

RULE MAKING PROCEEDING
Project No. P064202

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

NEGATIVE OPTION RULE : RECOMMENDED DECISION
: April 12, 2024

APPEARANCES: Katherine Johnson for the Federal Trade Commission,
Bureau of Consumer Protection, Division of Enforcement

Lartease M. Tiffith for the
Interactive Advertising Bureau (IAB)

Sarah Davies for the
International Franchise Association (IFA)

Michael Powell for the
NCTA – The Internet and Television Association (NCTA)

Thomas Haire for the
Performance Driven Marketing Institute (PDMI)

Berin Szoka for TechFreedom

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Recommended Decision (RD) finds that (1) the proposed amendment to the Negative Option Rule will have an annual effect on the national economy of \$100 million or more; and (2) the record does not establish what the recordkeeping and disclosure costs associated with the proposed rule will be.

I. INTRODUCTION

A. Procedural Background

This RD addresses disputed issues of material fact arising in the instant rulemaking proceeding of the Federal Trade Commission (FTC). The procedural history is as follows:

In 2019, the FTC issued an Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 52393 (Oct. 2, 2019) (ANPR) seeking public comment on the need for amendments to the existing Negative Option Rule. Following the ANPR, the FTC issued the *Negative Option Enforcement Policy Statement*, 86 Fed. Reg. 60822 (Nov. 4, 2021) (Policy Statement). That document describes the several statutes and FTC rules that impact the FTC’s negative option enforcement cases and provides an interpretation for the connection between such cases and the statutes and rules.¹

In 2023, the FTC sought public comment on specific proposed amendments with a Notice of Proposed Rulemaking, *Negative Option Rule*, 88 Fed. Reg. 24716 (Apr. 24, 2023) (NPRM). The proceeding is a so-called Magnuson-Moss rulemaking, authorized pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a,² which provides additional procedural steps beyond those of the Administrative Procedure Act, 5 U.S.C. §§ 553, 601 *et seq.*, such as presentations by “interested persons” in an informal hearing. The FTC appointed the undersigned Administrative Law Judge (ALJ) to preside over the informal hearing in the proceeding, *Negative Option Rule*, 88 Fed. Reg. 85525 (Dec. 8, 2023) (Hearing Notice); Fed. Trade. Comm’n, Notice Regarding Requests Relating to the Informal Hearing in Project No. P064202, the Negative Option Rule (Jan. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/P064202-Neg-Option-Rule-Notice-Informal-Hrg-Requests.pdf (specifically authorizing the undersigned to “add or modify designated issues of material fact that are necessary to be resolved”); *see also* 16 C.F.R. § 1.13(b)(1)(ii) (“The presiding officer may at any time on the presiding officer’s own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to § 1.12(a).”).

¹ The statutes and FTC rules are: Section 5 of the FTC Act, 15 U.S.C. § 45(a); the Restore Online Shoppers’ Confidence Act, 15 U.S.C. §§ 8401-8405 (ROSCA); the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-9; the Rule on the Use of Prenotification Negative Option Plans, 16 C.F.R. § 425.1 (applies to plans like book-of-the-month clubs in which sellers provide periodic notices to participating consumers offering goods that are sent and charged for if the consumers do not decline the offer); the Mailing of Unordered Merchandise Section of the Postal Reorganization Act, 39 U.S.C. § 3009 (authorizing the FTC to charge as an unfair or deceptive practice in violation of Section 5 of the FTC Act any use of the mails to send unordered merchandise); and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (protects individuals; enforced by the Consumer Financial Protection Bureau).

² *See* Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

As the FTC ordered in the Hearing Notice, the hearing before the undersigned Administrative Law Judge in this proceeding commenced on January 16, 2024. The following interested persons appeared: TechFreedom; the International Franchise Association (IFA); the Interactive Advertising Bureau (IAB); the Internet and Television Association (NCTA); the Performance Driven Marketing Institute (PDMI); and the FTC Bureau of Consumer Protection (BCP).³ Following that hearing session, the undersigned designated these two issues of disputed material fact:

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

A second hearing session was held on January 31, 2024, to address the designated disputed issues of material fact. The expert report of Christopher Carrigan and Scott Walster, *Economic Analysis of the Federal Trade Commission's Proposed Negative Option Rule*, offered by IAB, was admitted in evidence.⁴ A third hearing session was held on February 14, 2024, at which Katherine Johnson appeared for BCP, and Lartese M. Tiffith appeared for IAB. The authors of the expert report, Messrs. Carrigan and Walster, testified on cross-examination.

BCP and IAB filed post-hearing briefs on February 22, 2024, and IAB filed a response to BCP's post-hearing brief on February 28, 2024.

The findings in this RD are based on the record. Preponderance of the evidence was applied as the standard of proof in the absence of any precedential or statutory standard of proof for FTC rulemaking informal hearing proceedings.⁵ All arguments and proposed findings that are inconsistent with this RD were considered and rejected.

³ The Hearing Notice designated TechFreedom; IFA; IAB; NCTA; PDMI; and FrontDoor as "interested persons" to make oral presentations and/or additional documentary submissions during the hearing. *See* 15 U.S.C. § 57a(c)(2)(A) ("an interested person is entitled to present his position orally or by documentary submissions (or both)"); 16 C.F.R. § 1.11(e). The undersigned treated BCP Enforcement as an interested person, as well. All of the foregoing, except FrontDoor, appeared at the hearing sessions.

⁴ Citations to the transcript will be noted as "[month, day] Tr. ___." Citations to exhibits offered by an interested person will be noted with that party's name, *e.g.*, "IAB Ex. ___."

⁵ The substantial evidence standard is applied by a court in reviewing the FTC's factual determinations. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 985 (D.C. Cir. 1985) ("The legislative history of the Magnuson-Moss Act further provides that the substantial evidence standard is to be applied only to the Commission's 'factual determinations' . . ."). "A factual finding is supported by substantial evidence if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522 (1981)). When the FTC is reaching its own factual determinations, if the record contains evidence supporting more than one possible factual

B. Allegations and Arguments of the Parties

This proceeding concerns alleged disputed issues of material fact arising from the NPRM, which proposes to amend the FTC's Negative Option Rule, by replacing the current rule, 16 C.F.R. § 425.1, with a new rule, 16 C.F.R. §§ 425.1-.8. IAB and other commenters argue, *inter alia*, that the FTC glossed over significant costs in finding, in a conclusory manner, that the proposed rule would not have an annual effect on the national economy of \$100 million or more and would not have a significant economic impact on a small number of small entities.⁶ *See* NPRM, 88 Fed. Reg. at 24731 ("The Commission has preliminarily determined that the proposed amendments to the Rule will not have such effects . . .").

In their comments in response to the NPRM, NCTA and IAB articulated twenty instances of what they argued were potential issues of disputed material fact. The Hearing Notice summarily found that these comments did not raise disputed issues of material fact.⁷ At the first hearing session, the interested persons reiterated their arguments that there are disputed issues of material fact. Thereafter, as noted above, the undersigned designated these two issues of disputed material fact:

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

determination, the agency "base[s] its determination on a 'preponderance' of reliable evidence." Trade Regulation Rule; Mail or Telephone Order Merchandise, 58 Fed. Reg. 49096, 49105 n.125 (Sept. 21, 1993); *cf. Steadman v. SEC*, 450 U.S. 91, 98-102 (1981) (concluding that the substantial evidence requirement under the Administrative Procedure Act, 5 U.S.C. § 556(d), means the traditional preponderance-of-the-evidence standard in the agency's decision-making). For this reason, preponderance is the more appropriate standard for this informal hearing. At any rate, "preponderance of the evidence" is a higher standard than "substantial evidence."

⁶ *See* 15 U.S.C. § 57b-3(a), which requires a preliminary regulatory analysis to amend a rule if the FTC estimates that the amendment will have an annual effect on the economy of \$100 million or more; 5 U.S.C. §§ 601-612, which requires a Regulatory Flexibility Act Analysis unless the FTC certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See also* NPRM, 88 Fed. Reg. at 24731.

⁷ The FTC stated that a disputed issue of material fact must raise "specific facts," and not "legislative facts," and must be not only "material" but also "necessary to be resolved." 88 Fed. Reg. at 85526-28 & nn., 18, 19, 21, 22. The FTC found that the commenters' proposed disputed issues of material fact are "quintessentially 'legislative facts' . . . [and] not issues of 'specific fact'." Thus, it found that there are "no 'disputed issues of material fact' to resolve at the informal hearing." 88 Fed. Reg. at 85527-28.

The two issues are a distillation of the more specific and quantifiable of the commenters' proposed disputed issues of material fact. The issues are "necessary to resolve" because the FTC is required to consider them under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively. *See* 16 C.F.R. § 1.13(b) (disputed issues of material fact must be "necessary to resolve").

Many of the disputed issues of material fact proposed by NCTA and IAB relate to the prevalence of unfair or deceptive negative option practices as a whole or in specific industries, as the Commission noted in its December 8 Hearing Notice. *See* 88 Fed. Reg. at 85527. Others relate to the anticipated effectiveness of the proposed rule in reducing those harms. For both categories, the proposed issues do not raise issues of specific fact; these are "generalized conclusions" that would not be aided by "trial-type" factfinding. *Id.* at 85528. For example, NCTA commented, "Is there substantial evidence that (1) [various communications services] have failed to provide consumers with material information relating to their services and any negative option features and (2) such practices are prevalent." Comments of NCTA at 35 (June 23, 2023), quoted in 88 Fed. Reg. at 85526. A potential response to this type of question is not particularly quantifiable. Thus, it is a question that would be difficult to test through cross-examination at an evidentiary hearing. To designate an issue of material fact for cross-examination, it must be that "[a] full and true disclosure with respect to the issue can be achieved only through cross-examination." 16 C.F.R. § 1.12(b)(2).

In dismissing NCTA and IAB's argument that "there is insufficient evidence to support the Commission's initial finding that the costs imposed by implementing the Rule's . . . requirements are not significant," the FTC found that "this statement, without more, does not rise to the level of a bona fide dispute." Hearing Notice, 88 Fed. Reg. at 85527. However, during the first hearing session and in supplementary briefing, the interested parties presented additional facts supporting their contention that costs would be significant. NCTA stated that initial implementation of online systems that comply with the proposed rule would cost major cable operators \$12 to \$25 million per company, which could amount to over \$100 million in that industry alone. Jan. 16 Tr. 13. IFA members estimated that compliance with the new rule would require hundreds of hours of review. Jan. 16 Tr. 8. IAB included in its briefing a report from Professor Yoram Jerry Wind, which estimated that compliance costs for six companies would exceed \$53 million. IAB Supplemental Comment, Attachment B, Expert Report of Professor Yoram Jerry Wind ¶ 9 (Jan. 23, 2024). These oral statements and supplemental submissions, which were not before the Commission when it issued the Hearing Notice, were sufficient for the issue of costs to rise to the level of a bona fide dispute.

In its post-hearing brief BCP argues that the record has insufficient evidence to conclude that the economic impact of the proposed amendments will have an effect on the national economy of \$100 million or more or that the specific recordkeeping and disclosure costs of the proposed amendments exceed the NPRM's estimated amounts. IAB argues, pointing to the Carrigan and Walster evidence, that the effects would easily surpass \$100 million annually, regardless of whether the costs or benefits is considered. It also argues that the recordkeeping and disclosure costs will be higher than the NPRM's estimates, generalizing from limited estimates that it, IFA, and NCTA provided. BCP did not offer any evidence to counter the evidence offered by IAB, IFA, and NCTA.

II. FINDINGS OF FACT

Based on the evidence in this proceeding: 1. It is found that the proposed rule will have an annual effect on the national economy of \$100 million or more; and 2. There is insufficient evidence to make a finding as to the size of the recordkeeping and disclosure costs associated with the proposed rule.

Background

Negative option offers contain a term by which the seller may interpret a consumer's failure to take affirmative action to reject a good or service or to cancel an agreement as acceptance or continuing acceptance of the offer. Examples are: automatic renewals, such as newspaper subscriptions and cable service; continuity plans, in which consumers agree to receive and pay for periodic shipments of goods or provisions of services, such as ongoing credit monitoring; free trials in which consumers receive goods or services for free for a trial period, after which they are charged unless they take action to decline the offer; and prenotification plans, such as book-of-the-month clubs, in which sellers provide periodic notice to consumers offering goods and send and charge for the goods unless the consumers decline the offer.⁸ The possible advantages to sellers are obvious – uninterrupted flow of revenues – as are the possible advantages to consumers – *e.g.*, uninterrupted telephone service.

At no time during the hearing did BCP offer any evidence as to either of the two issues of disputed material fact designated by the undersigned. It confined itself to cross-examination.

As noted above, offered by IAB and in evidence, is Christopher Carrigan and Scott Walster's January 30, 2024, expert report ("IAB Exp. Rept."). Mr. Carrigan, an academic, and Mr. Walster, a consultant, specialize in economic analysis in the context of regulatory policy. Feb. 14 Tr. 3-4; IAB Exp. Rept. at 2. They testified at the February 14, 2024, hearing session. IAB engaged them to perform an economic analysis of the possible benefits to consumers and costs to businesses of the proposed rule amendment to assess whether or not the economic effects of the rule would meet or exceed \$100 million annually. Feb. 14 Tr. 4, 13. Neither was aware of the negative option rule prior to their engagement. *Id.* at 8. However, Mr. Carrigan conceded that he had been enrolled in a (unidentified) negative option program that he had difficulty in cancelling, and Mr. Walster vaguely recalled seeing credit card statements that suggested that he was enrolled in something that he was not aware of. *Id.* at 12.

The Proposed Rule will have an Annual Effect on the National Economy of \$100 Million or More

The proposed rule amendment will have an annual effect on the national economy of \$100 million or more, whether costs to businesses, or, separately, benefits to consumers are considered. IAB Ex., *passim*; Feb. 14 Tr., *passim*. Specifically:

⁸ According to the FTC's Policy Statement, prenotification plans account for only a small fraction of current negative option marketing. 86 Fed. Reg. at 60824.

Costs to Businesses - \$100 Million or More

The FTC estimates that 106,000 entities currently offer negative option features. NPRM, 88 Fed. Reg. at 24733. A comparator for the potential costs of compliance is the FTC’s nearly contemporaneous Deceptive Fees rulemaking. *See* Notice of Proposed Rulemaking, *Trade Regulation Rule on Unfair or Deceptive Fees*, 88 Fed. Reg. 77420 (Nov. 9, 2023). In that proceeding the FTC estimated hourly wages for several professionals – lawyers, website developers, and data scientists – whose services might be used in bringing affected businesses into compliance with proposed disclosure enhancements. 88 Fed. Reg. at 77458. Those hourly wage rates ranged from \$42.11 for website developers to \$78.74 for lawyers. *Id.* Using even the lowest of these rates – for website developers – and omitting consultations with lawyers to determine whether a business’s practices or proposed changes complied with the amended Negative Option rule, would mean that, unless each business, on average, used fewer than 23 hours of professional services to comply, the rule would cost more than \$100 million. This is clearly unrealistically low inasmuch as there are several new requirements proposed that would require changes in existing practices and/or disclosure forms, such as: understandable clear and conspicuous display of disclosures in plain language; express informed consent to the negative option feature separately from the rest of the transaction; simple cancellation mechanism (“click to cancel”); a simple (“yes” or “no”) means to allow customers to decline to receive any additional offers (“saves”) during the cancellation process. *See* IAB Exp. Rept. *passim*. NCTA estimated that the proposed rule would cost major cable operators \$12 to \$25 million per company initially. Jan. 16 Tr. 13. IFA members estimated that compliance with the new rule would require hundreds of hours of review. *Id.* at 8.

In determining whether the proposed rule will have an annual effect on the national economy of \$100 million or more, it is the incremental benefits and costs over the existing law that must be estimated. 15 U.S.C. § 57b-3(a); *see* Feb. 14 Tr. 20. BPC cross-examined Messrs. Carrigan and Walster on whether they sufficiently considered the existing regulatory scheme and whether their analysis appropriately discounted costs businesses are already expending. Feb. 14 Tr. 20-28. Mr. Walster testified that their expert report included various assumptions about the percentage of firms already in full compliance with the proposed rule to account for incremental cost increases. *Id.* at 24. Mr. Walster also identified gaps in the existing regulations and laws – which are highlighted in the NPRM – that the proposed rule would address. *Id.* at 23; *see* 88 Fed. Reg. at 24726. Applying the most extreme assumption in the expert report, 80% of the businesses using negative option marketing would have to be already in full compliance with the proposed rule for costs to remain under \$100 million. IAB Ex. at 9-10. While it is conceivable that the practices of almost all businesses that would be affected by the proposed Negative Option Rule amendments already comply with the proposal, this would be inconsistent with the widespread problems and abuses that the NPRM describes.

Benefits to Consumers - \$100 Million or More

Using the U.S. Bureau of Labor Statistics definition of “household,” there are over 134 million households in the U.S. Even if only half of the households were affected, the annual benefits would have to average less than \$1.50 per household to avoid reaching the \$100 million threshold. Again using the Deceptive Fees rulemaking for comparison, the FTC calculated the

value to an individual of time saved by virtue of the proposed amendment at \$24.40 per hour. 88 Fed. Reg. at 77456. An annual savings of \$1.50 per household would equate to the value of three minutes of a non-work hour. Yet the proposed amendment to the Negative Option Rule was described as alleviating a problem of consumers' being forced to spend endless hours trying to cancel unwanted negative option programs.

Recordkeeping and Disclosure Costs Associated with the Proposed Rule

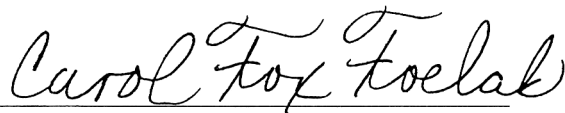
There is insufficient evidence to make a finding concerning the second issue – “What will the recordkeeping and disclosure costs associated with the proposed rule be?” IAB made a well-reasoned argument that the costs will be *higher* than the NPRM’s estimates, generalizing from limited estimates that it, IFA, and NCTA provided. However, it did not provide any evidence to establish what the costs *would be*. Nor did BCP provide any evidence to support the NPRM’s estimate. Accordingly, it is not possible for the undersigned to make a finding as to the recordkeeping and disclosure costs associated with the proposed rule. Further, in the absence of evidence, the issue is not genuinely disputed.

III. RECORD CERTIFICATION

It is certified that the record on which the findings of fact in this RD are based includes evidence from testimony taken in the hearings of January 16, January 31, and February 14, 2024, documentary exhibits admitted in evidence by the undersigned, and the rulemaking record to date. *See* 16 C.F.R. § 1.18(a).

IV. ORDER

This Recommended Decision is issued and shall become effective in accordance with and subject to the provisions of Section 1.13(d) of the FTC’s rules for trade regulation rulemaking, 16 C.F.R. § 1.13(d). This ends the informal hearing portion of the Negative Option rulemaking proceeding.



Carol Fox Foelak
Administrative Law Judge