



June 20, 2023

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

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency” or “FTC”) April 24, 2023 request for comments regarding proposed amendments to its Negative Option Rule (or “Rule”). Despite a multitude of laws currently in place that apply to negative option offers, consumers continue to be unknowingly tricked into signing up for these subscriptions by companies that employ deceptive marketing tactics, including dark patterns, and then make it difficult for consumers to cancel these recurring orders. As such, it is prudent for the Commission to strengthen its Negation Option Rule so that it can more effectively prevent and deter consumer deception in this area. While TINA.org supports many of the FTC’s proposed amendments to the Rule, it urges the Commission to make additional amendments to better protect consumers, and further reincorporates by reference its December 2, 2019 Comment to the FTC in support of the Rule.<sup>1</sup>

### **INTEREST OF COMMENTER**

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in the economy. At the center of TINA.org’s efforts is its website, [www.tina.org](http://www.tina.org), which provides information about common deceptive advertising techniques, consumer protection laws, and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad;<sup>2</sup> pillows and essential oils falsely marketed as being able to treat chronic diseases;<sup>3</sup> and a delivery meal kit service that falsely advertises free meals.<sup>4</sup> The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and has testified before Congress on issues related to consumer protection, deceptive marketing and economic justice.<sup>5</sup> TINA.org regularly draws on its expertise to advocate for consumer interests before the FTC and other governmental bodies and appears as *amicus curiae* in cases raising important questions of consumer protection law.<sup>6</sup>

Since its inception, TINA.org has filed legal actions against hundreds of companies and entities, published more than 1,400 ad alerts, written over 1,000 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

With respect to negative option marketing specifically, TINA.org has investigated and reported on dozens of companies using deceptive negative option offers,<sup>7</sup> and filed complaints with state and federal regulators regarding five brands.<sup>8</sup> As a result of these investigations and complaints, six regulatory enforcement actions have been filed (including one by the FTC<sup>9</sup>) cumulatively resulting in more than \$6 million in civil penalties and consumer redress.<sup>10</sup>

TINA.org is also tracking more than 150 class-action lawsuits challenging alleged misleading negative option marketing used by a multitude of companies, including Amazon, Walmart, Apple, Google, YouTube, NFL, MLB, and The New York Times.<sup>11</sup>

### **THE FTC'S PROPOSED AMENDMENTS ARE NEEDED**

In 2019, TINA.org provided data to the FTC that quantified the real and significant harm caused by deceptive negative option marketing.<sup>12</sup> Since then, the problems with this illegal marketing tactic have only continued to grow despite numerous laws that attempt to address the problem. Last fall, for example, the Washington Attorney General's office conducted a consumer survey that revealed that 59 percent of Washingtonians (3.5 million residents) may have been unintentionally enrolled in a subscription plan or service when they thought they were making a one-time purchase.<sup>13</sup> This is consistent with a 2022 Bankrate survey finding that more than half of U.S. adults end up with unwanted charges from a subscription or membership,<sup>14</sup> and a 2021 study by Chase Bank finding that nearly three-quarters of Americans waste more than \$50 a month on unwanted subscription fees.<sup>15</sup>

During this same time period, TINA.org filed complaints with the FTC regarding three companies engaged in deceptive negative option marketing: Rihanna's lingerie brand Savage X Fenty, children's clothing brand FabKids, and meal kit company HelloFresh.<sup>16</sup> These complaints were based, in part, on a plethora of consumer complaints filed with various entities, including TINA.org, the FTC and the BBB. Complaints included the following:

### **Regarding HelloFresh:**

I received a gift code and, upon entering the gift code I was prompted to enter my credit card info to pay for shipping. ... Upon further inspection they had taken my card information that I used for shipping and entered it into recurring payment without my knowledge. .... This happened to my grandmother as well. ... she entered her card information to pay for shipping, Hello Fresh ripped that information and put it into a recurring payment without her knowing. Thankfully I was there to straighten the issue out, but had I not been there for her I do not know what she would have done. I can only imagine how many people have gotten stuck with this issue and are still unable to resolve it. This really seems to be up there with telemarketing scams targeting the elderly, and is absolutely unacceptable.<sup>17</sup>

