

**Comments to the Federal Trade Commission
regarding the
Telemarketing Sales Rule Regulatory Review
16 CFR Part 310
RIN 3084-AB19
R411001
87 Fed. Reg. 33662 (June 3, 2022)
Advance Notice of Proposed Rulemaking**

**submitted by
Electronic Privacy and Information Center and
National Consumer Law Center (on behalf of its low-income clients), and
Center for Digital Democracy,
Consumer Action,
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FoolProof,
Mountain State Justice,
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New Jersey Citizen Action,
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INTRODUCTION

The Federal Trade Commission has released an Advance Notice of Proposed Rulemaking (ANPRM) to update the Telemarketing Sales Rule (TSR).¹ We applaud the Commission for its continued diligence in ensuring that its rules reflect the operational realities faced by consumers and other market actors. The undersigned consumer and privacy advocacy organizations² submit these comments (1) to underscore the harms caused by negative option plans and to recommend ways the TSR should address those harms; (2) to support the Commission’s proposal to subject inbound tech support telemarketing to the TSR and urge the Commission to subject any inbound negative option telemarketing to the TSR; (3) to support the Commission’s proposal to repeal the business-to-business (B2B) call exemption to the TSR; (4) to encourage the Commission to take care that its requirements do not lower the bar below the current requirements of the TCPA, and to be explicit that that is not the Commission’s intention; and (5) to suggest two additional changes to the TSR.

Our comments proceed as follows:

- I. The Commission should strengthen the protections for negative option sales.
 - A. Requiring advance notice to the consumer before a free trial converts to a paid sale will reduce consumer harm.
 - B. Imposing a requirement of advance notice at the end of a free trial period will bring consistency and predictability to the marketplace.
 - C. The Commission should specify the timing, manner of delivery, and content of the advance notice and set standards for the method of cancellation.
 - D. The Commission should give further consideration to a requirement that telemarketers obtain consumers’ express consent to purchase at the end of the free trial period.
- II. The Commission should subject inbound tech support telemarketing and any inbound negative option telemarketing to all of the provisions of the TSR.
- III. The Commission should repeal the TSR’s exemption for B2B telemarketing calls.
- IV. The Commission should take care to keep its TSR requirements equal to or stronger than the TCPA’s requirements, and to make it clear that its requirements do not lower the bar below the current requirements of the TCPA.
- V. The Commission should consider additional protections for consumers.

¹ Telemarketing Sales Rule, 87 Fed. Reg. 33,662 (June 3, 2022), <https://www.federalregister.gov/documents/2022/06/03/2022-10922/telemarketing-sales-rule> (hereinafter “FR ANPR”).

² See the Appendix for descriptions of the organizations joining in these comments.

I. THE COMMISSION SHOULD STRENGTHEN THE PROTECTIONS FOR NEGATIVE OPTION SALES.

At present, the TSR requires certain disclosures for negative option sales³ and prohibits misrepresentations.⁴ For one particular type of negative option sale—those in which the seller has pre-acquired the consumer’s account information and the sale will convert to a paid transaction after a free trial period—the rule requires two additional protections: the entire transaction must be audiorecorded, and the seller must obtain the last four digits of the consumer’s account number during the call (even if the seller already has the account number).⁵

In addition, the Commission has a general negative option rule that applies to plans in which the seller periodically sends subscribers an announcement that identifies the goods or merchandise it proposes to sell, where the seller will ship the merchandise and bill the subscriber unless the subscriber cancels by a certain date.⁶ That rule requires the seller to mail the consumer an announcement in advance of the upcoming shipment of goods and give the consumer an opportunity to refuse the shipment.⁷

The Commission is considering whether to amend the TSR to require the seller in a free-to-pay conversion transaction to give the consumer a notice before the free trial period ends. We strongly urge the Commission to impose such a requirement, and to take additional steps to strengthen the protections applicable to negative option sales.

A. REQUIRING ADVANCE NOTICE TO THE CONSUMER BEFORE A FREE TRIAL CONVERTS TO A PAID SALE WILL REDUCE CONSUMER HARM.

Unexpected charges, both when a free trial converts to a paid subscription and when the cancellation process is not as easy as the consumer expected, can have cascading consequences for low-income consumers. While many businesses may adhere to best practices, the Commission’s Rules should be robust enough to protect consumers from bad actors. This is especially important for older consumers, who may be deliberately targeted by these scams.

States and even the private sector have taken action to prevent these harms because they are so pervasive. While much attention is rightly paid to manipulative web design (“dark patterns”), manipulative telemarketing remains a significant source of harm as well.

³ 16 C.F.R. § 310.3(a)(a)(vii).

⁴ 16 C.F.R. § 310.2(a)(iv).

⁵ 16 C.F.R. § 310.4(a)(7)(i).

⁶ 16 C.F.R. § 425.1(c)(1).

⁷ 16 C.F.R. § 425.

The requirement of a notice to the consumer near the end of the free trial period will vastly improve consumers' ability to cancel the transaction and avoid being charged for products and services they do not want. Misleading free trials alone cost consumers more than \$1.3 billion over the 10-year period ending in 2019—an average of roughly \$130 million every year.⁸ Consumers may end up paying for a product or service they didn't want because the seller obscured the free-to-pay conversion feature of the sale or made it difficult to cancel. Or the consumer may simply forget about the end of the free trial period and miss the deadline for cancellation. Purveyors of free-to-pay conversion transactions count on consumers failing to cancel simply because they forget, are confused, or are misinformed.⁹ The Attorney General of Alaska¹⁰ has recently identified telemarketing-originated negative option subscriptions specifically as a source of harm to consumers in the state.

