UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

Negative Option Rule, FTC Matter No. P064202

October 16, 2024

"Article I of the Constitution vests 'all legislative Powers herein granted' in Congress. 'By vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people.'"[1] Whenever we engage in rulemaking, the Commission should recall that Article I of the Constitution vests legislative powers in Congress, not with agencies. Because of that, it is elected officials that delineate the boundaries, and set the requirements, that we as Commissioners must adhere to. I believe the Commission exceeds those boundaries and requirements in amendments to the Negative Option Rule, 16 C.F.R. Part 425, ("Rule") it finalizes today. Instead of pursuing targeted enforcement efforts or finalizing a rule consistent with the Commission's authority under Section 18 of the FTC Act,[2] the Commission has used its limited resources to promulgate a broader regulation that may not survive legal challenge.[3]

The likely unlawful character of the rule is compounded by the Majority's race to cross the finish line. Why the rush? There is a simple explanation. Less than a month from election day, the Chair is hurrying to finish a rule that follows through on a campaign pledge made by the Chair's favored presidential candidate.[4]

The Majority votes today to approve a final trade regulation rule amendment to the existing negative option rule. This amendment greatly expands the prior rule, which had covered now-rare

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[1] Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, FTC Matter No. P201200, at 1 (June 28, 2024) (quoting U.S. Const. Art. I and *W. Virginia v. EPA*, 597 U.S. 697, 737-38 (2022) (Gorsuch, J., concurring)) (cleaned up), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.

[2] 15 U.S.C. § 57a.

[3] *Cf.* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *supra* note 1, at 2 ("My dissent should not, however, be interpreted to mean that I endorse all non-compete agreements. To the contrary, I would support the Commission's prosecution of anti-competitive non-compete agreements, where the facts and law support such enforcement. That is why I am particularly disappointed that the Commission dedicated the Commission's limited resources to a broad rulemaking that exceeds congressional authorization and will likely not survive legal challenge.") (citation omitted).

[4] *See, e.g.*, *A New Way Forward for the Middle Class: A Plan to Lower Costs and Create an Opportunity Economy*, KamalaHarris.com, at 33 (Sept. 2024) ("Under her leadership as Vice President, the Administration has launched a historic effort to crack down on junk fees and save consumers time and money. This includes [a rule] to . . . make it as easy to cancel a subscription as it is to subscribe. . . . A Harris-Walz Administration will . . . continue to take on the everyday hassles that waste Americans' time and money, [including] subscriptions . . . .") (citing FTC press release), https://kamalaharris.com/wp-content/uploads/2024/09/Policy-Book-Economic-Opportunity.pdf.

prenotification plans (e.g., book-of-the-month clubs)—and goes well beyond what existing laws, such as the Restore Online Shoppers' Confidence Act ("ROSCA"),[5] Telemarketing Sales Rule ("TSR"),[6] or Regulation E,[7] require. The now-capacious Rule creates potential civil penalty liability for: any misrepresentation of material fact made in connection with the marketing of a product or service that has a negative option feature (§ 425.3); failure to disclose all material terms before obtaining billing information in connection with a negative option (§ 425.4); failure to obtain express informed consent before charging in connection with a negative option (§ 425.5); and failure to provide a simple mechanism for cancelling a negative option (§ 425.6). The Rule also preempts inconsistent state laws (§ 425.7).

I respectfully dissent, for three reasons. First, this rulemaking did not follow the FTC Act's Section 18 requirements for rulemaking because: (1) the Rule is much broader than the "area of inquiry" proposed by the advance notice of proposed rulemaking ("ANPR"); (2) the Rule fails to define with specificity acts or practices that are unfair or deceptive, improperly generalizing from narrow industry-specific complaints and evidence to the entire American economy; and (3) the Rule fails to demonstrate that the unfair or deceptive acts or practices related to negative option billing are "prevalent."[8] Second, the Rule's breadth incentivizes companies to avoid negative option features that honest businesses and consumers find valuable. Third, the Rule represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission's authority.

Such amendments could have provided greater clarity to businesses about the patchwork of federal laws pertaining to negative options and *lawfully* used our Section 18 rulemaking authority to fill potential gaps including, for example, cancellation requirements. Indeed, I am very concerned that consumers are sometimes misled by companies using deceptive negative option features. The Rule represents a missed opportunity to devote scarce staff resources to bringing enforcement actions related to negative option features using the clear tools that Congress gave us, rather than conducting an overbroad rulemaking that cost years of staff time to propose and finalize, but will likely not survive legal challenge.

