asurion

140 11th Ave N
Nashville TN 37203
asurion.com

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Office of the Secretary
600 Pennsylvania Avenue NW,
Suite CC-5610 (Annex N)
Washington D.C. 20580

RE: Negative Option Rule; Project No. P064202

INTRODUCTION

Asurion welcomes the opportunity to provide comments in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking ("NPRM") regarding its proposal to amend its Negative Option Rule ("Proposed Rule"). While Asurion appreciates the intent of the Commission's proposal, Asurion is concerned that the Proposed Rule is overly broad, targets well-regulated segments of the economy, and would impose undue and unintended costs to both American businesses and consumers. Asurion therefore respectfully asks that the Commission narrow its Proposed Rule by exempting insurance agreements, service contracts on consumer goods, and cancellable month-to-month agreements. Every jurisdiction that has addressed the question of auto-renewal subscriptions has exempted either insurance agreements and service contracts, exempted month-to-month agreements, or exempted both.[1] Asurion respectfully asks the Commission to do the same.

Asurion is the nation's largest technology solutions company with over 12,000 employees across the country. We offer a range of insurance and service contract products that protect consumers' personal electronic devices from loss, theft, accidental damage, and electrical and mechanical failure. By rapidly fixing and replacing devices that help consumers navigate their daily lives, Asurion has seen high consumer satisfaction and tremendous growth such that one out of every three American households has at least one Asurion subscription. With tens of millions of active insurance policies and service contracts in place, the Proposed Rule would have significant impact and cost to Asurion's operations and negative consequence for the consumer.

[1] Alaska, California, Colorado, Connecticut, Delaware, District of Colombia, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, New Mexico, New Jersey, New York, North Carolina, North Dakota, South Dakota, Tennessee, Oregon, Utah, Vermont, Virginia have all adopted auto-renew laws in some form.

INSURANCE PRODUCTS

Insurance is a highly regulated industry that Congress has acknowledged should remain regulated at the state level. Federal overreach into this area would be both unnecessary and contrary to federal law.

a. States recognize that automatic renewal laws should not apply to insurance.

The insurance products offered by Asurion are regulated by the Departments of Insurance in all fifty states, Puerto Rico, and the District of Columbia. Asurion is licensed in every jurisdiction, and both its sales practices and claims handling are subject to each respective jurisdiction's oversight. Additionally, the insurance policy terms and conditions, rates, and rules are subject to filing and approval with each regulator.

In talking to stakeholders and legislatures around the country, it is evident that the issues consumers have with auto-renew agreements are not with insurance products or service contracts, but with unregulated segments of the economy that lock consumers into multi-month or yearly contracts. As a result, jurisdictions around the country have exempted entities that are already regulated by departments of insurance from their respective auto-renew regimes.[2] As drafted, the proposed rule imposes new federal regulation on the insurance industry, which states already amply regulate.

b. The Commission does not have jurisdiction to regulate the business of insurance and attempting to do so in the Proposed Rule would violate the McCarran-Ferguson Act.

Congress prohibited FTC regulation of the "business of insurance" in § 2(b) of the McCarran-Ferguson Act.[3] In determining whether conduct constitutes the "business of insurance" in this context, the Supreme Court looks to three factors: First, an "indispensable characteristic of insurance" is the "spreading and underwriting of a policyholder's risk." *Union Labor Life Ins. Co. v. Pierno*, 458 U.S. 119, 128-29 (1982) (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)). Second, the Court identified "the contract between the insurer and the insured" as being "[a]nother commonly understood aspect of the business of insurance." *Id*. at 129. Finally, a court must ask whether the practice is limited to entities within the insurance industry. *Id*.

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[2] *See generally* Cal. Bus. & Prof. Code §§ 17605 (2021); HI Rev Stat § 481-9.5 (2018); Tenn. Code § 47-18-133 (2021); N.Y. Gen. Bus. Law § 527-a (2021); Del. Code tit. 6 § 2734; N.C. Gen. Stat. § 75-41 (2017).

[3] 59 Stat. 33, as amended, 15 U.S.C. §§ 1012. The Act states:
"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance...." § 2, 15 U.S.C. §§ 1012(a), (b).

