



FTC | Informal Hearing on Proposed Amendments to the Negative Option Rule – January 31, 2024

Judge Foelak:

Good morning. This is an informal hearing in the Negative Option Rulemaking matter, and I am Judge Foelak, and I would like to have your appearances for the record of the parties that will be appearing, and when you make your appearance please state the number of witnesses that you will have, if any, and the time estimate that you have for your presentation.

Katherine Johnson:

Hi, good morning, Your Honor. Katherine Johnson on behalf of BCP, Bureau of Consumer Protection. I'm also here in the room with my colleagues Harris Senturia and Jonathan Ware. We will not be presenting any witnesses this morning, Your Honor, so we won't be taking any time for that. We did have a point of clarification about whether ... Obviously, we want to reserve our right to conduct any cross examination for any witnesses that do appear, and it's unclear, based on some of the filings preceding this proceeding whether we'll have an opportunity to cross examine those witnesses who will be introducing documents.

Judge Foelak:

Okay, thank you. I would like to comment in a normal rulemaking proceeding, papers come in without a live witness, so that does not mean that these exhibits can not be admitted. Okay, next.

Lartease Tiffith:

Hi, Your Honor, this is Lartease Tiffith, nice to see you again, from the Interactive Advertising Bureau, I'm the executive vice president. Consistent with Your Honor's order, we have submitted documentary evidence for today. We will not be having a live witness.

Judge Foelak:

Okay, thank you. Next. Oh, sir, sir, do you have an estimate as to the length of your presentation, if any?

Lartease Tiffith:

Yeah, yeah. I think I'll take maybe 10 to 15 minutes probably, somewhere around there.

Judge Foelak:

Okay, thank you. Okay, please next.

Sarah Davies:

Hi, good morning, Your Honor. I'm Sarah Davies with the International Franchise Association. We will not be calling any witnesses, and I estimate approximately 10 minutes for our presentation today.

Judge Foelak:

Okay. I guess the NCTA is not going to appear.

April Taber:

Your Honor, this is April Taber, the secretary of the commission, the NCTA submitted a document at approximately 11:20 last night stating that they would not be appearing at today's hearing, but they did submit documents in lieu of testimony, which we have forwarded to your attention.

Judge Foelak:

Thank you. Those documents will be admitted as comments in the rulemaking. Okay. Please proceed, Miss Johnson.

Katherine Johnson:

Hi, good morning, Your Honor. As I indicated earlier, the Bureau of Consumer Protection will not be introducing any witnesses this morning.

Judge Foelak:

Okay, and you're not going to make any presentation. Okay. Okay, next. The IAB is up next.

Lartease Tiffith:

Great. Thank you, Your Honor, and thank you for this opportunity to speak today. Today we want to just again highlight some concerns we have about some of the substantive and procedural deficiencies with this process. First, IAB, we feel as though we've been prevented from exercising the statutory right to engage in cross examination, because the commission has not been ordered to put forward a witness in support of the facts underpinning the proposed rule.

Although the presiding officer's ruling states that, prior ruling, states that witnesses may be cross examined during the hearing, the commission has not designated any witnesses and the ruling does not require them to do so. Second, IAB and other interested person were given only three business days to prepare for this hearing, which deals with two disputed issues of material fact, designated for the first time by the presiding officer on January 25th. Thus, even if the commission decides or decided today to put forward a witness at the hearing, IAB would not have had a notice of the identity of that person and no ability to meaningfully prepare.

Finally, IAB, we've raised numerous other deficiencies with the informal hearing that have not been addressed, including that additional disputed issues of material fact be designated as such. All of the substantive and procedural defects have prevented the development of the record on issues that are critical to the promulgation of an appropriate rule. Any upcoming hearing, here, this hearing, exacerbates these problems rather than remedying them.

