



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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March 13, 2024

VIA ELECTRONIC FILING

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

**Re: Rule on the Use of Consumer Reviews and Testimonials
(Project No. P214504)**

Presiding Officer Foelak:

Staff for the Bureau of Consumer Protection submits this letter brief regarding IAB's submissions and testimony at the informal hearing that concluded on March 6, 2024.

When the Commission issued its Notice of Proposed Rulemaking (NPRM) over 8 months ago,¹ it asked numerous questions on which it sought public comment. The NPRM included a lengthy Preliminary Regulatory Analysis (PRA), developed by Commission economists, setting forth the proposed rule's estimated benefits and costs. Within the PRA were multiple requests for specific information that would aid in determining the accuracy of those estimates, including estimates of compliance costs.

None of the commenters, including IAB, provided the Commission with any specific data regarding compliance costs to help it determine more precise estimates. Instead, IAB waited until the start of the informal hearing to submit information and provide testimony regarding two surveys of its members intended to show that compliance costs under the proposed rule would not be "minimal." This survey information and testimony is not what the Commission requested in the PRA, offers little value regarding actual compliance costs of affected businesses under the proposed rule, and is severely deficient in many respects as described below.

¹ See Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49,364 (Jul. 31, 2023), <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials>; <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-proposed-rule-banning-fake-reviews-testimonials> (Jun. 30, 2023).

IAB Failed to Offer a Qualified Witness or Reliable Documents on Compliance Costs

- In an Order dated February 23, 2024, Your Honor questioned whether the disputed cost issue was *material* “since the FTC already undertook a PRA that concluded that the benefits of the rule greatly outweigh its costs, even if the actual costs are more than double what the FTC assumed.” You continued, “However, if IAB offers an expert witness or proposed testimony from affected firms’ compliance officers or legal counsel to shed light on what would be involved with compliance review and implementation, then the issue could give the FTC a way of better quantifying cost.” Your Honor repeated that “IAB may provide a witness, such as an affected firm’s compliance officer or legal counsel or an expert witness, through whom an expert report may be introduced, in support of its arguments.” IAB designated only Lartease Tiffith, its Executive Vice President for Public Policy, an attorney, as a witness for the March 6 hearing.
- In an Order dated March 5, 2024, occasioned by IAB’s failure to provide or specifically identify proposed exhibits, Your Honor stated: “IAB is reminded that testimony by its attorney about survey responses is hearsay and will be weighed accordingly.” Mr. Tiffith proceeded to give testimony and present exhibits that are entirely hearsay and thus deserve little weight.
- IAB failed to provide copies of either the actual survey instruments given to respondents or any company’s set of responses to either survey. Instead, it provided: a hearsay document purporting to be the text of IAB’s first survey, attached to Mr. Tiffith’s submission on February 20, 2024; and two hearsay documents in the form of two Excel charts, submitted on March 5, purporting to represent summaries of survey responses and the questions asked on the second survey. Mr. Tiffith then gave hearsay testimony about them on March 6.²

IAB’s Survey Respondents Are Not Representative of All Companies Affected by the Proposed Rule, of Any Subset of Such Companies, or of Anything Else

- In the February 23 Order, Your Honor noted, in rejecting IAB’s other proposed disputed issue of material fact, that, as for IAB’s first survey, “the eighteen responses may be of questionable value when applied to the nearly 21,000 large companies and nearly 24.6 million small companies that the FTC estimated would be affected by the rule. *See* 88 Fed. Reg. at 49386.” For the same reason, both IAB surveys (the second one having nineteen responses) are of questionable value with respect to the cost issue as well. Per the Commission staff’s estimate, 18 or 19 survey respondents would equal less than .0000008% of all affected businesses.

² Had the Federal Rules of Evidence applied to the informal hearing, Mr. Tiffith could not have provided opinion testimony as a lay witness or entered any of the exhibits into evidence. *See* Fed. R. Evid. 701, 801, 1002, and 1006. Indeed, his testimony and the documents purporting to reflect or summarize the survey questions and answers are at least triple hearsay, in that they were introduced to prove that third parties received certain questions and gave certain answers in documents that he failed to produce before or submit at the hearing. *See id.* 805.