Today's rulemaking did not need to end this way. Had political leadership at the Commission taken more time to engage with other Commissioners to refine and improve the Rule, my vote and statement would look very different. Instead, less than a month from November 5, the Chair has put political expediency over getting things right. Unfortunately, pushing politically motivated rulemakings has not been the exception with the Majority.[9] Today, I believe we are seeing another low in our abuse and misuse of the tools Congress has given us. Rather than engage in blatant electioneering to advance political ends, the Commission should have instead focused

[5] 15 U.S.C. §§ 8401-8405.
[6] 16 C.F.R. Part 310.
[7] 12 C.F.R. 1005.10.
[8] 15 U.S.C. § 57a.
[9] *See generally* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *supra* note 1.

on stewarding its resources effectively and in ways that restore our institutional legitimacy, not further undermine it. I dissent.

I.

The historical context surrounding Congress's enactment of rulemaking requirements in Section 18 of the FTC Act is important. Congress passed the Magnuson-Moss Warranty Act in 1975, which imposed exacting requirements and limitations on rulemaking regarding unfair or deceptive acts or practices.[10] In the 1970s, the Commission tried to use its rulemaking and unfairness authority aggressively—for example, "to ban all advertising directed to children on the grounds that it was 'immoral, unscrupulous, and unethical' and based on generalized public policies to protect children."[11] In response, Congress refused to fund the Commission, shutting it down for several days.[12] Even this harsh rebuff did not completely cool Congressional ire with the "National Nanny" (as the Washington Post—no bastion of conservative thought—facetiously dubbed the Commission).[13] A 1979 Senate Report found that the agency's rulemaking efforts were filled with "excessive ambiguity, confusion, and uncertainty."[14] In 1980, Congress legislated to limit the Commission's authority, by imposing additional procedural obligations on Section 18 rulemaking.[15] Among other things, Congress created additional procedural rights, well beyond the Administrative Procedure Act's baseline procedural requirements, such as requiring the FTC to issue an ANPR with numerous specific requirements, which the Commission must submit to Congress, for each rulemaking.[16]

Congress' harsh reaction to the FTC's overreach only makes sense if we understand that Section 18 was created and then expanded not to *give* the Commission free-ranging rulemaking authority, but to *curb* it. We should be exacting in following the requirements of Section 18, lest we risk repeating history—drawing Congressional ire that that could further limit our authority and budget. Indeed, Section 18's rulemaking requirements, while demanding, are the means of assuring that we act within the parameters established by Congress.

As an initial matter, this Rule's procedural irregularities begin with how the Rule was finalized in a compressed time frame. Given the rigorous demands of Section 18 rulemaking, historically, it has taken the Commission, on average, 5.57 years to issue a rule after the Magnuson-

[10] Magnuson-Moss Warranty Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183.
[11] *See* J. Howard Beales III, *The Fed. Trade Comm'n's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. OF PUB. POL'Y & MKTG. 192, 193 (2003) (citing FTC Staff Report on Television Advertising to Children (Feb. 1978); Notice of Proposed Rulemaking on Television Advertising to Children, 43 Fed. Reg. 17967 (Apr. 27, 1978)). In the 1970s, the Commission aggressively used its rulemaking authority—so aggressively that it has been called the "second most powerful legislature in America." Timothy J. Muris, *The Consumer Protection Mission: Guiding Principles and Future Direction*, 51 ANTITRUST L.J. 625, 625 (1982). The approach of today's Majority threatens to turn back the clock to this earlier, ill-advised approach.
[12] *Id.* at 193.
[13] *Id.*
[14] S. REP. NO. 96-500, at 3 (1979).
[15] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.
[16] *Id.*

Moss procedures were enacted.[17] That, apparently, was too much time and procedure for the Majority. In 2021, during the pendency of this rulemaking, the Commission made changes to its rules of practice,[18] over objections from the Commissioners in the Minority, to limit the efficacy of Section 18's procedural safeguards and compress rulemaking timeframes.[19] Among other things, the Commission revised the Rules of Practice so as to remove selection of the Presiding Officer from an independent judge and assign that role to the Chair; strip the Presiding Officer of significant control over the hearing process; and narrow opportunities for the public to help determine which factual issues are in dispute.[20] Then-Commissioners Phillips and Wilson dissented, noting: "What the[se] changes—adopted without public input—in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record."[21]

Apparently not content with even these procedural shortcuts and compressed timeframe, political leadership now speeds to the finish line with minimal opportunity for Commissioner engagement on the final Rule. There should be ample opportunity for robust consideration and dialogue leading up to a Commission vote on any regulation, and especially for a highly consequential rule. Such opportunity for dialogue may assuage concerns, produce constructive changes, and ultimately lead to a better result. Indeed, in the past where political leadership has been willing to engage and make needed modifications preceding votes, that consideration and engagement have been very valuable and led to bipartisan support for Commission actions.

