Supplemental Supporting Statement
Final Rule
Trade Regulation Rule Concerning
Recurring Subscriptions and Other Negative Option Programs
16 C.F.R. Part 425
(Control Number: 3084-0104)

Overview of Information Collection

The Federal Trade Commission ("FTC" or "Commission") is issuing final amendments to the Commission's "Rule Concerning Use of Prenotification Negative Option Plans," retitled the "Rule Concerning Recurring Subscriptions and Other Negative Option Programs" ("Rule," "final Rule" or "Negative Option Rule"). The final Rule now applies to all negative option programs in any media, and, among other things, (1) prohibits misrepresentations of any material fact made in connection with marketing goods or services with a negative option feature; (2) requires sellers to provide important information prior to obtaining consumers' billing information and charging consumers; (3) requires sellers to obtain consumers' unambiguously affirmative consent to the negative option feature prior to charging them; and (4) requires sellers to provide consumers with simple cancellation mechanisms to immediately halt all recurring charges.

The final Rule makes changes in the Rule's recordkeeping and disclosure requirements that will increase the Paperwork Reduction Act ("PRA") burden as detailed below. Accordingly, the Commission is submitting the final Rule and this Supplemental Supporting Statement to OMB for review under the PRA.

(1) Necessity for Collecting the Information

To address negative option issues at the time, the Commission promulgated the Negative Option Rule in 1973 pursuant to the FTC Act, 15 U.S.C. §§ 41-58. However, the 1973 Rule only covered prenotification plans, which are now uncommon, and thus, rarely a problem. During its 2014 review of the Rule, the Commission found unfair, deceptive, and otherwise problematic negative option marketing practices continue to cause substantial consumer injury, despite determined enforcement efforts by the Commission and other law enforcement agencies. The Commission also found negative option practices not covered by the Rule accounted for the vast majority of the recent FTC enforcement activity in this area. These other negative option plans include continuity plans, automatic renewals, and free-to-pay or nominal-fee-to-pay conversion offers.

Given the ongoing harm, in 2019 the Commission issued an Advance Notice of Proposed Rulemaking (ANPR) seeking comment on the current Rule, as well as possible measures to reduce consumer harm created by deceptive or unfair negative option marketing. In 2023, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking comments on proposed amendments that were designed to: (1) provide industry with a one-stop, clear regulatory framework, (2) prevent deceptive and unfair practices, and (3) better address these practices when they do occur

by providing the Commission with the power to seek civil penalties and redress where such remedies are now unavailable.

The rulemaking record demonstrates that prior legal authorities fell short because they left consumers unprotected from certain practices and constrained the relief the Commission was able to obtain for law violations to redress consumers and deter future unlawful activity. In the ANPR and NPRM, the Commission explained it receives thousands of consumer complaints a year related to negative option marketing.

The Commission made changes to the Rule based on the record, some of which affected the PRA analysis. Specifically, the Commission determined to specify and thereby limit the types of disclosures required, narrow the scope of entities covered (by excluding those solely involved in "promoting" negative option plans), curtail the length of time for retaining records (to only three years), and establish an option for sellers to eliminate having to keep records of consent if they have the requisite processes in place.

The final Rule now clarifies existing requirements regarding negative option marketing currently dispersed in other rules and statutes administered by the FTC and provides a consistent legal framework across media and offers. It also consolidates requirements, such as those in the Telemarketing Sales Rule (TSR), 16 CFR Part 310, and the Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. §§ 8401-8405, specifically applicable to negative option marketing. The final Rule also provides clarity about how to avoid deceptive negative option disclosures and procedures. For example, ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures. The final Rule now provides clear standards for sellers about the content and timing of important information disclosures and what constitute "simple mechanisms" for the consumer to stop recurring charges. Further, the Rule allows the Commission to seek civil penalties and consumer redress under Section 19(a)(1) of the FTC Act in contexts where such remedies are currently unavailable, such as deceptive or unfair practices involving negative options in print materials and face-to-face transactions (i.e., in media not covered by ROSCA or the TSR).

