



Informal Hearing on Proposed Amendments to the Negative Option Rule | February 14, 2024

Judge Foelak:

Good morning. This is a third hearing session in the negative option rulemaking, project number P064202. And I am Judge Foelak and assisting me today is an attorney from our office. Mr. Benjamin Ristau, please proceed.

Lartease Tiffith:

Good morning, Your Honor.

Judge Foelak:

Very good. I'm just going to make one more remark. I understand, well, today is for the purpose of cross-examining the two individuals that prepared the expert report for IAB and I will swear the witnesses in each one as he prepares to testify. And sir, are you going to have them briefly summarize in their report or we've all read the report so we can go right into the cross-examination?

Lartease Tiffith:

If it's okay with you, I'd like for them to just summarize just for the background and I think we can then go into cross-examination. So I believe we have some remarks that they can prepare summary for, and then we can go into the cross-examination. If that's okay with you, Your Honor.

Judge Foelak:

Okay. Right. It won't be new evidence, they'll just be summarizing what they've already submitted or perhaps the first one can do that, the second one won't have to.

Lartease Tiffith:

Yeah.

Judge Foelak:

Okay. Please proceed.

Katherine Johnson:

Your Honor, this is Katherine Johnson with the Bureau of Consumer Protection. Did you want us to have us make our appearances before we start the proceedings?

Judge Foelak:

Oh, of course, of course. I'm sorry. I am Judge Foelak, like as I said, and please make your appearances for the record. Sir.

Lartease Tiffith:

Yep. So I'm Lartease Tiffith. I'm the executive vice president for public policy at the Interactive Advertising Bureau and I'm joined today by the two experts. I'll let them each introduce himself, Scott Walster and Christopher Carrigan.

Judge Foelak:

Okay, very good. Ms. Johnson.

Katherine Johnson:

Good morning, Your Honor. Katherine Johnson with the Bureau of Consumer Protection.

Judge Foelak:

[inaudible 00:02:53]-

Jonathan Ware:

Good morning, Your Honor. Jonathan Ware, also from the Bureau of Consumer Protection.

Adrienne Lighten:

And good morning, Your Honor. Adrienne Lighten from the Bureau of Consumer Protection.

Judge Foelak:

Okay, very good. So all the parties-

Katherine Johnson:

Your Honor.

Judge Foelak:

Yes.

Katherine Johnson:

Again, this is Katherine Johnson. I just wanted to clarify, this is a slightly unusual situation where we have two different witnesses who've prepared a single report. I'm just trying to understand how Your Honor would like to proceed with the cross-examination after they're done with their opening remarks. I don't know if you would like us to do it panel style where I just present the question and either one answers or to take each witness separately. Obviously I don't know who prepared what part of the report, so it's kind of hard to direct my questions to a specific witness.

Judge Foelak:

Well, perhaps they should appear as a panel. I will swear each one of them in and the first one can clarify whether they split up the different parts of it or whether it was in any way and you can ask your questions. Okay, very good.

Okay, sir, do you want to produce your witnesses?

Lartease Tiffith:

Yeah. Sure. Yep. So again, joining today is Scott Walster and Christopher Carrigan. I'll let them briefly summarize their report and then we'll go into the cross-examination.

Judge Foelak:

Well, okay, before they do that, I'm going to swear them in.

Okay. Mr. Walster or whichever one is going first.

Scott Walster:

Yeah, I think in the opening remarks, Chris Carrigan is going to start it off and I will finish it off. But we will both give an introduction to ourselves early on in that presentation.

Judge Foelak:

Okay. Well since you're on the screen, I'll put you under oath now. Please raise your right hand. Do you solemnly swear that the testimony you're about to give at this hearing shall be the truth, the whole truth, and nothing but the truth?

Scott Walster:

Yes, I do.

Judge Foelak:

Okay. Your colleague?

Chris Carrigan:

Yes, I'm here.

Judge Foelak:

Would you please raise your right hand. Do you swear that the testimony you are about to give at this hearing shall be the truth, the whole truth and nothing but the truth?

Chris Carrigan:

I do, yes.

Judge Foelak:

Okay. Thank you Mr. Carrigan. Okay. Please proceed.

Chris Carrigan:

Sure. Well, thank you Your Honor. We appreciate you providing us with time today to review and answer questions about our report assessing the economic impacts of FTC's negative option rule. I'm Chris Carrigan. I'm associate professor of Public Policy and Public Administration at George Washington University, as well as a co-director of the GW Regulatory Study Center. My expertise centers on regulatory policymaking and my research has examined a variety of topics relevant for evaluating the application of economic analysis and regulatory context such as this. I hold a PhD in public policy from Harvard, an MBA from the University of Chicago and a BA in economics from Davidson College. With me, as you know, is Scott Walster and I'll allow him to introduce himself.

Scott Walster:

Thank you Chris. And thank you Your Honor for the time today. My name is Scott Walster. I'm a co-founder of Peregrine Economics and a managing director in the firm's regulatory economics practice. I specialize in economic analysis related to criminal and civil securities law actions and regulatory policy matters. Previously I served as an assistant director in the Division of Economic and Risk Analysis at the US Securities and Exchange Commission where I developed economic analysis for cases involving violation of federal securities laws and on SEC rulemaking efforts.

Chris Carrigan:

So Scott and I were asked by the Interactive Advertising Bureau to assess whether FTC's negative option rule if finalized would likely have an annual effect on the national economy of 100 million or more. As outlined in our report, our fundamental conclusion is that the effects of the proposed rule on the US economy would easily surpass that number, and this is true whether one considers the proposal's benefits or costs. In contrast, FTC has determined that the proposed rule would not have annual effects reaching 100 million and for this reason does not need to conduct a full regulatory analysis of the proposed rule.

To reach our conclusion, we performed rough cut or back of the envelope analysis, which mimics the process agencies and others involved in the regulatory process such as the Office of Information Regulatory Affairs, OIRA, followed to determine whether a rule reaches a threshold for requiring a full regulatory impact analysis or regulatory analysis. The criteria outlined in the FTC Act for deciding when a proposed amendment requires benefit cost analysis mirrors the standards outlined in executive orders 12866 and 14094, which govern rulemaking in the executive branch. Consistent with OIRA's guidance, we analyze the proposed rules effects which include benefits and costs to determine whether either category would exceed \$100 million in any one year. Using that approach to believe FTC's assessment, or at least our opinion, is that the proposed rule would not have impacts on the national economy of more than 100 million one would have to conclude that the proposed rule would offer few benefits to individual households. Even though the preamble states that negative option programs are widespread in the marketplace and according to commenters cited by FTC continue to grow dramatically accompanied by ongoing widespread deceptive practices.

More specifically, one would have to believe that the proposed rules average annual benefits amount to less than 75 cents per household. Even if only half of US households were affected, which is likely an understatement, annual benefits would've to be less than \$1.50 on average for those benefits not to reach 100 million.

To further elaborate, FTC issued a notice of proposed rulemaking on its trade regulation rule on unfair or deceptive fees last November, that like this rule asserted consumers would save time if companies misleading pricing practices were curtailed. In its associated economic analysis FTC quantified the value of an hour time save for individuals making purchases online at \$24.40 per hour. Applied to the

proposed rule this suggests that the wide-ranging set of disclosure, consent, and cancellation requirements that FTC believes will mitigate harms to consumers across a multitude of industries would actually save households less than two minutes per year.

Yet in his associated press release, FTC notes the new click to cancel provision along with other proposals would go a long way to rescuing consumers from seemingly never ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to newspapers to gym memberships. In the end, we feel it's simply not plausible to assert that the proposed rule will bring significant benefits to consumers while simultaneously suggesting its economic effects would not eclipse 100 million annually.

Either the proposed rule will affect meaningful number of consumer transactions or its effects are so small as to generate close to no benefits. And if the latter were true, FTC would likely not be justified in proceeding with the rule because it could not provide as the FTC Act requires an explanation of the reasons for the determination of the Commission that the final rule will obtain its objectives in a manner consistent with applicable law

Judge Foelak:

Okay, thank you.

Scott Walster:

Your Honor, I have a little more to read into the record about the cost here. If I could continue.

Judge Foelak:

Oh, sorry. Please proceed.

Scott Walster:

Thank you. Thank you.

Like with the benefits to believe the proposed rule would not have an annual effect of at least \$100 million. One also needs to assert it would impose very small costs on a large number of businesses that use negative options. As described in the proposed rules preamble, FTC estimates there were 106,000 entities currently offering negative option features to consumers. To stay below the threshold firm's compliance to comply with all aspects of the rules and other costs associated with the rule could not reach \$950 annually per firm. Yet one time compliance costs alone would greatly exceed \$950 per firm and the deceptive fees rule FTC assumed that all live event ticketing and short-term lodging firms that emit certain fees from advertised prices would at minimum need five hours of lawyer time to determine what is necessary to comply with the proposed rule. 40 hours of web developer time to comply with its presentation requirements and 40 hours of data analyst time to understand its business impacts.

Using these averages as proxies at the same hourly rates reveals that the negative option proposed rule's one-time compliance costs would amount to \$455 million well above the \$100 million threshold. But if FTC's deceptive fee rules is noticeably simpler to comply with and the proposed rule in that it only provides for prices and fees to be presented upfront without misrepresentations. In contrast, the proposed rule requires compliance with six groups of provisions related to misrepresentations, important information, consent, simple cancellation mechanisms, no additional offers before cancellation absent consent and annual reminders. Under a still conservative assumption that each group of provisions would take the same amount of worker time to comply with as the deceptive fees rule, the negative option proposed rules one time cost reach \$2.7 billion.

Moreover, these time estimates utilize the low end of the FTC's range for what it would take to comply with a deceptive fees rule. Using the high end of the FTC's estimates, one-time costs for negative option compliance would range from \$910 million to \$5.5 billion. Commenters have suggested the work streams to manage its requirements are in some cases entirely new and separate and costly to build as a result. Even in the extreme case where we assume most firms are already fully complying with every requirement in the proposed rule and so only need one hour of lawyer time to confirm compliance, the proposed rules cost would still exceed \$100 million annually. At the low end, four out of five firms would already need to be in complete compliance to keep one time cost below \$100 million. If instead each of the six groups provisions are as complex as the deceptive fees rule and worker time is at the higher end of FTC's range, then over 99% of firms would already have to be fully compliant to keep one-time costs below \$100 million.

