

Dissenting Statement of Commissioner Christine S. Wilson

Notice of Proposed Rulemaking, Negative Option Rule

March 23, 2023

Today the Commission announces a Notice of Proposed Rulemaking (NPRM) suggesting modifications to the Commission’s Rule Concerning the Use of Prenotification Negative Option Plans (Negative Option Rule or Rule). The Commission first sought comment on amendments to this Rule in an Advance Notice of Proposed Rulemaking (ANPR) published in October 2019.¹ At that time, the Commission explained that abuses in negative option marketing persisted despite the Commission’s active enforcement. The existing Negative Option Rule covers a narrow category of negative option marketing, prenotification negative option plans. Other types of negative option features are covered by other statutes or rules² enforced by the Commission, and deceptive practices in connection with negative option plans have been challenged under Section 5 of the FTC Act. The Commission noted in the ANPR that differing requirements in the Commission’s varied statutes, rules and Section 5 enforcement actions did not provide a consistent, cohesive framework for enforcement and business guidance. The Commission proposed expanding the Negative Option Rule to synthesize the legal requirements within one rule. I supported seeking comment on this proposal because clarity with respect to regulatory requirements benefits consumers and businesses.³

The proposed Rule the Commission announces today may achieve the goal of synthesizing the various requirements in one rule – but it also sweeps in far more conduct than previously anticipated. The broadened scope of the Rule would extend far beyond the negative option abuses cited in the ANPR, and far beyond practices for which the rulemaking record supports a prevalence of unfair or deceptive practices. In fact, the Rule would capture misrepresentations regarding the underlying product or service *wholly unrelated to the negative option feature*. For these reasons, I dissent.

The comments received in response to the ANPR, consumer complaints, and the Commission’s enforcement actions demonstrate that abuses in negative option marketing persist despite our active enforcement in this area. As the NPRM explains, some marketers misrepresent or fail to disclose clearly and conspicuously the terms, or even the existence, of negative option features; fail to obtain consumers’ express, informed consent to the recurring charges; fail to

¹ 85 FR 52393 (Oct. 2, 2019).

² Specifically, the FTC enforces several statutes and rules that address negative option marketing, including the Restore Online Shoppers’ Confidence Act (ROSCA), 15 U.S.C. §§ 8401-8405; the Telemarketing Sales Rule (TSR), 16 C.F.R. § 310; the Postal Reorganization Act (also known as the Unordered Merchandise Rule), 39 U.S.C. § 3009; and the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r.

³ In 2021, rather than take the next step in the rulemaking process and issue an NPRM, the Commission chose to issue a Policy Statement on Negative Option Marketing, from which I dissented. This Commission repeatedly has issued Policy Statements in the midst of ongoing rulemakings addressing precisely the same issues. Publishing guidance during the pendency of a related rulemaking short-circuits the receipt of public input, conveys disdain for our stakeholders, and does not constitute good government. *See* Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson, Enforcement Policy Statement Regarding Negative Option Marketing (Oct. 2021), https://www.ftc.gov/system/files/documents/public_statements/1598067/negative_option_policy_statement_csw_dissent.pdf.

provide a simple mechanism to cancel; and/or engage in activities designed to frustrate consumers' ability to cancel. I agree that these issues are prevalent in the market.

The scope of the proposed Rule is not confined to negative option marketing. It also covers any misrepresentation made about the underlying good or service sold with a negative option feature. Notably, as drafted, the Rule would allow the Commission to obtain civil penalties, or consumer redress under Section 19 of the FTC Act, if a marketer using a negative option feature made misrepresentations regarding product efficacy or any other material fact. The proposed text is as follows:

425.3 Misrepresentations.

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 Federal Trade Commission Act ("FTC Act") for any Negative Option Seller to misrepresent, expressly or by implication, any material fact related to the transaction, such as the Negative Option Feature, *or any material fact related to the underlying good or service.* (Emphasis added).

The Notice confirms that the scope of this provision is intended to extend beyond the terms of the negative option feature. Specifically, the Notice explains that "the proposed Rule prohibits any person from misrepresenting, expressly or by implication, any material fact regarding the *entire* agreement – not just facts related to a negative option feature." It further explains that "[s]uch deceptive practices may involve misrepresentations related to costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation, or any other material representation."