Giving consumers notice near the end of the free trial period is especially important because of the serious and cascading consequences of unexpected charges, particularly when the payment is made via a debit card or another payment mechanism that takes money directly from the consumer's bank account. Many families are vulnerable to the harms caused by unexpected charges. In every year since 2013, the Federal Reserve has reported that 11% or more of adults would be unable to pay an unexpected \$400 expense (at its worst, in 2015-2016, this number

⁸ See Nerissa Coyle McGinn, FTC, States Continue Focus on Negative Option Marketing and Autorenewals, Loeb & Loeb (Jan. 2022), <https://www.loeb.com/en/insights/publications/2022/01/ftc-states-continue-focus-on-negative-option-marketing-and-autorenewals> (“As part of a Better Business Bureau study, the attorneys general of 22 states indicated that over a 10-year period ending in 2019 misleading free trial offers cost consumers more than \$1.3 billion.”).

⁹ See Attila Tomaschek, Use This Clever Trick to Make Sure That Free Trial Really Ends Up Being Free, CNET (July 13, 2022), <https://www.cnet.com/personal-finance/credit-cards/use-this-clever-trick-to-make-sure-that-free-trial-really-ends-up-being-free/> (“The truth is, companies are counting on you to forget about canceling your trial as much or perhaps even more than they're counting on you to willfully convert into a paying customer.”).

¹⁰ See “Negative Option Scam”, Telemarketing, Alaska Department of Law Consumer Protection Unit, https://www.law.alaska.gov/department/civil/consumer/cp_telemarketing.html#neg_option (last accessed July 30, 2022).

climbed to more than 25%).¹¹ The impact is even more staggering for low-income adults, half of whom reported that they could not weather an unexpected \$400 charge in 2021.¹²

The median balance in bank accounts held by a low-income consumer is just \$810,¹³ so an unexpected debit can swiftly push the consumer into overdraft. Four out of ten low-income consumers are worried about being able to make even the upcoming payments they are expecting.¹⁴ While some banks have changed their overdraft policies recently, unexpected charges can still have cascading consequences, including additional fees and negative reports to

¹¹ See, e.g., Board of Governors of the Federal Reserve System, Economic Well-Being of U.S. Households in 2021 (May 2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf> ("eleven percent of all adults said they would be unable to pay the expense by any means, similar to the 12 percent seen in 2020"); Report on the Economic Well-Being of U.S. Households in 2019, Featuring Supplemental Data from April 2020 (May 2020), <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf> (12%); Report on the Economic Well-Being of U.S. Households in 2018 (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> ("Another 12 percent of adults would be unable to pay their current month's bills if they also had an unexpected \$400 expense that they had to pay. Altogether, 3 in 10 adults are either unable to pay their bills or are one modest financial setback away from hardship"); Report on the Economic Well-Being of U.S. Households in 2016 (May 2017), <https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf> (between 20-44%); Report on the Economic Well-Being of U.S. Households in 2015 (May 2016), <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf> (31%); Report on the Economic Well-Being of U.S. Households in 2014 (May 2015), <https://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf> (14%); Report on the Economic Well-Being of U.S. Households in 2013 (June 2014), <https://www.federalreserve.gov/econresdata/2013-report-economic-well-being-us-households-201407.pdf> (19%).

¹² See Board of Governors of the Federal Reserve System, Economic Well-Being of U.S. Households in 2021 (May 2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf> (half of adults with a family income of less than \$25,000 could not pay all of their bills or would not be able to pay if they incurred one \$400 setback).

¹³ See Tyler Parker, First Republic Bank, A Look at the Average American's Savings (Jan. 13, 2022), <https://www.firstrepublic.com/insights-education/a-look-at-the-average-americans-savings>.

¹⁴ See, e.g., Stephen Rogers, Anthony Waelter, The pursuit of happiness...if you can afford it, Deloitte (Feb. 10, 2022), <https://www2.deloitte.com/us/en/insights/industry/retail-distribution/consumer-behavior-trends-state-of-the-consumer-tracker/united-states-income-distribution.html> ("As of December 2021, four in 10 lower-income consumers (individuals earning US\$40,000 or less annually) in the United States were concerned about making coming payments. As some would expect, this metric has remained significantly higher compared to higher-income earners. But it's also been much more volatile. Since the pandemic started, it has hit 50% two different times.").

credit reporting agencies.¹⁵ This means that even if unexpected charges are fully refunded at a later date, significant damage may already have been done.¹⁶

While a single subscription is unlikely to result in a \$400 charge, the fact that perennially more than 10% of Americans are in such a financially precarious position underscores the importance of the Commission safeguarding every consumer's ability to be free from unexpected charges and to be free to cancel a subscription as easily as they initiated it.¹⁷

Improving the protections for negative option sales is particularly important now in light of the growth of the subscription-based billing model, which is uniquely amenable to free-to-pay conversion sales. Over the last 20 years, many industries—for example, movies,¹⁸ music,¹⁹ and

¹⁵ See Sally Greenberg, Capital One eliminates predatory overdraft charges, NCL (Jan. 6, 2022), https://nclnet.org/overdraft_fees/ (noting that a \$5 charge can result in a \$40 cost, for each \$5 charge); Joe Valenti, Overdraft fees can price people out of banking, CFPB (Mar. 30, 2022), <https://www.consumerfinance.gov/about-us/blog/overdraft-fees-can-price-people-out-of-banking/> (“One customer noted last September that they were charged \$400 in overdraft fees in the span of just two months,” “an unpaid overdraft may lead to a financial institution closing the customer’s account and reporting to a specialty credit reporting agency (CRA) that provides bank account screening”).

