



March 13, 2024

Via Electronic Filing

Presiding Officer Foelak
c/o Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Reviews and Testimonials Rule (16 CFR Part 465) (Project No. P214504)

Presiding Officer Foelak:

The Interactive Advertising Bureau (IAB) respectfully submits this post-hearing brief on the disputed issue of material fact in the Reviews and Testimonials Rulemaking hearing proceedings—whether the compliance costs for businesses will be minimal. Over the course of these hearing proceedings, IAB has submitted the results of two surveys about the compliance costs associated with the proposed rule for its members. BCP Staff, in contrast, has put forward nothing on this disputed issue. Given this stark disparity in evidence, we respectfully request that the Presiding Officer conclude that compliance costs will not be minimal, and that the Commission significantly underestimated the costs of the proposed rule.

The imbalance in evidence in the record is reason enough for the Presiding Officer to conclude that the Commission significantly underestimated costs. Nevertheless, this post-hearing brief addresses BCP Staff's various attempts to undermine IAB's survey evidence at the March 6, 2024 hearing. Ultimately, BCP Staff is in no position to criticize the rigorosity of IAB's survey evidence or insinuate that respondents did not engage in a good faith calculation of their compliance costs when BCP Staff has provided no basis whatsoever for the Commission's assumption that large companies would spend only 8 hours, or approximately \$492, and small companies would spend 1 hour, or approximately \$33, to comply with the proposed rule.¹ BCP Staff has been on notice of IAB's concerns since last fall, but has provided no additional support for these assumptions.²

IAB and its members agree with the Commission's goals in this rulemaking and support a narrowly tailored rule that will stop bad actors from undermining the authenticity and trustworthiness of consumer reviews. In order to make an informed decision amongst various regulatory alternatives and identify an appropriately tailored rule, the Commission must engage in a reasoned analysis of the costs and benefits of the proposed rule. The superficial analysis of costs in the Notice of Proposed Rulemaking (NPRM), however, has prevented the Commission from considering alternatives that could achieve the same benefits as the proposed rule, while imposing

¹ Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364, 49386 (July 31, 2023) (hereinafter "NPRM").

² Comment of Interactive Advertising Bureau on NPRM, at 5, 15 (Sept. 29, 2023).

meaningfully lower costs on legitimate companies. These are steps that are required by 15 U.S.C. § 57b-3(b)(1) and the Administrative Procedure Act, and that the Commission has failed to complete.³ A more narrowly tailored rule that incorporates a higher knowledge standard and narrower language would effectively target bad actors while avoiding the creation of significant uncertainty and risk for legitimate companies.

For these reasons, the Presiding Officer should (1) conclude that compliance costs will not be minimal; and (2) recommend that the Commission re-assess costs as well as potential regulatory alternatives and allow comments on that revised analysis.

I. The Presiding Officer Should Conclude that Compliance Costs for Businesses Will Not Be Minimal.

IAB has submitted two surveys that demonstrate that compliance costs resulting from the proposed rule will not be minimal. IAB submitted a summary of the results of its first survey (the “Initial Survey”), as well as the survey questions, with its February 20, 2024 submission.⁴ After the Presiding Officer designated the disputed issue of material fact, IAB conducted a second survey focused on compliance costs (the “Compliance Cost Survey”). IAB submitted the results of the Compliance Cost Survey, as well as the results of the Initial Survey, on March 5, 2024.⁵ For the avoidance of doubt, IAB is attaching to this submission as Exhibit A and B the questionnaires and instructions for each survey. Below, IAB discusses why each survey was reliable and supports the conclusion that compliance costs will not be minimal.

A. The Compliance Cost Survey

To conduct the Compliance Cost Survey and tally the results, IAB engaged an independent third party survey firm. IAB shared the link to the survey with its members, and specifically sent the link to representatives of member companies who were most likely to know the answers to the questions.⁶ The email transmitting the survey to the members did not provide any detail about IAB’s specific concerns or identify the disputed issues of material fact it had proposed.⁷ Nineteen IAB member companies filled out the survey anonymously in the few days that IAB had to collect

³ 15 U.S.C. § 57b-3(b)(1) (requiring a Preliminary Regulatory Analysis to contain “a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law” and “a preliminary analysis of the projected benefits and any adverse economic effects and any other effects” of the proposed rule and each alternative).