While none of the criteria above is determinative, *id*., the practice of insurance companies utilizing auto-renewal provisions in their agreements with subscribers fits squarely within each of the three factors. Consumers rely upon auto-renewal provisions to ensure against lack of coverage. This is integral to both ensuring against loss and spreading risk within an insurance pool. Second, this practice is, and indeed *must* be, present in a clear and conspicuous manner per state regulation in the agreement the insurer enters into with the insured, thus satisfying the second factor. Finally, the agreements in question are only between the insurance provider and the insured. They are the lifeblood of the relationship between the two contracting parties and are not agreements for ancillary services outside of that relationship. The use of auto-renewal provisions do not relate to agreements between the insurer and third-party vendors or operators; they are only concerned with how the insured receives and pays for coverage within the four corners of the agreement.

Having dispensed with the three-factor analysis, there is a final question as to whether the action by the insurer is regulated under state law.[4] The question here is easily answered. Agreements between the insurer and the insured are regulated in every jurisdiction in the United States. There is no question that the any use of an auto-renew subscription in an insurance agreement is regulated by state law.

c. The Commission has previously granted exemptions for insurance.

The Commission has previously recognized that insurance is sufficiently regulated and declined to extend federal regulation to insurance in another context. When the Commission promulgated its Cooling-Off Rule granting consumers a three-day period to return products purchased in the home, it exempted insurance sales.[5] Having chosen to limit regulation of insurance *sales*, an activity that is both arguably within the scope of FTC regulation and less regulated at the state level, the Commission should now extend the same exemption to the particularities of an insurance agreement—the terms of which are regulated in every jurisdiction.

SERVICE CONTRACTS

While the business of insurance predates the United States, the service contract industry has been around for over a hundred years. As technology continued to develop, especially in the second half of the 20th Century, service contracts became ubiquitous in America due to the increase in demand by consumers for good repair and regular servicing. Service contracts compliment insurance policies on consumer goods by covering accidental damage or breakdown due to normal use or malfunction of a product, areas that are generally excluded from insurance policies on consumer goods.

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[4] *Supra* note 3.
[5] 16 CFR Part 429(a)(6).

a. Service contracts are a well-regulated industry.

The vast majority of jurisdictions in the United States have developed regulatory regimes to govern the service contract industry, most of which adopted the model act, at least in part, developed by the National Association of Insurance Commissioners (NAIC).[6] Additionally, states have imposed various licensure and financial surety requirements and have made service contracts subject to various consumer protection laws. Moreover, service contracts for consumer goods are commonly sold at the point-of-sale contemporaneously with, and often in the same agreement as, insurance sales; such a sales method necessarily means that the service contract must abide by the regulatory requirements of the insurance agreement.

b. The consumer goods service contract industry is consumer friendly, and the Commission cannot demonstrate prevalence in the industry of unfair or deceptive practices.

The current state-based regulatory scheme results in consumer-friendly industry practices. For example, Asurion's retail service contracts on consumer goods offer a 30-day free-look period allowing consumers to cancel for a full refund in the first 30 days. *In addition*, consumers may cancel our service contract anytime for a *pro rata* refund of any unearned portion of the contract. While only eleven states require such a clause be present in a service contract, it is virtually standard in the industry. Similarly, allowing the consumer to cancel via the method the consumer enrolled is also standard. When consumers are allowed to cancel at any time via the method of their enrollment, a great consumer experience is created.

Take the Commonwealth of Virginia as an example. Asurion has over 3.2 million active insurance and service contracts in Virginia, yet we average less than four complaints per year filed with the regulators. With consumer satisfaction at that level, it is difficult to justify the need for burdensome and costly additional regulation. In fact, the Commission cannot meet its statutory threshold to demonstrate there is any pervasive unfair or deceptive practice in the industry. Section 18 of the Federal Trade Commission Act authorizes rulemaking to address "unfair and deceptive practices" that are "prevalent".[7] And "prevalence" must be established with evidence indicating a "widespread pattern" of such a deceptive practice.[8] The Commission

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[6] The NAIC Service Contract Model Act contains the following definition of "service contract": "…a contract or agreement for a separately stated consideration or for a specific duration to perform the repair, replacement or maintenance of property or indemnification for repair, replacement or maintenance, for the operational or structural failure due to a defect in materials, workmanship or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including, but not limited to, towing, rental and emergency road service, but does not include mechanical breakdown insurance or maintenance agreements." Asurion encourages the Commission to adopt this definition for purposes of rulemaking.

[7] 15 U.S.C. § 57a(b)(3) (1975).

