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

RE: Negative Option Rule; Project No. P064202

Kelley Drye & Warren LLP ("Kelley Drye") submits these comments on behalf of a group of longstanding direct marketing companies ("the Companies") that have marketed and sold goods to consumers through direct marketing channels and retail stores for well over 50 years. The Companies appreciate the opportunity to comment on the Federal Trade Commission's Proposed Negative Option Rule ("the Proposed Rule").[1]

The Companies appreciate that certain bad actors may misuse or misrepresent negative option plans such as automatic renewal plans and continuity plans. At the same time, it is important to acknowledge that such plans have become increasingly popular over time precisely because consumers value the convenience and benefit of receiving goods and services on a recurring basis. The Commission must consider the differences in marketing and delivering goods as compared to services (*e.g.*, services are not subject to the same supply chain considerations) and both the costs and benefits of the Proposed Rule, including the very real potential of creating a chilling effect against businesses offering such plans because of excessively prescriptive requirements and the potential of incurring sizeable civil penalties for any misstep, even one that does not result in consumer harm.

Moreover, the Companies believe that the potential for misuse is minimal in connection with continuity plans for goods such as those offered by the Companies where consumers regularly receive goods that are fully returnable and refundable. To the extent that the Commission ultimately adopts a version of the Proposed Rule, such rule must be narrowly tailored to address consumer harm that has been documented in "prevalent" unfair and deceptive acts and practices and defined "with specificity."[2]

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1 Negative Option Rule, 88 Fed. Reg. 24,716 (Apr. 24, 2023).

2 15 U.S.C. §§ 57a(a)(1)(B), 57a(b)(3).

While the Companies initially marketed and sold goods exclusively through mail and printed catalogs, they have evolved over time to also engage with consumers through the internet and other electronic methods. The Companies believe that the Proposed Rule does not currently adequately account for important distinctions between negative option features involving the delivery of physical goods and negative option features involving services. First, goods can be returned and refunded, and second, consumers are charged *only* upon the receipt of the goods, thus being repeatedly reminded of the recurring charge. The Proposed Rule seeks to prescribe a one-size-fits-all approach without acknowledging inherent variability in advertising and disclosure practices for the diversity of the businesses impacted by the proposal. Regrettably, the Proposed Rule would pose considerable obstacles on many business models, especially for retailers of goods, and could essentially put legacy retailers of goods like the Companies out of business.

Importantly, the Companies continue to conduct a substantial proportion of their business through printed catalogs and mailings to consumers and respectfully posit that some of the requirements in the Proposed Rule fail to provide sufficient flexibility to permit those legacy, traditional enrollment methods that some consumers still prefer. The Companies strongly believe that the Proposed Rule must be narrowly tailored to address prevalent unfair and deceptive acts and practices that have been the subject of FTC enforcement. The Companies also strongly believe that the Proposed Rule should preserve flexibility to continue to allow businesses the opportunity to market and sell goods and services through various channels, including printed catalogs and mailings.

I. <u>Legal Standard</u>

Section 18(a)(1)(B) of the FTC Act empowers the Commission to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices" and to "include requirements prescribed for the purpose of preventing such acts or practices."[3] Importantly, as acknowledged in the Proposed Rule, while the Restore Online Shoppers' Confidence Act (''ROSCA''), 15 U.S.C. 8401–8405, requires sellers of negative option features to disclose all material terms of the transaction before obtaining the consumer's billing information and obtain a consumer's express informed consent, Congress deliberately did not authorize the FTC to promulgate regulations to carry out ROSCA. As such, even assuming that Congress did not intend to specifically foreclose the Commission from promulgating regulations governing negative option offers, the Commission must comply with all of the substantive and procedural requirements imposed by the Magnuson-Moss Act, many of which were added specifically in 1980 by Congress to address perceived overreach by the Commission. Importantly, the Commission is only authorized to issue a notice of proposed rulemaking "where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[4]

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[3] 15 U.S.C. § 57a(a)(1)(B).

