Federal Trade Commission |Informal Hearing on Proposed Amendments to the Negative Option Rule | January 16, 2024

Judge Foelak:

Good morning. This is a hearing in the negative option rule making proceeding, number P064202. And I am Judge Pollak. And sitting with me here also is Mr. Ben Ristau from our office. The Office of Administrative Law Judge is who will be assisting me. May I have your appearances please?

Katherine Johnson:

Good morning, Your Honor. Katherine Johnson, staff attorney with the Bureau of Consumer Protection, Division of Enforcement.

Lartease Tiffith:

And then you have Lartease Tiffith, EVP for Public Policy from the Interactive Advertising Bureau.

Michael Powell:

Good morning. I'm Michael Powell, president and CEO of NCTA.

Thomas Haire:

Good morning. I'm Thomas Haire, the co-founder and chief content officer of the Performance Driven Marketing Institute.

Berin Szoka:

I'm Berin-

Katherine Johnson:

Good morning. Sarah... Sorry, Berin. Good morning. Sarah Davies, general counsel, International Franchise Association.

Berin Szoka:

I'm Berin Szoka, president of TechFreedom.

Jonathan Ware:

Jonathan Ware, also from the Federal Trade Commission and Bureau of Consumer Protection. Thank you.

Judge Foelak:

Okay. I guess we're ready to proceed. First off, the Bureau of Consumer Protection wanted five minutes to address various points, which is granted. And of course the IAB will have the time requested to respond. Sir, are you going to want to respond immediately after they speak perhaps? I mean, before anything else happens?

Lartease Tiffith:

Yes.

Judge Foelak:

Okay. Very good.

Lartease Tiffith:

Yeah. I'm happy to do the rebuttal time then. [inaudible 00:02:11].

Judge Foelak:

Very good. Okay. Please proceed.

Katherine Johnson:

Good morning, Your Honor. Katherine Johnson, staff attorney with the Bureau of Consumer Protection, Division of Enforcement. Thank you for allowing FTC staff to be heard this morning. I would like to address two matters. First I would like to start with IAB's petitions. Second, I would like to address some procedural issues. On the first matter, as you know, IAB filed a petition on January 10th and a second petition yesterday, January 15th, asking you for various forms of relief. Among them are an extraordinary requests that Your Honor compel the commission to present a witness for cross-examination and compel discovery regarding various alleged ex parte communications. Obviously, IAB's request for an order compelling a commission witness is premature at this juncture because Your Honor has made no determination regarding disputed issues of material fact or whether cross-examination will be allowed, two, [inaudible 00:03:14] predicates to having any witnesses be present at all.

But even if not premature, it would be improper. Not only is there no mechanism to allow such compulsory process in the commission rules and IAB cited none, IAB's request is directly at odds with the rules. Under the commission's prior rules, the presiding officer did have some limited authority to seek to compel witness attendance subject ultimately to commission approval. After the 2021 revisions however, the commission removed compulsory mechanisms from the rules. As the commission explained in promulgating the revised final rule at 86 Federal Register 38542, these procedures are unnecessary for the conduct of effective informal hearings and are inconsistent with the informal nature of such proceedings. Thus, IAB cites no basis for Your Honor to compel any party, including the commission, to produce a witness at an informal hearing because there simply is none.

This same rationale applies to its other requests. The commission rules simply do not provide for the kind of discovery order IAB is seeking and such an order is contrary to what the rules envision given the 2021 revisions. But Your Honor need not address whether to compel any witnesses or discovery because

IAB's request for designation of disputed issues of material fact and cross-examination should be denied. The commission considered these same seven issues and found these are not disputed issues of material fact. The commission's legal and factual basis for its determination are set forth in the December 8th, 2023 hearing notice at 88 Federal Register 85525, but in short it found that each of the issues IAB raises are not disputed, material or necessary to be resolved as those terms are understood in the context of Mag-Moss legislative history, the commission rules and relevant case law. IAB offers nothing materially new here for Your Honor to consider, simply repeating its bare assertions. Accordingly, Your Honor should find as the commission did there are no disputed issues of material facts and deny IAB's request to designate issues and for cross-examination.

This brings me to the second issue I wanted to address this morning which concerns a few procedural matters that would arise if you are inclined to designate disputed issues of material fact and allow cross-examination. Should Your Honor make such determinations, we would respectfully request Your Honor state the reasons on the record for finding disputed issues of material fact, including the necessary findings supporting the need for cross-examination. Specifically, commission rule 1.12(b) requires requests for cross-examination and rebuttal submissions establish three things. First, the disputed issue concerns an issue of specific fact and not legislative fact. Second, cross-examination specifically rather than oral or rebuttal submissions is required for a full and true disclosure of the facts. And third, cross-examination or rebuttal is required to resolve a particular issue.

In addition to requesting you place the factual predicate for these determinations into the record, we would ask that you set any further proceedings necessary to conduct cross-examination no more than two weeks from today. Although IAB has requested a 60-day delay, that request is outside of presiding officer's authority under commission rule 1.13(a)(2)(ii). Specifically, that rule limits extending the hearing beyond a 30-day period without commission approval. As a result, the delay IAB seeks is not possible unless the commission itself extends the number of days for the hearing, again, a request the commission had previously considered and denied. Contrary to IAB's assertion, a two-week continuance would provide adequate time for Your Honor and interested persons to prepare in accordance with commission rule 1.13(b)(2). This also allows sufficient time within the 30-day window to address any new matters that may arise at the proceeding. Thank you, Your Honor. I appreciate your time and I'm happy to answer any questions you may have.

