

**In the Matter of:**

**Federal Trade Commission**

*March 6, 2024*  
*Informal Hearing*

**Condensed Transcript with Word Index**



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1 INFORMAL HEARING ON PROPOSED TRADE REGULATION  
 2 RULE ON THE USE OF CONSUMER REVIEWS AND  
 3 TESTIMONIALS  
 4  
 5 WEDNESDAY, MARCH 6, 2024  
 6 10:00 A.M.  
 7 BEFORE THE HONORABLE CAROL FOX FOELAK  
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1 P R O C E E D I N G S  
 2 - - - - -  
 3 JUDGE FOELAK: Good morning. Are there  
 4 other participants present?  
 5 OPEN EXCHANGE: Yes. You may start the  
 6 intro.  
 7 JUDGE FOELAK: Okay. Very good. Good  
 8 morning. This is a hearing in the informal  
 9 hearing proceeding, rulemaking Proceeding of  
 10 Project Number P214504 pertaining to  
 11 customer reviews and testimonials.  
 12 May I have your -- I am Judge Foelak,  
 13 and may I have your appearances for the -- of  
 14 counsel for the record, please.  
 15 MR. MICHAEL ATLESON: My name is  
 16 Michael Atleson. I'm an attorney for the  
 17 Bureau of Consumer Protection.  
 18 MR. LARTEASE TIFFFITH: And I am  
 19 Lartease Tiffith. I am the executive vice  
 20 president for public policy at the  
 21 Interactive Advertising Bureau, IAB.  
 22 JUDGE FOELAK: Okay. Very good.  
 23 Whichever one of you is going to go first,  
 24 which is probably Mr. Tiffith, please  
 25 proceed.

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1 MR. LARTEASE TIFFFITH: Great. Thank  
 2 you, Your Honor. Your Honor, again, I'm  
 3 Lartease Tiffith. I'm executive vice  
 4 president for public policy at the  
 5 Interactive Advertising Bureau. IAB was  
 6 founded in 1996 and headquartered in  
 7 New York City.  
 8 We represent over 700 leading media  
 9 companies, brand marketers, agencies, and  
 10 technology companies that are responsible for  
 11 selling, delivering, and optimizing digital  
 12 advertising and marketing campaigns.  
 13 Together our members account for  
 14 86 percent of online advertising expenditures  
 15 in the United States. Working with our  
 16 members --  
 17 JUDGE FOELAK: Could I interrupt you  
 18 for one second?  
 19 MR. LARTEASE TIFFFITH: Sure.  
 20 JUDGE FOELAK: I just want to make -- I  
 21 just want to check to see if there are any  
 22 other interested persons present.  
 23 (No response.)  
 24 MR. LARTEASE TIFFFITH: Okay.  
 25 Apparently not.

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1 MS. KATHRYN DEAN: Yes, Your Honor.  
 2 Kathryn Dean from Fake Review Watch is  
 3 attending.  
 4 JUDGE FOELAK: Okay. Do you intend to  
 5 cross-examine?  
 6 MS. KATHRYN DEAN: No, Your Honor.  
 7 JUDGE FOELAK: Okay. Very good. Okay.  
 8 Please proceed again, Mr. Tiffith. Yes,  
 9 sir.  
 10 MR. MICHAEL OSTHEIMER: Your Honor, this  
 11 is Michael Ostheimer from the Federal Trade  
 12 Commission representing BCP, and I do not  
 13 intend to cross-examine. That will be by  
 14 Mr. Atleson.  
 15 JUDGE FOELAK: Okay. Please proceed,  
 16 Mr. Tiffith.  
 17 MR. LARTEASE TIFFITH: Okay. Great.  
 18 Thank you, Your Honor. Again, I'm  
 19 Lartease Tiffith, executive vice president  
 20 for public policy at the Interactive  
 21 Advertising Bureau. Again, we were founded  
 22 in 1996 and headquartered in New York. Our  
 23 members, which are 700 of the leading  
 24 companies in brand marketing agencies and  
 25 technology companies in the digital

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1 advertising and marketing space, together  
 2 our members account for approximately 86  
 3 percent of the online expenditures with  
 4 respect to ads in the United States.  
 5 We work with our members to do a  
 6 bunch of things, including critical consumer  
 7 and market research. We educate our brands  
 8 and agencies in the wider business community  
 9 on the importance of digital marketing.  
 10 You know, I thank you today for  
 11 giving us an opportunity to present, once  
 12 again, information. We appreciate your  
 13 careful consideration of IAB's arguments and  
 14 evidence thus far.  
 15 Additionally, IAB would like to  
 16 reiterate its support for this rulemaking's  
 17 goals. The integrity of consumer reviews is  
 18 important to both consumers and businesses,  
 19 and IAB supports a rule targeted at those bad  
 20 actors that abuse consumer reviews for their  
 21 own gain.  
 22 But it is also important for the  
 23 Commission to engage in a reasoned analysis  
 24 of the costs and benefits of a proposed rule,  
 25 so they can make an informed decision among

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1 regulatory alternatives. IAB is concerned  
 2 that the superficial analysis of cost and a  
 3 notice of proposed rulemaking has prevented  
 4 the Commission from considering alternatives  
 5 that could achieve the same benefits as the  
 6 current proposed rule while imposing  
 7 drastically lower costs of legitimate  
 8 companies.  
 9 As IAB has previously explained, a  
 10 narrowly-tailored rule that incorporates a  
 11 higher knowledge standard and narrower  
 12 language would effectively target bad actors  
 13 while avoiding imposing significant  
 14 uncertainty and risk on legitimate companies.  
 15 Today I plan to present the evidence  
 16 IAB has gathered on a disputed issue of  
 17 material fact designated by the presiding  
 18 officer, whether their compliance costs for  
 19 businesses will be minimal.  
 20 The Commission's preliminary  
 21 regulatory analysis posits that in a  
 22 heightened compliance review scenario, large  
 23 companies will spend approximately \$492 to  
 24 comply with a proposed rule. It comes to  
 25 this conclusion by assuming lawyers at large

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1 companies will spend, at most, eight hours in  
 2 total reviewing the rule and taking actions  
 3 in response. However, IAB's evidence  
 4 demonstrates that actual incremental  
 5 compliance costs to businesses would be  
 6 significantly higher than the Commission's  
 7 estimate in its preliminary regulatory  
 8 analysis.  
 9 In an initial survey of 18 IAB member  
 10 organizations, over half of respondents  
 11 estimated that their initial compliance cost  
 12 would be at least \$1,000. This is more than  
 13 double the Commission's estimate. IAB  
 14 circulated a second survey to further  
 15 investigate estimated compliance costs of the  
 16 proposed rule. And as I will discuss,  
 17 responses to this survey illustrate in more  
 18 detail that the Commission's estimated cost  
 19 of compliance to businesses is unrealistic  
 20 and requires further development for the  
 21 Commission to meet its statutory obligations  
 22 under 15 USC Section 57-B-3B1, which requires  
 23 the Commission to assess adverse economic  
 24 effects of the proposed rule and reasonable  
 25 alternatives.

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1 The evidence IAB has gathered to date  
 2 shows that the Commission has vastly  
 3 underestimated the proposed rule's cost to  
 4 businesses. An alternative more targeted  
 5 rule could generate the same benefits to  
 6 consumers while reducing the compliance  
 7 burden legitimate businesses would face.  
 8 And I will first focus on the initial  
 9 survey. In response to the presiding  
 10 officer's February 13th order inviting  
 11 further submissions concerning the two  
 12 disputed issues of material fact proposed by  
 13 IAB, IAB conducted an initial survey of its  
 14 members that included questions about  
 15 estimated compliance costs. 18 members --  
 16 JUDGE FOELAK: Sir, let me get. I  
 17 would just like to interrupt there. Up  
 18 until now in your presentation it's been  
 19 more of a presentation of argument. If you  
 20 are going to start testifying as a witness,  
 21 then I should swear you in.  
 22 MR. LARTEASE TIFFITH: That sounds  
 23 great. We'll do that, and then I will  
 24 continue my -- continue on. So I will put  
 25 my hand up.

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1 JUDGE FOELAK: Okay, good.  
 2 (Witness was sworn.)  
 3 JUDGE FOELAK: Thank you, please  
 4 proceed.  
 5 \* \* \*  
 6 LARTEASE TIFFITH,  
 7 after having been duly sworn, testified as  
 8 follows:  
 9 MR. LARTEASE TIFFITH: So in regards to  
 10 the first initial survey, over half of  
 11 respondents estimated their initial  
 12 compliance costs, including costs related to  
 13 employee time, seeking advice of counsel,  
 14 and technological investments would be at  
 15 least \$1,000 if the proposed rule goes into  
 16 effect.  
 17 Excluding the respondents who didn't  
 18 know the cost of their business, 10 out of 12  
 19 respondents estimated the cost would be at  
 20 least \$1,000, and 8 of 12 estimated a cost  
 21 would be at least \$10,000.  
 22 Further, one-third of respondents who  
 23 provided an estimate responded that initial  
 24 compliance costs would be over \$50,000, which  
 25 is over 100 times the Commission's estimate.

