

June 23, 2023

Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

*Comment submitted electronically via <https://www.regulations.gov>*

**Re: Negative Option Rule; Project No. P064202 ("Click-to-Cancel" Proposal)**

Dear Commissioners:

The undersigned civil society organizations write to you in strong support of the Federal Trade Commission's proposed amendments to the Negative Option Rule.<sup>1</sup> Today's digital marketplace is rife with unfair or deceptive corporate marketing strategies that manipulate people into buying unwanted subscriptions or accepting the seller's preferred choices, which implicate both anti-monopoly and consumer protection concerns. There is clear evidence that updates to the current rules governing negative option transactions are necessary and overdue.

We are particularly concerned that monopolies, like Amazon, have the power to game the market and substantially limit our ability to make our own decisions. Using deceptive tactics to restrict or manipulate our choices is one way that corporations subject us to coercive, unaccountable power in our daily lives. We applaud the FTC's proposal to modernize the 50-year-old Negative Option Rule in response and urge you to resist industry arguments to weaken the final regulation.

The FTC's proposed amendments would finally address core issues raised by the online proliferation of abusive or misleading negative option marketing schemes, including misrepresentations, disclosures, consent, and cancellation, and would make noncompliance with the new rule subject to civil penalties. We welcome these improvements as a major step forward in protecting consumers against corporate attempts to trick or scam them into subscription traps. Given that powerful companies all too often rely on exploitative negative option ploys to retain customers and maintain or grow their market dominance, the new protections will also play an important role in the FTC's efforts to address corporate monopoly power.

First, the proposal would substantially expand and consolidate legal requirements for merchants to cover all forms of "negative option" marketing, which refers to sellers interpreting a consumer's silence or inaction to be acceptance. Negative option tactics include prenotification plans (e.g., gift-of-the-month clubs), continuity plans (e.g., weekly bottled water delivery), automatic renewals, and free trial conversion offers. Importantly, the new rule would also cover negative option marketing regardless of the context, including online, telephone, and in-person face-to-face sales pitches. These proposed expansions are sorely needed given the gaps in the current patchwork of consumer protections related to negative option transactions,<sup>2</sup> particularly

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<sup>1</sup> Fed. Trade Comm'n, Negative Option Rule, 88 Fed. Reg. 24716 (Apr. 24, 2023), <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.

<sup>2</sup> For example, as the Federal Register notice states, "the proposed Rule would allow the Commission to seek civil penalties and consumer redress in contexts where such remedies are currently unavailable, such as deceptive or

the current Negative Option Rule's limited coverage of only prenotification plans for physical goods (which the FTC estimated in 2017 as representing fewer than 100 sellers<sup>3</sup>).

The FTC's proposed amendments would then subject the broader range of covered business practices to comprehensive standards that will ensure consumers can understand and consent to what they are buying, as well as easily cancel if they wish. For instance, among the provisions are requirements for merchants to provide clear and conspicuous information about the negative option, whether it is an online dating app subscription or a gym membership, and to obtain a consumer's "unambiguously affirmative consent" to agree to it. To further improve the consent provision, we recommend the FTC to require sellers to obtain a customer's consent to a free-to-paid conversion no more than 6 days before the conversion would take place, as consumers commonly forget to cancel an unwanted or unused trial. Similarly, because too many people remember their subscription only when they are charged, the FTC should strengthen the reminders provision by requiring sellers to notify consumers no more than 6 days and no less than 2 days before each recurring charge.<sup>4</sup>

The proposal's "click to cancel" provision would further require sellers to make the cancellation process as easy and hassle-free as the initial purchase and sign-up. That is, under the new rule, an online subscription service that a consumer bought on the internet with one click would be cancellable online with one click—rather than solely through a phone call, an in-person visit, or an online gauntlet of confusing prompts. Businesses should be relying on the quality of their goods or services to retain customers, not by forcing them to research how to cancel their subscription<sup>5</sup> or by making termination as frustrating as possible.

These new consumer protections are common-sense and urgently needed to curb the devious sales tactics that are now flourishing in the digital marketplace at the expense of consumers and businesses that eschew the shady sales practices. Among the worst are so-called "dark patterns"<sup>6</sup> or user interface or design features that manipulate consumers into making choices that pad the business's bottom line and bolster market share but run counter to the consumer's wishes or interests. While these design choices can seem small on the surface, when corporate monopolies deploy dark patterns, they are manipulating the public, shaping markets to their own benefit, and reducing our autonomy in daily decisions. For an illustration of how these sales practices work in

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unfair practices involving negative options in traditional print materials and face-to-face transactions (*i.e.*, in media not covered by ROSCA or the TSR) and misrepresentations (which are not expressly covered by ROSCA, even when on the internet)." 88 Fed. Reg. 24716, 24726.

<sup>3</sup> Fed. Trade Comm'n, Negative Option Rule, 82 Fed. Reg. 38907, 38908 (Aug. 16, 2017), <https://www.federalregister.gov/documents/2017/08/16/2017-17318/agency-information-collection-activities-proposed-collection-comment-request>.

<sup>4</sup> Additional details are included in the public comment letter led by the National Consumer League and National Consumer Law Center submitted in response to this Request for Information.

<sup>5</sup> For example, Google Trends shows substantial increases in user search interest in "how to cancel" a subscription or membership over the past decade:

<https://trends.google.com/trends/explore?date=all&geo=US&q=how%20to%20cancel%20subscription,how%20to%20cancel%20membership&hl=en> (accessed June 20, 2023).

<sup>6</sup> See, e.g., Fed. Trade Comm'n, *Bringing Dark Patterns to Light*, FTC Staff Report (Sept. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf).

practice to rig consumer choices in a company's favor and to further aggrandize its market dominance, we can look to the world's largest online retail company, Amazon—as the FTC itself did in its enforcement action against the tech behemoth this week.<sup>7</sup>

As a recent class action lawsuit,<sup>8</sup> other legal complaints,<sup>9</sup> and consumer advocacy watchdog reports<sup>10</sup> explain more in detail, Amazon forces its Amazon Prime subscribers to overcome numerous obstacles and confusing pressure tactics to end their subscription. In turn, these onerous hassles work to maintain a reliable revenue stream for Amazon and a rich source of consumer data from its Prime subscribers. In fact, subscription fees, including Amazon Prime memberships, were worth \$35 *billion* in revenues to Amazon last year<sup>11</sup>—and those Amazon Prime subscribers spend more than twice as much as other Amazon customers.<sup>12</sup> Amazon's internal campaign to thwart Prime subscribers from leaving was reportedly so successful that cancellations dropped by 14 percent at one point.<sup>13</sup> Furthermore, these consumers' increased spending as Prime members and the cost of the Prime subscription itself are likely crowding out competitor retailers from their household budgets. In other words, despite already holding too much power, Amazon relies on abusive negative option marketing as yet another way to defend and grow its market dominance while manipulating consumers for profit. Amazon later agreed to simplify its convoluted Prime termination process across the European Union amid negative publicity and regulatory scrutiny, but consumers in the U.S. have not yet been so fortunate.<sup>14</sup>

We must underscore our concern that unfair or deceptive negative option sales tactics are not merely annoying to consumers. All too often they are financially, emotionally, and legally

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<sup>7</sup> Makena Kelly, *FTC sues Amazon for tricking customers into signing up for Prime*, The Verge (June 21, 2023), <https://www.theverge.com/2023/6/21/23768372/ftc-amazon-lawsuit-prime-dark-patterns-subscriptions>.

<sup>8</sup> Corrado Rizzi, *Amazon Uses 'Dark Patterns' to Hinder Consumers Looking to Cancel Prime Membership, Class Action Says*, ClassAction.org (Nov. 9, 2022), <https://www.classaction.org/news/amazon-uses-dark-patterns-to-hinder-consumers-looking-to-cancel-prime-membership-class-action-says>.

<sup>9</sup> See, e.g., Electronic Privacy Information Center, *Lawsuit, Citing EPIC, Alleges Amazon Locks Customers Into Prime Subscriptions With Dark Patterns* (Nov. 10, 2022), <https://epic.org/lawsuit-citing-epic-alleges-amazon-locks-customers-into-prime-subscriptions-with-dark-patterns>.