In addition to our prior objections and concerns, I also would highlight that even though the burden is not on us to put forward evidence, it is on the commission to support their rulemaking, we actually have put forward two expert reports, that you've seen prior to yesterday, which was one from Professor Nguyen from Morton, the other one that we have put forward yesterday is an additional one that's a

joint report by two experts, Professor Christopher Carrigan, who's at the George Washington University, and also from Scott Walster, who is a former assistant director in the Division of Economic and Risk Analysis at the FCC. They both are expert reports and all three experts support that there is a deficiency in the rulemaking process, and that the BCP and the commission have not met the burden, and that the costs are actually way higher than what they projected, so over \$100-million dollars easily. So I would just refer Your Honor to review those reports, and on behalf of everyone, we also believe that there is still time to have more process involved here, and that the commission should be forced to meet its burden before moving forward with the rulemaking.

Judge Foelak:

Thank you, sir.

Lartease Tiffith:

Yep.

Judge Foelak:

Many of those arguments you put forth in your petition, firstly in reference to the FTC not putting forth a witness, well, if there is a disputed material fact and there's no evidence on one side and there's evidence on the other side, then it's no contest. So that should not be a problem. Okay. The time constraints that you refer to are real, but they're per the Federal Trade Commission rule. However, your objection is noted for the record. Correspondingly, your argument concerning that there should be more disputed issues of material fact, those arguments are also noted for the record, the objections are noted for the record and preserved for appeal. Your expert reports of course will be admitted.

Lartease Tiffith:

Thank you, Your Honor.

Harris Senturia:

Your Honor, if I may be heard briefly.

Judge Foelak:

Yes, sir.

Harris Senturia:

My name is Harris Senturia. I am also an attorney with the Federal Trade Commission Bureau of Consumer Protection. Please forgive me, Your Honor, for not fully understanding the process here, but we did have some questions about those, the extra report, particularly the one that was submitted late last night, and did not understand until quite recently that there would be no witness to ask questions of. I don't expect Mr. Tiffith means to be a witness, but Your Honor's comment about evidence on one side and not on the other, we do think there are some questions worth asking about the coverage and the assumptions of the economist report. I don't know at what point would be an appropriate time to ask those questions or present those questions for Your Honor.

Judge Foelak:

Okay. Why not treat Mr. Tiffith as a witness and ask him the questions, and we'll see where we go from there?

Harris Senturia:

That's okay with me, and Mr. Tiffith, this is obviously a very unusual situation, and so I hope you'll bear with me a little bit. I understand you're not the author of the report. I haven't had very much time with the report, so I'm just going to ask you some questions about things that might be in it that I didn't see. So from what I could tell from what's written there, it appears that the report doesn't break down the potential costs based on different elements of the proposed rule. Do you understand what I'm saying there? Sorry, let me rephrase that.

There's a disclosure element for example in the proposed rule, and it doesn't seem like there's an estimate related to cost pertaining to disclosure. Do I have that right? Or is there some place I should be looking for that?

Lartease Tiffith:

Yeah. I think you should take a closer look at the rule. We followed the procedures that normally when you do cost analysis you follow. These experts have been doing this for a long time and they followed the procedure. I think that if you have concerns about that, this is another reason why we should have more time for this process, but at the same time I think, once again, it's interesting that the commission hasn't put forth any evidence on your side showing that your projections that it would be less than \$100-million dollars, are you familiar with that answer?

Harris Senturia:

So I appreciate your comments and definitely, to be clear, the judge has admitted the report and it certainly will be considered. What I'm trying to maybe get at a little bit is in response to a notice of proposed rulemaking, the commission will typically consider the comments and the information that submitters propose, and sometimes a proposed rule ends up getting narrowed down a bit based on those comments or those rules. So to the extent that the commission would be trying to think about is there a narrower way based on this proposed rulemaking to accomplish these goals with fewer costs, I don't see that in this report. That's really what I mean to be asking is what information there is here for the commission to consider as it moves forward?

