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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex N)
Washington, DC 20044

June 27, 2023

Re: Negative Option Rule; Project No. P064202

Dear Secretary Tabor:

We write to you today regarding the FTC's Proposed Negative Option Rule (the Proposed Rule), which we submit, as currently drafted, infringes upon the McCarran-Ferguson Doctrine, pursuant to 15 U.S.C.A. § 1011 et seq. For the past 78 years, that Doctrine's directive of "the business of insurance shall be regulated by the States" has led to the strongest, safest and most successful insurance market in the world. The Proposed Rule would needlessly encroach on the States' authority in a number of ways related to the insurance area, and the state insurance regulators' authority over it and insurance-related areas. The Proposed Rule's biggest jurisdictional affront to the states' insurance regulatory authority pertains to service contracts. If service contracts are not exempt from the Proposed Rule, then NCOIL must oppose it for this reason.

The National Council of Insurance Legislators (NCOIL) is a national legislative organization with the nation's 50 states as members, represented principally by legislators serving on their states' insurance and financial institutions committees. NCOIL writes Model Laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act over seventy-five years ago, and to serve as an educational forum for public policymakers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and breaking insurance issues.



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Service contracts, like insurance, provide consumers the ability to protect themselves from financial hardship. In the case of service contracts, the risk arises should some of their most important purchases (i.e. mobile devices, motor vehicles, household systems and appliances) break down and require expensive repair, replacement, or maintenance. Specifically, service contracts ensure the repair, replacement, or maintenance for the operational or structural failure of property (or indemnity for the same) due to defects, accidental damage, normal wear and tear, or damages due to service interruption.

The FTC apparently has some concerns with certain companies' use of service contracts. Having not yet studied them, we at NCOIL take no position on those specific concerns at this time, other than to condemn unfair and deceptive actions in all instances.

However, service contracts have historically been recognized as an insurance-related product, which is illustrated by the fact that state insurance departments, in whole or in part, currently regulate service contracts in 43 states. Many of those regulations include specific requirements on issues such as cancellations and refunds, disclosures, demonstration of financial responsibility to pay claims, and entity registration with the state department of insurance. This level of regulation dictates that under the express power given by Congress to the States to regulate insurance, States also have the express power to regulate certain products, such as service contracts, that fall within the regulatory penumbra of insurance regulation.

Accordingly, we at NCOIL urge the FTC to exempt service contracts from the Proposed Rule. Doing so would ensure that the Proposed Rule does not violate the McCarran Ferguson Doctrine by infringing on the Congressionally-delegated rights of the States to regulate the business of insurance. Failing that, we urge the FTC to withdraw the Proposed Rule.

Very truly yours,



Tom Considine
CEO
NCOIL



Will Melofchik
General Counsel
NCOIL