December 22, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

RE: Negative Option Rule (16 CFR Part 425) (Project No. P064202)

The Interactive Advertising Bureau (IAB) welcomes this opportunity to submit this comment in response to the Federal Trade Commission's request for public comment on its Initial & Final Notice of Informal Hearing (Hearing Notice) for the Negative Option Rule.[1] IAB has been actively engaged in this rulemaking given the sweeping and novel ramifications of the proposed rule. IAB previously submitted a comment in response to the Commission's Notice of Proposed Rulemaking (NPRM), in which it requested the opportunity to present its position at an informal hearing and conduct cross-examination on disputed issues of material fact, consistent with the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (Magnuson-Moss).[2]

This comment sets forth IAB's serious concerns with the lack of due process and the substantive deficiencies of the informal hearing, which will stifle—not encourage—the required examination of important issues about the burden and effectiveness of the proposed rule. Instead of ensuring the informal hearing process is robust and meaningful, the Commission has severely undercut this important step in order to finalize the proposed rule without additional debate. In doing so, the Commission is circumventing the required rulemaking process, and relying on its own suppositions rather than developing a robust rulemaking record as Magnuson-Moss requires. The Commission's approach to the informal hearing is even more concerning in light of the other procedural infirmities that have plagued this rulemaking, including for example that the Commission impermissibly expanded the scope of the rule between the Advance Notice of Proposed Rulemaking (ANPR) and NPRM.[3] Viewing this rulemaking as a whole, it is clear that

[1] Negative Option Rule, 88 Fed. Reg. 85525 (Dec. 8, 2023) (hereinafter, "Hearing Notice").

[2] Comment of Interactive Advertising Bureau on Negative Option Rule, at 20-21 (filed June 23, 2023) (hereinafter, "IAB Comment").

[3] *See Prometheus Radio Proj. v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (purposes of notice and comment include "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review"); California v. Azar, 911 F.3d 558, 580 (9th Cir. 2018) (where agency "dramatically expanded" aspect of the rule and introduced features that were "not the subject of any previous round of notice and comment," public was "den[ied] the safeguards of the notice and comment procedure").

the Commission's approach has undermined the goals of the heightened procedural processes imposed by Magnuson-Moss and will lead to a deeply flawed rule.

This comment identifies IAB's specific concerns that: (1) the Commission incorrectly determined that there are no disputed issues of material fact that merit cross-examination; (2) the procedures for the informal hearing as provided in the Hearing Notice are inconsistent with the statute, legislative history, and past Commission practice; and (3) the Commission has provided inadequate time for interested persons to prepare for the hearing. All of these problems will prevent the Commission from remedying an already severely underdeveloped record, which numerous commenters have highlighted. This will result in a final rule that will unduly burden businesses with wasteful costs, confuse consumers, and dampen creativity and innovation without meaningful consumer protection benefits. Accordingly, IAB requests that the Commission remedy these deficiencies by issuing a new initial Hearing Notice that is consistent with the statute, including by inviting all commenters to participate in the hearing through documentary submissions, applying the appropriate standard for analyzing proposed disputed issues of material fact, providing participants more than ten minutes to raise important issues at the hearing, and allowing the presiding offer to issue a recommended decision. IAB further requests additional time to prepare for the informal hearing.

I. Background on IAB and Its Engagement in this Rulemaking

IAB represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns.[4] Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, IAB develops both technical standards and best practices for our industry. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing.

The proposed Negative Option Rule will have an enormously damaging impact on our members, and consumers who benefit from the convenience, savings, and options presented by autorenewals. As highlighted in IAB's comment on the NPRM, this rule will have major harmful repercussions for the marketplace once finalized, as it seeks to fundamentally alter how autorenewal marketing operates. For this reason, IAB (along with more than a thousand other stakeholders) provided detailed comments raising a significant number of issues that warranted further study or changes to the rule. Specifically, IAB identified concerns that the proposal would cause significant harm to both consumers and businesses in the form of increased costs, harm to innovation, and decreased consumer choice, without providing meaningful consumer protection benefits.[5] IAB also explained how the Commission had failed to comply with the requirements of Magnuson-Moss, for instance by failing to: (1) issue a sufficient ANPR, (2) show that the acts or practices that were the subject of the rulemaking were prevalent, and (3) define with specificity the acts or practices which are unfair or deceptive under the rule.[6] IAB also raised concerns that

[4] www.iab.com

[5] IAB Comment, at 1-2.

[6] *Id.* at 2-3.

the proposed rule was inconsistent with the Supreme Court's recent decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), that the ban on saves absent consumer consent posed First Amendment concerns, that the Commission had repeatedly failed to consider alternatives that would impose a significantly lower burden on consumers and businesses, and that it failed to explain deviations from its past practices.[7]

As part of its efforts to ensure these problems are thoroughly examined and documented in the record, IAB requested that the Commission hold an informal hearing pursuant to Magnuson-Moss, and it identified seven disputed issues of material fact that it sought to resolve through cross-examination of the Commission's witnesses.[8] Those disputed issues included the costs and burdens of the proposed rule, as well as whether the rule would effectively address the concerns the Commission had articulated in the NPRM. Five other commenters also requested a hearing, and another commenter raised an additional thirteen disputed issues of material fact.[9]

The Commission's Hearing Notice effectively silenced these commenters and shut down their attempts to participate in the rulemaking process required by Magnuson-Moss. The FTC's notice applied a newly-announced legal standard and swept all twenty of the proposed disputed issues of material fact aside by determining without individualized explanation or justification that none of them merited cross-examination.[10] This hasty and superficial approach is particularly inappropriate for a proposed rule that would introduce sweeping new legal requirements.

In addition to silencing the six commenters who requested the hearing, the Hearing Notice also eliminated any opportunity for other interested persons to participate in the informal hearing. First, the Commission expressly invited only the six hearing participants to submit comments in response to the Hearing Notice, which is contrary to Magnuson-Moss.[11] Second, the Hearing Notice announced that the initial and final hearing notices called for by the Commission's own rules would be collapsed into one, thereby depriving interested persons of an additional opportunity to request cross-examination.[12] The Commission has provided only 14 days for commenters to respond to this Hearing Notice, which is an egregiously short period of time in comparison to the Commission's ample timeframe to respond to the commenters' request for evidentiary support for the Commission's arguments.

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[7] *Id.* at 3-4, 17-18.

[8] *Id.* at 20-21.

[9] Hearing Notice, at 85526-29.

[10] *Id.* at 85527-28.

[11] 15 U.S.C. §57a(c)(2)(a) ("Subject to paragraph (3) of this subsection, an interested person is entitled to present his position orally or by documentary submission (or both).").

[12] 16 C.F.R. § 1.12(a) (stating that the initial notice of informal hearing should include "an invitation to interested persons to submit requests to conduct or have conducted cross-examination or to present rebuttal submissions, pursuant to § 1.13(b)(2), if desired"); *id.* § 1.12(c) (stating that the final notice of informal hearing shall include "[a] list of the interested persons who will conduct cross-examination regarding disputed issues of material fact" . . . "[b]ased on requests submitted in response to the initial notice of public hearing.").

Rather than using the informal hearing to take evidence with the goal of understanding the relevant issues, the Commission effectively nullified the hearing -- deciding that it would instead consist of six ten-minute presentations delivered virtually to an Administrative Law Judge (ALJ) from the Securities and Exchange Commission with essentially no authority to resolve any disputed issue. The FTC already announced that the ALJ will not make a recommended decision, and that her role will be restricted to ensuring the orderly conduct of the hearing, for instance by choosing the order of the presentations, and placing the transcript and comments on the rulemaking record.[13] The FTC's mandated process appears designed to silence critical voices rather than to facilitate open discussion as contemplated by Magnuson-Moss.