To fulfill the proposed rules requirements, firms also need to monitor ongoing compliance, particularly as they offer new products. For deceptive fees rule FTC allocated as much as 10 hours of lawyer time to all firms who check for compliance annually. Using this figure, the propose rule's reoccurring monitoring costs alone would range from 83.5 million to more than \$500 million annually depending on whether the estimates consider actions to be complete compliance checks on additional aspects of the proposed rule not captured to the deceptive fees rule, and this cost estimate does not include any worker time to implement required corrections.

Finally, it's important to note that these estimates only focus on compliance costs. The rule introduces other categories of costs that would need to be considered. For example, indirect costs are likely to result from the proposed rule, including missed opportunities for customers to consider additional offers prior to canceling and the unattended loss of services and additional time spent on multiple consent agreements and reviewing reminders. In summary, using elements from FTC's own approach in preparing regulatory analysis for another similar rule demonstrates that the proposed rules effects would easily surpass \$100 million annually.

Thus, FTC is required to prepare a regulatory analysis including a comprehensive assessment of the likely benefits and costs of its preferred approach and reasonable alternatives. A full treatment of this topic is outside of the scope of what we were asked to do, but our report does provide guidance on how FTC might prepare a preliminary regulatory analysis in this case. Thank you.

Judge Foelak:

Thank you. Okay. Please proceed. Ms. Johnson, are you first? Or I guess you're the only participant.

Katherine Johnson:

Yeah. Yes, Your Honor. And Katherine Johnson with the Bureau of Consumer Protection. I will be the only examiner at this proceeding today.

Judge Foelak:

Do you realize the seal behind you is reversed?

Katherine Johnson:

I thought I had fixed that, Your Honor. I apologize. I can-

Judge Foelak:

That's okay. I thought maybe you... Okay. Please proceed.

Katherine Johnson:

Yes. Thank you. Thank you again both Mr. Walster and Mr. Carrigan for being available today. I appreciate the opportunity to ask you a few questions about your report. As I indicated at the very beginning, this is a slightly unusual situation, so I think the way to proceed is that I will ask my question. I may direct it to you one of you specifically, but generally it'll be to either or both of you at the same time and whoever feels best equipped to answer the question can just go ahead and answer. We can just take a pause and allow one of you two to proceed with the answer.

I want to start with just a few basic background questions. You had mentioned that you were here on behalf of IAB. I wanted to just clarify that you haven't been hired by anybody else. You're not here representing any other interests beyond the interest for IAB?

Lartease Tiffith:

Your Honor, I think just so that we can make sure we can avoid some of these problems. I think that your order made it very clear that the cross-examination is limited to the actual report, an expert report. I just want to make sure that the counsel for the FTC doesn't try to go into any areas that would infringe on attorney-client privilege. So I just want to make sure that we can avoid that.

So at the end of the day, we're looking at how they prepared the report and what the assumptions were made and things like that. And so I think we should just want to make sure that counsel for the FTC has informed that we are going to avoid things that veer outside of the scope of the report.

Katherine Johnson:

Your Honor, I didn't take your... Oh, sorry. I'm sorry, Your Honor. I did take your instruction...

Judge Foelak:

I would also like to add, since the report has already been admitted as an expert report, they have been accepted as experts. Okay. Please proceed.

Katherine Johnson:

We're not going to challenge their expertise at this proceeding, but I do think as with any usual cross-examination it's appropriate to ask questions that may present bias or show prejudice. So, I don't see anything inappropriate about asking questions that are generally accepted in cross-examination even when the cross-examination is limited to the scope of the expert report examination into potential bias is always accepted.

Judge Foelak:

I was just mentioning they were already accepted as experts just to forest all any question along that line. Anyway, please proceed.

Katherine Johnson:

Okay. Thank you, Your Honor. I ask again and obviously feel free not to answer and raise the privilege issue. I'm not asking for attorney-client communications, but I'm just trying to find out is whether you represent any other interests beyond IAB's interests, any other interests from any other interested party who's appeared or filed a comment in connection with the FTC's negative option rule beyond IAB? That's the question to Mr. Carrigan or Mr. Walster.

Scott Walster:

Thank you for the question. We appear today here as independent economic experts on this topic. We were retained by a IAB as we disclose in our report.

Katherine Johnson:

And I guess my question is, you were retained solely by IAB?

Lartease Tiffith:

So again, I think he answered the question. The report also says that IAB has retained the experts, that's who they work for. I think it's very clear on the expert report that they're doing it. I like to get to the actual substance of the report so that we can avoid some of these issues because it's very clear in the report that they're here on behalf IAB. So I don't think there was any confusion about that.

Judge Foelak:

Okay. Ms. Johnson, I think that the question has been answered.

Katherine Johnson:

Yes. Thank you, Your Honor. And when were you first retained by IAB?

Scott Walster:

It was, I believe towards the end of January, I don't have the specific date with me, but it was approximately a week prior to when we filed the report.

Katherine Johnson:

And were you familiar, either one of you familiar with the Commission's negative option rule before you were engaged or retained by IAB?

Scott Walster:

No, we didn't have any prior involvement or awareness of the negative options rule.

Katherine Johnson:

And is that true for you as well, Mr. Carrigan?

Chris Carrigan:

That's correct, yes.

Katherine Johnson:

So the first time that either one of you learned about the negative option rule was when IAB reached out to you about preparing the report?

Scott Walster:

That's correct, yeah.

Katherine Johnson:

And have you read the advance notice of proposed rulemaking, which is at 84 Federal Register 52393?

Scott Walster:

Thank you. I believe I read parts of it. I have not read the document in complete from start to finish.

Chris Carrigan:

And me as well. At various points we've read parts of it.

Katherine Johnson:

Sorry, I didn't mean to interrupt.

Chris Carrigan:

No, that's fine.

Katherine Johnson:

And how about the Commission's notice of proposed rulemaking, which I'll refer to as the NPRM, which is 88 Federal Register 24716. Have you read that document?

Chris Carrigan:

Yes.

Scott Walster:

Yes.

Katherine Johnson:

And I'm guessing the answer is no, but I'm going to ask it anyway. Did either one of you file a comment in response to the AMPR or the NPRM?

Chris Carrigan:

No.

Scott Walster:

No.

Katherine Johnson:

Apart from your January 30th, 2024 report, have either of you made any comments publicly about the rule?

Scott Walster:

No.

Chris Carrigan:

No.

Katherine Johnson:

And what is your understanding of the Commission's proposed negative option rule?

Scott Walster:

Yeah, thank you for the question. My understanding of it is that the FTC will now be filling in some gaps in existing regulatory structure around negative options. Specifically, they're going to be asking that all negative options be presented without material misrepresentations both to the negative option and to the product or service itself. They're going to now require important information to be disclosed about the negative option. They're going to require separate consent for the negative option feature. In addition to any other feature of the transaction, there is going to be, what is called, a click to cancel feature where cancellation of a negative option should be as easy as the signup process for the transaction, and it should occur in the same medium that the signup occurred in. There's also now a limitation on the ability to present save offers to consumers without prior consent. And a requirement for annual reminders regarding the negative option that a consumer is signed up for.

Katherine Johnson:

Mr. Carrigan, is your understanding the same as well?

Chris Carrigan:

That's correct. Yeah.

Katherine Johnson:

Thank you. And what informed your understanding of the rule, Mr. Walster?

Scott Walster:

Thanks. The notice of proposed rulemaking.

Katherine Johnson:

Was there anything else?

Scott Walster:

Yeah, I believe we looked at the press release that accompanied it as well.

Katherine Johnson:

And anything beyond that?

Scott Walster:

Yeah, I mean common letters that we cite to in our report we reviewed. So those would be informed as well.

Katherine Johnson:

Can you think of anything else that informed your view?

Chris Carrigan:

Well, I mean if you're talking more generally beyond simply the rule, I mean our understanding of the academic literature, our contribution to that, Scott's experience in doing economic analysis. So all of those aspects of our expertise informed it.

Katherine Johnson:

Informed your understanding of the Commission's proposed negative option rule?

Chris Carrigan:

Well, the specific provisions, no. But the analysis or their assessment that the rule did not meet or exceed \$100 million.

Katherine Johnson:

In your report at pages five through seven, you discussed consumer benefits. And as I understand it, you assumed the top line \$100 million benefit and divided this number by the number of households, assuming everyone is a victim, to determine the minimum time savings benefit required to pass that \$100 million threshold. Is that an accurate statement of your benefits analysis?

Chris Carrigan:

Yeah. Well, we didn't assume that the benefits were \$100 million. We asked the question if the benefits were under \$100 million, how much benefit would the average consumer or average household in this particular case reap in terms of savings or any other benefit for that matter?

Katherine Johnson:

You said average household, but in your analysis you used every household. Am I understanding that correctly?

Chris Carrigan:

Yeah. I should say on average a household what they would save in terms of, well, their financial benefit, and then we also did it in terms of time saving, what that would mean.

Katherine Johnson:

Just in terms of the simple math, you took 100 million and you divide it by every household in the United States. Am I understanding that?

Chris Carrigan:

That's accurate. But then we also did it where we assumed half of households would be affected, and we did that simple math as well.

Christopher Carrigan:

... well. And then we did other math to translate that into time savings.

Katherine Johnson:

And just as far as that first assumption where you assumed every household, would you and Mr. Walster be one of the households that would be benefiting from the rule?

Christopher Carrigan:

Yes, we potentially could be, for sure. Yes.

Katherine Johnson:

Great. Have you been enrolled in a negative option program?

Christopher Carrigan:

Yes.

Katherine Johnson:

Have you been enrolled in a negative option program without your express informed consent?

Christopher Carrigan:

I've been enrolled in negative option programs that I remember having a very difficult time getting myself out of because I didn't want to be involved in there. I can't remember if it was a deceptive practice upfront that introduced me to the program or not.

Katherine Johnson:

How many times has that happened?

Mr. Tiffith:

One thing I want to just object to. It seems like we're going to the expert's experience as consumers rather than the expert's experience as an expert providing economic analysis of this rule. I just want to make sure that, again, your Honor, your order is respected, that you asked that the cross-examination be limited to what the expert report was itself, and this is clearly going outside of the scope of that order.

Judge:

If that is an objection, it's overruled. You can go ahead a little bit into your questioning about bias if that's what you're doing, Ms. Johnson.

