

January 23, 2024

Presiding Officer Carol Fox Foelak
c/o Federal Trade Commission
Office of the Secretary
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)

Dear Presiding Officer Foelak:

The undersigned organizations, representing businesses across a wide range of sectors, write regarding the Federal Trade Commission's ("FTC" or "Commission") proposed amendments to the Negative Option Rule ("Proposed Rule") and your January 16, 2024 Order ("Order") directing interested parties to file briefs on disputed issues of material fact to inform potential further hearings on the Proposed Rule.¹ We appreciate your recent Order, your engagement in this informal hearing, and your consideration of potential further hearings and other actions on this critical rulemaking for our organizations.

The FTC Act and Commission Rules of Practice Grant the Presiding Officer Discretion to Enhance Public Participation in Informal Hearings

As we previously outlined to the Commission, we have serious concerns about the process the Commission has established to solicit public feedback about the Proposed Rule.² The procedural shortcomings adversely impact the record for the Proposed Rule and harm the integrity of the process. The Commission's Rules of Practice ("Rules") grant the Presiding Officer specific directives on conducting an informal hearing as part of trade regulation rules under Section 18 of the FTC Act.³ While the Commission revised its Rules in 2021 to place significant limitations on public input in the rulemaking process, the Presiding Officer retained discretion to develop a rulemaking record that aligns with the legislative intent of the FTC's hybrid rulemaking process.⁴

In particular, the Rules empower the Presiding Officer with discretion either on their own motion, or at the written request of an interested person, to modify the scope of issues designated in the initial notice of informal hearing, and, if new issues are designated, to

¹ Negative Option Rule, 88 Fed. Reg. 85525 (Dec. 8, 2023); Negative Option Rule, Order on informal hearing and further briefing, 88 Fed. Reg. 85525 (Jan. 16, 2024).

² See U.S. Chamber Coalition Letter on Negative Option Rule Informal Hearing Process (Dec. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0006> ("Coalition Letter").

³ See 16 CFR § 1.13.

⁴ 15 U.S.C. § 57a(c).

determine whether interested persons may conduct cross-examination or present rebuttal submissions.⁵ The Presiding Officer also has “all powers necessary or useful to ensure orderly conduct of the hearing,” which necessarily should include, but not be limited to, a list of disputed issues of material fact to be resolved, a list of persons to make oral presentations, an invitation to facilitate cross examinations and rebuttals, and any other relevant procedural rules.⁶ Other rules empower the Presiding Officer “[t]o modify the location, format, or time limits prescribed for the informal hearing.”⁷ These grants of authority are intended to ensure the integrity of the rulemaking process and the furtherance of strong public participation in informal hearings. Indeed, Congress provided that interested parties are entitled to present their position orally or by documentary submission (or both).⁸

The Commission staff, however, takes the position that the Rules severely handicap the Presiding Officer’s rights to facilitate a robust record by placing an arbitrary time limit on the Presiding Officer’s ability to notify interested parties about new designated issues, identify witnesses, and collect evidence. Even accepting Commission staff’s interpretation, which other commenters have identified as suspect, consider what happens if the Commission identifies disputed issues of material facts: interested parties can make a request to conduct or have conducted cross-examination and to present rebuttal submissions. But, if the Presiding Office identifies disputed issues of material fact and the timeframe for an informal hearing is limited to a 30-day period as the Commission argues, such a construct severely undermines public participation in fact gathering related to disputed issues of material fact that are material and necessary to resolve. If the Presiding Officer identifies disputed issues, interested parties may not receive adequate notice, be allotted time to petition to participate, have necessary time to prepare materials responsive to newly identified disputed issues of material fact, or otherwise may not be able to fully exercise their procedural rights.

The undersigned request the Presiding Officer establish a process to sufficiently address all relevant disputed issues of material fact raised by all interested persons, including those who did not participate during last week’s informal hearing. Interested parties should be provided adequate notice of disputed issues, and be granted opportunities to petition to participate and prepare written submissions.⁹ A hearing should be scheduled that allows parties to make oral presentations, cross-examine Commission staff, provide rebuttal submissions or testimony, and provide any relevant supplementary documentary information. If the Presiding Officer agrees with the Commission staff that the hearing time period cannot be extended beyond 30-days when a Presiding Officer identifies new issues of disputed fact after the start of the informal hearing process, we urge the Presiding Officer recommend to the Commission that there is good cause to extend the time for informal hearings in this rulemaking proceeding. There is no statutory basis for the Commission’s arbitrary imposition of a 30-day time limit. Pursuant to its

⁵ See 16 CFR § 1.13(b)(1)(ii).

⁶ See 16 CFR § 1.13(a)(2); 16 § C.F.R. 1.12(a).

