

*Via Online Filing*

December 2, 2019

April J. Tabor  
Acting Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave., NW  
Suite CC-5610 (Annex J)  
Washington, DC 20580

Re: **Negative Option Rule (16 CFR part 425) (Project No. P064202)**

Dear Secretary Tabor:

MPA -- The Association of Magazine Media (“MPA”) respectfully responds to the Federal Trade Commission’s (“FTC” or “Commission”) request for comment “on the need for amendments to the Commission’s ‘Rule Concerning the Use of Prenotification Negative Option Plans.’”<sup>1</sup> MPA believes that amendments to the Rule – particularly those that would expand its scope to include, and increase regulatory burdens on, advance consent marketing programs such as automatic renewals – are neither warranted nor in the public interest.

There now exists a comprehensive system of federal and state laws that govern advance consent marketing and sales practices via every medium. MPA members have designed their advance consent subscription mechanisms to comply with applicable federal and state laws as well

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<sup>1</sup> Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52393 (Oct. 2, 2019) (hereafter “Request”). Consistent with the FTC’s nomenclature, MPA will refer to the Rule Concerning the Use of Prenotification Negative Option Plans as the “Negative Option Rule” or “Rule” in these comments. MPA may, however, use the term “advance consent” in lieu of “negative option” to refer to sales models in which our members’ customers affirmatively accept subscription agreements that contain automatic renewals of the subscription.

as best practices that reflect our trusted first party relationship with our customers. The magazine media industry is built on a foundation of long-term subscribers, and customer satisfaction married with simple subscription management processes are the cornerstone of the industry's viability and vitality. MPA and its members believe that an additional regulatory framework, layered on top of the comprehensive existing laws, would complicate subscription processes without conveying additional consumer protection, and could damage today's fragile media landscape.

Since the conclusion of the Commission's prior Rule review,<sup>2</sup> the FTC has engaged in robust law enforcement against allegedly deceptive and unfair negative option marketing practices under numerous federal statutes by itself and in coordination with state regulators. Moreover, the past several years has seen the enactment or bolstering of auto-renewal laws in approximately two-dozen states.

MPA believes that the Commission and its state counterparts have ample law enforcement tools at their disposal to police unlawful business conduct involving negative option programs. We strongly urge regulatory restraint. Perhaps the Commission or its staff perceive a marketplace "gap" through which a unique and pernicious business practice remains unchecked by current laws and regulations. If that is the case, an examination of that specific concern should be undertaken. But the imposition of new, overly prescriptive, and broadly applied regulations is not the answer. MPA is concerned that expanding the Rule would result in over-burdening lawful business to

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<sup>2</sup> See generally Rule Concerning the Use of Prenotification Negative Option Plans, 74 Fed. Reg. 22720 (May 14, 2009) (initiation of last Rule review) and 79 Fed. Reg. 44271 (July 31, 2014) (conclusion of last Rule review and determination to retain Rule in its current form).

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consumers' detriment, while failing to stop unique problematic practices already subject to Section 5 of the FTC Act, the Commission's various trade regulation rules, and state laws. We therefore ask the Commission to be judicious when considering any Rule amendments, particularly when such amendments may have the unintended effect of hindering the circulation of journalistic information via magazine and newspaper subscriptions.

### ***MPA's Interest in Rulemaking***

MPA was established in 1919 and is the leading national trade association for more than 500 consumer magazine media brands spanning a wide array of genres (*e.g.*, news, entertainment, sports, lifestyle, politics, health & fitness, business, travel & leisure, and other content). Our membership informs, inspires, and entertains more than 90 percent of all U.S. adults: according to MRI-Simmons, 91 percent of all U.S. adults, and 94 percent of those under the age of 25, have read either print or digital editions of magazine media in the last six months.<sup>3</sup>

Our members' customers reflect the US population, and they consume magazine media content through a variety of delivery platforms, including print and digital editions, mobile web, web (desktop or laptop), and video. In most instances, we enjoy direct, first-party relationships with readers, and they trust us to deliver reliable, curated content through transparent terms of sale. In fact, magazine media is rated to be more inspiring, fulfilling and trustworthy than websites or television.<sup>4</sup>

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<sup>3</sup> See MRI-Simmons, Fall 2018; MPA Magazine Media Factbook <http://bit.ly/2scFaVQ>.