[4] 15 U.S.C. § 57a(b).

The Commission purports to meet the prevalence requirement by citing to enforcement actions that involved negative option plans and referencing comments from certain organizations citing consumer complaints related to such plans.[5] Notably, almost all of the cases cited by the Commission in the Proposed Rule relate to internet advertising or online sign-up processes.[6]

In addition to the requirement of finding prevalent unfair or deceptive acts or practices, the FTC must define those acts "with specificity."[7] Courts have previously invalidated FTC rules where the agency failed to define with specificity the prohibited acts or practices and failed to establish a rational connection between the alleged illegality and the proposed requirement under the rule.[8] The Commission only acknowledges its obligation to define such prevalent unfair and deceptive acts and practices "with specificity" in a footnote in the Proposed Rule and makes minimal effort to justify the many highly prescriptive requirements in the Proposed Rule as related to specific "prevalent" unfair and deceptive acts and practices.[9]

II. <u>Comments on Specific Proposed Requirements</u>

A. <u>Issues related to Requiring a Precise Disclosure Date for Future Shipments</u>

Section 425.4(a) of the Proposed Rule requires certain disclosures of "important information" in connection with promoting or offering for sale any good or service with a negative option feature, including (1) that consumers' payments will be recurring, if applicable, (2) the deadline by which consumers must act to stop charges, (3) the amount or ranges of costs consumers may incur, (4) the date the charge will be submitted for payment, and (5) information about the mechanism consumers may use to cancel the recurring payments.[10]

While the Companies agree that consumers must be provided material information related to the transaction prior to providing express affirmative consent, the Proposed Rule goes too far in appearing to require a specific date by which consumers must act to stop charges when certain negative option plans are inherently more flexible and allow consumers to cancel anytime. For example, as noted above, the Companies sell consumer products such as collections through subscription offers. When consumers enroll, they affirmatively elect to purchase products in the collection. The price of each item in the collection is prominently specified. The Companies disclose that subsequent products in the collection will ship as they become available along with approximate timing, and that consumers will be charged upon shipment but can: (1) cancel any time; and (2) obtain a full refund (including return shipping) if they do not cancel prior to a

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5 88 Fed. Reg. at 24,725.

6 See 88 Fed. Reg. at 24,719 n.31. Indeed of the 13 cases cited as evidence of prevalence since the Advance Notice of Proposed Rulemaking, only one focused on print advertising. *See FTC v. XXL Impressions*, No. 1:17–cv–00067–NT (D. Me. 2018).

7 15 U.S.C. § 57a(a)(1)(B).

8 *Katharine Gibbs Sch. v. F.T.C.*, 612 F.2d 658, 662 (2d Cir. 1979).

9 88 Fed. Reg. at 24,719, n. 33.

10 88 Fed. Reg. at 24,726.

shipment and subsequently return the product. There is no precise "deadline" to cancel. In all cases, consumers can receive a full refund of the purchase price of the product, and, in the vast majority of the cases, that refund will include reimbursement for inbound and outbound shipping. In most cases that privilege is for a full year from delivery. In no cases is the return period less than 120 days.

This approach preserves needed flexibility for the consumer and the Companies, and it virtually eliminates any risk of consumer harm from undesired charges. Notably, disclosing, at enrollment, a precise date by which the consumer must cancel is both impossible and unnecessary. As compared to services, products in collections are frequently hand cast and hand painted which creates inherent unpredictability in their delivery. Moreover, as goods, availability is subject to change for any number of reasons, including supply chain issues. Consumers appreciate the flexibility that such subscriptions for collections offer and understand that the frequency of shipments (and thus date of charge) may vary. For example, in certain coin collections, the Companies may be unable to reliably predict when the coins will become available. Under the current Proposed Rule, the Companies would be unable to offer such collections on flexible terms where consumers are charged when the coins become available unless the Companies are able to identify with precision upfront when the product in the collection will ultimately become available.

