Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of	)	
	)	Project No. P064202
Negative Option Rule	)	Docket No. FTC-2023-0033-0001
	)	

COMMENTS OF SIRIUS XM RADIO INC.

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Sirius XM Radio Inc. ("Sirius XM") respectfully submits these comments in response to the Federal Trade Commission's ("Commission" or "FTC") Proposed Rule to amend its negative option rule.[1]

I. INTRODUCTION

Sirius XM is the leading audio entertainment company in North America with a portfolio of audio and infotainment businesses, including its flagship subscription entertainment service Sirius XM; the ad-supported and premium music streaming services of Pandora; emergency roadside assistance of Sirius XM Connected Vehicle; and informational weather services for pilots and boaters.

The Commission should update its negative option rule to reflect technological advancements. As noted by the Commission and prior commenters in this proceeding, negative option plans offer benefits to consumers, including by allowing them to avoid multiple time-consuming and inefficient transactions and enjoy consistent service availability. When properly administered, these plans offer benefits to businesses as well, reducing marketing and subscriber retention costs that allow businesses to grow and enhance their product and service offerings.

[1] Negative Option Rule, 88 Fed. Reg. 24716 (Apr. 24, 2023) ("NPRM").

Any changes to the Commission's regulatory scheme should provide additional transparency to consumers, and the Commission should carefully target its changes to achieve this desired goal. Any such changes to the regulatory scheme should not cause unintended consumer harm, result in less appealing subscription options for consumers and/or diminish consumer privacy and create data security risks, in each case without materially improving the customer experience. The Commission should avoid "one-size fits all", broad-brush requirements that ignore differences between general advertising and material disclosures best provided at the point of purchase, that ignore changes in technology over time, or that impede a business's ability to converse with its customers and meet their needs. Finally, any requirements the Commission adopts should not create inconsistent federal and state regulatory requirements.

II. THE COMMISSION SHOULD ENSURE THAT THE NEGATIVE OPTION RULE CONTINUES TO PROTECT CONSUMER EXPECTATIONS.

The record of this proceeding is replete with evidence of significant consumer benefits from negative option arrangements.[2] The Commission should ensure that any changes to its rules do not result in unintended negative consequences, such as consumer confusion, unwanted calls, or added burdens on consumers.

[2] *See* Comments of MPA – The Association of Magazine Media, Project No. P064202, at 5 (Dec. 2, 2019) ("Automatic renewal subscribers get uninterrupted service and access to their favorite magazine content, and seamless and easy customer service interactions with publishers."); Comments of Entertainment Software Association and Internet Association, Project No. P064202, at 2 (Dec. 2, 2019) ("Entertainment Software Comments") (noting "abundant benefits to consumers, including the ability to test an unfamiliar product or service, the convenience and certainty of recurring products and services, and access to greater product and services offerings, often at lower prices"); Comments of the News Media Alliance, Project No. P064202, at 2 (Dec. 2, 2019) ("For consumers, automatic renewals offer significant benefits, including a convenient way to avoid disruption in their service.); Comments of Pennsylvania Office of Attorney General et al., Project No. P064202, at 8 (Dec. 2, 2019) ("State Attorneys General Comments") (noting "where a consumer has agreed to pay for a magazine subscription for a specified time period, it is arguable that the consumer would view an auto-renew feature as a convenience and may expect an offer to include it").

A. The Commission Should Ensure That Disclosure and Notice Requirements Strike the Appropriate Balance Between the Need to Inform and the Desire Not to Annoy.

