June 23, 2023

April J. Tabor
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

VIA ELECTRONIC SUBMISSION

Subject: Health & Fitness Industry Comments on Proposed Amendments to the Commission's Negative Option Rule; Project No. P064202

Secretary Tabor,

On behalf of IHRSA, The Global Health & Fitness Association and the industry at large, I write to submit comments on the Negative Option Rule Amendments (Rule) issued by the Federal Trade Commission (FTC) March 23, 2023.

We acknowledge the important consumer protection issues that inform FTC's review of negative option marketing practices. We believe that the rulemaking process presents an opportunity for the FTC to work cooperatively with our industry to establish guidelines that promote fairness and trust in a way that does not unnecessarily burden or hamper the growth of the fitness industry—particularly the entrepreneurs and small businesses that are at its core.

In this letter, we address several aspects of the current rule that we believe stand in the way of this goal, specifically:

Memberships vs. subscriptions. There are clear distinctions between in-person, brick-and-mortar health and fitness businesses and online subscription services. The industry emphasizes the importance of recognizing the fundamental differences between these two types of operations and tailoring the rule accordingly to avoid undue burdens on legitimate health and fitness businesses.

Continuous service agreement v. negative option feature. A month-to-month contract represents a very different risk to consumers than a long-term contract that begins after a free trial or auto-renews without notice. The industry asks that continuous service contracts not be held to the same notice and disclosure requirements to reflect the different arrangements.

Cancellation method. The industry agrees that cancellation should not be unnecessarily burdensome on consumers and allow for an online notice of cancellation where joining online is possible. However, the rule should not apply a one-size-fits-all cancellation method and should allow businesses to include reasonable requirements for an orderly end to a membership.

Save provisions. When a member expresses a desire to cancel their membership, the industry needs to be able to provide standard customer service and offer alternative solutions, such as membership pauses or freezes, different service tiers, and digital options. These options allow members to adjust their agreements without the need for burdensome consent requirements. The industry requests a revision of the "save" provision to allow health facilities to inform members of options that may meet their needs better than a total cancellation.

Money-back guarantees. The industry emphasizes the distinction between a money-back guarantee and free trials, which are the focus of the proposed rule. The health and fitness industry primarily operates under membership agreements that often, by state statute, must allow consumers the opportunity to cancel their membership within the first few days after the opportunity to try the club's services. The industry does not typically rely on negative option features commonly associated with digital subscriptions and app-based services. The final rule should be tailored to address the specific practices and characteristics of the health and fitness industry.

We also recognize the appropriate balance between reasonable consumer protection and the ability of parties to bargain[1] and create the terms[2] of their agreement[3] as they desire without unreasonable regulatory burden or interference. American jurisprudence for more than a century has preserved this appropriate balance.

I. Background

IHRSA is the leading trade association dedicated to enhancing mental and physical health in the United States by increasing access to physical activity. From health and fitness clubs, gyms, studios, sports and aquatic facilities, and industry partners—IHRSA works to promote and protect the industry and ensure a diversity of options to keep Americans moving. In the U.S. alone, health and fitness businesses are a major driver of the economy, representing over $35 billion in contributions to gross domestic product (GDP) annually. Most importantly, we help our patrons live healthier lives, which strengthens immune systems, increases productivity and enhances overall happiness.

[1] Legal Information Institute. (n.d.). *Bargain*. Legal Information Institute. https://www.law.cornell.edu/wex/bargain

[2] Legal Information Institute. (n.d.-b). *Bargain*. Legal Information Institute. https://www.law.cornell.edu/wex/bargain

[3] Legal Information Institute. (n.d.-b). *Agreement*. Legal Information Institute. https://www.law.cornell.edu/wex/agreement

Individuals utilize club, studio, and fitness facility programs in the U.S. more than all other countries except Sweden. In fact, according to the *IHRSA 2022 Health Club Consumer Report*[4], 66.5 million U.S. consumers over age six belong to a health club or studio—one in five consumers—where they logged a collective 4.5 billion visits. This is because consumers know that our industry's services directly improve their physical and mental health and provide important in-person activities, programs, services, and benefits that are both individually and group focused, each of which contains an important social component. In short, the health and fitness industry provides an indisputable social good in the form of preventive health.

Health and fitness facilities are as diverse as the communities they serve, from small studios and individual practitioners to traditional large gyms and clubs serving consumers at every price point. Consumers participate in fitness activities reflective of the overall population diversity and customer diversity aligns with the country as a whole. In recent years, we have seen marked growth among Hispanic consumers. Overall, Americans aged 55-64—those who are actively aging—visit health and fitness facilities more frequently than all other segments–some 88 times per year.