As written, the Proposed Rule would prohibit such arrangements and effectively foreclose the Companies' longstanding business model, which its loyal customers appreciate and which has neither been the subject of frequent consumer complaints or law enforcement. In order to ensure that such lawful arrangements remain viable, we suggest the following revisions to Section 425.4:

> (2) The deadline (by date, ~~or~~ frequency, <u>*or other description*</u>) by which the consumer must act in order to stop ~~all~~ charges;
>
> (4) The date, <u>*frequency or other description*</u> ~~(or dates)~~ each charge will be submitted for payment.

This more flexible language acknowledges that businesses may not be able to reliably predict a precise date for shipment and charges and that consumers may still affirmatively elect to enroll in such subscription plans.

B. <u>"Immediately Adjacent" Requirement</u>

Section 425.4(b)(1) of the Proposed Rule provides that any "important information" required under subsection 425.4(a) must be "clear and conspicuous." The Companies agree that such information should meet the FTC's longstanding standard of "clear and conspicuous" for disclosures of material information. However, subsection 425.4(b)(2) goes further and specifies "[i]f directly related to the negative option feature, the disclosures must appear *immediately adjacent* to the means of recording the consumer's consent for the negative option feature."[11]

In purporting to justify this requirement, the preamble notes only that: "the Commission's law enforcement experience as well as the comments demonstrate the need for this direction, which should benefit businesses who are trying to make non-deceptive claims by leveling the playing field."[12] But the Commission has long acknowledged that disclosures need not necessarily be "immediately adjacent" to the mechanism for obtaining express affirmative consent in order for the disclosure to be clear and conspicuous. For example, in its .Com Disclosure Guides, How to Make Effective Disclosures in Digital Advertising, the FTC explains that required disclosures must be "clear and conspicuous" and notes that "advertisers should consider its placement in the ad and its proximity to the relevant claim."[13] The Guides specifically contemplate that it may be impossible or impractical to include all material information adjacent to a claim.[14]

The Commission also declined to impose a prescriptive "immediately adjacent" requirement in many of the very consent orders relied upon in the Proposed Rule. Most of those settlements align with longstanding FTC precedent and guidance by requiring that such disclosures be "clear and conspicuous."[15] Even in the orders where the FTC does define more prescriptively *where* certain disclosures must appear, it has almost always preserved some needed flexibility by requiring that disclosures to appear "in close proximity" to representations related to free, trial, or no obligations claims related to a negative option feature.[16] Departing from longstanding precedent and guidance would pose significant logistical hurdles for business without countervailing benefits to consumers.

Particularly in print publications and catalogs where space is inherently limited, it is not practical to disclose all of the information required under Section 425.4(a) "immediately adjacent" to the consumer's consent. It is also not required to prevent deception because the FTC has long acknowledged that clear and conspicuous disclosures – even if not "immediately adjacent" to the consumer's consent – are likely to be seen and understood by consumers. The proposed "immediately adjacent" standard is also inconsistent with even the most stringent state laws,

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11 Proposed Rule § 425.4(b)(2)(i) (emphasis added).

12 88 Fed. Reg. at 24,727

13 FTC .Com Disclosure Guides, How to Make Effective Disclosures in Digital Advertising, at 3.

14 Guide at 10.

15 *See, e.g., FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2018). While these orders may require costs and length of any trial period to be disclosed "immediately adjacent" to the consumer's consent, they do not require all material information to be disclosed immediately adjacent as set forth in the Proposed Rule.