II. The Commission Incorrectly Concluded that There Are No Disputed Issues of Material Fact

IAB strongly disagrees with the Commission's superficial and unsupported conclusion that the disputed issues of material fact identified by IAB and the NCTA are "not genuinely disputed or material."[14] The Commission asserts two reasons for this: (1) that the proposed disputed issues of material fact are not supported by affirmative evidence provided by commenters that would satisfy the summary judgment standard; and (2) that the proposed disputed issues of material fact raised by commenters are "legislative" facts, rather than "specific" facts.[15] But these are not legitimate bases for finding that there are no disputed issues of material fact. Indeed, neither Magnuson-Moss, nor the Commission's rules or past practices, require disputed issues of material fact to be so-called "specific" facts, not "legislative" facts, or supported by affirmative evidence from commenters.[16] Instead, Magnuson-Moss simply states that "[a]n interested person is entitled … if the Commission determines that *there are disputed issues of material fact it is necessary to resolve* . . . to conduct . . . such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."[17]

IAB, as well as other commenters, had no notice of the Commission's novel standard for determining whether disputed issues of material fact merit cross-examination. In fact, the Commission's NPRM simply requested that commenters, "indicate whether there are any disputed issues of material fact that need to be resolved during the hearing."[18] IAB, as well as NCTA, indicated what disputed issues of material fact required resolution at the hearing per the Commission's request. The Commission has now dismissed all of the disputed issues raised by both commenters without any specific analysis of whether those facts were disputed, material, and necessary to resolve, which is the statutory standard. The Commission's lack of analysis is troubling, and is not only inconsistent with the statute but will also prevent the development of the record on important issues, as required by Magnuson-Moss and the Administrative Procedure Act

[13] Hearing Notice, at 85529.

[14] *Id.* at 85528.

[15] *Id.* at 85526-28.

[16] *See generally* 15 U.S.C. § 57a; 16 C.F.R. § 1.7-1.20.

[17] 15 U.S.C. § 57a(c)(2)(B) (emphasis added).

[18] Negative Option Rule, 88 Fed. Reg. 24716, at 24730 (Apr. 24, 2023) (hereinafter "NPRM").

(APA). As explained in more detail below, (1) IAB's proposed disputed issues of material fact meet the statutory standard, and (2) the Commission's newly announced requirements prevent additional development of the record that is necessary for the Commission to issue a proper rule.

A. IAB's Proposed Disputed Issues of Material Fact Are Genuinely Disputed, Material, and Necessary to Resolve.

In its comment, IAB disputed the Commission's estimates of cost and burden, as well as whether the proposed rule would actually improve consumer understanding. These issues are (1) disputed because the Commission asserts without evidence that the cost and burden for businesses will be minimal (while IAB asserts they will be significant) and that its proposed rule will address the unfair or deceptive acts or practices that it claimed were prevalent in the NPRM (while IAB believes the rule will cause significant confusion and prohibit legitimate and consumer-friendly practices); (2) material because they raise significant issues that should impact the content of the final rule; and (3) necessary to resolve because without this information, the Commission cannot make an informed and fair determination.

But rather than specifically evaluating each of IAB's proposed disputed issues of material fact, the Commission swept all seven of IAB's issues aside without any individualized analysis (along with thirteen issues proposed by the NCTA), and ignored another commenter's request that the Commission engage in further factfinding.[19] The fact that the Commission did not even attempt to analyze the twenty specific issues proposed by commenters further demonstrates the Commission's disregard for developing the rulemaking record and ensuring true and full disclosure of all material information. The Commission should not be able to rely on disputed factual conclusions while at the same time preventing interested commenters from cross-examining witnesses about their validity.

Applying the statute's standard for assessing whether a disputed issue of material fact merits cross-examination, it is clear that all seven of IAB's proposed issues were disputed, material, and necessary to resolve, and that allowing cross-examination would benefit all parties by fostering full and true disclosure of important issues that should inform the content of the final rule:

1. **Whether the costs associated with implementing these new requirements will be significantly higher than the FTC estimates**.

This is a significant issue disputed by IAB because the Commission has concluded with no basis that costs will not be significant, while IAB asserts that costs will in fact be substantial as well as disproportionate to any benefits from the proposed rule.[20] This issue is material because cost (as well as cost/benefit tradeoffs) is a significant consideration that would impact the

[19] *See* Hearing Notice, at 85526-28; *id.* at 85526 n. 14 (dismissing FrontDoor's request for further factfinding on disputed issues of material fact raised in the comments).