Judge Foelak:

First off, let me comment about the more recent request of IAB. It appears to me to be more directed to the commission or the chair than to the presiding judge and is somewhat in the nature of a FOIA. So I will leave it to the commission to rule on that. And granted, there's a lot of stuff they're asking that would be withheld under FOIA, but they would, I'm sure, get a Vaughn Index eventually that would tell them what they want to know. Okay. Sir, do you want to go ahead with your response?

Lartease Tiffith:

Sure. Thank you, Your Honor. Again, my name is Lartease Tiffith. I'm the EVP for Public Policy at the Interactive Advertising Bureau. We represent over 700 leading companies that make up the digital advertising and media industry who will be impacted by this proposed rule. I want to go to my colleague's comments earlier from the FTC and address some of those points. One, the rules clearly contemplate under the statute that there be a right to cross-examination and witnesses are needed for that to be meaningful. So the commission should have put forward a witness for us to be able to exercise that right. Instead, what they've done is they've only capping this to only six parties who clearly have one very similar point of view and there's been no alternative provided at this hearing.

In addition, there are some points that I want to raise about what my colleague said earlier about it's immaterial some of the points that we raised through our pleadings and which I would also encourage and ask for an opportunity to respond in writing, because we are just learning today that the FTC was granted an opportunity to speak and so we were not fully prepared to respond here without notice. But here are some points that I would like to raise for you, Your Honor.

As we raised in our pleadings, IAB has serious concerns with the procedure the commission has employed at this informal hearing. That includes the fact that the Bureau of Consumer Protection staff have not been held to the same standards for participation in this hearing as other interested parties. Specifically, the staff made an untimely request to participate in this hearing but was permitted to do so while other interested parties were denied. IAB request the opportunity to respond and I appreciate the opportunity to do it here orally but also appreciate an opportunity to do it in writing. IAB disagrees with this [inaudible 00:10:28], that this hearing satisfies the letter or purpose of Magnuson-Moss. The statute explicitly requires that the hearing officer make a recommended decision, but staff's hearing notice stated that the officer was not anticipated to make such a decision.

Similarly, Magnuson-Moss provides the right, as I said earlier, to cross-examination. Interested parties have had no way of knowing that the commission would apply a summary judgment standard to the proposed disputed issues of material fact. The commission never stated its intention to do so in the MPRM. IAB would've developed such affirmative evidence if they had more than a few weeks notice over the holidays that such evidence was required in order to exercise the right to cross-examination. In order for the right to cross-examination to be meaningful, the commission must, as I said earlier, put forward witnesses in support of the rule.

The statute provides the commission the power to prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs of delay, but the steps the commission has taken to limit meaningful development of the record cannot be characterized as legitimate rules to avoid unnecessary costs or delay. The commission cannot curtail the statutory right of interested priorities and persons to participate in the hearing either by documented submission or oral presentation. One hour is severely dis-efficient and a stark departure from the commission's normal past practice with regards to rulemaking.

Judge Foelak:

Thank you. I will reserve ruling on these motions and issue a written ruling in due course. Okay. Are we ready to go ahead with the prepared speeches?

Berin Szoka:

I am, Your Honor.

Judge Foelak:

Okay. First up.

Berin Szoka:

Your Honor, I'm Berin Szoka, president of TechFreedom, think tank dedicated to technology policy and law. I've spent much of the last decade studying the Federal Trade Commission, its history, its processes and its structure. For better or worse, the FTC is the de facto Federal Technology Commission. Every precedent the agency sets influences how it might regulate technology across the board. So I'm here today to raise three concerns about the proposed rule, the process used, the need for the rule and its scope.

In regulation, process always matters, but nowhere does it matter more than at the FTC. The Magnuson-Moss Act of 1975 authorized the FTC to write consumer protection rules. Because of the extraordinarily amorphous nature of the FTC's authority to define what qualifies as unfair and deceptive, Congress imposed special procedural requirements beyond notice and comment rulemaking under the Administrative Procedure Act. Yet even these safeguards proved inadequate to prevent the FTC from going on a rulemaking bender in the late 1970s. At its peak, the FTC initiated more than one rulemaking each month. When the FTC finally attempted to ban the advertising of sugared cereals to children, the Washington Post famously dubbed the FTC the National Nanny.

In 1980, furious lawmakers briefly shuttered the agency and slashed its funding. The commission faced the real possibility of abolition. A bipartisan pair of Senators aptly summarized the danger of FTC overreach, saying, "The apparent power of the commission with respect to commercial law is virtually as broad as the Congress itself. In fact, the FTC may be the second most powerful legislature in the country," unquote. Lest the FTC supplant Congress as a second unelected national legislature, a huge bipartisan majority of Congress and President Jimmy Carter imposed additional safeguards on Magnuson-Moss rulemaking.

As revised, the Mag-Moss process aims to ensure that the FTC fully vets the trade-offs inherent in any trade regulation rulemaking. Notably the FTC must publish an advanced notice of proposed rulemaking, give Congress advanced notice and publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives considered. Unlike notice and comment rulemakings, Mag-Moss allows commenters to request an informal hearing and requires that the presiding officer, quote, "Make a recommended decision as to all relevant and material evidence," unquote. Today's hearing makes a mockery of the process that Congress designed. Both IAB and NCTA identified multiple material questions of fact, but the FTC refused to allow an evidentiary hearing today as Congress require. That decision means that you as the presiding officer cannot decide questions of fact.