¹⁶ The CFPB recently reported that an egregiously low 2% of complaints to credit bureaus resulted in relief for consumers. See Press Release, CFPB Releases Report Detailing Consumer Complaint Response Deficiencies of the Big Three Credit Bureaus, CFPB (Jan. 5, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-report-detailing-consumer-complaint-response-deficiencies-of-the-big-three-credit-bureaus/>.

¹⁷ Attention is rightly paid to “subscribe online but call to cancel” models, but the same overarching principle of “it should be as easy to cancel as it was to sign up” should apply when a consumer subscribes via telemarketing. See Coalition Letter to Chairman Simons, Re: You Can Log Out, but You can Never Leave: How Amazon manipulates consumers to keep them subscribed to Amazon Prime, Public Citizen (Jan. 14, 2021), <https://www.citizen.org/wp-content/uploads/Amazon-Dark-Patterns-FTC-letter-.pdf> (“With an increasing number of online platforms reaching high levels of popularity among consumers, and a variety of free trial subscriptions lowering the cost of entry, consumers are signing up for ever-more services and the prospect of keeping track of every service becomes complicated. In short, it is very easy to sign up for services, but cancelling subscriptions can be challenging by design”).

¹⁸ See Doug Gordon, Did Streaming Kill The Video Store?, WPR (Jan. 30, 2021, 12:00 pm), <https://www.wpr.org/did-streaming-kill-video-store> (subscription-based streaming services disrupting rental stores like Blockbuster Video); Kelly Connolly, Tim Surette, The Ultimate Guide to What’s on HBO Max, Netflix, Hulu, and More in July 2022, TV Guide (July 26, 2022), <https://www.tvguide.com/news/whats-on-netflix-amazon-hulu-hbo-max-in-july-2022/> (TV Guide, focusing on entertainment offerings by subscription-based streaming services).

¹⁹ See Paul Miller, Debate rages as Spotify, MG, and Rdio kill/save the music industry, The Verge (Jan. 26, 2012), <https://www.theverge.com/2012/1/26/2740981/debate-spotify-mog-rdio-kill-save-music-industry>.

video games²⁰—have transitioned to subscription-based models. Even professional software has made the transition.²¹ The “subscription economy” is expected to more than double between 2021 and 2025.²² A cottage industry has even cropped up to help consumers manage and cancel their subscriptions.²³

B. IMPOSING A REQUIREMENT OF ADVANCE NOTICE AT THE END OF A FREE TRIAL PERIOD WILL BRING CONSISTENCY AND PREDICTABILITY TO THE MARKETPLACE.

Two major credit card companies, Visa and Mastercard, recently adopted policies for free-to-pay conversion transactions similar to the Commission’s proposal. In April 2020, Visa updated its policies to require sellers to send an email or text to confirm the terms of the agreement, provide proactive notification of future payments at the end of a trial period, and provide instructions for

²⁰ See, e.g., N. Summers, Xbox Game Pass clears 10 million subscribers, Engadget (Apr. 30, 2020), <https://www.engadget.com/xbox-game-pass-10-million-subscribers-114529988.html> ; Dan Ackerman, Best Game Subscription Services, CNET (July 24, 2022), <https://www.cnet.com/tech/gaming/best-game-subscription-services/> ; Nicholas De Leon, Best Video Game Subscription and Streaming Services, Consumer Reports (June 26, 2022), <https://www.consumerreports.org/gaming/best-video-game-subscription-streaming-services-a5008588137/>.

²¹ See Stephen Shankland, Adobe kills Creative Suite, goes subscription-only, CNET (May 6, 2013), <https://www.cnet.com/tech/tech-industry/adobe-kills-creative-suite-goes-subscription-only/>; M. Moon, Microsoft is releasing a non-subscription Office suite in 2021, Engadget (Sept, 24, 2020), <https://www.engadget.com/microsoft-non-subscription-office-suite-2021-072127104.html> (“This subscription-based version of its suite gives you access to Word, Excel, PowerPoint, Outlook and other apps for a monthly payment. While you can use some of those apps for free online with a Microsoft account, you won’t be able to install them on your PC like you’d be able to if you pay for a subscription. . . . it remained unclear for quite some time if [Office 2019] would be the last perpetual release and if Microsoft would transition to a subscription-only model for the Office suite.”).

²² See Heather Long, Andrew Van Dam, Everything’s becoming a subscription, and the pandemic is partly to blame, Washington Post (June 1, 2021), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/> (“The UBS financial services firm predicts that this “subscription economy” will grow to \$1.5 trillion by 2025, more than double the \$650 billion it’s estimated to be worth now.”); FTC To Focus on Subscription Services—Hints at Taking Action Against “Dark Patterns”, Davis+Gilbert (Nov. 10, 2021), <https://www.dglaw.com/ftc-to-focus-on-subscription-services-hints-at-taking-action-against-dark-patterns/> (“Subscription-based programs exist for everything from home fitness to dog food, and they are widely recognized as being the future of retail.”).