<sup>4</sup> See 2019 MPA Magazine Media Factbook at 56 (citing MRI-Simmons, Spring 2018), available at <file:///C:/Users/esb02/Downloads/MPA-2019-Factbook-ff1-lo.pdf>.

The overwhelming majority of magazines in the U.S. are sold by subscription – 92 percent according to our latest data.<sup>5</sup> A significant percentage of these magazine subscriptions are sold with an advance consent feature that allows readers to affirmatively accept the automatic renewal of their subscription, providing subscribers the benefit of uninterrupted delivery of their favorite titles. This consumer benefit, and the numerous others identified below, should be preserved without encumbering the ability of our members to continue to offer automatic renewal subscriptions to their readers. Expansion of the Negative Option Rule that would subject advance consent subscriptions to additional prescriptive regulations and requirements will potentially complicate today’s well-established advance consent procedures or cause customer confusion through lack of consistency with existing laws and regulations.

MPA, of course, enthusiastically supports the FTC’s consumer protection mission. Over many years, MPA has participated in FTC initiatives involving the Telemarketing Sales Rule, the CAN-SPAM Act, native advertising, fraudulent sales agents, dot-com disclosures, endorsement and testimonial guidelines, privacy issues, weight loss marketing, and advertising directed at minors (COPPA). With respect to advance consent marketing practices, MPA contributed to the FTC’s 2007 workshop analyzing negative option marketing.<sup>6</sup> We also submitted written comments in response to the Commission’s previous Negative Option Rule review.<sup>7</sup> As this long-

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<sup>5</sup> *See id.* at 114.

<sup>6</sup> *See* Comments of Magazine Publishers of America, Negative Option Workshop – Comment P064202 (Jan. 25, 2007).

<sup>7</sup> *See* Comments of Magazine Publishers of America, Prenotification Negative Option Rule Review; Matter No. P064202 (July 27, 2009) (hereafter “MPA 2009 Comments”).

term engagement indicates, our members have offered automatic renewal subscriptions for years, and our customers have responded well. We re-emphasize here the key points that our organization made during both the 2007 workshop and the 2009 Rule review: advance consent programs carry significant benefits to both consumers and marketers, and current laws and regulations are sufficient to protect consumers using such programs.

***Magazine Media Rely On Automatic Renewal Programs, Sometimes with Free Trials, To Readers' Benefit***

The Commission itself recognizes that “[n]egative option offers are widespread in the marketplace and can provide substantial benefits for sellers and consumers.”<sup>8</sup> The administrative record developed from prior Commission proceedings amply identifies the benefits of negative option programs generally, and of automatic renewal programs specifically, and so we will only reiterate the latter briefly here.

The primary reasons magazine publishers adopted automatic renewal subscriptions were to facilitate a long-term relationship with consumers, provide a frictionless customer service experience, and to save costs from the traditional multiple-renewal notice approach. The growth in automatic renewal subscriptions shows that this approach has succeeded for both readers and publishers.

Automatic renewal subscribers get uninterrupted service and access to their favorite magazine content, and seamless and easy customer service interactions with publishers. If the

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<sup>8</sup> See Request, 84 Fed. Reg. 52394.

automatic renewal includes a free trial period, subscribers who participate benefit from the ability to try-out magazine titles before committing to a purchase, and of course need not pay anything should they decide to cancel during the trial period.<sup>9</sup> In fact, many automatic renewal subscribers often become long-term customers.<sup>10</sup> Uninterrupted magazine subscriptions allow readers to receive continuous delivery of their favorite titles for as long as they wish.<sup>11</sup> The renewal notification process is simple and streamlined.<sup>12</sup>

It is also true that automatic renewals generate cost savings for publishers, while allowing them to better serve their readership. Uninterrupted subscriptions save publishers money because interruptions require publishers to update mailing lists and, if a consumer subsequently renews, to send out missed copies in a separate, expensive mailing.<sup>13</sup> Automatic renewal subscriptions also save publishers from the expense of creating, printing, and mailing multiple renewal notices.<sup>14</sup> Renewal notices can begin to be mailed up to six months prior to renewal, so cost savings from avoiding these renewal notice costs are significant.