Since 1980, the FTC has rarely used its Mag-Moss powers, but when it did so, it took the hearing process very seriously. On the Eyeglass Rule, 31 speakers testified over 32 days. On the Vocational Home Study School Rule, more than 400 speakers spoke over 44 days. On the Funeral Rule, it was 315 speakers over 52 days. These were sectoral rules with limited effect. Here regarding a rule that could impose significant costs across the entire economy, over 100 comments were submitted, yet the FTC has allowed only four other commenters to speak today. This sham hearing will be over and done with in just about an hour.

Your Honor, you are not being asked to sit as an administrative law judge but as a glorified timekeeper. It is not surprising that the chair did not ask the commission's own chief ALJ to preside over this farce. Presumably, she expects you to do what Judge Michael Chappell has been unwilling to do in the few administrative cases that have reached him, to rubber-stamp the FTC's attempt to sidestep the safeguards imposed by Congress. At a minimum, you should remind the FTC what is at stake here today. This rule will inevitably be challenged. Mag-Moss requires that if the court determines that the commission had, quote, "Precluded disclosure of material facts which was necessary for fair determination by the commission of the rulemaking proceeding taken as a whole, the court shall hold unlawful and set aside the rule," unquote. True the statute does give the FTC some discretion to streamline the informal hearing process but only as noted to avoid unnecessary costs or delay. Limiting presentations

Berin Szoka:

... to just 10 minutes, barring all cross-examination, and prohibiting any additional parties from participating cannot possibly be justified under this narrow standard. It's not too late for the commission

to remedy this inadequate process by holding a further, longer, and more meaningful hearing with the opportunity for other parties to comment. Your Honor, you would be well within your rights to urge the commission to do so.

My second concern. The FTC has not shown that the proposed amendments are needed. The FTC can issue a trade regulation rule, " Only where it has reason to believe that the unfair or deceptive acts and practices which are the subject of the proposed rulemaking are prevalent."

"An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances in a way that is material. An act is unfair if it causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."

A host of laws, including FTC rules, already prohibit deceptive and unfair deceptive billing practices and allow the FTC to obtain civil penalties for violations. But the FTC wants to go beyond these laws. The commission wants to prohibit conduct that Congress specifically authorized in Roscoe, namely by requiring companies to give consumers a simple cancellation method to cancel a recurring payment. The FTC wants to go above what Congress explicitly required to require the same method of cancellation upon sign up. The net effect of all of this is to allow the FTC to impose civil penalties for conduct that remains legal under the statutes that Congress enacted.

Finally, my third concern. Today's rule would indeed allow the FTC to impose civil penalties even more broadly. In effect, it would rewrite the statute. TechFreedom raised its concerns in comments joined by two other think tanks and seven former FTC officials. Ostensibly, the proposed amendments are about protecting consumers from negative option marketing. But as former Commissioner Christine Wilson warned in her dissent, the scope of the proposed rule is not confined to negative option marketing. It also covers any misrepresentation made about the underlying good or service sold with a negative option feature. Thus, "Even if the negative option terms are clearly disclosed, informed consent is obtained and cancellation is simple." The FTC could for the first time seek civil penalties for run-of-the-mill deception claims, such as claims involving product efficacy, national origin, and about how information about the consumer or the transaction is shared, used or secured. This is yet another abuse of the rulemaking process. It aims to circumvent a deliberate choice made by Congress not to empower the FTC to impose civil penalties for ordinary misrepresentations. Congress made that choice in crafting the original FTC Act.

Lawmakers reaffirmed that choice as recently as 2010. The sprawling Dodd-Frank financial overhaul passed by the House initially included a provision that would've authorized the FTC to obtain civil penalties for any provision authorized by law and enforced by the commission, including Section 5's ban on deception. After considerable opposition, this provision was dropped in conference and for good reason. It would've fundamentally changed the balance struck by Congress in crafting the FTC Act. Extending this rule to all aspects of a service that uses negative option marketing achieves much the same result. True, if a company chose to use negative option marketing, Section 5(m)(1)(A) would still require the FTC to show the company had "actual knowledge or knowledge fairly implied," that its conduct was illegal as in any action for civil penalties based on a rule violation. Here that would require showing that a company knew that its misrepresentation about a product was deceptive.

But this is not the only part of the statutory framework that matters. As the Seventh Circuit explains in its credit bureau decision, Congress carefully counterbalanced the exceptionally amorphous standard of Section 5 with a detailed framework, namely the combination of Section 5(m)(1)(A's) knowledge requirement with Section 18(a)(1)(B's) procedural requirements that the commission give defendants fair notice through rules that define with specificity prohibited acts before those defendants may be ordered to pay money, whether in the form of restitution or civil penalties.