Lartease Tiffith:

Yeah. I appreciate your question. I think the other thing is that, just for us as stakeholders, we have no information from the commission about what went into its decision that the costs were less than \$100-million dollars at all. But yet, we've put together three experts who have said that it far exceeds \$100-million dollars. I also think that your question would be better directed to the experts, and if there was more time perhaps we could allow for that, but unfortunately given that under the commission's rules we have a very limited time, and they're not available today. But I think those questions shouldn't be directed to me, because I didn't prepare the report. Again, those questions should be to the ones who did.

Judge Foelak:

Okay. Let me point out, Mr. Ware-

Harris Senturia:

Oh, I'm sorry. Yes, Your Honor.

Judge Foelak:

... the possibility for rebuttal submissions by you.

Harris Senturia:

To be clear, Your Honor, I'm sorry, this is Harris Senturia-

Judge Foelak:

Oh, I'm sorry, I'm sorry.

Harris Senturia:

It's showing it's Mr. Ware, because we're on via the phone. So I just wanted to be clear who was speaking.

Judge Foelak:

Okay, okay. Anyway-

Harris Senturia:

Yes, I appreciate that, Your Honor. Thank you. I guess that's one of the other questions that I was going to ask, and I don't know,

Harris Senturia:

... Mr. Tiffith, whether you'd have any response on it is regarding some of the assumptions in the report. It seems like I don't see treatment of sort of costs that are incremental to existing state regulations or existing, for example, FCC regulations, that kind of thing. I didn't see a contemplation of maybe not everybody tries to cancel something every year when we're thinking about annual costs and annual effect, and I didn't see any discussion of potential exemptions. I know for example, NCTA has asked for potential exemptions for those who are primarily-

Lartese Tiffith:

So I think so that we can use our time judiciously here. I think your questions would be best saved for rebuttal and I think that it'll also be best saved for the experts. I did not prepare the report. I'm not here pertaining to be the experts, and so your questions directed at me I think are not going to really be the best use of the court's time right now.

Judge Foelak:

Okay. How about-

Harris Senturia:

I appreciate that. I just wondered if you could... Thank you, Your Honor.

Judge Foelak:

How about this idea? How about another hearing session next week at which one or both of the experts would appear?

Lartease Tiffith:

Your Honor, both of the experts are actually professors and they have difficult schedules. I think the earliest that they could be available is on the day of the 14th of February, so we can make them available that day, but that's based on their schedule.

Judge Foelak:

Okay. Well, if they're not available, they're not available. Okay. Until the 14th. Okay. So we will schedule a hearing with them by the same virtual means at 10:00 AM on the 14th.

Lartease Tiffith:

And Your Honor, I would also ask that the Commission be required to put forth support for its basis for that there is the cost of compliance and so forth for this rulemaking would be under \$100 million. I think in fairness that they have not met their burden and that they should be required to do so at this next hearing. So through their own evidence, their own witness in particular, would be I think appropriate for you to require that they submit someone for cross-examination on that date. Perhaps, Mr. Harris.

Judge Foelak:

Does the BCP have any response to that?

Harris Senturia:

Well, Your Honor, as Ms. Johnson said earlier, we are not presenting any witnesses and as far as the basis, the FTC's sort of discussion of its basis, the actual reports, both Professor Wynn's and, I think it's Wynn, and the one we received last night, cite heavily to the NPRM, and so we think that the basis that are listed in the NPRM are therefore within the record.

As far as going forward, Your Honor, candidly, I'm not authorized to say anything other than we don't have any witnesses, but we do appreciate the opportunity to ask some questions about the assumptions behind the experts' reports.

Judge Foelak:

Very good. Like I said before, Mr. Tiffith, if there's no evidence put forth on one side and evidence put forth on the other side, then there's actually no issue, so it shouldn't really be a problem for you. Okay. Do we have anything more for the IAB matter or should we move on-

Lartease Tiffith:

No, I-

Judge Foelak:

Go ahead.

Lartease Tiffith:

Yeah, no, I think from the IAB perspective, we understand Your Honor's decision about having a further opportunity for our experts to appear on the 14th.

