

Economic Analysis of the Federal Trade Commission's Proposed Negative Option Rule

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January 30, 2024

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I. Background

We were asked by the Interactive Advertising Bureau to assess the economic impacts of a Federal Trade Commission (“FTC”) rule proposal, the Negative Option Rule (“Proposed Rule”).³ Specifically, our assignment was to assess whether the Proposed Rule, if finalized, will “have an annual effect on the national economy of \$100 million or more,” which is one of the “designated disputed issues of material fact” to be addressed at the upcoming FTC informal hearing scheduled for January 31, 2024.⁴

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In conducting our examination, we analyzed whether the benefits and costs of the Proposed Rule, if finalized by FTC, would reach or exceed \$100 million and outlined the implications of our findings for the analytical procedures that FTC must follow in developing the Proposed Rule. In performing this analysis, we were supported by staff of Peregrine Economics, who worked under our direction.

Our fundamental conclusion is that the effects of the Proposed Rule, if finalized, on the U.S. economy would easily surpass \$100 million annually. And this is true regardless of whether one considers the costs or benefits of the proposal. By contrast, FTC has determined that the

³ Negative Option Rule, 88 FR 24716 (Apr. 24, 2023) (“Negative Option Rule” or “Proposed Rule”).

⁴ Order of Administrative Law Judge Foelak (Jan. 25, 2024).

Proposed Rule would not have annual effects exceeding \$100 million.⁵ For that reason, FTC has determined that it need not conduct a full regulatory analysis of the proposed Rule.

However, to believe FTC's assessment, one would have to conclude that the rule would offer almost no benefits to individual households, even though FTC recognizes that negative option programs are "widespread in the marketplace" and "can provide substantial benefits for sellers and consumers."⁶ As explained further below, for the Proposed Rule to fall below the \$100 million threshold, it could only have an average benefit of \$0.75 to \$1.50 per year for U.S. households. If that were the case, FTC would not be justified in proceeding with the Rule because it could not provide "an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen," as the FTC Act requires.⁷

In much the same way, in order to believe that the Proposed Rule would not have at least a \$100 million annual impact on the national economy, one would also need to assert that the Proposed Rule would impose only very small costs, both one-time and recurring, on the large number of businesses that use negative options. In fact, the methodology and approach that FTC has used in past rulemakings can be employed to show that the Proposed Rule will impose costs that far exceed \$100 million, both with respect to one-time and recurring compliance costs. And that calculation ignores a wide range of additional costs that would be imposed on consumers and businesses.

As a result, FTC has failed to perform its obligation to identify and assess the benefits and costs of the Proposed Rule and reasonable alternatives under the requirements at 15 U.S.C. § 57b-3(b), which mandate that FTC perform a "preliminary regulatory analysis" if the rule's impact reaches the \$100 million threshold.⁸ That omission is significant because it undermines important transparency values served by the FTC Act and the notice-and-comment rulemaking process more generally, which serves to help the public more accurately assess whether a rule's benefits justify its costs. Without a sufficient assessment of the Proposed Rule's benefits and costs, it is difficult for stakeholders to participate in the rulemaking process in an informed way. For this reason, FTC's rule proposal leaves interested parties unsure of how exactly the rulemaking may affect them, undermining their ability to contribute to the rulemaking process in this case.

II. A Back-of-the-Envelope Assessment of the Proposed Rule's Likely Effects

As described in the Proposed Rule and the FTC Act at 15 U.S.C. § 57b-3, FTC is required to prepare "a preliminary regulatory analysis" if the agency determines that its rule updating a previous rule meets at least one of three criteria, namely that the amendment will:

- 1) have at least a \$100 million annual effect on the economy;

⁵ Negative Option Rule, at p. 24731.

⁶ Negative Option Rule, at p. 24716.

⁷ 15 U.S.C. § 57b-3(a - b).

⁸ 15 U.S.C. § 57b-3(b).