Notably, the health and fitness industry faced challenges in 2020 due to pandemic shutdowns and changing consumer behavior, leading to the closure of many facilities. However, in 2021, the industry demonstrated resilience with a 3.6% growth in total members compared to 2019.

This growth highlighted the importance of in-person experiences, as consumers chose not to permanently shift to at-home fitness. Although health club visits dropped significantly in 2020, with a 50% decline from 2019, there was a notable recovery in 2021, with a 41.6% increase in visits compared to the previous year. While not fully back to pre-pandemic levels, this rebound has demonstrated the value consumers place on the brick-and-mortar business model and the in-person services provided by health and fitness facilities.

These examples demonstrate that customers who actively engage with health and fitness facilities understand and appreciate the in-person nature of the services offered. They willingly enter into service agreements, paying recurring fees to maintain continuous access to tangible and accessible services and goods.

II. Observations

It is crucial to strike the right balance between consumer protection and consumer access to important health and fitness services. Several aspects of the proposed rule do not accurately reflect longstanding and widespread pro-consumer business practices

[4] Google. (n.d.). *2022 IHRSA Health Club consumer Final.pdf*. Google Drive. https://drive.google.com/file/d/1ClMqRQAlSYrS-fELPoFOGXV22weMFZ_c/view?usp=sharing

and unfairly apply rare and contemptible examples from a few bad actors to an entire industry.

IHRSA agrees it is important to provide members with simple means to terminate their contracts within the terms of their express agreements. In fact, many operations allow several options for agreement termination through simple online solutions including online account management, email cancellation requests, and specific online cancellation buttons or forms. Many of these options are currently available for members who have purchased their membership either online or in person. On the other hand, to extent short-term (e.g., month-to-month) continuous service agreements fall within the scope of the proposed rule (which they should not, given the reduced risk of consumer confusion), the rule imposes new disclosure and consent requirements that are already reflected in the terms of membership agreements to which consumers affirmatively consent.

Unfortunately, the proposed rule fails to acknowledge the fundamental differences between the health and fitness industry, which largely provides services in person in physical facilities upon continuous service contracts signed in person or online, and purely online subscription services targeted by the rule. We hope the Commission will address these concerns when issuing its final rule.

III. Clarifications

A) Continuous service agreements

The proposed rule applies to negative option sellers, which are persons selling, offering, promoting, charging for, or otherwise marketing goods or services with a "Negative Option Feature." A "Negative Option Feature" is defined as a type of agreement under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer, including, but not limited to:

(1) an automatic renewal;
(2) a continuity plan;
(3) a free-to-pay conversion or fee-to-pay conversion; or
(4) a pre-notification negative option plan.

The rule itself (in contrast to general descriptions in Section II of the Supplemental Information) does not define these four concepts, but it appears to be concerned with paid contracts that initiate automatically after a free trial period or auto-renew without notice after a long, pre-paid initial term. The risk to consumers in these arrangements, which are often purely digital with no human interaction, is that the consumer lacks notice and an opportunity to cancel before being locked into a new contract term.

This is distinct from a month-to-month continuous service contract of the kind often used by the health and fitness industry. A typical health and fitness membership agreement is a conditional revocable license for access to real property and equipment. It is an agreement in writing signed or similarly authenticated in advance by a consumer who pays a recurring fee in exchange for access to the gym's facilities, equipment, and services. The membership agreement explicitly sets forth the material terms and conditions of the relationship, including the duration of the membership, the cost or payment structure, any additional fees or charges, facility rules and regulations, cancellation policies, and other relevant terms. Under such an arrangement, the consumer is on notice of the recurring cost because of the monthly charge and has the option to cancel each month under the terms of their contract. The risk that a consumer will forget what they have agreed to or be locked into a long-term agreement is not present, particularly where live human interaction occurs regularly between the consumer and the fitness service provider. Accordingly, the Commission should make clear that a monthly continuous service agreement is not “an auto renewal” as that undefined term appears in the Rule.

IHRSA is concerned that the lack of clarity and distinction between “an automatic renewal”—which the commission appears to contemplate is a “negative option feature” if it is a “provision of a contract”—and the traditional continuous service agreements used in the health and fitness industry will wrongly and unnecessarily apply the requirements of the rule, including consent, disclosure, and annual reminders for negative option features, to health and fitness clubs operating under traditional service agreements.