The FTC's proposed rule flaunts the specificity requirement of Magnuson Moss. Section 5's general prohibition on deception is the antithesis of specific, so it cannot be incorporated into a rule as the basis for civil penalties. Determining which evidence is relevant and material presumes that the proposed rule is specific. Otherwise, how could the presiding officer possibly know which evidence should be considered? It is thus impossible to say whether the commission has fully explored the evidence that would be implicated by a rule that allows the commission to impose civil penalties for any deceptive practice engaged in by services that use negative option marketing. There is simply no way to imagine all such scenarios or what the trade-offs involved might be. Thus, such a proposal cannot possibly be justified under Section 18(c)(1)(B). Therefore, such a proposal lies outside the bounds of the Magnuson Moss Act. Accordingly, we urge you to recommend that the commission drop this part of its proposed rule. Thank you for the opportunity to testify today.

Judge Foelak:

Thank you.

Sarah Davies:

Hi, good morning, Judge Foelak. My name is Sarah Davies, and I'm honored to testify on behalf of the International Franchise Association, the world's oldest and largest organization representing franchising. Our membership is comprised of franchisors, franchisees, and suppliers to franchise companies. Today in the U.S. there are more than 3000 franchise brands and nearly 800,000 franchise locations that support over 8 million jobs and generate over 825 billion for our economy.

However, contrary to common mischaracterization of franchising, it is not big business Franchising is small business. More than 80% of franchise owners operate just one location. Further, most franchisors are small too. Over 50% of franchise brands in operation today have less than 20 franchise units in their system. Nearly a third of all franchisors make less than 5 million per year. As is always the case, small businesses are disproportionately affected by regulations rather than larger firms that have the legal and executive firepower to navigate difficult administrative and operational changes.

The use of franchising is varied throughout the economy, including many industries that would be subject to the FTC's proposed negative option rule like fitness, preventative healthcare, and personal wellness services and children's extracurricular activities. Many of these small businesses are still recovering from the effects of closures during the COVID-19 pandemic, while also struggling with economic headwinds and a challenging labor market.

These small business owners provide critical health, wellness and child care services and regularly engage in person with their customers in providing those services. They are distinct from digital subscriptions and mobile applications at the core of the FTC's proposed role [inaudible 00:24:30]. Integral to so many of these small businesses is the community created with their members. Many of these franchisees invested in their franchise systems based on a business model that includes as a core component a membership program, and the proposed rule interferes in their private contracts with their franchisors.

Negative option marketing provides an enormous benefit to both consumers and small businesses, including convenience and time savings, a streamlined transaction experience and lower cost. Countless companies offer recurring billing to consumers without incident. Recurring billing is not inherently deceptive or unfair. Moreover, recurring billing already is regulated by a host of federal and state regimes.

IFA and its members believe in honest business practices with clear and conspicuous disclosures, informed consent and cancellation that is not difficult or impossible. The FTC's proposed rule, however,

is unnecessary and improper both substantively and procedurally. Not only has the FTC not identified specific acts or practices that are unfair or deceptive, but the proposed rule is also not based on substantial evidence, lacks a meaningful cost benefit analysis, fails the balancing test required by the FTC Act, and is devoid of the procedural guarantees afforded by the Mag Moss Act. Further, the proposed rule will negatively impact consumers and hurt small businesses both from a service offering and a financial perspective. First, it will [inaudible 00:26:03] potentially beneficial products, services, and discounts available to consumers. Many of our small business franchisees operate almost entirely on a month-to-month membership model that allows for cancellation each month prior to the next renewal cycle and also provides for suspension or freezing of memberships as an alternative to cancellation. These small businesses should be able to explain alternative 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 relationship based on a short-term need that they need not terminate their membership entirely.

For example, a massage franchise system reports that approximately 10% of memberships are frozen at any given time, with 75% of those members electing to reactivate their memberships. Our fitness center brands similarly experience members electing to freeze memberships rather than cancel at rates as high as 40%. Customers electing to freeze memberships rather than cancel avoid paying a second initiation fee when returning and retain benefits and incentives offered to long-term members.

The FTC, however, failed to consider how immediate cancellations will increase rather than decrease consumer cost. A chiropractic services franchise offers monthly memberships curated to the patient's health and wellness goals developed in coordination with a practitioner. The FTC failed to consider how immediate cancellations could lead to adverse health outcomes as consent requirements restrict the facility's ability to properly advise patients of the adverse effects of discontinuing care. The FTC also failed to consider how immediate cancellations could undermine discounting, as many of our members providing children's extracurricular activities offer incentives like complimentary birthday parties and other benefits to customers electing to freeze rather than cancel. The proposed rule disrupts the process that is working for the benefit of both consumers and small business owners.

Second, our members are deeply concerned about the economic impact to their small business. We reiterate our written request that the FTC conduct a small business regulatory impact analysis to determine how the proposed rule will impact small businesses.

This analysis raises important questions of fact warranting an evidentiary hearing, which the commission has refused to allow. Without a cost-benefit analysis agency rules have been vacated. The cost-benefit analysis that was conducted by the FTC was simply inadequate and failed to consider numerous costs. The proposed rule would require all sellers across all industries to reconfigure their contracts and disclosures, whether written, telephonic or in person. Not only will sellers, including small businesses, need to revise their specific negative option terms, they also will need to closely analyze their contracts, saves and cancellation procedures, telemarketing processes, online checkout flows, and in-person displays. The FTC's perfunctory cost-benefit analysis assumes all sellers are already complying with these obligations and therefore estimates low cost of compliance, but that cannot be true given the FTC must show based on substantial evidence that there are ongoing widespread and deceptive or unfair practices to justify this rule in the first place. The FTC estimates that it will take just three hours a year for businesses to comply with the proposed rule at an estimated wage rate of $22.15 per hour. This estimate is grossly understated and emits key costs. For example, our members estimate it will take hundreds of hours to review and modify their contracts, websites, telemarketing, and in-person sales practices. Employee training will also take considerable time at considerable cost. Further, many in franchising do not currently have the technology to immediately cancel memberships upon notice as required under the proposed rule, as most are structured to allow members to continue accessing and

using facilities and services throughout the end of the termination notice period. The proposed rule's requirements demand these small businesses expend significant financial resources and time to comply. The FTC did not consider these costs in its analysis. These issues raise questions of fact that must be analyzed at an evidentiary hearing.