- 2) result in a “substantial change” in prices or costs of certain goods or services; or
- 3) significantly affect “persons subject to regulation under such amendment and upon consumers.”⁹

Since FTC has “preliminarily determined” that none of the three criteria apply to its Proposed Rule, it has not prepared a preliminary regulatory analysis.¹⁰ Doing so would include describing the need and purpose of the Proposed Rule as well as analyzing the potential benefits and costs of both the Proposed Rule as well as the alternative approaches identified by FTC that “may accomplish the stated objective of the rule in a manner consistent with applicable law.”¹¹

A. Criteria for Determining the Proposed Rule’s Anticipated Impacts

The criteria outlined in the FTC Act for determining when a proposed amendment requires a benefit-cost analysis mirror the standards outlined in Executive Orders 12866 and 14094, which govern rulemaking within the Executive Branch. Those standards govern when a rule is economically or 3(f)(1) significant, thus requiring additional analysis of its costs and benefits.¹² As a result, guidance developed for those processes can be helpful in evaluating FTC’s analysis here.

Under these authorities, an agency’s assessment of whether a proposed rule requires a rigorous economic analysis must consider both its costs and benefits. For example, as described by the Office of Information and Regulatory Affairs (“OIRA”) in its 2011 guidance concerning preparation of regulatory impact analyses, designating a regulation as economically significant for purposes of the executive order requires considering “*benefits, costs, or transfers*.”¹³ OIRA’s memorandum to agencies implementing President Biden’s Executive Order 14094 underscores this point, noting that “[t]he word ‘or’ in the previous phrase, ‘benefits, costs, *or* transfers’ is important” in deciding that a rule is 3(f)(1) significant.¹⁴ Thus, a rule is considered economically or 3(f)(1) significant if any of the three categories of effects—benefits, costs, or transfers—reaches the threshold.

Similarly, these documents further explain that eclipsing the threshold for significance in the executive orders requires any one of the categories of benefits, costs, or transfers to exceed

⁹ 15 U.S.C. § 57b-3(a).

¹⁰ Negative Option Rule, at p. 24731.

¹¹ 15 U.S.C. § 57b-3(b).

¹² Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993); and Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 11, 2023).

¹³ OIRA, Regulatory Impact Analysis: Frequently Asked Questions, 1 (2011).

¹⁴ A 3(f)(1) significant regulatory action is defined in Executive Order 12866 as one that may “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Note that the threshold for the annual effect is now \$200 million, as outlined in the Executive Order 14094, published in 2023. Richard Revesz, Implementation of Modernizing Regulatory Review Executive Order, 2, (April 6, 2023).

the threshold in any one year. As noted in OIRA’s 2011 guidance, “[t]he \$100 million threshold applies to the impact of the proposed or final regulation in *any one year*.”¹⁵ The 2023 OIRA memo further clarifies, “[i]f a regulatory...action’s likely effects—benefits, costs, or transfers—may be at least \$200 million [which is the new threshold as reflected in the 2023 Executive Order 14094] in at least one year, then the action is significant under Section 3(f)(1) of E.O. 12866, as amended by the Modernizing E.O.”¹⁶

Even where a full regulatory impact analysis may not ultimately be required, these authorities clearly contemplate that the agency will conduct some economic analysis to determine whether the impact of a proposed review falls above or below the \$100 million threshold. For these threshold assessments, back-of-the-envelope analysis can be used to help guide the decision around whether to proceed into a full impact analysis. Back-of-the-envelope analysis has been advocated by observers of the regulatory process as an approach to encourage participation in the regulatory process.¹⁷ Moreover, it is valuable for assessing whether a more complete analysis is needed.

Applied to FTC’s Proposed Rule, this approach would mean that FTC must analyze whether the benefits or costs associated with the Proposed Rule meet or surpass the \$100 million threshold. If either the costs or benefits meet or exceed that threshold in a single year, both a more detailed preliminary regulatory analysis as well as a final regulatory analysis are required by the FTC Act. As described below, it is our opinion that the Proposed Rule’s economic effects would far surpass \$100 million. Indeed, the Proposed Rule’s one-time compliance costs alone could easily exceed \$1 billion. Moreover, these impacts can be clearly demonstrated using relatively straightforward methodologies that FTC itself has used in recent regulatory impact assessments.