[20] NPRM, at 24731-32 ("The Commission has preliminarily determined that the proposed amendments to the Rule will not have such effects on the national economy; on the cost of goods and services offered for sale by mail, telephone, or over the internet; or on covered parties or consumers . . . .").

appropriate breadth of the rule. This is an important aspect of the decision to issue a rule that is necessary for the Commission to resolve under the APA. Through cross-examination, IAB could probe the basis for the Commission's estimate that the costs will not be significant and draw out any potential flaws in that analysis.

2. **Whether the NPRM makes compliance easier for businesses, in light of the lack of preemption of state law.**

This issue is also disputed because the Commission asserts that the proposed rule will simplify compliance for businesses, while IAB maintains that compliance will be more difficult and costs will be significant.[21] Not only will the rule exacerbate the current patchwork of state laws, but it will also create even more confusion through its unclear requirements such as cancellation that is "as simple as" sign-up. Like cost, compliance burden is material because it could impact the scope and specific provisions of the rule. It is necessary to resolve this issue because without this information the Commission cannot appropriately assess less burdensome alternatives as the APA requires. Through cross-examination, IAB could elicit information about the complexities of compliance created by the proposed rule and vet the facts that the Commission relied on to conclude compliance will be simplified.

3. **Whether the disclosure requirements proposed by the NPRM improve customer understanding of the terms of an automatic renewal across devices and contexts.**

This issue is disputed because the Commission asserts without citation to evidence that its strict disclosure requirements will improve consumer understanding, while IAB maintains that the Commission has failed to consider that more information is not always clearer, particularly across device types and contexts.[22] This issue is material because the resolution of this issue could lead to a change in the substance or applicability of the disclosure requirements, and is necessary to resolve because adopting a rule that is counter to the available evidence would not satisfy the APA. IAB could have used cross-examination to vet the Commission's conclusion and examine whether the disclosure requirements actually improve consumer understanding.

4. **Whether the double opt-in consent requirement improves consumer understanding, even if the autorenewal feature is disclosed per the proposed disclosure requirements.**

[21] *Id.* at 24726 (stating that the rule would "facilitate compliance by providing one-stop regulatory shopping"); *see also id.* at 24731 ("In addition, most sellers provide some sort of disclosures, follow consent procedures, and offer cancellation mechanisms in the normal course of business. Thus, compliance with the proposed requirements should not create any substantial added burden.").

[22] *Id.* at 24726-27; *see also* Improving online disclosures with behavioural insights, OECD (Apr. 2018), available at https://www.oecd.org/sti/consumer/policy-note-improving-online-disclosures-behavioural-insights.pdf.

This issue is disputed because the Commission asserts that double opt-in consent will meaningfully improve customer understanding of autorenewals, but IAB member experience suggests that this requirement will create new burdens for consumers without improving their understanding of autorenewal sign-up processes.[23] In particular, consumers are already familiar with how subscription sign-up experiences work, and could be confused by the lengthy and burdensome experiences required by the proposed rule. This is a material issue because it directly impacts the consent requirements in the proposed rule. The issue is necessary to resolve because whether the proposed rule actually provides meaningful consumer protection benefits is an important aspect the Commission must consider per the requirements of the APA. Through cross-examination, IAB could examine the basis for the Commission's conclusion and draw out more information about the effectiveness of the proposed rule.

5. **Whether a cancellation flow that complies with the Commission's requirements (i.e., that asks the consumer for consent to receive a save) is easier for a consumer to navigate and understand than a cancellation flow that simply provides the offer or discount.**

This issue is disputed because the Commission asserts that banning all saves absent consent will benefit consumers, while IAB maintains that asking a customer whether they would like to receive a save is no simpler than offering the save right away, and would create unnecessary burdens on consumers that prevent them from receiving beneficial offers.[24] This is material because it impacts whether the rule should require consent for saves at all, and is necessary to resolve because without this information, the Commission cannot accurately determine the least burdensome way to ensure that cancellation mechanisms comply with ROSCA's simple cancellation requirement, as the APA requires. IAB could have used cross-examination to test the Commission's conclusion, elicit flaws in that analysis, and elucidate less burdensome means of addressing the Commission's concerns.