Consequently, marketers using negative option features in conjunction with the sale of a good or service could be liable for civil penalties or redress under this Rule for product efficacy claims or any other material representation even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple. Consider a dietary supplement marketed with a continuity plan that is advertised to relieve joint pain. The Commission alleges the joint pain claims are deceptive and unsubstantiated. The Rule could apply. A grocery delivery service offered via subscription asserts that the consumer's shopping lists will not be shared, but in fact the service does share the information for advertising purposes – a privacy misrepresentation. The Rule could apply. Cosmetics purchased through a monthly subscription service are marketed as Made in USA but in fact are made elsewhere. The Rule could apply.

The Commission does not have authority to seek civil penalties in *de novo* Section 5 cases. And the Commission's ability to seek consumer redress was gravely curtailed by the Supreme Court's decision in *AMG* that found the Commission does not have authority to seek consumer redress under Section 13(b) of the FTC Act.⁴ This proposed Rule would fill that vacuum when marketers use a negative option feature.

The Notice explains that the inclusion of non-negative option related misrepresentations is needed because "FTC enforcement experience demonstrates misrepresentations in negative option marketing cases continue to be prevalent and *often involve deceptive representations not*

⁴ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

only related to the negative option feature but to the underlying product (or service) or other aspects of the transaction as well.” (Emphasis added). The Notice cites ten cases as representative of these prevalent deceptive representations. Thus, the Notice asserts that our law enforcement experience demonstrates that marketers that misrepresent negative option features typically do so in conjunction with other deception.

The Commission is authorized to issue a notice of proposed rulemaking when it “has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”⁵ Importantly, we did not seek comment in the ANPR about whether an expanded negative option rule should address general misrepresentations; no comments are cited in the NPRM to support the inclusion of these provisions. Absent the above-quoted brief explanation with the accompanying case cites, the Notice does not offer evidence that negative option marketing writ large is permeated by deception. If that were the case, it might be appropriate to fold in representations about *any* material fact.

In addition, we know that negative option marketing is used lawfully and non-deceptively in a broad array of common transactions – newspaper subscriptions, video streaming services, delivery services, etc. Will the expansion of the Rule as proposed discourage companies from using negative option features, that consumers prefer and enjoy, because of potential liability? Does the inclusion of product efficacy and any other material information in this proposed Rule over-deter the negative option abuses that the Rule purportedly was primarily designed to prevent? The Notice does not discuss these issues. I encourage the public to address these issues in their comments in response to this Notice.

It is possible the Commission would exercise prosecutorial discretion and not allege violations of the Rule for all advertising claims, privacy or data security issues, or claims regarding secondary characteristics (e.g., Made in USA or environmental claims). But the Notice does not indicate a limiting principle to this proposed provision. This Commission, in many areas, has demonstrated a zeal and willingness to push beyond the boundaries of our authority.

In the wake of *AMG*, this Commission has proposed broad, sweeping rules for privacy and data security (the Commercial Surveillance and Data Security ANPR), as well as pricing and fees (the “junk fees” or Unfair or Deceptive Fees ANPR). As I noted in my dissents, the scope of those proposals extended far beyond practices for which Commission law enforcement and other evidence have established a prevalence of deceptive or unfair practices.⁶ In July 2021, this Commission promulgated a final Made in USA labeling rule that include a definition of

⁵ 15 U.S.C. 57a(b)(3).

⁶ See Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Junk Fees (Oct. 2022) (explaining that the proposal could launch rules that regulate the way prices are conveyed to consumers across nearly every sector of the economy and is untethered from a solid foundation of FTC enforcement), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf; Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson, Trade Regulation Rule on Commercial Surveillance and Data Security (Aug. 2022) (noting that many practices discussed in the ANPR are presented as clearly deceptive or unfair despite the fact that they stretch far beyond practices with which we are familiar, given our extensive law enforcement experience, and wander far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf.

“labeling” that, in my view, went beyond our Congressional authority to regulate labels.⁷ The Commission also has employed or announced novel applications of our existing rules that I believe similarly extend beyond our regulatory authority. For example, in September 2021, the Commission issued a Policy Statement on Breaches by Health Apps and Other Connected Devices that included a novel interpretation of the Health Breach Notification Rule that expanded both the covered universe of entities and the circumstances under which the Commission will initiate enforcement.⁸

With respect to negative options, this Notice states that the proposed rule is consistent with the Commission’s ROSCA cases. I disagree. ROSCA Section 8403 states that for goods or services sold through a negative option feature, the seller must “clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer’s billing information.” The requirement in ROSCA to disclose “all material terms of the transaction” cannot reasonably be interpreted to include all product efficacy claims or any material fact about the underlying good or service. A term of the transaction is distinct from an advertising claim or other potentially material information.