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1 Even a conservative reading of this result  
 2 shows that estimated compliance costs for  
 3 companies would be far greater than the  
 4 amount the commission assumed in the  
 5 preliminary regulatory analysis.  
 6 The initial survey results also  
 7 suggested businesses would change existing  
 8 practices in response to the proposed rule.  
 9 For example, over half of respondents  
 10 stated that they would be somewhat or very  
 11 likely to change their current review process  
 12 to delete, suppress, or otherwise display  
 13 fewer consumer reviews in light of proposed  
 14 Section 465.2. Additionally, nearly 90  
 15 percent of businesses, 15 out of 17,  
 16 indicated they would be somewhat or very  
 17 likely to require reviewers to submit more  
 18 information to authenticate their identity  
 19 before leaving a review.  
 20 In response to proposed section  
 21 465.2's imposition of liability on a business  
 22 that knew or should have known a review it  
 23 purchased or procured or a testimony it  
 24 disseminated was written by an individual who  
 25 did not exist.

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1 In regards to our second survey,  
 2 which we submitted to the Court yesterday,  
 3 once the presiding officer issued the order  
 4 designating whether the compliance costs for  
 5 businesses would be minimal as a disputed  
 6 issue of material fact, IAB circulated a  
 7 second survey to its membership to gather  
 8 more detailed information about members'  
 9 estimated compliance cost. 19 members  
 10 responded to the second survey.  
 11 The survey first asked respondents  
 12 whether they allowed customer reviews to be  
 13 posted on their website or used or solicited  
 14 customer reviews for testimonies to market  
 15 their products. All 19 members answered yes  
 16 to each -- to at least one of these  
 17 questions, and so zero respondents were  
 18 screened out.  
 19 The survey first asked respondents to  
 20 consider whether they would adopt or alter  
 21 their business practices in order to comply  
 22 with the proposed rule, including procuring  
 23 updated technology, creating new policies,  
 24 and enhanced support from staff. These are  
 25 practices that companies state they would

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1 implement or change in response to the  
 2 proposed rule and thus are additive to any  
 3 efforts needed to comply with existing law.  
 4 As discussed in several comments to  
 5 the notice of proposed rulemaking, many  
 6 businesses already have robust practices  
 7 dedicated to fighting fake reviews. But as  
 8 IAB has pointed out on several occasions, due  
 9 to the proposed rule's breadth and vague  
 10 language, many companies will be forced to  
 11 invest significant resources into their  
 12 compliance programs in order to ensure that  
 13 they will not be held liable or subject to  
 14 civil penalties under the proposed rule.  
 15 So in spite of these existing  
 16 practices, the majority of members would  
 17 adopt or strengthen at least one business  
 18 practice in response to the rule, with many  
 19 anticipating needing to adopt or strengthen  
 20 several practices in order to comply.  
 21 The survey presented a list of 10  
 22 specific practices that companies may adopt  
 23 or strengthen in response to the proposed  
 24 rule. Those practices were, one, technology  
 25 designed to monitor, detect, and prevent

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1 submission publishing and possible further  
 2 dissemination of fake reviews or testimonials  
 3 at scale.  
 4 Two, identity collection and other  
 5 vetting processes and tools for users  
 6 submitting reviews and testimonials.  
 7 Three, tools for collecting reports  
 8 of reviews from external parties.  
 9 Four, creation and maintenance of  
 10 public facing policies addressing practices  
 11 prohibited by the rule that align with  
 12 relevant local regulations.  
 13 Five, staff tasked to moderate  
 14 reviews according to business policies and  
 15 investigate reports of abuse or other signals  
 16 detected by proactive mechanisms.  
 17 Six, enforcement policies and  
 18 mechanisms that address actions of bad  
 19 actors.  
 20 Seven, creation of internal policies,  
 21 contractual obligations, and/or training  
 22 programs for employees, officers, and agents  
 23 to prevent them and any of their relatives  
 24 from writing reviews about the business  
 25 without appropriate disclosure.

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1 Eight, technology processes and  
 2 staffing to monitor, investigate, and enforce  
 3 internal policies when employees, officers,  
 4 agents, or their family members violate them.  
 5 Nine, audit and testing capabilities.  
 6 And, ten, legal support to ensure  
 7 compliance with local regulations as  
 8 applicable and/or to take actions against bad  
 9 actors violating business policies.  
 10 For each practice, at least six  
 11 companies indicated they would adopt or  
 12 strengthen that practice.  
 13 The survey then asks companies about  
 14 the types of employees and contractors that  
 15 would be involved in implementing these  
 16 practices. The responses show that a  
 17 significant variety of employees would be  
 18 needed, including, for example, web  
 19 developers, business analysts, human resource  
 20 personnel, review moderators, in-house  
 21 counsel, compliance analysts, and customer  
 22 experience executives.  
 23 The Commission's cost estimate was  
 24 significantly more limited and simply assumed  
 25 that only lawyers at large companies or

16

1 owners of small companies would spend a  
 2 meaningful amount of time reacting to the  
 3 proposed rule. The survey then asks about  
 4 the costs to implement the identified  
 5 practices. The estimates provided in  
 6 response to these questions clearly  
 7 demonstrate the cost of compliance would be  
 8 considerably higher than minimal.  
 9 First, seven respondents of the 10  
 10 that answered the relevant question  
 11 anticipated they would need to hire new  
 12 employees to implement these practices. The  
 13 cost of hiring and training new employees was  
 14 noticeably absent from the Commission's cost  
 15 estimates in a preliminary regulatory  
 16 analysis.  
 17 In addition, the median number of  
 18 employees that respondents expected would  
 19 need to be engaged in implementing these  
 20 practices was 10, and the median number of  
 21 hours was 100, which significantly exceeds  
 22 the Commission's heightened compliance review  
 23 estimate of eight hours.  
 24 Furthermore, of those respondents who  
 25 provided an estimate of how much it would

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1 cost to have employees or contractors spend  
 2 the time necessary to implement responsive  
 3 practices, the median estimated cost was  
 4 121,000, a figure significantly higher than  
 5 the Commission's \$492 estimate in the  
 6 preliminary regulatory analysis.  
 7 Five members also estimated that it  
 8 would cost them from \$5,000 up to 200,000 to  
 9 bill or acquire new tools, equipment,  
 10 software, or other materials to implement  
 11 these practices.  
 12 Additionally, of the 13 companies  
 13 that anticipated needing to consult counsel,  
 14 five of the seven that provided an estimated  
 15 number of hours counsel would spend advising  
 16 on the proposed rule expected to need at  
 17 least 15 and up to 4,000 hours of counsel's  
 18 time to advise on the response to the  
 19 proposed rule.  
 20 The cost of counsel is particularly  
 21 relevant given the vague language in the rule  
 22 such as "disseminate" and "procure," as well  
 23 as the use of the, quote/unquote, "knew or  
 24 should have known" standard.  
 25 Companies may need the assistance of

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1 counsel to access -- assess possible  
 2 interpretations of the standard and to  
 3 navigate the uncertainty that a vague,  
 4 unexplained legal standard creates.  
 5 Survey results also highlight the  
 6 Commission's failure to consider the ongoing  
 7 costs of compliance in the preliminary  
 8 regulatory analysis at all. The median  
 9 number of employees that respondents expected  
 10 to be engaged in annually maintaining these  
 11 practices was five, and the median estimate  
 12 for hours spent by these employees  
 13 maintaining these -- the practices was 100  
 14 hours.  
 15 The survey shows that at least some  
 16 members anticipate ongoing annual costs.  
 17 Seven members estimated that it would cost  
 18 the company at least \$20,000 annually to have  
 19 employees or contractors maintained in  
 20 responsive practices, with four of those  
 21 estimates surpassing over \$100,000.  
 22 Additionally, six members estimated  
 23 that they would spend upwards of \$15,000  
 24 annually to maintain tools, equipment,  
 25 software, or other materials necessary to

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1 maintain the responsive practices.  
 2 Results from both surveys demonstrate  
 3 that there is a broad range of responsive  
 4 practices that different businesses  
 5 anticipate they will specifically need to  
 6 implement in consideration of the proposed  
 7 rule on top of any current practices they  
 8 might already conduct.  
 9 In addition, factors such as  
 10 long-term ongoing costs, the impact of which  
 11 can be substantial, must be considered in any  
 12 thorough analysis of the proposed rule  
 13 impact. The Commission did not consider such  
 14 costs at all in its analysis.  
 15 As IAB has explained in prior  
 16 submissions, these high costs are likely  
 17 driven by many of the vague terms and  
 18 overbroad provisions included in the proposed  
 19 rule, which creates uncertainty and risks for  
 20 many legitimate companies. Companies must  
 21 manage uncertainty regarding how the rule  
 22 will be interpreted and enforced once  
 23 implemented.  
 24 If the Commission had conducted a  
 25 more robust analysis of compliance costs and

