



September 29, 2023

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

**Re: Reviews and Testimonials NPRM, R311003**

Dear Commissioners:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (“NPRM” or the “Rule”).<sup>1</sup> The Chamber supports FTC and other government agency efforts to hold bad actors responsible for fake review and testimonial fraud. The Chamber agrees with the FTC’s assessment that fake reviews and testimonials negatively impact the retail, hospitality, and personal service marketplaces. Fake reviews undermine informed shopping, result in purchases of poorer quality, and harm users’ trust in retail, marketplace service providers, brands, and review platforms.

Comments by Chair Khan stated platforms may benefit from problematic reviews and endorsements.<sup>2</sup> The Chamber rejects this simplistic and unsupported mischaracterization. Platforms are incentivized to fight fake reviews and testimonials because they harm the long-term health of their businesses. Honest companies are interested in repeat customers and future sales. Accordingly, platforms invest heavily in both human operators and innovative technologies to address the ever-evolving threat of fake reviews. The Chamber hopes the FTC can recognize that the business community is a significant part of the solution to combating bad actors who take advantage of consumers through fake reviews.

While the Chamber supports efforts to address deceptive or unfair uses of reviews and endorsements in appropriate circumstances, any rulemaking should only address clear and unambiguous unfair or deceptive acts or practices (“UDAP”) violations. Our comment begins by discussing relevant legal issues related to the

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<sup>1</sup> See 88 Fed. Reg. 49364 (2023), available at <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials>.

<sup>2</sup> Statement of Chair Lina M. Khan, *Regarding the Advance Notice of Proposed Rulemaking on Unfair or Deceptive Reviews and Endorsements* (Oct. 20, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P214504ChairStatementFakeReviewsANPR.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P214504ChairStatementFakeReviewsANPR.pdf) (“The platforms that host reviews may also, in some instances, benefit indirectly from fake ratings and endorsements and have financial incentives to turn a blind eye to misconduct that brings in revenue.”).

rulemaking. We then discuss a few areas where the proposed rule provisions could impact businesses in ways that warrant reconsideration or clarification. Next, we highlight a few concerns with current definitions. We conclude with a call for more public input as part of the Section 18 rulemaking process.

## **I. The Rule Should Clarify Limitations to the FTC’s Legal Authority**

### **a. Section 5 of the FTC Act Does Not Permit Secondary Liability**

Several commenters to both the ANPR and the NPRM suggest that the Commission impose liability on a broader set of actors, namely review sites and online retailers, which they accuse of facilitating violations of the FTC Act. As the Commission recently made clear in the notice for proposed rulemaking for the Trade Regulation Rule on Impersonation of Government and Businesses, Sections 5 and 18 of the FTC Act contain no express authorization for assisting-and-facilitating liability.<sup>3</sup> The Chamber respectfully suggests that any final rule, should such a rule be adopted, similarly make clear the FTC’s limited authority to capture indirect liability under the FTC Act.

### **b. The Commission Should Clarify, in Text, that the Rule Does Not Apply to Websites that Disseminate Fake Reviews or Engage in Good Faith Moderation of Content**

The Chamber is concerned that several provisions in the Rule are inconsistent with Section 230 of the Communications Act of 1934.<sup>4</sup> Section 230 broadly immunizes providers of an interactive computer service from liability for presenting third party content or for engaging in good faith moderation of content on their websites. The Chamber is concerned that several sections of the proposed Rule seek to impose liability on websites for content supplied by third parties or interfere with the right of websites to engage in good faith content moderation. As will be discussed in further detail below, several of the proposed Rule provisions should be revised to be consistent with Section 230.

### **c. The Imposition of Civil Penalties Requires Actual Knowledge**

Section 5(m)(1)(b) of the FTC Act authorizes the Commission to ask federal courts to impose civil penalties for violations of FTC trade regulation rules committed “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such an act is unfair or deceptive and is prohibited by such rule.”<sup>5</sup> As the FTC Act makes clear, the imposition of civil penalties requires a heightened

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<sup>3</sup> 87 Fed. Reg. 62741, 62747 (2022), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>4</sup> 47 U.S.C. §230 (1996).

<sup>5</sup> 15 U.S.C. § 45(m)(1)(A).

knowledge standard. And in a situation where a person’s liability to pay redress or civil penalties for a violation of a rule depends on the acts or wrongdoing of another person, like here, actual knowledge is especially appropriate.<sup>6</sup>

The Chamber appreciates that the Commission is seeking comment specifically about the appropriate knowledge standard as relates to a few provisions. The NPRM posited specific questions about the knowledge standard used in Sections 465.2 and 465.5.<sup>7</sup> The Chamber is concerned that a “knows or should know” or a “knows or could have known” standard allows the FTC to second guess compliance practices after the fact and increase the costs of compliance. Civil penalties should not be assessed on the grounds of a highly fact specific inquiry into the effectiveness of legitimate efforts to monitor and investigate potential fake reviews and testimonials. The FTC should be careful to avoid penalizing commercial efforts taken to comply with the Rule; an “actual knowledge” standard fosters such an outcome.

When a business makes an intentional decision to substantially support or to willfully ignore fake review or testimonial schemes, they should be held accountable for their part in that harm. Therefore, the Chamber suggests that the FTC implement a knowledge standard that recognizes the significant deterrent effect of civil penalties and require “actual knowledge.”

## **II. The Chamber Has Concerns with Specific Proposed Rule Provisions**

### **a. Certain Prohibitions related to Fake Reviews or Testimonials (Section 465.2) May Discourage Companies from Collecting and Displaying Truthful and Beneficial Reviews**

Fake or false reviews or testimonials are deceptive, and the Chamber supports rulemaking efforts to address such damaging acts and practices. The business community invests heavily in efforts to proactively stop fake reviews so that input from consumers is trustworthy and reflects actual experiences. But, as drafted, Section

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<sup>6</sup> Case law under Section 13(b) of the FTC Act developed a knowledge standard for individual liability to pay restitution to consumers for injury resulting from law violations of a corporation controlled by the individual. There courts have ordered individuals to pay consumer redress when the Commission could show the individual “had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth.” *FTC v. Ross*, 743 F.3d 886, 892-93 (4th Cir. 2014) (adopting the test for individual liability used by other federal appellate courts, including the First, Seventh, Ninth, Tenth, and Eleventh Circuits); *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573–74 (7th Cir.), cert. denied, 493 U.S. 954 (1989). Under the Telemarketing Sales Rule, the Commission requires actual knowledge or “conscious avoidance” standard to impose assisting and facilitating liability. 16 C.F.R. § 310.3. In adopting the “conscious avoidance” standard, the Commission noted that proof of conscious avoidance is widely accepted in criminal cases as fulfilling the requirement of proof of knowledge. 60 Fed. Reg.42842, 43852 n. 105 (1995).

<sup>7</sup> See NPRM questions 8 and 16.

465.2 may sweep too broadly and create unintended consequences for the important review ecosystem.

The Chamber appreciates that the Commission made clear section 465.2 does not apply to businesses, like third-party review platforms, that disseminate consumer reviews that are not of their products services, or businesses. Further the Chamber appreciates that the section does not apply to any reviews that a platform simply publishes and that it did not purchase. The Chamber respectfully requests that the Commission expand this coverage.

First, the Commission should make clear that this limitation on the application of Section 465.2 applies to retailers that allow reviews and testimonials to be displayed on their websites. Second, the Chamber encourages the Commission to make clear Section 465.2 does not apply to platforms or retailers that display ratings even if they prompt review submissions or aggregate star ratings of submitted reviews. Reviews have massive value to consumers, providing shoppers with important insights into products to help make informed purchasing decisions. Any final rule should be careful not to discourage companies from providing forums for reviews. It is unclear whether a website that displays fake testimonials (i.e., causes the dissemination of a testimonial) or aggregates reviews could run afoul of the rule. The risk of civil penalties may cause companies to restrict review opportunities without additional clarification from the agency. Finally, the NPRM commentary acknowledges that Section 465.2 would not apply to “to businesses, like third-party review platforms, that disseminate consumer reviews that are not of their products, services, or businesses,” nor would it apply “to any reviews that a platform simply publishes and that it did not purchase,” but the Chamber encourages the Commission to make such an exemption clear in the regulatory text.<sup>8</sup>

Moreover, the clarifications discussed above would better align the Rule with Section 230. Imposing liability on companies like third-party review platforms or retailers for displaying reviews or testimonials is inconsistent with Section 230, which broadly immunizes providers of an interactive computer service from liability for presenting third party content.<sup>9</sup> Accordingly, the Commission must clearly indicate that the Rule provision would not apply to any website displaying a consumer review or testimonial that they did not purchase or procure.

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<sup>8</sup> 88 Fed. Reg. 49364, 49378.

<sup>9</sup> 47 U.S.C. §230 (1996).

**b. The Commission Has Not Demonstrated Prevalence of Review Repurposing and Should Drop the Provision (Section 465.3) from the Rule**

The FTC has failed to demonstrate prevalence for a rule related to consumer review repurposing (Section 465.3). The Commission can demonstrate prevalence through cease-and-desist orders regarding relevant acts or practices or any other information indicating a widespread pattern of unfair or deceptive acts or practices.<sup>10</sup> The Commission points to a single settlement and a handful of news articles that report on anecdotal evidence of review repurposing. The NPRM does not identify any qualitative or quantitative research that defines the scale or scope of the practice.

Crafting rules that impose civil penalties based on a single case resolved through settlement is not evidence of prevalence. The anecdotal evidence from news sources that review repurposing occurs on a single retail website is not demonstrative of prevalence across the trillion-dollar e-commerce market.<sup>11</sup> Congress intended that the FTC demonstrate well-documented evidence of litigated cases to support rulemakings. And yet here, the FTC continues its recent pattern of proposing new rules based on news reporting and/or a small number of settlements, which runs afoul of Section 18 requirements.

The Chamber agrees with the FTC that review hijacking (reviews coopted and/or stolen by other sellers) and review repurposing (merging reviews for unrelated products to inflate ratings and review numbers) is a deceptive practice in certain circumstances. The Chamber supports the appropriate enforcement in this area. But because the Commission has failed to demonstrate a widespread pattern of unfair or deceptive acts or practices, the Chamber recommends eliminating the review repurposing section from any final rule. Instead of issuing the proposed rule provision, the Chamber recommends that the agency focus on consumer and business education to help retailers and platforms establish best practices to prevent review repurposing.

Should the FTC move forward with the provision, the Chamber recommends that the Commission clarify in the text of the rule that the provision does not apply to businesses, like third-party review platforms or retailer websites, which display or publish repurposed reviews that they did not purchase. Section 465.3 makes it an unfair practice “to cause” review repurposing. As drafted, the Chamber is concerned that the provision could capture online retailers that publish or aggregate into star rating consumer reviews repurposed by third parties. In other words, the Commission would

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<sup>10</sup> 15 U.S.C. § 57a(b)(3).

<sup>11</sup> The article that indicated review repurposing was an “acute problem” on Amazon.com stated that it was “unclear if review hijacking is a significant issue on other online retail platforms.” Jake Swearingen, *Hijacked Reviews on Amazon Can Trick Shoppers*, Consumer Reports (Aug. 26, 2019), <https://www.consumerreports.org/customer-reviews-ratings/hijacked-reviews-on-amazon-can-trick-shoppers/>.

be holding online retailers liable for the content of third parties, which is inconsistent with Section 230. Because Section 230 protects interactive computer service providers from civil liability for content of a third party, the Commission must clearly state in the Rule that the provision would not apply to a company for simply publishing or aggregating a consumer review. Further, this clarification would be consistent with the Commission's position for Section 465.2 which clarified the Rule's application to third-party review platforms.

**c. Prohibitions on Company-Controlled Review Websites May Capture Legitimate Business Activity (Section 465.6)**

The Chamber agrees that sellers who misrepresent the independent nature of websites, organizations, or entities that review their own products can run afoul of the FTC Act. The Chamber is supportive of a fake review rule aimed at addressing the practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own product. Which is why the Chamber supports provisions of the rule addressing fake reviews and insider reviews and testimonials. But as drafted, Section 465.6 sweeps too broadly.

The plain language of the section could capture retailers that sell their own house brands. The provision also appears to prevent media companies from operating general review websites that publish reviews by independent critics and consumers about films or television produced by affiliated studios or divisions. The question of fake reviews is not about the ownership of the website or entity, but about the nature of the review. Independent reviews of affiliated products or services can reflect truthful and non-deceptive speech that is beneficial to consumers. Moreover, the fraudulent nature of reviews on purportedly independent websites would likely be covered by Sections 465.2 and 465.5 of the proposed Rule. Therefore, the Commission should drop Section 465.6 from a final rule since the unfair or deceptive practices are adequately addressed in other sections of the proposed Rule and the provision prohibits truthful and beneficial speech.

**III. The Commission Should Clarify Several Definitions**

In addition to the substantive provisions of the NPRM, the Chamber has several recommended clarifications for the definitions proposed in NPRM.

**a. The Commission's Definition of "Substantially Different Product" May Chill Beneficial Commercial Speech**

The Chamber appreciates that the Commission raised questions about whether the definition of "substantially different product" is appropriate for the Consumer Review Repurposing provision of the Rule. Because the Commission has not

demonstrated prevalence of review repurposing, it undermines a clear understanding of how consumers use or rely on reviews for related products. As discussed above, the Chamber recommends that the Commission drop the review repurposing section (Section 465.3) from the rule. Should the Commission move forward with a rule that includes a review repurposing provision, the proposed definition needs additional study.

Would consumers find value reading reviews for cotton sheets when purchasing sateen sheets from the same company? Would consumers find value in reading reviews about a handcrafted ceramic bowl when purchasing a ceramic bowl with handles from a small seller on a large, global marketplace focused on handmade or vintage items and crafts? Would consumers find value in reading reviews for annual iterations of new dog toys that capture new characters? The extremely narrow definition of a “substantially different product,” which allows for no variation beyond color, size, count, or flavor, is overly restrictive.

Legitimate actors are likely to defer to limiting review activity, which could deny consumers the ability to see all relevant or helpful reviews. Accordingly, the Chamber recommends that the Commission conduct customer surveys on consumer expectations about what the term “substantially different product” means as well as study whether and how consumers value related product reviews and release that information for public comment before moving forward with a final rule.

#### **b. The Commission Should Define the Term “Relative”**

The term “relative” is too vague. It is unclear whether the rule applies to third cousins, the spouses of a stepbrother’s child from a previous marriage, or friends that are considered family. Large companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.

#### **c. The Commission Should Not Adopt a Prescriptive Definition of Clear and Conspicuous**

The definition of “clear and conspicuous” is overly prescriptive and abandons the FTC’s longstanding commitment to flexibility. The FTC has long taken the position that it is not for FTC staff to dictate the specifics of an ad campaign, endorsement, or testimonial. The agency has traditionally shied away from imposing a one-size-fits all approach to disclosures. Instead, the FTC has focused on ensuring that consumers looking at an advertisement come away with an accurate understanding.<sup>12</sup>

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<sup>12</sup> Lesley Fair, *Full Disclosure*, FTC Business Blog (Sept. 23, 2014), <https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure>.

But here, the Commission, requires that disclosures on the internet or mobile applications be “unavoidable,” meaning the Commission strictly prohibits disclosures for which a consumer must “take any action” to see them. This definition, therefore, prohibits hyperlinks and scrolling, which is inconsistent with longstanding Commission guidance about effective disclosures in space-constrained environments.<sup>13</sup> Accordingly, the Chamber recommends adopting a definition that permits a more flexible approach to adequate disclosures.

#### **IV. Section 18 Rules Should Encourage, Not Eliminate, Opportunities for Public Discourse.**

The NPRM declares that “the Commission elects not to provide a separate, second comment period for rebuttal comments.”<sup>14</sup> The failure to allow for a rebuttal comment period undercuts public participation in the rulemaking process. While the public can guess at potential disputed issues of material fact, they will be in the best position to make that assessment after reviewing comments to the NPRM. Interested parties should have the opportunity to react to and benefit from the comments, arguments, and information of others during the rulemaking process. Moreover, retailers, platforms, online marketplaces with third-party sellers, and review sites regularly engage in substantial efforts to address fake review practices on their sites and may have insights about practices or observations included in comments to the NPRM that would provide value to the rulemaking record. Without a rebuttal comment period, the FTC limits opportunities to learn about issues that may warrant further attention. The FTC’s election to skip a second comment period for rebuttal comments undermines a process committed to public input.

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<sup>13</sup> Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, at ii, 15-17 (2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

<sup>14</sup> 88 Fed. Reg. 49364, n.1, <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials#citation-169-p49374>.



## V. Conclusion

In conclusion, the Chamber recommends that the Commission eliminate a few provisions from the Rule, as well as modify or clarify a few other aspects of the Rule. We stand ready to discuss these issues and our suggestions in greater detail. If you have any questions, please reach out to Nina Frant at [nfrant@uschamber.com](mailto:nfrant@uschamber.com) and Matt Furlow at [mfurlow@uschamber.com](mailto:mfurlow@uschamber.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Frant". The signature is fluid and cursive, with the first name "Nina" written in a larger, more prominent script than the last name "Frant".

Nina Frant  
Vice President  
Consumer Policy  
U.S. Chamber of Commerce