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Via eRulemaking Portal
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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

The Electronic Transactions Association ("ETA") respectfully submits these comments in response to the Federal Trade Commission's ("FTC" or the "Commission") request for public comment on its proposed Rule Concerning Recurring Subscriptions and Other Negative Option Plans (the "Proposed Rule").

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing more than $44 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

While ETA fully supports the Commission's efforts to protect consumers, we are opposed to the Proposed Rule as written because it is not narrowly tailored to address the harms outlined in the Advanced Notice of Proposed Rulemaking or Notice of Proposed Rulemaking ("NPRM").[1] We raise two significant concerns in this letter.

First, by effectively covering all agreements with automatic renewal provisions, the Proposed Rule is broader in scope than necessary to protect consumers from the pitfalls of Negative Option Marketing. The Proposed Rule would create a tool that the Commission could use to interpose regulatory influence and law enforcement authority in contractual arrangements between businesses in a way that has not been authorized by Congress or justified by the Commission's own rationale for the Proposed Rule.

ETA's opposition is not rooted in mere conjecture. The Commission's recent attempt to apply the Restore Online Shoppers' Confidence Act ("ROSCA") to payment processing agreements is a telling sign of how broadly the Commission would apply the Proposed Rule.[2] In that case, the Commission alleged that a merchant processing agreement between a payment processor and its merchant-business customer was subject to ROSCA—a law drafted by Congress to protect *online shoppers*—because it contained an automatic renewal clause and, by virtue of

[1] *See generally* Negative Option Rule, 88 Fed. Reg. 24,716 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425); Rule Concerning the Use of Prenotification Negative Option Plans, 85 Fed. Reg. 52,393 (Oct. 2, 2019).
[2] *FTC v. First Am. Payment Sys., L.P.*, No. 4:22-cv-00654 (E.D. Tex. 2022).

being executed online, was a transaction effected over the Internet. The case was resolved through a stipulated agreement with no findings of wrongdoing by a court or admission of liability on the defendants' part, and no court to our knowledge has agreed with the Commission's application of ROSCA to payment processing agreements. Nonetheless, if finalized without appropriate exemptions for commercial arrangements between contracting business parties, the Proposed Rule would endow the Commission with self-appointed authority to impermissibly regulate a whole host of industries and business arrangements because of the Commission's position that an automatic renewal clause in an arm's length commercial agreement is a "Negative Option Feature."

While it may seem easy for businesses to avoid regulation under the Proposed Rule by removing automatic renewal clauses from their contracts, that cannot be the answer. Automatic renewal clauses are a mainstay in many commercial agreements for operational ease and business continuity purposes. In the payment processing industry, for example, automatic renewal clauses in merchant agreements ensure that merchants continue to receive the uninterrupted ability to accept card and other electronic payments from customers, and access to reliable payment processing is a requirement of virtually all merchants in our modern economy.

Imposing the consumer protection measures of the Proposed Rule on business-to-business contractual arrangements when they include automatic renewal clauses would have adverse economic effects on entire industries, including the payment processing industry. Respectfully, it does not appear that the Commission has considered these consequences. For example, the Proposed Rule dictates the form and content of required disclosures in a manner that may work for some consumer relationships, but not in the context of payment processing agreements. Payment processing agreements address various complex subjects relating to anti-fraud measures, compliance with payment network and legal requirements, data security obligations, pricing terms, and other requirements. Through the Proposed Rule, the FTC would prescribe what contractual disclosures payment processors should make and how those disclosures should be made in a way that does not consider all of the various terms and conditions that are typically included in payment processing agreements. For that reason, the Proposed Rule would generate legal and operational uncertainty and fail to account for other legal obligations and requirements that impact payment processing agreements.

As another example, requiring that payment processors that enable merchants to sign contracts online (including through proprietary electronic application systems or common apps, such as DocuSign) provide a "click-to-cancel" mechanism significantly alters the ability of payment processors to control the term and termination provisions of their agreements. It does not appear the Commission has thought through circumstances in which a "click-to-cancel" requirement would not be workable in certain business dealings, especially where identity verification or service transition discussions may need to be considered.