²³ See, e.g., David Nield, 6 Apps to Help You Trim Down Subscriptions—and Save Money, Wired (Jan. 18, 2021), <https://www.wired.com/story/6-apps-cancel-subscriptions-save-money/>.

initiating cancellation.²⁴ Mastercard announced a similar policy in January 2019, although its policy applies only to physical products (e.g. skincare and health care).²⁵

These recent changes show a growing sense in the marketplace that protections like those the Commission is proposing are necessary to prevent consumer harm. But leaving these safeguards up to individual companies will create a patchwork of different policies, with the scope, timing, nature, and even existence of the protections varying depending on the payment system provider. By incorporating these increasingly recognized best practices into a universally applicable rule—one that applies to all types of payment systems and to all products and services—the Commission will both protect consumers and bring efficiency and predictability to the marketplace.

C. THE COMMISSION SHOULD SPECIFY THE TIMING, MANNER OF DELIVERY, AND CONTENT OF THE ADVANCE NOTICE AND SET STANDARDS FOR THE METHOD OF CANCELATION.

The Commission asks: *Are additional TSR provisions needed to protect consumers from deceptive negative option programs – for example, should the Rule mandate specific notice requirements and a simple cancellation mechanism?*²⁶

We strongly support incorporating specific notice requirements and a simple cancellation mechanism into the TSR. We recommend as follows:

Timing: The seller should be required to send the consumer notice no more than six days and no less than three days before the end of the free trial period, with two days added if the seller sends the notice by postal mail. Notice too early would not serve the purpose of a timely reminder, and notice too late would not give the consumer time to act.

Method of delivery: The seller should be required to ask the consumer to specify how the notice should be sent, by requesting an email address, a postal address, or a number to which to send a text message. This should not be coupled with a request for consent to receive prerecorded messages or telemarketing calls for any purposes other than notice or cancellation.

²⁴ See Mary Kay Bowman, Taking the guesswork out of free trials and promotions, VISA (Apr. 16, 2020), <https://usa.visa.com/visa-everywhere/blog/bdp/2020/04/15/taking-the-guesswork-1586994815229.html>.

²⁵ See Paul Petta, Free Trials Without The Hassle, Beyond The Transaction (Jan. 16, 2019), <https://newsroom.mastercard.com/2019/01/16/free-trials-without-the-hassle/>.

²⁶ See Fed. Trade Comm’n, 16 CFR Part 310 (RIN 3084-AB19), Notice of Proposed Rulemaking (Apr. 28, 2022), at 44, https://www.ftc.gov/system/files/ftc_gov/pdf/ANPR%20v%2030.pdf (hereinafter “FTC ANPRM”).

Content: The TSR should specify the content of the notice. Given the history of telemarketers obscuring consumers’ rights,²⁷ the Commission should not count on telemarketers presenting consumers’ cancellation rights clearly. Just as it has done with the Holder Rule, the Used Car Rule, and the cosigner notice provision of the Credit Practices Rule, the Commission should create and mandate use of a simple, plain-language form.

How to cancel: The TSR should require the seller to give the consumer the choice of at least two free, simple, cancellation mechanisms. If postal mail is one of the options, the seller should be required to accept the postmark date as the date of cancellation. To avoid further sales pitches, neither cancellation option should require the consumer to talk to the seller. If cancellation by phone is allowed, it should be an automated system that merely requires the consumer to press keys, and the consumer must not be charged for the call. Bad actors operating in the telemarketing industry have devised methods for frustrating consumers’ attempts to reverse credit card charges or otherwise obtain refunds,²⁸ so it is important the Commission ensure that providers comply with requirements for an easy cancellation process.

D. THE COMMISSION SHOULD GIVE FURTHER CONSIDERATION TO A REQUIREMENT THAT TELEMARKETERS OBTAIN CONSUMERS’ EXPRESS CONSENT TO THE PURCHASE AT THE END OF THE FREE TRIAL PERIOD.

The purpose of a free trial period, and its allure, is that it enables the consumer to try out a product or service with which the consumer is not familiar and to determine whether it meets the seller’s glowing description and has value to the consumer. Only after the free trial period is underway does the consumer have the knowledge necessary to make an informed decision.

Requiring the telemarketer to get the consumer’s express consent to be charged for the product at that point—after the free trial period is well underway—would ensure that consumers know what they are buying and can make an informed decision. It would dramatically reduce the

²⁷ See, e.g., Magazine Scams, State of California Department of Justice Rob Bonta Attorney General, <https://oag.ca.gov/consumers/general/magazine-scams> (“Many of these companies refuse to cancel people’s packages....Sales persons will often misrepresent the cost and cancellation terms.”) (last accessed July 30, 2022); Press Release, Colorado Attorney General Cynthia H. Coffman Announces \$11.1 million Judgement against Subscriber Services, Inc. Telemarketing Scam, Stop Fraud Colorado (June 2, 2016), <https://www.stopfraudcolorado.gov/about-consumer-protection/press-releases/2016-06-02-000000/colorado-attorney-general-cynthia-h.html> (“Defendants stacked the rebate program with a mountain of complex and onerous terms and conditions to ensure that consumers would receive little if any money through the rebate program. Once consumers had ordered the magazines, Subscriber Services refused to cancel and aggressively collected on the supposed ‘oral contract.’”).