Here, however, the time period for me to review this economy-wide Rule was a matter of weeks. Those weeks were also packed with dozens of cases, one other rulemaking, and other policy matters. (Remarkably, the Chair had this draft final Rule for some time before it was circulated to the other Commissioners.) Reviewing the NPRM was no substitute for robust discussion and negotiation related to the final Rule's language and statement of basis and purpose, as the final Rule differs in important ways from the rule as proposed. The push to finalize is inexcusable, particularly because it is a discretionary rulemaking with no due date (imposed by Congress or otherwise). For those tracking the Rule and national politics closely, this rush to the finish line (and less than a month from a Presidential election) is no surprise. This Rule is connected to the current administration's efforts relating to so-called junk fees (which are beginning to make a

[17] Jeffrey S. Lubbers, *It's Time To Remove the "Mossified" Procedures for Removing FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1997 (2015).
[18] Press Release, Fed. Trade Comm'n, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct* (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct.
[19] *See* Dissenting Statement of Comm'rs Christine S. Wilson and Noah Joshua Phillips, *Regarding the Comm'n Statement On the Adoption of Revised Section 18 Rulemaking Procedures* (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf.
[20] *Id.* at 3-5.
[21] *Id.* at 3.

regular appearance before elections[22]), and it has been in the spotlight for some time, including at the White House[23] and now on the campaign trail.[24]

But elevating political goals comes at a high price, harms policy efforts that might otherwise benefit consumers, and undermines the Commission's legitimacy. Publicly appearing to refuse to keep an open mind on a final rule or to prejudge complex policy questions, along with an apparent unwillingness to reconsider various aspects of a rulemaking may create PR buzz for the campaign trail and score political points. But that posture creates real legal risk for the Rule. Statements from the White House[25] and related statements from the Chair[26] concerning this rule—

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[22] *See generally* Betsy Klein et al., *Biden Cracks Down on "Junk Fees" in New Economic Focus Ahead of Midterms*, CNN (Oct. 26, 2022), https://www.cnn.com/2022/10/26/politics/biden-bank-fees-speech/index.html.

[23] *See, e.g.*, *Biden-Harris Administration Announces Broad New Actions to Protect Consumers from Billions in Junk Fees*, The White House (Oct. 11, 2023) ("The FTC proposed a 'click to cancel' rule in March of 2023, that, if finalized as proposed, would require sellers to make it as easy for consumers to cancel their enrollment as it was to sign up. This rule would rescue consumers from seemingly never-ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to gym memberships."), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.

[24] *See, e.g.*, *A New Way Forward*, KamalaHarris.com, *supra* note 4.

[25] *See, e.g.*, President Biden (@POTUS), X.com (Aug. 12, 2024) ("We're making it easier to cancel subscriptions and memberships. You shouldn't have to navigate a maze just to cancel unwanted subscriptions and recurring payments. *The FTC is hard at work finalizing its 'Click to Cancel' rule that it proposed to make this process a requirement*.") (emphasis added), https://x.com/POTUS/status/1823037212885414107; *see also FACT SHEET: Biden-Harris Administration Launches New Effort to Crack Down on Everyday Headaches and Hassles That Waste Americans' Time and Money*, The White House (Aug. 12, 2024) ("Today, President Biden and Vice President Harris are launching 'Time Is Money,' a new governmentwide effort to crack down on all the ways that corporations . . . add unnecessary headaches and hassles to people's days and degrade their quality of life. . . . The Federal Trade Commission (FTC) has proposed a rule that, if finalized as proposed, would require companies to make it as easy to cancel a subscription or service as it was to sign up for one. The agency is currently reviewing public comments about its proposal."), https://www.whitehouse.gov/briefing-room/statements-releases/2024/08/12/fact-sheet-biden-harris-administration-launches-new-effort-to-crack-down-on-everyday-headaches-and-hassles-that-waste-americans-time-and-money/.

[26] *See, e.g.*, Lina Khan (@linakhanFTC), X.com (Aug. 12, 2024) ("As @POTUS notes, @FTC's proposal would require that firms make it as easy to cancel a subscription as it is to sign up. Too often people have to jump through endless hoops—or end up stuck paying for services they don't want. *Our rule would end this tax on your time & money*.") (emphasis added), https://x.com/linakhanFTC/status/1823094653962289640. That Tweet came in response to the President unequivocally saying, "[w]e're making it easier to cancel subscriptions and memberships," and signaling the proposal would be finalized consistent with the NPRM. *See* President Biden (@POTUS), *supra* note 25. Other statements are similarly probative of apparent conclusions being reached about the contours of the final rule. *See, e.g.*, Chair Lina M. Khan, Remarks at Center for American Progress, at 3-4 (Sept. 25, 2024) ("We've also unfortunately seen a rise in subscription traps. We've all been there. Every month, you're paying for that gym membership you don't really use, or streaming services you never signed up for in the first place. But it's absurdly difficult to actually cancel these services. You have to call customer service and spend an hour on the phone with a bot before you finally get through to a human being. Customer Service then transfers you to Memberships. They transfer you to Cancellations. And then suddenly the call drops and you have to do it all over again. It can feel like you're stuck in some type of endless doom loop. And many people understandably just give up—and pay dozens if not hundreds of dollars for subscriptions they don't want or need. And of course, that's kind of the point: to wear you down and keep taking your money, month after month. *I'm excited that the Commission will be considering finalization of a 'click to cancel' rule that would require companies to make it just as easy to cancel a subscription as it is to sign up for one*.") (emphasis added), https://www.ftc.gov/system/files/ftc_gov/pdf/20240925-remarks-chair-khan-center-for-american-progress.pdf; *see also* Chair Lina M. Khan, Remarks at Strike Force on Unfair and Illegal Pricing Public Convening, at 2 (Aug. 1, 2024) ("We're currently working toward finalizing our 'click to cancel' rule. Too often, businesses require people to jump through endless hoops just to cancel a subscription.