Consumers are entitled to clear information before finalizing their purchase of any service, including a service that includes a negative option. However, a one-size-fits-all approach to disclosures is not appropriate given the variety of products and services that businesses offer consumers. Businesses require sufficient flexibility to tailor the information provided to match the product, consumer customizations, or service being offered with the expectations of their customers. The Commission recognizes this "inherent tradeoff between providing consumers with additional information and ensuring they see and understand the information they need."[3]

Proposed Section 425.4 does not provide this kind of flexibility, since it would require the provision of certain elements of information "prior to obtaining the customer's billing information."[4] For example, businesses cannot be expected to provide the "amount or ranges of costs consumers may incur" prior to obtaining the consumer's billing information because a consumer may elect a billing option that changes the price of the service. Moreover, sales tax cannot be calculated until after the consumer has provided a billing address. Similarly, the "date the charge will be submitted for payment" or "[t]he deadline (by date or frequency) that the consumer must act in order to stop all charges" is unknown until the consumer signs up for the service.[5] Instead, and consistent with the requirements in the Commission's existing

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[3] NPRM, 88 Fed. Reg. at 24727.

[4] *Id.* at 24735.

[5] *Id.* at 24726 & 24735. Proposed Rule 425.4 also requires notices that go beyond the negative option plan. *Id.* at 24727 (the proposed rule "would require sellers to disclose any material conditions related to the underlying product or service that is necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer") (footnote omitted). As discussed below, the FTC has defined the scope of this proceeding as the negative option rule and should limit its proposal to that rule.

Telemarketing Sales Rule ("TSR"), the Commission should require that businesses present material terms for negative option offers *prior to charging the consumer*, provided such information is not retained by business if the consumer does not complete the transaction.[6]

The obligation to provide "clear and conspicuous" disclosures should be tied to the point of sale.[7] Requiring the "clear and conspicuous" disclosure of a negative option provision in every television advertisement, for example, does not further consumers' interests.[8] Consumers are not likely to remember the negative option portion of the offer they saw advertised when they sign up for the service. Businesses are promoting their products and services in such advertising, which may not even mention pricing or terms. Notice would be more effective and accurate if it was "clear and conspicuous" and given proximate to the offer at the time of enrollment or purchase.[9]

The Commission's proposal to require an annual reminder notice to be sent to consumers "through the same medium (such as internet, telephone, or mail) the consumer used to consent"[10] is problematic for several reasons, not the least of which is the unintended effect of consumers' possibly not receiving the notices and placing businesses at risk of violating other federal and

[6] *See* 16 C.F.R. § 310.3(a)(1) (requiring disclosure of material information "[b]efore a customer consents to pay"); *see also* Cal. Bus. & Prof. Code § 17602(a)(1) (requiring disclosure of material terms "before the subscription or purchasing agreement is fulfilled").

[7] NPRM, 88 Fed. Reg. at 24734 (Proposed Rule 425.2(c)); *id.* at 24735 (Proposed Rule 425.4(b)(1)).

[8] In addition, the "placement" obligations in Proposed Rule 425.4(b)(2) do not make sense if the "clear and conspicuous" disclosure obligations apply to advertising. The proposal is "[i]f directly related to the negative option feature, the disclosures must appear immediately adjacent to the means of recording the consumer's consent for the negative option feature," but obviously disclosures in video or audio advertising cannot be "immediately adjacent" to the recording of the consumer's consent. *Id.* at 24735.

[9] *See* FTC Staff Report, *Mobile Privacy Disclosures: Building Trust Through Transparency*, at 15 (Feb. 2013) ("Providing such a [just-in-time] disclosure at the point in time when it matters to consumers, just prior to the collection of such information by apps, will allow users to make informed choices about whether to allow the collection of such information."); Cal. Bus. & Prof. Code § 17602(a)(1) (requiring "temporal proximity" between the notice and the request for consent).

[10] *See* NPRM, 88 Fed. Reg. at 24736 (Proposed Rule 425.7).

state laws, including those relating to telemarketing. As a general matter, nothing in the record of this proceeding to date has identified a problem with how sellers communicate with their consumers in regard to renewal notices. Mandating exactly how renewal notices must be sent is unwarranted. Instead, the FTC should follow the approach adopted by various states and not mandate a particular delivery method, but provide businesses with various alternatives for delivery, such as by email or postal mail based on the information the consumer provided to the business. This approach strikes a fair and reasonable balance of satisfying the FTC's desire for consumers to be notified of an upcoming renewal (and opportunity to cancel to avoid any charge) while providing flexibility in how a business can provide these notices.