Further, the Commission's estimation of compliance costs as set forth in the NPRM seems unreasonable and inadequate considering all of the industries that use automatic renewal clauses in their agreements. In the NPRM, the FTC relied on census data for firms and establishments in industry categories where some sellers offer free trials, automatic renewal, prenotification plans,

and continuity plans to arrive at 106,000 entities currently offering negative options to consumers.[3] Respectfully, we question that these calculations covered the many providers of goods and services to business where automatic renewal clauses are used.[4] The regulatory compliance burden to comply with the Proposed Rule in business-to-business contractual dealings would not just include the manpower to comply with the technical disclosure, consent, cancellation, and other requirements. The burden would also be realized in significant costs generated by how the Proposed Rule would effectively change the operational landscape of entire industries. At a minimum, if the FTC were to apply the Proposed Rule to business-to-business contractual arrangements with automatic renewal clauses, the Proposed Rule would be ripe for judicial review for the FTC's failure to consider the impact of the Proposed Rule on such arrangements. [5]

In short, the Commission's rationale for supporting the Proposed Rule does not justify the broad and sweeping effect of the Proposed Rule in all areas where the Commission could apply the Proposed Rule as written. The FTC could better tailor the Proposed Rule by changing the scope of the Proposed Rule to apply "in connection with promoting or offering for sale any good or services *purchased, leased, or rented primarily for personal, family, or household purposes* . . . ."[6] Alternatively, the FTC could appropriately clarify and narrow the inclusion of "automatic renewal" in the definition of "Negative Option Feature" to exclude automatic renewal clauses in contractual arrangements "*between a seller and any business to induce the purchase of goods or services or a charitable contribution by the business*."[7]

Second, the Proposed Rule's definition of "Negative Option Seller" includes anyone "*charging for* . . . goods or services with a negative option feature." From our perspective, we interpret the phrase "charging for" to broadly cover the entity selling the good or service that has the negative option feature – and we do not interpret the FTC to be covering (nor do we think it

[3] 88 Fed. Reg. 24,716, 24,733.

[4] As a result, we suspect that the Commission has not fully satisfied its statutory obligations related to proposed rulemakings. *See* 15 U.S.C. § 57b-3(b)(1)(C) ("In any case in which the Commission publishes notice of a proposed rulemaking, the Commission shall issue a preliminary regulatory analysis relating to the proposed rule involved. Each preliminary regulatory analysis shall contain . . . a preliminary analysis of . . . any adverse economic effects . . . .").

[5] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) ("[W]e must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974))). *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (casting doubt on the government's cost savings calculations for a policy and ultimately reversing a decision based on the policy); *Atchinson, T. & S.F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973) (upholding Interstate Commerce Commission ruling, in part because the agency relied on "quite detailed studies" establishing the costs of certain required inspections); *Long Island Power Auth. v. FERC*, F.4th 705, 712 (D.C. Cir. 2022) ("exacting precision" is not required for determining costs, but "we do set aside cost allocations that are either unreasonable or inadequately explained." (quoting *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018))); *cf. Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (concluding that, given the historical concern expressed by governmental and private parties, the agency's failure to undertake any assessment of environmental issues in connection with its issuance of annual licenses was an abuse of discretion).

[6] This is the approach the FTC has used with its Rule Concerning Cooling-Off Period for Sales Made at Homes or Certain Other Locations. *See* 16 C.F.R. §§ 429.0–429.3.

[7] This is the approach the FTC has used with the Telemarketing Sales Rule. *See* 16 C.F.R. § 310.6(b)(7).

would be reasonable to interpret this definition to cover) intermediaries, such as payment processors, that merely effect the transfer of funds from the consumer buyer to the merchant seller resulting from a negative option feature. These payment processors and other intermediaries, unlike the merchant selling or offering the underlying good or service, do not control the terms of the negative option feature and do not control the interface with the consumer buyer. Therefore, payment processors and other intermediaries are not in a position to comply with the terms of the Proposed Rule. Nonetheless, to avoid misinterpretation and confusion around the overly broad meaning of "*charging for*," we request the final rule include an express exemption for payment processors and other intermediaries involved in the flow of funds in a transaction involving a consumer and a merchant-seller.

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We appreciate your taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact Scott Talbott, Senior Vice President, Government Affairs, stalbott@electran.org.

Sincerely,

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