...I recently received and [sic] ad on Instagram offering a discounted price for Hello Fresh. I clicked the ad to see what the deal was and if its [sic] something hat [sic] was be suitable financially. After deciding it wasn't, I clicked out of the ad. That Sunday a box full of food showed up at my door and I was confused so I called Hello Fresh and asked them what happened and why this happened. I was told I activated my account- which I never knowingly did so. All I did was click an ad and I guess it gathered my information from last time and began charging me and shipping food. I never gave them consent to charge my card and I never even received a notification letting me know it was active and that I had an order being shipped or that I was charged...<sup>18</sup>

... I tried to call and cancel, they told me it was canceled, but it was not. I received packages from them filled with sauce onions pork and hot peppers, all things I don't eat. I called the bank to file a dispute and set up a stop payment, but that didn't stop, they just kept changing the amount they were charging, so the stop payment didn't do anything. Now left with no options, I have to close out my card!<sup>19</sup>

### **Regarding FabKids:**

I am absolutely beyond mad to find out that Fabkids has been charging me \$39.99 per month!! I bought my Daughter some shoes for X-Mas. THAT WAS 7 MONTHS AGO!!!! This company is a huge scam!!! I just lost out on almost \$300! This should be a crime and will be reporting this to my bank!<sup>20</sup>

I purchased a few months back not realizing that I would be signed up for vip charging me \*\*\*\*\* monthly. I just realized it today... I've been charged the last 3 months...<sup>21</sup>

I would give 0 stars if it was an option. This company is such a scam. I ordered one thing off their site and was charged \$39 a month going forward. I called in

March 2021 to cancel the membership that I never signed up for, only to find out in July that they have still be [sic] charging me. This cannot be legal.<sup>22</sup>

**Regarding Savage X Fenty:**

I think their business model is extremely predatory. Why would I want \$50 charged to my account on a monthly basis for bras and panties that I have not even decided I want. They make it extremely difficult to cancel your account. Save yourself the trouble and do not purchase from Savage X Fenty. You will probably inadvertently sign up for this subscription where you are charged monthly.<sup>23</sup>

I have been trying to cancel my monthly subscription/membership for MONTHS. No response on live chats, no response through customer service. They keep charging me 50 dollars...<sup>24</sup>

TINA.org also continues to regularly receive consumer complaints regarding deceptive marketing tactics used to lure consumers into subscription plans. The following is just one example regarding a “free” offer for cosmetic product Derm Le Mar:

Their site offers “free” ads intermittently. I also found pop up ads, including on Facebook. The ad I used was embedded in an article I was reading relative to face cream reviews. The problem is that after you receive the “free” sample they charge your credit card for a second sample you did not order. Then they bill you another \$129 without authorization. I did a bit of research and found others who reported the same scam. They have at least three sites and three alias sites, and the name Revolutionary Liquid Lift appeared on my Visa bill. I have filed reports with the MO Attorney General and the FTC. (March 25, 2023)

In short, problems with negative option offers persist and the FTC’s currently available tools are clearly not sufficient to rein them in. Thus, an amended Negative Option Rule is necessary in order for the FTC to efficiently and effectively protect millions of U.S. consumers who are victimized by deceptive negative option marketing each year.

**SUGGESTED ADDITIONS TO THE FTC’S PROPOSED AMENDMENTS**

While TINA.org supports the FTC’s proposed amendments to the Rule to better inform marketers of their legal obligations and further protect consumers, TINA.org nevertheless believes that certain additional revisions are necessary to increase the Rule’s utility and impact.