B. Application of the Impact Threshold to FTC’s Proposed Rule’s Benefits

According to FTC’s Proposed Rule, the use of negative option marketing programs are “widespread in the marketplace” and data show these programs “continue to grow dramatically” in recent years.¹⁸ In the view of several commenters, this “sheer volume of negative option marketing” is accompanied by “ongoing, widespread deceptive practices,” which FTC describes in the Proposed Rule.¹⁹ In response, FTC has proposed a wide-ranging set of disclosure, consent, and cancellation requirements that it believes will mitigate harms to consumers across a multitude of industries and businesses. Given the scope of negative option marketing practices and the breadth of FTC’s proposed regulations, a large portion of U.S. households would be

¹⁵ OIRA, Regulatory Impact Analysis: Frequently Asked Questions, 1 (2011).

¹⁶ Richard Revesz, Implementation of Modernizing Regulatory Review Executive Order, 2, (April 6, 2023).

¹⁷ See, e.g., Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” Regulation and Governance, 11(2), 203-212 (2016).

¹⁸ Negative Option Rule, at pp. 24716 and 24720.

¹⁹ Negative Option Rule, at p. 24720.

affected by the proposal through negative option marketing associated with some combination of continuity plans, automatic renewals, or free trial marketing.²⁰

Given that the U.S. Bureau of Labor Statistics has estimated that there are over 134 million households in the U.S.,²¹ one would have to believe that the average annual benefit of the Proposed Rule amounts to less than \$0.75 per household for it not to reach the threshold for FTC to perform a preliminary regulatory analysis. Even if only half of U.S. households were affected, which is likely a substantial understatement, the annual benefits would have to be less than \$1.50 on average to avoid reaching this threshold.

To further elaborate on this point, on November 9, 2023, just one month prior to the December 8, 2023 hearing notice issued on this matter, FTC issued a notice of proposed rulemaking on its Trade Regulation Rule on Unfair or Deceptive Fees (“Deceptive Fees Rule”) that, like the Proposed Rule,²² asserted that consumers would save time if companies’ misleading pricing practices were curtailed.²³ In its economic analysis for this proposed rule, FTC quantified the value of an hour of time saved for individuals making purchases online in which fees were disclosed upfront instead of at the end of the transaction at \$24.40 per hour.²⁴ This figure represented the average value of a non-work hour to an individual living in the U.S.

Applying this number to the Proposed Rule, FTC would have to believe that this rule would save households, on average, less than two minutes per year in time as a result of any efficiencies enjoyed by households from the variety of provisions of the Proposed Rule, including prohibiting misrepresentations, cancellation methods that are at least as easy as what is needed to start the negative option feature, and requirements that the negative option feature be

²⁰ Negative Option Rule, at p. 24720.

²¹ Bureau of Labor Statistics, U.S. Department of Labor, 2022 Consumer Expenditure Survey, at <https://www.bls.gov/news.release/cesan.nr0.htm>. The Bureau uses the term “Consumer units,” which is described as consisting “of families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share major expenses.” This is consistent with our definition of households.

²² In the press release accompanying the Proposed Rule, FTC explained that the Rule’s “the new click to cancel provision, along with other proposals, would go a long way to rescuing consumers from seemingly never-ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to newspapers to gym memberships.” The release further quotes the FTC Chair, Lina Khan, as suggesting, “[t]he proposal would save consumers time and money, and businesses that continued to use subscription tricks and traps would be subject to stiff penalties.” FTC, Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to “Click to Cancel” Recurring Subscriptions and Memberships, (Mar. 23, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>.

²³ Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420 (Nov. 9, 2023). As background, FTC proposed the rule to “prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose.”