²⁸ See, e.g., Press Release, FTC Imposes Restrictions on Electronic Payment Systems for Opening Merchant Accounts for Fictitious Companies, Assisting a Business Opportunity Scam, FTC (Mar. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-imposes-restrictions-electronic-payment-systems-opening-merchant-accounts-fictitious-companies>; Complaint, Re: Electronic Payment Systems, LLC, et al, File 1523213, FTC (Aug. 7, 2017) at ¶¶ 59-60, 112, 119-120, <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3213-152-3214-x170045-electronic-payment-solutions-america-inc-et-al>. See also note 27, *supra*.

opportunity for fraud. We urge the Commission to give further consideration to imposing this requirement.

II. THE COMMISSION SHOULD SUBJECT INBOUND TECH SUPPORT TELEMARKETING AND ANY INBOUND NEGATIVE OPTION TELEMARKETING TO ALL OF THE PROVISIONS OF THE TSR.

The Commission indicates that it is considering subjecting inbound telemarketing of tech support to the TSR. At present, the TSR applies to inbound telemarketing for certain types of transactions where fraud is pervasive and for upsells, but otherwise exempts telephone calls initiated by the consumer from most provisions.²⁹ We strongly support this proposal. Fraudulent transactions that begin with a computer pop-up warning about malware have skyrocketed in recent years.³⁰ The FTC’s information indicates that these scams can involve inbound telemarketing.³¹ The serious nature of this fraud is comparable to that in the transactions already singled out for coverage of inbound calls.

In addition, we urge the Commission to apply the TSR to inbound as well as outbound of *any* transaction that has a negative option or free-to-pay conversion feature. There is some evidence that DVDs, books, and newsletters are being sold through inbound telemarketing. For example, a Florida consent order refers to the sale of these products through negative option plans without outbound telemarketing, so it is reasonable to infer that inbound telemarketing was used.³²

²⁹ 16 C.F.R. § 310.6(b)(6).

³⁰ *See, e.g.*, Lucian Constantin, Scareware found hidden in Google Play apps downloaded by millions, PCWorld (Feb. 4, 2015), <https://www.pcworld.com/article/431677/scareware-found-hidden-in-google-play-apps-downloaded-by-millions.html>.

³¹ *See* FTC Data Spotlight, Older Adults Hardest Hit by Tech Support Scams (“FTC Data Spotlight”) (Mar. 7, 2019) <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams> (“These scams usually start with a phone call or a pop-up warning of a computer problem that gives a number to call. People tell us the scammers often claim to be Microsoft or Apple – they may even spoof caller ID to make it look like one of these companies really is calling. In another twist, they get people who actually do need computer help to call them by posting phony customer support numbers for well-known companies online.”).

³² *See* Assurance of Voluntary Compliance, Re: Boardroom, Inc., No. L11-3-1019, State of Florida Office of the Attorney General (June 20, 2013), [http://myfloridalegal.com/webfiles.nsf/WF/MMFD-98VKCB/\\$file/Boardroom+-+Executed+AVC.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MMFD-98VKCB/$file/Boardroom+-+Executed+AVC.pdf) at para 5 (“Respondent has advertised Products using television infomercials, direct mail, print, telemarketing and oral representations made by telephone, and online through proprietary and third party web-sites”); at para 6 (“[Respondent] has no present intention to engage in outbound Telemarketing, directly or through a third party”).

III. THE COMMISSION SHOULD REPEAL THE TSR'S EXEMPTION FOR B2B TELEMARKETING CALLS.

Business-to-business (B2B) calls are currently exempt from the TSR, except that certain provisions apply to calls to businesses to induce the purchase of nondurable office or cleaning supplies.³³ In its recent NPRM, the Commission proposed repealing the B2B exemption for instances of misrepresentation.³⁴ In this ANPRM, the Commission asks whether it should repeal the B2B exemption entirely.³⁵

We support these proposals. Fraudulent, abusive, or unwanted calls to small businesses harm them and their owners in the same way that these calls harm consumers. There is no reason to believe that phone-based attempts to exploit or harass small business victims have diminished since the pandemic began.³⁶

Moreover, the operational realities of work have changed (including the prevalence of “gig economy” work and working from home), and the Commission’s regulations should better

³³ 16 C.F.R. § 310.6(b)(7).

³⁴ Proposed § 310.6(b)(7).

³⁵ See FTC ANPRM at 29, 44.