Judge Foelak:

Okay, very good. Next, Ms. Davies.

Ms. Davies:

Hi, good morning again. I'm Sarah Davies, and again, appreciate the opportunity to testify on behalf of the International Franchise Association, the world's oldest and largest organization representing franchising and our membership, which is comprised of franchisors and franchisees and suppliers to franchise companies.

Your Honor has identified two disputed issues of material fact that are the focus of today's hearing. And I want to focus on the second issue related to cost of compliance with disclosure and record keeping requirements under the FTC's proposed negative option goal. To understand the impact of cost we need to consider first the parties bearing the cost. I'm here today on behalf of our small business members. Franchising is small business. More than 80% of franchise owners operate just one location. More than 50% of brands in operation today have less than 20 units, and nearly a third of all franchisors make less than 5 million per year.

So while franchise businesses operate under the same trademark system-wide, they're independent small business owners and pillars of the communities in which they operate. Our members that will be impacted by the proposed rule, operate fitness centers, gyms, chiropractic, and other preventative healthcare facilities, massage studios and spas, personal wellness centers offering waxing, tanning and other beauty services, afterschool activities like trampoline and indoor adventure parks, martial arts studios, music lessons, performing arts studios and supplemental education services and residential services like insect and pest treatments, housekeeping and routine maintenance. They operate on membership models that feature a month to month membership option cancelable each month upon notice.

The franchise businesses in these industries are still recovering from mandated closures during the pandemic, while also navigating ongoing labor shortages and economic headwinds. IFA estimates that over 150 of its member brands currently offer a month to month membership option that would be impacted by this proposed rule. There are approximately 45,000 franchise businesses operating across those 150 franchise systems.

At the outset, I want to reiterate that IFA and its members believe in honest business practices with clear and conspicuous disclosures, informed consent and cancellation that is not difficult or impossible. We support the FTC's efforts to protect consumers from cancellation terms that are inconsistent with those beliefs. It is important to remember that the FTC has the burden of proof here. The FTC is required to conduct a regulatory flexibility analysis unless the FTC certifies that the rule will not have a significant impact on a substantial number of small entities. The FTC stated in its NPRM that a preliminary analysis suggests that the proposed amendments to the rule will not have a significant economic impact on small entities.

The FTC also concluded that the proposed reporting record keeping and other compliance requirements on small entities is not significant, but the FTC does not identify the specific evidence it considered in reaching those conclusions. Rather, the conclusions are based on the FTC's faulty assumptions that the majority of firms subject to the rule already retain records sufficient to verify consumer consent and further offers prior to cancellation for at least three years. And that the FTC anticipates the substantial majority of sellers routinely provide these newly required disclosures in the ordinary course. As a matter

of good business practice. The FTC does not point to specific evidence supporting these assumptions. In fact, small businesses will bear significant compliance, record keeping and disclosure cost because the requirements have closed by the rule, while similar to existing practices include distinct and new requirements.

IFA's earlier submissions identified the significant cost that the proposed rule will have on small businesses. For example, we discussed feedback from our members estimating that the compliance cost associated with the proposed rule will take thousands of hours to modify existing contracts and operational processes and will disrupt operation of business for several months.

Let me provide more details to that. Memberships in certain industries, for example, fitness and healthcare, are already regulated at the state level. While franchisees may be provided a template membership agreement, it is ultimately the responsibility of each franchisee to conform the template consistent with the requirements under applicable state and local laws where they operate, typically with the guidance of an attorney. Conformed membership agreements for each studio are then uploaded usually through a manual process, to a membership management system licensed to each franchisee often by a third party, and membership fees paid by consumers are commonly processed through a separate third party payment processor. Franchisees may pay additional fees for services through third party providers, which ensure compliance with applicable law with respect to the disclosure format. For example, certain states require that disclosures to consumers be delivered via mail rather than electronic notice.