Katherine Johnson:

Thank you, your Honor. So you just stated that you had some experience with having a difficulty canceling a negative option program, but not necessarily being enrolled against, or unwittingly.

Mr. Walster, have you had any similar experience where you've either been enrolled unwittingly in a negative option program or had difficulty canceling?

Scott Walster:

Yeah. Thank you for the question. I can't recall specific instances, though I do recall seeing credit card statements sometimes that suggested that I was enrolled in something that I was not aware of, but I don't recall specific instances or how many times that has occurred.

Katherine Johnson:

I want to move on to your report and just start with how IAB described the task at hand that it asked you to do.

Christopher Carrigan:

Yeah. So we were asked to assess whether or not the economic effects of the rule would meet or exceed \$100 million annually based on the FTC requirement for when FTC would need to do a detailed benefit cost analysis of the proposed rule and its alternatives. So we were asked to assess whether or not we thought that the rule would meet or exceed that threshold.

Katherine Johnson:

And in analyzing that question, you produced the report that the judge has accepted into evidence, which is entitled Economic Analysis of the Federal Trade Commission's Proposed Negative Option Rule. Is that the report that you prepared as a result of your analysis?

Christopher Carrigan:

Yes.

Katherine Johnson:

Were all the materials that you relied on in formulating your opinion cited in your report?

Christopher Carrigan:

I think that would be generally true, yes. I mean, there's a broader set. I can't say me in particular. And Scott, I think would agree with this. He can weigh in as well. But I mean we have a general knowledge and understanding of the rulemaking process and how to perform analysis. We didn't cite to all those instances of things that we read or things that I've produced in an academic sense or what have you. But the most relevant things, we did cite to.

Katherine Johnson:

So beyond your just general background knowledge and expertise, the actual materials that you consulted and relied on, those are all cited in the report?

Christopher Carrigan:

Yes.

Scott Walster:

Yes.

Katherine Johnson:

Are you aware that the presiding officer designated two different disputed issues in these proceedings?

Scott Walster:

Yeah. I'm aware that there was a second provision. I don't have it in front of me right now, and I don't recall it verbatim, but I do recall that there being a second provision involved here.

Katherine Johnson:

Just for the record, the second question was what will the record keeping and disclosure costs associated with the proposed rule be? Does that sound familiar?

Scott Walster:

Yeah, it does sound familiar. And to be clear, I know that our ask was to address the first question of \$100 million in the rule or more.

Katherine Johnson:

And that was my question. That you're only offering an opinion with respect to the first question, which is will the proposed rule have an annual effect on the national economy of \$100 million or more?

Scott Walster:

Yes. Thanks.

Katherine Johnson:

In your report, you conclude the commission should have prepared a preliminary regulatory analysis. This is on page three. Do you agree that a preliminary regulatory analysis is different from the analysis of whether the proposed amendment has \$100 million effect on the national economy?

Christopher Carrigan:

Yes, I agree with that. Well, we agree with that.

Katherine Johnson:

Would you agree that under Section 22 of the FTC Act, it is the commission who in the first instance estimates and determines whether the amendment will have an effect on the national economy of \$100 million more?

Christopher Carrigan:

Yes. That's my understanding.

Katherine Johnson:

In your report, you talk about the potential costs of compliance with the proposed rule. I just want to put that in the context with the facts that we already have out there. Do you have a copy of the NPRM handy?

Christopher Carrigan:

I do, yes.

Katherine Johnson:

Okay. Your Honor, at this point, I just wanted to make a note for the record. The NPRM is at 88 Federal Register 24:7:16.

Judge:

Correct.

Katherine Johnson:

It's not an official part of the rulemaking record as far as I know, but the experts have cited to it. It's been cited to by all the commenters who have appeared at this proceeding. And I would just ask your Honor to officially make it part of the rulemaking record.

Mr. Tiffith:

And just be clear, you're asking for the NPRM to be-

Judge:

Yes. I would think that in a way ... Well, okay. Sure. Go ahead, sir. Were you going to say something?

Mr. Tiffith:

Oh, I was clarifying that she's asking for the NPRM to be admitted. I'm just making clear that that's what she's asking.

Judge:

I think that's what she's doing. Are you asking that the NPRM be admitted as evidence, Ms. Johnson?

Katherine Johnson:

Yes, your Honor.

Judge:

Okay. The notice of proposed rulemaking of April 24th, 2023 in the negative option rule is admitted.

Katherine Johnson:

Thank you, your Honor. I might have spoken over either one of you or both of you, but you do have a copy of the NPRM available to you? If not, I think I might be able to figure out how to share it on my screen.

Scott Walster:

No need to do that. I do have it in front of me.

Christopher Carrigan:

And I have as well.

Katherine Johnson:

All right. Please do not challenge me technologically.

Judge:

Plus the screen sharing has been turned off, I believe from yesterday's hearing, is my understanding. Please go ahead.

Mr. Tiffith:

Well, during our tech check, we actually enabled it this morning. So today, it is available.

Judge:

Very good, very good.

Katherine Johnson:

I want you to turn to 88 Federal Register 24:7:33. Are you there?

Scott Walster:

I am there.

Katherine Johnson:

The commission provided an estimate at 88 Federal Register 24:7:33 of approximately \$5.7 million in costs. Did you see that?

Scott Walster:

Yes.

Katherine Johnson:

And you understand that this was based on the fact that due to existing laws in the ordinary course of business, the time for the cost of compliance would be low. For instance, the commission estimated one hour per firm for record keeping because the majority of firms subject to the rule already retain these types of records, and it estimated approximately two hours for disclosure compliance because the substantial majority sellers routinely provide the required disclosures in the ordinary course of business. Did you see that explanation in the NPRM?

Scott Walster:

I did.

Mr. Tiffith:

I just want to make sure. One question. I think while you gave time for the witnesses to find the portion that you're looking for, I want to also make sure I have time to find where you're looking at.

Katherine Johnson:

Certainly.

Mr. Tiffith:

So can you cite again what page of the NPRM that you're referring to?

Katherine Johnson:

Of course. This is at 24:7:33. There's two paragraphs dealing with the record keeping and disclosure hours. I'm just summarizing from those two paragraphs.

Mr. Tiffith:

Okay. I'm there now. Thank you.

Katherine Johnson:

In those two sections. Go ahead, I'm sorry.

Scott Walster:

Yeah, no, to answer your question, yes, was aware of that. I want to make it clear here that the Paperwork Reduction Act piece of this is a subset of compliance costs that would go into complying with a rule like this. And there's additional time for lawyer review, web developer review, business analyst review. And to give everyone some context here in the deceptive fees rule, the one-time compliance costs for that rule, I believe were between 2.4 and \$4.8 billion in that rule. And the Paperwork Reduction Act portion of it, the subset that applies there, I think the FTC calculated as being \$13 million of Paperwork Reduction Act fees. So to be clear, this is a small subset of what we would consider in the broader cost of compliance or costs generally to get above \$100 million.

Katherine Johnson:

I just want you to repeat, you said there was 13 million versus what was the other number?

Scott Walster:

I believe in the deceptive fees rule, the one-time compliance costs, so that's just the upfront compliance costs, were 2.4 to \$4.8 billion. Those are estimates, but I've got generally the magnitude right there.

Katherine Johnson:

I was just curious to know whether this was the kind of back of the envelope estimation strategy that you advocate?

Scott Walster:

No. No, definitely not. The back of the envelope approach should consider all costs involved, indirect and direct costs. So that would include cost to consumers from unexpected loss of services. It would include extra time that they have to contribute to give review to consent agreements. It would include lost save opportunities, in addition to compliance costs, both one time and recurring on firms. So no, this is not what we're referring to as a back of the envelope.

Katherine Johnson:

Okay. Thank you for that clarification. I appreciate it. But would you generally agree that the commission did indicate some order of magnitude of its cost estimate as part of the proposed rule?

Scott Walster:

The section on the Paperwork Reduction Act is a portion of costs, but it is a very small portion of costs that I believe are out there for this. And it is not a full consideration of what the economic effects could be on the economy.

Christopher Carrigan:

And I would just add to that, that we probably can't get in FTC's head around what they were thinking were the full set of costs, but it would surprise me if that's what they thought were the full set of costs associated with this rule.

Mr. Tiffith:

I would also just add, the reason that we're here today is that we put forth information and the FTC has had plenty of opportunities to put forth its own information supporting the rule, and has not done so throughout any of these proceedings. And yet, here we are. We provided economic analysis and we have our witnesses here to do it today, but yet the agency itself, despite many opportunities afforded to it to provide more details around what it considers to be the economic basis for the rule, hasn't done so. I just wanted to make that clear.

Katherine Johnson:

Your Honor, it is highly unusual to have a party interrupting an examination when there's no objection. It's just speaking. I would ask that perhaps Mr. Tiffith save some of his commentary as part of a redirect if that's what he wants, or at some other time. He's had plenty of opportunities to voice his views about the inadequacies of the proposed ruling.

Judge:

Okay. Thank you. Obviously objections will be entertained and ruled upon, but there will be redirect of course, or opportunity for redirect.

Katherine Johnson:

Thank you, your Honor. Would you agree, gentlemen, that the commission specifically invited comments from interested parties on the economic effects of the proposed rule? You can look at 88 Federal Register 24:7:31, where the beginning of the commission's preliminary regulatory analysis. This is at section 14.

Scott Walster:

I see section 14 and I could read it now. Yeah, if you want to read into record exactly what you're referring to, that would be great. Otherwise, we could read it and acknowledge on our end.

Judge:

I think it's right at the beginning of the paragraph. Is that right, Ms. Johnson?

Katherine Johnson:

It is actually at the end where the commission says, "The commission, however, request comment on the economic effects of the proposed amendments." So would you agree that the commission asked for comments on this issue?

Judge:

Yes. I'm sorry.

Scott Walster:

Yes, based upon that sentence. Yes.

Katherine Johnson:

And if we also turn to section 13, there's-

Mr. Tiffith:

Your Honor, I want to just lodge an objection again. This questioning seems to be going outside of the scope of their report. You made it very clear in your order that we were limiting it this time today, because again, the commission did not want to have a hearing at all, a court hearing, and we put forth our experts to allow for cross-examination, but your order specifically said it would limit it to the scope of their expert report. And I think here, we're not doing that. I think that the counsel for the commission is going beyond the scope of their report.

Katherine Johnson:

Your Honor, in their report, they addressed this issue, saying that the commission did not provide the public meaningful opportunity to participate. And I'm just asking whether there were opportunities to participate.