Finally, I will note that this rulemaking is being considered at a time when the FTC has taken an interest in various practices common in franchising with little regard to the impact on small business franchisors and franchisees. 2023 saw several FTC rulemakings that threaten the franchise model as well as a request for information regarding common franchise agreement provisions and franchise or business practices. All at a time when the FTC's franchise rule governing pre-sale disclosures is in desperate need of updating. Despite urging from IFA to improve disclosures to drive healthy franchise relationships, the franchise rule review has remained dormant since 2020. IFA was notably troubled that the leading nature of the questions posed in the RFI will yield incomplete and anecdotal accounts of franchise relationships rather than a holistic picture of franchising as it currently exists. Similar to the anecdotal accounts that form the basis of the proposed rule we are discussing today, this flawed rulemaking approach thus appears pervasive throughout the FTC's recent rulemaking efforts. We believe the commission must engage with all of the facts available to it and avoid making rules for the exception. Thank you again for the opportunity to appear.

Judge Foelak:

Thank you.

Lartease Tiffith:

Good morning, Your Honor.

Judge Foelak:

Good morning. Again.

Lartease Tiffith:

Again. Thank you for the opportunity to speak today. I am Lartease Tiffith again and I'm the Executive Vice President for Public Policy at the Interactive Advertising Bureau. IAB represents, again, over 700 leading companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaign. Together, our members account for 86% of online advertising expenditures in United States.

IAB requested to present our position at this informal hearing because the proposed negative option rule will have significant negative ramifications for our members. Furthermore, auto-renewals provide significant benefits to both businesses and consumers in the form of cost savings, convenience, and heightened value. We submitted a comment in response to the commission's notice of informal hearing, and in that comment we raised several significant concerns with the procedures employed at this informal hearing.

In particular, we identified our concerns that the commission had denied all requests for cross-examination by applying a newly-announced and incorrect legal standard and that the commission decided to allot only one hour for six-minute presentations at the hearing.

These procedures are not consistent with Magnuson Moss and are particularly concerning in light of these other procedural deficiencies in this rulemaking. Ultimately, these inadequate procedures will

prevent the development of the record on important issues and lead to a rule that will have damaging effects for both consumers and industry.

As the FTC staff said earlier, and essentially I think conceded, the presiding officer does have the authority to provide more time for evidentiary hearing, and I employ you on behalf of the entire industry that you do so. Because of the 10-minute time limit imposed by the commission, my presentation going forward will focus on only a few key issues, but many other significant issues are detailed in our written comments

Lartease Tiffith:

Comments and in the petitions filed with Your Honor. I incorporate all of them by reference in my remarks here today.

Starting with the proposed disclosure requirements, I'll focus on two highly problematic provisions, the disclosure content and presentation requirements. The primary legal framework that currently applies to most auto-renewals is ROSCA, which requires that businesses provide texts that clearly and conspicuously discloses all material terms of the transaction. The current framework benefits industry and consumers by ensuring that consumers receive the information they need when considering whether to sign up for an auto-renewal while preserving flexibility for businesses to tailor sign up experiences to the needs of their customers. The proposed rule would disrupt the current regime by adding specific requirements dictating what auto-renewals disclosures must say and how they must be presented. These requirements are overly prescriptive and the commission has not provided evidence demonstrating that these requirements will provide meaningful consumer protection benefits in all contexts in which the requirements would apply.

As a result, the requirements will simply add burden to businesses and restrict innovation without any corresponding benefit. And as a technology develops, these prescriptive requirements will constrain companies from being able to adapt their offerings to the needs of their customers. The commission has not shown how these rigorous, sorry, these rigid requirements would operate in the best interest of consumers in all contexts. Overall, these requirements will undercut consumer clarity rather than improvement, and companies that already provide clear and conspicuous disclosures to their customers will face new uncertainties and risks, and the commission's refusal to allow development of the record on these issues will likely lead to an overly restrictive and harmful final rule.

Next, I'd like to address concerns around consent. Under ROSCA companies are required to obtain express informed consent from customers. The proposed rule in contrast states that in order to obtain express informed consent, a business must obtain the consumer's unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction.

We have concerns with this provision because the deceptive and unfair acts or practices the commission has identified in the rule-making records to support this revision are isolated egregious practices. The commission has not shown that such practices are prevalent across all or even a majority of the auto-renewal signup experiences that will be impacted by this division. These narrow deceptive practices are insufficient to support the commission's proposal, which would uproot the industry standard for obtaining consent to auto-renewal offers across all media.