Currently membership agreement terms commonly provide for cancellation via digital method upon notice prior to the next monthly renewal cycle, it's not immediate. The termination notice provides a period of during which the consumer may continue accessing the services through the termination date. But that termination notice also provides a benefit to the small business owners who may adjust the schedules for their employees and modify inventory orders to reflect the expected number of member visits during the subsequent weeks. The proposed rule requires that the form of membership agreement be revised for compliance with disclosure and cancellation requirements consistent with the rule, and existing members across more than 45,000 franchise business operating with a membership model will be required to sign a new form of membership agreement.

Updating the membership agreements across the franchise systems spanning industries will require franchisors and franchisees to expend significant time and expense in conforming a revised template membership agreement to comply not only with state laws, but also the proposed rule and further conduct an analysis to confirm that the state law requirements do not conflict with the proposed rule. The FTC's assumption that compliance with the proposed rule will take nearly three hours annually does not reflect market realities. The FTC also does not include any legal compliance in its analysis.

As an example, a national fitness franchise reports that compliance with changes to the membership cancellation terms in a single state requires 80 hours to complete, plus an additional 40 to 80 hours to update software system codes to implement changes to auto-renewal terms applicable to PIMA processing. The franchise system estimates that hours incurred to comply with the proposed rules substantially exceed what is required in a single state, and additionally will require approximately 96 hours to update training materials provided to franchisees and an additional 10 hours per studio to train franchisees. These figures do not consider the hours franchisees must spend training their employees on new membership agreement forms and cancellation procedures.

Additionally, the membership management systems and payment processing systems used by most of our member brands do not currently have the functionality to issue disclosures, obtain consent and retain records of such disclosures and consent to comply with the proposed rule, as well as the disclosure delivery requirements applicable across the states. Accordingly, brands will be required to

seek technology modifications from third party providers of membership agreement management and payment processing services all at additional cost. These costs were not considered by the FTC and its analysis when issuing the proposed rule, and they far exceed the estimates provided by the FTC and its notice of proposed rulemaking. And these costs are costs that small businesses cannot sustain, particularly in the current economic climate.

The FTC should pause what feels like a rush rulemaking and conduct a thorough cost benefit analysis as required under Section Five of the Mag-Moss Act and the other federal statutes. We also renew our requests of the FTC undertake a small business regulatory impact analysis so that its rulemaking may be informed by data of the actual cost incurred by small business owners, particularly those in franchise systems and their consumers.

IFA and its members welcome the opportunity to work with the FTC to provide such data and cost information. Thank you

Ms. Davies:

... again for the opportunity to appear and share the concerns of the franchise community.

Judge:

Thank you. Okay. That concludes the-

Katherine Johnson:

Your Honor, this is Jonathan Ware from the Bureau of Consumer Production. Similar to with Mr. Tiffith, we had some questions and appreciate the opportunity to address to Ms. Davies.

Judge:

Okay. Please do.

Katherine Johnson:

Good morning, Ms. Davies, and thank you for your comments here today, as well as the January 23rd, 2024 submission on behalf of the International Franchise Association, as well as the comments from last summer the IFA submitted in response to the notice of proposed rulemaking, the NPRM, that's at 88 Federal Register at page 24-716.

I wanted to start first just making sure the record's clear of what's been submitted. In your January 23rd, 2024 letter, you cite some cost estimates from a preventive healthcare franchise and some fitness franchise system. Were any of those businesses among the 16,000 comments that were submitted to the FTC last summer in response to the NPRM?

Ms. Davies:

They were not.

Katherine Johnson:

The comments you've provided note that the franchising covers 3000 brands and 800,000 in businesses. You've talked about a couple examples today and in your letter of January 23rd. Can you tell us a little bit about how those examples were chosen and how reflective they might be of IFA members in those particular industries?

Ms. Davies:

Sure. So they were selected to provide a cross section of the industries that are impacted by the rule. IFA's membership spans hundreds of industries. Not all of those industries are impacted by the rule, but that there are substantial number of industries that are including the ones that I highlighted here today and represents a significant portion of IFA's membership. It goes beyond just what you would typically think of in the membership space in fitness to a number of other industries that access and use monthly membership models.

