

December 22, 2023

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: Notice of Proposed Rulemaking, Federal Trade Commission; Negative Option Rule;
Project No. P064202 (88 Fed. Reg. 24,716-24,739, April 24, 2023)**

To Whom It May Concern:

The undersigned organizations, representing businesses across a wide range of sectors, submit these comments regarding the Federal Trade Commission's ("FTC" or "Commission") proposed amendments to the Negative Option Rule ("Proposed Rule") and the Commission's initial notice of informal hearing and final notice of informal hearing for the Proposed Rule ("Informal Hearing").¹ We have an interest in the Informal Hearing because the proposed Negative Option Rule will have significant consequences for our members and a substantial impact on the American economy.²

Our comments today focus on the FTC's rulemaking process for the Proposed Rule and its approach to developing the rulemaking record through an Informal Hearing. We have serious concerns with the process the Commission has established to solicit public feedback about the Proposed Rule. As discussed below, we request that the Commission withdraw the Final Hearing notice and issue an initial hearing notice consistent with previous rulemakings and federal law.

To promulgate trade regulation rules under Section 18 of the FTC Act, the Commission must engage in a hybrid rulemaking process that provides for extensive participation from the public.³ Section 18 requires any rule adoption to be based on a substantial record replete with

¹ Negative Option Rule, Initial notice of informal hearing; final notice of informal hearing; listing of Hearing Participants; request for submissions from Hearing Participants, 88 Fed. Reg. 85525 (Dec. 8, 2023).

² While the Informal Hearing notice only contemplates submissions from Hearing Participants, Section 18 of the FTC Act gives any interested person the right to participate in an informal hearing. 15 USC 57a(c)(2) ("Subject to paragraph (3) of this subsection, an interested person is entitled – (A) to present his position orally or by documentary submission (or both)...") The FTC Act and the FTC's Rules of Practice do not define "interested person," so the plain meaning of the term applies.

³ Section 18 procedures are "aimed at enhancing the public's participation and testing the facts and assumptions upon which the agency bases its regulatory policy." Barry B. Boyer, Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission at 41 (1979) (Boyer's report was in Support of Recommendation 79-1 Hybrid Rulemaking Procedures of the Federal Trade Commission by the Administrative Conference of the United States (adopted June 7-8, 1979)), <https://www.acus.gov/sites/default/files/documents/1979-01%20Hybrid%20Rulemaking%20Procedures%20of%20the%20Federal%20Trade%20Commission.pdf> .

evidence supporting the rule.⁴ To meet this obligation, the Administrative Conference of the United States (“ACUS”) states that the Commission should take a “funnel” approach that would allow a “more systematic, thorough investigation and consideration of rulemaking proposals than would be customary in section 553 rulemaking prior to the publication of the proposed rule.”⁵ Unfortunately, the FTC’s Negative Option Rulemaking procedures do no such thing.

The Commission’s announcement of the Informal Hearing has also made clear that the agency seems loath to allow the required public participation in the entire rulemaking process, is unwilling to take important steps to validate the foundation for its rule, and deviates from its statutory mandate. Below is a list of procedural shortcomings of the Commission’s approach to developing a thorough rulemaking record through an informal hearing.

- The Commission did not provide for a rebuttal comment period following the NPRM.⁶ In silencing rebuttal comments, interested parties were not afforded an opportunity to challenge evidence submitted by other parties. In addition to creating opportunities for parties to respond to information about studies or data submitted to the rulemaking record, rebuttal comments highlight potential disputed issues of material fact.
- The Commission undermined opportunities for parties to submit disputed issues of material fact by requiring any designation of disputed issues at the close of the comment period to the NPRM. Interested parties must submit disputed issues of material fact before having an opportunity to review the entire record, including submissions of other parties. That means that only the Commission is positioned to consider and address the credibility, information, and facts submitted in response to the NPRM. Such a process is contrary to Congressional intent in establishing a rulemaking process deliberately designed to elicit extensive public feedback. In doing so, the Commission has made it clear it is no longer open to feedback on areas of controversy in the entire rulemaking record.
- The Commission has wrongly determined that there are no disputed issues of material fact to be resolved at the hearing by using a standard it announced for the first time in the notice of Informal Hearing. Neither the NPRM nor the Commission’s rules offer any definition of a disputed issue or how the Commission would evaluate those requests. In responding to these “indications” of disputed issues, the Commission made clear that it was expecting, in essence, a response to a motion for summary judgment. Moreover, the

⁴ The statute requires a reviewing court to set aside any rule that it finds is not supported by substantial evidence in the rulemaking record. 15 U.S.C. § 57a(e)(3)(A).

⁵ Hybrid Rulemaking Procedures of the Federal Trade Commission, ACUS Recommendation 79-1 at 6 (June 8, 1979) (“Effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates . . . a “funnel” approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision.”).

⁶ Prior to the July 2021 reforms to the FTC’s rules of practice, parties had at least thirty days after the close of the NPRM written comment period to propose disputed issues of material fact.

Commission was the only party privy to the full rulemaking record when accessing disputed issues and has ostensibly determined the comments to date have introduced no disputes.