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- Further, there is no evidence that: IAB membership generally is representative of all affected businesses; that all IAB members are businesses affected by the proposed rule; or that the respondents are representative of all affected businesses or even IAB's own membership. Indeed, between two and four respondents on the first survey answered "Don't know" to the threshold questions about whether their own companies post or use reviews or testimonials at all. Mr. Tiffith testified that IAB has more than 700 members and that each survey went to all members. Eighteen or nineteen respondents make up less than 3% of members. And if one looks at only those respondents who provided numerical cost estimates on either survey, the percentage of responding members falls to below 2%.
- In addition, Mr. Tiffith, who is not an economist or statistician and was not qualified to testify as an expert, was in no position to testify, as he did, regarding the representative nature of the respondents. That would be true even if Mr. Tiffith knew the identity of the respondents, which he admitted he did not. Mr. Tiffith also testified that he did not know whether or to what extent the hundreds of members who didn't respond to the surveys failed to do so because they did not think the proposed rule would have a material impact on their businesses.
- As for the survey respondents, IAB failed to provide any information about: who they are; what they do; how big they are; who filled out the survey; what amount of diligence or care they used; who they consulted in the process; what they reviewed, knew or understood about the proposed rule; whether they were influenced by IAB's publicly stated concerns about compliance costs; what they may have misunderstood about their obligations and liability under the proposed rule; how they calculated costs; or the factual basis for any of their answers. In addition, there is no way of discerning whether and to what extent any particular provision in the proposed rule (or a misunderstanding of that provision) affected any portion of the few examples of estimated compliance costs elicited by these surveys. With no ability to assess the bases for the estimated costs or how any portions of them are attributable to any proposed rule provision, the Commission could not assess how any change or clarification to any provision – including those urged by IAB – might impact compliance costs.
- Further, as noted above, two respondents on the first survey answered "Don't know" to each of the two threshold questions. Since Mr. Tiffith could not testify as to whether they were the same two companies, we can conclude that between two and four of the 18 respondents were allowed to answer the whole survey despite not knowing if their own companies post reviews on their website, if they use reviews or testimonials, or both.

IAB's Surveys Contained Misstatements About the Proposed Rule

- The fourth page of the document purporting to reflect the text of IAB's first survey, submitted on February 20, contains a misstatement of law, misleading respondents into believing that civil penalties could be imposed for rule violations where a business merely "should have known" that a certain act or practice violated the rule. As Commission staff has now explained multiple times, the applicable standard for

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imposition of civil penalties is the higher standard found in Section 5(m)(1)(A) of the FTC Act. In his testimony, Mr. Tiffith appeared to acknowledge this fact, but nevertheless suggested that the NPRM said otherwise. This is simply false.

- This misstatement about civil penalties likely led reasonable respondents to overestimate their compliance costs, perhaps dramatically, given the inflated financial risk of noncompliance. Indeed, in the same “Compliance Costs” section of the first survey in which the misstatement is found, IAB directs respondents to estimate their costs “[i]n light of the above.” IAB itself has argued multiple times, including in its Response to BCP Staff dated February 12, 2024, that “legitimate companies would need to invest significant resources to comply with the proposed rule in order to avoid being exposed to civil penalties because they ‘should have known’ that a review or testimonial violated the proposed rule.” Further, some of the respondents could have been easily susceptible to such overestimates. According to the IAB website, www.iab.com/, IAB members include some large retailers, some of which have many reviews on their websites, and any of which could well have been survey respondents.
- On March 8, 2024, two days after the hearing closed, Mr. Tiffith submitted another hearsay document purporting to represent what IAB said about the proposed rule to those responding to the second survey. The last bullet point in the document states: “The civil penalty associated with each violation of this rule is \$51,744.” But this is also false. Such civil penalties are not “associated with each violation.” Rather, they may be imposed by a court only upon a showing that a defendant had, per Section 5(m)(1)(A) of the FTC Act, the requisite “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.” Additionally, \$51,744 is the maximum civil penalty per violation, but courts must take into account the statutory factors set forth in Section 5(m)(1)(C) of the FTC Act and may impose much lower per-violation penalties. This misstatement likely led reasonable respondents to overestimate their compliance costs.
- The documents that IAB submitted on February 20 and March 8 also misstate that the proposed rule would impose liability for “procuring” reviews that a business knew or should have known were fake or false. However, the proposed rule (at Section 465.2(c)) is limited to a prohibition on such procurement for third-party websites; it does not include liability for procuring reviews for a company’s own website.³ This misleading statement may have led reasonable respondents to overestimate their compliance costs.
- According to its website, www.iab.com/, IAB members include large third-party platforms, some of which host numerous reviews. One or more of these platforms may have been survey respondents,⁴ and they may have been under the false impression – suggested publicly by IAB several times, including in its January 30, 2024, submission – that the proposed rule would impose liability on businesses that merely host reviews that