²⁴ Deceptive Fees Rule, at p. 77452: “Given that the mean wage is \$29.76 and consumers reportedly value time at 82% of their mean wage, an hour of saved search time is worth \$24.40/hour.” See OEWS National, *supra* n. 272 (providing the mean hourly wage); Daniel S. Hamermesh, “What’s to Know About Time Use?,” *Journal of Economic Surveys*, 30(1), 198-203 (2015) (providing the value of consumer time).

immediately cancelled if requested by that household. Stated differently, \$100 million is equivalent to less than 4.1 million saved hours using the FTC non-work hour estimate, which divided by the number of U.S. households, amounts to roughly 0.03 hours, equivalent to under two minutes per household per year.²⁵

Considering how many minutes there are in a year, this translates to 0.0004 percent of a household's annual time.²⁶ Thus, FTC's conclusion around the impact of the Proposed Rule represents a substantial contrast to how it viewed its Deceptive Fees Rule, in which the agency determined that its proposal would save consumers between 28.1 million and 50.6 million hours of wasted time spent searching for the total price in transactions.²⁷

As a result, in order for FTC to arrive at the conclusion that the Proposed Rule will have annual impacts of less than \$100 million, it would have to believe that the rule will have close to zero positive effect on the lives of those in the average U.S. household. From a public policy perspective, this calls into question why FTC would propose such a rule in which there appears to be so little benefit to the average consumer. Still, in its associated press release, FTC notes, "[t]he new click to cancel provision, along with other proposals, would go a long way to rescuing consumers from seemingly never-ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to newspapers to gym memberships." The release further quotes the FTC Chair, Lina Khan, as suggesting, "The proposal would save consumers time and money, and businesses that continued to use subscription tricks and traps would be subject to stiff penalties."²⁸

In the end, it is simply implausible to assert that the Proposed Rule will bring significant benefits to consumers while simultaneously suggesting that the economic effects of the Proposed Rule would not eclipse the threshold that would prompt FTC to perform a preliminary regulatory analysis in this case. In order for FTC's preliminary assessment that "the proposed amendments to the Rule will not have such effects on the national economy; on the costs of goods and services offered for sale by mail, telephone, or over the internet; or on covered parties or consumers" to be accurate, the agency must be willing to assert that the proposal would offer consumers only negligible benefits.²⁹ FTC cannot have it both ways: either the Proposed Rule will affect a meaningful number of consumer transactions (in which case additional economic

²⁵ \$100 million divided by the value of a non-work hour (\$24.40) means it would take 4,098,361 hours to reach \$100 million in benefits; there are 134,090,000 million consumer units or households in the U.S. as of 2022; 4,098,361 hours divided by 134,090,000 million households means each household would save less than .031 hours or 1.83 minutes to remain under the \$100 million threshold.

²⁶ 0.0004 percent = 2 minutes divided by 525,600 minutes in a year.

²⁷ Deceptive Fees Rule, at pp. 77456 and 77464.

²⁸ FTC, Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Memberships, (Mar. 23, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>.

²⁹ Negative Option Rule, at p. 24731.

analysis is necessary under the agency’s own precedent), or the Proposed Rule’s effects are so small as to generate close to no benefits at all.

C. Measuring Compliance Costs through Prior FTC Rulemakings

Regardless of one’s views of the Proposed Rule’s benefits, applying a back-of-the-envelope approach to costs reveals that they would substantially exceed the \$100 million annual threshold. As described in the Proposed Rule’s preamble, “FTC staff estimates there are 106,000 entities currently offering negative option features to consumers.”³⁰ This estimate is a result of FTC’s assumption that 20 percent of firms in industries with sellers that offer free trials, automatic renewal, prenotification plans, and continuity plans do so through negative option marketing.³¹ Dividing \$100 million by FTC’s figure for the number of firms affected would suggest that compliance and other costs to these firms would not even reach \$950 per firm annually if one accepts FTC’s assessment that effects of the rule do not reach the threshold for analysis.