Sales made via telephone is one example of the problem created by requiring that a notice be sent in the same form as the customer's initial enrollment. Requiring telephone calls to consumers likely would be perceived by customers as an increase in nuisance calls,[11] many of which customers do not desire and will not answer if they are not expected. In such instance, consumers would not "get" the notice and would not be reminded of their negative option plan and/or upcoming renewal. Furthermore, if consumers revoked their consent to receiving such calls,[12] affected businesses would thereafter find themselves in a catch-22: if they honor the

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[11] Businesses having a significant number of subscribers who have enrolled by telephone would be forced to develop an automated system and using pre-recorded messages to deliver these calls, as the cost of live agents placing these calls and reading all of the information required by Proposed Rule 425.7 would be incredibly costly. If these businesses did not obtain the requisite consent for these calls, they would be at risk of consumer lawsuits that carry significant financial damages and regulatory enforcement actions. Even worse, if a subscriber changes telephone numbers and did not update this information with the business, and the number was reassigned to a new person with whom the business has no relationship, under the TCPA that business could be exposed to liability for calling a person without the appropriate consent. As the FTC is well aware, these fact scenarios are very real and thus requiring businesses to place these calls to satisfy the annual notice requirement would put these businesses at great risk.

[12] Consumers who have provided prior express consent to receive autodialed or prerecorded calls may revoke such consent through any reasonable means. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7994, 7997 (2015);

consumer request they risk running afoul of the proposed rule, and if they continue making these calls, they run the risk of violating those consumers' do not call requests. Delivering this reminder via a telephone call does not benefit the consumer as they are unlikely able to retain the information provided during the call or remember important dates needed to efficiently manage their negative option plan.

Mandating the manner by which renewal notice must be sent – that is, in the same manner as the method used when consumers enrolled – will present businesses that allow sales to be completed by telephone with a compliance quandary and require them to incur significant costs and resources to develop complaint solutions. Instead, the FTC should follow the lead of states with laws in this area and allow businesses the flexibility to send renewal notices using a method of their choice.

B. Sirius XM Supports Requirements for Clear and Conspicuous Consent at the Time of Purchase.

Sirius XM supports the proposed rule's requirement to obtain express informed consent to a negative option arrangement. Businesses should be required to obtain such consent from consumers at the point of sale.[13] Businesses should be able to obtain such consent in conjunction with the other terms of an offer,[14] as long as they clearly and conspicuously disclose the negative option features and the other material terms of the offer and refrain from "includ[ing] any information that 'interferes with, detracts from, contradicts, or otherwise undermines" the

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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, FCC 23-49 (rel. June 9, 2023).

[13] *See* NPRM, 88 Fed. Reg. at 24735 (Proposed Rule 425.5). Similar to Proposed Rule 425.4, this rule purports to go beyond negative option requirements. *See id.* at 24728 (noting "the Rule requires sellers to obtain consent for the entire transaction to ensure consumers also agree to elements of the agreement not specifically related to the negative option feature.") (footnote omitted). The Commission should limit application of the proposed rule to negative option billing arrangements.

[14] *See id.* at 24735 (Proposed Rule 425.5(a)(1)).

negative option terms.[15] Requiring an additional consent for the negative option feature – separate and apart from the other elements of an offer – will result only in consumer confusion.