Judge:

Yeah, your objection is overruled. I understand that she is pointing this out to question portions of their report. Okay. Please proceed.

Scott Walster:

I'm sorry. There was a characterization of our report there, and I just wanted to be clear. I think we had noted at the end of there, that transparency and a comment process around a regulatory analysis is important here. I don't recall, as you characterized it, that there was no opportunity to act for commenters to provide thoughts on the economics of it.

Mr. Tiffith:

Yeah. Again, your Honor, the FTC invited comments but didn't follow through their obligation to conduct a full preliminary analysis in the NPRM. That would've given the public appropriate notice of the rules of facts. So that's another reason for the objection as well. So one, they're mischaracterizing what the expert agent said in the report. And again, it goes outside of the scope of your order in their report.

Judge:

He's quite right. Okay. His objection as stated is sustained.

Katherine Johnson:

Let's move to page 11 of your report where you discuss talking about preparing a regulatory analysis. Would you agree that in preparing a regulatory analysis, it's important to understand the existing state of what law requires?

Christopher Carrigan:

Yes.

Katherine Johnson:

Why is it important to have a baseline understanding of existing law and conducting a regulatory analysis?

Christopher Carrigan:

Because you want to determine the incremental benefits and costs associated with ... You begin with a status quo, and then you determine from that status quo what would be the incremental benefits and costs.

Katherine Johnson:

So you agree that knowing the present baseline of existing negative option laws is important to understanding the costs of compliance, or the incremental costs of compliance with the proposed negative option rule?

Christopher Carrigan:

Yes.

Katherine Johnson:

Do you agree that knowing the present baseline of existing negative option laws is important to determining the benefits to consumers under the proposed negative option rule?

Christopher Carrigan:

Yes.

Katherine Johnson:

Would you agree that section 22 of the FTC Act considers economic impact of the amendments, so it specifically contemplates evaluating the incremental economic impact of the amendments in relation to existing law?

Christopher Carrigan:

You're referring now to the FTC Act?

Katherine Johnson:

I'm referring to section 22. You cited it in your report. It's 15 USC 57B3.

Christopher Carrigan:

Yeah. Can you just ask your question one more time?

Katherine Johnson:

Sure. Would you agree that section 22 considers the economic impact of the amendments, so it specifically contemplates evaluating the incremental economic impact of the amendments in relation to existing law?

Christopher Carrigan:

Yes. I'm not rereading it right now. I don't have it in front of me, but yes, that makes sense to me, that if it's an amendment, then you would assess the incremental benefits and costs of that amendment. Yes.

Katherine Johnson:

What work did you do to determine the present state of current laws and regulations addressing negative option agreements?

Christopher Carrigan:

We read-

Scott Walster:

Yes. Thank you. Sorry, Chris. Go ahead.

Christopher Carrigan:

Yeah, go ahead please, Scott.

Scott Walster:

Yeah. No, the NPRM goes into a discussion of what the existing regulatory requirements are and the limitations around those, and that was the basis for our understanding of it. And that was what you would expect economists who are trying to evaluate the effects of a rule that they would evaluate what has been part of the notice of proposed rulemaking.

Christopher Carrigan:

And in particular, the preamble.

Katherine Johnson:

Are you familiar with ROSCA, the Restore Online Shoppers Competence Act, which is 15 USC 8401 at SEC?

Scott Walster:

Yes.

Katherine Johnson:

Are you familiar with the negative option components of the Telemarketing Sales Rule, or TSR?

Scott Walster:

Yes, generally. Thank you.

Katherine Johnson:

Okay. Are you familiar with the states that have negative option laws?

Scott Walster:

I'm familiar generally that some states have negative option laws. I've seen reference to those in the notice for proposed rulemaking and also in comment letters addressing this as well.

Katherine Johnson:

Do you happen to know how many states have negative option laws?

Scott Walster:

I believe the estimates that I've seen, I think it was referenced in the notice of proposed rulemaking, is somewhere around 15 to 20 or 15 to 18, I think is the range that I've seen.

Katherine Johnson:

Are you familiar with the negative option components of the Electronic Funds Transfer Act, the EFTA?

Scott Walster:

I am generally familiar with how that was referenced here. Not as familiar with the specific components of that. Again, we're relying on the descriptions provided in the notice of proposed rulemaking for that, and I don't believe there was an extensive discussion of the electronics funds portion of it.

Katherine Johnson:

Are you familiar with the payment card network regulations aimed to deter fraud that cover negative option agreements?

Scott Walster:

I'm sorry, those are outside of ... Those are not regulatory requirements. These are individual business requirements that you're referring to?

Katherine Johnson:

Yes.

Scott Walster:

Yes. I'm familiar that they were referenced in the notice of proposed rulemaking.

Katherine Johnson:

Are you familiar with any foreign laws that may cover negative option agreements for multinational companies?

Scott Walster:

I am not.

Mr. Tiffith:

I'm going to object here, just because we made our witnesses available because the commission did not put forth a witness but wanted to cross-examine our witness, and we made them available here. We don't have an abundance of time for them to be here. The FTC's rule clearly affected the things that are happening in the US economy and the US. I think asking questions about international laws kind of goes out of the scope of what we're here to discuss today.

Judge:

Okay. Your objection is overruled. I understand she is getting at what the incremental cost might be, or attacking the assumptions on that basis of the incremental cost. Please proceed, Ms. Johnson.

Katherine Johnson:

Thank you, your Honor. I don't believe either of you answered the question.

Scott Walster:

Yeah. In terms of foreign regulations, I'm not familiar with those currently.

Katherine Johnson:

Are you familiar with other regulations, for instance, the FTC regulations that would apply here, such as Broadband Acts or the Television Viewer Protection Act, the TVPA?

Scott Walster:

Yeah. I'm familiar with section five of the FTC Act and its relevance here. Again, our understanding of what is appropriate here, and importantly what the gaps are in the regulatory structure, is based upon the notice of proposed rulemaking. So there's ROSCA, there's TSR, there's section five. The notice of proposed rulemaking documents this quite well. The limitations of that are in section five, and it notes that these are, even with states, a patchwork of regulatory requirements, and it goes into the limitation of those. So for instance, ROSCA does not cover anything outside of online transactions. The TSR does not cover anything outside of telephone interactions. So you're missing a lot of in person interactions there.

There's the existing rule that we're familiar with as well, which only covers pre-notification plan. So I'm happy to go into this in more detail, but I think if we're trying to get at the incremental effects here, section five of the notice of proposed rulemaking documents this quite well.

Christopher Carrigan:

I would just add also, it's throughout the preamble, but it's also in the comments of the commissioners and the chair associated with the proposed rule, as well as the press release.

Katherine Johnson:

Would you agree with me, though that knowing the number of firms in compliance with these rules already is a relevant fact in determining the incremental cost of compliance?

Scott Walster:

This is addressed in our analysis. Yeah. There are incremental effects going on here that are well-documented. So this is a patchwork of existing requirements that this will sit on top of. So as I said before, with ROSCA dealing with just online firms, not covering in-person interactions there, with the TSR only covering telephone interactions. There's a gap there for in-person interactions. The rules themselves, and we can get into this, offer incremental effects on what is already in the regulatory structure. So the requirement that now, that before any saves could be presented

Mr. Wallister:

... consumers that consent has to be provided is a incremental requirement. The separate consent for agreeing to the negative option piece of a transaction separately from any other portion of the

transaction is an incremental piece of this. Now, the important information is prescribed of what exactly needs to be disclosed there, which wasn't previously part of the regulatory structure. I'm going to forget some of this, but the material misrepresentations part of it, I think now goes beyond just negative options and deals with all the information of the underlying product or service. So, it is important to consider the incremental effects, and there are many incremental effects in this proposed rulemaking.

Speaker 1:

And then I would just add one additional thing. That is the report itself highlights different assumptions around sets of firms that may be in full compliance with every component and asks the question of, "What percentage of firms would actually need to be in full compliance for this rule to not reach the hundred million dollar threshold?" And we get to some numbers, as you know. Up to 80% of firms would have to be in compliance. 99% of firms would have to be in compliance with every single facet of the rule.

Ms. Johnson:

I'm going to ask some questions about that in a little bit. But I want to just go on a different track for a moment and stick with where I was at in asking you about the regulatory landscape over which the proposed rule is operating. Are you familiar with the FTC's 2021 negative option enforcement policy statement? This is at 86 Federal Register 60822.

Mr. Wallister:

Yeah, I'm familiar with the guidance.

Ms. Johnson:

And in that, the commission provided a detailed analysis of what it views is required under a negative option loss. Would you agree with that?

Mr. Wallister:

Sorry. Can you rephrase the question? Because I think there's going to be some tension here. The guidance is the FTC's interpretation of existing laws. It is not a statement of law itself. Guidance is just that. It is a guidance with interpretation, but it is not a statement of law or does not carry the force of law with it.

Ms. Johnson:

But would you agree that sellers in the negative option base would take the FTC's guidance into consideration and how it interprets negative option laws and crafting its ... How it operates in that realm?

Mr. Wallister:

Well, that may be the case. The commenters that provided comments in this proposed rulemaking note that much of what is being required here is incremental and new in comparison to what they're currently providing. So, even though that guidance is out there, it is just that. It is a guidance. And I think you have in the record, many comments that are referring to the incremental effects of this proposed rule rather than just the guidance.

Ms. Johnson:

Is your view that the 2021 negative option policy statement is not important in understanding or in constructing a baseline?

Mr. Wallister:

No, I did not answer in that ... I said that it is a guidance, and it is strictly that. We have to be careful here. Guidances are not rulemakings. They did not go through the comment and review process. This is partly why we are here, is to go through that process.

Ms. Johnson:

I'm not asking about whether it's a rule or not. I'm asking about what role it might play in constructing a baseline and examining [inaudible 01:02:09].

Mr. Tiffeth:

I'm going to object here. For one, it's outside of the scope. And two, it calls for speculation. I think the witness has also been very clear about how he feels about the guidance, that it's not law itself. And it's part of this process to determine what is going to be going forth, whether that policy guidance is part of this proposal for creating a law. So, I think he's answered a question. I also think it's outside of scope and calls for speculation.

Speaker 2:

Okay. Your objection is overruled. I understand she is trying to get to the bottom of what the baseline for the incremental cost is. And even though the guidance is only, quote, unquote, filing cabinet law, there might be some companies that follow it voluntarily. Anyway, please proceed, Ms. Johnson.