[8] *Id*.

simply cannot provide such evidence in the service contract consumer goods industry. As such, service contracts on consumer goods should therefore be exempt from the Proposed Rule.

c. Auto-renewal provisions and regulation

Month-to-month auto-renewal protection provisions in both insurance and service contracts on consumer goods are essential to consumers. Americans today run both their professional and personal lives on their phones, computers, and other personal electronic devices. Being deprived of them for days or weeks due to a gap in coverage is not only stressful, time consuming, and detrimental to job performance, but it can result in tremendous monetary cost as well. The purchase of these devices is an investment by the consumer, and auto-renewal protection provisions help ensure that investment is protected.

The Proposed Rule appears to primarily target unregulated companies that obfuscate consumers' wishes and make canceling a contract with an automatic renewal provision difficult. Unlike some of the unregulated industries that have been the impetus for this Proposed Rule, the Service Contract industry already abides by the principles embodied in the Proposed Rule. The industry embraced state-mandated "clear and conspicuous" disclosures and easy to cancel methods in all jurisdictions long ago. By being overly prescriptive in detailing what "affirmative consent" looks like and requiring a two-step process for the consumer, the Proposed Rule casts all auto-renewal provisions in the same negative light and inadvertently hurts consumers. There is an implication in the Proposed Rule that utilization of auto-renewal protection provisions are inherently misleading, when in actuality use of such provisions as currently employed by many providers benefit consumers. Moreover, if this Proposed Rule is adopted as drafted, many consumers who want and could benefit from auto-renewal protection provisions will neglect to make the requisite two separate affirmative consents and suffer real consequences when they find themselves with a broken device during a gap in coverage.

Inability to cancel service contracts is simply not a complaint we see from our subscribers in any substantive fashion. Not only has Asurion not received any volume of such complaints, but our regulators, some of which are very aggressive and would ensure we were informed of the issue, have also not relayed these concerns. For this very reason, many consumer-friendly jurisdictions, such as California and New York, have exempted the industry from new auto-renewal laws.[9] Given the tens of millions of active service contracts in America today and the lack of complaints about being unable to cancel those contracts, we do not believe that the Commission has sufficient data to justify subjecting the industry to the Proposed Rule; indeed, while the Proposed Rule and the cited survey explicitly address certain types of auto-renewal, it does not cite consumer complaints related to service contracts on consumer goods.

[9] *See* D.C. Code § 28A-204 (2022); Or. Rev. Stat. §646A.295 (2015); N.Y. Gen. Bus. Law § 527-a(8) (2021); Cal. Bus. & Prof. Code §§ 17605(c), (f) (2021).

Finally, many pro-consumer members of Congress seem to recognize that the service contract industry does not need to be subject to additional regulation related to auto-renewal provisions. There is currently identical legislation in both the Senate (sponsored by Senator Van Hollen, D-MD) and the House of Representatives (sponsored by Representative Clark, D-NY) pertaining to regulation of agreements containing auto-renewal provisions. While the legislation would impose additional regulatory requirements on those that sell service contracts, the bill explicitly exempts service contracts that meet the following definition:

> *… a contract or agreement for a separately stated consideration for any duration—*
> *(A) to perform the repair, replacement, or maintenance of property or indemnification for service repair, replacement, or maintenance for the operational or structural failure of any motor vehicle or residential or other property due to a defect in materials, workmanship, accidental damage from handling, or normal wear and tear; or*
> *(B) to indemnify for the same, including towing, rental, or emergency road service or road hazard protection, and which may provide for the service repair, replacement, or maintenance of property for damage resulting from power surges or interruption.*[10]

When the legislation was introduced last Congress, numerous consumer protection groups including the National Consumer Law Center, the Consumer Federation of America, the Center for Economic Justice, and the National Consumers League publicly endorsed the legislation.[11] While not binding on the Commission, it is persuasive authority regarding how pro-consumer members of Congress and pro-consumer organizations view the matter. If neither the proposed bills nor consumer groups believe the service contract industry to be a bad actor in this space, the Commission should take care not to reflect such concern in the final rule and grant the industry an exemption.

MONTH-TO-MONTH AGREEMENTS

One purported reason for the Proposed Rule is to provide consumers notice that they are to be charged for the renewal of an agreement before such renewal goes into effect, thereby providing the consumer an opportunity to cancel. Once again, the Proposed Rule appears to have been drafted for unregulated actors without appreciation for how routine insurance and service contracts operate. Month-to-month agreements are simply different and

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[10] Consumer Online Payment Transparency and Integrity Act, Section 2 (b)
[11] Van Hollen, Clarke Introduce Bicameral Bill to Protect Consumers from online Free Trial Scams, available at https://www.vanhollen.senate.gov/news/press-releases/van-hollen-clarke-introduce-bicameral-bill-to-protect-consumers-from-online-free-trial-scams.

consumer-friendly by nature when accompanied by industry-standard clear and conspicuous disclosures for a number of reasons. First, the consumer is billed on a monthly basis, which necessarily implicates a monthly reminder of the subscription, and such charges are itemized for the consumer on the monthly bill. Second, as previously noted, the consumer can cancel at any time and receive a pro rata refund for the time remaining on the monthly contract. Third, and maybe most importantly, most consumers do not want to lose the added protection especially as the purchased product ages.

The Proposed Rule would also require month-to-month contract providers to send an annual push notice identifying the product or service, amount, frequency, and method of cancellation. When would sending such an annual notice be logical for an insurance or service contract provider whose customer is getting a monthly notice through the itemized bill? Should it be included in one of the monthly statements? Does it have to be separate and apart? If so, on which month is it most appropriate to be sent? Regardless of how any of those questions is answered, a mandatory annual notification on top of monthly notifications would only cause duplication of notification efforts and confuse the consumer. Currently, there is not a single jurisdiction in the country that requires an annual notification for month-to-month auto-renewal contracts. A new federal annual notice requirement and the accompanying record keeping requirements in the Proposed Rule will likely negatively impact every month-to-month auto-renewal contract in the nation by adding unnecessary cost and creating a poor customer service environment.

Consumers are not confused about the fact that they automatically pay monthly for consumer goods and services in a month-to-month agreement; this is especially true of agreements that originate in highly regulated industries like the insurance and service contract industries. For this reason, every single piece of enacted auto-renewal legislation in the country has exempted insurance and service contracts entities and their affiliates, month-to-month contracts, or both. Even in Vermont, the jurisdiction with arguably the most stringent auto-renewal law in the country, the law provides an exemption for month-to-month agreements.[12] Asurion urges the Commission to follow suit and exempt month-to-month contracts, which are cancellable at any time with a pro rata refund, from the Proposed Rule. At the very least, the Commission should exempt month-to-month agreements that are sold to consumers in conjunction with state-regulated insurance and service contract products.

COST OF IMPLEMENTATION

In the Proposed Rule, the Commission estimates that the total annual labor cost for all entities subject to the Proposed Rule to be $5,689,550, and annual non-labor cost to be *de*

[12] 9 V.S.A. § 2454a.

minimis.[13] Asurion finds this cost estimate to be a substantial understatement of the true cost of implementation. From record development and storage, to purchasing new hardware, to developing trading modules, the aggregate cost of implementing the new rule would costs Asurion and its clients alone millions of dollars.

There are tens of millions of insurance agreements and service contracts in effect today that would be covered by the Proposed Rule. While the Proposed Rule frames its cost estimate as not significant due to the redundancy of its mandates with what many states already require (which raises the question of why the Proposed Rule is necessary in the first place), it fails to appreciate that its overly prescriptive requirements require a dramatic overhaul of *existing* agreements. The record keeping alone for Asurion would be substantial. It would require new technical capacity and maintenance, additional human resources, and new training for employees.

Additionally, the new requirement to create a separate affirmative consent will also require a rebuilding of existing technical platforms. Furthermore, for those consumers who consent telephonically to their agreements or consent in person at the point of purchase, we and our clients would have to build and maintain new mechanisms to accommodate the new requirements. The Proposed Rule would also impose a need to rewrite current disclosures. Aside from the fact that such a requirement would minimize other important information for the consumer (*e.g.* data availability, cellular coverage, trade-in value, costs, etc.), the need to rewrite disclosures would impose heavy costs on businesses and consumers.

CONCLUSION

Asurion appreciates the opportunity to comment on the Commission's Proposed Rule. For the reasons discussed above, we strongly urge the Commission to incorporate an exemption for insurance agreements, service contracts on consumer goods, and cancellable month-to-month agreements into the Negative Option Rule amendments.

[13] Negative Option Rule, 88 Fed. Reg. 24716, 24734 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425).