UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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February 20, 2024

VIA ELECTRONIC FILING

Presiding Officer Foelak
c/o Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Rule on the Use of Consumer Reviews and Testimonials (Project No. P214504)

Presiding Officer Foelak:

Staff for the Bureau of Consumer Protection respectfully submits the following discussion applicable to Your Honor's consideration of IAB's petition and letter submitted on the evening of February 12 and its oral presentation at the Informal Hearing on the morning of February 13. We intend this discussion to: (1) remedy any confusion about the applicable knowledge standard with respect to a court's imposition of civil penalties for violations of trade regulation rules; (2) distinguish IAB's speculations about possible, overly broad interpretations of the rule from genuine disputed issues of material fact (DIMF); (3) distinguish IAB's conclusory statements pertaining to the Commission's Preliminary Regulatory Analysis (PRA) from facts that address why or how the agency's specifically estimated costs or benefits are incorrect; and (4) distinguish IAB's proposed DIMFs here from the ones Your Honor identified with respect to the Negative Option Rule.

1. Knowledge Standard for Civil Penalties

As explained in our February 7 letter brief, under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), the Commission can obtain civil penalties for a rule violation only by showing that a defendant had "**actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule**." For purposes of seeking civil penalties in a court action, the agency could not override that language by putting a lower knowledge standard into a regulation. Thus, despite IAB's suggestion to the contrary, a court could not impose civil penalties without proof that a defendant

knew (actually or by fair implication) that it had committed the act in question.

Further, the Commission could have drafted the rule without adding the "known or should have known" standard or any other knowledge standard in the text. As noted in our earlier letter, doing so would have been consistent with the fact that a court can find that a defendant has committed deceptive or unfair acts or practices in violation of Section 5(a) of the FTC Act without evidence of scienter. However, even under such a rule, the Commission would still have to prove that a defendant had the knowledge required by Section 5(m)(1)(A) before a court could impose civil penalties. Accordingly, the "should have known" standard in the proposed rule has no bearing at all on the imposition of civil penalties.

2. Speculations about Rule Interpretation

In framing its two proposed DIMFs, IAB initially relied on the mistaken notion that civil penalties could be imposed when a defendant merely "should have known" it was violating the rule. In its recent filings and oral presentation, however, IAB points also to its beliefs, stated in conclusory fashion, about what might theoretically happen if some businesses were to interpret the rule language in an overly broad manner. Such concerns do not involve specific facts but, rather, are "legislative facts," or generalized conclusions that would not be aided by "trial-type" factfinding.[1] Mere beliefs about unintended consequences do not amount to a DIMF.[2] Nonetheless, as part of the rulemaking process, Commission staff has been analyzing all comments received to address whether and how the proposed rule should be modified. In other words, the Commission must consider concerns raised by IAB and other commenters when crafting the final rule, but that does not mean that IAB's concerns rise to the level of DIMFs.

3. Failure to Meaningfully Address Estimated Costs and Benefits

On several occasions, IAB has noted that it disagrees with certain statements in the Commission's PRA, found in the NPRM. As discussed in our February 7 letter, however, what IAB has failed to do over seven months is to address the highly detailed and specific cost estimates set forth in the PRA. IAB's few, conclusory statements of disagreement do not meaningfully address those estimates, and it has highlighted no specific fact indicating why any of them are wrong.

4. Distinctions from the Negative Option Rule

IAB assumes incorrectly that Your Honor's ruling on DIMFs with respect to the Negative

[1] The difference between "specific" and "legislative" facts is set forth in 16 C.F.R. § 1.12(b)(1) and is discussed in the Commission's Initial Hearing Notice. *See* 89 Fed. Reg. 2526 (Jan. 16, 2024), *available at* https://www.federalregister.gov/documents/2024/01/16/2024-00678/rule-on-the-use-of-consumer-reviews-and-testimonials.

[2] As explained in the Initial Hearing Notice, the relevant legislative history reflects that the applicable standard for DIMFs is analogous to the summary judgment standard, pursuant to which conclusory assertions and mere speculations are insufficient. *See, e.g.*, *Bones v. Honeywell Intern., Inc.*, 366 F.3d 869, 876 (10th Cir. 2004) ("Testimony which is grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment.") (*citing Rice v. U.S.*, 166 F.3d 1088, 1092 (10th Cir. 1999)).

Option Rule means that you should make the same decision here as to compliance costs. In that proceeding, you designated as a DIMF: "Will the proposed rule have an annual effect on the national economy of $100 million or more?" In an order dated January 25, 2024, Your Honor determined that this issue, as well as another issue related to recordkeeping and disclosure costs, were "'necessary' to resolve because the Commission is required to consider them under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively." Such requirements have been satisfied here, however, as the Commission has already published its PRA, and as the contents and adequacy of a regulatory analysis under Section 22 of the FTC Act, 15 U.S.C. § 57b-3(a), is only subject to judicial review "if the Commission has failed *entirely* [emphasis added] to prepare a regulatory analysis."[3] Here, IAB's first proposed DIMF is also a more amorphous question: "Whether the compliance costs for businesses will be minimal." In raising it, IAB has not identified anything other than theoretical concerns about rule interpretation. The question of whether compliance costs might be more than "minimal" is also not necessary to resolve because, even if those costs are somewhat greater than the Commission estimated, IAB has not challenged the conclusion in the PRA about the proposed rule's estimated benefits or, as noted in our February 7 letter, the conclusion that those benefits *vastly* outweigh the estimated costs.

Sincerely,

/s/ Michael Atleson

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[3] *See* 15 U.S.C. § 57b-3(c).