- The Commission’s rejection of disputed issues of material fact contradicts the agency’s own instructions in the NPRM. The NPRM simply asked commenters to “indicate whether there are any disputed issues of material fact,” which several commenters did. However, the notice of Informal Hearing, for the first time, asserts that commenters were required to provide affirmative evidence to satisfy the summary judgment standard.
- The Commission combined the initial hearing notice with the final hearing notice, determining that such a process could be truncated because of its erroneous conclusion that there were no findings of disputed issue of material fact. But the FTC’s rules of practice provide no indication that the agency will issue a single hearing notice if there are no disputed issues of material fact. The rules contemplate an additional opportunity to request participation in the hearing through cross-examination, but the combined notice removed that opportunity for commenters.
- The combined notice also undermined an opportunity for parties to contest the Commission’s determination about no disputed issues of material fact. Prior to the July 2021 reforms to the FTC’s rules of practice, interested parties had ten days after publication of the final notice to petition the Commission for addition, modification, or deletion of a designated issue. The Commission’s rules of practice no longer allow for that petition period. Without the full participation of the Presiding Officer and all of interested parties the Commission itself determined disputed issues of material fact, making the opportunity to comment on the initial hearing notice’s determination about disputed issues even more important.
- The Commission’s proposed hearing process is inconsistent with the statute’s purpose of providing a robust hearing process. The Commission scheduled a hearing, limiting each party to a 10-minute presentation, and allowing all of two weeks, over the December holidays, for interested parties to submit their presentation or additional documents.
- The Informal Hearing notice makes clear that the Commission is unwilling to provide a broad and independent review of the rulemaking record that would allow the public to identify any issues before the agency finalizes the rule. The Commission noted that because there are no disputed issues, “the presiding officer is not anticipated to make a recommended decision,” despite the clear statutory requirement that the presiding officer “make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence.” The Presiding Officers recommendation, under the statute, is not limited to discussion of disputed issues of material fact.

By determining that there are no disputed issues of material fact necessary to resolve, the Commission has eliminated cross-examination, rebuttal evidence, and a decision from the

presiding officer. The Magnuson-Moss Act⁷ and the FTC Improvements Act of 1980⁸ were aimed at constructing a different model of rulemaking, one where more effective, workable, and meaningful rules would be promulgated if interested persons have opportunities by cross-examination and rebuttal evidence to challenge the factual assumptions on which the Commission bases its rules.⁹ The Commission's process to craft amendments to the Negative Option Rule has undermined public participation throughout the entire process.

Considering the serious procedural shortcomings associated with the Commission's Informal Hearing announcement, we respectfully request that the FTC withdraw the Informal Hearing notice and instead publish an initial hearing notice that provides an opportunity to interested parties to request to participate in an informal hearing as well as time to petition the Presiding Officer to consider disputed issues of material fact. The failure to allow interested parties time to analyze the Commission's novel standard for disputed issues of material fact and respond to the hearing notice by marshalling affirmative evidence to facilitate the Commission's examination of the many disputed issues of material fact raised in NPRM comments places the Proposed Rule in legal jeopardy.¹⁰

If the Commission is unwilling to follow its own rules of practice and established precedent, at a bare minimum, the undersigned organizations request an additional 60 days to respond to the hearing notice and recommend that the hearing be delayed. Currently, the Commission is allowing only 14 days for the preparation of written comments. Substantially more time is needed to allow for meaningful participation if the Commission is truly interested in full and meaningful public participation in their rulemaking processes. Moreover, we request that the Commission address our broader set of procedural concerns to better improve the public's ability to participate in the rulemaking process, ensure fairness for all participants and adhere to the Commission's statute.

We appreciate the Commission's consideration of our concerns and requests. If you have any questions, please reach out to Nina Frant, Vice President of Consumer Policy at the U.S. Chamber of Commerce at nfrant@uschamber.com.

Sincerely,

ACA Connects – America's Communications Association
ACT | App Association
BSA | The Software Alliance
Computer & Communications Industry Association (CCIA)

⁷ Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637.

⁸ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252.

⁹ Hybrid Rulemaking Procedures of the Federal Trade Commission, ACUS Recommendation 79-1 at 5 (June 8, 1979); H.R. Rep. No. 93-1606, at 34 (Dec. 16, 1974) (Conf. Rep.).

¹⁰ A court "shall" set aside the Negative Option Rule if it finds that the lack of cross-examination or rebuttal submissions "precluded disclosure of disputed material facts which was necessary for fair determination." 15 U.S.C. § 57a(e)(3)(B).

Consumer Technology Association
Digital Media Association (DiMA)
Electronic Transactions Association
Entertainment Software Association (ESA)
Flex Association
IHRSA – The Health & Fitness Association
Information Technology Industry Council (ITI)
Interactive Advertising Bureau
International Franchise Association
News/Media Alliance
NCTA – The Internet & Television Association
NTCA –The Rural Broadband Association
Performance Driven Marketing Institute (PDMI)
Software & Information Industry Association (SIIA)
TechNet
USTelecom – The Broadband Association
U.S. Chamber of Commerce