6. **Whether consumers are actually confused or burdened by a reasonable number of "saves."**

IAB disputes the Commission's conclusion that all "saves" are harmful and burdensome to consumers, as many so-called "saves" convey truthful and helpful information, including about benefits and discounts.[25] This is a material issue because it will impact whether the ban on saves should be preserved or removed from the proposed rule. It is necessary to resolve because, without this information, the Commission cannot analyze the constitutionality of this provision or consider all important aspects of the problem as the APA requires. Through cross-examination, IAB could have explored whether the evidence shows that saves are harmful or helpful for consumers.

[23] NPRM, at 24727-28.

[24] *Id.* at 24729.

[25] *Id.*

7. **Whether the deceptive practices identified in the rulemaking record are limited to certain media (e.g., phone or in-person).**

IAB disputes the Commission's conclusion that unfair or deceptive acts or practices are widespread across all media.[26] This issue is material because it affects the scope of the rule, and whether a more targeted proposal would better address the Commission's concerns while avoiding some of the negative consequences. This issue is necessary to resolve because the Commission needs this information to avoid promulgating an overbroad rule that violates the APA. IAB could have used cross-examination to test the strength of the evidence supporting the breadth of the proposed rule.

B. The Commission Applied a Flawed Standard for Determining If Disputed Issues of Material Fact Merit Cross-Examination.

In the Hearing Notice, the Commission relied on the legislative history of Magnuson-Moss to assert that in order for disputed issues of material fact to warrant cross-examination, commenters must put forward affirmative evidence that would satisfy the summary judgment standard and demonstrate that those facts are "specific" facts, not "legislative" facts.[27] As noted above, the Commission announced this standard for the first time in the Hearing Notice denying cross-examination, and it is not required by the statute or the Commission's rules, nor was it described in the NPRM. Even more importantly, this standard should not be used to determine when cross-examination is warranted at informal hearings because it improperly shifts the burden from the Commission to commenters to justify the rule with vetted and robust evidence. This will have the effect of discouraging full and true disclosure of important issues and relieving the Commission of its obligation under the statute to engage in a meaningful fact-finding exercise that is capable of withstanding the scrutiny of interested persons.

For example, by requiring commenters to put forward affirmative evidence challenging the Commission's findings, the Commission is preventing a full evaluation of important issues that is necessary to issue a properly tailored rule. IAB closely reviewed the Commission's reasoning for the proposed rule, evaluated that analysis, and concluded, in light of its members' extensive experience with negative option marketing, that the Commission's analysis had serious flaws and that many of its findings were not reasonable in light of the limited (or lack of) evidence it cited. But instead of allowing IAB to explore these important issues at the hearing as the statute requires, the Commission asserts that it is actually IAB's burden to put forward evidence in order to establish that the Commission's findings are genuinely in dispute.[28]

The Hearing Notice reflects the Commission's failure to grapple with IAB's arguments by stating that, "if [the Commission's] findings are otherwise adequately supported by record evidence" the burden is on the commenters to "come forward with sufficient evidence to show there is a genuine, bona fide dispute over material facts that will affect the outcome of the

[26] *Id.* at 24726.

[27] Hearing Notice, at 85527-28.

[28] *Id.* at 85527.

proceeding."[29] But this was precisely the nature of many of IAB's arguments—that the Commission's conclusions about the proposed rule, including for example that it should incorporate double opt-in consent and prohibit all saves absent consumer consent, were not adequately supported by record evidence of prevalent unfair or deceptive acts or practices or analysis that considered the costs to consumers and businesses. Imposing the summary judgment standard in this context will thus serve to prevent true and full disclosure of material facts by allowing the Commission to simply declare that its own findings "are supported by ample evidence in the record."[30] It would allow the Commission to unfairly be the judge of its own determinations, regardless of how facially defective those conclusions might be, and then shift the burden to commenters who do not have access to the full record. This is not the process that Magnuson-Moss contemplated.

Second, the Commission also bases its denial of cross-examination on the ground that all of the proposed disputed issues of material fact are so-called "legislative" facts, not "specific" facts. According to the Commission, "legislative" facts "combine empirical observation with application of administrative expertise to reach generalized conclusions" and so "they need not be developed through evidentiary hearings."[31] Even accepting the Commission's conclusion that it is proper to exclude "legislative facts," the Commission's view of such facts is too broad. Almost every piece of evidence in a rulemaking will involve both "empirical observation" and an application of "administrative expertise." By excluding all such evidence, the Commission would render the fact-finding process of the informal hearing irrelevant.