**I. Reminders Requirements Should be Expanded**

Proposed Section 425.7 (Annual reminders for negative option features not involving physical goods) would require negative option sellers who use a negative option feature that does not involve the automatic delivery of physical goods “to provide consumers

reminders, at least annually, identifying the product or service, the frequency and amount of charges, and the means to cancel.”<sup>25</sup> The FTC’s proposed amendments do not require such reminders for plans that involve the automatic delivery of physical goods because “each delivery serves as a reminder of the contract, allowing consumers to reasonably avoid further payments by contacting the company and cancelling the arrangement.”<sup>26</sup>

This reasoning, however, is flawed in offers in which the automatic delivery of physical goods unknowingly begins *after* a trial period.<sup>27</sup> In such cases, the delivery of physical goods after the trial period has ended does not serve as a reminder of the contract terms, but rather may leave the misimpression that the “trial” period is still in effect. In such cases, the reasonable consumer does not know that they have to take affirmative action to avoid recurring charges because they have not been provided with any notice or reminder that the deal has transitioned from a free offer to a recurring charge – an issue that has been reported to TINA.org on numerous occasions. For example, in February 2023, one consumer noted:

I purchased an HP Printer in Oct. 2022 and signed up for their 6-month trial. It was then offered to me, to enroll in their paper subscription trial for 3 months, so I did. At no point did I receive a notice that the trial was ending, they cannot provide anything about their policy in writing, and the offer did not inform me that if the paper subscription is not cancelled or paid for, it would impact my ability to print. They’re refusing to provide a statement or bill for Dec 2022-Jan 2023.

Such consumer complaints are consistent with survey data showing that 42 percent of consumers forget they are still paying for a subscription they no longer use.<sup>28</sup> “Many of those happen after you get enticed by a free trial for an online streaming service or a monthly subscription service for clothes or personal items, and then you forget to cancel it after that trial is over.”<sup>29</sup>

While TINA.org supports the Commission’s proposal to require periodic reminders for certain negative option offers, TINA.org urges the FTC to also require marketers using free trial offers that transition to negative option offers – whether for the delivery of physical goods or not – to provide clear and conspicuous reminders to consumers of when a trial period is ending, as well as obtain consumers’ reaffirmance of consent to be charged, before charging them.

Further, there are also negative option offer contracts involving the delivery of physical goods in which consumers will not receive such items in the mail unless they take affirmative action. In these instances, consumers are not reminded that they are bound to a negative option offer because they have not taken affirmative action to select which goods they want. Examples of this type of negative option offer include those used by lingerie brands Adore Me and Savage X Fenty in which consumers are charged a monthly fee but receive nothing unless they take affirmative action.<sup>30</sup> As a result, consumers can be blindsided by the recurring charges. As one consumer explained:

I bought from this company once because of a sale, I did enjoy what I got. HOWEVER, WITHOUT MY KNOWLEDGE SAVAGEXFENTY USED MY DEBIT CARD INFORMATION TO SIGN ME UP FOR THEIR MONTHLY SUBSCRIPTION. this is a VIP package that costs \$49.95 a month. I did not want or authorize the making of this account for me. 5 months later (because I do not use my debit card often and don't check transaction history often) I had 5 months and \$250 missing from my account. I never wanted this VIP package and never authorized SavagexFenty to sign me up for it.<sup>31</sup>

TINA.org urges to the FTC to make clear that such negative options offers require annual reminders, at a minimum, pursuant to Proposed Section 425.7 despite the fact that physical goods are being delivered to consumers.

### **I. Consumers Should Have Notice of Material Changes to the Terms of Subscriptions**

The proposed amendments to the Rule do not require sellers to provide notice to consumers when sellers make material changes to a negative option contract. In declining to include such an amendment, the FTC reasoned that:

Because these contracts can last years, and even decades, the original agreement often allows the seller to change material terms of the agreement such as price, services, and product quantity. ... [W]hether such a practice is unfair or deceptive depends heavily on the facts presented in each case... Because consumer interpretation of these claims is so fact dependent, it is not practical to draw a universal line between legal and violative behavior. Thus, the Commission can best address issues in this area on a case-by-case basis through law enforcement actions. Given the importance of this issue, however, the Commission seeks further comment on whether and how the Rule can address this issue consistent with FTC's authority to combat unfair or deceptive practices.<sup>32</sup>

