2)(A).

business relationship.[75] Saves often include a consumer-friendly offer like a substantial discount to continue the membership. Many consumers find such offers compelling—and accept them. Moreover, the Commission's proposed approach would neither simplify nor speed up the cancellation process for consumers, because it would entail consumers having to answer a question along the lines of "Would you like to consider a different price or plan that could save you money?" It will instead lengthen the cancellation process and likely make it more confusing to navigate. The Commission has no legitimate interest (substantial or otherwise) in requiring sellers to ask consumers whether they would like to hear about other offers *in general*, rather than simply asking those consumers whether they would like to accept a *particular* save.

Second, the Commission is unlikely to be able to show that "the regulatory technique" proposed is "in proportion to" whatever substantial "interest" it might have.[76] Even if the Commission might have a legitimate interest in prohibiting sellers from making so many successive "saves" to their customers as to make the cancellation process more difficult, the Commission's blanket prohibition on even a single save absent express consumer consent would in no way be proportional to that interest.

And *third*, the Commission has not explained how "[t]he limitation on expression" it has proposed is "designed carefully to achieve the State's goal."[77] The Commission had many less restrictive means of accomplishing its interests, such as by permitting sellers to make only a limited number of saves before a consumer cancels an autorenewal agreement. The Commission's proposal to instead completely prohibit even a single save absent express consumer consent is unlikely to satisfy *Central Hudson*.

IAB strongly urges the Commission to reconsider its prohibition on saves in light of these serious policy and constitutional concerns with the approach announced in the NPRM.

VI. Reminder Requirements

The NPRM proposes a new section governing renewal reminders, which would impose an annual reminder requirement on all subscriptions that do not involve automatic delivery of physical goods.[78] IAB recommends that the Commission remove this requirement for several reasons. First, there are currently over fifteen states with renewal reminder requirements that vary in terms of when the requirement is triggered, the required timing for sending the notice, and the required content for the notice. This existing patchwork of state law requirements, which the NPRM does not preempt, already imposes a significant burden on businesses and adding an additional layer of complexity will exacerbate the burden.[79] Second, renewal reminders were not mentioned in the Commission's 2019 ANPR at all, which prevented commenters from assessing the issues the

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[75] *Central Hudson*, 447 U.S. at 564.
[76] *Id.*
[77] *Id.*
[78] 16 C.F.R. § 425.7.
[79] *See, e.g.*, Cal. Bus. & Prof. Code § 17602(a)(4); Colo. Rev. Stat. § 6-1-732(4); Conn. Gen. Stat. Ann. § 42-126b; D.C. Code § 28A-203(b); 6 Del. Code § 2734(b); Fla. Stat. Ann. § 501.165(2); Ga. Code Ann. § 13-12-3; Haw. Rev. Stat. § 481-9.5(b); Idaho Code § 48-603G(4); 815 Ill. Comp. Stat. § 601/10(b); 10 Me Rev. Stat. § 1210-C(3); N.C. Gen. Stat. § 75-41(a); N.D. Gen. Stat. § 51-37-02(2); Tenn. Code § 47-18-133; Va. Code Ann. § 59.1-207.46(d) (effective July 1, 2023); 9 Vt. Stat. Ann. § 2454a(a).

Commission was considering for inclusion in the NPRM, possible alternatives, and the objectives the Commission seeks to achieve. This requirement has thus failed to satisfy the procedural obligations set forth in Magnuson-Moss.[80]

At a minimum, the Commission should revise this provision to require that renewal reminders be available to consumers as an option, but if consumers choose not to activate them, companies should not be required to send them.

VII. Free Trials & Material Changes

IAB supports the Commission's reasoning and approach to material changes in the NPRM.[81] The industry practice for subscription-based services and products is to have regular price increases over time, and consumers have come to expect these periodic increases. A rule attempting to regulate every potential material change to a subscription would undoubtedly be overbroad, and would fail to account for the highly context-specific nature of changes to subscriptions.

Similarly, IAB supports the Commission's decision not to propose a requirement that sellers obtain a second consent from the consumer after a free trial.[82] Such a requirement would be inconsistent with consumer expectations because it does not reflect the current state of the marketplace. Furthermore, it would not provide meaningful benefits to consumers, who are familiar with subscriptions, appreciate the conveniences of free trials, and understand how to take advantage of, and cancel, free trials. Overall, free trials provide benefits to consumers and industry by allowing consumers to try out a company's service free of charge, and decide not to cancel if they like the service and want to keep it.