Still, considering one-time compliance costs alone suggests the actual figure would greatly exceed \$950 per firm. In fact, the analysis performed by FTC in its Deceptive Fees Rule demonstrates that the one-time firm compliance costs of the Proposed Rule would easily surpass \$100 million. In the Deceptive Fees Rule, FTC assumed that all live-event ticketing firms and short-term lodging firms that omit certain fees from advertised prices would, at minimum, need five hours of lawyer time on average to determine what is necessary to comply with the proposed rule, 40 hours of web developer time to comply with the rule presentation requirements, and 40 hours of a data scientist or data analyst time to understand the business impacts of the rule.³² Using these averages as proxies for lawyer, web developer, and business analyst time—and also using the same hourly rates for those jobs as FTC employed in the Deceptive Fees Rule—the Negative Option Rule’s one-time compliance costs would amount to \$455 million for the 106,000 entities impacted, well over the \$100 million threshold.³³

Yet FTC’s Deceptive Fees Rule is noticeably simpler to comply with than the Proposed Rule in that it only provides for prices and fees to be presented upfront and without misrepresentations. The Proposed Rule, by contrast, requires compliance with six groups of provisions laid out by FTC related to misrepresentations, important information, consent, simple cancellation mechanisms (“Click to Cancel”), no additional offers before cancellation absent

³⁰ Negative Option Rule, at p. 24733.

³¹ Negative Option Rule, at p. 24733.

³² Deceptive Fees Rule, at pp. 77450, 77458, and 77467.

³³ Many firms using negative option marketing present their offers through the web. For those firms that present offers through other means, web developer time is used as a proxy for worker time to create the presentation of the offers. The Deceptive Fees Rule uses data analyst time as a proxy for those workers who would determine prices and interpret the impact of any changes in demand. In this case, this time is used as a proxy for business analyst time that would be employed to determine the strategy and marketing decisions associated with the negative options provisions under the Proposed Rule. In the estimates of compliance costs, hourly rates FTC assigned to lawyers, data analysts, and web developers in the Deceptive Fee Rule are used, which were \$78.74, \$55.40 and \$42.11, respectively. See, Deceptive Fees Rule, at p. 77450.

consent (“Saves”), and reminders.³⁴ Under the conservative assumption that each of these groups of provisions would take the same amount of worker time to comply with as the Deceptive Fees Rule (i.e., five hours of lawyer time, 40 hours of web developer time, and 40 hours of business analyst time), the Proposed Rule would result in one-time costs of \$2.7 billion.

Moreover, as previously described, these time estimates utilize the low end of FTC’s range for what it would take to comply with the Deceptive Fees Rule. At the high end, FTC doubles the amount of time each category of worker would spend on compliance.³⁵ Doubling the costs for the Proposed Rule results in one-time costs ranging from \$910 million to \$5.5 billion, depending on whether the Proposed Rule’s overall compliance burden is equivalent to that of the Deceptive Fees Rule (on the low end) or six times as burdensome as the Deceptive Fees Rule (on the high end) due to the separate requirements of its six groups of requirements. As noted by various commenters on the Proposed Rule, the work streams to handle its requirements are, in some cases, entirely new and separate and costly to build as a result.³⁶ Indeed, the high end of the range may understate the Proposed Rule’s costs because each of the Proposed Rule’s six major requirements may require more compliance work than the Deceptive Fees Rule, as the work stream needed to comply with the Deceptive Fees Rule involves relatively straightforward adjustments and re-optimizations of existing processes as opposed to new work streams.³⁷

The Negative Option Rule’s expected costs would exceed \$100 million annually even in an extreme case in which (1) the majority of firms are already in compliance with the Rule’s requirements;³⁸ (2) those firms would only need one hour of lawyer time to confirm compliance; and (3) it is only the remaining (non-compliant) firms that would experience additional lawyer, web developer, and business analyst time. In this scenario, four out of five firms (i.e., 80 percent of the market) would already need to be in compliance with every aspect of the Proposed Rule to keep one-time costs below \$100 million. That is assuming worker time is at the low end of the range (i.e., five hours of lawyer time, 40 hours of web developer time, and 40 hours of business analyst time) and compliance for all six groups of provisions, collectively, is as easy to implement as the Deceptive Fees Rule.³⁹ Put another way, if one assumes that the Proposed Rule is as burdensome as the Deceptive Fees Rule and that fewer than 80 percent of affected firms are

³⁴ Negative Option Rule, at pp. 24726-30.