Furthermore, the Commission misreads *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), which it quotes to assert that "legislative facts" need not be developed through evidentiary hearings.[32] But that quotation describes the typical rulemaking process, and it goes on to state that "[e]videntiary hearings, although not necessary to determine legislative facts, nevertheless may be helpful in certain circumstances. For example, Congress, when it enacted the Magnuson-Moss Act, recognized that special circumstances might warrant the use of evidentiary proceedings in determining legislative facts."[33]After discussing the Administrative Conference of the United States (ACUS) Recommendation that the Commission cites, the court explains that "a review of this and subsequent ACUS correspondence demonstrates that the term 'specific fact' refers to a category of legislative fact, the resolution of which may be aided by the type of adversarial procedures inherent in an evidentiary proceeding with limited cross-examination."[34]

IAB's proposed disputed issues of material fact constitute "specific" facts and their resolution would be aided by cross-examination. For example, how much the rule will cost and

[29] *Id.* (emphasis added).

[30] *Id.*

[31] *Id.* at 85527-28.

[32] *Id.*

[33] Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151, 1163 (D.C. Cir. 1979).

[34] *Id.* at 1164.

whether consumers and businesses will be confused by the requirements imposed by the rule are pure questions of fact, not policy judgments. IAB requests the Commission reconsider its conclusion, as denying all cross-examination will prevent the development of facts that is necessary to the resolution of important issues and will have major ramifications for the rule. Otherwise, the Commission's wholesale designation of all proposed disputed issues of material fact as "legislative" raises serious due process concerns for IAB, as well as concerns about the legitimacy of any final rule issued without cross-examination.

III. The Informal Hearing the Commission Intends to Provide Is Inconsistent with the Statute, Legislative History and Past Commission Practice

In passing Magnuson-Moss, Congress set forth heightened procedural and substantive requirements to ensure that Section 18 rules would be issued based on a well-developed record necessary to support such rules. This process is important because it ensures that significant rules impacting wide swathes of commerce—such as this one—are grounded in a thorough evaluation of all relevant considerations. One of these heightened procedural requirements is the informal hearing process, and numerous specific provisions of Magnuson-Moss indicate that Congress intended this hearing process to be robust and meaningful, so that important issues would be adequately scrutinized by relevant stakeholders. For example, by statute, interested persons are "entitled" to present their positions and to engage in cross-examination or rebuttal submissions on disputed issues of material fact to facilitate "a full and true disclosure."[35] The statute also provides for a presiding officer who must make a "recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[36] The importance of the hearing process is reinforced by the statute's provisions for judicial review. If the Commission wrongfully denies or limits cross-examination such that it "preclude[s] disclosure of disputed material facts which was necessary for fair determination," the resulting final rule can be set aside.[37] An inadequate hearing is thus a deficiency that can jeopardize the legitimacy of the final rule.

The hearing that the Commission intends to provide is not designed to encourage disclosure of information that will help inform the Commission's final rule. Instead, the Commission is avoiding any substantive engagement with the issues raised by multiple commenters. The Commission's erroneous determination that there are no disputed issues of material fact, as discussed above, improperly precludes interested persons' ability to fully participate in the hearing process via cross-examination and rebuttal submission.[38] The Commission is also failing to provide a mechanism by which interested persons may exercise their statutory entitlement to present their positions "orally or by documentary submission."[39] Lastly, the Hearing Notice purports to relieve the presiding officer of her statutory duty to make a recommended decision at

[35] 15 U.S.C. § 57a(c)(2).

[36] *Id.* § 57a(c)(1)(B).

[37] *Id.* § 57a(e)(3).

[38] *See id.* § 57a(c)(2)(B).

[39] *Id.* § 57a(c)(2)(A).

the hearing's conclusion.[40] These deviations from the statutory requirements minimize and devalue a hearing process intended to provide an important avenue by which the public may engage in the rulemaking process. And they ultimately serve to prevent any party or individual besides the Commission—including the presiding officer at the hearing—from providing their analysis and weighing in on the proposed rule.

The legislative history of the statute also demonstrates that the informal hearing is meant to generate robust evaluation of the issues raised by commenters. For example, the House Report that the Commission cites in the Hearing Notice explains how the Magnuson-Moss rulemaking process was designed to "permit the fullest possible participation in any such rulemaking proceeding and make available to the Commission the widest possible expression of views and data on the issues presented by the proposed rules."[41] But by shutting down all requests for cross-examination and allowing only six interested persons to participate in the hearing for a total of an hour, the Commission appears to be actively attempting to prevent the expression of views or data that conflict with its own shallow conclusions. The report goes on to explain that, "[i]t was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous."[42] The process the Commission is providing here, however, is designed to achieve the opposite by limiting oral presentations to six commenters in one hour of testimony, denying all requests for cross-examination, and prohibiting documentary submissions from any interested person except the six hearing participants.

Finally, the sixty-minute hearing format with no cross-examination is not consistent with the Commission's historically thorough approach to informal hearings in past Section 18 rulemakings, and the Commission has not explained this stark departure. For instance, during the rulemaking process for the Funeral Rule, the FTC held fifty-two days of hearings, in which three hundred and fifteen witnesses testified.[43] The hearings generated 14,719 transcript pages and approximately 4,000 exhibit pages.[44] When considering the Used Car rule, the FTC provided all witnesses an opportunity to make an opening presentation, allowed for cross-examination by representatives of all key stakeholder groups, including used car dealers, the auto rental and leasing industries, and consumer groups, and accepted rebuttal statements after the hearings.[45] More recently, the FTC held a day-long public workshop to explore proposed changes to the Business

[40] *See id.* § 57a(c)(1)(B) ("The officer who presides over the rulemaking proceeding shall make a recommended decision . . . .").

[41] H.R. Rep. No. 93-1606, at 32 (Dec. 16, 1974) (Conf. Rep.).

[42] *Id*. at 33.

[43] *Harry and Bryant Co. v. F.T.C.*, 726 F.2d 993, 996 (4th Cir. 1984).

[44] *Id.*

[45] 49 Fed. Reg. 45692 (1984).

Opportunity Rule.[46] The workshop was open to the public and welcomed comments from the public as well.[47] The mandated sixty minute hearing with no cross-examination presents a stark contrast with these prior hearings, and will result in the Commission issuing its final rule without the full development of the record required by Magnuson-Moss and the APA.

IV. IAB Requests More Time to Prepare for the Hearing

The Commission's Hearing Notice raised numerous significant issues, but it has only given the hearing participants three weeks to prepare for the informal hearing following comment submission, all of which is occurring during the holiday season. This short amount of time is inadequate for IAB and the rest of the hearing participants to prepare meaningfully for the presentation. Accordingly, IAB requests that the Commission delay the hearing to allow the parties adequate time to prepare.

V. IAB Reiterates the Points Made in its NPRM Comment

Finally, although this comment does not restate all of the points that IAB raised in its original comment, IAB seeks to highlight its concerns in light of the Commission's decision not to use the informal hearing to examine these important issues. IAB raised numerous procedural and substantive concerns with the proposed rule and the Commission still has the opportunity to change its approach to the informal hearing and use it to respond to the concerns raised by IAB (as well as over one thousand other commenters). To that end, IAB highlights several key points that would be productive to address at a meaningful and revised informal hearing.

A. The Proposed Rule Fails to Consider the Enormous Benefits of Subscription Services for Consumers.

As IAB previously raised, the proposed rule would eliminate significant cost savings and product options for consumers. Consumers benefit from the lower prices that businesses can offer through a subscription model. Consumers are entirely familiar with this model and the usual sign-up process, including free trials that offer consumers the chance to try out new products and services at no cost so that they can make a more informed decision about whether to make a purchase. The Commission has proposed to overhaul this settled industry practice by requiring businesses to "obtain the consumer's unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction" and "obtain the consumer's unambiguously affirmative consent to the rest of the transaction."[48]

These actions will negatively impact both consumers and businesses. Consumers do not expect to have to consent a second time once they choose to purchase an autorenewing plan. Indeed, requiring double opt-in consent will make the sign-up process more cumbersome

[46] FED. TRADE COMM'N, Business Opportunity Rule Workshop (2009), https://www.ftc.gov/news-events/events/2009/06/business-opportunity-rule-workshop.