We urge the Commission to clarify the distinction and exclude traditional short-term recurring service contracts from the consent, disclosure, and notice requirements associated with negative option features.

B) Memberships vs. Subscriptions

We ask the Commission to reinforce the intrinsic differences between negative option digital subscription services and in-person membership services and access. It is important to recognize that they have different connotations depending on the context and product they represent.

While “subscription” typically refers to an arrangement where individuals pay for recurring access to specific products, services, or content, “membership” involves an arrangement where customers agree to pay a recurring fee that permits access to facilities, equipment, and in-person, tangible and accessible services and physical goods.

Unlike purely digital subscription services, members of brick-and-mortar fitness facilities can access immediate, in-person interaction to address customer service needs, and

members benefit from this both in physical use of equipment and services and interpersonal communication and relationships.

C) Simple Cancellation Mechanism (“Click to Cancel”)

IHRSA and the industry generally agree with the intent of the proposed rule—that termination of membership agreements should be accommodated, under the terms of the contract, while preserving the contractual relationship between the parties. The industry is committed to providing the highest quality of consumer experience by working with the Commission to ensure members have a simple and efficient way to terminate agreements in a reasonable and convenient way that accounts for the current realities of business and administrative operations.

Under the rule, a “simple mechanism” is required for cancellation at least as simple as initiation (a) through the same medium (such as Internet, telephone, mail, or in-person) the consumer used to consent to the Negative Option Feature, and specific requirements based on the specific orientation of cancellation. While application may sound fair on its face, the rule does not account for the administrative requirements and security implications that a “simple mechanism” poses when applied to the health and fitness industry for both the consumer and the club.

Health club members already have an immediate remedy to stop any recurring payments under the gym memberships—even if those amounts are validly owed by the member. Typically, gym members sign written authorizations with the gym authorizing the recurring charges under their agreements. Under the Electronic Funds Transfer Act and other relevant rules (NACHA), these authorizations are revocable at any time by the member. Indeed, the member can stop all future payments on their cards or bank accounts with immediate effect by communicating this revocation to the club or billing provider. If a club does not comply, or if the member prefers not to speak to the club for any reason, they also may affect this same result by contacting their bank or card issuer.

As previously mentioned, the typical health & fitness industry membership agreement explicitly outlines the terms and conditions, including the duration of the membership, the cost or payment structure, and billing terms. Membership charges are typically processed on a monthly basis from the time of agreement, and in many cases by a third-party service provider. The charge, in most cases made to a credit card, is considered payment for the use of the facility and service for that particular payment/billing cycle (typically one month) such that it allows access until the billing term expires. Current facilities offering options for agreement termination through online solutions at a time prior to the end of the billing term continue service through the end of the billing term, such that consumers who give notice to terminate still have access to the club through the effective date of their termination at the end of that short term (typically a month). We ask that the final rule clarify that termination of an agreement

need not be “immediate” upon notice (i.e., the same moment as the consumer provides notice), which may be a practical impossibility for various processing, identity verification or other reasons, but rather that termination may be effective at the end of the remaining billing cycle as. explicitly laid out in the membership service agreement.

Additionally, the rule fails to account for information security protection in the cancellation process in the form of identity verification, which in our modern technological climate is at least as important as the consumer protections of disclosure and consent. While the idea of “click to cancel” provides a simple mechanism for an individual to make changes to their agreement, it also poses a risk of unauthorized changes being made to an individual's agreement without their consent. In many other cases between merchants and customers, a relationship involving changes to services involving a stored payment device or system requires two step authentication or additional communication to ensure privacy and safety. We ask that the final rule consider the serious risk of unauthorized access.

Another factor to consider is that many clubs use automated clearing house transactions (ACH) to debit member checking accounts for recurring payments. This widely accepted practice avoids the fees and interest associated with credit card payments, a feature consumers value and appreciate. It is appropriate for a brick-and-mortar business, where a consumer purchasing the right to access that facility, would be asked to visit the facility to verify their identity as part of their account termination or suspension. This practice is appropriate and treats customer privacy, identity protection, and secure financial information as top priorities—a practice in marked contrast with many online and virtual apps and subscriptions that benefit from being virtual only and therefore out of sight, out of mind.

Therefore, we urge the Commission to ensure the final rule accurately reflects the real-world implications and standard recurring membership practices in the marketplace by clarifying that the “simple mechanism” is not a “click” for immediate termination of the agreement, but rather a “click” to initiate intent to terminate for all purposes in service/access contracts under the rule.