³ See 88 Fed. Reg. 49,391.

⁴ According to one of the Excel charts, three of the respondents to the second survey apparently indicated that millions of “consumer reviews or testimonials were submitted to [their] business’s website(s) in 2023.”

turn out to be fake or false.⁵ In the NPRM, however, the Commission explained clearly that proposed rule Section 465.2 “does not apply to businesses, like third-party review platforms, that disseminate consumer reviews that are not of their products, services, or businesses. Neither does it apply to any reviews that a platform simply publishes and that it did not purchase.”⁶ If respondents nonetheless relied on IAB’s incorrect statements about liability for mere review hosting, it would have likely had a dramatic impact on cost estimates for businesses affected by such supposed liability.

The Few Cost Estimates Elicited by the Surveys Are Ambiguous and Lack Specificity

- Question 7 on the first survey asked for respondents to provide estimates of compliance costs within certain broad ranges. According to the Excel chart, six of the 18 respondents said “Don’t know,” meaning that only 12 respondents gave any cost estimate. It is possible, though nobody can say for sure without the actual survey results, that one or more of those remaining 12 respondents gave cost estimates despite having also responded “Don’t know” to one or both of the threshold questions. The same is true with respect to Question 8, which also related to compliance costs, and for which eight of 18 respondents said, “Don’t know.”
- Another deficiency in Question 7 is that, instead of asking companies to provide a dollar amount, it asked them to select a range, such as \$1,000 to \$9,999. For any of the ranges, we do not know whether respondents selecting that range would have provided a dollar figure on the low or high end if given that option. It is thus impossible to meaningfully calculate average compliance costs even for this tiny, unidentified, unrepresentative sample of companies.
- As for the second IAB survey, Mr. Tiffith was unable to confirm whether any of the 19 respondents were the same companies that responded to the first survey, since he does not know who any of them are. It may be that they were mostly the same companies, but, whatever the overlap, it is impossible to probe whether any answers are inconsistent across surveys and, if so, why.
- According to the Excel chart for the second survey, Questions 9, 12, 15, and 16 asked for specific cost estimates of one kind or another. For each of these questions, at least eleven of the nineteen respondents gave no estimate at all, and, for the latter three questions, an additional respondent gave an answer of \$0 or \$1.

For all of the reasons above, we respectfully request that Your Honor find that, given the weakness and unreliability of IAB’s purported evidence, it has not shown that compliance costs relating to the proposed rule would be more than minimal. Despite the lack of specific evidence submitted in this process, IAB and other commenters have raised some cost-related concerns that could well impact decisions regarding the final rule. Commission staff is diligently reviewing all

⁵ See also IAB, Cmt. on NPRM at 4-5 (Sept. 29, 2023) (arguing that a rule “focusing on legitimate companies that host reviews...will impose significant costs” on them), <https://www.regulations.gov/comment/FTC-2023-0047-0101>; IAB Press Release (Feb. 9, 2024), https://www.iab.com/news/iab_defends_online_speech_commerce_at_ftc/.

⁶ See 88 Fed. Reg. 49,378.

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comments that touch on compliance costs, including NPRM comments and the information provided during the informal hearing process.

Sincerely,

/s/ Michael Atleson

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