The amendments expand the scope of the Rule to cover all forms of negative option marketing in all media (e.g., telephone, Internet, traditional print media, and in-person transactions) and add new requirements governing disclosures, consumer consent, and cancellation. The amendments are designed to ensure that consumers understand what they are purchasing and can also cancel their participation in a negative option plan without undue burden or complication. The final Rule also requires negative option sellers to retain records sufficient to verify consumer consent to the negative option feature for three years from the date of consent. However, a seller need not maintain these records if the seller can demonstrate by a preponderance of the evidence that it uses processes ensuring no consumer can technologically complete the transaction without consent.

(2) <u>Use of the Information</u>

The amendments will allow consumers to make informed decisions regarding the purchase of negative option programs and cancel their participation in such programs without undue burden. Specifically, the amendments will require sellers to disclose all material terms of a negative option

offering, including: (1) the terms of the negative option contract, including the terms of recurring payments and whether charges will increase after any applicable trial period ends; (2) the deadline by which a consumer must act in order to stop recurring charges; (3) the amount the customer will be charged and the frequency of charges; and (4) the information necessary for the consumer to find a simple mechanism to cancel. The amendments also require that all written and oral offers involving negative option plans must be disclosed clearly and conspicuously to consumers.

The final Rule will also require negative option sellers to retain records sufficient to verify consumer consent to a negative option feature for 3 years from date of consent. The Commission cannot adequately ensure that sellers are complying with the disclosure and consumer consent requirements unless sellers maintain records that show such compliance. However, if the seller can demonstrate by a preponderance of the evidence that it uses processes ensuring no consumer can technologically complete the transaction without consent, then such seller does not have to maintain these records for such transactions.

(3) Consideration of Using Improved Information Technology to Reduce Burden

The final Rule's disclosure requirements are technology-neutral and apply to advertisements and other promotional materials regardless of the means a seller uses to promote a negative option plan offering. The amendments provide sellers the flexibility to make required disclosures in whatever medium they use to conduct covered sales, whether via telephone, Internet, traditional print media, or in-person transactions. In this way, the final Rule allows regulated entities to take advantage of improved information technology offerings and is consistent with the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note.

(4) Efforts to Identify Duplication

Several federal statutes address some aspects of negative option marketing, but Commission staff have not identified any other federal statutes, rules, or policies that would duplicate the final Rule. ROSCA, the TSR, the Postal Reorganization Act (*i.e.*, the Unordered Merchandise Statute), 39 U.S.C. § 3009, and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r, address aspects of negative option marketing, but do not provide industry and consumers with a consistent legal framework across different media and the various types of negative option offerings.

ROSCA and the TSR do not address negative option plans in all media. ROSCA's general statutory prohibitions against deceptive negative option marketing only apply to Internet sales, and the TSR's more specific provisions only apply to telemarketing. As a result, different requirements apply depending on whether a negative option offer is made online, over the telephone, or in some other medium (*e.g.*, in person, in print, through the mail, etc.).

The EFTA and the Unordered Merchandise Statute also contain provisions addressing negative option marketing. EFTA prohibits sellers from imposing recurring charges on a consumer's debit cards or bank accounts without written authorization. The Unordered Merchandise Statute provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair

method of competition and an unfair trade practice in violation of Section 5 of the FTC Act.

Nonetheless, the Commission's enforcement experience has shown that harmful negative option practices that fall outside of these statutes' coverage remain prevalent in the marketplace.[1] In addition, the current regulatory framework does not provide consumers and businesses with clarity about how to avoid deceptive negative option disclosures and procedures. Accordingly, the amendments require specific disclosures and procedures for administering negative option programs that are not addressed by these other statutes.

(5) Efforts to Minimize Burden on Small Businesses

In formulating the amendments, the Commission sought to minimize prescriptive requirements and provide flexibility to negative option sellers including small businesses. In addition, FTC staff anticipates that most sellers including small businesses already provide for the sorts of disclosures, consent procedures, and cancellation mechanisms that are required by the amendments in the normal course of business. Thus, compliance with the requirements should not create a substantial added burden on covered entities including small businesses.