³⁶ See Legal Library: Cases and Proceedings, filter: Consumer Protection Topic = Small Business, FTC, https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&search=&field_competition_topics=All&field_consumer_protection_topics=1431&field_federal_court=All&field_industry=All&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=&end_date= (last accessed July 29, 2022) (library of FTC proceedings for small business victims, many of which included phone contact with victims but not TSR claims). The BBB’s 2018 report noted telephone as the most prevalent contact method for scams attempted against small businesses (57%), and that many scammers pretended to be someone the small business trusted (53%). See BBB, Scams and Your Small Business (2018), <https://bbbfoundation.images.worldnow.com/library/71061ba0-018d-4c11-bdbe-a12950c1a2dd.pdf> (hereinafter “BBB Scam Report”). Many of the top 10 scams reported by the BBB in April 2022 appeared in Table 4 of the BBB’s 2018 report as well, suggesting the risks of such harms are not dissipating. See BBB, BBB Business Tip: Top 10 scams targeting small businesses (Apr. 12, 2022), <https://www.bbb.org/article/news-releases/19932-bbb-warning-businesses-dont-fall-for-that-scam>. The BBB estimated in 2018 that more than \$7 billion was lost by small businesses, not including intangible costs such as time and consumer trust. See BBB Scam Report at 15. AARP has reported on scams targeting small businesses. See AARP Fraud Resource Center: Small Business Scams, <https://www.aarp.org/money/scams-fraud/info-2020/small-business.html> (last accessed July 29, 2022). State AGs have taken notice of recent phone-initiated scams targeting small businesses as well, see, e.g. Florida Attorney General’s Office, How to Protect Yourself: Small Business Scams, <http://myfloridalegal.com/pages.nsf/main/8be56222bbd1923b85256cc9005ecf4d!OpenDocument> (last accessed July 29, 2022); Michigan.gov Consumer Alerts, Tax Scams Targeting Small and Midsized Businesses, <https://www.michigan.gov/ag/consumer-protection/consumer-alerts/consumer-alerts/scams/tax-scams-targeting-small-and-midsized-businesses> (last accessed July 29, 2022).

reflect those realities.³⁷ Many gig economy workers are treated (often wrongly) as small businesses rather than employees for some purposes. Expanding the TSR to cover B2B calls would have the benefit of mooted the question whether calls to gig economy workers—for example, a call to an Uber driver about the car they use for both business and personal purposes—fall within the current B2B exemption. Even for individuals who are unquestionably small business owners rather than employees, there may be ambiguities about whether the purpose of a call (for example, a call to sell an upgrade to the internet connection for a home-based business) is to induce a purchase by the business or by the individual. Eliminating the need to identify whether calls were made to induce a business vs. a consumer purchase will simplify enforcement litigation and make it easier to hold bad actors to account for unwanted and unlawful calls.

Although we support the Commission’s proposal in its NPRM to apply the TSR’s prohibition of misrepresentations to B2B calls, we also strongly support the Commission’s proposal to eliminate the distinction between B2B and B2C calls altogether for the reasons outlined above.

IV. THE COMMISSION SHOULD TAKE CARE TO KEEP ITS TSR REQUIREMENTS EQUAL TO OR STRONGER THAN THE TCPA’S REQUIREMENTS, AND TO MAKE IT CLEAR THAT ITS REQUIREMENTS DO NOT LOWER THE BAR BELOW THE CURRENT REQUIREMENTS OF THE TCPA.

The Commission has been a leader in bringing enforcement actions where consumers have been harmed by illegal and unwanted telemarketing schemes, returning tens of millions of dollars over the last two years alone to defrauded consumers in matters that included TSR violations, often working in collaboration with one or more state Offices of the Attorney General.³⁸ To facilitate

³⁷ See Kim Parker, Juliana Menasce Horowitz, and Rachel Minkin, COVID-19 Pandemic Continues To Reshape Work in America, Pew Research Center (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> (60% who say their jobs can be done from home do so all or most of the time want to keep it that way, while 23% said they teleworked frequently before the coronavirus outbreak; 78% who work from home all or most of the time want to continue to do so). Even employers seem to be counting on more employees working remotely. See Susan Lund, Anu Madgavkar, James Manyika, Sven Smit, Kweilin Ellingrud, and Olivia Robinson, The future of work after COVID-19, McKinsey Global Institute (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> (“A survey of 278 executives by McKinsey in August 2020 found that on average, they planned to reduce office space by 30 percent.”); Mark Bayles, Will Your Smartphone Get You a Job?, Page One Economics (Jan. 2019), <https://research.stlouisfed.org/publications/page1-econ/2019/01/02/will-your-smartphone-get-you-a-job> (“According to the Pew Research Center, in 2015, nearly one in ten Americans earned money from a job found through a digital platform.”); 58% of gig workers report that the work is important or essential for meeting their basic needs, and 61% of those individuals are doing so to cover gaps or changes in their income. See Monica Anderson, Colleen McClain, Michelle Faverio, and Risa Gelles-Watnick, The State of Gig Work in 2021, Pew Research Center (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

³⁸ See, e.g., Human Resource Development Services, Inc. d/b/a Saint James School of Medicine, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2123034-human-resource-development-services-inc-dba-saint-james-school-medicine-ftc-v> (seeking to return \$1.2MM to

future actions by the Commission and by its partners in enforcement, we urge the Commission to be mindful of how its rulemaking regarding the TSR may relate to the TCPA, and ensure that its policy choices only ever raise the bar.

For example, as we note in our corresponding NPRM comments,³⁹ the TCPA’s signed writing provision reads “express invitation or permission,” while the TSR reads “express informed consent or express agreement.” Defendants may attempt to utilize this inconsistency in language between the TCPA and the TSR to attempt to evade liability. The Commission should be explicit that it is not seeking in its TSR rulemaking to undercut the standard set by the TSR.

While we recognize the statutory limitations of the TSR,⁴⁰ we urge the Commission wherever possible to be explicit that it is not seeking to lower the bar set by current TCPA rules.