The cases in which I supported alleging violations of ROSCA under this Section clearly involved material terms of the transaction. In MoviePass, consumers purchased a movie subscription and the term at issue was whether the subscription was unlimited.⁹ In WealthPress, another recent matter alleging violations of ROSCA under this Section, the terms at issue were included by the marketer in the “terms and conditions” section of the website and consumers were required affirmatively to agree to accept the terms to complete the transaction.¹⁰ The facts in these cases do not support a reading of the ROSCA “material term of the transaction” language to include *any* advertising claim.

⁷ See Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson, Final Rule related to Made in U.S.A. Claims (July 2021), https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf. The dissent explained that the Rule was not supported by the plain language of Section 45a of the FTC Act that provided authority for the Commission to promulgate a rule addressing “labels” or “the equivalent thereof.” The language of the Rule described labels to include stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags, that contain MUSA claims.

⁸ See Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 2021), https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf; see also Separate Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, *FTC v. Avant, LLC* (Apr. 15, 2019) (dissenting with respect to the maiden use of the Telemarketing Sales Rule (TSR) provision related to novel payments (specifically remotely created checks) in a non-fraud case), https://www.ftc.gov/system/files/documents/public_statements/1514073/avant_inc_1623090_separate_statement_of_christine_s_wilson_4-15-19.pdf. In the *Avant* matter, the Commission sought to impose liability under the TSR against a legitimate company, selling legitimate products, in circumstances not contemplated when the Rule was promulgated to address fraudulent businesses abusing these types of payments. *Id.*

⁹ See Concurring Statement of Commissioner Christine S. Wilson, *In re Moviepass, Inc.* (June 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590708/commissioner_wilson_concur_moviepass_final.pdf.

¹⁰ See Christine S. Wilson, Concurring Statement of Commissioner Christine S. Wilson *WealthPress Holdings, LLC* (Jan. 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2123002wealthpresswilsonconcurstmt.pdf.

It is useful also to recall the genesis of ROSCA and the specific grant of authority Congress provided the Commission. As noted in the findings, ROSCA was promulgated to address a specific abuse in negative option marketing prevalent at that time – third-party upsells of products or services made during check-out for an initial purchase that included negative option features.¹¹ The terms of the third-party offer that included the negative option feature were not adequately disclosed and consumers were not given an opportunity to consent to a transfer of their billing information to a third-party. They were then locked into recurring charges to which they had not consented and often had difficulty cancelling. The provisions in Section 8403 were ancillary to the intent of the statute and there is no indication in the statute or the legislative history that they were intended to confer on the Commission authority to seek civil penalties or redress for representations wholly unrelated to the terms of the negative option feature. In other words, this proposed Negative Option Rule is inconsistent with the FTC’s prior ROSCA cases.

The proposed Rule also will treat marketers differently for purposes of potential monetary liability for Section 5 violations, depending on whether they sell products or services with or without negative option features.

The careful reader may observe that the Commission’s Telemarketing Sales Rule (TSR) also includes a prohibition on general misrepresentations.¹² But the TSR was promulgated pursuant to Congressional authorization.¹³ The legislative history and Statement of Basis and Purpose of the TSR also provide a substantial evidentiary basis establishing that outbound telemarketing routinely was used as a vehicle for fraud and deception – marketers disturbed consumers in the solitude of their homes, and subjected them to deception and aggressive sales tactics that caused significant consumer injury.¹⁴

I appreciate staff’s steadfast efforts to protect consumers from deceptive negative option practices. I might have supported a tailored rule to address the negative option marketing abuses prevalent in our law enforcement experience that consolidated various legal requirements. This proposal instead attempts an end-run around the Supreme Court’s decision in *AMG* to confer *de novo* redress and civil penalty authority on the Commission for Section 5 violations unrelated to deceptive or unfair negative option practices.

For these reasons, I dissent.

¹¹ See 15 U.S.C. § 8401.

¹² 16 CFR 310.3(a)(2)(iii) (prohibiting misrepresentations regarding “[a]ny material aspect of the performance, efficacy, nature, or central characteristic of the goods or services that are the subject of a sales offer”).

¹³ Telemarketing and Consumer Fraud and Abuse Prevention Act. 15 U.S.C. §§ 6101 et seq.

¹⁴ See, e.g., 60 FR 43842 (Aug. 23, 1995) (Statement of Basis and Purpose for the Commission’s Rule).