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1 properly assessed reasonable alternatives, it  
 2 would be clear that a more narrowly-tailored  
 3 rule focused on the activities of bad actors  
 4 could achieve the same benefits the  
 5 Commission seeks while imposing a  
 6 significantly lower compliance burden on  
 7 legitimate companies. But because of the  
 8 flawed analysis of costs in the Commission's  
 9 preliminary regulatory analysis, the  
 10 Commission has not been able to engage in a  
 11 reason analysis of the potential alternatives  
 12 and their associated costs and benefits.  
 13 With that, that is -- concludes my  
 14 remarks. We look forward to further  
 15 development of these issues in support of,  
 16 and issues of a clearer and more tailored  
 17 rule. Thank you, Your Honor.  
 18 JUDGE FOELAK: Do you want to move the  
 19 admission as an exhibit of your submission  
 20 of March 5th?  
 21 MR. LARTEASE TIFFITH: Yes, I would. I  
 22 would like to include the submission that  
 23 we -- be submitted, be so.  
 24 JUDGE FOELAK: Okay. Your  
 25 March 5th submission is admitted as an

1 exhibit.  
 2 (Exhibit 1 was marked.)  
 3 JUDGE FOELAK: Okay. Mr. Atleson?  
 4 MR. MICHAEL ATLESON: Thank you.  
 5 CROSS-EXAMINATION  
 6 BY MR. MICHAEL ATLESON:  
 7 **Q. Mr. Tiffith, let's start with**  
 8 **the first IAB survey of its members and look**  
 9 **at the survey document you provided with your**  
 10 **February 20th submission. Please go to the**  
 11 **section on Page 4 titled "Compliance Costs."**  
 12 **Can you please read the first bullet under**  
 13 **that section?**  
 14 A. Yeah. Give me one moment. I'm  
 15 going to pull that up. I'm on that  
 16 submission, and you said which page, Page 4,  
 17 I think I heard, or --  
 18 **Q. Yes.**  
 19 A. Are you looking at the survey  
 20 results itself or the attachment?  
 21 **Q. The survey document that you**  
 22 **provided on February 20th.**  
 23 A. Okay. Give me a moment to pull  
 24 that up. Sorry. If you have it in front of  
 25 you, it may be easier, so we both are

1 looking at the same document, if you want to  
 2 share your screen and share the document.  
 3 **Q. I cannot share my screen**  
 4 **currently.**  
 5 A. Okay. I am now looking at it.  
 6 And I'm going to Page 4 again. Okay. I'm  
 7 at the top of Page 4, which starts with,  
 8 "Change its current review process."  
 9 **Q. Please read the first bullet**  
 10 **under the section titled "Compliance Cost"?**  
 11 A. The FTC's proposed rule on  
 12 reviews and testimonies will allow the FTC  
 13 to obtain civil penalties for certain  
 14 activities the FTC has determined are unfair  
 15 or deceptive, including where the violator  
 16 knew or should have known that a certain act  
 17 or practice violated the rule.  
 18 **Q. You admit that this is an**  
 19 **incorrect statement of law?**  
 20 A. No. I disagree with that.  
 21 **Q. Do you admit that courts may not**  
 22 **impose civil penalties for FTC rule**  
 23 **violations based on a "knew or should have**  
 24 **known" standard?**  
 25 A. Well, based on the NPRM, which

1 is -- and we've had this debate before, and  
 2 I would just --  
 3 **Q. I'm just asking you whether you**  
 4 **agree with that?**  
 5 A. Yeah. I disagree with your  
 6 assertions that it's a mischaracterization.  
 7 It's not true. It's -- actually, that's  
 8 taken from the NPRM.  
 9 **Q. Do you admit that courts may not**  
 10 **impose civil penalties for FTC rule**  
 11 **violations based on a "knew or should have**  
 12 **known" standard?**  
 13 A. Again, if you disagree with what  
 14 the -- what's -- again, we're referring to  
 15 what's in the NPRM.  
 16 **Q. I'm not asking you about the**  
 17 **NPRM. I'm asking you if you agree that**  
 18 **courts may not impose civil penalties for FTC**  
 19 **rule violations based on a "knew or should**  
 20 **have known" standard?**  
 21 A. Under the current law, correct.  
 22 But again, we're talking about the NPRM,  
 23 which is the Commission looking to change  
 24 that.  
 25 **Q. Do you admit that the correct**

1 **civil penalty standard for rule violations is**  
 2 **under section 5(m)(1)(a) of the FTC act?**  
 3 A. That is part of it, yes. But  
 4 again, we don't disagree about what the  
 5 current status of the law is. The real  
 6 point at issue is what is the NPRM seeking  
 7 to do.  
 8 **Q. You think we can change the law**  
 9 **through a rule?**  
 10 A. I think you can -- I think the  
 11 rule that you're looking to propose and how  
 12 you're going to interpret the law, yes, you  
 13 can do that.  
 14 **Q. Okay. Do you admit that Section**  
 15 **5(m)(1)(a) of the FTC Act requires a showing**  
 16 **of actual knowledge or knowledge fairly**  
 17 **implied on the basis of objective**  
 18 **circumstances, that an act is unfair or**  
 19 **deceptive and is prohibited by such rule?**  
 20 A. That is what the FTC Act  
 21 requires. But again, we're talking about  
 22 how the agency is seeking to change. And  
 23 again, it's the NPRM.  
 24 If you're saying you're not  
 25 going to hold companies to the "should have

1 known" standard, I advise you to change the  
 2 NPRM. That would be the easiest way to do  
 3 that, is to say, whether than you -- whether  
 4 than bringing in extraneous information that  
 5 has nothing to do with the NPRM -- because,  
 6 again, that's what we're talking about and  
 7 what's bound to it -- that if you say that  
 8 we're not going to -- we don't plan on  
 9 enforcing that, we won't do that, things like  
 10 that, why didn't the agency put that in the  
 11 NPRM so that all parties are aware of how the  
 12 agency is going to enforce the rule?  
 13 **Q. Did the NPRM state that the FTC**  
 14 **would impose civil penalties on companies**  
 15 **that merely knew or that merely should have**  
 16 **known of a violation?**  
 17 A. It uses the language "should or  
 18 should have known" in there.  
 19 **Q. Right. For violation --**  
 20 A. And it's about --  
 21 (Multiple speakers.)  
 22 MR. LARTEASE TIFFITH: It's about the  
 23 enforcement action. Again, I don't think  
 24 this gets to the factual determination  
 25 issue, which we are here to address.

1 BY MR. MICHAEL ATLESON:  
 2 **Q. I'm getting there, but this is**  
 3 **actually relevant.**  
 4 A. I don't think it is. I think  
 5 that you're seeking to, you know, again,  
 6 address legal determinations, which we've  
 7 already briefed.  
 8 **Q. It's a legal determination that**  
 9 **you put in your survey, right?**  
 10 A. You may -- why don't you -- you  
 11 may have -- you may disagree with that, but  
 12 that is taken from the NPRM, which is the  
 13 relevant document at issue here.  
 14 **Q. The statement that you read is**  
 15 **taken directly from the NPRM?**  
 16 A. It's taken from there, which is  
 17 the "should or should have known" standard.  
 18 **Q. The bullet point that you read**  
 19 **is --**  
 20 A. Obviously, we --  
 21 **Q. You characterized?**  
 22 A. We summarized it.  
 23 **Q. Okay. We'll move on.**  
 24 A. But you may disagree whether it  
 25 was true or not, but I think a reasonable

1 person reading that would find that to be  
 2 true. Thank you.  
 3 **Q. Okay. On March 5th, you**  
 4 **provided an Excel chart with some information**  
 5 **about the survey, but --**  
 6 A. I think it would be helpful for  
 7 you to show me what you're looking at,  
 8 because I have to then --  
 9 **Q. This is what you --**  
 10 A. Yeah. If you could --  
 11 **Q. There are not that many**  
 12 **documents that you submitted. We're talking**  
 13 **about the Excel chart that you submitted**  
 14 **yesterday, about the first survey.**  
 15 A. And I submitted more than one  
 16 document. I just want to make sure -- more  
 17 than one survey result, too, which has  
 18 already been provided. So I'm just going to  
 19 go through each of the attachments --  
 20 **Q. The Excel chart --**  
 21 A. Yes. Each of the attachments.  
 22 **Q. It's the Excel chart that you**  
 23 **provided yesterday with respect to the first**  
 24 **survey. Let me know when you've got it.**  
 25 A. And are you talking about --

