

UNITED STATES OF AMERICA  
Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20507

RULE MAKING PROCEEDING  
Project No. P064202

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NEGATIVE OPTION RULE : ORDER  
: January 31, 2024

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The Federal Trade Commission (FTC) commenced this proceeding with a Notice of Proposed Rulemaking, *Negative Option Rule*, 88 Fed. Reg. 24716 (Apr. 24, 2023) (NPRM). The FTC appointed the undersigned Administrative Law Judge (ALJ) to preside over the informal hearing in the proceeding, *Negative Option Rule*, 88 Fed. Reg. 85525 (Dec. 8, 2023) (Hearing Notice). A hearing session was held on January 16, 2024, at which the following interested persons appeared: TechFreedom; the International Franchise Association (IFA); the Interactive Advertising Bureau (IAB); the Internet and Television Association (NCTA); the Performance Driven Marketing Institute (PDMI); and the FTC Bureau of Consumer Protection, Division of Enforcement (BCP Enforcement).

A second hearing session was held on January 31, 2024, to address the following disputed issues of material fact<sup>1</sup>:

1. Will the proposed rule have an annual effect on the national economy of \$100 million or more? *See* 88 Fed. Reg. at 24731.
2. What will the recordkeeping and disclosure costs associated with the proposed rule be? *See* 88 Fed. Reg. at 24733-34.

IFA, IAB, and BCP Enforcement appeared. NCTA did not appear but submitted a written comment on January 30, 2024. IAB's presentation addressed, *inter alia*, its January 30, 2024, petition, which argued that the FTC should be ordered to present a witness in support of the facts underpinning the proposed rule; that additional disputed issues of material fact should be designated; and there are several procedural deficiencies arising from the short timeline for the proceeding. The undersigned denied the January 30, 2024, petition, noting that if a party offers no evidence in support of a disputed fact and an opposing party offers evidence in support of the non-existence of the disputed fact, the necessary finding is that the "fact" does not exist. The undersigned held that

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<sup>1</sup> *See Negative Option Rule* (A.L.J. Jan. 25, 2024); Fed. Trade. Comm'n, Notice Regarding Requests Relating to the Informal Hearing in Project No. P064202, the Negative Option Rule (Jan. 10, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P064202-Neg-Option-Rule-Notice-Informal-Hrg-Requests.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P064202-Neg-Option-Rule-Notice-Informal-Hrg-Requests.pdf); *see also* 16 C.F.R. § 1.13(b)(1)(ii) ("The presiding officer may at any time on the presiding officer's own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to § 1.12(a).").

the timeline was mandated by the FTC's rules and noted IAB's objection for the record. IAB also offered the expert report of Christopher Carrigan and Scott Walster, *Economic Analysis of the Federal Trade Commission's Proposed Negative Option Rule*, which was admitted in evidence.

In light of the January 31, 2024, hearing session, any interested persons may submit additional comments by February 9, 2024. A third hearing session will be held virtually on February 14, 2024, at 10:00 a.m. EST, at which Messrs. Carrigan and Walster will be available for cross examination.

IT IS SO ORDERED.

A handwritten signature in cursive script that reads "Carol Fox Foelak". The signature is written in black ink and is positioned above a horizontal line.

Carol Fox Foelak  
Administrative Law Judge