Ms. Johnson:

I actually don't remember what my last question was. Thank you, Mr. Tiffeth, for that. So, I'm just going to ask again. Would you agree that understanding the scope of the enforcement policy statement is, at least, an aspect of constructing a baseline when determining incremental compliance?

Mr. Wallister:

Yeah. The current practices of businesses are what is important there in how you evaluate the incremental effects of the rulemaking. And I'll just note there are incremental steps that is being asked in the proposed rulemaking, that we're not part of the guidance here. I think I referenced this before, but the idea that saves cannot be presented now without consent is not part of the guidance that I'm aware of. And so you immediately have some incremental effects that you have to consider

Ms. Johnson:

Beyond the saves provision, can you point to any other aspect of the enforcement policy statement that is not in line with the proposed rule?

Mr. Wallister:

Again, this is-

Speaker 2:

[inaudible 01:04:31] let me interject. I think that is going beyond ... They might've said, "Oh, well, only 10% of the companies affected follow the guidance because they don't have to." And that would figure into the baseline, but you don't have to ask them if everyone was already following it.

Ms. Johnson:

Well, my question, Your Honor, was a little bit different. It was just trying to understand what the differences are from the baseline between the policy statements and the proposed rule. Mr. Wallister suggested-

Speaker 2:

Well, okay.

Ms. Johnson:

[inaudible 01:05:23].

Speaker 2:

Exactly. If the guidance and the proposed rule were exactly the same, but only 10% of affected companies followed the guidance because they didn't have to, that would alter the baseline.

Ms. Johnson:

Well, let me ask-

Speaker 2:

[inaudible 01:05:40].

Ms. Johnson:

... Mr. Wallister this. What work did you do to determine how many firms were already in compliance with existing laws or the guidance that was out there?

Mr. Wallister:

Right. On the lower end of our estimate where we get to \$ 455 million of compliance costs, it assumes that each firm will, some on average, have hours to contribute to that. So, there could be firms that are in complete compliance with the group, and they would require a lower amount of hours. There could be firms that are not in complete compliance with it, and they would require a higher range of hours. The averages here speak to that across the distribution. Just to remind everyone, this comes from the deceptive fees rules, using that as a proxy for the amount of time that they would have to get into compliance with that. In that rulemaking, all live event firms, a hundred percent of them, were part of the analysis where some hours would be contributed to the compliance costs here.

In similar fashion in this rulemaking, each firm is part of the analysis, and the average effect of the amount of hours that would go into it takes into consideration that some firms might be in more compliance with it because they've, say, come into compliance in other jurisdictions, but not all jurisdictions. The averages there build in the assumption that some firms are in more compliance compared to others.

Ms. Johnson:

Your report was submitted on behalf of IAB. Did you inquire among IAB's members, who's currently in compliance with existing law to get a sense of that level of incremental compliance there?

Mr. Wallister:

No, I did not.

Ms. Johnson:

In your report, you referenced the expert, Jerry Wynn, who also conducted a survey on behalf of IAB. Did you ask any of those, who were subject to the survey, what their compliance was with ROSCA, TSR, the FTA enforcement [inaudible 01:08:18]?

Mr. Tiffeth:

I'm going to object. He mentioned just a moment ago, he didn't speak to any of our members. So, I think the second question is basically the same as the first question that she's already answered.

Ms. Johnson:

Well, that assumes that the only people that Mr. Wynn inquired of were IAB members. I don't know that fact is in evidence. So, I'm just asking the question. If that's the case, then it is the same question. Is that what you're telling me, Mr. Tiffeth? only

Mr. Tiffeth:

Well, I'm saying, basically, you asked him earlier whether he had talked to any member company or any IAB member companies. He said no. And now, you're asking about a survey that was conducted on behalf of IAB by Professor Wynn and whether he talked to any of them. I think they're very similar. But if you see a distinction, I'll let it be.

Ms. Johnson:

Did you, Mr. Wallister, speak with any of the subjects of that survey?

Mr. Wallister:

No.

Ms. Johnson:

I want to go back to the commission's statement in the NPRM concerning its regulatory analysis. And this is again [inaudible 01:09:48] Register 22 and 731. It's towards the end of that first paragraph. The commission states, "In developing these proposals, the commission has sought to minimize prescriptive requirements and provide flexibility to sellers. In meeting the rule's objectives, in addition, most sellers provide some sort of disclosures, follow consent procedures, and offer cancellation mechanisms in the normal course of business." And the commission's basic premise is that because it was regulating over existing laws such as ROSCA and state laws, and the enforcement policy statement that many of the requirements of the rule were already part of the ordinary course of business. Excuse me. Do you disagree with that statement from the commission?

Mr. Wallister:

That statement takes into account, limited amounts of what is being required here. When you talk about a cancellation process, what is being asked here is more prescriptive and that it has to be as easy as the subscription process. When you talk about consent or the FTC talks about consent, there is now a separate requirement for consent to the negative option plan versus other features of the transaction. So, while some of these things like consent and disclosure have been considered, the incremental prescriptions that are going on here, the burdens that we address in our back of the envelope calculation.

Speaker 1:

[inaudible 01:11:32]. I'm sorry. If I could just interject, there's also a different kind of discussion also in the preamble associated with whether or not this rule is just synthesizing existing law. And I think it's pretty clear in the preamble and the press release, as well as the statements of the commissioners and the chair, that that's not the case in this particular rule, that there are significant additional impacts of this rule, both in its effects and also the types of things that companies would need to do to comply.

Speaker 2:

Ms. Johnson?

Ms. Johnson:

Yes, I'm sorry. I was just thinking through my next question. I apologize for the long pause. Usually, that's not seen on the record. I'll go ahead. I want to just turn to the benefits discussion in your report. And again, we talked about this a little bit before at the beginning. Generally speaking, the analysis that you gentlemen conducted was you took the hundred million dollar benefit, divided it by the number of households, assumed every household in America is a victim of a deceptive or unfair negative option practice in order to come up with a minimum per household benefit.

Speaker 1:

No, we don't assume that. Actually, we do multiple estimates to say, "Yes. If it were true that every household was affected in some way by the rule, this would be the impact. If half the households were affected, this would be how ... In fact, it wouldn't be ... If it were, this would be the impact." It's more that the impact or the benefits would have to be below this certain number in order to stay below the hundred million dollar threshold.

Ms. Johnson:

Okay, I just want to make sure I understand this because it wasn't clear to me. The way I read your analysis is that in order for every household to drive a benefit, it must be assumed that every household is engaged in a negative option contract. And that negative option contract is [inaudible 01:14:21] of the proposed rule in some way. Are those not correct assumptions underlying the mathematics that you did?

Speaker 1:

Well, the simple math would say yes, but it's an average value. So, it's still conceivable that some households would not be affected at all. Others would be affected in a more significant way. And then like I said, we also do an assessment where we say, "Let's assume that 50% of households would be affected by the rule. This is what the number would be." I'd have to go back to it, but I think it's basically the next sentence or within a few sentences of the first calculation.

Ms. Johnson:

So, it could be a valid assumption that the firms with whom those consumers engaged in did so in ways that already complied with the law. It's not that every negative option contract was violating the law.

Speaker 1:

No, that would not be necessary.

Ms. Johnson:

And could it also be a valid assumption that some smaller percentage of those consumers ... So, not every household, has engaged with a firm that has violated some aspect of the proposed rule?

Speaker 1:

Yes, it's possible then that less than 134 million in any one year or over a period of time, or what have you Yes, that's possible. But like I said, we already kind of account for that.

Ms. Johnson:

So, less than 140 million in terms of the number of households is ... But you don't make the assumption that there could be less than a hundred million dollar benefit. That's just part of the construct of your hypothetical?

Speaker 1:

No. We're basically doing a threshold analysis where we're saying, "In order for what the FTC ... In order for what they say to be true, this is how small the benefit to the average household would have to be." So, we don't assume that it's over a hundred million. We're just basically asking the question, "If it's true that FTC is correct, that the annual benefit is under a hundred million dollars, this is how small the benefit would have to be to the average household."

Ms. Johnson:

Well, to every household, right? Because you used every household.

Speaker 1:

Well, not every single household. It would be on average for every household.

Ms. Johnson:

I guess I'm just trying to understand [inaudible 01:16:59].

Speaker 1:

So, some could be more. Some could be less.

Ms. Johnson:

Right.

Speaker 1:

[inaudible 01:17:02]. That's what an average is. Sorry.

Ms. Johnson:

Right. But it can't be more than every household. It's an average-

Mr. Tiffeth:

I'm going to just object. Just first of all, counsel, he's answering your question. If you could allow him to do so, I would just appreciate that.

Ms. Johnson:

Are you the judge, Mr. Tiffeth? I'm sorry. Was there an objection [inaudible 01:17:18]?

Mr. Tiffeth:

I'm objecting just to ... It seems like [inaudible 01:17:20].

Speaker 2:

Okay. Please proceed.

Ms. Johnson:

I'm really just trying to understand the assumptions that you use in doing the calculation. I am not an economist. I can't even say that math is my best subject. An average, as I understand it, is there could be more than 134 million, less than 134 million. You come up together. You have an average of 134 million. I'm asking, is it possible that it's fewer than 134 million households affected by the rule and fewer than every single company in which they engaged with is violating the rule?

Speaker 1:

Yes. [inaudible 01:18:06].

Ms. Johnson:

Are those reasonable assumptions that could have been made here?

Speaker 1:

That's possible, yes. And that is something that we also do computations to suggest that's possible. Yes.

Ms. Johnson:

Would it be helpful in evaluating the benefits of a proposed rule to know the potential benefits above the baseline of existing rules?

Speaker 1:

Yes.

Ms. Johnson:

For instance, the law already requires businesses tell the truth in their advertising. So, if you're going to examine the benefit of the misrepresentation provision, it might not necessarily be in terms of time-savings, for instance.

Speaker 1:

Well, there are other benefits. That's correct. Yes. So, it could be time-savings. There could be money saved as well. There could be a variety of different benefits. And we focus on one because it's a prominent benefit. And when you do a back-of-the-envelope analysis, you take the most important effects. And then you look at those effects, both direct and indirect, and then you make an assessment of, "What would be the potential magnitude of those effects?" But you don't have to assess every single benefit. No.