This rationale for permitting companies to change material terms such as price, services and product quantity without ever having to inform consumers is at odds with the FTC's longstanding position regarding material terms. In its Policy Statement on Deception, for example, the FTC states:

A "material" . . . practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.<sup>33</sup>

As a result, the Commission requires that material terms be clearly and conspicuously disclosed to consumers when relevant to the marketing being presented.<sup>34</sup> The same logic should be applied when there is a change to a material term in negative option contracts because undoubtedly "it is information that is important to consumers" and is likely to affect whether or not a consumer will want to continue with a subscription service. Moreover, permitting companies to, in essence, hide material changes to adhesion

contracts is likely to cause consumer injury because consumers do not read these contracts (let alone monitor them for changes) and a significant minority of consumers are not even aware they are bound by these subscription contracts.<sup>35</sup> As such, requiring companies to inform consumers of material changes to subscription contracts would benefit consumers at little to no cost to the companies.<sup>36</sup> Such an approach would also be consistent with FTC precedent.<sup>37</sup>

Further, the FTC's proposal is at odds with numerous state laws. For instance, laws in many states, including California, Colorado, Hawaii, New York, North Dakota, Oregon, Virginia and Oregon, require that, if there is a material change in the terms of an automatic renewal or continuous service offer, the business must provide the consumer with a clear and conspicuous notice of the material change.<sup>38</sup>

TINA.org strongly urges the FTC to require sellers of negative option offers to notify consumers of any material changes to the terms of the negative option contract in order to properly protect consumers from harm.

## CONCLUSION

Deceptive negative option marketing is a pervasive and widespread problem in our economy, which has not been effectively addressed by the Commission's currently available tools. An amended Negative Option Rule would be in the public's best interest, particularly in the wake of the Supreme Court's AMG Capital Management decision, as it would substantially improve the agency's ability to combat and deter deception and unfairness in this area. As such, TINA.org supports the Commission amending the Rule but urges the agency to make further amendments to better protect consumers.

Sincerely,



Bonnie Patten  
Laura Smith  
Truth in Advertising, Inc.

---

<sup>1</sup> TINA.org’s Comment to the FTC Re: The FTC Should Update Its Negative Option Rule (Dec. 2, 2019), [https://truthinadvertising.org/wp-content/uploads/2019/12/12\\_2\\_19-comment-to-FTC-re-NOO-Rule.pdf](https://truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf).

TINA.org also filed a comment with the FTC on July 15, 2021 supporting the Movie Pass, Inc. Consent Agreement, which is also relevant here, particularly as it pertains to the Commission’s proposal to prohibit misrepresentations in connection with a negative option offer of “any material fact related to the transaction, such as the negative option feature, or any material fact related to the underlying good or service” (Proposed Section 425.3), which TINA.org supports. See TINA.org’s Comment to FTC Re: *In the Matter of MoviePass, Inc.* – Consent Agreement (Commission File No. 192 3000) (July 15, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/07/FTC-2021-0032-0003\\_attachment\\_1.pdf](https://truthinadvertising.org/wp-content/uploads/2021/07/FTC-2021-0032-0003_attachment_1.pdf).

<sup>2</sup> TINA.org’s Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>.

<sup>3</sup> TINA.org’s MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>;  
TINA.org’s doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>;  
TINA.org’s Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

<sup>4</sup> TINA.org’s HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.

<sup>5</sup> *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com.*, 117th Cong. (Feb. 4, 2021) (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; *Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the Comm. on Com., Sci., & Transp.*, 117th Cong. (Apr. 27, 2021), (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

<sup>6</sup> For example, TINA.org participated as amicus curiae in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, No. 19-508 (U.S. Dec. 7, 2020), [https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389\\_19-508%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf). TINA.org also filed an amici curiae brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm’n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), [https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen\\_Amici-Curiae-brief.pdf](https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf).

<sup>7</sup> TINA.org’s Ad Alerts: Results Using the “Subscriptions” Filter, <https://truthinadvertising.org/ad-alerts/?f-search=&f-tactic%5B%5D=4700>.

<sup>8</sup> TINA.org’s O2PUR Investigation, <https://truthinadvertising.org/brands/o2pur/>;  
TINA.org’s Adore Me Investigation, <https://truthinadvertising.org/brands/adore-me/>;  
TINA.org’s FabKids Investigation, <https://truthinadvertising.org/brands/fabkids/>;  
TINA.org’s Savage X Fenty Investigation, <https://truthinadvertising.org/brands/savage-x-fenty/>;  
TINA.org’s HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.



---

<sup>9</sup> Complaint for Permanent Injunction and Other Equitable Relief, *Fed. Trade Comm'n v. AdoreMe, Inc.* (S.D.N.Y. 2017) (No. 1:17-cv-09083), <https://truthinadvertising.org/wp-content/uploads/2017/11/FTC-v-AdoreMe-complaint.pdf>; Motion to Enter Stipulated Order for Permanent Injunction and Monetary Judgment, *Fed. Trade Comm'n v. AdoreMe, Inc.* (S.D.N.Y. 2017) (No. 1:17-cv-09083), <https://truthinadvertising.org/wp-content/uploads/2017/11/FTC-v-AdoreMe-settlement-motion.pdf>.

<sup>10</sup> Settlement Agreement, *In the Matter of Scott Barth*, DCP Case No. 82403 and 86039 (Utah Div. of Consumer Prot. Dept. of Com. Jan. 20, 2017), <https://truthinadvertising.org/wp-content/uploads/2017/01/O2Pur-Settltmt-Agrmt-w-Scott-Barth.pdf>; Settlement Agreement, *In the Matter of: Alpha Int'l Mktg. LLC*, No. 86039 (Utah Div. of Consumer Prot. Dept. of Com. Jan. 4, 2017), <https://truthinadvertising.org/wp-content/uploads/2017/01/O2Pur-Settltmt-Agrmt-w-Alpha-Intern.pdf>; Motion to Enter Stipulated Order for Permanent Injunction and Monetary Judgment, *Fed. Trade Comm'n v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. Nov. 20, 2017), <https://truthinadvertising.org/wp-content/uploads/2017/11/FTC-v-AdoreMe-settlement-motion.pdf>; Press Release, Off. N.Y. State Att'y Gen., A.G. Schneiderman Announces Settlement With Adore Me Lingerie Company For Deceptive Advertising (Mar. 20, 2018), <https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-settlement-adore-me-lingerie-company-deceptive>; Stipulation for Entry of Final Judgment, *State of California v. AdoreMe, Inc.*, No. 18cv332846 (Cal. Super. Ct. Aug. 20, 2018), <https://truthinadvertising.org/wp-content/uploads/2019/01/Adore-Me-Final-Judgment.pdf>; Final Judgment and Injunction Pursuant to Stipulation, *State of California v. Lavender Lingerie, LLC d/b/a Savage X Fenty*, No. 22CV402737 (Cal. Super. Ct. Nov. 23, 2022), <https://truthinadvertising.org/wp-content/uploads/2021/12/CA-v-Savage-x-Fenty-order.pdf>; In the Matter of AdoreMe, Inc. Settlement Agreement (June 9, 2023), [https://truthinadvertising.org/wp-content/uploads/2021/12/NC\\_AdoreMe\\_Settlement-Agreement.pdf](https://truthinadvertising.org/wp-content/uploads/2021/12/NC_AdoreMe_Settlement-Agreement.pdf).