(6) Consequences of Conducting Collection Less Frequently

The prior Rule's disclosure requirements applied only to promotional materials that contain a negative option plan. The final Rule requires negative option sellers to provide disclosures to consumers regarding the amount to be charged, the deadline by which the consumer must act to avoid charges, the date charges will be submitted for payment, and the cancellation mechanism the consumer can use to end the negative option program. Not requiring disclosures of material terms for a negative option program at the time when it is offered by a seller could potentially injure consumers who may unwittingly enroll in a negative option program without notice of the material terms. The intent of the required disclosures is to enable consumers to make informed purchasing decisions.

The final Rule will also require negative option sellers to retain records sufficient to verify consumer consent to a negative option feature for 3 years from the date of consent. The Commission cannot adequately ensure that sellers are complying with the disclosure and consumer consent requirements unless sellers maintain records that show such compliance. Staff believes that a record retention period shorter than this would hamper the Commission's ability to verify sellers' compliance with the Rule, because the statute of limitations applicable to Commission rule violations is three years.[2]

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[1] For instance, the Commission recently brought two cases under Section 5 of the FTC Act involving negative option plans that did not involve either Internet sales or telemarketing. *FTC and State of Maine v. Health Research Laboratories, LLC*, No. 2:17-cv-00467-JDL (D. Me. 2018); and *FTC and State of Maine v. Marketing Architects*, No. 2:18-cv-00050 (D. Me. 2018).

[2] *See* Section 19(d) of the FTC Act, 15 U.S.C. § 57b(d).

(7) <u>Circumstances Requiring Collection Inconsistent with Guidelines</u>

The collection of information in the final Rule is consistent with guidelines contained in 5 C.F.R. 1320.5(d)(2).

(8) <u>Consultation Outside the Agency</u>

The Commission sought public comment on the proposed requirements and the associated PRA analysis. In developing the proposed requirements, the Commission considered 17 comments from individuals and entities representing a wide range of viewpoints, in response to an Advance Notice of Proposed Rulemaking[3] and 1,162[4] unique comments in response to a Notice of Proposed Rulemaking ("NPRM").

The NPRM sought comments on the PRA analysis and stated, "comments should provide any available evidence and data that supports their position, such as empirical data."[5] The Commission did not receive such evidence. A few commenters from businesses and industry groups, however, raised generalized concerns that the NPRM underestimated PRA-related costs.[6]

The Commission also held an informal hearing, at the request of interested parties, and designated Administrative Law Judge Carol Fox Foelak as the presiding officer.[7] Based on submissions by interested parties, and other information in the record, the presiding officer designated two disputed issues of material fact, including, "What will the recordkeeping and disclosure costs associated with the proposed rule be?"[8]

Based on the record, the presiding officer concluded, "There is insufficient evidence to make a finding concerning the … recordkeeping and disclosure costs associated with the proposed rule," and "in the absence of evidence, the issue is not genuinely disputed."[9] The presiding officer further explained: "IAB made a well-reasoned argument that the costs will be higher than the NPRM's estimates, generalizing from limited estimates that it, IFA, and NCTA provided. However, it did not

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[3] *See* Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 52,393 (Oct. 2, 2019).
[4] The Commission published 1,162 unique comments. Overall, the Commission received 16,612 comments. Of those, 15,449 were not posted online for various reasons (i.e., 14 unrelated, 23 duplicates, and 15,412 that appear to be non-unique responses to mass media campaigns) and one comment was withdrawn. The Commission has considered all timely and responsive public comments it received in response to its NPRM.
[5] 88 Fed. Reg. 24,730.
[6] Sirius XM, FTC-2023-0033-0857; SCIC, FTC-2023-0033-0879; Coalition, FTC-2023-0033-0884; ETA, FTC-2023-0033-1004; Direct Marketing Companies, FTC-2023-0033-1016. In addition, one commenter seemingly confused PRA-related costs with full implementation of the Rule, but still offered only generalized points. See Asurion, FTC-2023-0033-0878. Another commenter queried whether the Commission's estimate of the number of firms offering negative option features include B2B sales with automatic renewal clauses. ETA, FTC-2023-0033-1004. The staff estimate did not seek to exclude such sellers.
[7] Hearing Notice, 88 Fed. Reg. 85,525.
[8] Recommended Decision by Presiding Officer, https://www.regulations.gov/comment/FTC-2024-0001-0042.
[9] *Id.*.

provide any evidence to establish what the costs would be.”[10]

(9) Payments or Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

The information to be disclosed is of a routine business nature. No personal or sensitive information is involved nor is any commercially confidential information included.