⁴ Comment of Interactive Advertising Bureau (Feb. 20, 2024) (describing results of Initial Survey and submitting questions used in survey).

⁵ Comment of Interactive Advertising Bureau (Mar. 5, 2024) (describing results of Compliance Cost Survey and submitting compiled results of Initial Survey and Compliance Cost Survey).

⁶ FTC, Informal Hearing on Proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 1:12:42 (Mar. 6, 2024), <https://kvgo.com/ftc/Informal-Hearing-Use-of-Consumer-Reviews-and-Testimonials-March-6-2024> (hereinafter, “Hearing Video”).

⁷ That email is attached to this submission as Exhibit C.

responses. BCP Staff criticized IAB for not providing the “individual responses” to this survey, but the Excel sheet IAB produced on March 5, 2024 shows how each respondent answered each question.⁸ IAB has reattached those results to this submission as Exhibit D.

To ensure reliability, the survey began with two “screener” questions. These questions asked, “does your business allow customer reviews to be posted on the business’s website?” and “do you use or solicit customer reviews or testimonials to market products offered by your business?” If a company did not answer “yes” to at least one of these questions, the company would be screened out. All nineteen companies answered “yes” to at least one of these questions.

The questionnaire then asked the respondents “approximately how many total consumer reviews or testimonials were submitted to your business’s website(s) in 2023?” and “approximately how many consumer reviews or testimonials are currently displayed on your business’s website(s)?” The responses reflect significant variety in the volume of consumer reviews and testimonials the respondents receive and display on their websites. Some respondents received or displayed dozens of reviews or testimonials, while others received or displayed millions. These responses demonstrate the variety in the types of businesses responding to the survey, indicating that the survey responses are representative of many different types of companies that would be impacted by the proposed rule.

Before asking respondents about their compliance costs, the survey provided a high-level summary of the proposed rule.⁹ The summary accurately described each rule provision and recounted that the proposed rule would “allow the FTC to obtain civil penalties for certain activities the FTC has determined are unfair or deceptive.”¹⁰ BCP Staff cannot claim that this is an inaccurate statement of what the rule would do when the NPRM itself states, “the proposed Rule . . . will allow the Commission to seek civil penalties against the violators”¹¹ At the March 6, 2024 hearing, BCP Staff criticized the summary of the rule IAB provided to its members as part of the *Initial Survey*.¹² IAB addresses those criticisms in Section I.B, but those concerns do not apply to the *Compliance Cost Survey* because the language BCP Staff specifically critiqued during cross-examination was not included in the summary of the rule used with the Compliance Cost Survey.

⁸ Hearing Video, 59:41.

⁹ IAB provided this summary on March 7, 2024 in response to concerns raised by BCP Staff at the March 6, 2024 hearing.

¹⁰ Submission of Interactive Advertising Bureau, Rule Summary – IAB Survey 2 (Mar. 7, 2024).

¹¹ NPRM, at 49377; *see also id.* at 49378 (“Because fake reviews and the other unfair or deceptive review and testimonial practices described here are so prevalent and so harmful, the unlocking of additional remedies through this rulemaking, particularly the ability to seek civil penalties against violators and obtain redress for consumers or others injured by the conduct, will allow the Commission to more effectively police harmful review and testimonial practices that plague consumers and honest businesses.”) (emphasis added).

¹² *See, e.g.*, Hearing Video, 22:09.

Following this summary, the survey asked respondents to consider whether they would adopt or alter their business practices in order to comply with the proposed rule. Many businesses already have robust practices dedicated to fighting fake reviews, allowing them to reliably estimate the costs of policing fake reviews. But due to the proposed rule’s breadth and vague language, many companies will be forced to invest significant resources into their compliance programs in order to ensure they will not be held liable. Companies stated they would implement or change these practices in response to the proposed rule, and thus they are *additive* to any efforts needed to comply with existing law. So in spite of these existing practices, the majority of respondents would adopt or strengthen at least one business practice in response to the rule, with many anticipating the need to adopt or strengthen several practices in order to comply.