The Commission should treat "free trial" offers the same as all other forms of negative option arrangements for purposes of the consent requirement. Contrary to the views of some commenters, free trial offers do not require different treatment in the negative option rule.[16] Free trial offers benefit consumers in the form of lower prices and minimal transaction costs. Adding costly regulatory requirements will result in businesses making fewer of these offers to consumers, as well as the potential for the inadvertent lapse in continuing services if the consumer is forced to take a second action to continue service. As long as consumers are clearly informed about the terms of a free trial offer and evince affirmative consent, no further consumer consent should be required when the free trial period expires. As the Commission recognizes, "if sellers follow the proposed Rule's disclosure and consent requirements, consumers should understand they are enrolled in, and will be charged for, the negative option feature once the free trial ends."[17]

C. An Easy-To-Use Cancellation Method Is in the Best Interest of Consumers and Companies.

Consumers' and businesses' interests are aligned in wanting a simple, clear cancellation method for negative option offers. While businesses certainly want to retain their customers, businesses also want to ensure that customers have a positive experience through the lifecycle of their subscription, including through cancellation. If a customer cancels a service, providing a

[15] *See id.* (Proposed Rule 425.5(a)(2)).
[16] *Cf.* State Attorneys General Comments at 8.
[17] NPRM, 88 Fed. Reg. at 24728.

positive customer service experience is more likely to result in that individual returning as a customer in the future, in addition to reducing complaints and the possibility of refunds.

The Commission should allow sufficient flexibility for businesses to meet the needs and desires of its customers in this regard.[18] All parties want an easy-to-use and an accessible method of cancellation, but this does not mean there is benefit to mandating that the cancellation method be identical to the method the consumer used to purchase.[19] For example, requiring a customer to use direct mail to cancel if the customer used direct mail to accept a subscription offer would be inconvenient for the customer and not the customer's expected or desired means for cancellation. Instead, the cancellation method should be an easy-to-use mechanism for a consumer to stop recurring charges,[20] which would closely track consumer expectations and allow for changes in technology. In addition, the rule must allow for reasonable efforts on the part of the business to verify the identity of the subscriber before cancelling.[21]

Similarly, the Commission should afford businesses flexibility in how they address "save" offers so that they can best serve customers. Businesses should be free to interact with their customers to find them better offers that fit their needs.[22] If a customer expresses a desire to cancel without considering other options, it is in the business's interest to move directly to cancellation. The Commission should clarify that each specific "save" offer in response to a

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[18] *See* Comments of ACT | The App Association, Project No. P064202, at 4 (Dec. 2, 2019).

[19] *See* NPRM, 88 Fed. Reg. at 24735 (Proposed Rule 425.6(c)).

[20] Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345, § 4, 124 Stat. 3618, 3620 (2010) (codified as 15 U.S.C. § 8403).

[21] *See* Cal. Bus. & Prof. Code § 17602(d)(3) (stating that "a business may require a consumer to enter account information or otherwise authenticate online before termination of the automatic renewal or continuous service online if the consumer has an account with the business").

[22] State Attorneys General propose a ban on these types of "saves" but offer no justification for such a ban. *See* State Attorneys General Comments at 11.

cancellation request does not require individual consent.[23] This does not appear to be the intent of the proposed rule and would result in a lengthy and stilted interaction between the business and consumer that serves neither's interest.

III. RETENTION REQUIREMENTS SHOULD BALANCE CONSUMER EXPECTATIONS AND PRIVACY CONCERNS.

The proposed amendments to the negative option rule would require businesses to maintain records of consumer consents in two instances: verifying consumer agreement to a negative option feature and agreeing to hear a save attempt.[24] Under the NPRM, businesses would need to keep these records for a minimum of three years or one year from when the consumer contract is terminated, *whichever is longer*. The proposed retention period could result in decades-long retention requirements based on the longevity of the customer's service. For any business with customers who maintain a negative option plan for longer than three years or customers who regularly request to cancel and consent to hear save offers, retention under the proposed rule will become untenable over time and extremely costly to maintain.

Maintaining these types of records for certain reasonable time periods also serves businesses' interests when addressing consumer inquiries about their account and, if required, to provide proof of enrollment in the face of a lawsuit. However, any required retention period for these "records of consent" should strike a fair balance between the need to demonstrate compliance, privacy considerations, security of the personal information contained in such records, and the businesses' need for flexibility in determining what records to maintain and how best to maintain them, without unreasonable burdens.

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[23] *See* NPRM, 88 Fed. Reg. at 24735-36 (Proposed Rule 425.6(d)).

[24] *See id.* at 24735 (Proposed Rule 425.5(a)(4)); *id.* (Proposed Rule 425.6(d)); *id.* at 24727.

Nothing in the record of this rulemaking evidences a problem that warrants such extensive record retention requirements. The Commission has not suggested that its enforcement efforts have been stymied or otherwise frustrated by record keeping practices. In fact, it appears from the many enforcement actions the Commission has brought against businesses that the Commission had sufficient data and records on which to rely in bringing such actions.

When the Commission conducts an investigation, either informally through an access letter or more formally through a Civil Investigative Demand, it currently has broad authority to request information and documentation from target entities. The time period for these requests is typically in the area of three to five years, and in some cases more limited, which is in line with the Commission's statutory authority to pursue violations. Record retention requirements adopted for the express purpose of facilitating enforcement should not extend beyond the limits of the Commission's authority, specifically the agency's statute of limitations. Forcing businesses to keep records beyond their usefulness for the Commission's enforcement purposes creates an unnecessary burden and risk on businesses without a corresponding benefit. Furthermore, privacy concerns and principles of data minimization support narrowly tailored data retention requirements. Many records of customer contacts contain personally identifiable information and, consistent with Commission guidance, should be maintained only for as long as necessary.[25]

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[25] Former FTC Chairwoman Edith Ramirez stated, "companies should only collect the data they need for a specific business purpose and should safely dispose of it when that objective has been accomplished." Edith Ramirez, Commissioner, FTC, Remarks at Privacy By Design and the New Privacy Framework of the U.S. Federal Trade Commission, Hong Kong, at 2 (June 13, 2012), www.ftc.gov/sites/default/-files/documents/public_statements/privacy-design-and-new-privacy-framework-u.s.federal-trade-commission/120613privacydesign.pdf; *see also* FTC, *Protecting Personal Information: A Guide for Business*, at 6-7 (Oct. 2016), https://www.ftc.gov/system/files/documents/plain-language/pdf-0136_proteting-personal-information.pdf (advising businesses to "scale down" their retention of personally identifiable information by retaining such information "only as long as it's necessary"); FTC

In addition, the proposed rule would impose significant logistical and financial costs on, as well as present legal risk exposure to, businesses. Many businesses maintain records of interactions with consumers, particularly telephonic communications, in "batch," which means that recordings of phone calls placed to and received from consumers are maintained in aggregate daily files. These files are not directly stored in the customer database alongside each customer's account. Call recordings take up voluminous server space and must be kept securely as they may contain sensitive personal information. Mandating that calls reflecting the consumer consents be maintained as proposed in the NPRM would require businesses to keep ***all recordings*** in the batch even if ***just one*** of them was a "consent related call" required to be retained, which could possibly be for an indefinite period of time, where even one of the recordings involves a long-time subscriber. Calls completely unrelated to "consent to purchase" or a "save" attempt would also have to be maintained indefinitely as current systems cannot recognize a "consent to purchase call" recording from a general customer service call recording retained in the same batch file. This retention requirement would present businesses with extraordinary logistical and financial burdens, as the costs associated with maintaining ***all*** of these recordings would be significant. Based on Sirius XM's internal estimates of the number of telephone call recordings and its average customer tenure, keeping these recordings for the proposed periods would result in additional expenses of several million dollars each year. Businesses would have to design, develop, and test customized infrastructure in order to reduce the indefinite retention of all calls.

Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change*, at 47 (Dec. 2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201-privacyreport.pdf.

Retention requirements should be time-based, not user-based. Many businesses retain records of consumer contacts for a certain number of years from the date of the record, and do not measure retention requirements individually for each consumer. This practice is consistent with the way businesses currently maintain records and aligns with typical document retention schedules.