<sup>10</sup> See, e.g., Natasha Lomas, *Can't figure out how to end your Amazon Prime sub? These complaints could help...*, TechCrunch (Jan. 14, 2021), <https://techcrunch.com/2021/01/14/cant-figure-out-how-to-end-your-amazon-prime-sub-these-complaints-could-help/>; Public Citizen et al., *Letter to Fed. Trade Comm'n* (Jan. 14, 2021), <https://www.citizen.org/wp-content/uploads/Amazon-Dark-Patterns-FTC-letter-.pdf>; Forbrukerrådet (Norwegian Consumer Council), *You Can Log Out, but You Can Never Leave* (Jan. 14, 2021), <https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

<sup>11</sup> Amazon's 2022 annual report indicates (p. 67) \$35.2 billion in 2022 in net sales of subscription services, including "annual and monthly fees associated with Amazon Prime memberships, as well as digital video, audiobook, digital music, e-book, and other non-AWS subscription services." [https://s2.q4cdn.com/299287126/files/doc\\_financials/2023/ar/Amazon-2022-Annual-Report.pdf](https://s2.q4cdn.com/299287126/files/doc_financials/2023/ar/Amazon-2022-Annual-Report.pdf).

<sup>12</sup> David Chang, *The average Amazon Prime member spends this much per year*, Motley Fool (July 22, 2022), <https://www.fool.com/the-ascent/personal-finance/articles/the-average-amazon-prime-member-spends-this-muchper-year/>.

<sup>13</sup> Hannah Towey & Eugene Kim, *Amazon used a sneaky tactic to make it harder to quit Prime and cancellations dropped 14%, according to leaked data*, Business Insider (Mar. 15, 2022), <https://www.businessinsider.com/amazon-project-iliad-made-cancel-prime-membership-harder-leaked-data-2022-3>.

<sup>14</sup> Natasha Lomas, *Amazon agrees to drop Prime cancellation 'dark patterns' in Europe*, TechCrunch (July 1, 2022), <https://techcrunch.com/2022/07/01/amazon-ends-prime-cancellation-dark-patterns-europe/>.

damaging to contend with, costing people precious time and money. For free trial conversions alone, one survey found that 59% of consumers have dealt with a free trial that automatically converted into a paid contract against their will.<sup>15</sup> The Better Business Bureau also reported that victims' losses in free trial scam cases pursued by the FTC amount to more than \$1.3 billion over the last ten years.<sup>16</sup> Furthermore, as many State Attorneys General have previously written to the FTC,<sup>17</sup> the states must continue to expend substantial resources combating negative option marketing abuses, while the FTC itself reports that it continues to receive thousands of complaints each year about negative option sales practices.<sup>18</sup> The current regulatory requirements, penalties, and incentives are plainly not enough to deter companies from resorting to these exploitative tactics for profit, including multinational giants such as Amazon.

The FTC's current rules are woefully inadequate to rein in the unfair or deceptive negative option tactics that corporations like Amazon are using to stack the deck in self-serving ways, rather than seeking to compete on quality, service, and innovation. While individual enforcement actions against abusive dark patterns, including the FTC's latest legal complaint against Amazon, remain a crucial tool, we need a modernized Negative Option Rule to ensure Amazon and other corporations cannot continue to operate outside of the law.

We thank the FTC for recognizing that it should not be this way and for setting forth a strong proposed rule to create a robust national baseline for negative option protections that will match the challenges of the modern e-commerce era. The FTC should finalize the rule swiftly, with enhancements to strengthen it even further, and we stand ready to offer our assistance as this rulemaking moves forward.

Sincerely,

Athena Coalition  
American Economic Liberties Project  
Demand Progress Education Fund  
Demos  
Economic Security Project  
Electronic Privacy Information Center  
Institute for Local Self-Reliance  
Jobs With Justice  
Main Street Alliance  
Open Markets Institute  
Public Citizen  
U.S. PIRG

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<sup>15</sup> Bankrate, *Despite safety concerns, 64% of U.S. debit or credit cardholders save their information online* (Oct. 24, 2019), <https://www.bankrate.com/pdfs/pr/20191024-online-shopping-survey.pdf>.

<sup>16</sup> Better Business Bureau, *BBB Study: Free Trial Scams* (Dec. 2018), [https://www.bbb.org/all/scamstudies/free\\_trial\\_scams/free\\_trial\\_scams\\_full\\_study](https://www.bbb.org/all/scamstudies/free_trial_scams/free_trial_scams_full_study).

<sup>17</sup> Public Comment Letter in Response to FTC Advance Notice of Proposed Rulemaking on Negative Option Rule, 84 Fed. Reg. 52393, by State Attorneys General (Dec. 2, 2019), <https://www.regulations.gov/comment/FTC-2019-0082-0012>.

<sup>18</sup> 88 Fed. Reg. 24716, 24719.