Katherine Johnson:

Okay. And I just want to understand and appreciate there's limits to what you may be able to be informed to talk about, is it right that the cost estimates you've given are things that were conveyed to IFA that you're now passing along to the presiding officer?

Ms. Davies:

Correct.

Katherine Johnson:

And can you tell us a little bit about how you received those? Is it a phone call? Is there some sort of detailed accounting documentation that you received that you then summarized? What can you describe about how these estimates came to you?

Ms. Davies:

Communications from our member brands based on conversations that we've had, and internal resolution.

Katherine Johnson:

Okay. And-

Ms. Davies:

Go ahead.

Katherine Johnson:

No, sorry for speaking over you. Looking at your January 23rd, 2024 letter, it looks like it's describing a singular preventive healthcare franchise system that's on page one and two. Is that right? It's one preventive healthcare?

Ms. Davies:

Correct. Yes.

Katherine Johnson:

And what can you tell us about the scale, size, and complexity of that entity in terms of things like employees, locations, number of consumers, service, transactions, revenue, so we can get a sense of its relative proportion to the other entities in that industry?

Ms. Davies:

I would have to provide, I mean, I would have to look into additional information as to the number of transactions, their membership rates. It's for us, it's an average size system in that space. So I mean, it could estimate a couple hundred units, system-wide, few hundred, but I would have to confirm the precise number.

Katherine Johnson:

I believe I've read in some of your comments that something like 90% of healthcare franchises are 10 or fewer locations. Is that approximately correct?

Ms. Davies:

I believe that the data point is that half of the franchise systems across all industries have 20 units or less, but that includes all industries, including a number of industries that are not subject to this rule. I don't know that that is the case for all of the businesses that would be impacted here. And there certainly are systems that have significantly more than 20 units that would be impacted by this rule.

Katherine Johnson:

So just to stick with the preventative healthcare franchise system, do you have information on what that industry looks like in terms of size and how the example you're using relates to that?

Ms. Davies:

We would be happy to provide it. I'm not prepared to testify on those statistics today, but certainly would appreciate the opportunity to work with the FTC on a continuing basis to help support its cost benefit analysis of the rule.

Katherine Johnson:

And in what they provided you, did that break out costs for different elements of the rule so that the rule has disclosure consent saves record keeping reminders? What level of granularity were you provided as to those different types of potential costs of compliance?

Ms. Davies:

So just speaking generally, yes. The communications that we've had across industries with members included a breakout of what the initial costs are to be in a position to comply with the disclosure requirements and the record keeping requirements. A lot of that is what I discussed in my testimony today.

The critical point is that many of these brands are not even in a position to be able to comply today because the technology does not exist. So before we can even get to disclosure compliance with continuing disclosure cost, we have to get over the hurdle of being able to comply from a technology standpoint.

Katherine Johnson:

Can you talk about how, for example, just staying on, again this first example of the preventative healthcare franchise system, how are they now complying with current state laws that require consent and have disclosure obligations?

Ms. Davies:

As I mentioned in my testimony, the franchisees, that's their independent responsibility to comply with the laws in their states. And so membership agreements are conformed to comply with those laws and systems are updated. I think the data that I included in my testimony today as it relates to a fitness concept identified cost of updating a system in response to changes at a single state level as 80 hours of updates to complete, not counting the additional 40 to 80 hours included in modifying code. So again, that was an example that was illustrative of the cost and how they compare it to the FTCs estimates.

Katherine Johnson:

Okay. And just to roadmap it, I will get to the, I'll have some questions about the fitness stuff as well, but I just want to focus first on the health data and information that you provided so we can get some greater clarity on that. Was one of the assumption... what were the assumptions that you provided to that entity for them to come up with the cost estimates that they did?

Ms. Davies:

So there were no assumptions provided. It was the requirements under the rule. And so if the rule as proposed is issued as a final rule and businesses have to comply, what were their anticipated costs of compliance based on what they understand and what we understand about the breadth of the rule and what happens in practice at the state level.

Katherine Johnson:

And for this, again, preventative healthcare franchise systems that provided information, in what they told you, did they say they were explicitly excluding compliance costs for existing state or federal laws that may be substantially similar to what the proposed rule may require them to do?

Ms. Davies:

They didn't say that those were excluded, but I think that's the whole point. I mean, the proposed rule doesn't preempt state law. And so compliance is, there are compliance costs associated with the proposed rule, and then there are additional costs in assessing whether the proposed rule, whether state law requirements are inconsistent with the proposed rule. So I did not receive information from any brands that the proposed rules requirements are precisely equivalent to what's required at state law, and so there are no additional cost of compliance.

Katherine Johnson:

In your January 23rd, 2024 letter on page one, again, with this preventive healthcare franchise system, they provided you the estimate of 20 hours of complying with disclosure requirements in 2,080 hours in complying with record keeping requirements. Did they provide you with any specificity of how that was calculated or what was driving those particular costs and time?

Ms. Davies:

The estimates, my understanding is the estimates were based on the capabilities of the current system and modifications that would have to be made to be in a position to comply with the system and train all of their franchisees on compliance with the system. And then update system level, unit level capabilities, technological capabilities, and record keeping capabilities. I mean, I just want to reiterate again, these are networks of small businesses. So these are independently owned and operated small

businesses. It's not as simple as updating the terms of service, on a digital subscription and clicking agree to continue using the app.

Katherine Johnson:

So I just want to be clear, because at the outset I was asking about the scale, size, and complexity of the source of this information, and I understood you to say you didn't have information on that size and now you're describing it as a small business. Can you elaborate or have you been able to refresh your recollection of the size, scope, or complexity of the preventative healthcare system that gave you this information that's in your January 23rd, 2024 letter?

Ms. Davies:

Right. No, it's not inconsistent. I mean, the reference to small business is that this is a franchise system that is comprised of hundreds of small businesses. And so while the information is provided by our member brands, which are the franchisors, it's ultimately the small businesses that will have to comply that operate under those marks. So these are not isolated businesses that I'm testifying on behalf of franchise systems or networks, small businesses, significant number of small businesses.

Katherine Johnson:

Forgive me if I'm confused because I understand the example again, we're talking about of the preventative healthcare franchise system is one entity that perhaps has franchisees beneath it and I hear you talking about the data is about multiple entities in the business. Can you help get clarity of the example again, you're giving on page one of your January 23rd, 2024 letter. That relates to a singular preventative healthcare franchise system, is that right?

Ms. Davies:

Ms. Davies:

Those estimates relate to the costs that are anticipated to be incurred by the franchisor. It doesn't take into account the additional costs that will be required for compliance at the individual unit level by all of the independent small businesses.

Katherine Johnson:

Okay. And you don't know anything about the size or scale or scope of that franchisor as you sit here now?

Ms. Davies:

I'm happy to provide information. They were included as examples. We would be happy to work with the FTC on a more robust cost-benefit analysis related to the role, so that the FTC can meet its burden of doing a cost-benefit analysis. But as I sit here today, no, I cannot provide the stats on the number of units in that specific system.

Katherine Johnson:

Okay. And I fully understand and appreciate you are a representative of the association and you're relaying the information you got secondhand. So I don't at all mean to come across as confrontational. I

appreciate the additional guidance you can provide us. I want to move to the next category of cost estimates you provided in the January 23rd, 2024 letter. This is on page two as it relates to fitness franchise systems. Can you elaborate and tell us a little more about the entities, singular or plural, from which you received information that went into the cost estimates you have on page two of your letter?

Ms. Davies:

Sure. So we represent a number of franchise brands, those... Or fitness brands. Those fitness brands span big box gyms and boutique fitness. And so the cost estimates that were received were based on feedback from a cross section of member brands in the fitness space that include those different types of fitness centers.

Katherine Johnson:

Okay. I just want to get a little more granular than that. Cross section is very broad, because we're trying to be as detailed as we can here. Can you tell us specifically how many entities gave you cost information, and then sort of similar question I had before, the size, scope, complexity of each of those contributors to the estimate?

Ms. Davies:

So given the time constraints, we didn't seek a full survey of the entirety of our fitness membership. Again, happy to work with the FTC and do more fulsome data collection. But given the less than one week we had to provide supplemental information, we solicited information from member brands that had availability to share information with us on such as a tight timeframe. That comprised big box gyms, so the large footprint gyms, and boutique fitness. So if you are unfamiliar with boutique fitness, it's smaller footprint gyms that often are focused on a specific workout type, whether it's boxing or spinning or focused HIIT workouts. And so the data that we received is from a cross-section of our fitness member brands.

Katherine Johnson:

Okay. So how many of the big box brands provided you cost estimate data?

Ms. Davies:

I would have to confirm. I mean, again, we had less than a week to get information and summarize the information so that we could hopefully work with the FTC on a more robust cost-benefit analysis. They were intended as examples.

Katherine Johnson:

So just so I'm clear, I'm looking back at the NPRM in April 2023, which solicited feedback about specific costs. Am I right that IFA and its members did not submit any cost information in response to the NPRM last summer?

Ms. Davies:

I believe that IHRSA did in its comment response, and IFA's comment response included its support of IHRSA's comment response that identified the concerns of the fitness industry related to cost of compliance and the challenges with complying with disclosure requirements and record-keeping requirements and the immediate cancellation requirements under the rule. So indirectly, yes.

Katherine Johnson:

As it relates to your January 23rd, 2024 letter, how many boutique fitness centers provided you with cost information?

Ms. Davies:

Again, I would have to confirm.

Katherine Johnson:

In that same letter of January 23rd, 2024, with respect to fitness franchise systems, you state, quote, "Our members estimate that the impact to member lifetime value will exceed \$100,000 per fitness center," end quote. What is the total member lifetime value that your members estimate there exists?

Ms. Davies:

It varies depending on the concept. So it varies depending on whether it's a boutique fitness or big bucks, and it varies across types. Again, I hate to keep repeating myself, but I would certainly look forward to the opportunity to participate in research that would be helpful to the FTC and evaluating the cost of compliance with the rule in a more fulsome way, if that is of interest to the FTC. We provided the examples we were able to pull together and provide in the time that we were allotted between the January 16th hearing and the deadline to provide supplemental information.

Katherine Johnson:

Was that information in your submissions last summer in response to NPRM?

Ms. Davies:

The cost, the individual cost information related to the issues of material fact that Judge Pollak [inaudible 00:49:27], no. We responded expressing our concerns with the breadth of the proposed rule and our support of IRHSA's comment in response to the proposed rulemaking that outlines the issues with the breadth of the rule and lack of specificity.

Katherine Johnson:

Ms. Davies, you mentioned one comment, I think you said IRHSA, that was in response to the NPRM where the commission, you had laid out its analysis and factors that it had considered in the cost to industry. Are there any others you can recall that were submitted by IFA members that had comments related to cost of compliance?

Ms. Davies:

I'm not aware of IFA's members submitting comments directly. It doesn't mean that they did not do so anonymously. But our comments reflected the broader concerns of our membership that will be impacted by the proposed rule.

Katherine Johnson:

Okay. And those comments were all, again, in response to what the commission had set forth in the NPRM?

Ms. Davies:

Yes.

Katherine Johnson:

Ms. Davies, I really appreciate your patience in responding to some questions to help give some greater clarity to the record. That's all the questions I have, your Honor.

Speaker 1:

Thank you. Does anyone have anything else?

Ms. Davies:

Thank you, your Honor, for the opportunity. We appreciate it.

Speaker 1:

Okay. We will be in recess until February 14th then. Thank you.

Ms. Davies:

Thank you.

Katherine Johnson:

Thank you, your Honor.