D) “Save” Provisions

IHRSA and the industry are concerned with the Commission's efforts to restrict a business’ right to effectively provide standard customer service in order to retain a consumer’s business.

Under the rule, a seller must immediately cancel the negative option feature--seemingly regardless of the terms and conditions of the service contracts to which the consumer agreed--upon request from a customer, unless the seller obtains the consumer’s unambiguously affirmative consent to receive a “save” prior to cancellation. Such

consent applies only to the cancellation attempt in question and not to subsequent attempts, which would require the seller to ask for permission for an attempted "save" each time they initiate changes or termination of a service agreement and comply with burdensome record keeping requirements on all pre-approved ability to save.

Health and fitness industry facilities offer varying levels of service, options for temporary pauses in membership known as "freezes", and access to other service options that may meet the customer's needs without full terminations.

Membership pauses or "freezes": Membership holds or freezes are typically offered to accommodate temporary circumstances when a consumer is unable to utilize the facilities for a certain time period. Common reasons for requesting a freeze include medical issues, extended vacations, seasonal relocations, or other personal circumstances that prevent regular attendance. Indeed, state health club contract statutes often mandate relocation and disability as legitimate reasons to freeze or terminate a membership. Pauses or freezes are usually time-limited and have a specific duration, varying from a few weeks to several months. In many cases, freezes provide a cost-free or low-cost alternative to full termination, allowing a member pause access based on their needs, while allowing them to retain the membership rate already agreed upon when they choose to return, without any further disruption to service.

Members may not be aware of their options in this regard. Health and fitness facilities should be able to explain these options to members without the administrative burden of "single-use" prior consent, so that the consumer understands—before they simply "click to cancel a long-term membership based on a short-term need—that they need not necessarily terminate their membership entirely. The final rule should account for such pause or freeze options available to a member under their service agreement.

Varying levels of service and access: Health and fitness facilities offer ranging levels of membership "tiers" to provide members with the appropriate level of access that is right for their health and fitness needs. In many cases, a member may seek to terminate their agreement due to the realization that the service tier they selected is not the level of service they need or desire. In such cases, the facility should have the ability to explain the different options available to the consumer, whether through a lower cost reduced service, or a higher tier of service offering options that the customer may not be aware of.

Digital options or alternatives: The COVID-19 pandemic resulted in health and fitness facilities developing digital platforms and services to provide the member an ability to achieve similar physical and mental health benefits of their typical in-facility experience through a remote option. In the majority of cases, these services were provided under the normal contract service agreements without additional purchase or agreement addendum. These options provide a member a viable option to remain physically active

outside of the facility. For many consumers, a continued virtual fitness option is a better alternative to termination.

Given the unique nature of these service membership agreements between health and fitness facilities and the member, IHRSA respectfully requests a revision of the “save” provision to allow health facilities to inform members of options that may meet their needs better than a total cancellation.

E) Free Trials vs. Money Back Guarantees

Negative option marketing treats a consumer's inaction as consent to purchase a product or service. In such situations, the seller assumes that if the consumer doesn't explicitly decline an offer or cancel an agreement within a specified period, they are automatically enrolled or obligated to make a purchase. The rule appears to be focused on these types of services through digital subscriptions and app-based services, such as, for example, when a consumer who inputs their credit card number when downloading a gaming app with a “free trial” is later automatically charged if they have failed to affirmatively cancel before the end of the trial.

By contrast, health and fitness clubs offer potential customers the ability to experience their locations risk-free through “money back guarantees”. A money back guarantee, also known as a satisfaction guarantee, allows customers to request a refund if they are not satisfied with the product or service, or simply change their mind after making a purchase and trying out the services provided. Unlike a free trial, customers acknowledge the agreement and requirement to make an initial payment to use the product or service. Many state health club contracts statutes require such “money back guarantees” within the first few days of a health club membership.

Money back guarantees typically come with specific terms and conditions including a specified duration within which the customer can request a refund, limitations or exclusions, and the process for initiating the refund request. Money back guarantees reduce the perceived risk for customers and serve as a reassurance that they can get their money back if the product or service does not meet their expectations. Unlike a free trial, where customers have an opportunity to evaluate the product before paying, money back guarantees allow customers to use the product or service fully and then decide if they want a refund based on their experience.