[47] 74 Fed. Reg. 18712 (2009).

[48] 88 Fed. Reg. 24716, at 24735.

without demonstrated benefits in consumer understanding. It will increase the length of all subscription sign-up experiences, particularly for customers of subscription bundles. Moreover, the new requirements will increase costs for businesses, who will face major compliance costs to overhaul their sign-up processes, which will in turn increase costs for consumers.

The proposed rule's restriction of "saves" poses similar concerns. A cancelling customer might not know the full slate of benefits that come with her subscription. The proposed rule would define a business's effort to inform the consumer of these benefits—or a business's offer of a better deal to maintain its relationship with the customer—as a "save" and prohibit it absent advance consent to receive such information or offers. The Commission's definition of "saves" is overly broad, and it would prohibit the presentation of these truthful, useful, consumer-friendly details about a consumer's subscription before they cancel it. For example, the definition appears to prohibit a seller from informing a consumer what the consumer will lose by cancelling, even if those losses are irreversible, if the consumer does not give advance consent. Requiring consent to present this information would impose illegal burdens on truthful speech; would prevent sellers from sharing truthful, helpful information with consumers; and risks confusing consumers who likely expect to be presented with such information before cancellation. The practical result will be fewer benefits and less truthful information flowing freely to consumers.

Finally, the proposed rule will cost consumers money. It fails to make clear that legitimate "save" offers—which redound to consumers' benefit—are permissible. Indeed, save offers are a common industry practice and are beneficial to both consumers and businesses. For consumers, save offers provide discounted and tailored options to continue to receive a service. For businesses, save offers can retain customers whose current plan may not be a good fit but who might find their needs met through a different product. In addition, many customers want to change their product or services, not cancel. Companies can and should be able to help customers "right size" their account before cancelling, but the proposed rule would hinder truthful speech and thereby harm the consumers the rule is intended to help.

These are all important issues about the costs of the proposed rule and the benefits of autorenewals that the Commission has not adequately addressed, and could have been further illuminated at a more fulsome informal hearing.

B. The Proposed Rule Is Inconsistent with ROSCA and the FTC's Guidance.

Furthermore, as described in IAB's NPRM comment, the proposed rule's "as-simple-as" requirement departs from the text of ROSCA. ROSCA merely requires that a business provide "simple mechanisms for a consumer to stop recurring charges"; it says nothing about whether cancellation must be as simple as sign-up. The proposed rule also attempts to lock in the cancellation experience's level of simplicity (by keying it to the simplicity of the sign-up mechanism), but the statute gives businesses more flexibility than that. Furthermore, the proposed rule's requirement that "[a] disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it" is inconsistent with the FTC's longstanding guidance as set forth in the Dot Com Disclosures.[49] In this guide, the FTC

[49] *Id.* at 24734.

has taken the position that scrolling and hyperlinking are permissible in certain space-constrained circumstances.

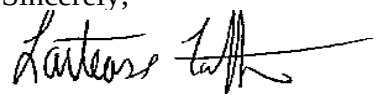
C. The Proposed Rule Prohibits Lawful Conduct that Exceeds the Commission's Authority to Regulate Unfair or Deceptive Acts or Practices.

With this proposed rule, the Commission has exceeded its statutory mandate. The FTC is charged with regulating "unfair or deceptive" acts or practices, but several of the proposed rule's requirements exceed the bounds of this authority by prohibiting broad swaths of conduct that are neither unfair nor deceptive. For example, the Commission's proposed cancellation requirements would prohibit any cancellation mechanism that presents a "save" to a customer, absent their express informed consent to receive that save. But the Commission has not explained how presenting a customer with a single "save" (for instance, a single offer for a discount that can be easily declined) constitutes an "unfair" or "deceptive" practice. Such a cancellation mechanism does not make any material misrepresentation or omission, and the save is both easily avoidable and provides a substantial benefit to consumers. IAB thus remains concerned that the proposed rule exceeds the Commission's authority.

* * *

IAB thanks the Commission for this opportunity to submit these comments and looks forward to working closely with the Commission on this important topic. Please do not hesitate to contact me at lartease@iab.com with any questions.

Sincerely,



Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau