

Good afternoon, Chairman Matzie, Chairman Marshall, Representative Borowski and members of the House Committee on Consumer Protection, Technology and Utilities. I am Nick Smyth, Assistant Chief Deputy Attorney General in the Bureau of Consumer Protection within the Pennsylvania Office of Attorney General. Thank you for the opportunity this afternoon to comment on the proposed legislation known as HB 2557 on what we call “negative options.”

This proposed legislation will go a long way to protect Pennsylvania consumers who often find themselves tricked into a subscription or renewal plan where they are called upon to pay for goods or services that they never agreed to. Let me first talk a little bit about what we mean by “negative options” and how marketing and sales programs that use this device pose an issue for those of us in consumer protection.

Traditional contract law principles require that before a party is obligated, there must be both an offer and an acceptance of material terms – in other words, both parties must have given their “mutual assent” or “have a meeting of the minds” on the terms. This means that typically silence cannot be viewed as acceptance. When you think about it, this is true in ordinary life where we think

that we are not bound to agreement until there is a “handshake” or some sort of outward expression that both sides agree to the terms.

The marketing and sales of goods or services through “negative options” turn those principles upside-down. Silence is deemed acceptance. Therefore, these kinds of sales tactics are ripe for deception.

Furthermore, the subscription model is booming and is utilized to market and sell a wide variety of products and services. From streaming and software services, apparel, vitamins and wellness products, to meal delivery services, the subscription billing model is now unavoidable. In fact, according to some estimates, the size of the “subscription economy” more than quadrupled over the last decade (Zuora 2022).

This office has long been a leader in seeking to crack down on deception in the area of negative options. At the national level we have co-led a number of comment letters submitted to the Federal Trade Commission to strengthen its current “Negative Option Rule.” 16 C.F.R. 425.1 For example, in June of last year, this office helped to lead a bipartisan letter concerning proposed amendments to

that federal Rule. We wrote in support of FTC's comprehensive efforts to stem the tide against what they termed "prevalent, unabated consumer harm in the marketplace" caused by the unfair and or deceptive use of negative option marketing. We had a number of comments within that letter including an emphasis that:

- Terms of the plan must be adequately and conspicuously disclosed so the consumer may make an informed decision about the subscription;
- Consumers must be provided certain key information such as pricing, minimum purchase requirements and frequency of shipments before purchasing a negative option feature.
- Consumers should not be charged for negative option features without their express consent.
- Consumers should be able to easily cancel a negative option.
- Consumers should receive regular reminders about negative option features they are paying for.

Additionally, this office that same month in 2023 co-lead a multistate effort to settle with AdoreMe, Inc., an online intimate apparel retailer. This settlement with 30-plus states resolved claims that the company deceptively marketed its VIP

membership program to consumers and made it difficult for consumers to cancel the membership after purchasing. The company offered consumers discounted pricing if they enrolled in that VIP program. Once enrolled, consumers were charged \$39.95 per month unless they made a purchase or “skipped” the charge before the 5<sup>th</sup> day of each month. Those monthly charges accrued in the consumers’ account in the form of store credits, which could be used on future purchases. The settlement alleged that the company engaged in misconduct by among other things, failing to properly disclose the terms of the membership program and the amount of the monthly charge to consumers.

Under the terms of the settlement, the company was required to notify all consumers with active VIP memberships of their ability to obtain a refund of any unused store credits. Additionally, \$2.35 million was paid to the states involved to be used for future consumer protection investigations.

In addition to these efforts at the national level, this office has taken actions on its own against other companies allegedly engaged in this conduct. For example, in June of 2020, this office entered into a settlement with Baltimore-based Money Map Press, LLC, that allegedly sold deceptive investment

publications. According to the settlement, the company engaged in a broad range of misconduct including misrepresenting offers as “free” when they were not. The company agreed to pay \$75,000 in consumer restitution.

Also, in October 2021, this office settled with two Pittsburgh-based companies that advertised “free jewelry” minus shipping and handling fees. The companies allegedly failed to clearly and conspicuously disclose that accepting the “free jewelry” would result in automatically being enrolled in a membership club, which was billed monthly until canceled by the consumer. Those companies - known as Wicca Movement and Cultural Quotes - paid \$10,000 and \$15,000 in consumer restitution, respectively.

Emerging from this data and these enforcement/advocacy efforts is a set of principles that would enhance existing consumer protection law to make clear that certain negative option features or automatic renewals are illegal in Pennsylvania. The proposed bill embodies these principles in a way that will help protect Pennsylvania consumers on a going-forward basis. Under this proposed bill, businesses engaging in these kinds of practices must provide notice to the consumer in a clear, conspicuous bold-faced manner regarding:

- The specific procedure by which the consumer may cancel.
- An acknowledgment that includes the offer terms and information regarding how to cancel that is able to be retained by the consumer.
- And a guarantee that the seller will notify the consumer in a timely way before the automatic renewal occurs.

Moreover, any sort of renewal period cannot exceed 12 months.

If the offer includes a free, discounted or otherwise different introductory trial, then the seller must disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays the full amount for the goods or services; also in the event of free or discounted introductory trials, at the initiation of the trial period, the seller must disclose a description of all charges that will be imposed after the trial ends, including whether billing will include charges for shipping and handling and the amount of the shipping and handling charges. Most importantly, consumers must be able to cancel the trial in the same manner in which they agreed to the trial.

Lastly, the proposed bill requires that a seller cannot make any charge to the buyers credit/debit card, bank account, third-party account or any other

financial account unless the seller has complied with all the requirements above and obtained the buyer's "affirmative consent." This is very important because there can be no charge out of the consumer's pocket until the consumer expressly agrees to pay. The "affirmative consent" required by this bill is defined to mean a clear, affirmative act signifying a consumer's freely given, specific and informed and unambiguous agreement as well as a written statement including a statement written by electronic means or unambiguous affirmative action.

This statutory framework will go a long way in preventing deception in the marketplace and assure the consumers are fully apprised of all material terms and agree to those terms before they are on the hook for any sort of good or services offered by way of a negative option or automatic renewal.

Also, let me take this opportunity to voice our support in favor of HB 116, introduced by Representative Ciresi , that in our view wisely requires companies who offer automatic renewal contracts to provide a notification before each such automatic renewal. Most importantly, this bill will require that those businesses allow subscribers to cancel their subscription services exclusively online if they initially subscribed over the internet. We have heard from consumers saying they

were not aware that their agreement was automatically renewed or otherwise complained about difficulty in terminating the renewal offer or continuous service. As the band Eagles relatedly sang in Hotel California, consumers find that “they can check out any time they like, but they can never leave.” This legislation widely provides, as its name implies, a mechanism where consumers can “click to cancel.”

Thank you for the opportunity to address the committee this morning and I will be happy to take any questions.