April 13, 2026

Via Electronic Filing

Ms. April Tabor

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Mail Stop H–144 (Annex N)
Washington, DC 20580

Re: Negative Option Rule ANPRM, Project No. P064202

Dear Secretary Tabor:

The Entertainment Software Association ("ESA") appreciates the opportunity to comment in response to the Federal Trade Commission's ("Commission" or "FTC") Advance Notice of Proposed Rulemaking regarding the Rule Concerning the Use of Prenotification Negative Option Plans ("ANPRM").[1] ESA is the U.S. trade association for the video game industry, and our members are the innovators, creators, publishers, and business leaders reimagining entertainment and transforming how America plays video games on consoles, handheld devices, and personal computers.[2] ESA submits this comment to share the perspective of its members, which have extensive experience offering a wide array of subscriptions in compliance with the current legal regime.

Subscriptions are widespread and well-established features of our industry that provide substantial benefits to both players and businesses. Players have long enjoyed a variety of benefits, including transparent pricing, convenient access to content, and, in many cases, lower-cost alternatives to individual purchases. For businesses, subscriptions similarly provide predictability and flexibility to innovate and offer new products at lower prices. Players are familiar with and value these arrangements and have come to expect them in the video game context.

ESA values consumer trust and the overall player experience. Consistent with that focus, ESA supports the Commission's efforts to understand the types of subscription practices that harm consumers. However, subscription services are already subject to numerous federal and state laws governing disclosures, consent, cancellation, and renewal reminders. In particular, the FTC already possesses several robust enforcement tools, such as Section 5 of the FTC Act, the Restore Online Shoppers' Confidence Act ("ROSCA"), and the Telemarketing Sales Rule ("TSR"), to curb

[1] Rule Concerning the Use of Prenotification Negative Option Plans, Advance Notice of Proposed Rulemaking, 91 Fed. Reg. 12318 (Mar. 13, 2026) (hereinafter "ANPRM").

[2] A list of our members is available at https://www.theesa.com/about-esa/#membership.

subscription practices that harm consumers.[3] The FTC's extensive enforcement history using these authorities, as set forth in the ANPRM, demonstrates that the current legal regime is effective, and there is no need for even more regulation.[4]

If, however, the Commission nonetheless determines to proceed with this Rulemaking, ESA supports an approach that is narrowly tailored and sufficiently flexible to address only those unfair or deceptive acts or practices that the Commission determines to be prevalent in subscription offerings, without adding unnecessary complexity to the existing legal landscape.[5] New, inconsistent requirements—particularly in the absence of preemption—will create significant compliance and operational costs, constrain innovation, and degrade the consumer experience. Accordingly, it is critical that any Rule avoid overly prescriptive requirements that would impede industry's ability to offer subscription arrangements that consumers knowingly choose and value.

I. The FTC Should Avoid Adding Complexity to Existing Auto-Renewal Regulation.

ESA supports the Commission's efforts to address harmful subscription practices, including conduct by bad actors who obscure or withhold material information about the autorenewal offer from consumers. But the Commission has not demonstrated that a new Rule governing subscription practices is necessary to address prevalent unfair or deceptive acts or practices, as required under the Magnuson-Moss Act.[6] Existing law already equips the FTC with robust enforcement authority to address such conduct, making additional rulemaking unnecessary. Specifically, at the federal level, ESA's members already comply with ROSCA, which requires disclosure of material terms, express informed consent, and simple cancellation, as well as Section 5 of the FTC Act, which prohibits deception and unfairness.[7] The TSR similarly provides the FTC with the authority to police subscription marketing and billing practices conducted through telemarketing.[8] The Commission has effectively used these authorities in numerous recent cases, as described in the ANPRM.[9] These actions demonstrate that the FTC is already able to identify,

[3] 15 U.S.C. §§ 8401–8405; 15 U.S.C. § 45; 16 C.F.R. pt. 310.

[4] *See* ANPRM, nn.2, 34, 42.

[5] *See* Dissenting Statement of Commissioner Melissa Holyoak, Negative Option Rule (Oct. 16, 2024) ("In the SBP, the Commission argues that it has satisfied this standard for its economy-wide rulemaking because it has issued more than 35 cases 'challenging harmful negative option practices' and has received 'tens of thousands of consumers complaints.' This evidence may well suggest that some unfair and deceptive acts related to negative option offers are indeed prevalent. But these statistics do not establish prevalence of misrepresentations of material fact related to products with negative option features, any more than the number of FTC cases and consumer complaints involving the Internet means that the entire Internet should be the subject of a Section 18 rulemaking prohibiting misrepresentations.").

[6] 15 U.S.C. § 57a.

[7] 15 U.S.C. §§ 8401–8405; 15 U.S.C. § 45.

[8] 16 C.F.R. pt. 310.