Ms. Johnson:

And if the commission or even someone performing a regulatory analysis doesn't have the quantitative data to determine the benefits, another way to look at it is, "Who would determine the break-even point?"

Speaker 1:

Yes. And that's effectively what we do.

Ms. Johnson:

And the break-even point is just any point in which the benefit exceeds the cost.

Speaker 1:

Well, a break-even analysis, yes. Officially, I thought you were talking about a break-even in the sense of the threshold of a hundred million because right here, we're not assessing ... There's basically two stages, as you know. The first stage is to say, "Would the rule have a hundred million dollars annual impact on the economy?" That's the first step. And that's where you do a rough cut or back-of-the-envelope analysis to make that determination. And then the next step would be to do a full benefit-cost analysis on the proposed rule and alternatives. And in that case, you could do a break-even analysis associated with that. Yes.

Ms. Johnson:

And that's what the commission did in the deceptive fees rule. Correct?

Mr. Wallister:

Again, yes, they did a break-even analysis to figure out what kind of benefit you would need to exceed the compliance costs. I just want to be clear. We're getting outside of the scope of what we were asked to do. The break-even portion of this would come after there's been a determination that there's been more than a hundred million dollars of impacts on the nation's economy. And so I just want to make clear that that is a separate step that follows the question that Mr. Kerrigan and I were addressing in this report, which is the hundred million dollar threshold.

Ms. Johnson:

You relied heavily, though, on the analysis that was conducted by the commission and the deceptive fees rule. So, I just want to walk through analysis in terms of how it might be applied here to the proposed rule. That is where I'm going with this.

Mr. Wallister:

Thank you. That's helpful. I think we'll continue to remind when it's something from the deceptive fees rule that applies to the hundred million threshold versus something that would follow in a full regulatory analysis, which is what was done in the deceptive fees case.

Ms. Johnson:

Thank you for that clarification. I know you'll probably disagree with this assumption. But if we were to use the \$5.7 million cost that the commission referred to you in the NPRM, which I understand you believe is less than what the full range of costs might be under a regulatory analysis ... But just for argument's sake, if we took that \$5.7 million and figured out what the break-even point is, then would you agree that ... And that would just mean dividing it by the number of households or the number of consumers, that the amount would be something around 4 cents per household?

Mr. Wallister:

Yeah. Thank you for the question. This is why I preferenced this earlier, that the Paperwork Reduction Act portion of this is not the analysis of the cost of compliance with the full rule. And to demonstrate that, yes, in the deceptive fees case, when FTC was getting between 2.4 and \$4.8 billion of one-time compliance costs, I believe their Paperwork Reduction Act was \$13 million of that. I don't agree with the premise of the question being that that's what the compliance would be on a household basis. You'd need to consider all the other compliance costs that come in outside of the paperwork reduction portion of this.

Mr. Tiffeth:

And just real quick, because I noticed that we're seven minutes from 11:30, we scheduled this from 10:00 to 11:30. I just want to be clear about the time, that we have about seven more minutes of time in here.

Ms. Johnson:

Your Honor, I did not understand there to be a time limit on today's hearing.

Speaker 2:

No, there's no time limit on today's hearing, as far as I'm concerned. And this is their opportunity for cross-examination. All evidence has to be in by tomorrow per the Federal Trade Commission's rules. So, please proceed.

Mr. Tiffeth:

May I inquire as to-

Speaker 2:

Yes.

Mr. Tiffeth:

... how much more time that the FTC is looking for here so, at least we can manage our expectations?

Speaker 2:

Yes. Yes. Yes. Can you tell me, Ms. Johnson, how much longer you have?

Ms. Johnson:

Sure. I'm probably halfway through. So, another hour, hour and a half.

Speaker 2:

[inaudible 01:24:52].

Mr. Tiffeth:

Well, I would, at least, ask for a break or something where we could ... Again, we were-

Speaker 2:

Okay. Ms. Johnson, is this a good time for a break?

Ms. Johnson:

I have just a few more questions about benefits, and then we can take a break.

Mr. Tiffeth:

Sounds good.

Speaker 2:

Okay, that sounds good.

Ms. Johnson:

I just wanted to ask, based on your understanding of the rule, do you think the benefits to consumers would exceed your calculated costs of \$2.7 billion?

Speaker 1:

Would the benefits to consumers exceed 2.7 billion? Actually, that was not specifically what we were being asked to do, to assess the magnitude of the benefits. We were asked to assess whether or not the benefits exceeded a hundred million dollars. As I said before and Scott said as well, the first stage is to assess whether or not the effects of the rule would cross the hundred million dollar threshold. The second task then, if you decide that they do, is to do a full benefit-cost analysis. In which case, then you would determine precisely or as precisely as you could, what the total magnitude of the benefits are, and then you'd be able to make the determination of whether or not the benefits exceeded 2.7 billion.

Ms. Johnson:

So, you have no estimate of what you think the benefits could be with respect to the proposed rule?

Speaker 1:

An exact assessment? No.

Ms. Johnson:

No. A back-of-the-envelope assessment.

Speaker 1:

I think there's two possibilities here. The first possibility is that the rule has substantial positive benefits for consumers, which is what the preamble suggests, as well as the press release and the commissioner's statements, that it would have significant effects. And if that's the case, then it'd be very hard to argue that the effects are not over a hundred million dollars. The alternative

Christopher Carrigan:

... Alternative is that the benefits are very, very small to individual consumers. But again, that would be inconsistent with the presentation of the rule. So I guess there's two possibilities here. And so again, our task was to assess based on the preamble itself and based on the notice of proposed rulemaking, as well as the press release, et cetera, to make a determination based on that, whether or not FTC was accurate in suggesting in this case that the benefits did not exceed a hundred million dollars.

Katherine Johnson:

Well, what information would you need to know to quantify the benefits?

Christopher Carrigan:

So you would first assess what are the various benefits. One of them as we've suggested in our report is time savings. So you would need to have an estimate of what the monetary value of time savings is. And we use for that, we used FTC statement and deceptive fees analysis, where they suggested it was \$24.40. And so you would have to then make an estimate of, again, a specific estimate of how many consumers were affected and what the individual benefits would be, or number hours of potential time saved would be. And then you could calculate benefits based on that. And then you would also assess other potential benefits. For example, a consumer who avoids paying charges as a result of a negative option, a deceptive negative option, that they now with this particular rule would avoid. So there'd be multiple benefits that you'd want to compute, but that's basically how you would do it.

Scott Walster:

And to be clear, this is happening after the a hundred million dollars threshold is crossed. That is part of the regulatory analysis when you do that full analysis of the benefits. The question that is part of our report and what we're discussing here today is just whether or not you get above a hundred million dollars. Once you get confidence that you are above that mark, whether it be costs or benefits, you can stop and perform the full regulatory analysis, which would follow,

Katherine Johnson:

I think we can now take a break your Honor. I'm ready to move on to the next section.

Judge Foelak:

Okay. Sir. [inaudible 01:29:36], do you have an estimate as to how long your redirect will be, if you're planning to have redirect?

Lartease Tiffith:

Yeah, I don't think I'll take an hour, your Honor. I think I'll take probably 15 minutes.

Judge Foelak:

Okay, very good. Okay. I'll take a 10-minute break now, and then come back and perhaps Ms. Johnson can refine her questioning during the 10 minutes, perhaps not. Okay. We'll be in recess for 10 minutes. Okay, we're back on the record. Please proceed. Ms. Johnson?

Katherine Johnson:

Thank you, your Honor. Thank you. So I want to go to the costs now. And going back to the baseline in terms of costs. Did you review the overlap between any of the regulations that we discussed before, any of the existing law and what the rule requires to estimate how much time it would take for a firm to comply?

Scott Walster:

Yeah. Thank you. So I've relied on section five of the analysis to understand the patchwork of existing regulatory requirements. I think also in the MPRM, it also addresses that this proposed rulemaking is not preemptive of state requirements. So that was part of the analysis there. I'm sorry, was there a second part to the question?

Katherine Johnson:

No, there was not. What work did you do to determine the cost to comply with the additional disclosure requirements?

Scott Walster:

Taking a step back, the deceptive fees rule serves as the proxy for our hours estimates here. And the reasons for that is because the deceptive fees rule requires some information to be presented to consumers without material misrepresentations, and with disclosure of certain fees, and requires that prices be, the fully advertised price be presented upfront. In that rule, they at the low end, assume that live event ticketing firms and some short term lodging firms would spend five hours of lawyer time, 40 hours of web developer time, and 40 hours of data analyst time to get in compliance with bringing up the full advertised price upfront to consumers and avoid material misrepresentation, and to have disclosure, a proper disclosure of the fees presented to consumers before the transaction. That is very much akin to what is going on in the proposed rulemaking on negative options. There is a material misrepresentation piece both around the product service and the negative option feature.

There's important information that has to be disclosed upfront. Consent needs to be provided upfront to consumers separately from negative option, separately from the other portions of the transaction. In addition, there are other groups of provisions that go into the negative option. So the cancellation features, the limitation on saves, and annual reminders. So while deceptive fees is related here, you can bring in that as a proxy for the amount of time it would take for a firm to get into compliance with this rule completely as it stands, or you can analyze it by group of provisions in this rule, and that's what we did here.

Katherine Johnson:

Okay. Well, let me just ask you this. Are you aware of the baseline of existing law over which the deceptive fees rule is operating?

Scott Walster:

The deceptive fees rule is requiring fees to be presented upfront, which I'm trying to recall if there was existing regulatory requirements around there. Certainly the existing requirements around disclosure and material misrepresentations could fall under section five if needed.

Katherine Johnson:

Okay. So beyond section five, are you aware of any other existing baseline regulations over which the deceptive fees rule is operating?

Scott Walster:

Yeah, the section five is the one that I'm primarily familiar with here. I can't think of the others, if they're already...

Katherine Johnson:

Okay. I can direct your attention to 88 Federal Register 77437. There's a discussion of the existing regulations in the deceptive fees rule. Do you have that available?

Scott Walster:

Can you bring that up for me?

Katherine Johnson:

I can try.

Scott Walster:

If you... Yeah, I don't know if you have a question on it, but if you do, you should.

Katherine Johnson:

Well, the question was... I just wanted to have you take a look, and I can just say it for the record. It's that the discussion and the deceptive fees rule was that there were very few existing regulations covering the same general area. So I think there were two states that had legislation and progress, and two international laws. So if you accept that as the premise for the next question, then I can move on or I can try to find a copy for you to take a look at.