and other matters related to her tenure or connected to her party's campaign efforts[27]—raise the possibility that foreordained outcomes and political goals curtailed considering the rulemaking record with an open mind and without prejudgment, as law requires.[28] Today's sprint to the finish line has shortchanged the kind of deliberation and thoughtful engagement Congress deemed appropriate when it established rulemaking requirements under the Magnuson-Moss Act.

In addition to my concern about these irregularities, I am convinced that this rulemaking has failed to satisfy Section 18's requirements for rulemaking in three ways. First, the Commission is issuing a broad final rule even though the ANPR was far narrower. This mismatch means that the Commission failed to provide in its ANPR the "brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission" that Section 18 requires.[29] The mismatch is the result of leadership changes and priorities. The ANPR was voted out in 2019 by a bipartisan Commission under then-Chair Joseph J. Simons.[30] It sought public comments about centralizing existing legal requirements regarding negative options and filling gaps via Section 18 rulemaking related to disclosures, consent, and cancellation.[31] The current Majority took the bipartisan ANPR and politically supercharged it.

Customers end up paying dozens if not hundreds of dollars a month in subscriptions they want to escape. Our proposed rule would require that companies make it as easy to cancel a subscription as it is to sign up for one—ending this tax on people's time and money."), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.08.01-remarks-chair-khan-strike-force-public-convening.pdf. In light of such statements unambiguously reflecting a firm belief in the need for regulatory action—and all but committing to the proposed solution—it is risible to suggest this rule was not effectively baked well before the Commission's vote.

[27] *See, e.g.*, Talmon Joseph Smith, *Lina Khan Ends FTC Term. What's Next for Her?*, SEATTLE TIMES (Oct. 1, 2024) ("Q: You've not gotten any whispers, any word that you will not be wanted in a Harris administration? A. No, I think to the contrary."), https://www.seattletimes.com/business/lina-khan-ends-ftc-term-whats-next-for-her/; *see generally* Ben Brody, *Lina Khan Hits the Road with Democrats Ahead of Election*, Punchbowl News (Oct. 2, 2024), https://punchbowl.news/article/campaigns/ftc-lina-khan-campaigns-with-democrats/; *cf.* Letter from James Comer, Chair, Committee on Oversight and Accountability to Lina Khan, Chair, Fed. Trade Comm'n, at 1 (Oct. 8, 2024) ("During this election season, you have engaged in partisan political activities with numerous Democrat congressional candidates, undermining the FTC's independence and its mission to protect American consumers regardless of partisan affiliation"), https://oversight.house.gov/wp-content/uploads/2024/10/FTC-re-Chair-Khan-Campaign-Season-Events_10.8.202423.pdf.

[28] *See generally* 15 U.S.C. § 57a(b)(1); 5 U.S.C. § 553(c); *cf. Air Transport Ass'n of Am. Inc. v. Nat' Mediation Bd.*, 663 F.3d 476 (D.C. Cir. 2011); *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249 (D. Wyo. 2004); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008). The Chair's approach is highly unusual, given this legal risk and the Commission's responsibility to keep an open mind—which is why, typically, Commissioners do not comment on *pending* rulemakings.

[29] 15 U.S.C. § 57a(b)(2)(A).

[30] Fed. Trade Comm'n, Press Release, *FTC Seeks Public Comment on Ways to Improve Current Requirements for Negative Option Marketing* (Sept. 25, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-seeks-public-comment-ways-improve-current-requirements-negative-option-marketing.

[31] 84 Fed. Reg. 52393, 52394 (Oct. 2, 2019) ("The Commission seeks comments on ways to improve its existing regulations for negative option marketing, a common form of marketing where the absence of affirmative consumer action constitutes assent to be charged for goods or services. Negative option offers are widespread in the marketplace and can provide substantial benefits for sellers and consumers. However, consumers cannot reap such benefits when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, such problematic negative option practices have remained a persistent source of consumer harm, often saddling consumers with recurring payments for products and programs they did not intend to purchase or did not want. In the past, the Commission has sought to address such practices

Importantly, the ANPR did not contemplate broader regulation prohibiting all misrepresentations of material fact related to products that have negative option features. The ANPR tailored its inquiry by ". . . highlighting five basic Section 5 requirements that negative option marketing must follow to avoid deception": (1) disclosure of material terms of a negative option offer; (2) clear and conspicuous disclosures; (3) pre-purchase disclosures; (4) consent; (5) cancellation.[32] Absent from this list is anything about prohibiting all misrepresentations of material fact related to any product that happens to have a negative option feature. Similarly, when the ANPR stated that the Commission was seeking comment "to reduce consumer harm created by deceptive or unfair negative option marketing," it specified the Commission's interest pertained to "disclosures, consumer consent, and cancellation."[33] Again, absent from that list was anything about prohibiting all misrepresentations of material fact related to marketing of any product that has a negative option feature.

When Commission leadership changed in 2021, the "area of inquiry" changed as well. Almost immediately, the Commission under Chair Khan disrupted this particular rulemaking process to issue an Enforcement Policy Statement Regarding Negative Option Marketing[34]—sub-regulatory guidance on the very same topic as the rulemaking itself. The Commission then issued a Notice of Proposed Rulemaking ("NPRM") in 2023 that introduced into the rulemaking—for the first time—the notion of prohibiting misrepresentations related to marketing of products with negative option features.[35] Former Commissioner Christine S. Wilson dissented from the issuance of the NPRM for this (among other) reasons. In her dissenting statement, Commissioner Wilson explained: "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."[36]

The Statement of Basis and Purpose ("SBP") accompanying the final Rule cursorily dismisses concerns about the ANPR's adequacy, dubiously arguing that Section 18 requires no such "specificity" in describing the area of inquiry.[37] But the whole purpose of Section 18's

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through individual law enforcement cases and a patchwork of regulations. Nevertheless, problems persist, and consumers continue to submit thousands of complaints to the FTC each year about negative option marketing. To address these concerns, the Commission seeks comments on ways to improve existing regulatory requirements, including whether it should use its rulemaking authority under the FTC Act to expand the scope and coverage of the existing Negative Option Rule.").

[32] *Id.* at 52395.

[33] *Id.* at 52396.

[34] Fed. Trade Comm'n, Press Release, *FTC To Ramp Up Enforcement Against Illegal Dark Patterns that Trick or Trap Consumers Into Subscriptions* (Oct. 28, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions.

[35] Fed. Trade Comm'n, Press Release, *Federal Trade Comm'n Proposes Rule Provision Making It Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Memberships* (Mar. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring.

[36] Dissenting Statement of Comm'r Christine S. Wilson, *Notice of Proposed Rulemaking, Negative Option Rule*, at 3 (Mar. 23, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_commissioner_wilson_dissent_negative_option_rule_finalrevd_0.pdf.

[37] SBP at 37-38.

requirement of a description of what the Commission aims to do is to elicit public comment to inform the Commission about its choices. Indeed, Section 18 requires an ANPR to invite interested parties to provide "suggestions or alternative methods for achieving such objectives."[38] Parties cannot possibly include alternative methods if the ANPR wholly fails to identify the objective, *i.e.*, regulating misrepresentations in marketing of products with negative option features.

It is telling that the ANPR here only elicited 17 comments,[39] while the NPRM (which made clear that the Commission was significantly expanding its focus) elicited *16,000* comments.[40] The narrowness of the ANPR meant that the Commission could not, consistent with Section 18, proceed to a much broader NPRM.[41] In choosing to interpret the ANPR (and the 17 comments it elicited) as sufficient predicate for the much-expanded NPRM, the Commission cut itself off from valuable public comments at important early stages (especially as to regulatory alternatives) and ignored the rulemaking guardrails that Congress carefully established to forestall nondelegation concerns that might otherwise exist.[42]

The second procedural failing lies in the Commission's failure to "prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices" as Section 18 requires.[43] "Because the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct."[44] Section 425.3 of the Rule fails Section 18's specificity requirements. Section 425.3 prohibits *any* misrepresentation of material fact made in connection with the sale or promotion of a product that has a negative option feature.

Unfairness explicitly requires a cost-benefit analysis relating to the practices at issue.[45] Meanwhile, deception is a subset of the broader unfairness authority. With its focus on reasonableness and materiality, no cost-benefit analysis is required because the Commission has historically argued that deceptive practices are always harmful. So far, so good. But both unfairness, and particularly deception, require the Commission to provide sufficient evidence for a reviewing court to evaluate whether the Commission has met the legal predicate for either theory (particularly as it relates to reasonableness and materiality). While the Rule provides examples of material misrepresentations, those are merely examples. Indeed, the Commission ignores the specificity requirement by generalizing from poorly sampled past agency cases. Whatever the merits of the past cases, the Majority does not remotely come close to explaining how the evidence

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[38] 15 U.S.C. § 57a(b)(2)(A)(ii).
[39] *See* Regulations.gov, Negative Option Rule (ANPR), FTC-2019-0082, https://www.regulations.gov/docket/FTC-2019-0082.
[40] The Commission published 1,162 unique comments. SBP at 18. *See* Regulations.gov, Negative Option Rule (NPRM), FTC-2023-0033-0001, https://www.regulations.gov/document/FTC-2023-0033-0001.
[41] 15 U.S.C. § 57a(b)(2)(A) ("*Prior* to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission *shall* publish an advance notice of proposed rulemaking in the Federal Register.") (emphasis added).
[42] *Cf.* Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, *In re Non-Compete Clause Rule*, FTC Matter No. P201200, at 20-22 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf (describing nondelegation doctrine).
[43] 15 U.S.C. § 57a(a)(1)(B).
[44] S. Rep. No. 93-1408 at 7702, 7755, 7763 (1974) (Conf. Rep.) (emphasis added).
[45] 15 U.S.C. § 45(n).

in those limited cases are similar to the myriad contexts an economy-wide rule would inevitably apply to.

Indeed, the Rule is not limited to misrepresentations relating to *deceptive terms of negative option features* (or some other specific, deceptive conduct), but instead, applies broadly to *any* material fact. Nor does the Rule require that the consumer actually use the negative option feature; the mere *presence* of a negative option feature would render any misrepresentation of material fact subject to the Rule. Taken together, the Rule is nothing more than a back-door effort at obtaining civil penalties in any industry where negative option is a method to secure payment. The Rule's application to any misrepresentation therefore fails to meet Section 18's "specificity" requirement,[46] and will no doubt invite serious legal challenge on this basis.[47]

The Supreme Court's decision in *AMG*, which held the language of Section 13(b) does not authorize the Commission to obtain equitable monetary relief,[48] limited the Commission's ability to seek money for first-time violations of the FTC Act. The Commission is still able, however, to seek monetary remedies for violation of rules issued under Section 18.[49] Here, the Final Rule effectively transforms Section 5's broad prohibition on unfair or deceptive practices into a Section 18 rule, allowing the Commission to expand its ability to seek money. Indeed, because negative option features are widely used in a variety of industries, the Rule greatly expands that ability. While I generally support *legislation* that would grant the FTC authority under Section 13(b) to obtain court orders for redress or disgorgement (with whatever guardrails Congress deems fit), the Commission should not circumvent legislative prerogative via improper Section 18 rulemaking.

The third significant procedural flaw in this rulemaking is that the Commission failed to appropriately establish the "prevalence" of unfair and deceptive practices related to all negative option features for all products in all markets and all media (*i.e.*, with respect to the scope of this rule). According to Section 18, the Commission may issue an NPRM "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[50] Section 18 further provides:

> The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—
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> (A) it has issued cease and desist orders regarding such acts or practices, or
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> (B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.[51]

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[46] *Cf. Katharine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 661-62 (2d Cir. 1979) (setting aside FTC rule under Section 18 that did not, among other things, define unfair practices with sufficient specificity).
[47] *See, e.g.*, *id.* at 663 ("When Congress provided that the Commission's rules must define unfair and deceptive acts with specificity, it clearly intended that the Commission's definition would be subject to judicial review.").
[48] *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021).
[49] 15 U.S.C. § 57b(a)(1).
[50] *Id.* § 57a(b)(3).
[51] *Id.*

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."[52] 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.

If similarity among complaints and cases only at the highest level of generality constitutes the "prevalence" sufficient to ground an economy-wide rulemaking, then a "prevalence" determination is in fact no meaningful guardrail on the Commission's conduct at all, creating precisely the type of non-delegation concerns that Section 18's guardrails were meant to prevent. Canons of "avoidance" warn us to avoid adopting interpretations that would render statutes unconstitutional.[53] To avoid precisely that fate, "prevalence" must require more than what the Commission has shown here.

A final concern here. The Rule's failure to define with specificity the acts or practices which are unfair or deceptive, combined with the rule's preemption of inconsistent state laws,[54] seems likely to create confusion and, ultimately, may harm consumers. The Second Circuit rebuked the Commission for a similar approach in a prior rulemaking after the Commission had "fail[ed] . . . to define with specificity the acts or practices which are unfair or deceptive."[55] Absent "a specification of the acts or practices which the Commission deems deceptive," the Court explained that "the breadth of the preemption provision is such that it places in issue an indefinite variety of state laws and regulations" that were relevant to the underlying contractual relationships. Similarly, here, state laws govern the types of conduct today's Rule attempts to regulate.[56] One risk of misguided *federal* regulation is that it can confuse or jeopardize *state* laws and enforcement. Given the Rule's lack of specificity, it raises that concern.

II.

The Rule is troubling not only procedurally but also substantively. By singling out representations made in connection with negative option billing models and subjecting these representations to civil penalties or other monetary relief, it tilts the playing field in ways that are

[52] SBP at 8.
[53] *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon of constitutional avoidance as "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L. J. 1945, 1949 (1997) (providing examples of cases in which the Supreme Court construed a statute so as to avoid a constitutional question).
[54] 16 C.F.R. § 425.7(a) ("Relation to State Laws") ("*In General*. This part shall not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to negative option requirements, except to the extent it is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.").
[55] *See Katharine Gibbs School*, 612 F.2d at 667.
[56] *See, e.g.*, SBP at 145-46, 214.

likely to pervert business incentives. For example, businesses may avoid using negative option billing models, even when businesses and consumers could derive significant value from them.

One might argue that no shift in incentives will happen for *honest* businesses because the Rule only addresses *mis*representations of material fact. In other words, all an honest business needs to do to avoid civil penalties is to tell the truth about products and services that involve negative option billing. But what constitutes a misrepresentation can sometimes be in the eye of the beholder (that is, a Commissioner).[57] Even honest businesses will have reason to reconsider the use of negative option billing now that it means subjecting themselves to potential civil penalties for misreading Commission tea leaves.[58] And businesses will also need to factor in the compliance costs associated with implementing this Rule's disclosure, consent, and cancellation requirements—prescriptive requirements that are absent for other billing models or less prescriptive under existing law, such as ROSCA.

These shifting incentives matter to consumers because the reason that honest businesses adopt negative option billing is to lower transaction costs between consumers and firms. For example, say I want to watch a particular streaming service at my convenience. I don't want to be bothered with signing up and paying a fee each month that I log on; I want negative option billing—a subscription—to reduce the friction in my streaming experience. Raising the transaction costs will reduce a business's sales and the utility consumers derive from these services. In other words, in our good intentions, we may harm the consumers and competition we are supposed to protect.[59]

The Rule purports to address any overbreadth by including, consistent with the Commission's Rules of Practice,[60] an "Exemptions" provision, which provides: "Any person to whom this Rule applies may petition the Commission for a partial or full exemption."[61] In response to such petition, "[t]he Commission may . . . issue partial or full exemptions from this part if the

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[57] *Cf.* Statement of Comm'r Christine S. Wilson Concurring In Part and Dissenting In Part, *FTC v. Neurometrix, Inc.*, FTC Matter No. 1723130 (Feb. 28, 2020), (disagreeing with the majority of the Commission on claim interpretation and substantiation for certain claims), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.08.01-remarks-chair-khan-strike-force-public-convening.pdf.

[58] Some businesses were already subject to disclosure requirements under existing laws such as ROSCA and the TSR. But those laws are more limited. For example, 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." 15 U.S.C. § 8403.

[59] Concurring and Dissenting Statement of Comm'r Melissa Holyoak, *Social Media and Video Streaming Services Staff Report*, FTC Matter No. P205402, at 18-19 (Sept. 19, 2024) ("The core of this agency's mission is to protect consumers. Unfortunately, recent years have seen some Commissioners take a narrow view of that mission and where harms emanate from. . . . [W]e should also protect the American people from harms that follow when we fail to robustly and comprehensively scrutinize our own policy efforts and advocacy, including for economic effects, and to anticipate potential unintended consequence."), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-social-media-6b.pdf; *cf.* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In re Rytr, LLC*, FTC Matter No. 2323052, at 5 (Sept. 25, 2024) ("We must protect consumers through robust enforcement. Indeed, the Commission is at its best when it does so. But we must also think carefully about the potential harms to consumers and innovation that attend misguided enforcement. Today's misguided complaint and its erroneous application of Section 5 will likely undermine innovation in the AI space. I therefore respectfully dissent."), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf.

[60] 16 C.F.R. §§ 1.25, 1.31.

[61] 16 C.F.R. § 425.8.

Commission finds application of the Rule's requirements is not necessary to prevent the acts or practices to which the Rule relates."[62]

But the "Exemptions" provision does nothing to reduce the burden on firms from the overbreadth of the Rule's coverage of all misrepresentations of material fact. Rather, taken together, they effectively shift the burden of crafting a tailored rule to regulated entities. And, once again, it appears that the Commission is tilting the playing field in a manner that is likely to harm both consumers and competition. Small businesses and new market entrants are less likely to be able to afford the potentially costly legal fees needed to petition the Commission to obtain an exemption. Even for businesses that can afford to use the exemption process, this process will impose costs on businesses, who will pass on those costs to consumers. Raising potential costs for consumers through an improperly promulgated rule is not a desirable outcome at any time, but especially not in an inflationary economy. Businesses and consumers will not be alone in bearing increased costs. Conducting the exemption process will continue to drain FTC staff resources—reducing the time that our talented staff could devote to enforcing the clear authorities Congress has given us, such as ROSCA.[63]

A final point here. I also have concerns about the Commission's economic analysis of the quantifiable benefits that may result from the Rule's substantive requirements. For example, the Commission's estimate related to the upper bound of the Rule's benefits for consumers who cancel subscriptions with in-person enrollment is based in part on the complaints of 25 individual consumers in a single industry,[64] and a number of other simplifying assumptions.[65] But this self-selected group of 25 consumers does not comprise a random sample, even among people who were not able to cancel subscriptions with in-person enrollment on their first attempt.[66] It is at least possible that other individuals who cancelled subscriptions in person had different experiences or expectations than these particular consumers—and therefore did not voice any complaint. Indeed, given that consumer experiences and expectations may vary significantly across industries and products, there is no reason to believe that balancing of harms and benefits of these consumers can be appropriately extrapolated to the entire economy. Thus, the Commission's estimated benefits are not based on what could be characterized as a representative sample. Without knowing the frequency of consumers having significant difficulty cancelling in-person subscriptions, it is not possible to assess how much weight to place on the estimate of the high end of the range of benefits from the proposed rule. Most of the difference between the low-end and high-end estimates of benefits is driven by the estimate of the high end of the benefits for in-person subscriptions.

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[62] *Id.*

[63] To be clear, my concern is not with the exemption process itself (or its inclusion in the Rule), but with the enormous work it must do to compensate for the overbreadth of the provision regarding misrepresentations.

[64] *See, e.g.*, SBP at 171 ("Notwithstanding IHRSA's assertion that many fitness clubs offer online cancellation, at least 25 individual consumers submitted comments attesting to the difficulties of canceling gym memberships.").

[65] *Id.* at 173 ("Based on these comments, the Commission makes the simplifying assumption that the worst gym membership cancellation experiences involve three failed attempts at cancellation, each costing one hour of time, and that, because of those cancellation failures, three unwanted monthly charges were processed."); *see id.* at 169-70 (explaining how, in its economic analysis for the Rule, "the Commission proxies the per-cancellation benefits of an additional, remote, method of cancellation by looking at those benefits in the context of gym memberships").

[66] *See id.* at 171.

III.

This Rule is particularly disappointing because it represents two missed opportunities. In 2019, a bipartisan Commission unanimously voted in favor of issuing the ANPR, which was intended to (1) consolidate the requirements from various laws the FTC enforces, providing businesses who have to navigate this patchwork with greater clarity, thereby benefiting both consumers and businesses; and (2) explore whether a Section 18 rule should fill any gaps "when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible."[67] Today's final Rule could have stayed that prudent course rather than expanding in scope and complexity as it has under this Commission.

The second missed opportunity has taken place every day since the Commission expanded the scope of the rulemaking. This Commission chose to devote scarce staff resources to this overbroad rulemaking—one that seems likely to be challenged in court, which will lead to even more taxpayer-funded expenses—rather than direct our talented staff to draft a rule within the scope of our authority or bring enforcement actions using clear legal authorities like ROSCA and TSR. In my time at the Commission, I have voted in support of numerous ROSCA cases, including *NGL*,[68] *Care.com*,[69] and *Legion Media*,[70] and numerous TSR cases, including *Career Step*,[71] *Carshield,*[72] and *Panda Benefit Services*.[73] As I have said elsewhere, I believe the Commission is at its best when it focuses on enforcing the law, not writing it.[74] But I am not reflexively opposed to rulemaking where Congress has delegated the Commission relevant authority, *and we act consistent with that authority*.[75] Unfortunately, that is not what today's Rule is. Instead, we have an ill-disguised political maneuver from the Majority in the form of a rule, one rushed to publication to advance the prospects of the Chair's preferred presidential candidate.

I dissent.

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[67] 84 Fed. Reg. 52393, 52394.
[68] *FTC v. NGL Labs, LLC*, No. 2:24-cv-5753 (C.D. Cal.), https://www.ftc.gov/legal-library/browse/cases-proceedings/ngl.
[69] *FTC v. Care.com, Inc*., No. 1:24-cv-987 (W.D. Tex.), https://www.ftc.gov/legal-library/browse/cases-proceedings/carecom-inc-ftc-v.
[70] *FTC v. Legion Media LLC*, FTC Matter No. 2423034, https://www.ftc.gov/legal-library/browse/cases-proceedings/242-3034-legion-media-llc-et-al-ftc-v.
[71] *FTC v. Career Step, LLC*, FTC Matter No. 2323019, https://www.ftc.gov/legal-library/browse/cases-proceedings/232-3019-career-step-llc-ftc-v.
[72] *FTC v. NRRM, LLC*, FTC Matter No. 2223031, https://www.ftc.gov/legal-library/browse/cases-proceedings/2223031-carshield.
[73] *FTC v. Panda Benefit Servs., LLC*, FTC Matter No. 2423041, https://www.ftc.gov/legal-library/browse/cases-proceedings/2423041-panda-benefit-services-llc-ftc-v.
[74] Prepared Statement of Comm'r Melissa Holyoak, Fed. Trade Comm'n, Before the Subcomm. on Innovation, Data, and Commerce of the Energy and Commerce Comm., U.S. House of Representatives, Concerning "The Fiscal Year 2025 Federal Trade Commission Budget," at 2-4 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-testimony-7-5-24.pdf.
[75] *Id.*