(12) Annual Hours Burden

Number of Respondents. The Commission received no evidence to dispute the NPRM’s statements on the number of entities offering negative option features to consumers, so the Commission adopts the NPRM estimate that there are 106,000 such entities. Although the final Rule is narrower in that it excludes the term “promote” from its scope, the Commission retains the estimate of 106,000 entities for the purposes of this analysis, which would be more conservative and tend to overstate the burden.

Recordkeeping Hours. The Commission received no evidence to dispute the NPRM’s statements on recordkeeping under the PRA. As the final Rule is narrower, the time and financial resources needed to comply with disclosure requirements still do not constitute “burden” under the PRA.[11] Accordingly, the Commission adopts the NPRM estimate that 53,000 entities subject to the Rule will require approximately one hour per year to comply with the Rule’s recordkeeping requirements, for an annual total of 53,000 burden hours.

Disclosure Hours. Similarly, the Commission received no evidence to dispute the NPRM’s statements on disclosure hours under the PRA. As the final Rule narrowed and delineated the types of disclosures required, the time and financial resources associated with making these disclosures is even less than under the proposed Rule, which also did not constitute a “burden” under the PRA because they are a usual and customary part of regular business practice. 5 CFR 1320.3(b)(2). Accordingly, the Commission adopts the NPRM estimate that the disclosure burden required by the Rule will be, on average, two hours each year for each seller subject to the Rule, for a total estimated annual burden of 212,000 hours.

Estimated Annual Labor Cost. The Commission received no evidence to dispute the NPRM’s statements on labor costs under the PRA. For the final Rule, the Commission updates its labor cost estimates by using more recent wage data. For recordkeeping, staff multiplied the 53,000

[10] Recommended Decision by Presiding Officer, https://www.regulations.gov/comment/FTC-2024-0001-0042.

[11] Under the PRA, the time, effort, and financial resources necessary to comply with the collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) does not constitute a burden under the Rule where the associated reporting, recordkeeping, or disclosures are a usual and customary part of business activities. 5 CFR 1320.3(b)(2).

estimated hours to comply with the Rule's recordkeeping provisions by a clerical wage rate of $20.94/hour,[12] to yield an annual cost of approximately $1,109,820. For disclosure compliance, staff multiplied the 212,000 estimated hours by an hourly wage rate for sales personnel of $25.62,[13] to yield an annual cost of $5,431,440. Thus, the estimated total annual labor costs are $6,541,260 [($1,109,820 recordkeeping) + ($5,431,440 disclosure)].

(13) Estimated Annual Capital and/or Other Non-labor Related Costs

The Commission received no evidence to dispute the NPRM's statements that capital and start-up costs associated with the Rule's recordkeeping provisions are de minimis under the PRA. The Commission adopts those findings.

(14) Estimate of Cost to Federal Government

Staff estimates that the annualized cost to the Commission (per year over the 3-year clearance renewal being sought) to administer the disclosure requirements will be approximately $100,000, representing approximately fifty percent of an FTC attorney work year.

(15) Changes in Burden

The amendments to the Rule will result in an estimated additional 265,000 annual hours of burden and $6,541,260 in associated annual labor costs.

(16) Statistical Use of Information

There are no plans to publish any information for statistical use.

(17) Failure to Display the Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to the Certification for Paperwork Reduction Act Submissions

The FTC certifies that this collection of information is consistent with the requirements of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), and is not seeking an exemption to these certification requirements.

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[12] This figure is derived from the mean hourly wage shown for Information and Record Clerks. See Bureau of Labor Statistics, "Occupational Employment and Wages, May 2023, 43-9061 Office Clerks, General," https://www.bls.gov/oes/currenT/oes439061.htm.

[13] This figure is derived from the mean hourly wage shown for Sales and related occupations. See *id*.