⁷ See 16 CFR § 1.13(a)(2)(ii).

⁸ 15 U.S.C. § 57a(c)(2).

⁹ See 16 C.F.R. § 1.12(a)(3) and (6).

Rules, the Commission may extend the number of days for the hearing and should do so here.¹⁰ The ability of interested parties to receive adequate notice about disputed issues of material fact and have time to petition to participate and prepare responsive submissions and testimony is required for a full and true disclosure with respect to any designated issue.

Allow All Interested Persons to Make Oral or Written Presentation and Raise Disputed Issues of Material Fact.

Interested persons include not just those who participated in the January 16, 2024, hearing, but other persons who seek to make oral or written presentations.¹¹ As noted above, the Presiding Officer has discretion to add to the list of interested persons to make oral or written presentations and include other disputed issues of material fact if good cause is shown.¹² Commission staff requested, and was granted, permission in the previous informal hearing to make an oral presentation after the Commission's stated deadline of June 23, 2023, to request such a presentation. One party was explicitly denied the ability to participate by the Commission in the previous hearing because the Commission stated the association in question did not meet the June deadline.¹³ It creates an unfair playing field if Commission staff is granted preferences that other interested parties are not afforded.

The Commission wrongly determined that there were no disputed issues of material fact using a standard it announced for the first time in the notice of the Informal Hearing.¹⁴ We strongly disagree with this standard. This standard was raised at the last minute to justify the Commission's determination that they do not need to address evidence challenging the factual assumptions on which the Commission bases its rules. We urge the Presiding Officer not to shut off public debate about complex and controversial issues of fact that are central to the justification of the rule. While the Presiding Officer cannot correct the procedural deficiencies of the rulemaking process to date, any informal hearing should allow all interested persons to make an oral presentation and to raise disputed issues of material fact.

Grant Each Hearing Participant Adequate Time To Make Oral An Presentation

The Presiding Officer has the authority to "modify the location, format, or time limits prescribed for the informal hearing."¹⁵ Many of the comments in the record are highly substantive and involve complex business practices that merit careful discussion and

¹⁰ See 16 C.F.R. § 1.13(a)(2)(ii).

¹¹ 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.

¹² See 16 C.F.R. § 1.13(b)(1)(ii).

¹³ Negative Option Rule, Notice Regarding Requests Relating to the Informal Hearing, 88 Fed. Reg. 85525 (Jan. 10, 2024).

¹⁴ See Coalition Letter at 2.

¹⁵ See 16 C.F.R. § 1.13(a)(2)(ii).

examination. In a different rulemaking proposal, the Commission granted hearing participants 30 minutes to make oral presentations during the informal hearing.¹⁶ Limiting each party to a 10-minute presentation, and allowing a mere two weeks, over the December holidays, for interested parties to submit their presentation or additional documents was wholly inadequate.

Provide Sufficient Time for Cross Examination of Commission Staff and Presentation of a Rebuttal Submission

Each participating party should be granted the opportunity to cross-examine Commission staff and present a rebuttal submission on relevant disputed issues of material fact designated by the Presiding Office. The Presiding Officer has the authority to allow for cross-examination and a rebuttal submission to resolve disputed issues of material fact.¹⁷ These exchanges are crucial to address gaps in the existing record and assess the validity of assumptions and evidence made by the Commission in support of the Proposed Rule.

The Presiding Officer Should Make a Recommended Decision

The FTC Act requires that “[t]he officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence[.]”¹⁸ The Presiding Officers recommendation, under the statute, is not limited to discussion of disputed issues of material fact.¹⁹

Conclusion

If any of the aforementioned requests are denied, in whole or in part, we respectfully request the reasons for the denial be placed in the rulemaking record to facilitate a transparent rulemaking process. We appreciate your consideration of our requests. If you have any questions, please reach out to Matt Furlow, Policy Director at the U.S. Chamber of Commerce at mfurlow@uschamber.com.

Sincerely,

ACA Connects – America’s Communications Association
ACT | App Association
Consumer Technology Association
Electronic Transactions Association
Information Technology Industry Council (ITI)
IHRSA–The Health & Fitness Association
Interactive Advertising Bureau

¹⁶ See 88 Fed. Reg. 49364 (2023), available at <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials>.

¹⁷ See 16 C.F.R. § 1.13(b)(2).

¹⁸ 15 U.S.C. § 57a(c)(1)(B).

¹⁹ Id.

International Franchise Association
National Retail Federation
NCTA – The Internet & Television Association
News/Media Alliance
Performance Driven Marketing Institute (PDMI)
Software & Information Industry Association (SIIA)
TechNet
USTelecom – The Broadband Association
U.S. Chamber of Commerce