Practice	Number and Percentage of Companies Stating They Anticipate Implementing the Practice for the First Time, or Strengthening or Increasing their Usage of the Practice
Technology designed to monitor, detect, and prevent submission, publishing and possible further dissemination of fake reviews or testimonials at scale	8/19 respondents or approximately 42%
Identity collection and other vetting processes and tools for users submitting reviews and testimonials	6/19 respondents or approximately 32%
Tools for collecting reports of abuse from external parties	6/19 respondents or approximately 32%
Creation and maintenance of public facing policies addressing practices prohibited by the rule that align with relevant local regulations	8/19 respondents or approximately 42%
Staff tasked to moderate reviews according to your business’s policies and investigate reports of abuse or other signals detected by proactive mechanisms	6/19 respondents or approximately 32%
Enforcement policies and mechanisms that address actions of bad actors	6/19 respondents or approximately 32%
Creation of internal policies, contractual obligations, and/or training programs for employees, officers, and agents to prevent them and any of their relatives from writing reviews about the business without appropriate disclosure	7/19 respondents or approximately 37%
Technology, processes and staffing to monitor, investigate and enforce internal policies when	7/19 respondents or approximately 37%

employees, officers, agents or their family members violate them	
Audit and testing capabilities	7/19 respondents or approximately 37%
Legal support to ensure compliance with local regulations as applicable and/or to take actions against bad actors violating your business’s policies	8/19 respondents or approximately 42%

The survey then asked companies about the types of employees and contractors that would be involved in implementing these practices. The responses showed that a significant variety of employees would be needed, including for example web developers, business analysts, human resources personnel, review moderators, in-house counsel, compliance analysts, and customer experience executives. The Commission’s cost estimate was significantly more limited and simply assumed that only lawyers at large companies (or owners of small companies) would spend any amount of time reacting to the proposed rule—eight hours for lawyers at large companies and one hour for small business owners.¹³

The survey then asked about the costs to implement the identified practices. These questions were open-ended, and asked respondents to provide specific estimates of the number of employees, the number of hours, and the overall cost to implement and maintain compliance. The questions also provided a “don’t know” option. Respondents could also indicate that they did not expect to incur any additional costs to comply with the proposed rule. The estimates provided in response to these questions clearly demonstrate that the cost of compliance will be considerably higher than the Commission estimated, and certainly not “minimal.” At the March 6, 2024 hearing, BCP Staff suggested that these estimates are not reliable because IAB does not know how much time or effort companies spent ensuring their estimates were accurate.¹⁴ BCP Staff has no basis whatsoever to conclude that companies did not take the survey questions seriously and provide accurate estimates of their compliance costs, as the Commission’s cost estimate relies entirely on assumptions, without any empirical basis or industry data.

Turning to the specific results of the survey, seven respondents—of ten that answered the relevant question—anticipated that they would need to hire new employees to implement these practices. The cost of hiring and training new employees was notably absent from the Commission’s cost estimates in the Preliminary Regulatory Analysis. In addition, the median number of employees that respondents expected would need to be engaged in implementing these practices was 10, and the median number of hours was 100, which significantly exceeds the Commission’s “heightened compliance review” estimate of 8 hours for large companies. Furthermore, of those respondents who provided an estimate of how much it would cost to have employees or contractors spend the time necessary to implement responsive practices, the median estimated cost was \$121,000—a figure significantly higher than the Commission’s \$492 estimate. Five members also estimated that it would cost them from \$5,000 to up to \$200,000 to build or

¹³ NPRM, at 49386.

¹⁴ Hearing Video, 1:12:04; *see also id.* 53:54.

acquire new tools, equipment, software or other materials to implement these practices. Additionally, of the thirteen companies that anticipated needing to consult counsel, five of the seven that provided an estimated number of hours counsel would spend advising on the proposed rule expected to need at least fifteen (and up to 4,000) hours of counsel's time to advise on their response to the proposed rule. The cost of counsel is particularly relevant given vague language in the rule such as "disseminate" and "procure" as well as the use of the "knew or should have known" standard. Companies may need the assistance of counsel to assess possible interpretations of this standard, and to navigate the uncertainty that a vague, unexplained legal standard creates.