1 there's two Excel spreadsheets that I  
 2 attached yesterday.  
 3 **Q. The Excel spreadsheet with**  
 4 **respect to the first survey.**  
 5 A. Okay. Good.  
 6 **Q. Got it?**  
 7 A. I have it open.  
 8 **Q. So you provided this chart with**  
 9 **some information about the survey, but you**  
 10 **haven't provided any of the actual 18**  
 11 **responses to the survey, correct?**  
 12 A. No. I disagree. We have the  
 13 answers to the responses that are in there.  
 14 That's what the percentages are. So if you  
 15 look at the column --  
 16 **Q. No. I'm asking you whether you**  
 17 **provided each company's response, as opposed**  
 18 **to you or someone at IAB filling in the**  
 19 **numbers and the percentages based on those**  
 20 **responses. You didn't provide us the 18**  
 21 **companies' actual responses, correct?**  
 22 A. No. Because the --  
 23 **Q. It was this chart?**  
 24 A. It was a survey of companies in  
 25 which they didn't have to -- we didn't want



29

1 to discourage people from filling out the  
 2 survey, so we just asked them to do it.  
 3 It's from, you know -- it's from our  
 4 members. And in order to allow for them to  
 5 provide answers without feeling like other  
 6 people would know who they were, we just  
 7 gave them the link to the survey to fill out  
 8 and they filled it out. I don't know which  
 9 of my members filled this out.  
 10 **Q. Okay. So --**  
 11 JUDGE FOELAK: Could I ask one  
 12 question?  
 13 (Multiple speakers.)  
 14 JUDGE FOELAK: Mr. Tiffith, so they  
 15 just answered like yes or no to each  
 16 question, or they --  
 17 MR. LARTEASE TIFFITH: No, no. There's  
 18 a bunch of questions. So we follow the --  
 19 we follow the process by which they would --  
 20 they had the questions. And then each  
 21 member was allowed to fill in and submit the  
 22 response to that. So this is where I think  
 23 it would be helpful, Judge, if we actually  
 24 was publishing the document that we're  
 25 talking about at the same time. Because

30

1 you're not able to see what he -- the BCB  
 2 staff and I are looking at.  
 3 And normally when you have  
 4 cross-examination and you want to use a  
 5 document, you show it so that everyone is on  
 6 the same page. I'm looking at something.  
 7 I'm looking at the attachment I have to it.  
 8 And it says, "Survey Questions." So it  
 9 says -- you know, Question 1 -- and this is  
 10 just an example. I'm not going to read all  
 11 of it. But I'm going to give you just an  
 12 example of what the sort of information that  
 13 is provided through the survey results is.  
 14 Does -- the first question is, does  
 15 your business allow customer reviews to be  
 16 posted on the business's website? And so  
 17 there are three possible responses to that.  
 18 There's, yes, and we had 10 people who said  
 19 that, which is 55.6 percent of respondents.  
 20 We have a no, which is 6, which is  
 21 33.3 percent, and then don't know, which is  
 22 2 percent and 11.1 So that's how that first  
 23 question is presented.  
 24 JUDGE FOELAK: Okay. What I was  
 25 getting at, was there any opportunity for a

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1 narrative?  
 2 MR. LARTEASE TIFFITH: So the thing  
 3 that we did -- and I think that was attached  
 4 to the -- the first survey, mind you, we  
 5 submitted back on the 20th. And I believe  
 6 in the document, which we're not using  
 7 now -- we're going to the Excel file. But  
 8 in the -- the list of questions that were  
 9 presented in a separate attachment, it shows  
 10 the language we were using there.  
 11 And, you know, I don't know if  
 12 counsel wants to bring it up, but, again, I  
 13 think it should be something where -- if  
 14 we're going to talk about a document, it  
 15 should be presented and published for both  
 16 the -- you know, the Court's viewing, as well  
 17 as for the public's.  
 18 JUDGE FOELAK: Okay. But my -- my  
 19 question is more simple. It's like, could  
 20 the person responding you say -- you know,  
 21 answer, no, however, blah, blah, blah for  
 22 another paragraph, explaining. That's my  
 23 question. Could they do that on your  
 24 survey?  
 25 MR. LARTEASE TIFFITH: No. We asked --

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1 on this one we had -- on this survey, which  
 2 is different. The second survey was more  
 3 open-ended, but here we have specific  
 4 responses that people had to -- had to code  
 5 in. Yeah.  
 6 JUDGE FOELAK: Okay. Thank you.  
 7 BY MR. MICHAEL ATLESON:  
 8 **Q. So, Mr. Tiffith, you don't know**  
 9 **who any of the 18 companies are other than**  
 10 **the fact that they're IAB members; is that**  
 11 **right?**  
 12 A. That's right. Because we  
 13 sent -- they had to be an IAB member to take  
 14 the survey, but I don't know which of the 18  
 15 or which companies among our membership.  
 16 **Q. So you don't know the size of**  
 17 **any of the companies?**  
 18 A. Well, based on the number of  
 19 reviews and other things like other -- I  
 20 have a way of determining the varied sizes  
 21 of it, but I actually don't know like -- for  
 22 instance, like one company is X and the  
 23 other one is Y. I don't have that  
 24 information.  
 25 **Q. And you don't know the specific**

33

1 **types of products or services any of these**  
 2 **companies offer, correct, other than that**  
 3 **they would fall within IAB's membership?**  
 4 A. They would fall within the IAB  
 5 membership. There was also some questions  
 6 proposed that would move them -- if they  
 7 didn't do customer reviews for their  
 8 products and services, they would be removed  
 9 from it, right, so...  
 10 **Q. How many companies did you send**  
 11 **this first survey?**  
 12 A. To all of our members.  
 13 **Q. How many members is that again?**  
 14 A. We have 700 -- approximately  
 15 700, maybe a little bit over.  
 16 **Q. Okay. Of the companies that**  
 17 **chose not to respond, how many of them so**  
 18 **chose because they didn't think the rule**  
 19 **would have a substantial impact on the**  
 20 **business?**  
 21 A. I have no way of telling you  
 22 that, because we didn't ask them to say why  
 23 they did or did not. And I would also kind  
 24 of add in another very important point here  
 25 is, again, we were given a very limited

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1 amount of time to provide evidence here,  
 2 okay? So if we had more time, I think we  
 3 would have had a lot more responses. But  
 4 given the very, very small amount of time we  
 5 had, we weren't able to get everybody to  
 6 fill out a survey.  
 7 **Q. The proposed rulemaking was made**  
 8 **public over eight months ago, wasn't it?**  
 9 A. That is true. However, eight  
 10 months ago we were talking about a number of  
 11 other issues. And at that time, the Court  
 12 had not identified, as the judge has done  
 13 now, that the compliance cost is a disputed  
 14 issue of material fact.  
 15 **Q. And you have been raising that**  
 16 **issue for months.**  
 17 A. Along with a lot of other issues  
 18 we've been raising for months about the  
 19 process by --  
 20 **Q. You specifically asked for**  
 21 **commenters to provide specific evidence to**  
 22 **help with costs, right; that was over eight**  
 23 **months ago?**  
 24 A. Again, there was a lot of other  
 25 things that were also being considered in a

35

1 NPRM. We put together very robust filings  
 2 and submissions regarding this. And now,  
 3 until this time, have we narrowed it down to  
 4 this issue. And that's based on briefings  
 5 we've done and the fact that the Judge has  
 6 decided that this is an area in which she  
 7 would like to see more evidence put forth.  
 8 And we've done it, and we've put together  
 9 two survey results.  
 10 I would also mention that the  
 11 Judge also asked and invited the FTC to put  
 12 forth some explanation of its assumptions and  
 13 other things, and you didn't do that.  
 14 **Q. Okay.**  
 15 A. And you've had eight months as  
 16 well to prepare for this.  
 17 **Q. Are companies who responded to**  
 18 **the survey statistically representative of**  
 19 **all businesses affected by the proposed rule?**  
 20 A. We believe they are  
 21 representative of our membership. And  
 22 generally we are -- like I said in the  
 23 beginning, we have over 700 member  
 24 companies. We are also about 80 percent --  
 25 sorry, 86 percent of the online advertising

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1 marketing place in the United States. So I  
 2 feel like it is a -- generally, a very good  
 3 survey.  
 4 **Q. Is it statistically**  
 5 **representative of all businesses affected by**  
 6 **the proposed rule?**  
 7 A. I believe it's a good  
 8 representation. Now, we could talk about  
 9 statistically, and I'm happy to do that.  
 10 But again, given that the FTC has put forth  
 11 no -- no evidence on its side to share -- to  
 12 refute this and we --  
 13 **Q. That's -- you're just -- let's**  
 14 **keep it to the questions, okay? So I'm**  
 15 **asking you whether these 18 companies are**  
 16 **statistically representative of all**  
 17 **businesses affected by the proposed rule?**  
 18 **You're saying they're representative of your**  
 19 **membership --**  
 20 A. And generally --  
 21 (Multiple speakers.)  
 22 **Q. But aren't there lots of other**  
 23 **businesses in the country that are affected**  
 24 **by this rule that are not companies that**  
 25 **would be -- fall within, you know, the**

1 **membership parameters of IAB?**  
 2 A. One, again, I think this is a  
 3 good reflection of generally the member  
 4 companies -- not only the member companies,  
 5 but generally the companies that would be  
 6 affected by this. It's not an insignificant  
 7 amount. And again, I would also say that --

8 **Q. 18 is not an insignificant**  
 9 **amount?**

10 A. I don't think so, no. When you  
 11 consider that -- when we look at the -- when  
 12 we look at the -- the range of responses in  
 13 terms of the impact that the -- the proposed  
 14 rule would have on the survey respondents,  
 15 it's clear to me that it's a -- that is a  
 16 variety of member companies.

17 **Q. Even though you don't know who**  
 18 **they are?**

19 A. Even though I don't know who  
 20 they are.

21 **Q. All right. When you sent out**  
 22 **the survey to your members, did they know**  
 23 **that the survey was intended to support IAB's**  
 24 **arguments made in connection with this**  
 25 **ruling?**

1 A. They were told that we had to  
 2 respond to the Court's order, which they  
 3 were aware of, which asked for IAB to  
 4 present additional evidence about how the  
 5 rule would impact them as it pertains to  
 6 compliance and compliance costs. That's  
 7 what we provided.

8 **Q. When you sent out the survey to**  
 9 **your members, did they know what IAB's**  
 10 **concerns were about the proposed rule?**

11 A. Well, first of all, let me --  
 12 back up a little bit. We communicate  
 13 regularly with our members about ongoing  
 14 issues like this with the FTC. So we have  
 15 been from -- starting from the first  
 16 admission we did over the summer in July,  
 17 we've been updating our members about this  
 18 process.

19 So, yes, so they have been  
 20 following along, and members have been  
 21 knowing for -- since the beginning. That's  
 22 what we regularly do as a regular course of  
 23 business, is to update our members on ongoing  
 24 situations like this. The Negative Option  
 25 Rule is another one that we also keep our

1 members very much abreast of.  
 2 **Q. Did you suggest to the survey**  
 3 **recipients that they read the proposed rule?**

4 A. I believe -- I will have to go  
 5 back and look at that. This is where I need  
 6 to pull this up, because I don't have it.  
 7 I'm looking at the spreadsheet in front of  
 8 me right now and not the actual other  
 9 attachment that we had. And again, I think  
 10 it would be helpful for me, rather than  
 11 having to dig through my computer to figure  
 12 out, if you have a document that you want to  
 13 show -- and I believe the screen share is  
 14 available -- that you share that document,  
 15 so that I don't have to take time to kind of  
 16 find where you're looking at.

17 **Q. I'm not asking a question based**  
 18 **on a document. I'm asking you whether in one**  
 19 **of the documents you've provided or**  
 20 **otherwise, did you suggest to the survey**  
 21 **recipients that they read the proposed rule?**

22 A. One second. I believe we did.  
 23 I don't have it in front of me, but I  
 24 believe that we -- we -- in providing a  
 25 description of it, we provided a link. But

1 I would have to double check that. Again, I  
 2 don't have everything that -- I would have  
 3 to look through to find that, but I believe  
 4 that we did.

5 **Q. Did you suggest to them that**  
 6 **they read the NPRM or any part of it?**

7 A. I believe that's the same thing.  
 8 We provided them with -- that they should  
 9 read the proposed rule, which is the NPRM.

10 **Q. The NPRM consists of a lot of**  
 11 **pages and the proposed rule, right?**

12 A. Well, that's where the proposed  
 13 rule is, and that's where we would point  
 14 them to.

15 **Q. Do you know whether any of them**  
 16 **did read the proposed rule itself when**  
 17 **completing the survey?**

18 A. I don't. Again, it was  
 19 something that members didn't have to --  
 20 we're not tracking who each of the --

21 **Q. Right.**

22 A. -- folks are among our  
 23 membership.

24 **Q. Let's go to the first page of**  
 25 **the survey document, the one that was**

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1 attached to your February 20th submission.  
2 And look at the first two threshold  
3 questions. Can you please read those aloud?

4 A. Again, I'm going to ask that you  
5 share your screen.

6 Q. I don't have the facility to do  
7 that right now.

8 MS. TABOR: This is the secretary.  
9 Actually, all participants have the ability  
10 to screen share. It's been enabled.

11 MR. MICHAEL ATLESON: I can attempt to  
12 do that on my computer or, Mr. Tiffith,  
13 through your documents, you could do that as  
14 well.

15 THE WITNESS: I would prefer that you  
16 do it, because it's your questioning, and I  
17 prefer that you bring it up. Thank you.

18 JUDGE FOELAK: You could use the green  
19 button on the controls that says share  
20 screen.

21 MR. LARTEASE TIFFITH: So I'm viewing  
22 your document, I believe.

23 BY MR. MICHAEL ATLESON:

24 Q. Okay. It's up.

25 A. Yeah.

42

1 Q. It's going to take me a little  
2 bit of time for each one, but all right. So  
3 this is the first page of the survey  
4 questions from the first survey that you  
5 submitted on February 20th; is that right?

6 A. That's correct.

7 Q. And -- okay. So we're looking  
8 at the first two threshold questions. And  
9 now we need to pull up the Excel charts. I'm  
10 not sure I can do both at the same time.

11 So let's just look at this one  
12 here for now. On the -- on the Excel chart  
13 that you submitted yesterday, it says that 10  
14 people, 10 companies answered yes to the  
15 first question, and 15 companies answered yes  
16 to the second question, right?

17 A. Again, if you could pull up the  
18 document, so we're -- we're both referring  
19 to the same thing, that would be great.  
20 You're referring to a document. I would  
21 like for you to pull it up.

22 Q. Are we seeing the chart?

23 A. Yeah. I see it. So the first  
24 question, Does your business allow customer  
25 reviews to be posted on the business

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1 website, of the people who responded, the  
2 18, 10 said yes.

3 Q. Right. And on Question 2, 15  
4 said yes, right?

5 A. On Question 2, Do you use or  
6 solicit customer reviews or testimonials to  
7 market products offered by your business, 15  
8 said yes. That's correct.

9 Q. How many of the 18 answered yes  
10 to both questions?

11 A. That, I don't know.

12 Q. Or do you not know for sure?

13 A. I can't tell of the 18, how many  
14 answered both, but I would imagine given  
15 their -- we're talking about a universe of  
16 18 that if you had 10 or 15, there's  
17 probably some overlap there at least.

18 Q. Right. Now, from the Excel  
19 chart alone, we can't match up any company's  
20 response to the threshold questions with the  
21 same company's answers to the last two  
22 questions, which we'll get to, which are on  
23 cost estimates, right?

24 A. I -- I believe that's the case.  
25 Now, are you referring to a specific

44

1 question? Do you have a specific question  
2 in mind, or are you just talking about the  
3 questions in general?

4 Q. I'm talking about the last two  
5 questions down here, Question 7 and 8. Those  
6 are the two questions about cost -- specific  
7 costs.

8 A. Uh-huh.

9 Q. And I'm asking whether there's a  
10 way you can tell --

11 A. Can you go back down to  
12 Question 7 and 8?

13 Q. Uh-huh.

14 A. I just want to finish reading  
15 it.

16 Q. Do you understand the question?

17 A. I believe I am getting it, but I  
18 just -- you were kind of moving between the  
19 two. I just wanted to kind of finish  
20 reading what you were looking at. Okay.  
21 You can continue.

22 Q. Okay. So from this chart, we  
23 can't match up any company's response to the  
24 threshold questions with the same company's  
25 answers on these last two questions; is that

1 **right?**  
 2 A. That's correct. We're not able  
 3 to tell, of the ones who said yes to the  
 4 first two questions, whether -- who also  
 5 said -- how they may have answered this  
 6 question.  
 7 We do know that we have 18  
 8 respondents to this question, but we're not  
 9 able to say who answered what among them.  
 10 **Q. Okay. And I see here -- let's**  
 11 **go back to Questions 1 and 2. So for each --**  
 12 **Question 1 and Question 2, we have two**  
 13 **companies saying, don't know, right?**  
 14 A. Of the 18, that's correct.  
 15 **Q. Do you know whether those are**  
 16 **the same two companies?**  
 17 A. I don't know.  
 18 **Q. Okay. So you have somewhere**  
 19 **between two and four of your 18 respondents**  
 20 **who completed the whole survey despite not**  
 21 **knowing whether their companies posted**  
 22 **reviews on their websites or --**  
 23 A. Let's be very --  
 24 (Multiple speakers.)  
 25 MR. LARTEASE TIFFITH: Let's be very

1 clear. Let's go back to Question 7 and 8  
 2 again. So we have again six and seven, who  
 3 said, don't know. It very well goes to --  
 4 or potentially four, are also the same ones  
 5 who are saying no to this question.  
 6 BY MR. MICHAEL ATLESON:  
 7 **Q. But you don't know, right?**  
 8 A. I don't know, but I would -- I  
 9 would think that was probably a -- I would  
 10 feel like more than likely, since they  
 11 didn't know the first two, they probably  
 12 didn't know that one either.  
 13 **Q. We're going to go back to the**  
 14 **survey document. And let's go to the**  
 15 **compliance cost section again.**  
 16 A. Are we -- so are we doing a  
 17 different question now, not still focusing  
 18 on Questions 7 and 8?  
 19 **Q. We are. We actually are going**  
 20 **to go to the last two questions. Those are**  
 21 **the same seven and eight here on the last**  
 22 **page.**  
 23 **Okay. Were the survey**  
 24 **respondents basing their answers to these two**  
 25 **questions, at least in part, on your**

1 **statement on the prior page that we already**  
 2 **talked about relating to liability for**  
 3 **companies?**  
 4 A. They were doing it based on what  
 5 it would take for them to come into  
 6 compliance with the proposed rule. That's  
 7 the question we asked them, and that's  
 8 actually in this question itself. And they  
 9 were responding to that.  
 10 **Q. Well, don't both of these**  
 11 **questions about costs start with, "In light**  
 12 **of the above"?**  
 13 A. Yes. All of the above.  
 14 **Q. Right. And isn't that an**  
 15 **implicit direction for respondents to**  
 16 **consider what you just said in the same**  
 17 **section on the prior page about civil penalty**  
 18 **liability?**  
 19 A. I believe -- on the first --  
 20 this first one we said right here, in light  
 21 of the above and considering your answers to  
 22 Questions 1 and 2, please estimate that.  
 23 And in the second we do the same,  
 24 considering all other questions. So just as  
 25 it is read there, in light of the above in

1 considering your answers to all other  
 2 questions in this survey, then answer that  
 3 question. So, yes, that's how we did it. I  
 4 think the questions themselves are very  
 5 clear about what we asked them to do. And  
 6 they provided a response.  
 7 **Q. As far as you know though, they**  
 8 **considered your statement about civil penalty**  
 9 **liability in determining which of the answers**  
 10 **they were going to pick on these last two**  
 11 **questions, right?**  
 12 A. I assume they considered  
 13 everything we provided them, but I can't say  
 14 they only considered one thing or the other.  
 15 But I would imagine they considered  
 16 everything that we asked them to consider.  
 17 **Q. All right.**  
 18 A. Yeah.  
 19 **Q. Now, I need to go back to the**  
 20 **chart again. Okay. And we're going to go on**  
 21 **the chart back to Question 7 and Question 8.**  
 22 **On Question 7, 6 of the 18 gave no estimate,**  
 23 **right?**  
 24 A. They say, don't know. That's  
 25 right.

1 **Q. And Question 8, 7 of the 18**  
 2 **didn't give an estimate, right?**  
 3 A. That's right. They quoted,  
 4 don't know.  
 5 **Q. And you don't know, again, how**  
 6 **many of those six or seven people were the**  
 7 **same companies that said I don't know to one**  
 8 **or both of the threshold questions?**  
 9 A. That's right. And the other  
 10 thing I would add, if I may finish my  
 11 answer, is that, again, because of the  
 12 judge's order asking for specifically  
 13 more -- asking for evidence related to cost,  
 14 the second survey which we haven't gotten to  
 15 yet is --  
 16 **Q. Right. We'll get to the second**  
 17 **survey.**  
 18 A. -- a lot more detailed than the  
 19 first survey was.  
 20 **Q. Back to Question 7 again. For**  
 21 **the two companies that apparently answered**  
 22 **with the option of estimated cost between**  
 23 **\$1,000 and 9,999, you don't know whether**  
 24 **their actual estimates would have been closer**  
 25 **to the lower number or the higher number,**

1 **Q. If this survey misstated any**  
 2 **provision or aspect of the proposed rule,**  
 3 **that could affect the calculation of**  
 4 **compliance costs, right?**  
 5 A. I'm sorry. Repeat the question.  
 6 **Q. If the survey misstated any**  
 7 **provision or aspect of the proposed rule,**  
 8 **that could affect the calculation of**  
 9 **compliance costs for purposes of Question 7**  
 10 **and 8, right?**  
 11 A. If -- if the survey question --  
 12 if the survey questions had, then, yes.  
 13 But -- you know, again, or characterization  
 14 and interpretation is that it's accurate.  
 15 **Q. Might some respondents have**  
 16 **understood the proposed rule to impose**  
 17 **liability based on merely the hosting of fake**  
 18 **or false consumer reviews?**  
 19 A. Some could have. That would  
 20 also be why interpretation -- I think that's  
 21 also part of the concern we have here, is  
 22 that based on this lower standard, "should  
 23 or should have known," which means that  
 24 if -- and not actual knowledge, is that many  
 25 businesses are going to have to do things to

1 **right?**  
 2 A. No. They were asked to choose a  
 3 range, and that's the range.  
 4 **Q. And the same is true of the four**  
 5 **companies between \$10,000 and 49,999?**  
 6 A. That's correct.  
 7 **Q. Okay. And you don't know how**  
 8 **any of these respondents actually calculated**  
 9 **their estimated costs, right?**  
 10 A. I don't.  
 11 **Q. You don't know how much time or**  
 12 **effort any of the respondents put into those**  
 13 **calculations, right?**  
 14 A. I don't.  
 15 **Q. You don't have any breakdown of**  
 16 **how any of the respondents calculated the**  
 17 **cost of different tasks to make up those**  
 18 **totals, right?**  
 19 A. Not based on this question right  
 20 here, no.  
 21 **Q. Okay. And you don't know which**  
 22 **provisions of the proposed rule might be**  
 23 **attributable to any portion of the estimates**  
 24 **that they gave?**  
 25 A. That's correct.

1 figure out how best they could comply with  
 2 that standard.  
 3 That includes some may decide --  
 4 like you say, they may do -- you know, do  
 5 something in one area or all areas. I have  
 6 no way to know, based on their estimate, what  
 7 they considered in that. But again, that is  
 8 something that's going to be subject to each  
 9 of the companies.  
 10 And again, all of the companies  
 11 who are going to have this are going to do  
 12 the same kind of calculations to figure out  
 13 how they're going to do it.  
 14 **Q. Do you know who in each company**  
 15 **answered the survey?**  
 16 A. We sent it to the companies and  
 17 sent it to the -- the individuals best able  
 18 to answer the question, so who would be able  
 19 to determine the cost. So people who are  
 20 working --  
 21 **Q. You don't know who they are?**  
 22 A. I don't know who they are, no.  
 23 **Q. Do you know --**  
 24 **(Multiple speakers.)**  
 25 MR. LARTEASE TIFFITH: We directed it

1 to them.

2

3 BY MR. MICHAEL ATLESON:

4

5 **Q. Do you know whether any person**  
6 **answering the survey consulted with others at**  
7 **their company with relevant knowledge?**

8

9 A. I would assume they did, but I  
10 don't know. Because, again, I -- you know,  
11 as I've stated from the beginning, it was  
12 not a survey where we know each of the  
13 individuals who did it.

14

15 **Q. Right. So you also don't know**  
16 **the factual basis, if any, that the people**  
17 **answering the survey had for their answers?**

18

19 A. Correct.

20

21 **Q. Okay. I'm going to move to the**  
22 **second survey. Give me a moment to bring**  
23 **that up. Okay. So do you see it?**

24

25 A. Yes.

26

27 **Q. All right. This is a rather**  
28 **long document, literally long, like this**  
29 **(showing), so I'll try and move it around as**  
30 **best as I can. This is by the way the Excel**  
31 **chart that you produced yesterday with**  
32 **respect to the second survey; is that right?**

1 A. That's correct.

2

3 **Q. Okay. Now, for the second**  
4 **survey, you didn't provide us with a copy of**  
5 **the actual survey document itself, did you?**

6

7 A. I don't think so. This time,  
8 again, as you will recall, we were kind of  
9 pushed to get our stuff in the record. I  
10 had -- originally, our plan was that we had  
11 more time to do that. So I didn't attach  
12 everything at the same time because I was  
13 trying to meet this truncated deadline.  
14 But, no.

15

16 So the things that we provided  
17 yesterday were the submission itself, which I  
18 think had some of that in there. So we  
19 should go to the actual written document.  
20 And the two survey -- sorry. Two Excel files  
21 that were attached.

22

23 So let me -- let me look and see  
24 if that would actually -- because I don't  
25 have that in front of me at the moment. Let  
26 me take a look at that from yesterday.