VIII. Preliminary Regulatory Analysis

As described throughout this comment, the NPRM will have a significant effect on businesses that offer automatically renewing subscriptions, regardless of size, and will result in higher prices and fewer options for consumers. Accordingly, IAB is concerned with the Commission's conclusion that it need not issue a preliminary regulatory analysis to accompany the NPRM.[83] This conclusion is particularly concerning given the Commission's failure to raise several of the significant issues proposed in the NPRM in the 2019 ANPR. For example, the Commission notes that it lacks adequate data to conclude whether the NPRM will impact a substantial number of small entities, but the Commission did not solicit public input on key aspects of the rule.[84] Moreover, by expanding the scope of the proposed rule well beyond the ANPR, the prior comments that the Commission collected could not have reflected the NPRM's likely impact on businesses and consumers. IAB thus urges the Commission to reconsider this conclusion, and conduct the analysis as required by statute.

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[80] 15 U.S.C. § 57a(b)(2)(A).
[81] NPRM, at 24729-30.
[82] *Id.* at 24728.
[83] *Id.* at 24731.
[84] *Id.*

IX. IAB Requests an Informal Hearing.

IAB requests to make an oral submission at an informal hearing as set forth in Magnuson-Moss.[85] IAB is interested in this proceeding because its members will be significantly impacted by the NPRM if promulgated as currently drafted. As set forth above, many of the proposed provisions are overly broad and would prohibit practices that are consumer-friendly and where the record does not demonstrate there is a prevalent deceptive practice.

An oral hearing is warranted because IAB will be able to field questions and further explain the reasoning behind the concerns it has described in this comment to the Commission. This setting will allow for more constructive back and forth, and a more fruitful discussion about how the proposed rule can be revised to address any potential deceptive and unfair practices affecting the marketplace without overburdening legitimate business practices.

IAB's anticipated testimony includes discussion of three topics: (1) the disclosure content and presentation requirements; (2) the consent requirement imposing separate agreement to the autorenewal feature and the rest of the transaction; and (3) the definition of "save" and the corresponding prohibition on all "saves" absent consent. IAB intends to present to the Commission the impracticality of these provisions, and why it should not proceed with adopting these sections as drafted.

IAB also intends to raise several disputed issues of material fact. First, IAB intends to raise several disputed material facts related to compliance costs and the accuracy of the Commission's estimates, including:

- Whether the costs associated with implementing these new requirements will be significantly higher than the FTC estimates;[86] and

- Whether the NPRM makes compliance easier for businesses, in light of the lack of preemption of state law.

Second, IAB intends to raise issues of disputed material fact that relate to each of the major substantive sections in the NPRM (i.e., disclosures, consent, and cancellation):

- Whether the disclosure requirements proposed by the NPRM improve customer understanding of the terms of an automatic renewal across devices and contexts;

- Whether the double opt-in consent requirement improves consumer understanding, even if the autorenewal feature is disclosed per the proposed disclosure requirements;

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[85] 15 U.S.C. § 57a(c).

[86] NPRM, at 24733 n. 87 (stating, for example, that "because all legitimate sellers offer consumers some sort of cancellation mechanism in the normal course of business, the proposed Rule's requirement for a simple cancellation mechanism is unlikely to create additional burdens").

- Whether a cancellation flow that complies with the Commission's requirements (i.e., that asks the consumer for consent to receive a save) is easier for a consumer to navigate and understand than a cancellation flow that simply provides the offer or discount;

- Whether consumers are actually confused or burdened by a reasonable number of “saves”; and

- Whether the deceptive practices identified in the rulemaking record are limited to certain media (e.g., phone or in-person).

X. Conclusion

IAB appreciates the Commission’s efforts to protect consumers from bad actors that engage in deceptive or unfair practices. It remains concerned, however, that the NPRM will not address those practices and instead impose unnecessary burdens on companies that have worked for years to provide inventive, convenient subscription offers that improve consumers’ lives. IAB strongly urges the Commission to consider the concerns set forth in this comment, and revise the NPRM to ensure that it does not overburden companies that provide subscription offers with requirements that will have unintended negative consequences for consumers.

At a minimum, IAB requests that the Commission consider a delayed implementation date of at least 12 months following the finalization of the new rule. As explained in this comment, the requirements in the NPRM will have a significant impact on industry and will be costly and time consuming to implement. Even minor changes can require significant time to design, test, and implement across a variety of ingress points. Thus, IAB requests that the Commission consider a delayed implementation date.

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IAB thanks the Commission for this opportunity to submit these comments and looks forward to working closely with the Commission on this important topic. Please do not hesitate to contact me at lartease@iab.com with any questions.

Sincerely,

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