The survey results also highlight the Commission's failure to consider the *ongoing* costs of compliance. The median number of employees that respondents expected to be engaged in annually maintaining these practices was 5, and the median estimate for hours spent by these employees maintaining these practices was 100 hours. Seven members estimated that it would cost the company at least \$20,000 annually to have employees or contractors maintain the responsive practices, with four of those estimates surpassing \$100,000. Additionally, six members estimated that they would spend upwards of \$15,000 annually to maintain tools, equipment, software, or other materials necessary to maintain the responsive practices.

B. The Initial Survey

IAB conducted the Initial Survey in response to the Presiding Officer's February 13, 2024 order inviting further submissions concerning the two disputed issues of material fact proposed by IAB. Like the Compliance Cost Survey, IAB engaged a third party, independent survey firm to run the survey. IAB shared the link to the survey with its members, and specifically sent the link to representatives of the member companies who were most likely to know the answers to the questions.¹⁵ The email transmitting the survey to the members did not provide any detail about IAB's specific concerns or identify the disputed issues of material fact it had proposed.¹⁶ Eighteen companies filled out the survey anonymously in the few days that IAB had to collect responses. At the March 6, 2024 hearing, BCP Staff criticized IAB for providing a compiled summary of results and not providing the "individual" results of this survey, so IAB is submitting today an Excel sheet that shows how each respondent answered each question as Exhibit F.¹⁷ The Initial Survey was multiple choice, and there is a "key" describing what each response means on the second page of the Excel Sheet.

Like the Compliance Cost Survey, the Initial Survey began with the same two "screener" questions. If a company did not answer "yes" to at least one of these questions, the company would be screened out. All eighteen companies answered "yes" to at least one of these questions. At the March 6, 2024 hearing, BCP Staff suggested that the responses were unreliable because the results IAB provided did not show how the respondents that answered "don't know" to the first two screener questions, responded to the rest of the questions. But if a company had responded "don't know" to both screener questions, that company would have been screened out. Thus, the

¹⁵ *Id.* 56:25.

¹⁶ That email is attached to this submission as Exhibit E.

¹⁷ Hearing Video, 27:30.

scenario contemplated by BCP Staff at the March 6, 2024 hearing—that a company answered “don’t know” to both screener questions and then estimated their compliance costs anyway—would not have been permitted by the survey.¹⁸ The results IAB has submitted today also show that no company responded “don’t know” to both screener questions.

The Initial Survey also provided a summary of the proposed rule for respondents to consider before answering the questions. BCP Staff criticized this summary because it stated that “[t]he FTC’s proposed rule on reviews and testimonials will allow the FTC to obtain civil penalties for certain activities the FTC has determined are unfair or deceptive, including where the violator ‘knew or should have known’ that a certain act or practice violated the rule.”¹⁹ BCP Staff asserted that this statement of law was inaccurate, and so the corresponding results cannot be reliable.²⁰ IAB disagrees. Companies subject to the proposed rule do not have the luxury of relying on BCP Staff’s statements that the Commission would not and could not seek civil penalties in a situation where a company only “should have known” that a certain review was fake or false. Instead, regulated parties reasonably rely upon the proposed rule and NPRM, and make a decision with respect to their compliance programs to ensure that they will not face excessive uncertainty and risk. There is no dispute that the proposed rule incorporates a “should have known” standard. The NPRM also repeatedly describes how the Commission’s goal with this rule is to obtain civil penalties from violators.²¹ IAB’s summary of the law was thus not inaccurate, as it simply reflected what was contained in the NPRM. The companies responding to the survey thus set forth their understanding of their burdens based on this uncertainty created by the proposed rule.²² BCP Staff has not explained why it could not simply resolve the uncertainty imposed by this section, and significantly reduce compliance costs, by replacing the “should have known” standard—which it says it cannot rely on to obtain civil penalties anyway—with an actual knowledge standard.

Turning to the results themselves, the Initial Survey also supports the conclusion that the Commission significantly underestimated compliance costs. Unlike the Compliance Cost Survey, which had open ended questions, the Initial Survey contained multiple choice options. Question 7 specifically asked about compliance costs. In response to this question, over half of respondents estimated their initial compliance costs—including costs related to employee time, seeking advice of counsel, and technological investments—would be at least \$1,000 if the proposed rule went into effect. Excluding the respondents who didn’t know the cost for their business, ten out of twelve respondents estimated the cost would be at least \$1,000 and eight of twelve estimated the costs

¹⁸ *Id.* 48:20.

¹⁹ Comment of Interactive Advertising Bureau, Reviews and Testimonials Rule: Survey Questions (Feb. 20, 2024).

²⁰ Hearing Video, 21:49.

²¹ NPRM, at 49377-78.

²² BCP Staff have also not responded to IAB’s February 12, 2024 submission, which explained that the proposed rule can be read to impose civil penalties on a company that simply “should have known” that a particular review or testimonial was fake if the company had *knowledge fairly implied* that purchasing or disseminating fake or false reviews or testimonials in circumstances where it should have known they were fake or false is an unfair or deceptive practice prohibited by the rule.

would be at least \$10,000. Further, one third of respondents who provided an estimate responded that initial compliance costs would be over \$50,000, which is over 100 times the Commission's estimate. Even a conservative reading of this result shows that estimated compliance costs for companies would be far greater than the amount the Commission assumed in the Preliminary Regulatory Analysis.

II. The Commission Must Revise its Preliminary Regulatory Analysis, Consider Reasonable Alternatives, and Allow Comments on its New Proposal.

Under the Commission's rules, the Presiding Officer must issue a recommended decision within sixty days of the completion of the hearing.²³ The decision should explain "the presiding officer's proposed resolution of disputed issues of material fact."²⁴ In light of the evidence described above, we respectfully request that the Presiding Officer conclude that the proposed rule's compliance costs will be significantly higher than the Commission estimated. The Commission's estimate simply assumes that large companies will spend eight hours implementing the proposed rule, and small companies will spend only one. BCP Staff has submitted nothing to support these assumptions. In contrast, IAB conducted two surveys, both of which demonstrate that the Commission's superficial cost estimate has dramatically underestimated the costs associated with the proposed rule.

The Commission's failure to estimate costs matters because it means the Commission did not conduct an informed or reasonable analysis of regulatory alternatives. As IAB has explained in prior submissions, these high costs are likely driven by many of the vague terms and overbroad provisions included in the proposed rule, which create uncertainty and risk for many legitimate companies that cannot predict how and when they might be subject to liability and civil penalties. Specifically, IAB has identified the undefined terms "disseminate" and "procure" as creating significant uncertainty for companies as it is not clear what activities these terms will capture. That uncertainty is exacerbated by lack of clarity about how the "should have known" standard will apply. Other problematic aspects of the rule that will contribute to this uncertainty and risk include Section 465.5's incorporation of undefined terms like "agent" and the should have known standard, Section 465.7's lack of clarity as to whether the list of permissible reasons to suppress a review is intended to be exhaustive or not, and Section 465.8's failure to incorporate an actual knowledge standard.

If the Commission had conducted a more robust analysis of compliance costs, and properly assessed reasonable alternatives, it would be clear that a more narrowly tailored rule focused on the activities of bad actors could achieve the same benefits the Commission seeks, while imposing

²³ 16 C.F.R. § 1.13(d). According to the Commission's rules, "[i]f a petition for review of a ruling by the presiding officer has been filed under paragraph (e) of this section, the recommended decision must be rendered within sixty days following the resolution of that petition or any rehearing required by the Commission." *Id.*

²⁴ *Id.* The Commission's rules of practice state that the Presiding Officer's decision is "limited to explaining the presiding officer's proposed resolution of disputed issues of material fact." *Id.* The Presiding Officer thus has the authority to recommend steps that the Commission should take to resolve the disputed issue as the rulemaking process proceeds.

a significantly lower compliance burden on legitimate companies. But because of the flawed analysis of costs in the Commission's Preliminary Regulatory Analysis, the Commission has not been able to engage in a reasoned analysis of the potential alternatives and their associated costs and benefits. To resolve this disputed issue, the Presiding Officer should recommend that the Commission (1) issue a Supplemental Notice of Proposed Rulemaking (SNPRM) that reassesses the costs associated with the proposed rule and considers reasonable alternatives that would impose lower costs, and (2) allow interested persons to comment on the new proposal. This additional comment period will foster transparency and ensure that interested persons can provide input on the Commission's estimate and consideration of reasonable alternatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Lartease M. Tiffith", with a long horizontal flourish extending to the right.

Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau