



September 29, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

RE: Request for Comment on Use of Consumer Reviews and Testimonials NPRM; R311003

The Interactive Advertising Bureau (IAB) welcomes this opportunity to submit this comment in response to the Federal Trade Commission’s request for public comment on its Notice of Proposed Rulemaking addressing unfair or deceptive acts or practices involving consumer reviews and testimonials (“NPRM”).¹ Founded in 1996 and headquartered in New York City, the IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, the IAB develops both technical standards and best practices for our industry. In addition, the IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing. The organization is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

Customer reviews and testimonials play a critical role in the retail and service industries. Particularly when shopping online, consumers rely on this feedback to help them make informed decisions about products and services they cannot examine or test in person before they choose to make a purchase. Authentic consumer reviews (including incentivized reviews that are not conditioned on whether the review is positive or negative), as well as testimonials, play an important part in the consumer shopping journey. They provide consumers with a variety of perspectives and assessments, while also helping large and small businesses to promote their products and services efficiently and effectively. IAB supports the Commission’s goal of improving consumers’ confidence in the authenticity of the reviews and testimonials they encounter. Indeed, many of IAB’s members are already working proactively to prevent, detect, and stop the proliferation of deceptive reviews and testimonials in order to preserve the trust of their customers.

However, IAB has several concerns with the NPRM, particularly in light of industry’s ongoing efforts to proactively address inauthentic reviews. One major concern is its overbreadth. There is abundant evidence that bad actors are soliciting and paying for a large volume of fake

¹ Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364 (July 31, 2023) (hereinafter “NPRM”).”.

reviews, but the proposed rule would go beyond targeting these entities and sweep in legitimate businesses that are working hard to eradicate these practices. The bad actors often work in secret, so the Commission should work with, not against, legitimate businesses to target these specific deceptive practices.

Drawing the line in the right place is critical because an overly-broad rule that does not target deceptive conduct and the actual sources of inauthentic reviews and testimonials will generate negative consequences for both businesses and consumers. If liability is broadly imposed on legitimate businesses for failing to detect the activities of bad actors, those legitimate companies might simply choose to avoid liability by not allowing, or refraining from seeking out, reviews and testimonials on their websites. As a result, small businesses will lose an important tool that allows them to grow their businesses, and consumers will have less information to consider when making online shopping decisions. And ultimately, little will have been done to stem the tide of inauthentic reviews from the bad actors that generate and disseminate them.

In addition, as explained below, numerous sections of the proposed rule fail to satisfy statutory rulemaking requirements under the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act² (Magnuson-Moss) and the Administrative Procedure Act³ (APA), and also present serious concerns under the First Amendment and Section 230 of the Communications Decency Act⁴ (Section 230). IAB offers this comment with the goal of ensuring that the final rule targets practices that are actually deceptive, rather than inefficiently punishing legitimate companies seeking to promote products through consumer reviews and testimonials.

This comment first addresses the legal requirements that apply to the NPRM. Next it addresses specific provisions, beginning with section 465.2 and concluding with section 465.8. The comment then addresses several of the proposed definitions. Finally, the comment requests an informal hearing on certain topics under Magnuson-Moss.

I. Legal Issues

While IAB shares the Commission’s goal of improving consumer confidence in reviews and testimonials, it has significant concerns that the NPRM fails to comply with Magnuson-Moss, the APA, Section 230, and the First Amendment. In particular, the proposed rule (1) sweeps in practices that are not prevalent, in violation of Magnuson-Moss; (2) fails to address reasonable alternatives and important aspects of the problem, including the negative impacts on businesses and consumers from an overbroad rule; (3) runs afoul of Section 230 to the extent its vague terms would impose liability on websites for merely hosting reviews and testimonials as well as by interfering with good faith content moderation practices, and; (4) violates the First Amendment by imposing liability on businesses for the speech of third parties without knowing that speech violates any law⁵ and by imposing liability on companies for good faith content moderation

² 15 U.S.C. § 57a.

³ 5 U.S.C. § 706(2).

⁴ 47 U.S.C. § 230(c).

⁵ See, e.g., *Smith v. People of the State of California*, 361 U.S. 147, 155 (1959) (holding that a bookseller could not be held strictly liable for selling an obscene book (even though obscenity is not protected by the First Amendment) because allowing for strict liability would chill protected speech).

decisions.⁶ IAB further has concerns that several features of the proposed rule are significantly overbroad and impractical, including the use of vague terms like “disseminate” and “procure;” the incorporation of a “should have known” standard without guidance on how this standard will be applied; the overly strict limits imposed on review repurposing and review suppression without acknowledging the benefits of these features; and the general use of broad language that would capture non-deceptive activities.

II. Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials (§ 465.2).

IAB has several concerns with proposed section 465.2, which addresses “fake or false” reviews and testimonials. Although IAB agrees with the goal of eliminating fake or false reviews and testimonials, the text of this section sweeps in far more conduct that is likely to create unintended ill-effects for both consumers and businesses.

A. Failure to Satisfy Magnuson-Moss Requirements

First, the Commission has failed to show that it has “reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”⁷ The specific “unfair or deceptive acts or practices” prohibited by this section are defined as reviews and testimonials: (1) by someone who “does not exist;” (2) by someone who “did not use or otherwise have experience with the product, service, or business that is the subject of the review or testimonial;” or (3) that “materially misrepresents, expressly or by implication, the reviewer’s or testimonialist’s experience with the product, service, or business that is the subject of the review or testimonial.”⁸ IAB’s concerns specifically relate to the third category of prohibited practices, which covers any material misrepresentation (explicit or implicit) of the author’s experience. The rulemaking record does not establish that this specific conduct is “prevalent.” In fact, the overwhelming majority of the cases, research, and comments cited by the Commission focus on actual fake reviews.⁹ The NPRM asserts that “[c]onsumer reviews and testimonials that are not entirely fabricated can still misrepresent the experiences of the purported reviewers and testimonialists, and such misrepresentations are prevalent,” but the evidence the Commission cites to support this assertion does not rise to the level of prevalence.¹⁰

Instead, this evidence confirms that the NPRM should be narrowed to focus on actual fake reviews where no consumer used the product purportedly being reviewed. For instance, seven of the cases that the Commission has cited as demonstrating that misrepresentations of a reviewer’s or testimonialist’s experience is a prevalent unfair or deceptive practice also involved actual fake

⁶ See *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that it is substantially likely that social media companies’ “‘content-moderation’ decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict large platforms’ ability to engage in content moderation unconstitutionally burden that prerogative”).

⁷ 15 U.S.C. § 57a(b)(3) (emphasis added).

⁸ 16 C.F.R. § 465.2.

⁹ See NPRM at 22-31.

¹⁰ *Id.* at 31.

reviews.¹¹ Several of the other cases cited by the Commission provide no additional details about the unfair or deceptive act or practice at issue aside from bare allegations that the consumer testimonials in the case involved misrepresentations of the consumer's experience.¹² The remaining few cases involve a range of misrepresentations.¹³ Taken as a whole, this evidence does not establish prevalence with respect to reviews and testimonials that misrepresent the author's experience.

B. Failure to Engage in Reasoned Decision-making

In addition, proposed section 465.2 is overbroad, and the Commission has failed to consider the negative consequences of that overbreadth and reasonable alternatives that might avoid them. As an initial matter, IAB has significant concerns with the language used in sections 465.2(b) and 465.2(c), which impose liability on a business that "disseminate[s] or cause[s] the dissemination" of a testimonial or "procure[s] a consumer review" that the business knew or should have known was fake or false, as defined by the NPRM.¹⁴ These terms are vague and require clarification to avoid sweeping in companies such as online retailers that host consumer reviews and testimonials and engage in activities such as organizing, moderating, aggregating, and prompting the submission of reviews and testimonials. The NPRM's commentary acknowledges that this provision would not apply to "any reviews that a platform simply publishes and that it did not purchase," or to "businesses, like third-party review platforms, that disseminate consumer reviews that are not of their products, services, or businesses," but it does not expressly acknowledge that this same reasoning applies to online retailers that allow reviews and testimonials to be hosted on their websites.¹⁵

IAB strongly urges the Commission to confirm that liability under this section would require the company to do more than engage in these review/testimonial hosting activities. Without this confirmation, this section will have significant negative consequences that the Commission has failed to consider. For example, this section will over-incentivize the suppression of reviews and testimonials, as companies attempt to mitigate their risks under this section. This outcome will deprive consumers of useful and non-deceptive information about products as well as limit the ability of new online companies to use reviews and testimonials to promote themselves. It will likely also have a negative impact on consumer privacy, as some companies might choose to mitigate their risk by imposing authentication measures that require additional personal information from consumers before allowing them to review a product. Furthermore, focusing on

¹¹ *FTC v. Cardiff* involved testimonials written by actors who did not use the product; *FTC v. A.S. Resch* involved fabricated consumer testimonials; *FTC v. Data Med. Capital, Inc.* involved recycling of a testimonial that was for one company's mortgage rescue services so that it appeared to be for a different company's mortgage rescue services; *Natpac, Inc.* involved testimonial letters created before the authors even received the products; *Federated Sanitary Corp.* involved testimonials from individuals who never dealt with the defendant and testimonials distorted by the advertiser; and *Lorillard* and *RJ Reynolds* involved testimonials from individuals who did not smoke the brand of cigarettes at issue or any cigarettes at all. *Id.* at 32-33.