[9] *See, e.g.*, ANPRM, n.2 ("Since the 2019 advance notice of proposed rulemaking ('ANPRM'), 84 FR 52393 (Oct. 2, 2019), the FTC has brought cases (using its own litigating authority or upon notification and referral to the Department of Justice) alleging widespread negative option abuses by major companies including Vonage, Amazon, Adobe, Uber, LA Fitness, and Instacart. *FTC* v. *Vonage Holdings,* No. 3:22-cv-6435 (D.N.J. Nov. 3, 2022); *FTC* v. *Amazon.com Inc.,* No. 2:23-cv-0932 (W.D. Wash. June 21, 2023); *United States* v. *Adobe, Inc.,* No. 5:24-cv-03630

investigate, and stop problematic practices without a new Rule that would further complicate the regulatory landscape.

At the state level, subscriptions are governed by more than two dozen state automatic renewal laws, with each jurisdiction imposing its own disclosure, consent, cancellation, and reminder requirements.[10] For ESA's members—many of whom operate nationwide across multiple platforms and types of content—this fragmented framework requires substantial, ongoing compliance efforts.

Adding new federal requirements where existing authority is sufficient—and doing so without preemption—would further exacerbate this complexity. Layered and inconsistent obligations increase compliance costs, create operational challenges, and can in some cases undermine consumer protection by making subscription terms denser and more difficult for consumers to understand. As such, ESA urges the FTC to refrain from issuing a new Rule. If the Commission nevertheless determines that Rulemaking is warranted, it should take a flexible and narrow approach that does not further complicate the existing patchwork of laws governing subscriptions.

II. Any Rule Should Be Flexible and Tailored to Addressing Harmful Subscription Practices.

Below, ESA sets forth its specific recommendations in response to several of the questions posed by the Commission.

A. Express Informed Consent

If the Commission proceeds with Rulemaking, ESA supports the issuance of a Rule that provides clear, practical guidance on how companies can obtain express informed consent, without imposing new, overly prescriptive requirements. The Commission can provide this guidance by *first*, identifying the material information that companies should provide to customers in order to obtain express informed consent. Specifically, ESA supports a Rule that requires the clear and conspicuous disclosure of the auto-renewing nature of the program, price, billing cadence, free trial terms, and where cancellation can be effectuated. Requiring disclosure of this information ensures that consumers can make an informed decision about whether to enroll. *Second*, ESA urges the Commission to clarify that express informed consent is obtained when customers are presented with these terms clearly and conspicuously and then take an affirmative act to complete sign-up. Such clarity would reduce uncertainty and make compliance more workable for ESA's members.

However, the Commission should not adopt a requirement for separate consent to the autorenewal feature. If the Commission clarifies which subscription terms are material and

(N.D. Cal. July 23, 2024); *FTC* v. *Uber Techs., Inc.,* No. 3:25-cv-03477 (N.D. Cal. Apr. 21, 2025); *FTC* v. *Fitness Int'l, LLC,* No. 8:25-cv-01841 (C.D. Cal. Aug. 20, 2025); *FTC* v. *Maplebear Inc.,* No. 3:25-cv-10783 (N.D. Cal. Dec. 18, 2025) (Instacart).").

[10] *See, e.g.*, Cal. Bus. & Prof. Code §§ 17600–17606; N.Y. Gen. Bus. Law § 527-a.

provides practical guidance on how to obtain consent, separate consent is not necessary. Indeed, the Commission's enforcement record confirms that the most serious negative option harms arise from the failure to disclose material terms at all, or from disclosures that are buried or misleading, not from a lack of separate consent. Imposing an additional consent step could also create consumer confusion by disrupting the enrollment process and, in some cases, preventing consumers from initiating subscriptions they otherwise intended to start. Furthermore, an additional consent mechanism would create a new federal obligation that has not been adopted by the vast majority of the states. A separate consent requirement would therefore impose significant compliance burdens on ESA's members, while doing little to improve consumer understanding.

B. Use of Saved Billing Information

ESA requests that any new Rule confirm that companies can permissibly use saved billing information for subscription charges, provided that consumers can easily review and update that information after receiving the material disclosures and before finalizing their purchase. Saved billing information is a critical feature for video game subscription offerings, particularly on consoles, mobile devices, and personal computers, where consumers expect efficient and seamless transactions. As the Commission has previously recognized, relying on pre-saved billing information is appropriate so long as the required disclosures are presented clearly and conspicuously before the consumer consents to the use of that information.[11] This approach aligns with consumer expectations and saves consumers the time associated with repeatedly providing the same information to a trusted seller. It also protects consumers by providing them with an opportunity to decline the offer or change their method of payment before agreeing to the autorenewal.

C. Cancellation

ESA agrees with the Commission's concern about harmful cancellation practices, such as requiring consumers to wait on hold for extended periods of time or to travel to a physical location to cancel during prescribed periods of time.[12] Ensuring that consumers can cancel easily and without undue obstacles is critical to maintaining an effective subscription marketplace. Thus, ESA supports requiring all subscription companies that offer enrollment online to individual consumers to provide an online cancellation mechanism.