Lartease Tiffith:

I think we're better to actually see the actual document that you're referring to. So we've enabled the ability to share documents here, so if you could do that, that'd be great.

Katherine Johnson:

Sure. We can take all the time we need to do this.

Scott Walster:

Thank you. I appreciate it. I don't want to have to search this out myself here.

Katherine Johnson:

No, I'm just... We'll see if I can find it. Hold on a second.

Judge Foelak:

Ms. Johnson, we're looking at page 24737?

Katherine Johnson:

77437 was the one that I referenced. If I can open the document, I can...

Judge Foelak:

Oh, sorry.

Katherine Johnson:

For some reason, it does not want to pull up for me. Of course.

Judge Foelak:

So it's not to waste time, do you want to move to another topic?

Katherine Johnson:

It should just take me less than a minute. So now let's see. All right. I don't know. Can you see the document now?

Judge Foelak:

Yes.

Scott Walster:

Yeah.

Katherine Johnson:

So I might need to just make it a little... I don't know how big it is on your screen, but it's giant on mine. So this is at the beginning, the first full paragraph starting at 77437. It talks about what other law enforcement actions are taking place. And I don't want to read the whole thing into the record, but the second column starts...

Judge Foelak:

We're talking about the paragraph that starts the commission's law enforcement partners?

Katherine Johnson:

Yes. Actually, the next column over. Some states have also taken.

Judge Foelak:

Okay. Some states have. Okay.

Katherine Johnson:

Yes. So this is just a brief discussion of the existing state of the baseline regulations. Mr. Walster and Carrigan, if you want to take a look at that. Some reason I can't see you anymore. All right.

Scott Walster:

If possible too, when folks are done reading the body, if you could scroll down to the footnotes, it would help [inaudible 01:49:47] as well.

Katherine Johnson:

Sure. Whenever you are ready, I'm happy to scroll down.

Scott Walster:

I'm ready. Don't speak for the group.

Christopher Carrigan:

Yeah, it's fine.

Katherine Johnson:

Okay. Here's the rest of the page. See if I can kind of get it all in there.

Scott Walster:

And 226, I believe it's 226. Okay.

Katherine Johnson:

Okay. Thank you for taking a look at that. Before, earlier in our conversation we talked about the existing regulations governing negative options. We've talked about ROSCA, we've talked about TSR, we've talked about the EFTA state laws, the enforcement policy statement that might provide some guidance on how to operate in the negative options space. Would you agree that that's a very different regulatory landscape over which negative option laws are operating versus the deceptive fee rule is operating?

Scott Walster:

No, I don't make that characterization. I think that there are different regulatory acts that apply here, and depending on how well they're situated to address the current environment and deceptive fees could be different than what is going on in the negative options space. But I don't accept that as a given. I think, for example, there are some, in the section that you pulled up there, it references some states that are providing rules on this and it says, for example, California and Pennsylvania, and then it references New York though it's not necessarily exhaustive there.

Judge Foelak:

Ms. Johnson?

Katherine Johnson:

So I wanted to... Yeah? I'm going to just stop [inaudible 01:52:12].

Judge Foelak:

No, I'm just waiting for you to proceed.

Katherine Johnson:

Apologies, your Honor. We've talked very high level about how you went about conducting your analysis. Would you agree with me that in the deceptive fees rule, the rule assumes that 90% of the six million firms operating are already in compliance and 10% would need to come into compliance?

Scott Walster:

Yeah, so there are a lot of context that needs to be provided here. And if you provide me with a minute, I'll try to do so. The deceptive fees rule is looking at every single firm in the economy. Starts with a basis of six million, a little over six million firms, and assumes that 90% of those are in compliance. It then goes into some specific industries that are important for their analysis. The live event ticketing industry, short-term lodging, restaurants. For those, for example, live event ticketing, they assume that every single firm, a hundred percent of those, would need to be, have some compliance time on average applied to this rule. So when you move it to the example of what's going on in negative options, the FTC has already subsetted down the list of firms that are targeted here to the 106,000 that are providing negative options. They've already done the analysis of what firms this would not apply to, that are likely in compliance because they're not providing negative options.

So I just don't want to get to the point where we're saying, "Oh, because you assume 10% of the firms are not in compliance, here, you can take the 106,000 firms that are providing negative options and assume that 90% of them are in complaints." That is not the right way to go about the analysis. And we provide some sensitivities on this, on how many firms need to be in compliance. That's part of our report. I think that that range is, you need to have over 80% of the firms that are providing negative options be in compliance with this at a minimum. And at the high end of the range, you have to have more than 99% of firms providing negative options completely in compliance with what is being proposed in the negative options rule. So I hope that provides some context here for this.

Katherine Johnson:

It does, although I'm not sure I understand how you are equating the entire industry of 106,000 firms to a subset. I just don't understand where you're drawing the line. But let's just assume, because as far as I understand, you're assuming that all 106,000 firms would need to do something to come into compliance or at least have all the same compliance costs, that's the one of the assumptions.

Scott Walster:

No, you got to be careful here, because this again gets into averages, and Chris was trying to address this earlier. On average, we're saying a firm that falls into the 106,000 would have five hours of attorney time, 40 hours of web developer time, and 40 hours of data analyst time. That is an average. For some firms, it could be small. For many firms, it could be extraordinarily large. You could have hundreds of hours, thousands of hours being put into those categories because they offer many different negative option features, all of which would we need to have consent added for the negative option feature in addition to the transaction, all of which would have to have the important information disclosed, all of which would have to have the annual reminders

Scott Walster:

... sent out. So when you get to the average part of this, be sure that that is representative of the range of outcomes at the average level, and that is consistent with what the FTC does in the deceptive fees rule. They don't say every firm is alike and they each have to have this. They say, "Look, there's a range of firms that are out there. This is what we estimate the compliance cost to be on average."

Judge Fuller:

But if you had tracked what they had done in the deceptive fees rule and taken the 90% and 10%, then the numbers would be very different. I'm happy to talk through that analysis, but we knew-

Scott Walster:

I'm happy to hear your question. That's why I went to the description very early on in this line of questioning that the 90% here was applied to all firms in the economy, every single one of them, and that they decided that 90% would be in compliance probably because they don't have a business process that has a tack on fees as part of that. In the analysis that was part of the negative options plan, FTC already pinpointed the 106,000 firms that provide, at least they believe, provide negative options in the economy. So again, this 90%/10% thing is not the right ratio to even contemplate providing on the negative options rule.

Katherine Johnson:

So why is it not reasonable to assume that 90% firms are in compliance where there's a rule where there's a lot of, already a lot of existing law versus the 10% or the same assumption that the commission used where there was very little existing law?

Scott Walster:

Sure. I'm just going to read into the record part of section five on the limitations of the existing regulatory requirements in the notice for proposed rulemaking for negative options. "The existing patchwork of laws and regulations does not provide industry and consumers with consistent legal framework across media and offers. For instance, as discussed above, the current rule does not cover common practices such as continuity plans, automatic renewals, and trial conversions. In addition, ROSCA and TSR do not address negative option plans in all media. ROSCA's General statutory prohibitions against deceptive negative options marketing only apply to internet sales. And for the TSR, more specifically, provisions only apply to telemarketing, yet harmful negative option practices that fall outside of ROSCA and TSR coverage still occur."

It goes on and it can go on there. In addition to that, as I've stated before, there are new features as part of this rulemaking that have not been contemplated before as these rules. For instance, the idea of receiving consent before providing any save offers is not consistent with any existing rule on the book or the guidance provided previously.

Katherine Johnson:

But beyond consent-

Scott Walster:

We get into this, I'll just finish with, we do the sensitivity analysis of the number of firms that need to be in compliance here for the FTC to be correct that there's not a hundred million dollars as a one-time cost. And again, on the high end, you'd have to assume that over 99% of firms are in complete compliance with every single portion of this requirement. Annual reminders, separate consent, important disclosures, material misrepresentations of the product. But that is how you get to below a hundred million dollars in costs on the high end.

Katherine Johnson:

But isn't that the assumption that the commission put forward when it said it was doing its PRA analysis and saying that most states offer some sort of disclosures and consent and record keeping, that they were making an assumption that a lot of this law already existed out there and therefore the labor costs were compliance, but the rule would be relatively low?

Scott Walster:

I answered this a couple times and I'm sorry if it's not coming across clearly. The paperwork reduction portion of this is a very small portion of the overall compliance costs that go into dealing with a rule. And I've used the deceptive fees rule as an example there where \$13 million of compliance costs show up in the Paperwork Reduction Act versus up to \$4.8 billion of one-time costs on complying with the rule fully.

So these references to the Paperwork Reduction Act are, I think, inappropriate as a measure for the amount of firms that are in compliance. Just because they retain certain records as part of their business and could do so on additional pieces does not mean that there's not additional costs for lawyer review, web developer time to get the firm into shape to be able to retain those records. So I hope that it's clear in coming across to the audience here.

Katherine Johnson:

So just moving on to something else. In your report, you proposed a conservative assumption that'll take a firm an equal amount of time to comply with each of the six provisions of the proposed negative option rule. Did I characterize that correctly?

Scott Walster:

Close. We don't assume that it's an equal amount of time for each firm. We assume that it's an equal amount of time on average across the firm. So again, some firms could have a lot of time that go into each group of compliance, and some firms could have fewer time if they don't want to offer saves or something to that effect. But on average, each bucket when we do it by group assumes on average there is, I think, five hours of attorney time, 40 hours of web developer time, and 40 hours of business analyst time and then on the high end it doubles those announced consistent with the deceptive fees rule.

Katherine Johnson:

But if you were to disaggregate the rule and look at it provision by provision, so for instance, starting with the misrepresentation provision, would you agree with me that the misrepresentation provision is basically a restatement of what is already required under the law? This isn't a situation that you are using with respect to saves where there may not be something already existing, but a misrepresentation is already covered, for instance, under Section five under ROSCA.

Scott Walster:

I disagree with the characterization there, and here's why. The material representations clause in the proposed rule for negative options includes all products and services in addition to the negative option plan. The prior existing rule structure did not make that distinction, and that is an additive portion here, and I believe that there's comments to that effect in the record.

Katherine Johnson:

What I'm asking about is the extent to which the misrepresentation provision in the proposed rule overlaps with what Section five of the FTC Act generally requires, and that it requires companies to tell the truth about their advertising.