V. THE COMMISSION SHOULD CONSIDER ADDITIONAL PROTECTIONS FOR CONSUMERS.

In November 2015, the FTC prohibited telemarketers from using payment methods commonly relied on by scammers, and not used by honest telemarketers, such as “cash-to-cash” money

consumers) (last updated Apr. 15, 2022); Health Research Laboratories, LLC, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3021-health-research-laboratories-llc> (returning \$750k to consumers, filed jointly with State of Maine) (last updated Mar. 16, 2022); Apply Knowledge, LLC, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/132-3121-x140018-apply-knowledge-llc> (returning an additional \$25MM on top of the \$2MM returned to consumers in 2019) (last updated Dec. 8, 2021); Life Management Services, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3216-x160047-life-management-services-inc> (returning more than \$1.8MM to defrauded consumers, filed jointly with Florida AG’s Office) (last updated Dec. 1, 2021); 8 Figure Dream Lifestyle LLC, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3117-8-figure-dream-lifestyle-llc> (returning more than \$1 million to consumers) (last updated Oct. 4, 2021); E.M. Systems & Services, LLC, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3155-x150051-em-systems-services-llc> (providing \$11MM in redress to consumers, filed jointly with Florida AG’s Office) (last updated Apr. 28, 2021); Lead Express, Inc. (Harvest Moon Financial), FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3208-lead-express-inc-harvest-moon-financial> (returning more than \$970k to consumers) (last updated Feb. 11, 2021); and Walmart, FTC Cases and Proceedings, <https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3012-walmart-ftc-v> (seeking compensation for hundreds of millions in consumer losses from Walmart) (last updated June 28, 2022).

³⁹ See Comments of EPIC, et al, re: Telemarketing Sales Rule Regulatory Review, 87 Fed. Reg. 33,677 (June 3, 2022) at Section I.B.iv (Aug. 2, 2022).

⁴⁰ See, e.g., National Consumer Law Center, Federal Deception Law § 6.2.2 (4th ed. 2022), available at <https://library.nclc.org/FDL/subscribe> (noting that FCC TCPA enforcement can cover purely intrastate transactions, where FTC TSR enforcement requires at least one interstate phone call); *id.* at chapter 7.2.3.3 (noting \$50,000 threshold requirement for TSR private right of action).

transfers.⁴¹ This is now clearly noted on the FTC’s FAQ page for the TSR.⁴² Because the Commission has flagged peer-to-peer (P2P) payment services—including but not limited to Zelle,⁴³ Venmo,⁴⁴ CashApp,⁴⁵ and Paypal⁴⁶—as vehicles for scammers because of the difficulty consumers have in reclaiming money sent through P2P services,⁴⁷ we urge the FTC to prohibit telemarketers from using these payment methods as well. For similar reasons, we urge the FTC to prohibit telemarketers from using cryptocurrency, the payment method responsible for the greatest amount of dollars lost by consumers since January 2021.⁴⁸ Although social media is by far the most popular contact method for fraudsters using investment scams, consumer complaints show that phone call and text are also prevalent.⁴⁹

⁴¹ See Press Release, FTC Amends Telemarketing Sales Rule to Ban Payment Methods Used by Scammers, FTC (Nov. 18, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/11/ftc-amends-telemarketing-rule-ban-payment-methods-used-scammers>.

⁴² See “Payment Methods Other than Debit and Credit Cards”, Complying with the Telemarketing Sales Rule, FTC, <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#paymentmethods>.

⁴³ See, e.g., The ‘Zelle Fraud’ Scam: How it Works, How to Fight Back, Krebs on Security (Nov. 19, 2021), <https://krebsonsecurity.com/2021/11/the-zelle-fraud-scam-how-it-works-how-to-fight-back/>; Peter Butler, Zelle Scams: Protect Yourself to Stop Thieves in Their Tracks, CNET (July 23, 2022), <https://www.cnet.com/personal-finance/banking/zelle-scams-protect-yourself-and-stop-thieves-in-their-tracks/>.

⁴⁴ See Common Scams on Venmo, Venmo Help Center, <https://help.venmo.com/hc/en-us/articles/360048404533-Common-Scams-on-Venmo> (last accessed July 30, 2022).

⁴⁵ See Stephanie Osmanski, 10 Terrible Cash App Scams to Know About So You Don’t Get Ripped Off, Parade (Mar. 30, 2022), <https://parade.com/1355946/stephanieosmanski/cash-app-scams/> (last accessed July 30, 2022); Diane Wilson, Raleigh man loses \$24k in Cash App scam; ABC11.com (Dec. 11, 2020), <https://abc11.com/cash-app-scam-raleigh-man-scammers-protect-your-money/8691027/>.

⁴⁶ See Common email scams, Paypal, <https://www.paypal.com/bs/webapps/mpp/security/common-scams> (last accessed July 30, 2022).

⁴⁷ See Mobile Payment Apps: How to Avoid a Scam When You Use One, FTC, <https://consumer.ftc.gov/articles/mobile-payment-apps-how-avoid-scam-when-you-use-one> (last accessed July 30, 2022).

⁴⁸ See Emma Fletcher, Reports show scammers cashing in on crypto craze, FTC (June 3, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/06/reports-show-scammers-cashing-crypto-craze> (additionally noting reported losses in 2021 were nearly sixty times what they were in 2018).