³⁵ Deceptive Fees Rule, at pp. 77458 and 77467.

³⁶ See Internet & Television Association (NCTA), Comment Letter on the Proposed FTC Negative Option Rule (Jun. 23, 2023); Asurion, LLC, Comment Letter on the Proposed FTC Negative Option Rule (Jun. 23, 2023); and Interactive Advertising Bureau (IAB), Comment Letter on the Proposed FTC Negative Option Rule and the attached Expert Report of Professor Yoram Jerry Wind (Jan. 23, 2024).

³⁷ Deceptive Fees Rule, at p. 77448-9.

³⁸ This does not appear to be a likely outcome provided that requiring customers to consent multiple times does not appear to be a common business practice. Interactive Advertising Bureau (IAB), Comment Letter on the Proposed FTC Negative Option Rule (June 23, 2023).

³⁹ In this scenario, for the 20 percent (21,200) of firms not in compliance their costs would be $21,200 \times (5 \times \$78.74 + 40 \times \$55.40 + 40 \times \$42.11)$ for a total of \$91.0 million. For the remaining 80 percent (84,800) of firms in compliance their costs would be $84,800 \times \$78.74$ for a total of \$6.7 million. The combined total of \$97.7 million falls just below \$100 million. If 21 percent of firms are not in compliance the total would be over \$100 million.

currently in compliance, then it follows that the Proposed Rule's annual costs will exceed \$100 million.

The Proposed Rule's annual burden would substantially increase, if *each* of the six groups of provisions in the Proposed Rule is as complex to comply with as the Deceptive Fees Rule and worker time is at the high end of FTC's range. In that case, over 99 out of every 100 firms would already have to be in complete compliance with the Proposed Rule to keep one-time costs below \$100 million.⁴⁰ FTC has not produced an estimate of the number of firms that are already in compliance with the Proposed Rule, but it would seem unlikely that the agency would go through the time-consuming process of proposing the Rule if 99 percent of firms were already complying with the Proposed Rule's mandates.

The costs represented in this analysis which uses FTC's Deceptive Fees Rule methodology to estimate compliance costs are consistent with the areas of concern and costs raised by comment letters in the Proposed Rule proceeding (e.g., web development, employee training, lawyer fees, etc.). A number of commenters have expressed their concerns that these costs could be quite large for firms.⁴¹ As noted in the expert report of Jerry Wind, preliminary results from a survey questionnaire he designed indicate that FTC may very well be underestimating the cost of the Proposed Rule. His survey shows that the total annual cost of compliance for just six firms would be \$50 million, and that says nothing of the costs to the over 100,000 other firms that would also be impacted.⁴²

However, compliance costs for the Proposed Rule are not just confined to one-time costs. To fulfill the requirements of the Proposed Rule, firms need to continually monitor compliance as they offer and market new products. For the Deceptive Fees Rule, FTC allocated as much as 10 hours of lawyer time to all firms who check for compliance annually.⁴³ With that rule, the compliance time would be spent to confirm fees are presented up front in the transaction process and without misrepresentation. With the Proposed Rule, a similar process would be required by negative option marketers to ensure that their offers are continually presented free of misrepresentations.