For instance, for online subscription signup experiences that disclose the auto-renewal feature, the consent requirements will serve only to confuse consumers as they do not expect to have to consent a second time once they choose to purchase an auto-renewal plan. This experience will be particularly burdensome for customers of subscription bundles, potentially requiring them to check an additional box for each subscription in the bundle without any corresponding benefit to clarity or disclosure. By forcing businesses to adhere to this requirement, the MPRM will increase the length of all subscription

signup experiences regardless of any potential benefits to protecting consumers and sacrifice companies flexibility to tailor their signup experiences to the needs of their customers.

Next, I'd like to talk about the concerns around cancellation provisions and their proposed rule. ROSCA's current standard requires that companies provide customers with simple mechanisms to cancel their subscription. This is a flexible requirement that ensures customers are not trapped in unwanted subscription. The proposed rule, however, incorporates several problematic requirements that are significantly over broad without corresponding consumer protection benefits.

First, the proposed ban on so-called saves absent consumer consent to receive a save poses serious First Amendment concerns because it restricts the commercial speech that is neither misleading nor related to unlawful activity.

Next, the commission proposed approach is not proportional to any interest it might have because it imposes a blanket prohibition on all saves absent prior consent regardless of whether they impose any burden on consumers.

Finally, the proposal is not carefully designed to achieve the commission's goals. There are many less restrictive means of ensuring consumers are not overly burdened by lengthy cancellation flows, for instance, by prohibiting sellers from making more than two saves and narrowing the definition of saves.

Lastly, I'd like to address concerns around the cost and compliance burdens. We have significant concerns that the commission has vastly underestimated the cost that businesses will incur in attempting to comply with the proposed negative option rule. The commission has asserted without any evidence that these costs will not be significant. In reality, the proposed rule will force businesses to overhaul their subscription sign-up and cancellation expenses, which is a costly endeavor. IAB members have expressed significant concern that implementing the proposed rule will take immense resources and will require redesigns of all subscriptions, sign-up and cancellation expenses. Even minor changes to the customer experience can require significant time to design, tests and implement across a variety of ingress points. The fact that the proposed rule does not grant state law even further complicates compliance and will increase costs. Companies will be forced to divert significant resources to compliance programs that assess how to comply with each state's requirements as well as the commission's detailed proposed rule. The commission has not considered these facts, important facts, which must be assessed in order to issue an appropriately tailored rule.

I'll conclude by again raising concerns I raised earlier and again, employ Your Honor to use your discretion as the presiding officer here to allow for a more fulsome hearing to be conducted in the future. Thank you very much for your time today.

Speaker 2:

Thank you.

Katherine Johnson:

Good morning, Your Honor. I'm Michael Powell, president and CEO of NCTA, the Internet and Television Association. Our members include the nation's largest cable television and broadband providers and we provide home and mobile phone service as well. NCTA members also include the media companies that create content that consumers enjoy over cable and video streaming apps. We appreciate the opportunity to participate in this informal hearing today. It goes without saying that the Magnuson-Moss procedures can feel arcane, but at the heart of this rulemaking is a clear objective first to protect consumers from unfair and deceptive practices and second do so in a narrowly tailored manner that

does not ingest lawful business practices. In its zeal to do the first, I fear the commission is failing to do the second.

In my testimony, I will make four points. First, that the proposed rule is unjustifiably broad. Second, that the record shows that our industry's practices are lawful and benefit consumers. Third, that the true cost to comply with the proposed rule is dramatically higher than the agency's unsubstantiated assertion that expenses are de minimis. And fourth, that there must be a more rigorous process to address the material issues and disputed facts.

Let me now turn to the issue of the proposed rule's excessive breadth. To be clear, NCTA supports the FTC's efforts to protect consumers from unfair or deceptive practices. It should address situations where consumers get stuck with recurring payments for unwanted services and find it hard to cancel. The proposed rule expansion, however, balloons to encompass the entire U.S. market without distinguishing between beneficial practices and deceptive and unfair practices. Not only does this stretch the rule beyond the bounds of law, it risks upending popular, familiar services that consumers expect and enjoy.

The ominously labeled negative option feature is merely a plan that continues until the customer cancels. Most such plans present few concerns. In the agency's own words, they can provide substantial benefits for sellers and consumers. Such plans are convenient, avoiding the need to continuously renew a service with which they are satisfied and families frequently welcome promotional offers at discounted prices before paying full price. Moreover, in many industries like ours, automatic renewals are the only model that makes any sense. Consumers expect their internet service to flow reliably and without interruption. It would be quite aggravating to renew monthly and it could prove catastrophic to suddenly find your service cut off for failure to re-enroll at a time you most need it. Consumer advocates and FTC commissioners have similarly recognized the benefits of video services. Here too consumers benefit from negative options and easily subscribe and easily cancel. Given the genuine consumer benefits of many recurring plans, the commission has a legal obligation to separate the good from the bad. The commission's authority rests on regulating only areas where unfair or deceptive practices are widespread.

The record is replete, however, with examples of industries using the negative option lawfully and without any evidence of prevalent consumer harm. Yet the commission is unfazed in subjecting them to regulation, resting on a narrow set of examples. Regulating so indiscriminately is inviting certain judicial rejection. Moreover, it's just bad policy.

Injecting a bevy of new disclosures and content requirements into stable environments with established processes that are well understood by subscribers will create more confusion, not less, and placing speed bumps on conversations between consumers and their providers will deny them a rightful chance at a better deal and providers a fair opportunity to retain a good customer.

