

Notice Regarding Requests Relating to the Informal Hearing in Project No. P064202, the Negative Option Rule

The Commission received requests seeking extensions of time in connection with the informal hearing scheduled for January 16, 2024, in the above-referenced matter. These include both requests for extensions to provide documentary submissions¹ and requests for postponement of the hearing date.² One interested party filed a new and therefore untimely request to present orally at the hearing.³ These requests are denied for the reasons detailed below. Lastly, others asked the Commission to reconsider its determination that there are no genuinely disputed issues of material fact necessary to be resolved at the informal hearing.⁴ These requests are denied without prejudice and referred to the informal hearing's presiding officer who is responsible for handling them under the Commission's Rules of Practice.

Pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a, the Commission published the notice of proposed rulemaking (NPRM) concerning the Negative Option Rule in the Federal Register on April 24, 2023, with a sixty-day comment period that ended on June 23, 2023.⁵ In the NPRM, the Commission did not identify any disputed issues of material fact that need to be resolved at an informal hearing and solicited the public's views on whether there are any such issues.⁶ The NPRM informed interested persons that they must submit any requests to present views orally by the conclusion of the notice and comment period, no later than June 23, 2023.⁷ The Commission received six requests to present orally as well as two requests that the Commission designate potentially disputed issues of material fact.⁸

On December 8, 2023, the Commission published in the Federal Register an initial and final notice of informal hearing, which scheduled the informal hearing for January 16, 2024.⁹ In that notice, the Commission explained its finding that there are no disputed issues of material fact necessary to be resolved.¹⁰ Hearing participants were given until December 22, 2023, to provide documentary submissions. These periods afforded the public a meaningful opportunity to provide the Commission with written comments regarding its rulemaking proposal. Generally, agencies must provide 15 days' advance notice of a hearing. *See* 44 U.S.C. § 1508.

¹ Cmt. of the Interactive Advertising Bureau ("IAB") (Dec. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0007>; Cmt. of the Performance-Driven Marketing Institute ("PDMI") (Dec. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0005>; Cmt. of the U.S. Chamber of Commerce (Dec. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0006>; Cmt. of NCTA-the Internet & Television Association ("NCTA") (Dec. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0008>; and Cmt. of BSA-the Software Alliance ("BSA") (Dec. 20, 2023), <https://www.regulations.gov/comment/FTC-2023-0073-0002>.

² Cmts. of IAB, NCTA.

³ Cmt. of BSA.

⁴ Cmts. of IAB, NCTA, PDMI.

⁵ *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking to Amend Negative Option Rule, 88 Fed. Reg. 24716 (Apr. 24, 2023), <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.

⁶ 88 Fed. Reg. at 24730.

⁷ 88 Fed. Reg. at 24716.

⁸ *See* Fed. Trade Comm'n, Initial and Final Notice of Informal Hearing on Negative Option Rule, 88 Fed. Reg. 85525, 85525-26 (Dec. 8, 2023), <https://www.federalregister.gov/documents/2023/12/08/2023-26946/negative-option-rule>.

⁹ 88 Fed. Reg. at 85525.

¹⁰ *See* 88 Fed. Reg. at 85528.

Here, interested parties had two months to consider whether they wanted to present views orally, after which the Commission provided 39 days' advance notice of the informal hearing. Based on the facts and law, the Commission declines to expand or extend the period for documentary submissions, postpone the hearing date, or allow additional hearing participants.

Commission Rule 1.13(a)(2)(viii) allows the presiding officer to rule on all requests "made during the course of the informal hearing" pursuant to the presiding officer's authority to oversee "the orderly conduct of the informal hearing." 16 C.F.R. § 1.13(a)(2)(viii). The presiding officer may also add or modify designated issues of material fact that are necessary to be resolved. *See id.* § 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 requests made to the Commission to add designated issues of material fact are therefore denied without prejudice and referred to the presiding officer to address in the first instance under the Rules of Practice. Requests from participants may be made to the presiding officer at the informal hearing, or in advance pursuant to Commission Rule 4.2(d)(1), 16 C.F.R. § 4.2(d)(1). Write "Negative Option Rule (16 CFR part 425) (Project No. P064202)" on your submission and file it online through <https://www.regulations.gov/docket/FTC-2024-0001>. Or, if you prefer, send via overnight service to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex N), Washington, DC 20580.

By the Commission.



April J. Tabor
Secretary

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ISSUED: January 10, 2024