<sup>11</sup> TINA.org's Class-Action Tracker: Results Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=&f-tactic%5B%5D=4700>; TINA.org's Class-Action Tracker: Search Results for "Amazon" Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=amazon&f-tactic%5B%5D=4700>; TINA.org's Class-Action Tracker: Walmart+ Subscriptions, <https://truthinadvertising.org/class-action/walmart-subscriptions/>; TINA.org's Class-Action Tracker: Apple's Subscriptions to Digital Content, <https://truthinadvertising.org/class-action/apples-subscriptions-to-digital-content/>; TINA.org's Class-Action Tracker: Search Results for "Google" Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=google&f-tactic%5B%5D=4700>; TINA.org's Class-Action Tracker: Search Results for "YouTube" Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=YouTube&f-tactic%5B%5D=4700>; TINA.org's Class-Action Tracker: Search Results for "NFL" Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=NFL&f-tactic%5B%5D=4700>; TINA.org's Class-Action Tracker: MLB Prime Subscriptions, <https://truthinadvertising.org/class-action/mlb-prime-subscriptions/>; TINA.org's Class-Action Tracker: Search Results for "New York Times" Using the "Subscriptions" Filter, <https://truthinadvertising.org/legal-action/class-action-tracker/?f-search=New%20York%20Times&f-tactic%5B%5D=4700>.

---

<sup>12</sup> TINA.org’s Comment to the FTC Re: The FTC Should Update Its Negative Option Rule (Dec. 2, 2019), at 2, [https://truthinadvertising.org/wp-content/uploads/2019/12/12\\_2\\_19-comment-to-FTC-re-NOO-Rule.pdf](https://truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf).

<sup>13</sup> Press Release, Wash. State Off. Att’y Gen., CONSUMER ALERT: Attorney General’s Consumer Survey Reveals that Millions of Washingtonians May Have Been Unintentionally Enrolled in a Subscription Service (Oct. 10, 2022), <https://www.atg.wa.gov/news/news-releases/consumer-alert-attorney-general-s-consumer-survey-reveals-millions-washingtonians>; Wash. State Off. Att’y Gen., *Consumer Feedback Regarding Recurring Charges & Hidden Fees* (July 30, 2022), <https://agportal-s3bucket.s3.amazonaws.com/Hardwick%20Research%20Report%20Hidden%20Fees%207-30-22.pdf>.

<sup>14</sup> Veronika Bondarenko, *51% of Americans Say They Have Unwanted Subscriptions*, The Street, Feb. 8, 2022, <https://www.thestreet.com/investing/51-americans-say-they-have-unwanted-subscription-charges>; Allie Johnson, *Poll: Majority of Subscribers Experience Unwanted Charges*, BankRate, Feb. 6, 2022, <https://www.bankrate.com/finance/credit-cards/subscription-service-charges-survey/>.

<sup>15</sup> Press Release, Chase, *Survey from Chase Reveals That Two-Thirds of Consumers Have Forgotten About At Least One Recurring Payment in the Last Year* (Apr. 1, 2021), <https://media.chase.com/news/survey-from-chase-reveals>.

<sup>16</sup> Letter from TINA.org to FTC regarding Savage X Fenty’s Deceptive Advertising and Illegal Business Practices (Feb. 10, 2020), [https://truthinadvertising.org/wp-content/uploads/2020/02/2\\_10\\_20-TINA-ltr-to-FTC-re-Savage-X-Fenty\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf); Letter from TINA.org to FTC regarding FabKids’ Deceptive Advertising and Illegal Business Practices (Aug. 30, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/08/8\\_30\\_21-FabKids-complaint-to-FTC\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/08/8_30_21-FabKids-complaint-to-FTC_Redacted.pdf); Letter from TINA.org to FTC regarding HelloFresh’s Deceptive Advertising and Illegal Business Practices (June 22, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/06/6\\_22\\_22-TINA-complaint-to-FTC-re-HelloFresh.pdf](https://truthinadvertising.org/wp-content/uploads/2022/06/6_22_22-TINA-complaint-to-FTC-re-HelloFresh.pdf).

Several District Attorneys in California filed a lawsuit against Savage X Fenty over its deceptive marketing practices and entered into a \$1.2 million settlement with the company. Complaint for Injunction, Civil Penalties, and Other Relief, *State of California v. Lavender Lingerie, LLC d/b/a Savage X Fenty*, No. 22C402737 (Cal. Super. Ct. Aug. 9, 2022), <https://truthinadvertising.org/wp-content/uploads/2021/12/CA-v-Savage-x-Fenty-complaint.pdf>; Final Judgment and Injunction Pursuant to Stipulation, *State of California v. Lavender Lingerie, LLC d/b/a Savage X Fenty*, No. 22CV402737 (Cal. Super. Ct. Nov. 23, 2022), <https://truthinadvertising.org/wp-content/uploads/2021/12/CA-v-Savage-x-Fenty-order.pdf>. See also Press Release, Cnty. of Santa Clara Off. of Dist. Att’y, *Lingerie Company Settles \$1.2 Million Consumer Protection Lawsuit* (Nov. 28, 2022), <https://countyda.sccgov.org/news/news-release/lingerie-company-settles-12-million-consumer-protection-lawsuit>.

<sup>17</sup> Initial Complaint, Complaint on BBB’s HelloFresh Complaints (Jan. 10, 2021), <https://www.bbb.org/us/ny/new-york/profile/food-delivery/hellofresh-0121-142623/complaints>.

<sup>18</sup> Paige H., Review on BBB’s HelloFresh Customer Reviews (Oct. 29, 2021), <https://www.bbb.org/us/ny/new-york/profile/food-delivery/hellofresh-0121-142623/customer-reviews>.

- 
- <sup>19</sup> Judy W., Review on BBB’s HelloFresh Customer Reviews (Apr. 24, 2022), <https://www.bbb.org/us/ny/new-york/profile/food-delivery/hellofresh-0121-142623/customer-reviews>.
- <sup>20</sup> Joshua s, Review on BBB’s Fabkids Customer Reviews (July 14, 2021), <https://www.bbb.org/us/ca/san-francisco/profile/childrens-and-infants-wear-retail/fabkids-1116-440970/customer-reviews>.
- <sup>21</sup> Ashley C, Review on BBB’s Fabkids Customer Reviews (July 13, 2021), <https://www.bbb.org/us/ca/san-francisco/profile/childrens-and-infants-wear-retail/fabkids-1116-440970/customer-reviews>.
- <sup>22</sup> Erin R, Review on BBB’s Fabkids Customer Reviews (July 14, 2021), <https://www.bbb.org/us/ca/san-francisco/profile/childrens-and-infants-wear-retail/fabkids-1116-440970/customer-reviews>.
- <sup>23</sup> Letter from TINA.org to FTC Regarding Savage X Fenty’s Deceptive Advertising and Illegal Business Practices (Feb. 10, 2020), at 9, [https://truthinadvertising.org/wp-content/uploads/2020/02/2\\_10\\_20-TINA-ltr-to-FTC-re-Savage-X-Fenty\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf).
- <sup>24</sup> Letter from TINA.org to FTC Regarding Savage X Fenty’s Deceptive Advertising and Illegal Business Practices (Feb. 10, 2020), at 10, [https://truthinadvertising.org/wp-content/uploads/2020/02/2\\_10\\_20-TINA-ltr-to-FTC-re-Savage-X-Fenty\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf).
- <sup>25</sup> Negative Option Rule, 88 Fed. Reg. 24716, 24736 (Apr. 24, 2023), <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.
- <sup>26</sup> Negative Option Rule, 88 Fed. Reg. 24716, 24729 (Apr. 24, 2023), <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.
- <sup>27</sup> Of note, certain companies automatically enroll consumers into a continuing subscription *during* a trial period, as opposed to after the trial period ends. *See, e.g.*, TINA.org Relief Factor Ad Alert, May 7, 2020, <https://truthinadvertising.org/articles/relief-factor/>.
- <sup>28</sup> *Subscription Service Statistics and Costs*, C+R Research, May 18, 2022, <https://www.crresearch.com/blog/subscription-service-statistics-and-costs/>; Diane Wilson, *Survey: 42% of People Still Pay For Subscriptions They Don’t Use. Are You?*, ABC11 WTVD, Sept. 13, 2022, <https://abc11.com/subscription-not-using-still-paying-didnt-cancel-after-free-trial/12224628/>.
- <sup>29</sup> Diane Wilson, *Survey: 42% of People Still Pay For Subscriptions They Don’t Use. Are You?*, ABC11 WTVD, Sept. 13, 2022, <https://abc11.com/subscription-not-using-still-paying-didnt-cancel-after-free-trial/12224628/>.
- <sup>30</sup> *See* TINA.org’s Adore Me Investigation, <https://truthinadvertising.org/brands/adore-me/> and TINA.org’s Savage X Fenty Investigation, <https://truthinadvertising.org/brands/savage-x-fenty/>.
- <sup>31</sup> Letter from TINA.org to FTC Regarding Savage X Fenty’s Deceptive Advertising and Illegal Business Practices (Feb. 10, 2020), at 8, [https://truthinadvertising.org/wp-content/uploads/2020/02/2\\_10\\_20-TINA-ltr-to-FTC-re-Savage-X-Fenty\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf).

---

<sup>32</sup> Negative Option Rule, 88 Fed. Reg. 24716, 24729-30 (Apr. 24, 2023), <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.

<sup>33</sup> FTC Policy Statement on Deception (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>34</sup> FTC’s Advertising FAQ’s: A Guide for Small Business, <https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business>; FTC’s Dot Com Disclosures: Information About Online Advertising (May 2000), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>; FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

<sup>35</sup> The terms of negative option offers are typically presented to consumers in the form of lengthy contracts of adhesion in which consumers have no bargaining power and are unlikely to read the entirety of the contracts, never mind understand all the terms within them. As such, consumers would have no realistic way of knowing if one material term is changed unless the company is required to provide clear and conspicuous notice of the change.

<sup>36</sup> TINA.org is not suggesting that all changes to contractual terms be disclosed. Rather, TINA.org is urging the FTC to require that negative option marketers always clearly and conspicuously disclose *material* changes to *material* terms.

<sup>37</sup> See, e.g., Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief, *U.S. v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), [https://www.ftc.gov/system/files/documents/cases/182\\_3109\\_facebook\\_order\\_filed\\_7-24-19.pdf](https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf) (requiring Facebook to “clearly and conspicuously disclose” any sharing of users’ private information “which materially exceeds the restrictions imposed by a User’s Privacy Setting(s)” to consumers prior to such sharing, and obtain the user’s affirmative express consent.); Order Modifying Prior Decision and Order, *In the Matter of Facebook, Inc.*, No. C-4365 (F.T.C. Apr. 28, 2020), <https://www.ftc.gov/system/files/documents/cases/c4365facebookmodifyingorder.pdf> (same). See also Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises (Nov. 29, 2011), <https://www.ftc.gov/news-events/news/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep-privacy-promises>.

<sup>38</sup> Cal. Bus. & Prof. Code § 17602(e) (“In the case of a material change in the terms of the automatic renewal or continuous service that has been accepted by a consumer in this state, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”); Colo. Rev. Stat. §6-1-732(3) (“If a material change occurs in the terms of an automatic renewal contract that has been accepted by a consumer in this state, the person shall provide to the consumer, in a manner that may be retained by the consumer, a clear and conspicuous notice of the material change and information regarding cancellation of the automatic renewal contract, including information concerning the mechanism described in subsection (2)(d) of this section.”); Haw. Rev. Stat. §481-9.5(h) (“In the case of a material change in the terms of the automatic renewal or continuous service offer pursuant to a consumer contract that has been accepted by a consumer in Hawaii, the person shall clearly and conspicuously provide the consumer with a notice of the material change and provide information regarding how

---

to cancel in a manner that is capable of being retained by the consumer prior to the implementation of the material change.”); N.Y. Gen. Bus. Law §527-a(4) (“In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in this state, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”); N.D.C.C. § 51-37-02(3) (“If there is a material change in the terms of an agreement that contains a provision for automatic renewal, the seller shall provide the buyer with clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner which is capable of being retained by the buyer.”); Or. Rev. Stat. § 646A.295(3) (“In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer, the person shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”); Va. Code Ann. § 59.1-207.46(C) (“In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in the Commonwealth, the supplier shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.”)