Let me talk briefly about cable, broadband, voice and video streaming services, which are prime examples of industries needlessly swept up in this over broad proceeding. The communication industries have longstanding practices of lawfully using recurring subscriptions and promotional pricing offers to the benefit of consumers. Notably, neither the FTC, NPRM nor the state AG comments cite any cases involving cable, broadband, voice or streaming services.

In fact, NCTA submitted significant evidence that disproves the prevalence of unfair or deceptive practices in our industry. The data confirms that our services are popular and that customers are satisfied. Tens of millions of consumers use our services. They know they are paying for continuing service. Customers give their broadband and streaming services high marks, and they know how to cancel rarely complaining about the process.

The FTC's highly prescriptive proposal requiring numerous disclosures, multiple consents and specific cancellation mechanisms is a particularly poor fit for our industry. Our members offer services in a variety of custom bundles. They're provided over a wide range of devices and platforms. Consumers, for example, frequently subscribe to a triple play bundle that includes cable, broadband and voice services. They may face difficulty and unintended consequences if they want to cancel only one service in the package.

The proposed simple click-to-cancel mechanism may not be so simple when such practices are involved. A consumer may easily misunderstand the consequences of canceling and it may be imperative that they learn about better options. For example, canceling part of a discounted bundle may increase the price for remaining services. When canceling phone service, a consumer needs to understand they will lose 9-1-1 or lifeline services as well. Especially important, low-income consumers could be deprived of lower-cost plans and special government programs that would allow their families to keep broadband service.

As drafted, the proposal prevents almost any communication without first obtaining the consumer's unambiguous affirmative consent. That could disrupt the continuity of important services, choke off helpful information and forego potential savings. It certainly raises First Amendment issues.

All this is unnecessary because the evidence shows that cable broadband and streaming customers are readily able to cancel and respond favorably to additional information and offers. The numbers are telling. Out of millions of cancellations, complaints received by NCTA members amount to only a tiny fraction of 1%. Three out of four of the cable and broadband customers who called to cancel end up retaining some or all service after speaking with an agent.

Now, not only would the rule undermine a business model that's working, but it would impose enormous costs on our businesses. The agency erroneously estimates that only a couple of hours are required to comply with the rules and it breezily insists non-labor costs will be de minimis. These are gross underestimates of the real-world costs. Our companies will have to make major changes to their online systems. They will have to review and revise sales and customer service materials across all media platforms, retrain personnel, and maintain records for much longer than the current practice. Major cable operators estimate that it could take two to three years to rebuild their systems and could cost 12 to $25 million per company. Costs could easily exceed a hundred million dollars for initial implementation. by our industry alone. This is hardly de minimis and likely would lead to higher prices for consumers. Cost is just one example of the material disputed factual issues that could affect the outcome of this proceeding that has not been given adequate consideration.

We respectfully request more process before the FTC finalizes any rule, a proposed rule that sweeps broadly across the marketplace to regulate practices that consumers like and rely on deserves a more serious examination, a stronger factual foundation and a more rigorous cost benefit analysis. NCTA and IAB urged the commission to consider a number of disputed issues of material fact in our prior filings. The commission's January 10th notice referred our request to the presiding officer to address.

Accordingly, Your Honor, we respectfully ask you one, to recognize and consider the disputed issues of material fact that we timely identified in our filings. Two, to give notice and opportunity for the public to participate in further proceedings to ensure full and true examination of these issues, and three, to issue a recommended decision taking into account all relevant and material evidence as the law requires. We appreciate this opportunity to speak today and welcome the opportunity to engage further in this rulemaking. Thank you very much.

Speaker 2:

Thank you.

Thomas Hare:

Good morning, Your Honor. My name is Thomas Hare. I'm co-founder and chief content officer of the Performance Driven Marketing Institute, a not-for-profit trade association representing more than 120 member companies doing business in performance and direct consumer marketing. I'd like to thank the commission for giving the PDMI the opportunity to testify today, as well as my fellow speakers and Judge Follack for making today's hearing a valuable forum. The PDMI is dedicated to promoting, protecting

Thomas Hare:

... affecting and advancing the needs of its members through networking, education, and advocacy programs. Our membership includes brands across a variety of products and services for whom subscription marketing is an integral part of their business. The association also accounts media companies, including Paramount, NBCUniversal, and Warner Bros. Discovery, among others, adtech companies, creative agencies, and more as members. The PDMI's members are not engaged in the types of practices identified as problematic in the Notice of Proposed Rulemaking, yet all of them would suffer from the chilling effect these proposed regulations would have.

In our prior written comments to the Commission, the PDMI has detailed member concerns about the harmful impact of specific provisions. Subscription programs effectively and efficiently allow brands to develop a deeper relationship with their consumers, and make it possible for them to innovate and provide products and services of interest to those consumers. These programs also reduce administrative costs, resulting in lower costs for consumers. They help businesses build customer loyalty, reducing acquisition costs, and again, resulting in lower costs for consumers.