27

28 **Q. So while you're looking, as with**  
29 **the first survey, you didn't provide us with**  
30 **any of the individual companies' responses,**

1 **correct, just this chart?**

2

3 A. That's right. Again -- again,  
4 we -- you know, for the same reasons as the  
5 first survey.

6

7 **Q. And like the last one, you**  
8 **didn't identify any of the 19 companies that**  
9 **responded to the survey, right?**

10

11 A. That's right.

12

13 **Q. And you don't know the -- do you**  
14 **know who they are?**

15

16 A. No. I do not know. One thing I  
17 will say that we have in there in the  
18 written document, is that we do include,  
19 kind of -- maybe it's hard to read on the  
20 document itself, the Excel spreadsheet, but  
21 in the -- the written submission, we do  
22 have, like, the questions more clearly  
23 identified and the written submission, along  
24 with the results of that. So I just want  
25 to --

26

27 **Q. Okay.**

28

29 A. -- let you know that there's  
30 more there that's not -- that's in the  
31 written submission.

32

33 **Q. So as with the first survey,**

1 **you, I take it, don't know the size of any of**  
2 **these companies?**

3

4 A. No. Don't know the size. But I  
5 will say, if you still have the document up,  
6 is that I can tell that there's -- there's a  
7 variety of -- of companies that have  
8 responded based on the amount of customer  
9 reviews that they use in their business.

10

11 So right now I can only see the  
12 first 11 or -- 10 or 11 data points. But I  
13 see there is some who've done 1,000; 1,200.  
14 There's some in the 10,000s. There's some in  
15 the millions.

16

17 **Q. Right. You don't actually know?**

18

19 A. I just -- I would imagine that  
20 reflects a different size organization, but  
21 I don't know who they are.

22

23 **Q. Okay. And -- and similarly as**  
24 **the first survey, you don't know the specific**  
25 **types of products or services that any of**  
26 **these companies offer, except that they would**  
27 **be presumably something that an IAB member**  
28 **would offer?**

29

30 A. Correct. Yeah.

31

32 **Q. Did you send this survey to all**

1 of your members as well?  
 2 A. We did. Just like we did for  
 3 the first survey.  
 4 **Q. How many of the companies**  
 5 **responding to the second survey also**  
 6 **responded to the first survey?**  
 7 A. I have no way of knowing.  
 8 **Q. Okay. Of the companies that**  
 9 **chose not to respond, I take it you don't**  
 10 **know how many so chose because they didn't**  
 11 **think the rule would have a substantial**  
 12 **impact on the business?**  
 13 A. I don't know, one, whether they  
 14 saw the survey, because, again, we were  
 15 doing it on a very truncated time schedule.  
 16 I don't know if they saw it. And if they  
 17 saw it and decided not to respond or whether  
 18 they -- whatever. I actually couldn't  
 19 answer what they were thinking, whether they  
 20 even saw it. But I can only talk about the  
 21 19 that we actually had that provided  
 22 answers.  
 23 **Q. Okay. When you sent out this**  
 24 **survey to your members, did they know that it**  
 25 **was intended to support IAB's arguments made**

1 the phrase, "Considering the information you  
 2 just reviewed about the FTC's proposed rule,"  
 3 right?  
 4 A. Yeah.  
 5 **Q. Okay. Whatever that information**  
 6 **was, you didn't provide that, right?**  
 7 A. So, again, like I said before, I  
 8 believe we provided them with the NPRM,  
 9 and -- which is -- and asked them to review  
 10 it. And provide responses based on their --  
 11 you know, their own answer to the questions  
 12 based on having that. And that's what we  
 13 say in the actual question itself.  
 14 And we were asked -- they were  
 15 asked to do that, and so they provided a  
 16 response.  
 17 **Q. I'm sorry.**  
 18 A. The question says right here,  
 19 considering the information you just  
 20 reviewed about the FTC's proposed rules.  
 21 **Q. Right. But we don't know what**  
 22 **information they just reviewed about the**  
 23 **proposed rule?**  
 24 A. They reviewed the rule. That's  
 25 what they were asked to do.

1 in connection with this ruling?  
 2 A. Similar to the first one, we let  
 3 people know -- and, again, we do regular  
 4 updates with our members about ongoing  
 5 issues like this. We -- I let our members  
 6 know that the judge in this -- the presiding  
 7 officer wanted to have more evidence  
 8 presented related to compliance costs and we  
 9 needed their help to help by, you know,  
 10 filling out the survey, so that we could  
 11 provide that evidence to the judge.  
 12 **Q. And did you tell them at that**  
 13 **time that IAB's concern was that costs were**  
 14 **not as minimal as the FTC had suggested?**  
 15 A. I don't believe we did that, no.  
 16 **Q. Okay. But they knew that from**  
 17 **prior updates?**  
 18 A. They would have -- I mean, I  
 19 would assume that all our members are aware  
 20 of public policy matters because we  
 21 regularly send news letters and other  
 22 updates about what's going on. So I would  
 23 presume that they were aware of the issue.  
 24 **Q. Okay. So Question 4 on the**  
 25 **survey, according to this chart, starts with**

1 **Q. How do you know?**  
 2 A. I don't know if they did do  
 3 that, but they were asked to review the  
 4 rule.  
 5 **Q. Where was it they were asked to**  
 6 **do that?**  
 7 A. I believe when we asked them to  
 8 complete the survey, it was part of that,  
 9 asking them to take a look.  
 10 So but -- I would have to --  
 11 again, I would have to go back and try to  
 12 find that. But I don't have that in front of  
 13 me. I don't know what the -- I don't know  
 14 what the point of this question is. I told  
 15 you, I don't know who the respondents are.  
 16 I've already acknowledged that. And --  
 17 (Multiple speakers.)  
 18 BY MR. MICHAEL ATLESON:  
 19 **Q. -- their answers, depending on**  
 20 **what they reviewed about the proposed rule,**  
 21 **and you've shown us this question indicating**  
 22 **that you gave them something to review, but**  
 23 **you didn't tell us what it was that they**  
 24 **reviewed.**  
 25 A. As I said earlier, we give



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1 regular updates to our members on ongoing  
 2 matters, including this one. So earlier  
 3 when I said, you can assume they were aware  
 4 of where IAB is with respect to this. So I  
 5 --  
 6 **Q. This is, considering the**  
 7 **information you just reviewed. So I take it**  
 8 **that at some part of this survey that you**  
 9 **didn't provide but for this chart, you gave**  
 10 **them information to review. And I'm still**  
 11 **trying to figure out what information it was**  
 12 **that you asked them to review. We don't**  
 13 **know.**  
 14 A. We --  
 15 **Q. You don't --**  
 16 A. We don't know. I think that's  
 17 probably the best answer right now.  
 18 **Q. Okay. Did you -- what**  
 19 **specifically did you tell members receiving**  
 20 **the survey about civil penalty liability?**  
 21 A. Again, I asked -- we asked them  
 22 to refer to the rule. So -- and I think  
 23 they would have -- as we've already -- and I  
 24 have told you I've briefed. We've briefed  
 25 people that the FTC is seeking penalties and

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1 under a "should or should have known"  
 2 standard.  
 3 **Q. Okay. You told them --**  
 4 A. But --  
 5 **Q. -- for this survey.**  
 6 A. But -- but -- not for this  
 7 survey. This again goes to communications  
 8 generally about updates about what we're  
 9 doing. So --  
 10 **Q. Okay. Okay. Good enough. So**  
 11 **this survey did or didn't contain any text**  
 12 **besides the questions in this chart?**  
 13 A. I think there was a -- there  
 14 would have been additional texts just to  
 15 say, here's a survey, you know; can you  
 16 complete this? Here's a due date when we  
 17 need to get this by in order to present it  
 18 to the judge. That sort of thing.  
 19 **Q. It didn't have any statements**  
 20 **about the rule provisions?**  
 21 A. I will have to go back and look  
 22 at it, but I believe, you know, generally.  
 23 **Q. So now let's turn to questions**  
 24 **that ask for specific cost estimates. Let's**  
 25 **see if I can get to those. It's going to be**

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1 **maybe a little hard to get them all up on a**  
 2 **screen at once here.**  
 3 A. If you want to just do the  
 4 questions, I think the written submission  
 5 should have generally the questions in a  
 6 column and the respondent, if you want to  
 7 consider that.  
 8 **Q. Yeah. That won't be exactly**  
 9 **what I'm asking here. But let's just see if**  
 10 **we can do this. So the questions on the**  
 11 **survey that ask for specific cost estimates**  
 12 **are 9, 12, 15, and 16; is that right?**  
 13 A. You said 9, 12 -- what was the  
 14 other question?  
 15 **Q. 9, 12, 15, and 16. Those are**  
 16 **the ones with cost estimates that members put**  
 17 **in; is that right?**  
 18 A. Yes. But I would also say the  
 19 other ones also include some kind of cost  
 20 estimate, too, eventually. But, yes.  
 21 **Q. That doesn't include the numbers**  
 22 **of employees or hours?**  
 23 A. Exactly. Yeah. The word "cost"  
 24 is actually in those questions, yes.  
 25 **Q. Okay. So for Question 9 --**