16 *See, e.g., FTC v. AAFE Products Corp.*, No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC v. Pact Inc.*, No. 2:17–cv–1429 (W.D. Wash. 2017); *FTC v. Tarr*, No. 3:17–cv–02024–LAB–KSC (S.D. Cal. 2017); *FTC v. AdoreMe, Inc.*, No. 1:17–cv–09083 (S.D.N.Y. 2017).

which require that terms be presented “in visual proximity” to the consumer’s consent or, in the case of an offer conveyed by voice, in temporal proximity, to the request for consent.[17]

Moreover, New York, California and various other states require that the disclosures must be in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.[18] That language offers various options to ensure that the disclosures will be clear and conspicuous and workable across a host of industries. The Companies comply with these laws: the disclosures are always in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language and in visual proximity to the request for consent.

The Companies further believe that replacing “immediately adjacent to” with “in proximity to” would also be consistent with ROSCA’s basic “express informed consent” requirement while providing more guidance on how to comply and would remove ambiguity for marketers, while leveling the playing field and providing deterrence. In order to align with the FTC’s longstanding guidance and state law requirements, and avoid overly prescriptive requirements that would harm consumers and businesses, the Companies suggest that subsection 425.4(b)(2) be revised as follows:

> (2) Placement:
>
> (i) If directly related to the negative option feature, the disclosures must appear ~~immediately adjacent to the means of recording~~ <u>*in proximity to the request for*</u> the consumer's consent ~~for~~ <u>*to*</u> the negative option feature.

C. <u>Standalone Consent</u>

Section 425.5(a)(1) of the Proposed Rule would require the negative option seller to “[o]btain the consumer’s unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction.” Section 425.5(a)(3) of the Proposed Rule would further require the negative option seller to also “[o]btain the consumer’s unambiguously affirmative consent to the rest of the transaction” without specifying what is meant by the consumer’s consent to “the rest of the transaction.”

In purporting to justify this requirement, the FTC states that it “is consistent with ROSCA’s basic ‘express informed consent’ requirement while providing more guidance on how to comply” and

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17 Cal. Bus. & Prof. Code § 17602(a)(1).

18 *See, e.g.,* Cal. Bus. & Prof. Code § 17601(c) (defining “clear and conspicuous” or “clearly and conspicuously” as “in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language”).

that the standalone consent "removes ambiguity for marketers, while leveling the playing field and providing deterrence."[19] Notably, however, the Commission provides no evidence or rationale that a robust, clear and conspicuous disclosure proximate to the consumer's consent would be insufficient to prevent deception and remedy allegedly prevalent unfair or deceptive acts and practices. While the Commission may view such separate standalone consent as a best practice, in order to justify the requirement as part of a rule, it must be linked to "prevalent unfair and deceptive acts and practices" that are defined "with specificity."[20]

Prescribing two separate standalone consents is particularly unnecessary for subscriptions for goods such as those offered by the Companies because the overall terms are self-evident from the negative option feature. For example, as discussed above, the Companies market and sell collections of goods whereby the entire nature of the transaction underscores that the consumer is purchasing goods that are part of a set. When the consumer places the order, the Companies provide clear and conspicuous disclosures: (1) that by providing their payment method, the consumer is purchasing goods that are part of a set; and (2) the terms of the set, including cost, frequency of shipment and charges, and when and how to cancel. For such transactions, the act of ordering – with those clear and conspicuous disclosures – provides consent to the "rest of the transaction," that is, the request that goods be sent. Separating out these two disclosures and requiring separate consents or requiring a separate consent for the simple act of ordering goods, would be both unnecessary and confusing for consumers in this context.

The Companies understand that separate consents may be helpful in more complex transactions (for example, services with complicated terms and limitations) that do not involve the shipment goods, but the Proposed Rule should allow for flexibility to obtain express affirmative consent through reasonable means appropriate for the context of the transaction. In order to address this, the Companies propose to delete subsection (3) from Section 425.5(a) in recognition of the fact that the terms of "the rest of the transaction" may be inherent in the negative option feature.

> In obtaining such expressed informed consent, the negative option seller must:
>
> (1) Obtain the consumer's unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction; ***and***
>
> (2) Not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;
>
> ~~*(3) Obtain the consumer's unambiguously affirmative consent to the rest of the transaction.*~~

Retaining subsection (1) from Section 425.5(a) makes it clear that the seller must obtain the consumer's consent to the negative option feature offer *separate* from any other portion of the

[19] 88 Fed. Reg. at 24,727.

[20] *See supra* Section I.

transaction. These revisions address the issue discussed above by avoiding redundant disclosures and requiring sellers to separately obtain affirmative consent "to the rest of the transaction" for a negative option feature where all of the material terms are inherent in the disclosures of the negative option offer.

Alternatively, if the Proposed Rule ultimately requires sellers to obtain two separate affirmative consents from consumers, the Companies believe that the Proposed Rule should at least acknowledge that the second consent is not necessary for transactions involving the delivery of physical goods. The Proposed Rule already creates a carve-out for transactions involving delivery of physical goods from the requirement that sellers provide regular reminders of negative option features because "each delivery serves as a reminder of the contract, allowing consumers to reasonably avoid further payments by contacting the company and cancelling the arrangement."[21]

For a negative option offer involving the physical delivery of goods, the terms of "the rest of the transaction" are inherent in the consent to the negative option feature. As such, to the extent the Commission retains subsection 425.5(a)(1) and (a)(3), the Companies suggest that subsection (3) be revised as follows:

> In obtaining such expressed informed consent, the negative option seller must:
>
> (1) Obtain the consumer's unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction;
>
> (2) Not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;
>
> (3) Obtain the consumer's unambiguously affirmative consent to the rest of the transaction <u>*for transactions that do not involve the physical delivery of goods.*</u>

D. <u>Maintenance of Records</u>

Section 425.5(a)(4) of the Proposed Rule would require sellers to "[k]eep or maintain verification of consent for at least three years, or one year after the contract is otherwise terminated, whichever period is longer."[22] In estimating costs of the Proposed Rule and the recordkeeping requirement specifically as required under the Regulatory Flexibility Act, "the FTC estimates the majority of firms subject to the proposed recordkeeping requirements already retain these types of records in the normal course of business," and that "many transactions subject to the Rule are conducted via the internet, minimizing burdens associated with compliance."[23]

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[21] 88 Fed. Reg. at 24,729.

[22] 88 Fed. Reg. at 24,735.

[23] 88 Fed. Reg. at 24,731-32.

While many transactions are conducted via internet, that does not obviate the need for the Commission to also consider the burden on businesses like those operated by the Companies that also obtain verifiable consent via paper documents or telephone. The requirement to keep telephone recordings and paper documents for three years is extremely onerous and would impose considerable new costs on the Companies. For paper records, the Companies would need to expend substantial amounts to either store paper documents for longer periods or digitize consent, both of which are extremely costly. For recordings, the Companies would need to increase their storage capacity by more than four times in order to meet the proposed requirements – again imposing considerable new costs that would fundamentally call into question the Companies' business.

The proposed recordkeeping requirements are also not necessary. Verification of consent can adequately be shown by looking at the various elements of the transaction. For example, businesses can document consent by maintaining copies of the print ads and/or telephone scripts used along with a digitized record documenting the consumer's enrollment and consent to the terms on a specified date. These documents taken together would serve to verify that the consumer received a promotion containing the disclosures and request for consent and that the consumer provided express affirmative consent.

It is also unreasonable to require Companies to maintain verification for such long periods when consumers are on notice as to the charges – both in the form of the notices required under the Proposed Rule, deliveries of physical goods for negative options involving goods, and through billing statements through stored payment methods. The Companies agree that a longer period may be appropriate where consumers are charged less frequently, perhaps annually. To balance undue burden to business, particularly those like the Companies that continue to use traditional methods to enroll consumers, with the objectives of the Proposed Rule, we propose that § 425.5 be modified as follows:

> Consent.
>
> (a) Express informed consent. In connection with promoting or offering for sale any good or service with a negative option feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for a negative option seller to fail to obtain the consumer's express informed consent before charging the consumer. In obtaining such expressed informed consent, the negative option seller must: . . . .
>
> > (4) Keep or maintain verification of the consumer's consent *as follows:* ~~*for at least three years, or one year after the contract is otherwise terminated, whichever period is longer*~~
> >
> > > *for at least one year if the consumer is charged at least twice within six months after the initial charge; or*

for at least three years if the consumer is not charged at least twice within six months after the initial charge.

E. Method for Obtaining Consent

Section 425.5(c) of the Proposed Rule provides that a seller "will be deemed in compliance . . . if that seller obtains . . . consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the negative option feature and no other portion of the transaction." As discussed above, the Companies maintain that standalone consent is not necessary or reasonable, particularly for purchases of subscription collectibles where the negative option feature is clear on its face.

The Companies also note that there are other methods besides a check box or signature that can capture a consumer's affirmative assent to the terms. While the phrase "other substantially similar method" recognizes this, the Companies propose to add the following language to the section to emphasize that there is no one-size-fits-all approach to obtaining consumer consent:

> *It shall be a question of fact whether a negative option seller has obtained unambiguously affirmative consent for written offers by means other than through the use of a check box, and failure to use a check box shall not be presumed to indicate failure to obtain unambiguous affirmative consent.*

F. Consent to Attempt "Saves"

Section 425.6(d) of the Proposed Rule provides that "[t]he seller must immediately cancel the negative option feature upon request from a consumer, unless the seller obtains the consumer's unambiguously affirmative consent to receive a Save prior to cancellation." The Companies believe this provision, especially the word "immediately," is both overly prescriptive and likely to result in consumer harm by denying consumers meaningful opportunities to improve their service and/or pricing.

Consumers regularly contact customer service to learn more about their offerings and consider alternatives. While consumers may initially frame the request as a desire to cancel, many consumers are interested in learning about alternative pricing and/or other options such as discounts, credits, special bonuses, spreading out product shipping intervals, obtaining free shipping, and changing billing intervals going forward. The provision allowing "Saves" if the consumer provides consent to receive a Save prior to cancellation appears intended to address this, but is framed confusingly and is overly prescriptive. Moreover, the use of "immediately" suggests that a business cannot provide any context for the potential offers before pursuing a Save without first obtaining unambiguously affirmative consent. For example, it could prevent a customer service representative from stating something like "Before I process your cancellation request, may I tell you about some money saving offers?" unless the consumer had already provided "unambiguously affirmative consent" to receive a Save.

Finally, the recordkeeping requirements are both onerous and unworkable, given most of these interactions are likely to take place via telephone and storing recordings for three years is extremely costly.

In order to address those issues, the Companies propose to revise the section as follows:

> d) Saves: The seller must ~~immediately~~ *promptly* cancel the negative option feature upon request from a consumer, unless the seller obtains the consumer's ~~*unambiguously affirmative*~~ consent to receive a Save prior to cancellation. Such consent must apply only to the cancellation attempt in question and not to subsequent attempts*.* ~~*The negative option seller must keep or maintain verification of the consumer's consent to receiving a Save prior to cancellation for at least three years, or one year after the contract is otherwise terminated, whichever period is longer.*~~

III. Conclusion

The Companies appreciate the opportunity to comment on the Proposed Rule and strongly believe that the Proposed Rule must be narrowly tailored to address prevalent unfair and deceptive acts and practices that have been the subject of FTC enforcement and that have been defined with specificity. For the reasons discussed above, the Companies believe that the Proposed Rule does not currently adequately account for the differences between negative option offerings involving goods (rather than services), and negative option offers marketed through traditional methods such as paper catalogs, mailings, and telephones. The Companies strongly believe that the Proposed Rule should preserve flexibility to allow businesses the opportunity to market and sell goods through various channels, including printed catalogs and mailings.