Scott Walster:

The negative options rule as it's proposed has the additional requirement that all misrepresentations must be excluded. That was not part of any of the rules, specifically addressing negative options. Now, if the FTC could expand section five into that, that might be important for the analysis. But I think the need here that's being described in section five is that there are gaps here and there is a lack of clarity around that. And so I think to the extent firms are not in compliance with portions of that as they're providing negative options, but then that would be incremental here. And that's what's described under section five in the analysis.

Katherine Johnson:

I'm not talking about section five of the analysis. I'm talking about section five of the FTC Act, which generally makes it an unfair or deceptive act or practice to misrepresent. So that is basically what the FTC Act requires, and I'm asking to what... It would apply to negative option contracts. Would you agree with that? That people who sell negative option contracts are obligated under the FTC Act to tell the truth in their advertising?

Scott Walster:

I'm basing, so I realize that you're talking about section five of the FTC Act. I am referencing section five of the NPRM to note that there are major gaps in the existing patchwork of laws that require clarity here.

Lartease Tiffith:

And if I may jump in for a minute, because I also was confused. I thought you were talking about Health section five of the, not talking about section five of the FTC Act. I think once again, the witnesses are here, are not coming here to provide their legal analysis. They're here to provide their economic analysis. I think asking them questions about the various interpretations of all the laws is not fair for them. They're not here providing-

Judge Fuller:

Objection, and sustained.

Lartease Tiffith:

... Legal analysis or expertise. Thank you.

Katherine Johnson:

All right, well, I think I'm almost done, so just give me a moment. If your Honor would allow me just a few minutes to confer with my colleagues before I conclude my examination, I would appreciate it.

Judge Fuller:

Okay. How long do you want to confer? Five minutes?

Katherine Johnson:

Five minutes Off the record.

Judge Fuller:

Okay. Five minutes off the record.

Katherine Johnson:

Thank you, your Honor.

Judge Fuller:

Back on the record. Okay, Ms. Johnson.

Katherine Johnson:

Thank you, your Honor. And I just wanted to take a moment to thank Mr. Carrigan and Mr. Walster for their time today. I am going to conclude my examination rule.

Judge Fuller:

Thank you. Okay, sir, you're redirect.

Lartease Tiffith:

Thank you. Thank you, your Honor. And I'll direct this to both of the experts. Has anything said by any person doing today's hearing caused you to doubt or reconsider the conclusion set forth in your report?

Christopher Carrigan:

No.

Scott Walster:

No.

Lartease Tiffith:

I understand that your report does not directly state a conclusion on the second issue certified for this hearing, what will the record-keeping and disclosure costs associated with the proposed rule be? Nevertheless, are your conclusions on the first issue certified for the hearing, will the proposed rule have an annual effect on a national economy of more than a hundred million, relevant to how one might answer the second question certified? So might there be things from the first question, in answering the first question that may be helpful in whether it's methodology or understanding-

Katherine Johnson:

Your Honor, I don't want to be the one objecting, but Mr. Tiffith was very, very clear about how we are [inaudible 02:12:13] in by the report that seems inappropriate to ask them what their opinions are about the second question. I clarified with them that they were not offering any opinion on the second question. I think that Mr. Tiffith's question is highly inappropriate.

Judge Fuller:

Okay. Ms. Johnson, your objection is sustained. Please proceed.

Lartease Tiffith:

Are you aware of any evidence? Yep, I will. Thank you, your Honor. Are you aware of any evidence from the NPRM or any other source persuasively showing that the rule's incremental effects will be less than a hundred million per year?

Christopher Carrigan:

No.

Scott Walster:

No.

Katherine Johnson:

Could you please explain how your report accounts for the fact that certain firms might already be in compliance with the proposed rule?

Scott Walster:

Sure. Yeah. Consistent with the deceptive fees rule there, they understand that some firms might be in compliance in various jurisdictions along the way, both inside the country and outside of the country. And that would lower the hours burden that would be put on them to get into full compliance elsewhere. Or it might make it where there is very minimal costs to get into compliance.

That is similar to what we use in our analysis as we take the hours that they prescribe at the low end of five hours of lawyer time, on average 40 hours of web developer time and 40 hours of business analyst time, and apply that to firms in the negative option space. So in those estimates that we're pulling from the deceptive fees rule, it already is accounting for the fact that firms could be in various degrees of compliance with the proposed rule.

Christopher Carrigan:

And I just would add in addition to that, sorry, that we also do a variety of estimates where we make different assumptions around compliance as well in the report. And in each case suggested that the effects would be at least a hundred million dollars. The cost would be at least a hundred million dollars still.

Scott Walster:

I'm going to finish this off with the idea that the compliance costs that we've been talking a lot about here today are one set of costs that apply to this rule in determining whether or not it exceeds a hundred million dollars. You'd still also need to consider any additional time spent by consumers reviewing additional consent features and taking into account the material information that's been presented to them. You'd also need to take into account any lost savings from having discounted offers provided to them at the time of cancellation, so we don't want to get too focused on compliance costs is a large part of what we did to get comfortable that there's more than a hundred million dollars here, but there is other sets of costs that would be part of this initial assessment of a hundred million dollars as well.

Lartease Tiffith:

Thank you. My next question is, could you explain why the deceptive fees rule is a helpful analog to consider for your estimates?

Scott Walster:

Yeah. There's a number of reasons why. I stated before, the deceptive fees rule requires information to be disclosed upfront in the transaction process about the full advertised price and a description of the fees that are being charged to that, a fair description of them without material misrepresentation. And this has to be presented to consumers upfront in the transaction. That is a similar process to what is going on in the negative options world. There's misrepresentations that have to be eliminated. There's important information that has to be disclosed. Consent agreements have to be presented upfront to consumers. In addition to that, there's the information about being easy to cancel as it is to subscribe, saves and annual reminders.

The second reason, so in addition to the similarities of what's going on in the rules, the worker time that goes into complying with the deceptive fees rule is the same type of worker time that would be needed to comply with negative options. You would need attorney time to review the proposed rule to determine if you're in compliance and what would be needed to be done to get into compliance. There would be worker time to figure out the business strategy impacts of getting into compliance, and then also web developer time as a proxy for time spent on how to present the offer in various mediums to the consumer.

And then lastly, I'll add in there the benefits are very similar to the types of benefits that would flow through on the negative options side. There would be time savings from the FTC's perspective, from people being able to get out of subscription sooner, and there would be perhaps a reduction in money spent on subscription similar to there would be better prices or less money spent on live event ticketing because you're able to do better comparison shopping or you're doing better comparison shopping of short-term lodging. Here you would be able to fully evaluate the cost of the transaction earlier on, and you might say from getting out earlier from a subscription that you didn't want to be in.

Christopher Carrigan:

And I guess the last thing I would add is that the timing of the two rules is also fairly concurrent as well, which adds to the value of the comparison.

Lartease Tiffith:

Thank you. Can you explain why serving firms on their estimated cost for compliance, for instance, IB members, was not necessary to conduct your analysis?

Christopher Carrigan:

Well, our analysis was related to the first question. A survey could be valuable or a nice addition in answering the second question after you get to a hundred million dollars threshold. So the first question that you have to ask is, does the rule cross the a hundred million dollars threshold? And for that, as we've suggested in the report and today, that requires a back of the envelope, a rough cut analysis to ascertain the key benefits and the key costs, direct and indirect, and then assign rough values to those to make a determination should you go on to the next stage, which is to perform an in-depth benefit cost analysis, which would consider both the proposal as well as any alternatives, reasonable alternatives. In that case, perhaps doing a survey could be helpful to gather data around the specific, to

be more specific around the relative benefits and costs of the rule. But in the first stage, it's not necessary.

Lartese Tiffith:

Great. Your Honor, that's the end of my redirect.

Judge Fuller:

Okay. Thank you. Any recross, Ms. Johnson? Okay. I'm hearing no.

Katherine Johnson:

I... Yeah, sorry. I apologize, your Honor. No, I do not have any recross.

Judge Fuller:

Okay, no, no. Okay. Very good. Okay. Okay. Just wanted to say that rebuttal evidence can be submitted by tomorrow, February 15th by any interested person, and no submissions of evidence in this informal hearing can be filed after that date due to Rule 1.13A and B.

Okay. And as of tomorrow, February 15th, by close of business, the hearing is closed and the record of evidence is closed. However, if you desire interested, persons can file post-hearing briefs by February 22nd.

Obviously restricted as to arguments as to the facts, because that's all [inaudible 02:21:06]. Well, you can put in anything you want. That doesn't mean... Anyway. Okay. If no one has anything more-

Secretary Taper:

Excuse me, Judge Fuller?

Judge Fuller:

Yes.

Secretary Taper:

This is Secretary Taper. I just want to clarify one item for the record that the hearing record will be closed as of close of business tomorrow, which is five P.M. Eastern.

Judge Fuller:

Correcto.

Secretary Taper:

Thank you.

Judge Fuller:

Yes, yes, yes. That's by reason of 16 CFR, section 1.13B. Oh, sorry. 1.13A1. No, excuse me. A2.

Secretary Taper:

That's fine, your Honor. I just wanted to make sure the parties-

Judge Fuller:

A22. Pardon? I'm sorry.

Secretary Taper:

Oh, thank you, your Honor. I just wanted to make sure the parties were aware of that time.

Judge Fuller:

Yes. However, the filing of briefs is not part of the hearing, not part of the evidence, and that's just for my own convenience or for their wanting to set forth their views.

Lartease Tiffith:

Right. So it sounds like we have a five P.M. deadline for rebuttal tomorrow, and it sounds like on the February 22nd post hearing briefs are due that day.

Judge Fuller:

Correct. Okay. Anyone have anything more, Ms. Tabor? Anybody?

Secretary Taper:

No, your Honor. Nothing here.

Lartease Tiffith:

I just would ask, Your Honor, just a question. After we are through with the February 22nd post-hearing briefs. I guess you'll make a decision sometime after that.

Judge Fuller:

Yes. My recommended decision is due, I believe, 60 days after the close of the hearing. I mean, that also is by the Federal Trade Commission's Rules. And that would be required since there are, yes.

Lartease Tiffith:

Great. Thank you, your Honor.

Judge Fuller:

Okay. Ms. Johnson, anything? No?

Katherine Johnson:

No, your Honor. I have nothing further.

Lartease Tiffith:

Okay. Thank you, everyone. Today's session is closed. Thank you.