At a similar rate of 10 hours per entity for annual compliance checks, the recurring costs alone associated with the Proposed Rule would amount to \$83.5 million annually.⁴⁴ And this cost estimate does not include any worker time (i.e., web developer and business analysts) to ensure compliance or implement required corrections. The cost estimate also does not include any

⁴⁰ In this scenario, for the one percent (1,060) of firms not in compliance their costs would be $1,060 \times (60 \times \$78.74 + 480 \times \$55.40 + 480 \times \$42.11)$ for a total of \$54.6 million. For the remaining 99 percent (104,940) of firms in compliance their costs would be $104,940 \times \$78.74 \times 6$ for a total of \$49.6 million. The combined total of \$104.2 million is over \$100 million.

⁴¹ See Interactive Advertising Bureau (IAB), Comment Letter on the Proposed FTC Negative Option Rule, and the Attached Expert Report of Professor Yoram Jerry Wind (Jan. 23, 2024).

⁴² See Interactive Advertising Bureau (IAB), Comment Letter on the Proposed FTC Negative Option Rule, and the Attached Expert Report of Professor Yoram Jerry Wind, p.28 (Jan. 23, 2024).

⁴³ Deceptive Fees Rule, at pp. 77458 and 77467.

⁴⁴ \$83.5 million = 106,000 firms x 10 lawyer hours x \$78.74 per hour.

action taken to complete compliance checks on the additional aspects of the Proposed Rule that are not captured in the relative simplicity of the Deceptive Fees Rule—such as a review of compliance with provisions related to Click to Cancel, Saves, the delivery of reminders, receiving and documenting consents, and important information disclosures. Given the breadth of some firms’ marketing offers and the separate nature of where these compliance assessments would need to take place, each of these categories of compliance tasks could very well be equally as time consuming as work done to check compliance with the Deceptive Fees Rule. In that case, the estimate of 10 hours of lawyer time would apply to each of the Proposed Rule’s six categories of provisions, resulting in 60 hours of compliance inspections or over \$500 million in recurring costs per year.

To ensure aggregate recurring legal compliance costs remain under \$100 million annually, entities would not be able to spend more than 12 hours of lawyer time on average to check and implement their compliance obligations before they crossed the threshold.⁴⁵ Of course, there would likely be large differences in the time firms need to spend to review their negative option offerings. Some firms may not change processes much at all from year to year, suggesting that the aforementioned average estimates might be reasonably accurate. However, many firms with a wide array of product offerings and marketing offers that change somewhat regularly could experience costs that reach several multiples of these basic averages.

Finally, it is important to note that the estimates described in this analysis only focus on one category of costs, those associated with compliance specifically. In reality, the Proposed Rule, if implemented, would present many categories of costs—such as the potential for lost consumer welfare—that would *also* need to be considered in assessing whether the rule imposes \$100 million annually in costs and when preparing a preliminary regulatory analysis. Given that compliance costs alone are sufficient to demonstrate that FTC is required by its statute to perform a regulatory analysis, it seems hard to imagine how one might argue that the Proposed Rule’s costs would not surpass the \$100 million annual threshold once the myriad other costs it imposes are also considered.

III. Preparing a Preliminary Regulatory Analysis for the Proposed Rule

Because the effects of the Proposed Rule easily exceed \$100 million annually, as described, FTC is required to prepare a preliminary regulatory analysis, which among other elements, includes “for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.”⁴⁶

As an independent agency, FTC’s rules are not subject to OIRA review, which only applies to agencies of the executive departments. That said, OIRA’s Circular A-4, which outlines how those agencies should prepare regulatory impact analyses to accompany their 3(f)(1)

⁴⁵ \$100.2 million = 106,000 firms x 12 lawyer hours x \$78.74 per hour.

⁴⁶ 15 U.S.C. § 57b-3(b).

significant proposed rules, as well as the academic literature offer guidance on the elements to be included in such an analysis.⁴⁷ In addition to identifying a compelling need for the rule, which is typically a market failure, regulatory analysis requires that the analyst consider not just the direct benefits and costs of the rule but also the indirect effects, including the ancillary benefits and countervailing risks.

For example, in performing a regulatory analysis for this rule, FTC would need to quantify the firm compliance costs discussed above as well as the indirect costs or unintended consequences likely to result from the rule. As described in comment letters received on the Proposed Rule, an analysis of these costs of the proposal would consider, among other elements, missed opportunities for the customer to consider additional offers prior to cancelling, the unintended loss of services for the consumer, and the additional time the customer might spend on multiple consent agreements as well as on reviewing reminders.⁴⁸ Of course, along with these costs and more, FTC would need to quantify the full range of likely benefits as well.

Further, in addition to performing analysis on FTC's preferred alternative, the FTC Act mandates that the agency consider the benefits and costs of "any reasonable alternatives."⁴⁹ In deciding on potential alternatives, Circular A-4 and the academic literature generally suggest considering the "alternative of not regulating" as well as approaches that specifically address the economic market failure identified as prompting the rule, which in this case is asymmetric information.⁵⁰ Reasonable alternatives can vary on a variety of dimensions, including the stringency and type of instrument. For example, as described by Circular A-4, relative to design standards, "[i]f intervention is contemplated to address a market failure that arises from asymmetric or imperfect information,...[the analyst] should consider assessing whether informational remedies...may be appropriate."⁵¹

As described in comment letters received for the Proposed Rule, potential reasonable alternatives in this case could include limiting the requirements for multiple consents, allowing for a certain number of Saves without prior consent to be presented in a set of mediums that would limit any consumer burdens, and exemptions of certain business categories that could impact consumer safety.⁵² As part of its regulatory analysis, FTC would need to quantify both

⁴⁷ OMB, Circular A-4: Regulatory Analysis (Sept. 17, 2003, and Nov. 9, 2023); see, e.g., Susan Dudley et al., "Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker." *Journal of Benefit-Cost Analysis*, 8(2), 187-204 (2017).

⁴⁸ Computer & Communications Industry Association, Comment Letter on Proposed FTC Negative Option Rule (June 23, 2023); SFE Energy, Comment Letter on the Proposed FTC Negative Option Rule (2023-06-16); Association of National Advertisers (ANA), Comment Letter on the Proposed FTC Negative Option Rule (June 23, 2023). Cellular Telephone Industries Association (CTIA), Comment Letter on the Proposed FTC Negative Option Rule (June 23, 2023).

⁴⁹ 15 U.S.C. § 57b-3(b).

⁵⁰ Susan Dudley et al., "Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker." *Journal of Benefit-Cost Analysis*, 8(2), 187-204 (2017).

⁵¹ OMB, Circular A-4: Regulatory Analysis (Nov. 9, 2023), at pp. 25 and 26.

⁵² USTelecom – The Broadband Association, Comment Letter on the Proposed FTC Negative Option Rule (June 23, 2023). National Association of Mutual Insurance Companies, Comment Letter on the Proposed FTC

the benefits and costs of reasonable alternatives like these to enable interested parties to evaluate and comment on the various regulatory approaches FTC could consider in this matter.

IV. Conclusion

In sum, employing elements from FTC’s own approach in preparing its regulatory analysis to accompany another similar rule as well as a basic back-of-the-envelope methodology demonstrates that the effects of its Proposed Rule on the national economy, if finalized, would easily surpass \$100 million annually. Thus, contrary to its assessment as described in the preamble of the Proposed Rule, FTC is required to prepare a regulatory analysis, including a comprehensive quantitative assessment of the likely benefits and costs of its preferred approach as well as reasonable alternatives.

Importantly, the purpose of preparing the required analysis is not simply to fulfill a requirement as outlined in the FTC Act. Rather, FTC’s preparation of the required regulatory analysis for the Proposed Rule is needed not just to demonstrate how the benefits of its Proposed Rule measure up against its costs, but equally important, to offer the public, including those adversely affected by the Proposed Rule, a transparent account of the complete set of its likely effects to enable these interested parties to effectively participate in FTC’s rulemaking process.

Negative Option Rule (June 19, 2023). Interactive Advertising Bureau (IAB), Comment Letter on the Proposed FTC Negative Option Rule (June 23, 2023).