The Commission underestimates the burden and expense to businesses from its proposed indefinite retention requirements in the burden analysis it is required to conduct under the Paperwork Reduction Act.[26] While it is true that businesses often retain these types of records in the ordinary course of business, it is not the case that they retain these types of records "for at least 3 years, or until one year after the consumer cancels the contract or the contract is otherwise terminated, *whichever period is longer*."[27] The actual costs to businesses to revise their records retention systems and practices according to the proposed rule are orders of magnitude more than the "approximately one hour per year," which is the amount of time the Commission estimates for compliance.[28]

The Commission's objective in having businesses retain recordings of consumer consents to a negative option feature and save attempt can be achieved with lesser restrictive means that would not require covered businesses to incur significant time and cost and place them at risk of legal exposure. The Commission should adopt the time frames set forth in the TSR for telephonic consents, which would provide a consistent regulatory framework for call recordings and avoid the discrepancies and inconsistencies between the various laws and rules the

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[26] NPRM, 88 Fed. Reg. at 24733 (citing 5 C.F.R. § 1320.3(c)).
[27] *Id.* (emphasis added).
[28] *Id.*

Commission enforces for negative option offers, which was its stated goal in initiating this rulemaking.[29]

IV. THE COMMISSION SHOULD FOCUS ITS LIMITED ENFORCEMENT RESOURCES ON INSTANCES WHERE CONSUMERS SUFFERED ACTUAL HARM FROM NEGATIVE OPTION PRACTICES.

The scope of this rulemaking is limited to the negative option rule, and any new enforcement initiatives should be limited to violations of the negative option rule. Several of the proposed rule changes purport to apply to advertising and sales offers unrelated to negative options.[30] For example, Proposed Rule 425.4 requires certain disclosures to consumers of "any material term related to the underlying good or service that is necessary to prevent deception, *regardless of whether that term directly relates to the negative option feature*."[31] Thus, a business could have a disclosure that is compliant with the negative option rule and still somehow violate the negative option disclosure rule for unrelated reasons. The Commission has other enforcement tools in its toolbox to address general misrepresentations in advertising.

The Commission should preempt contradictory state law requirements related to negative option plans.[32] A growing number of state laws already address negative option offers and some of these laws already have inconsistent requirements.[33] This results in confusion to consumers and harm to businesses in the form of increased compliance costs. Commenters agree that

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[29] *See* Press Release, FTC, *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.

[30] *See supra* at notes 5 & 13.

[31] NPRM, 88 Fed. Reg. at 24735 (Proposed Rule 425.4(a)) (emphasis added).

[32] *See id.* at 24736 (Proposed Rule 425.8); *id.* at 24730.

[33] *See, e.g.*, Cal. Bus. & Prof. Code § 17600 *et seq.*; Fla. Stat. § 501.165; N.Y. Gen. Law § 5-903(2).

inconsistent state requirements create problems.[34] For nationwide services, conflicting state requirements restrict a business's ability to tailor offerings to consumers in all states, in order to ensure compliance with requirements applying only in some states. Preemption is critical.

V. CONCLUSION

The Commission's efforts to update and modernize its rules applicable to negative option billing arrangements are timely and will provide real consumer benefits. In certain instances, however, the proposed rule changes would result in confusion, unwanted contact, and inefficiencies for consumers without any corresponding benefit. In those cases, the Commission should make limited adjustments to the proposed rules as discussed herein. In addition, the Commission should revise the retention requirements for information related to customer contacts to more reasonably balance the Commission's enforcement needs, related document retention obligations in other rules applicable to negative option arrangements, and the legitimate privacy and security interests of consumers.

Respectfully submitted,

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[34] Comments of Performance-Driven Marketing Institute Project No. P064202, at 3 (Dec. 3, 2019); Entertainment Software Comments at 5.