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1 A. And if you could just refer  
 2 to -- go back up to nine, and then can you  
 3 go back up to the top, so I can read that  
 4 question again?  
 5 **Q. Okay.**  
 6 A. Okay. Go ahead.  
 7 **Q. 11 of the 19 respondents gave no**  
 8 **estimate at all; is that right?**  
 9 A. Based on this, yes, that's  
 10 right.  
 11 **Q. Okay. And for Question 12 -- go**  
 12 **back up to the top.**  
 13 A. Yeah. Because I can follow the  
 14 column. That's good. And I can see which  
 15 one we're talking about.  
 16 **Q. Again, 11 of the respondents**  
 17 **gave no estimate at all and a 12th respondent**  
 18 **said the amount was zero dollars; is that**  
 19 **right?**  
 20 A. Say that again. Yeah. Say that  
 21 again.  
 22 **Q. 11 of 19 respondents to Question**  
 23 **12 gave no estimate at all and a 12th**  
 24 **respondent said the amount was \$0; is that**  
 25 **right?**

1 A. I believe -- so let me actually  
2 look at the written submission, because I  
3 think we actually say how many people  
4 responded to the various questions. And  
5 that way I don't want to say anything that's  
6 not accurate. And go back up. I'm going to  
7 look at this and look at the number -- for  
8 the sake of argument, I'm going to agree  
9 that you counted the entries correctly.

10 Q. Okay.

11 A. I'm going to say that's correct,  
12 yeah.

13 Q. So Question 15, 13 of the 19  
14 respondents gave no estimate at all and a  
15 14th respondent said the amount was \$1; is  
16 that right?

17 A. Yes. Go back down a little  
18 further down. Because I think -- go to the  
19 bottom. That looks correct. Yes.

20 Q. Okay. And finally, for Question  
21 16, 12 of the 19 respondents gave no estimate  
22 at all and a 13th respondent said the amount  
23 was \$1; is that right?

24 A. That's -- that looks correct.

25 Q. Okay. For the few companies

1 that did answer any of those four questions,  
2 you don't know how exactly any of them  
3 actually calculated any of their estimated  
4 costs, right?

5 A. I -- I don't. Just as I said  
6 before, I don't know what they -- what each  
7 company did to come up with their figure.

8 Q. Right. And you don't know how  
9 much time or effort any respondent put into  
10 their calculations, right?

11 A. I do not. No.

12 Q. You don't know which provisions  
13 of the proposed rule are attributable to any  
14 portion of any of these estimated costs,  
15 right?

16 A. Correct.

17 Q. And you don't know who at each  
18 company answered this survey; is that right?

19 A. Well, I know that we directed to  
20 the person who was most likely to be able to  
21 answer the question, but I don't know who  
22 that person is.

23 Q. Okay. And you don't know  
24 whether any of those people did or did not  
25 consult others at the company with relevant

1 knowledge?

2 A. That's correct.

3 Q. And you don't know the factual  
4 basis of any of the people answering the  
5 survey had for these answers?

6 A. That's correct. I don't know  
7 what went into their determination.

8 MR. MICHAEL ATLESON: I have no further  
9 questions, Your Honor.

10 JUDGE FOELAK: Mr. Tiffith, a redirect,  
11 as it were?

12 MR. LARTEASE TIFFITH: You know,  
13 Your Honor, I think, again -- you know, I  
14 would just say that again, you know, just as  
15 you mentioned before, and in your order, we  
16 were given time to submit some evidence and  
17 we undertook that under a very tight  
18 schedule.

19 I think that, you know, counsel  
20 earlier made light of that there is 18  
21 respondents in the first survey and 19  
22 respondents in the second survey. But again,  
23 if you look at the customer reviews and the  
24 second one, you can see that there's a range  
25 of businesses who participated in it. And I

1 do believe it to be reflective of our overall  
2 membership, and I think in general a  
3 reflection of the companies.

4 And, you know, I would also just,  
5 again, echo that the burden here on  
6 establishing that they had considered the  
7 benefits and costs and also alternatives,  
8 which the FTC never did. They essentially  
9 only considered whether they would go forward  
10 with the proposed rule or not. But they  
11 didn't consider lesser alternatives,  
12 including only actual knowledge as being the  
13 standard they would hold companies by, which,  
14 you know, I believed would have significantly  
15 lessened the compliance costs and actually  
16 could create the same benefits for consumers.  
17 And by law, they're required to kind of do  
18 those considerations.

19 And I think, as you discovered from  
20 this process, that again the FTC has not put  
21 forth any details about the assumptions to  
22 assume, nor have they carried out the  
23 requirements of the Magnuson-Moss, in terms  
24 of considering reasonable alternatives.

25 And with that, I will just conclude

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1 and thank you for your time and thank you for  
 2 allowing us to continue this process. It's  
 3 been very, very beneficial for our members,  
 4 and I think for the public in general. Thank  
 5 you.  
 6 JUDGE FOELAK: Okay. Very good. That  
 7 seems to conclude the presentation of  
 8 evidence in this matter. Would the parties  
 9 like to file post-hearing briefs?  
 10 MR. LARTEASE TIFFFITH: Yes, Your Honor.  
 11 I would appreciate it if we could. I would  
 12 also, if it's okay with you, Your Honor, I  
 13 would also allow time for rebuttal.  
 14 I know that Commission staff  
 15 sometimes will maybe not write everything  
 16 that we wish they would in terms of their  
 17 response, and we would like to be able to  
 18 rebut things, especially things that may be  
 19 inaccurate or not true about either -- what  
 20 happened in this proceeding. So if you would  
 21 allow a rebuttal reply period as well to the  
 22 post-hearing briefs, that would be great.  
 23 JUDGE FOELAK: Okay. You're not  
 24 talking about rebuttal evidence, because I  
 25 believe Mr. Atleson --

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1 MR. LARTEASE TIFFFITH: No. Not  
 2 rebuttal evidence.  
 3 JUDGE FOELAK: You're talking about a  
 4 responsive brief. Okay. We can have two  
 5 rounds. We can have opening briefs and  
 6 responses. Okay.  
 7 When would be a good date? It should  
 8 be fairly soon. The hearing has to be closed  
 9 by the 14th of March, and then there is 60  
 10 days to hear -- for me to prepare the  
 11 recommended decision.  
 12 MR. LARTEASE TIFFFITH: Yeah. I  
 13 think -- you know, I believe that the  
 14 hearing itself has been concluded because  
 15 we're concluded today.  
 16 JUDGE FOELAK: That is correct.  
 17 MR. LARTEASE TIFFFITH: I would -- I  
 18 think a week for -- I think a week for  
 19 post-hearing briefs, so the 13th, and then  
 20 allowing, you know, the following Monday to  
 21 provide a reply. So basically, assuming no  
 22 objections, I think if we had until the  
 23 13th to file post-hearing briefs and then a  
 24 reply on the 18th, I think that -- that  
 25 would be doable. I'm also open to longer

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1 periods of time, but -- as well. But I  
 2 think that -- that would be --  
 3 JUDGE FOELAK: How do those dates sound  
 4 to you, Mr. Atleson?  
 5 MR. MICHAEL ATLESON: That's fine,  
 6 Your Honor.  
 7 JUDGE FOELAK: Okay. Very good. I  
 8 will put out an order memorializing this,  
 9 and the hearing is now closed, and thank you  
 10 for your participation.  
 11 MR. LARTEASE TIFFFITH: Thank you,  
 12 Your Honor.  
 13 MR. MICHAEL ATLESON: Thanks,  
 14 Your Honor.  
 15 OPEN EXCHANGE: We are no longer live.  
 16 Thank you.  
 17 (Whereupon, at 11:18 the hearing was  
 18 adjourned.)  
 19  
 20  
 21  
 22  
 23  
 24  
 25

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1 State of Tennessee )  
 2 )  
 3 County of Putnam )  
 4  
 5 I, Brittany Temples, Court Reporter, with  
 6 offices in Cookeville, Tennessee, hereby certify  
 7 that I reported the foregoing court proceeding by  
 8 machine shorthand to the best of my skills and  
 9 abilities, and thereafter the same was reduced to  
 10 typewritten form by me.  
 11 I further certify that I am not related to any  
 12 of the parties named herein, nor their counsel,  
 13 and have no interest, financial or otherwise, in  
 14 the outcome of the proceedings.  
 15  
 16  
 17  
 18 3/13/2024 s/Brittany Temples  
 19 Brittany Temples, LCR #099  
 20 Notary Public  
 21 State of Tennessee  
 22  
 23  
 24 My Commission Expires 3/28/2026  
 25 LCR Commission Expires 6/30/2024

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