

February 22, 2024

Presiding Officer Carol Foelak
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Presiding Officer Foelak:

We wrote to you on February 8, expressing the concern of consumer advocates about the persistent harms of unfair and deceptive negative option practices. We also highlighted the lack of reliability and credibility of the report commissioned by the Interactive Advertising Bureau (“IAB”) on January 31, upon which industry groups have relied to undo an entire Federal Trade Commission rulemaking process. Another informal hearing was held on February 14¹, during which the authors who were retained by IAB to prepare this report appeared and testified. During that hearing, you stated that post-hearing briefs may be filed by February 22, 2024. As such, Consumer Federation of America, the National Consumers League, and the National Consumer Law Center (on behalf of its low-income clients) submit these comments.

We write to reiterate our concerns about the report and testimony taken during these protracted informal hearings and how they may impact the success of an updated Negative Option Rule. It is critical at this juncture to acknowledge the extreme impact of this testimony and we urge you to review these statements critically. Notably, during the hearing, neither of the two individuals who authored the report and testified were subject

¹ References to the transcript “Tr.” are included throughout this letter. The transcript is available at https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-negative-option-rule-informal-hearing-feb-14-2024.pdf

to any voir dire regarding their expertise, experience, bias or background before providing opinion testimony. The two individuals testified that, prior to January 2024, when they were hired by IAB to write this report, they had no background or familiarity with the Negative Option Rule. (Tr. 8). They further testified that they had not studied the FTC's Negative Option Advance Notice of Proposed Rulemaking in detail which began this entire rulemaking process, and they did not participate in the public comment period. (Tr. 8). These individuals further testified that their estimates regarding compliance costs were based on assumptions – not inquiries or research about actual rates of compliance by IAB members with existing and sometimes overlapping laws, regulations, or policy guidance. (Tr. 26-27). To accept the opinions and conclusory statements of these individuals about a Rule which they have not studied in appropriate detail does a disservice to the rulemaking process.

Despite having **one year** to prepare and raise these issues in a manner that would allow for a reasonable estimate of costs, IAB chose to wait until the very last possible minute to introduce this testimony and report in an effort to stall an entire rulemaking that would have substantial benefits for consumers. This failure to participate in a public rulemaking should not be rewarded.

It is critical to remember why this rulemaking process was initiated – consumers are suffering harm as a result of unfair and deceptive conduct. The public stands to gain from clear rules that ensure consumers are no longer defrauded by unwanted subscription and burdensome cancellations, and consumers deserve the opportunity to make informed choices rather than be trapped in onerous, ongoing agreements. The report and testimony that were commissioned by IAB fall far short of establishing a proper basis to stall this rulemaking.

The undersigned consumer advocacy organizations appreciate the opportunity to provide input to this process and urge you to allow the Commission to move forward with its work to protect consumers and the marketplace.

Sincerely,

Consumer Federation of America

National Consumer Law Center (on behalf of its low-income clients)

National Consumers League