¹² *Id.* at 32 (citing *NextGen Nutritionals, LLC, Esrim Ve Sheva Holding Corp., Computer Bus. Servs., Inc., Twin Star Prods., Inc., and National Sys. Corp.*).

¹³ *See id.* (citing cases involving deceptive earnings claims and weight loss claims).

¹⁴ 16 C.F.R. § 465.2(b)-(c).

¹⁵ NPRM at 50.

legitimate companies that host reviews will accomplish little to stop the bad actors that create and spread fake or false reviews and testimonials online. Many of our members are already making significant efforts to combat fake reviews, and focusing a rule on these companies rather than bad actors does not address the source of the problem. Instead, it will impose significant costs on legitimate businesses, when a rule targeted at the behavior of these bad actors would be a much more effective and efficient mechanism to address the problem. Finally, we have concerns that the Commission lacks the authority to extend this section to review hosting activities using its Section 5 rulemaking authority because of their attenuated connection to unfair or deceptive acts or practices.¹⁶ By not acknowledging and assessing these risks and concerns, the Commission has failed to consider an important aspect of the problem in violation of the APA.

If the FTC nevertheless attempts to regulate review hosting, IAB recommends that the Commission adopt an actual knowledge standard and create a safe harbor for review hosting when the company has reasonable processes in place to identify and remove fake reviews. First, the Commission should adopt an actual knowledge standard. As discussed above, many well-intentioned companies are already working hard to uncover the deceptive activities of bad actors, but it is challenging and complicated to eradicate all such activity. A “should have known” standard for failure to uncover the deception of third parties will not only be tremendously costly, but will disincentivize companies from allowing reviews or testimonials on their websites at all. Instead, a business should be required to possess actual knowledge of a review’s or testimonial’s inauthenticity in order to trigger liability under this section. This higher standard is a reasonable alternative that the NPRM does not consider, as it would better ensure that the rule targets companies that are actually contributing to the proliferation of inauthentic reviews by failing to stop such conduct despite having actual knowledge of it. Second, a safe harbor would encourage companies to adopt reasonable processes to identify fake reviews, while not exposing these legitimate businesses to extensive civil penalty liability. This approach will keep the rule targeted at bad actors.

As for non-review hosting activities covered by the rule such as “purchasing” a review, IAB agrees that businesses have a greater degree of responsibility to ensure the reviews are authentic. But IAB remains concerned that the “should have known” standard is too vague in this context as well. IAB requests instead that the FTC adopt a “knew or consciously avoided” standard, as it adopted in the Telemarketing Sales Rule.¹⁷ This standard will ensure that businesses have adequate guidance on when they could be liable under the proposed rule.

If the Commission rejects this argument and imposes a “should have known” standard, the Commission must provide greater clarity about what sorts of indicators of inauthenticity would provide companies with sufficient notice to trigger liability. Without that guidance and faced with the risk of significant civil penalty exposure for failing to stop the actions of undiscovered third parties, many businesses would likely be deterred from using consumer reviews or testimonials at

¹⁶ Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741, 62747 (Oct. 17, 2022) (stating that the Commission could not adopt liability for “facilitation” activities because the “TSR provides express statutory authorization for assisting-and-facilitating liability, a form of indirect liability. Sections 5 and 18 of the FTC Act contain no such express authorization”).

¹⁷ 16 C.F.R. § 310.3(b).

all. This outcome will deprive small businesses of an important tool to spread the word about their businesses and consumers of useful information, while doing little to stem the tide of fake reviews.

Finally, IAB seeks clarification regarding section 465.2(a), which makes it unfair or deceptive for “a business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial” that falls into one of the three categories described at the beginning of this section. Specifically, the Commission should confirm that when a real consumer authors the review, the business cannot be said to have written or created it, and thus the section could not apply. This confirmation will help clarify the scope of this section and provide greater certainty to businesses.

C. Section 230 of the Communications Decency Act

Furthermore, imposing liability on companies like online retailers for merely hosting reviews or testimonials is inconsistent with Section 230, which protects interactive computer service providers from civil liability for the content of a third party. Here, if applied broadly, this section would do precisely that by holding websites that host consumer reviews and testimonials responsible for content posted by third party reviewers or testimonialists because that content is “fake” or “false.” Because this section is not consistent with Section 230, the Commission must clearly state in the rule that this provision would not apply to a company for simply hosting a consumer review or testimonial.

D. First Amendment Requirements

Finally, this section presents major First Amendment concerns. Because this provision restricts speech based on its content—specifically, whether the review is “fake” or “false” as defined by the Commission—strict scrutiny applies. To satisfy strict scrutiny, the rule must be narrowly tailored to serve a compelling state interest. However, this section’s prohibition on all reviews that are authored by individuals that “do not exist” or have not used the product would prohibit a wide swath of non-deceptive speech, including for example, any satirical reviews that a business authors, creates, sells, purchases, disseminates, or procures. The FTC has no interest in prohibiting speech that is not deceptive and contributes to the exchange of ideas online. Accordingly, this provision does not satisfy strict scrutiny and must be removed from the proposed rule, or significantly narrowed.

Furthermore, this section presents an additional First Amendment concern as it would impose liability on companies that “procure” consumer reviews or “disseminate or cause the dissemination of” testimonials, despite those companies having no knowledge that those reviews or testimonials violated any law. This risk of massive civil penalty liability even without knowledge that a review or testimonial violated the law will have a significant chilling effect on speech, as companies will likely drastically limit the consumer reviews or testimonials they seek out, or even allow on their websites, in order to ensure they will not face significant financial harm. In particular, this section’s application to reviews and testimonials that “materially misrepresent[] . . . the reviewer’s or testimonialist’s experience” is problematic because it places the onus on the business to have knowledge of the author’s state of mind as to whether their actual experience was expressed in the review. But the point of a consumer review is to capture the consumer’s subjective opinion, and it is impossible for anyone but the reviewer themselves to know if the review or

testimonial accurately reflected their experience. To mitigate their risk, companies will likely refrain from encouraging consumer reviews or testimonials at all. To avoid chilling this protected speech and to comply with First Amendment principles, the Commission should narrow this section as discussed in Section II.B.

III. Consumer Review Repurposing (§ 465.3) & Definition of Substantially Different Product.

IAB next has several concerns with section 465.3, which states that it violates the NPRM for a business “to use or repurpose a consumer review written or created for one product so that it appears to have been written or created for a substantially different product, or to cause such use or repurposing.”¹⁸ The NPRM defines “substantially different product” as a product that “differs from another product in one or more material attributes other than color, size, count, or flavor.”¹⁹

A. Failure to Satisfy Magnuson-Moss Requirements

To support its determination that consumer review “repurposing” is “prevalent,” the NPRM cites only one prior Commission case and a handful of online news articles describing the practice.²⁰ This evidence does not satisfy the prevalence standard.²¹ The Commission has cited one cease and desist order, but the statute clearly references multiple “cease and desist orders.” Moreover, requiring multiple cease and desist orders makes sense; otherwise, the Commission could create a rule based on any prior case involving a cease and desist order. Furthermore, this single cease and desist order was obtained by settlement, without factual findings as to whether the defendant had violated Section 5. As for the news articles cited by the Commission, all six refer to one type of review repurposing. A handful of online news articles referring to one example of this type of activity does not rise to the level of a “widespread pattern” of unfair or deceptive acts or practices.

B. Failure to Engage in Reasoned Decision-Making

In addition to the Magnuson-Moss defect identified above, the Commission fails to consider that this section will essentially prohibit a consumer-friendly and non-deceptive online shopping feature. As discussed above, this section targets the misuse of a feature offered by online retailers that allows sellers to “merge” product listings for products that come in different variations so that consumers can compare those variations on the same product page.²² This is a helpful feature, and the NPRM recognizes that variation relationships “enable[] buyers to compare and choose among product attributes from a single product detail page, thereby facilitating customer choice and ease of shopping.”²³ When misused, this feature would allow advertisers to

¹⁸ 16 C.F.R. § 465.3.

¹⁹ *Id.* § 465.1(j).

²⁰ NPRM at 33-35.

²¹ 15 U.S.C. § 57a(b)(3) (providing that a prevalence determination must be based on “cease and desist orders regarding such acts or practices” or “any other information available to the Commission [that] indicates a widespread pattern of unfair or deceptive acts or practices”).

²² NPRM at 33-34.

²³ *Id.* at 34.

use the reviews and ratings for a highly-rated product to mislead consumers into thinking that an entirely different product has received similar praise from consumers. IAB agrees that misuse of this feature to link plainly distinct products—for instance, the NPRM’s examples of a shower caddy and a jar of honey or a phone charger and a neck brace—would be deceptive because it suggests to consumers that a product has a higher star rating or more reviews than it actually does. But the text of the proposed rule is not limited to misuse of this feature in deceptive ways.

Instead, section 465.3 broadly prohibits the use of this feature and sets forth only four variations that do not make a product “substantially different”—color, size, count, and flavor. These four attributes fail to account for the multitude of situations where it is not deceptive to link two products and actually helpful for consumers so that they can comparison shop more easily. For example, consider a scenario where a book is offered as a paperback, e-book, audiobook, and hard cover, and the reviews for the product are presented on the same page. This example does not involve attributes differing in color, size, count or flavor, but it would be useful for the consumer to be able to compare the available options on the same page and it would not be deceptive for the product pages to be shared because reasonable consumers understand these types of product relationships. Accordingly, IAB recommends that the Commission remove the four specified attributes from the definition of “substantially different product.” This is a reasonable alternative that the Commission has not considered, and doing so will ensure greater flexibility and avoid a situation where non-deceptive practices are prohibited by the rule. Instead, the Commission should incorporate these attributes (along with others) as examples in business guidance, to assist companies in applying the rule in a more flexible manner.

Furthermore, IAB has significant concerns that the Commission intends to apply this provision to companies that offer this innovative feature, even when those companies do not actively participate in deceptive repurposing of reviews. Both this section’s general prohibition on review repurposing and this section’s final clause, which states that it is also a violation of the NPRM to “cause such use or repurposing,” pose this concern.²⁴ The Commission should confirm that this section would not impose liability on companies that simply provide the functionality that enables linking of two product listings, where the company has no role in the abuse of this feature and in fact provides guidance on appropriate use of the feature. IAB strongly cautions the Commission against applying this section in this manner, as it would not only discourage well-meaning companies from developing and offering these sorts of innovative features, which the Commission has acknowledged can be helpful for consumers, but it would unfairly hold legitimate businesses responsible for the misconduct of bad actors. These are important potential negative effects that the NPRM entirely fails to consider. To address this concern, IAB encourages the Commission to delete the phrase “cause such use or repurposing” from the rule, and confirm that the provision does not apply to a company that simply offers this feature.

IV. Buying Positive or Negative Consumer Reviews (§ 465.4).

IAB supports proposed section 465.4, which prohibits the practice of buying reviews that are required to reflect a certain sentiment. Providing compensation in exchange for reviews that must reflect a particular sentiment is a deceptive practice, and IAB supports the Commission’s goal of targeting and eliminating this practice. IAB also supports the Commission’s decision to

²⁴ 16 C.F.R. § 465.3.

keep this section narrow, and “not address incentivized reviews except for those required to express a particular sentiment.”²⁵ As discussed above, incentivized reviews are an important part of the online marketplace, particularly for small businesses, and businesses should not be exposed to civil penalties for seeking to promote their products with engaging content through incentivized and properly disclosed reviews that comply with the Endorsement Guides.

V. Insider Consumer Reviews and Consumer Testimonials (§ 465.5).

The next section of the NPRM focuses on so-called “insider” reviews and testimonials. As with several other sections discussed in this comment, this section fails to satisfy the requirements of Magnuson-Moss, fails to consider important consequences that will result if the NPRM is finalized and reasonable alternatives, and infringes on First Amendment principles.

A. Failure to Satisfy Magnuson-Moss Requirements

First, to the extent the Commission intends for this language to apply to reviews or testimonials written by employees of online retailers with hundreds of thousands of employees, the Commission has failed to demonstrate that this is an unfair or deceptive act or practice that is prevalent. None of the cases cited in the NPRM involved this type of company. Accordingly, there is inadequate support in the rulemaking record for a broad reading of this section, and the final rule should reflect that.

B. Failure to Engage in Reasoned Decision-making

IAB has concerns with the reasoning employed by the NPRM, and the ultimate approach the Commission has taken with this provision. As an initial matter, IAB agrees with the foundational principle reflected in the Endorsement Guides that reviews or testimonials by individuals that have a connection to the advertiser should include a disclosure when that connection is material to reasonable consumers. But this section of the proposed rule lacks the flexibility that is embodied in the Endorsement Guides and required under Section 5. Instead, section 465.5 seeks to impose liability for reviews and testimonials authored by certain employees or their relatives that lack disclosures regardless of context, and whether that connection is material under the circumstances. As a result, this section would impose civil penalties for reviews or testimonials that are not even deceptive. The Commission has failed to consider this flaw in the proposed rule.

Furthermore, the Commission should raise the knowledge standard for this section to actual knowledge of the fact that the review or testimonial was written by a so-called “insider” and lacked a disclosure. This is a reasonable alternative to the current proposed language that the Commission has not considered. This change would ensure that companies that are actually complicit in the proliferation of deceptive insider reviews and testimonials are the targets of this section, rather than well-meaning businesses that fail to discover and remedy reviews or testimonials by employees, managers, officers, agents, or any of those individuals’ relatives that lack disclosures.

²⁵ NPRM at 52.

Regardless of the knowledge standard the Commission imposes, the final rule must provide greater guidance on what sorts of scenarios would give rise to liability under this section. The proposed regulatory text currently gives no guidance to businesses for when they “should know” about a connection between a reviewer/testimonialist and the business or that a review/testimonial appeared without a disclosure. Without this guidance, companies will likely be disincentivized from allowing “insiders” to provide reviews or testimonials at all, which only serves to silence the opinions of a subset of individuals, deprive businesses of a legitimate way to tell the public about their products and services, and reduce the amount of information available to consumers. By failing to consider these consequences, and the less burdensome alternatives identified above, the Commission has failed to satisfy its rulemaking obligations.

There is an additional ambiguity in the language of this section that further exacerbates the problems already specified. Specifically, two subparts of this section use the undefined term “agent,” and it is not clear what individuals would be considered “agents” of the business. The meaning of the term “agent” in this section is important because it could dramatically expand the scope of the compliance programs that businesses will likely need to create in order to mitigate their risks under this section. This information would be particularly important for small businesses that have constrained resources to invest in such programs. Thus, IAB urges the Commission to remove this term from this section.

Finally, even setting aside the scope of this section, IAB urges the Commission to add a safe harbor to this provision that will assure businesses acting in good faith that they will not face civil penalty liability for the actions of rogue individuals. Specifically, that safe harbor could track the guidance set forth in the Endorsement Guides staff guidance, which states that if businesses are not encouraging insider reviews and testimonials, their responsibility is to (1) instruct employees on their obligation to make disclosures and keep a policy incorporating this requirement; (2) periodically remind employees of their obligations; and (3) take follow up action when the business becomes aware of policy violations.²⁶

C. First Amendment Requirements

Finally, in addition to statutory rulemaking concerns, this section poses concerns under the First Amendment. As with section 465.2, strict scrutiny applies to this section. See *supra* section II.D. By broadly prohibiting certain reviews or testimonials by “insiders” regardless of whether that speech is deceptive in context, the proposed rule is not narrowly tailored to a compelling state interest.

Furthermore, this section appears to impose liability on businesses for distributing the content of third parties, even when they had no knowledge that the content violated the proposed rule. Like section II.D above, imposing liability in this scenario will have a chilling effect on speech and is inconsistent with First Amendment principles. To avoid this outcome, the

²⁶ *FTC’s Endorsement Guides: What People Are Asking* (June 2023) (“It wouldn’t be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy. . . . If, however, you actively encouraged your employees to write reviews of your products, you would be responsible for monitoring them . . .”).

Commission should narrow this section as proposed above, including by elevating the knowledge standard for imposing liability.

VI. Review Suppression (§ 465.7).

Next, section 465.7(b) raises several concerns for IAB and its members because if interpreted broadly, it would significantly restrict a business's ability to moderate content on its website.

A. Failure to Satisfy Magnuson-Moss Requirements

IAB has concerns that the Commission has again failed to satisfy the requirement that the specific unfair or deceptive acts or practices identified in the rule be prevalent. The rulemaking record cites only one case, one closing letter, and one comment in support of the Commission's conclusion that review suppression is prevalent, and all three sources relate only to the suppression of negative reviews. See *supra* section III.A. In addition, one closing letter and comment are inadequate to demonstrate a "widespread" pattern of unfair or deceptive acts or practices.

Furthermore, even assuming the record established prevalence, at most these three sources show that suppression of negative reviews is the relevant prevalent practice. But the text of this section sweeps more broadly by setting forth a discrete and purportedly exhaustive list of reasons for which reviews can be permissibly suppressed. Because the Commission has failed to adequately support this section with a finding of prevalence, it must be narrowed.

B. Failure to Engage in Reasoned Decision-making

Furthermore, IAB urges the Commission to clarify that the list of reasons to permissibly suppress a consumer review set forth in this section is not exhaustive. A less burdensome alternative would be to simply clarify that this language is not an "only if" statement in the sense that it is meant to provide an exhaustive list of permissible reasons to suppress a review. The Commission could easily do so by revising this section to state: "For purposes of this paragraph, a review is not considered suppressed based upon rating or negativity if the suppression occurs for any of the following non-exhaustive list of reasons, so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review." The Commission should make this revision because as drafted, this list does not account for the countless situations that can arise when moderating consumer reviews. IAB has significant concerns that the NPRM fails to consider the unintended negative effect of prohibiting legitimate and non-deceptive review moderation practices, which will in turn cause confusion for consumers. As the NPRM acknowledges, there are situations where "consumers would reasonably expect and often prefer that a business exclude reviews" ²⁷ By failing to consider this more flexible and equally effective alternative, the Commission has not satisfied its obligation to engage in reasoned decision-making.

In addition, the Commission should clarify what it means for a review to be "suppressed (i.e., not displayed)." Many businesses that operate websites that display consumer reviews will

²⁷ NPRM at 56.

organize those reviews in reasonable ways to help consumers navigate what might be a large corpus of varying consumer commentary. For example, some products might have thousands of reviews such that it is not feasible to “display” every single review in the sense that every single review loads on a webpage automatically. If a business takes reasonable steps to organize their reviews, those reviews should not be considered “suppressed.” For that reason, IAB requests that the Commission revise the rule as follows: “suppressed (i.e., not displayed or accessible).” Without this clarification, the rule would be overbroad, and apply to scenarios that are not deceptive under Section 5.

C. Section 230 of the Communications Decency Act

Furthermore, by providing only a discrete list of permissible reasons to suppress a consumer review, this section interferes with a website’s ability to moderate the content that it displays, which is protected by Section 230.²⁸ Accordingly, the Commission should revise this provision so that it is clear the list of permissible reasons to suppress a review is not exhaustive.

D. First Amendment Requirements

Finally, this section poses First Amendment concerns. If it were interpreted to mean that companies are only permitted to suppress reviews for the enumerated reasons, it would constitute a significant infringement on the right of a company to moderate the content on its website. By limiting companies’ right to judge which content should be left up and which should be taken down on their own websites to a short list of permissible reasons, the proposed rule is not narrowly tailored to a compelling state interest. As such, the Commission should revise this provision so that it makes clear this list is not intended to be exhaustive.

VII. Misuse of Fake Indicators of Social Media Influence (§ 465.8).

As with other sections of the NPRM, section 465.8 poses several concerns for IAB and its members. This section should be narrowed to impose a requirement that the violator be aware that the indicators are fake, and should only apply when the indicators are actually used to misrepresent influence for a commercial purpose.

A. Failure to Satisfy Magnuson-Moss Requirements

First, the Commission has failed to meet the prevalence requirement with respect to this section. Specifically, the evidence the Commission has cited in the NPRM, which consists of one prior FTC case (which was settled), a state AG case, the lawsuits of social media platforms, and a few reports, all relate to the use of actual “fake” indicators of influence that the seller or purchaser knew were fake.²⁹ The specific unfair or deceptive acts or practices prohibited by the rule, however, appear to be significantly broader, by not imposing a requirement that the seller or

²⁸ 47 U.S.C. § 230(c)(2).

²⁹ See NPRM at 44-45 (describing cases involving the sale and purchase of fake followers and likes as well as websites selling likes, views and followers through the use of bot accounts).

purchaser intentionally use fake indicators of social media influence. As such, the Commission has failed to meet the prevalence requirement for this section.

B. Failure to Engage in Reasoned Decision-Making

Second, the Commission has failed to consider the negative consequences of this section if it were to be interpreted broadly. Indicators of social media influence frequently serve as a useful and non-deceptive source of information for consumers who value the opinions of individuals with “influence” on a specific platform or regarding a certain subject matter. When these indicators are awarded based on legitimate criteria, they serve this informative and non-deceptive purpose. The innovative companies that develop these indicators of influence should not be punished if bad actors try to abuse the processes that determine how indicators of influence are awarded. The Commission should therefore clarify that this section applies to true “fake” indicators of social media influence in the sense that those liable for violating the rule would be the companies selling or distributing indicators of influence when they know the recipients have not actually satisfied the relevant criteria. In contrast, this section should not apply when a legitimate business awards indicators of influence to an individual and that individual turns out to have abused the system and obtained those indicators of influence through inappropriate means. This clarification could be accomplished by revising this section to additionally require that the seller or purchaser act “with knowledge that the indicators of influence are fake.” Without this limitation, this section will dissuade companies from developing indicators of social media influence in order to avoid potential liability for the actions of bad actors.

Finally, IAB recommends that the Commission narrow this provision so that it applies when fake indicators of influence are actually used to misrepresent influence, not simply when they “can be” used for that purpose. Applying this section to indicators of social media influence that “can be” used for this purpose, but are not, would mean that the rule prohibits conduct that is not deceptive. This is a reasonable revision that the NPRM does not consider.

VIII. Definitions

In addition to the substantive sections of the NPRM, IAB also has several recommendations and clarifications for the definitions proposed in the NPRM.

A. Consumer Review

The proposed rule defines a consumer review as “a consumer’s evaluation, or a purported consumer’s evaluation, of a product, service, or business that is submitted by the consumer or purported consumer and that is published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations.”³⁰ The Commission should modify this definition because it is not clear what the phrase “published” means in this context. Because a consumer review should still be considered a “review” before it is publicly displayed by a website or platform, it would be clearer to define consumer review as follows: “a consumer’s evaluation, or a purported consumer’s evaluation, of a product, service, or business that is submitted by the

³⁰ 16 C.F.R. § 465.1(d).

consumer or purported consumer to a website or platform dedicated in whole or in part to receiving and displaying such evaluations.”

B. Celebrity Testimonial

The definition of “celebrity testimonial” mirrors the definition of “consumer testimonial” except that the individual providing the testimonial is referred to as a “well-known” person. This definition does not give advertisers adequate notice of when a testimonial is a “celebrity” testimonial or a “consumer” testimonial. IAB requests that the Commission provide further guidance on what constitutes a “well-known” individual.

C. Clear and Conspicuous

Finally, the definition of “clear and conspicuous” set forth in the NPRM raises several concerns that the Commission should address. Primarily, the proposed definition is overly prescriptive, and sacrifices the flexibility that has traditionally been inherent in this concept. For example, the definition strictly prohibits disclosures for which consumers must “take any action” to see them. This one-size-fits-all requirement does not reflect the flexible and contextual nature of the clear and conspicuous requirement. Furthermore, this requirement is inconsistent with longstanding Commission guidance, including in the Dot Com Disclosures, which indicates that scrolling and hyperlinking are permissible in certain space-constrained circumstances.³¹ Industry has relied on this well-established and practical guidance and used it to develop approaches to disclosures in space-constrained contexts such as mobile devices and tablets. The NPRM would contradict that guidance without explaining why the change is necessary or helpful to consumers.³² Relatedly, this definition fails to consider the variety of devices and surfaces where consumers interact with reviews and testimonials. For many small-screened devices, complying with this requirement would likely make the interface more confusing and difficult to navigate.

Furthermore, the rule requires that disclosures be “unavoidable” but imposing such a requirement in every situation regardless of context goes beyond the requirements of Section 5. The Commission has not demonstrated that making a disclosure unavoidable is necessary to prevent deception, so the rule should not impose that requirement under the threat of civil penalties.

IX. IAB Requests an Informal Hearing.

IAB requests the opportunity to make an oral submission at an informal hearing as set forth in Magnuson-Moss.³³ IAB is interested in this proceeding because the proposed rule will have a significant impact on its members if promulgated as currently drafted. As set forth above, many of the proposed provisions are overly-broad and would prohibit practices that are consumer-friendly and where the record does not demonstrate there is a prevalent deceptive practice.

³¹ .com Disclosures: How to Make Effective Disclosures in Digital Advertising, at ii (2013).

³² See *Fed. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.”).

³³ 15 U.S.C. § 57a(c).

An oral hearing is warranted because IAB will be able to field questions and further explain the reasoning behind the concerns it has described in this comment to the Commission. This setting will allow for a productive exchange, and a more fruitful discussion about how the proposed rule can be revised to address any potential deceptive and unfair practices affecting the marketplace without overburdening legitimate business practices.

IAB's anticipated testimony includes discussion of "fake or false" reviews and testimonials, consumer review repurposing, insider consumer reviews and testimonials, review suppression, and indicators of social media influence. IAB intends to present to the Commission the impracticality of these provisions, and why it should not proceed with adopting these sections as drafted.

IAB also intends to raise several disputed issues of material fact:

- Whether color, size, count, and flavor are the only attributes that would not confuse consumers when combined on a product page.
- Whether the compliance costs for businesses will be minimal, particularly if the "knew or should have known" standard is finalized.
- Whether the Commission's finding that unintended consequences from the NPRM are unlikely (e.g., for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).

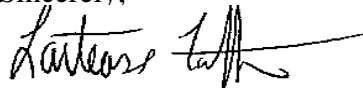
X. Conclusion

IAB appreciates the Commission's efforts to protect consumers from bad actors that engage in deceptive or unfair practices. We remain concerned, however, that the Commission has not met its statutory obligations with respect to many of these provisions, and has swept into the scope of its prohibitions (either intentionally or unintentionally) legitimate businesses engaged in marketing through reviews and testimonials rather than the bad actors that generate and spread fake reviews. IAB strongly urges the Commission to consider the concerns set forth in this comment, and to revise the proposed rule so that it is supported by the rulemaking record and does not extend to prohibiting non-deceptive practices.

* * *

IAB thanks the Commission for this opportunity to submit these comments and looks forward to working closely with the Commission on this important topic. Please do not hesitate to contact me at lartease@iab.com with any questions.

Sincerely,



Lartease M. Tiffith, Esq.
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