The fact is that many of the practices the FTC deems harmful to consumers here are actually beneficial. Subscription programs allow consumers to gain access to goods or services at a lower price, and free trial subscriptions allow consumers the opportunity to try out a product before there's any obligation to purchase. There's also a clear convenience for consumers to not have to renew subscriptions for products and services they need and value without the stress of unintended interruptions of service. Think of mobile phone plans, home internet service, streaming TV and audio services, and other day-to-day needs in 2024. Beyond the many troubling provisions of the NPRM, the PDMI shares other speakers' alarm with the FTC's procedural approach to this rulemaking, including the ANPR was wholly deficient from a Mag-Moss perspective, because it did not contain or even suggest the FTC was considering many proposals found in the NPRM. Instead, the FTC said in the ANPR that it was focused on harmonizing regulations that address subscription services.

What was not included in the ANPR that is included in the Notice of Proposed Rulemaking? New rules for double opt-in, click to cancel, a ban on save the sale offers, and expansion of the rule that cover all misrepresentations. All are unprecedented and potentially harmful, and there's been no public discussion of them, nor consideration by the FTC of any regulatory alternatives. For the Commission to contend that there are no disputed issues of fact in this rulemaking is disingenuous at best. The comments in the record have identified with specificity many disputed issues of fact, none of which have been addressed by the Commission. The FTC also has failed to meet its burden of showing prevalence of the alleged unfair and deceptive practices it says require action, and that its proposed rule is narrowly tailored to address them.

Rather than delving into these issues and developing a more fulsome and accurate record, the FTC simply contends its existing evidence in the record is sufficient to meet its significant burdens in a Mag-Moss rulemaking. This is simply not true. For instance, for the double opt-in proposal, the cases cited involve a failure to make any disclosures at all. There's no evidence from these egregious cases of

wrongdoing that a clear and conspicuous disclosure of terms, paired with a requirement of a clear and affirmative consumer consent used by nearly all marketers, is not sufficient. For the save the sale proposals, the FTC provides no evidence of any deceptive save the sale practices, or evidence that it interferes with the consumer's ability to cancel. This is particularly harmful to consumers, since most save the sale efforts result in a savings for them. For click to cancel proposals, the FTC has provided no evidence supporting the need for a more prescriptive requirement than ROSCA's simple method of cancellation. There's ample evidence though, that a click to cancel requirement may cause inadvertent cancellation. Yet another disputed issue of fact the FTC has failed to address.

Finally, in its effort to expand the rule to cover any misrepresentations in marketing, even if unrelated to the negative option feature, we refer to former Commissioner Christine Wilson's dissent during this process, calling the effort an end run around ROSCA in an attempt to circumvent the US Supreme Court's decision in the AMG Capital case.

The final area of the FTC's procedural misdeeds is its failure to perform a true cost benefit analysis. Businesses would have to overhaul their entire consumer experience to comply with these proposed rules, increasing costs which would be passed along to consumers. For small businesses this could mean possibly ceasing operations, thereby decreasing competition and yes, resulting in higher consumer costs. Final confirmation of these rules as drafted would mean many marketers would abandon these business models resulting in less convenience and higher costs for consumers.

While the PDMI takes issue with many of the provisions in the NPRM, our members are most broadly concerned about three. The save the sale provisions are troubling, requiring a seller to obtain a consumer's unambiguously affirmative consent. To receive such an offer would cause more consumer harm than good by depriving consumers of information necessary to make an informed choice on whether to hear such an offer. As a result, many consumers would be precluded from receiving offers that result in additional savings. Certainly, there are more narrowly tailored requirements that could ensure a consumer's simple ability to cancel without disrupting this common practice that is beneficial for both businesses and consumers.

Second, the requirement that the cancellation method be as simple as the method the consumer used to initiate the negative option goes beyond what is necessary to address any deception or unfairness and is improperly vague. The question must be asked, as simple as what really? Whether one method is as simple to use as another is inherently subjective, and the NPRM offers no guidance about how this might be judged.

Finally, our members are concerned by the proposal to expand the scope of the negative option rule to cover any false or misleading statements in an ad, even if unrelated to the negative option feature. The proposal would put every advertisement containing a negative option feature at risk of becoming subject to a rule violation and significant civil penalties.

On behalf of its member companies, the PDMI asked Judge Follet to require the FTC to adhere to the requirements of Mag-Moss in this rulemaking process. The current NPRM should be viewed as an ANPR, and there should be both additional periods of time for consumers and businesses to comment, as well as additional public hearings. Congress put Mag-Moss in place specifically to prevent the FTC from doing what it's trying to do here, move forward quickly without adequately demonstrating a sufficient record to support these overly prescriptive and counterproductive proposals. Again, on the behalf of the PDMI's members, thank you again for the opportunity to speak today.

Speaker 3:

Thank you. That's the last speaker, right? We will take a five-minute recess now before I conclude this session today. Thank you. Be back in five.

When everyone else is ready, we're back. Okay, very good. I just have a few preliminary remarks. Per the Federal Trade Commission rule 1.13, my authority to extend the hearings is Schedule 30, [inaudible 01:04:30], schedule of further sessions is limited to 30 days, so that is why the timeframe. Okay. A week from today I would set a deadline for the parties to brief if they want to, any further briefing on issues of material fact that they might feel are at issue, citing specific cause for concern as to why the particular issue is an issue. That will enable further hearing sessions, perhaps on the date suggested by the Federal Trade Commission representative, of two weeks. I won't set that as a fixed date, but you might pencil it in. I will follow up any rulings today with a written order within the week. And that's about it.

Speaker 4:

Thank you so much, Your Honor. Yeah, we appreciate it.

Speaker 3:

Okay, thank you. The hearing session is concluded. Thank you.