However, if the Commission proceeds with a new Rule, it should not adopt overly prescriptive cancellation requirements that dictate specific design choices or require strict symmetry between sign-up and cancellation pathways. Subscription services in the video game industry operate across a wide range of platforms, devices, and user interfaces, including consoles, mobile devices, and online. Rigid design mandates are unlikely to improve consumer understanding across these diverse contexts, particularly in the face of rapidly changing

[11] Negative Option Rule, 89 Fed. Reg. 90476, 90498 (Nov. 15, 2024) (vacated) ("[T]he Commission now clarifies that, where a consumer has previously provided account information to the seller and expressly allowed the seller to store that information, the seller must make the required disclosures prior to obtaining the consumer's consent to use saved account information.").

[12] *See FTC v. Fitness Int'l, LLC*, No. 8:25-cv-01841 (C.D. Cal. filed Aug. 20, 2025); *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-06435 (D.N.J. filed Nov. 3, 2022).

technology. A flexible standard that ensures consumers can cancel easily online when they signed up online—without prescribing the exact steps, location, or interface—would accommodate the diversity of the video game industry while ensuring that bad actors cannot evade ROSCA's existing requirement that online subscriptions provide a simple cancellation mechanism.[13]

The Commission should also avoid adopting new cancellation requirements that further complicate the existing patchwork of state subscription laws. That patchwork already imposes significant compliance burdens on subscription businesses, and additional, overly prescriptive cancellation requirements at the federal level would only exacerbate this burden. In particular, a prohibition on "save" offers—which are permitted by many state laws—would introduce further complexity to the current legal regime.

Furthermore, "save" offers and other communications at the point of cancellation can significantly benefit consumers and play an important role in supporting informed decision-making. Consumers receive meaningful value when businesses respond to cancellation requests with adjusted pricing or improved terms that better reflect consumer needs or preferences. Consumers also benefit from receiving clear, factual, and timely information at the point of cancellation about features or accumulated value they would forgo by cancelling. Such communications should not be treated as "save" offers at all. For these reasons, ESA urges the Commission not to categorically prohibit such communications as inconsistent with simple cancellation.

D. Reminder Requirements

Consistent with its prior determination, the Commission should not adopt a federal renewal reminder requirement.[14] Renewal reminders are already subject to a detailed and evolving patchwork of state laws, and adding a non-preemptive federal obligation would further complicate compliance for subscription businesses. Moreover, requiring additional reminders is likely to overwhelm consumers and diminish the effectiveness of important notices. Excessive reminders can also contribute to notice fatigue and may inadvertently contribute to phishing or other fraudulent activity that could undermine consumer trust. For these reasons, ESA urges the Commission not to adopt a new federal renewal reminder requirement.

E. Prohibition on Misrepresentations of the Underlying Product or Service

ESA's members are committed to building and maintaining consumer trust and ensuring that consumers are well-informed about their subscription choices and have a positive experience when interacting with their services. To the extent the Commission identifies a need to address misrepresentations in connection with negative option features in a new Rulemaking, this prohibition should be limited to terms about the negative option feature. The Rule should not cover misrepresentations about the underlying product or service, which are already prohibited by federal and state law. Expanding the Rule to reach misrepresentations unrelated to the negative

[13] 15 U.S.C. § 8403(3).

[14] Negative Option Rule, 89 Fed. Reg. 90476 (Nov. 15, 2024) (vacated) (declining to adopt proposed requirement for annual reminders).

option feature raises serious questions regarding the Commission's authority to incorporate such a requirement through rulemaking, as raised by Commissioner Holyoak in her dissent to the now-vacated 2024 Negative Option Rule.[15] For these reasons, if the Commission proceeds with this Rulemaking, it should refrain from prohibiting all misrepresentations made in connection with negative option programs and limit the Rule to clarifying the material terms of the negative option.

III. Conclusion

ESA appreciates the opportunity to comment on the Commission's ANPRM. Subscription services are a critical feature of the video game industry, and ESA's members have significant experience with applying the current legal regime to a variety of platforms and media. ESA supports the Commission's goals of addressing unfair or deceptive subscription practices that are prevalent and stopping real consumer harm. In ESA's view, however, those goals can be achieved through existing enforcement tools, without the need for a new Rule. Subscription services are already governed by a complex patchwork of federal and state laws, and additional regulation will increase complexity without commensurate consumer benefit. As such, if the Commission proceeds, it should focus on narrow and flexible requirements that avoid introducing unnecessary inconsistency across state and federal regimes. Such an approach would protect consumers while preserving the ability of industry, including ESA's members, to continue offering subscription arrangements that players actively choose and value.

Sincerely,

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[15] *See* supra note 5.