





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 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



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, 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 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 anoET Q q 02ea32(e )-3(d5(y)7(sis)5(g)4( m3 11.04 Tf 1 0 0 1 72.0( t)-3(\* n

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

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 C.0000091 c-5(n)3v2m/pon've oone bore you

Katherine Johnson:





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:



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? 1



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 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'm asking for the NPRM to be admitted as evidence. I'm asking for a copy of the NPRM available to you? If not, I think that's all. Thank you, your Honor.

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:

Okay. I'm there now. Thank you.

Katherine Johnson:

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

Scott Walster:



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

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

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.

KatherineJohnson:

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 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 as 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.





[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 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

Your report was submitted on behalf of IAB. Did you inquire am 0 g J Esggem m wu of

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 F2 11.042( (5-3(h)u)16rd11(em)14(a2 t)-3(h5-3(h-2(, (h)3(ead11(e)-3o)-5(rs)10(





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





Ms. Johnson:

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?





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:

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:

Katherine Johnson:

Apologies, youHonor. 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

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 a firm 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:





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:

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.

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

Lartease Tiffith:

Are you aware of any evidence? Yes, your Honor. 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.



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

Lartease 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.