The automatic renewal process has the additional benefit of forestalling the possibility of fraudulent renewal mailings. For a number of years, MPA members have struggled with unauthorized agents sending bogus renewal notices to subscribers. MPA and its members met

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<sup>9</sup> See “Negative Options: A Report by the staff of the FTC’s Division of Enforcement,” at 4 (Jan. 2009) (hereafter “Negative Option Staff Report”) at 4.

<sup>10</sup> See *id.* ; see also MPA 2009 Comments at 3.

<sup>11</sup> See MPA 2009 Comments at 3.

<sup>12</sup> *Id.*

<sup>13</sup> See Negative Option Staff Report at 3-4 (Jan. 2009).

<sup>14</sup> *Id.* at 3; see also MPA 2009 Comments at 3.

with Commission staff to describe the problem and provided examples of such unauthorized renewal notices. The Commission subsequently took action against the entities involved. Interestingly, in warning consumers about this type of scam (for newspaper subscriptions) shortly after the previous Rule review's conclusion, the Commission advised consumers to “[s]ign up for auto-renewal and payment, so that you don’t have to rely on renewal notices sent by postal mail.”<sup>15</sup>

Nothing in the record indicates that these substantial benefits have dissipated in the last five years, or that these benefits will somehow be enhanced through the promulgation of additional prescriptive regulations impacting automatic renewal programs.

***Current Auto-renewal Subscription Procedures Are Highly Transparent and Easy to Use***

While individual publishers tailor their subscription processes to their respective audiences, there are common elements to automatic renewal subscriptions that ensure customers are well informed and have access to easy cancellation methods if they no longer want to receive their subscriptions. These elements also reflect existing federal and state laws. The common characteristics include:

- Clear and conspicuous presentation of terms and conditions, including automatic renewal features. If the subscription includes a free trial, this includes the disclosure of price or the manner in which the pricing will change at the end of the trial period;
- Receipt of consumers’ affirmative consent prior to any charges;
- Publishers’ provision of a written acknowledgement of subscription, including of the automatic renewal feature and how to cancel;

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<sup>15</sup> See Colleen Tressler, “Headline news: Scammers issue bogus newspaper subscription renewal notices,” (Oct. 27, 2014), available at <https://www.consumer.ftc.gov/blog/2014/10/headline-news-scammers-issue-bogus-newspaper-subscription-renewal-notices>.

- Sending a written physical or electronic renewal notice one to two months prior to renewal reminding the consumer of the subscription's automatic renewal feature, cancellation methods, and deadline by which to cancel without being charged;
- Provision of multiple convenient cancellation methods, including online if the subscription was purchased online;
- Provision of a material change notice, if there are changes in terms and conditions.

To facilitate subscribers' ability to cancel – and to generally manage their subscriptions – publishers have increasingly established online portals for consumers to verify and manage their subscriptions. By creating an online account and logging in, consumers can handle any number of transactions, including verifying renewal dates, updating address, signing up for newsletters, setting vacation holds, and cancelling or changing their subscription. This ensures a secure, comfortable, and convenient experience for subscribers.

Even with these cancellation and subscription management tools, readers may forget to cancel a subscription they no longer wish to receive or simply change their mind once the automatic renewal period has begun. If that occurs, publishers will refund the consumer's payment for any unserved issues. This is another important consumer protection measure designed to maximize customer satisfaction.<sup>16</sup>

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<sup>16</sup> See MPA 2009 Comments at 4-5.

***There Does Not Appear to Be a Basis for Amending or Expanding the Rule***

As the Request notes, the Commission first promulgated the Rule in 1973.<sup>17</sup> Since then, the FTC has reviewed the Rule several times – in 1986, in 1997, and in 2009 – and has never seen fit to substantively modify or expand it. When most recently declining to expand the Rule, the Commission stated that “if ROSCA<sup>18</sup> and its other enforcement tools do not adequately protect consumers, the Commission could consider, based on a more complete record, whether and how to amend the Rule.”<sup>19</sup> MPA believes that the “more complete record” developed over the past five years shows that current law enforcement tools are adequate to protect consumers, and expansion of the Rule is unwarranted.

*The Current Regime is Effective and Manageable*

The existing Rule is part of a sweeping landscape of federal and state laws that govern negative option programs. The FTC itself identifies them: ROSCA is “primarily designed” to address negative option marketing online.<sup>20</sup> Each of the Telemarketing Sales Rule (“TSR”),<sup>21</sup> the Electronic Fund Transfer Act (“EFTA”),<sup>22</sup> and the Postal Reorganization Act (“PRA”)<sup>23</sup> address negative option practices in telemarketing, debit card processing, and direct mail contexts respectively. All of these statutes are buttressed by Section 5 of the FTC Act’s catchall unfairness

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<sup>17</sup> See Request, 84 Fed. Reg. at 52394.

<sup>18</sup> Restore Online Shoppers’ Confidence Act, 15 U.S.C. §§ 8401-8405.

<sup>19</sup> See Request, 84 Fed. Reg. at 52396 (citing 79 Fed. Reg. at 44276).

<sup>20</sup> See Request, 84 Fed. Reg. at 52394.

<sup>21</sup> 16 CFR pt. 310 *et seq.*

<sup>22</sup> 15 U.S.C. §§ 1693-1693r.

<sup>23</sup> 39 U.S.C. § 3009.

and deception authority.<sup>24</sup> And, each of these federal laws coexist with (but do not preempt) a growing number of state laws that regulate the same business practices, most notably California.<sup>25</sup>

While the FTC may be correct to describe the current landscape as a “patchwork of laws and regulations,” MPA does not believe that expanding the Negative Option Rule to encompass automatic renewals will change that fact. As long as state action is not preempted, rules and regulations established under the Negative Option Rule would layer on top of the existing “patchwork” and fail to “provide industry and consumers with a consistent legal framework across different media and types of plans.”<sup>26</sup> An omnibus, cross-media “one-size-fits-all” regulation in an attempt to create “a consistent legal framework” is neither feasible nor desirable: publishers should be afforded the flexibility to tailor their subscription offers to their readers within the bounds of existing laws. The FTC even acknowledges as much, conceding that “the legality of a particular negative option depends on an individualized assessment of the advertisement’s net impression and the marketer’s business practices.”<sup>27</sup>

As one ostensible basis for amending the Rule, the FTC notes that, since the conclusion of the last Rule review, “[t]he Commission and the states continue to regularly bring cases challenging negative option practices, including more than 20 recent FTC cases.”<sup>28</sup> The fact that the FTC and the states regularly bring law enforcement cases against allegedly unlawful negative

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<sup>24</sup> 15 U.S.C. § 45(a).

<sup>25</sup> Cal. Bus. & Prof. Code § 17602.

<sup>26</sup> See Request, 84 Fed. Reg. at 52396.

<sup>27</sup> See *id.* at 52395.

<sup>28</sup> See *id.* at 52396.

option marketers illustrates that the current legal framework *is* working. The Commission is an aggressive, and effective, cop on the negative option beat.

Still nascent in 2014, ROSCA has evolved into one of the Commission's strongest enforcement tools. Earlier this year, when announcing the settlement of a negative option lawsuit brought under Section 5, ROSCA, and the EFTA which netted strong injunctive and severe monetary relief, the FTC's Director of the Bureau of Consumer Protection warned that "[t]he FTC will continue to bring actions against this kind of deceptive and unfair marketing, and will seek to return money to victimized consumers."<sup>29</sup> Moreover, the FTC's Associate Director of the Division of Financial Practices earlier this year reported that six of the Commission's cases alleging violations of the EFTA in 2018 targeted negative option plans.<sup>30</sup> Notably, the FTC identifies two recent cases that it brought under its Section 5 authority involving negative option plans that did not involve either internet sales or telemarketing.<sup>31</sup> In one of these cases, in which the Commission partnered with the State of Maine, the FTC secured a stipulated money judgment of two million dollars.<sup>32</sup>

Furthermore, both FTC staff and state regulators have acknowledged that long-standing consumer protection principles apply to advance consent conduct that falls outside the parameters

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<sup>29</sup> See Press Release, "Online Marketers Barred from Deceptive 'Free Trial' Offers, Unauthorized Billing," (May 31, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/05/online-marketers-barred-deceptive-free-trial-offers-unauthorized>.

<sup>30</sup> See Ltr. from M. Mithal to P. Sanford dated May 30, 2019, at 10-13.

<sup>31</sup> See Request at 52396, n.26.

<sup>32</sup> See Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Marketing Architects*, 2:18-cv-00050-NT (D. Me. Feb. 5, 2018).

of the Negative Option Rule.<sup>33</sup> To the extent that the Commission may have concerns that the current legal landscape has “gaps” that must be filled in with a new, expansive Rule, we believe that such concerns are misplaced. Indeed, they are belied by the Commission’s impressive law enforcement record in which it has used all tools available to it – including standalone Section 5 authority – to secure strong injunctions and civil monetary relief and by regulators’ own admission that traditional consumer protection principles apply to negative option marketing practices.

*Overly Prescriptive Regulation Will Not Remedy Consumers’ Complaints*

As a second purported basis for amending the Rule, the FTC writes that it “continues to receive thousands of complaints each year related to negative option marketing.”<sup>34</sup> In MPA’s view, this also does not warrant expansion of the Rule.

MPA does not seek to minimize the complaints about negative option marketing that the Commission receives each year. As a leading industry advocate and frequent contributor to FTC initiatives, we are mindful of best practices that do not generate such complaints. Because the Commission provides no information about the nature of the negative option complaints it has received, and because the FTC’s own data shows that complaints related to magazines and books are *de minimis*,<sup>35</sup> MPA is concerned that an overly prescriptive rule will burden legitimate business

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<sup>33</sup> See Lesley Fair, “Acc-cen-tuate the negative?” (July 29, 2014) (“long-standing consumer protection principles of the FTC Act still apply” to continuity plans, trial conversions, and automatic renewals); *see also* FTC Hearings on Competition and Consumer Protection in the 21st Century, Tr. at 21-22 (June 12, 2019) (Ben Wiseman, Director of the Office of Consumer Protection for the Office of the Attorney General for the District of Columbia: “longstanding consumer protection principles that guide our enforcement actions still apply” to negative option marketing).

<sup>34</sup> *Id.*

<sup>35</sup> See FTC Consumer Sentinel Network 2018 Data Book, at 7, 84 (showing that consumer reports relating to magazine and books constitute approximately one-fifth of one percent of the total complaints received by the FTC).

behavior without targeting the most salient negative option problems that the FTC seeks to eradicate.

Further, we firmly believe that publishers must be afforded latitude to communicate with their readers in a way that is tailored to the medium and the consumers' preferences. The FTC should not pursue promulgation of a new Rule that micromanages lawful business conduct. Overly prescriptive rules will not enhance business compliance, nor will they benefit consumers. As part of the Commission's recent review of the Energy Labeling Rule, Commissioner Wilson issued a dissenting statement that captures the problem of over-regulation impeccably:

I continue to believe it is unnecessary for the [Energy Labeling] Rule to prescribe the weight of the paper (58 pounds per 500 sheets) a manufacturer must use when printing the EnergyGuide label and the minimum peel capacity of the adhesive to be used to affix the label to the appliance. I believe that the Commission can provide guidance on labeling requirements without dictating such minutiae. ***Freeing businesses from unnecessarily prescriptive requirements benefits consumers.***<sup>36</sup>

This applies with equal force to the Negative Option Rule. The combination of Commission complaints, consent decrees, and stipulated judgments in negative option cases, state laws, existing guidance documents, and industry best practices collectively guide industry and protect consumers without, for example, dictating the minutiae of exactly how a publisher must provide a "simple mechanism" for a consumer to stop recurring charges.

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<sup>36</sup> See Dissenting Statement of Commissioner Christine S. Wilson, *Energy Labeling Rule*, Matter No. R611004 (Oct. 22, 2019) (emphasis added).

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MPA appreciates the opportunity to share its views about this important issue with the Commission. As in the past, we stand ready to assist the FTC as it works to protect consumers and guide businesses. Please let us know how we may be of further assistance to the Commission.

Sincerely,

Rita Cohen  
Senior Vice President, Legislative and Regulatory  
Policy

*MPA – The Association of Magazine Media*