⁴⁹ See Jack Caporal, Study: Crypto and Investment Scams Skyrocket in 2021 and 2022, The Motley Fool (July 14, 2022), “Investment scam reports by contact method” chart, available at: <https://www.fool.com/research/crypto-investment-scams/> (citing to FTC data); Cristina Miranda, Scammers are using COVID-19 messages to scam people, FTC (Apr. 10, 2020), <https://consumer.ftc.gov/consumer-alerts/2020/04/scammers-are-using-covid-19-messages-scam-people>

Finally, we encourage the Commission to make explicit on its TSR FAQ page⁵⁰ the extent to which the TSR applies to text messages. Text messages are an increasingly prevalent contact method by which scammers seek to defraud consumers—the FTC’s statistics on reported fraud suggest a more than 300% increase since 2017.⁵¹ The Federal Communications Commission has also recently flagged it as an issue of concern to consumers.⁵² Providing explicit guidance would help consumers, their advocates, and other marketplace actors abide by and enforce the TSR.

CONCLUSION

Thank you for considering these suggestions for strengthening the Telemarketing Sales Rule. We would be happy to discuss these and any other issues with you.

Respectfully submitted, this the 2nd day of August 2022, by:

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(noting volume of government imposter calls and texts, and noting cryptocurrency as a payment method); Cristina Miranda, Cryptocurrency scams and the LGBTQ+ community, FTC (June 8, 2022), <https://consumer.ftc.gov/consumer-alerts/2022/06/cryptocurrency-scams-and-lgbtq-community> (“recent reporting suggests that crypto scams have an outsized impact on the LGBTQ+ community”); What To Know About Cryptocurrency and Scams, FTC, <https://consumer.ftc.gov/articles/what-know-about-cryptocurrency-and-scams> (last visited July 30, 2022) (noting that crypto scams can occur via text or phone call); Florida Attorney General’s Office, Scams at a Glance: Cryptocurrency Scams, [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CB8KJ2/\\$file/Cryptocurrency+Scams+English+FINAL.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CB8KJ2/$file/Cryptocurrency+Scams+English+FINAL.pdf) (last visited July 30, 2022) (noting that crypto-based scams can reach consumers via text or call); Cryptocurrency Fraud, AARP, <https://www.aarp.org/money/scams-fraud/info-2019/cryptocurrency.html> (last visited July 30, 2022) (noting calls and texts could be used for government or utility imposter scams seeking crypto payments).

⁵⁰ See Complying with the Telemarketing Sales Rule, FTC, <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule> (last accessed July 30, 2022).

⁵¹ See NCLC and EPIC, Scam Robocalls: Telecom Providers Profit (June 2022), at 10-11, available at: <https://www.nclc.org/issues/energy-utilities-a-communications/scam-robocalls-will-continue-until-telecom-providers-no-longer-profit-from-them.html>.

⁵² See Press Release, FCC Warns Consumers of Rising Threat of Scam Robotexts, Federal Communications Commission (July 28, 2022), <https://www.fcc.gov/document/fcc-warns-consumers-rising-threat-scam-robotexts>.

APPENDIX

Electronic Privacy Information Center: Electronic Privacy Information Center (EPIC) was established in 1994 to protect privacy, freedom of expression, and democratic values in the information age. EPIC has played a leading role in developing the authority of the FTC to address emerging privacy and cybersecurity issues and to safeguard the privacy rights of consumers. EPIC routinely files comments in response to proposed FTC rules and consent orders as well as complaints concerning business practices that violate privacy rights. Additionally, in conjunction with the National Consumer Law Center (NCLC), EPIC has filed numerous comments to the Federal Communications Commission (FCC) on matters involving illegal and unwanted robocalls and other phone-based scams.

National Consumer Law Center: Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Center for Digital Democracy: The Center for Digital Democracy's mission is to ensure that digital technologies serve and strengthen democratic values, institutions and processes. CDD strives to safeguard privacy and civil and human rights, as well as to advance equity, fairness, and community.

Consumer Action: Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media, and before lawmakers and regulators, to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, healthcare, privacy, insurance and telecommunications. www.consumer-action.org

Consumer Federation of America: The Consumer Federation of America is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

FoolProof: FoolProof teaches consumers to make healthy skepticism a lifelong habit, showing them the importance of questioning anything that touches their money or their welfare.

Mountain State Justice: Mountain State Justice opened its doors in 1996 to pursue impact and significant litigation on behalf of low-income West Virginians. Since that time, we have provided free legal services to thousands of individuals fighting to protect their families, their homes, their health and safety, and their livelihoods.

National Consumers League: Founded in 1899, the National Consumers League is America's pioneering consumer and worker advocacy organization. It's non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad.

New Jersey Citizen Action: New Jersey Citizen Action is a statewide grassroots nonprofit 501(c)(4) organization founded in 1982 that fights for social, racial, and economic justice. NJCA combines issue advocacy and community organizing with empowerment programs to address systemic and institutional inequities as well as the immediate needs and interests of low- and moderate-income New Jerseyans.

Public Good Law Center: The Public Good Law Center is a public interest firm dedicated to the idea that the law exists to serve everyone, not just those with means and ready access to the courts.

Public Justice Center: Founded in 1985, the Public Justice Center uses legal tools to challenge poverty and racial inequity in Maryland and beyond.

Public Knowledge: Public Knowledge is a non-profit based in Washington D.C. that promotes freedom of expression, an open internet, and access to affordable communications tools and creative works through education and advocacy.

South Carolina Appleseed Legal Justice Center: South Carolina Appleseed Legal Justice Center is a forceful and respected advocate for low-income South Carolinians on issues such as health care, immigration, reentry issues, housing, education, hunger, public benefits, domestic violence, and consumer issues.