We do not believe the proposed Rule embraces money back guarantees because they are not free to pay conversions or free trials, but rather refunds of membership fees paid at the outset. We request that the Commission make this distinction clear in its final rule.

V. Federal Preemption

Many states across the country have passed consumer protection legislation addressing negative option contracts and arrangements. This patchwork of inconsistent laws and regulations presents a myriad of challenges for businesses and multi-state operators seeking to serve their consumers but also for the consumers themselves.

The Rule purports to set a "floor" with respect to negative option marketing, such that state statutes that afford consumers "greater" protections will still apply. We urge the Commission to work with lawmakers on Capitol Hill to address the conflicting standards across the country, engaging with lawmakers and industry stakeholders to provide a uniform national standard that meets the needs of consumers and the businesses who serve them.

VI. Small Business Impacts

While the Federal Trade Commission (FTC) is not specifically required to conduct Small Business Regulatory Impact Analysis (SBRIA) for its rulemakings. IHRSA respectfully requests that the Commission consider conducting an analysis on how their proposed rule impacts small businesses in the health and fitness industry as defined by the U.S. Small Business Administration's definition and NAICS thresholds.

Small businesses in the health and fitness industry operate in a much different capacity to that of larger industry service providers and have less access to capital than that of larger businesses. In fact, according to a recent Goldman Sachs survey[5], 44% of U.S. small businesses have less than three months of cash reserves. Further, an even greater share—51%—of Black-owned small businesses have less than three months' cash on hand, according to the same survey leaving them more vulnerable to disruptions to traditional service agreements.

Additionally, it is important for the Commission to acknowledge the independent operations and annual revenues of franchisees when evaluating the impacts, the rule will have on health and fitness facilities, and not consider a franchise system as a single business entity.

[5] Google. (n.d.). *2022 IHRSA Health Club consumer Final.pdf*. Google Drive. https://drive.google.com/file/d/1ClMqRQAlSYrS-fELPoFOGXV22weMFZ_c/view?usp=sharing

VI. Conclusion

We hope it is clear that the health and fitness industry recognizes and supports the efforts of the Federal Trade Commission (FTC) to address unfair practices and protect consumers from deceptive billing through the proposed Negative Option Rule Amendments. However, the identified concerns and observations that the industry has raised regarding the proposed Rule's application to the unique circumstances of the health and fitness industry are critical to address in a final Rule.

One of the key issues raised is the need for clear distinctions between in-person, brick-and-mortar health and fitness businesses with attentive on-duty personnel, versus online subscription services. The industry emphasizes the importance of recognizing the fundamental differences between these two types of operations and tailoring the rule accordingly to avoid undue burdens on legitimate health and fitness businesses.

The industry also highlights the need for clarifying the distinction between shorter-term continuous service memberships that carry less risk of consumer confusion and longer-term contracts that may automatically renew at the end of an annual term. It is crucial for the final rule to clearly differentiate between these two concepts and avoid treating them as equivalents.

Additionally, the industry raises concerns about the application of a "simple mechanism" for cancellation, particularly in relation to billing terms and payment safety. The health and fitness industry operates under specific billing structures and safety requirements that need to be taken into account. The final rule should ensure that there is "simple mechanism" to initiate termination that is practical and aligned with industry standards, without compromising privacy and security.

Furthermore, the industry highlights the importance of preserving the option for businesses to provide standard customer service and offers alternative solutions, such as membership pauses or freezes, different service tiers, and digital options. These options allow members to modify their agreements without the need for burdensome consent requirements. The industry requests a revision of the “save” provision to allow health and fitness facilities to inform members of options that may meet their needs better than a total cancellation.

Finally, the industry emphasizes the distinction between free trials and money-back guarantees. The health and fitness industry primarily operates under membership agreements and does not rely on negative option features commonly associated with digital subscriptions and app-based services. The final rule should clarify that money back guarantees are not negative option features.

In conclusion, the health and fitness industry appreciates the opportunity to provide feedback on the proposed Negative Option Rule Amendments and urges the FTC to carefully consider the concerns and observations raised. By working cooperatively, the

industry and the FTC can establish guidelines that promote fairness, transparency, and consumer protection, while also recognizing the unique aspects of the health and fitness industry.

IHRSA would be happy to discuss these points and the rule's application to the industry in further detail. If you have any questions, please contact IHRSA's Vice President of Government Affairs, Mike Goscinski at mike.goscinski@ihrsa,org.

Respectfully submitted,

Liz Clark
President & CEO
IHRSA–The Global Health & Fitness Association