

**Comments of**

**TechFreedom**

Berin Szóka<sup>i</sup>

**At the**

Open Commission Meeting

**January 18, 2024**

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## INTRODUCTION

On January 18, 2024, TechFreedom's president, Berin Szóka, delivered remarks at the FTC's Open Commission Meeting. His oral remarks are presented here, lightly edited for clarity.

### **I. Comments of Berin Szóka**

I'm Berin Szóka, President of TechFreedom and a consumer protection law scholar.

Because the FTC has uniquely vast and flexible powers, the Magnuson-Moss rulemaking process aims to ensure that it fully vets the tradeoffs inherent in any trade regulation. Hearings are the key.

Since 1980, the FTC has generally taken Mag-Moss hearings seriously. Even on relatively minor updates to trade rules with limited sectoral effect, hearings ran weeks with hundreds of speakers. But now that the Commission is making the first new Mag-Moss rules in decades, the Commission is ignoring the safeguards Congress imposed and cutting every corner.

The proposed negative option market rule would affect business practices across the entire economy. Over 1100 comments were filed. Commenters disputed key facts about the rule's costs, but the Commission overruled them, barred cross-examination, and ordered a purely perfunctory hearing last Tuesday. With just one hour for five speakers, it was only a slightly longer version of today's open-mic session. It was, in short, theatre.

Instead of its own Administrative Law Judge, who has scrutinized how the Commission uses its broad powers, Chair Khan picked an ALJ from the Securities & Exchange Commission to run Tuesday's hearing. She might have thought Judge Foelak would operate as a glorified timekeeper. Instead, the judge ordered a further hearing with more time for commenters to submit evidence about disputed issues of fact. That's one small step for due process. But if the Commission is confident that the rule is worth issuing, it shouldn't fear allowing a full discussion of the evidence.

The bigger problem remains: the proposed rule applies not only to the use of negative option marketing, but to all aspects of any service that uses negative option marketing. So the Commission could, for the first time, impose civil penalties for ordinary misrepresentations, such as product efficacy or national origin. Congress chose not to give the FTC this power. It's improper for the Commission to claim that power by overly broad rulemaking. Any rule issued should focus on negative option marketing itself.

Thank you.

Respectfully submitted,

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