

consumers, including the Telemarketing Sales Rule (“TSR”), the Funeral Rule, the Restore Online Shoppers’ Confidence Act (“ROSCA”), and the Rule Concerning the Use of Prenotification Negative Option Plans (“Negative Option Rule”). Is there evidence that we have been unable to address specific types of deceptive and unfair pricing practices, for example in the marketing of negative option transactions, with these marketing-specific rules? Do we need a rule that covers all transactions? If industry-specific rules have not prevented harm from pricing practices, how would additional rules bring about greater compliance?

- The Funeral Rule’s goals are to lower barriers to price competition in the funeral goods and services market and to facilitate informed consumer choice. One way the Funeral Rule helps achieve these goals is to require funeral providers to “unbundle” the goods and services they sell and instead to offer them on an itemized basis. But this ANPR takes the opposite approach by favoring up-front, all-in pricing. How might this ANPR impact price transparency and competition?

Basis for the Rule

- Section 18 rules must be based on “prevalent” deceptive or unfair practices. Notably, this ANPR references several potentially deceptive and unfair fees that have been the subject of FTC workshops, business guidance, and even investigations, but *not* enforcement actions. Can the FTC meet the requisite showing of prevalence without any underlying FTC enforcement?

- What evidence, beyond law enforcement, can be used to demonstrate prevalence? Can a showing of prevalence be satisfied by a workshop or roundtable? News articles?

Flawed Assumptions and Vague Definitions

- The ANPR defines the term “junk fees” to include “fees for goods or services that are deceptive or unfair . . . whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.” How should the Commission determine whether fees correspond to goods and services that consumers value? What percentage of consumers should be the threshold? A majority of consumers? A significant minority?

- Do fees sometimes viewed as unnecessary by consumers reflect attempts by businesses to recover incremental costs? Is it reasonable for businesses to impose fees to recover

incremental costs? What percentage of incremental costs can a business recover before it becomes a “junk fee”?

- The ANPR defines “junk fees” to include “goods or services that consumers would reasonably assume to be included within the overall advertised price.” What evidence does the FTC need to demonstrate consumer expectations about what services, products, or fees are covered by a published price? Should the FTC be required to demonstrate quantitative or qualitative measures of consumer expectations?

- The ANPR defines “hidden fees” as fees that “are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all.” At what point in a transaction should fees be disclosed to consumers? Is disclosing a fee before a consumer makes a purchase too late? Should disclosures occur at the same point in a transaction regardless of the industry or market? Why or why not?

- The ANPR indicates that the Commission is exploring the “costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service.” How would this proposal work for dynamic fees, like shipping and handling, that are based on consumer input?

- The ANPR asserts that “junk fees . . . facilitate inflation.” What evidence points to a connection between fees and inflation?

Impact on Competition

- To what extent does competition discipline suboptimal pricing practices?

- Would a government requirement for all-in pricing facilitate coordination among regulated companies in the same industry?

- Could a potential rule incentivize all-in pricing and the bundling of products and services, which would then require consumers to pay for goods and services they may not want or need?

Opportunity Costs

- In 2022, including proposals that I anticipate will be voted out during the open Commission meeting, the FTC has initiated the rulemaking process for a total of six new rules. These massive regulatory undertakings require substantial FTC resources. To what extent does our current rulemaking agenda divert resources from our primary law enforcement mandate? Are there other risks associated with our apparent attempt to become a powerful legislature?

- Are there existing or emerging threats to consumers and competition we are not pursuing because resources are focused on rules instead of cases?

- Will the credibility of the FTC be tarnished if we pursue broad rulemaking efforts without qualitative and quantitative evidence of consumer injury?

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FEDERAL TRADE COMMISSION

16 CFR Part 465

Trade Regulation Rule on the Use of Reviews and Endorsements

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The Federal Trade Commission (the “Commission”) proposes to commence a rulemaking proceeding to address certain deceptive or unfair uses of reviews and endorsements. The Commission is soliciting written comment, data, and arguments concerning the need for such a rulemaking to prevent unfair or deceptive marketing utilizing reviews and endorsements. In addition, the Commission solicits comment on how the Commission can ensure the broadest participation by affected interests in the rulemaking process.

DATES: Comments must be received on or before January 9, 2023.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the **SUPPLEMENTARY INFORMATION** section below. Write “Reviews and Endorsements ANPR, P214504” on your comment, and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex B), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Michael Ostheimer (202–326–2699), mostheimer@ftc.gov, or Michael Atleson (202–326–2962), matleson@ftc.gov, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Room CC–10603, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. General Background Information

The Commission is publishing this advance notice of proposed rulemaking pursuant to Section 18 of the Federal Trade Commission (“FTC”) Act, 15 U.S.C. 57a, and the provisions of Part 1, Subpart B of the Commission’s Rules of Practice, 16 CFR 1.7–1.20, and 5 U.S.C. 553. This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

II. Objectives the Commission Seeks To Achieve and Possible Regulatory Alternatives

A. Rulemaking Addressing Endorsements and Testimonials

1. Background

Fake and deceptive reviews and other endorsements have long been problematic, and we have no reason to believe the market will correct this problem on its own. The commercial incentives to engage in such misconduct can be large. It can be difficult for anyone—including consumers, competitors, platforms, and researchers—to distinguish real from fake and determine the truth in this area. Further, some platforms may have mixed incentives to deal effectively with the problematic reviews and, despite some platforms purporting to take enforcement of problematic reviews seriously, fake and deceptive reviews continue to flourish on those very platforms. The sheer number of people engaged in fraudulent or deceptive reviews and endorsements makes them even more difficult to combat, especially given such content is often created by individuals or small companies, some of whom are located abroad.

Although the Commission has brought several cases involving reviews and other endorsements under Section 5 of the FTC Act, 15 U.S.C. 45, our current remedial authority is limited. Monetary relief is no longer available under Section 13(b),¹ disgorgement is not available under Section 19(b), 15 U.S.C. 57b(b), and, while the Commission has deployed new tools to combat this problem, in many cases, it remains difficult to obtain monetary relief.²

¹ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

² In October 2021, the Commission announced the issuance of a Notice of Penalty Offenses which can allow the FTC to obtain civil penalties from marketers that use fake reviews. See www.ftc.gov/

Under these circumstances, the availability of a civil penalty remedy may provide a potent deterrent. We believe initiating a Magnuson-Moss rulemaking to address certain types of clear Section 5 violations involving reviews and endorsements would benefit consumers, help level the playing field, and not burden legitimate marketers. The rule would be designed to deter bad actors, simplify our enforcement burdens by spelling out prohibitions plainly, and subject violators to civil penalties.

The Commission has well-established guidance on endorsements and testimonials. In particular, the Endorsement Guides reportedly remain very helpful to legitimate actors in the marketplace,³ but Commission guides are not enforceable regulations. Truly bad actors will not be deterred by Commission guidance, but the possibility of substantial civil penalties changes the economic incentives and may provide greater deterrence as to both legitimate and bad actors.

2. Objectives and Regulatory Alternatives

The Commission requests input on whether and how it should use its authority under Section 18 of the FTC Act, 15 U.S.C. 57a, to address certain inarguably deceptive or unfair commercial acts or practices involving reviews or other endorsements. The Commission does not propose to cover every issue addressed in the Endorsement Guides. Specifically, the Commission proposes addressing the following practices, many of which have been the subject of Commission investigations or law enforcement actions: (a) reviews or endorsements by

enforcement/penalty-offenses/endorsements. Such notices, however, are limited to practices addressed in prior fully litigated administrative decisions, only apply to marketers that engaged in covered misconduct after receipt of the notice, and do not provide for or allow consumer redress. The Commission can still obtain consumer redress through Section 19(a)(2) of the FTC Act if the Commission can satisfy a court that a reasonable person would have known the act or practice at issue was dishonest or fraudulent. See, e.g., Order at 2–4, *Fashion Nova LLC*, No. C–4759 (Mar. 18, 2022) (company that suppressed negative reviews agreed to pay \$4.2 million). If the marketer refuses to settle, such relief can only be obtained in federal court after a fully litigated administrative decision. Furthermore, redress in matters involving deceptive review practices can be very difficult to calculate and disgorgement and civil penalties are not available through such proceedings.

³ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR part 255. In an ongoing regulatory review of the Endorsement Guides, the Commission received over one hundred public comments, most of which noted the Guides are beneficial and should be retained, and none of which disagreed. See 87 FR 44288, 44289–44290 (July 26, 2022).

people who do not exist, who did not actually use or test the product or service, or who are misrepresenting their experience with it;⁴ (b) review

⁴ The Commission has challenged fabricated consumer reviews. See, e.g., Complaint 9–17, *FTC v. Roomster Corp.*, No. 1:22–CV–07389 (S.D.N.Y. Aug. 30, 2022) (purchase and sale of fake app store and other reviews for room and roommate finder app and platform); Complaint at 2–4, *Sunday Riley Modern Skincare, LLC*, No. C–4729 (Nov. 6, 2020) (company personnel created fake accounts to write fake reviews of company’s products on third-party retailer’s website); Complaint at 12–13, 15–16, *Shop Tutors, Inc.*, No. C–4719 (Feb. 3, 2020) (reviews of LendEDU were fabricated by its employees, other associates, or their friends and published on a third-party website); Complaint at 20, *FTC v. Cure Encapsulations, Inc.*, No. 1:19–cv–00982 (E.D.N.Y. Feb. 26, 2019) (Amazon reviews of defendants’ product were fabricated by one or more third parties whom defendants had paid to generate reviews). It has similarly challenged fictitious endorsements. See, e.g., Complaint at 14, 19, *FTC v. A.S. Resch, LLC (Synovia)*, No. 1:19–cv–3423 (D. Colo. Dec 5, 2019) (fake consumer testimonials); Complaint at 20–22, 31, *Global Cmty. Innovations LLC*, No. 5:19–CV–00788 (N.D. Ohio Apr. 10, 2019) (fake consumer testimonials); Complaint at 27–28, 43, *Jason Cardiff (Redwood Sci. Techs., Inc.)*, No. ED 18–cv–02104 SJO (C.D. Cal. Oct. 24, 2018) (testimonials in infomercial were paid actors who had not used defendants’ product); Complaint at 12–3, 20, *FTC v. Mktg. Architects, Inc.*, No. 2:18–cv–00050–NT (D. Me. Feb. 5, 2018) (fake testimonials); Complaint at 14, 21, *FTC v. Health Rsch. Labs., LLC*, No. 2:17–cv–00467–JDL (D. Me. Nov. 30, 2017) (fake consumer testimonials and expert endorsements); Complaint at 13, 18, 28, *XXL Impressions LLC*, No. 1:17–cv–00067–NT (D. Me. Feb. 22, 2017) (defendants do not know whether consumer endorsers of their products who appeared in their ads actually exist); Complaint at 5, 7, 12–13, *FTC v. Anthony Dill*, No. 2:16–cv–00023–GZS (D. Me. Jan. 19, 2016) (fake testimonials); Amended Complaint at 38–39, 43–44, *FTC v. Lisa Levey*, No. 03–4670 GAF (C.D. Cal. Mar. 8, 2004) (fictitious expert endorsements). It has also challenged false claims that specific celebrities endorsed specific products, services, or businesses. See, e.g., Complaint at 15, 19–20, 30–31, *Global Cmty. Innovations LLC*, No. 5:19–CV–00788 (N.D. Ohio Apr. 10, 2019); Complaint at 5, 18–20, 22–23, 36, *FTC v. Tarr, Inc.*, No. 3:17–cv–02024–LAB–KSC (S.D. Cal. Oct. 3, 2017); Complaint at 13–15, 18, *Sales Slash, LLC*, No. CV15–03107 (C.D. Cal. Apr. 27, 2015); Complaint at 2, 4–5, *Norm Thompson Outfitters, Inc.*, No. C–4495 (Sept. 29, 2014); *The Raymond Lee Org., Inc.*, 92 F.T.C. 489 (1978) (use of the names, photographs and words of public officials, including members of the Congress, misled consumers that the officials recommended or endorsed the business). It has similarly challenged false claims of endorsements by specific entities. See, e.g., Complaint at 15–16, 18, *FTC v. Mercola.com, LLC*, No. 1:16–cv–04282 (N.D. Ill. Apr. 13, 2016) (misrepresentation the FDA endorsed the use of indoor tanning systems as safe); *Mytinger & Casselberry, Inc.*, 57 F.T.C. 717, 743–46 (1960) (misrepresentation that a consent decree restraining respondents from making certain claims was an endorsement by the U.S. government of its product); *Trade Union Courier Publ’g Corp.*, 51 F.T.C. 1275, 1300–03 (1955) (misrepresentation that newspaper was endorsed by the American Federation of Labor when it was only endorsed by some unions within the AFL); *Ar-Ex Cosms., Inc.*, 48 F.T.C. 800, 806 (1952) (misrepresentation that lipstick had been recommended by Consumers’ Research); *A. P. W. Paper Co., Inc.*, 38 F.T.C. 1, 15–17 (1944) (misrepresentation that product was endorsed by the American Red Cross); *Wilbert W.*

Continued

hijacking, where a seller steals or repurposes reviews of another product; (c) marketers offering compensation or other incentives in exchange for, or conditioned on, the writing of positive or negative consumer reviews;⁵ (d) owners, officers, or managers of a company; (i) writing reviews or testimonials of their own products or services, or publishing testimonials by their employees or family members, which fail to provide clear and conspicuous disclosures of those relationships, or (ii) soliciting reviews from employees or relatives without instructing them to disclose their relationships;⁶ (e) the creation or

Haase Co., Inc., 33 F.T.C. 662, 681–83 (1941) (misrepresentation that insurance company had endorsed burial vault business and its vaults). Furthermore, the Commission has challenged advertisements that misrepresent endorsers' experiences. See, e.g., Complaint at 14, 18, *FTC v. A.S. Resch, LLC (Synovia)*, No. 1:19-cv-3423 (testimonialists had used a prior product formulation that contained substantially different ingredients); Complaint at 22, 25, *NextGen Nutritionals, LLC*, No. 8:17-cv-2807-T-36AEP (M.D. Fla. Jan. 9, 2018) (testimonials in ads misrepresented the actual experiences of customers); Complaint at 22–24, 27, *FTC v. Russel T. Dalbey*, No. 1:11-cv-01396-CMA-KLM (D. Colo. May 26, 2011) (testimonials misrepresented earnings from brokering promissory notes using defendants' system); *Computer Bus. Servs., Inc.*, 123 F.T.C. 75, 78–79 (1997) (testimonials by purchasers of home-based business ventures did not reflect their actual experiences); *R. J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 731–32 (1950) (endorsements communicated endorsers exclusively smoked Camel cigarettes whereas they did not smoke cigarettes, did not smoke Camels exclusively, or could not tell the difference between Camels and other cigarettes).

⁵ The Commission has challenged giving an incentive for a review or endorsement and requiring that it be positive. See, e.g., Complaint at 14, 19–20, *FTC v. A.S. Resch, LLC (Synovia)*, No. 1:19-cv-3423 (offered consumer endorsers with free product in exchange for “especially positive and inspiring” reviews); Complaint at 5–6, 8, *Urthbox, Inc.*, No. C–4676 (Apr. 3, 2019) (deceptively provided compensation for the posting of positive reviews on the BBB's website and other third-party websites); Complaint at 2–3, *AmeriFreight, Inc.*, No. C–4518 (Feb. 27, 2015) (every month past customers were encouraged to submit reviews of respondent's services in order to be eligible for a \$100 “Best Monthly Review Award”, given to “the review with the most captivating subject line and best content” and that they should “be creative and try to make your review stand out for viewers to read!”).

⁶ The Commission has challenged such conduct. See, e.g., Complaint at 2–4, *Sunday Riley Modern Skincare, LLC*, No. C–4729 (Nov. 6, 2020) (company owner and managers asked company employees to write product reviews on third-party retailer's website); Complaint at 15, 19–20, *FTC v. Health Ctr., Inc.*, No. 2:20-cv-00547 (D. Nev. Mar. 19, 2020) (defendants used testimonials from their employees that purported to be from ordinary consumers); Complaint at 14, 19, *FTC v. A.S. Resch, LLC (Synovia)*, No. 1:19-cv-3423 (ads include testimonial by 50% owner and officer); Complaint at 5–6, 8–9, *Mikey & Momo, Inc.*, No. C–4655 (May 3, 2018) (Amazon reviews written by company officer and her relatives); Complaint at 21, 25–26, *FTC v. NutriMost LLC*, No. 2:17-cv-00509-NBF (W.D. Pa. Apr. 20, 2017) (testimonials in ads were from licensees or franchisees, their relatives,

operation of websites, organizations, or entities that purportedly provide independent reviews or opinions of products or services but are, in fact, created and controlled by the companies offering the products or services;⁷ (f) misrepresenting that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity;⁸ (g) the

or their employees); Complaint at 10, 12, *FTC v. Aura Labs, Inc.*, No. 8:16-cv-02147 (C.D. Cal. Dec. 12, 2016) (app store review and website testimonials by CEO or relatives of Chairman); Complaint at 25–27, 32–33, *FTC v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (customer reviews on third-party websites written by managers); Complaint at 19, 21, *FTC v. Genesis Today, Inc.*, No. 1:15-cv-00062 (W.D. Tex. Jan. 26, 2015) (video testimonials to which defendants' promotional materials linked were provided by defendants' employees); Complaint at 10, *U.S. v. Spokeo, Inc.*, No. 2:12-cv-05001-MMM-SH (C.D. Cal. June 7, 2012) (defendant directed its employees to draft endorsements and post them on news and technology websites); *Gisela Flick*, 116 F.T.C. 1108, 113–14 (1993) (infomercial endorsement by company's Athletic Director).

⁷ The Commission has challenged sellers who control websites claiming to provide independent opinions of products. See, e.g., Complaint at 2, 8–9, *Son Le.*, No. C–4619 (May 31, 2020) (respondents operated purportedly independent websites that reviewed their own trampolines); Complaint at 19–20, 28, *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231-MSS-TBM (M.D. Fla. Sept. 24, 2015) (defendants operated Gastrichypass.me website, a purported independent, objective resource, which endorsed defendants' products); Complaint at 21–25, 28, *FTC v. NourishLife, LLC*, No. 1:15-cv-00093 (N.D. Ill. Jan. 7, 2015) (defendants operated Apraxia Research website, a purported independent, objective resource, which endorsed a type of supplement sold only by defendants). It has also challenged sellers who control purportedly independent organizations or entities that reviewed or approved the sellers' products or services. See, e.g., Complaint at 3–5, *Bollman Hat Co.*, No. C–4643 (Jan. 23, 2018) (respondents created seal misrepresenting that independent organization endorsed their products as made in the United States); Complaint at 18–20, 26, *NextGen Nutritionals, LLC*, No. 8:17-cv-2807-T-36AEP (M.D. Fla. Jan. 9, 2018) (misrepresentation that sites displaying the Certified Ethical Site Seal were verified by an independent, third-party program); Complaint at 2–4, *Moonlight Slumber, LLC*, No. C–4634 (Sept. 28, 2017) (respondent misrepresented that baby mattresses had been certified by Green Safety Shield, when in fact the shield was its own designation); Complaint at 4–6, *Benjamin Moore & Co., Inc.*, No. C–4646 (July 11, 2017) (respondent used seal of its own creation to misrepresent that paints had been endorsed or certified by independent third party); Complaint at 2–4, *ICP Constr. Inc.*, No. 4648 (July 11, 2017) (same); Complaint at 2–3, *Ecobaby Organics, Inc.*, No. C–4416 (July 25, 2013) (manufacturer misrepresented seal was awarded by industry association when in fact it created and controlled that association); Complaint at 2–4, *Nonprofit Mgmt. LLC*, No. C–4315 (Jan. 11, 2011) (respondents misrepresented their seal program was endorsed by two associations when in fact a respondent owned and operated them); Complaint at 34, 37, *FTC v. A. Glenn Braswell*, No. 2:03-cv-03700-DT-PJW (C.D. Cal. May 27, 2003) (defendants established Council on Natural Nutrition and then misrepresented it was an independent organization of experts who had endorsed defendants' products).

⁸ The Commission has challenged the suppression of customer reviews based upon their

suppression of customer reviews by physical threat or unjustified legal threat;⁹ or (h) selling, distributing, or buying, followers, subscribers, views, and other indicators of social media influence.¹⁰ The Commission hopes that by focusing on practices most clearly and inarguably deceptive or unfair, it can streamline its rulemaking, benefit consumers, and not burden legitimate marketers.

The Commission seeks comment on, among other things, the prevalence of each of the above practices, the costs and benefits of a rule that would address them, and alternatives to such a rulemaking, such as the publication of additional consumer and business education. In their replies, commenters should provide any available evidence and data that supports their position, such as empirical data, consumer perception studies, and consumer complaints.

3. The Rulemaking Process

The Commission seeks the broadest participation by the affected interests in the rulemaking. To that end, the Commission will proceed through an “open rulemaking,” which will provide all affected interests numerous opportunities to submit comments and to participate in the rulemaking process. The Commission encourages all interested parties to submit written comments.

The Commission also expects the affected interests to assist the Commission in analyzing various options and in drafting a proposed rule. The Commission believes public workshop conferences to discuss the various issues involving the rule are a productive and efficient means to develop the record and explore various alternatives. The Commission will also use public workshop conferences to assist the Commission in drafting a proposed rule.

negativity. See Complaint at 1–2, *Fashion Nova LLC*, No. C–4759 (Mar. 18, 2022). Commission staff has also addressed the issue in a closing letter. See Letter from Serena Viswanathan, Acting Associate Director, Division of Advertising Practices to Amy R. Mudge and Randall M. Shaheen, Counsel for Yotpo, Ltd. (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/closing_letters/nid/202_3039_yotpo_closing_letter.pdf.

⁹ The Commission has challenged review suppression through threats and intimidation as unfair. See Complaint at 8–10, 12, *World Patent Mktg., Inc.*, No. 1:17-cv-20848-DPG (S.D. Fla. Mar. 6, 2017).

¹⁰ The Commission has challenged the sale of fake indicators of social media influence, such as fake Twitter followers. See Complaint at 5, *FTC v. Devumi, LLC*, No. 9:19-cv-81419-RKA (S.D. Fla. Oct. 18, 2019).

4. Public Workshop Conferences

In order to facilitate the greatest participation by the public in the rulemaking process, Commission staff will hold several public workshop conferences to discuss the issues noted above. Staff will announce a schedule of these conferences after the close of the comment period.

III. Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of the proposed rulemaking. The Commission requests factual data upon which the comments are based be submitted with the comments. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. Please identify the evidence and data source(s) that support each of your answers.

Questions

(1) How widespread is the marketing of products or services using:

a. reviews or other endorsements by nonexistent individuals or by those who did not actually use or test the product or service;

b. reviews or other endorsements by individuals who are misrepresenting their experiences with a product or service;

c. review hijacking (where a seller steals or repurposes reviews from another product);

d. paid or incentivized consumer reviews that were required to be positive or required to be negative (if of a competitor's product);

e. consumer reviews written by the owners, officers, or employees of the company offering the product or service, or their family members; or

f. Websites or other organizations or devices that purportedly provide independent reviews or opinions of products or services but are in fact created and controlled by the companies offering the products or services?

(2) How widespread is the suppression of negative consumer reviews:

a. on retailer websites because the retailers filter out and do not publish negative reviews; or

b. by marketers threatening the authors of the reviews (other than through the form contract provisions prohibited by the Consumer Review Fairness Act)?

(3) How widespread is:

a. the sale of followers, subscribers, views, and other indicators of social media influence;

b. the purchase and use for commercial purposes of followers, subscribers, views, and other indicators of social media influence?

(4) For each of the practices described in Questions 1 through 3, above, does the practice cause consumer injury? If so, what evidence demonstrates such practices cause consumer injury?

(5) For each of the practices described in Questions 1 through 3, above, does the practice cause injury to competition? If so, what evidence demonstrates such practices cause injury to competition?

(6) For each of the practices described in Questions 1 through 3, above, are there circumstances in which such practices would not be deceptive or unfair? If so, what are those circumstances and could and should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not?

(7) Please provide any evidence concerning consumer perception of, or experience with, consumer reviews or other endorsements relevant to the practices described in Questions 1 through 3, above.

(8) What existing laws and regulations, other than the FTC Act, if any, cover the practices described in Questions 1 through 3, above? How do those laws affect consumers? How do those laws affect businesses, particularly small businesses?

(9) What actions, if any, have platforms taken to address the practices described in Questions 1 through 3, above? Have those actions been effective in reducing consumer harm associated with the practices described in Questions 1 through 3, above? Why or why not?

(10) What actions have others taken to facilitate or enable the practices described in Questions 1 through 3, above? For example, what types of services specifically allow marketers to engage in these practices, and who is providing these services?

(11) Is there a need for new regulatory provisions to prevent the practices described in Questions 1 through 3, above? If yes, why? If no, why not? What evidence supports your answer?

(12) How should a rule addressing the practices described in Questions 1 through 3, above, be crafted to maximize the benefits to consumers while minimizing the costs to businesses under either approach? What evidence supports your answer?

(13) Do current or impending changes in technology or market practices affect whether and how a rulemaking should proceed? If so, what are such changes and how do they affect whether and how a rulemaking should proceed?

(14) Are there foreign or international laws, regulations, or standards addressing reviews or endorsements the Commission should consider as to whether and how a rulemaking should proceed? If so, what are they? Should the Commission consider adopting, or avoiding, any of these? If so, why? If not, why not?

(15) Should the Commission consider additional consumer and business education to reduce consumer harm associated with the practices described in Questions 1 through 3, above? If so, what should such education materials include, and how should the Commission communicate that information to consumers and businesses?

(16) What alternatives to regulations should the Commission consider when addressing the practices described in Questions 1 through 3, above? Would those alternatives obviate the need for regulation? If so, why? If not, why not? What evidence supports your answer?

(17) Are there other commercial acts or practices involving reviews or other endorsements that are inarguably deceptive or unfair that should be addressed in the proposed rulemaking? If so, describe the practices. How widespread are the practices? Please answer Questions 4 through 8, 10, 11, 14, and 15 with respect to the practices.

IV. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 9, 2023. Write "Reviews and Endorsements ANPR, P214504" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write "Reviews and Endorsements ANPR, P214504" on your comment and on the envelope, and mail your comment to the following address:

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

Because your comment will be placed on the public record, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential"—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at www.regulations.gov—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it

receives on or before January 9, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission, Commissioner Wilson dissenting.

April J. Tabor,
Secretary.

Note: The following statements will not appear in the Code of Federal Regulations.

Statement of Chair Lina M. Khan

Online shopping runs on reviews. When you're in a brick-and-mortar store, you can see the inventory. If it's a couch, you can sit on it. If it's a TV, you can watch it. But when you're shopping online, it's much harder to know what you're actually buying. That's why reviews are so crucial. If 500 other people have bought something and say it works, you can have a lot more confidence.

But what if those people were paid to leave those positive reviews? Or what if they're bots? What if the seller is hiding a thousand one-star reviews?

That's the dilemma when you shop online. Reviews are essential, but it's hard to know when they can be trusted. Precisely because of the importance of reviews, firms can face powerful incentives to game the system. Businesses have been caught leaving positive reviews for their own products or services, suppressing negative ones, and boosting bad reviews of their competitors.¹ The incentives extend beyond the seller of the product itself. 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.

These practices don't only harm the consumers who place their trust in fake reviews. They also pollute the marketplace and put honest businesses at a competitive disadvantage.

The Commission has brought several enforcement actions to address this issue. In January, for example, the Commission settled allegations that the fast-fashion company Fashion Nova had

suppressed negative reviews.² And in August, the Commission, along with several state attorneys general, sued Roomster for allegedly flooding its rental listing marketplace with phony reviews.³

In addition to enforcement activity, the Commission has used other authorities to try to address market-wide problems with fake reviews. Last year, the Commission put more than 700 companies on notice regarding its litigated decisions in this area, which triggered the FTC's penalty offense authority.⁴ This past May, the Commission also proposed revisions to tighten its guidelines for advertisers who use endorsements and reviews and to warn social media platforms about inadequate disclosure.

With today's advance notice of proposed rulemaking, the Commission is seeking comment from the public on whether rulemaking would be an appropriate way to address the problem more systemically. A rulemaking here would provide benefits beyond the agency's other powers. The Supreme Court decision in *AMG Capital Management, LLC v. FTC* substantially limited our ability to seek monetary relief for harmed consumers.⁵ A rule against fake reviews could enable us to obtain civil penalties and return money to consumers injured as a result of

² Press Release, Fed. Trade Comm'n, Fashion Nova will Pay \$4.2 Million as part of Settlement of FTC Allegations it Blocked Negative Reviews of Products (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/fashion-nova-will-pay-42-million-part-settlement-ftc-allegations-it-blocked-negative-reviews>.

³ Press Release, Fed. Trade Comm'n, FTC, States Sue Rental Listing Platform Roomster and Its Owners for Duping Prospective Renters with Fake Reviews and Phony Listings (Aug. 30, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-states-sue-rental-listing-platform-roomster-its-owners-duping-prospective-renters-fake-reviews>. In addition, in 2019, the FTC sued a company called Synovia for marketing a fake arthritis cure with fake testimonials and fake doctor endorsements. Press Release, Fed. Trade Comm'n, FTC Stops Marketers from Making False Arthritis Treatment Claims (Dec. 5, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/12/ftc-stops-marketers-making-false-arthritis-treatment-claims>. In January of this year, the Commission settled with Vision Path for, among other things, failing to disclose that one of its own senior employees posted a positive review on the BBB website. Press Release, Fed. Trade Comm'n, Vision Path, Inc., Online Seller of Hubble Lenses, Settles Charges it Violated the Contact Lens Rule and FTC Act to Boost Sales (Jan. 28, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/vision-path-inc-online-seller-hubble-lenses-settles-charges-it-violated-contact-lens-rule-ftc-act>.

⁴ Fed. Trade Comm'n, *Penalty Offenses Concerning Endorsements*, <https://www.ftc.gov/enforcement/penalty-offenses/endorsements>.

⁵ *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021).

¹ See, e.g., Sherry He, et al., *The Market for Fake Reviews*, 41 Mktg. Sci. 896 (2020) (measuring the impact of fake reviews on Amazon sales); Theodore Lappas, et al., *The Impact of Fake Reviews on Online Visibility: A Vulnerability Assessment of the Hotel Industry*, 27 Info. Sys. Rsch. 940 (2016); Renee DiResta, *Manipulating Consumption, Medium* (Jun. 29, 2018), <https://medium.com/@noupaside/manipulating-consumption-42f2e9013d0b>.

deceptive or unfair reviews and endorsements.

I am grateful to staff for their hard work on this ANPR. And I am happy to cast my vote in favor of beginning this process. It's critical that the Commission use all its authorities in order to prohibit unfair or deceptive practices—and to help consumers who have been harmed by them. I look forward to hearing from the public and stakeholders as the agency embarks on the rulemaking process.

Statement of Commissioner Rebecca Kelly Slaughter

Online reviews and endorsements of products and services play a powerful role in influencing consumer choices. From 1996 to 2018, 233 million product reviews were posted on Amazon alone.¹ Last month, my own fridge unexpectedly broke down and I had to scramble to find a repairman. Like many consumers, I relied on online reviews and other endorsements to decide whom to hire for this important task. The importance of consumer reviews to modern commerce makes the problem of fake and deceptive reviews even more pernicious. Companies like Yelp flag about 25% of reviews as “less reliable” and a recent report found that 10.7% of all Google reviews are fake.² These practices harm not only consumers, but also mom-and-pop businesses, like my new and excellent appliance repairman, who rely on online reviews to attract new customers.

So, I'm pleased to support today's publication of this Advance Notice of Proposed Rulemaking on Reviews and Endorsements to help ensure that people have accurate information about the products and services they buy. The ANPR asks important questions about the prevalence of these practices. Our inquiry here asks questions about practices from fake reviews by non-existent people, or people who have never actually used the product, to review suppression, and the practice of buying followers or subscribers as an indicator of social media influence.

I hope that an open inquiry into these practices will also be illuminating for

¹ See Jianmo Lee et al., Justifying Recommendations using Distantly-Labeled Reviews and Fined-Grained Aspects, *Empirical Methods in Natural Language Processing (EMNLP) 2019*, <https://research-it.wharton.upenn.edu/data/amazon-user-review-database/>.

² See Ryan Kailath, “Some Amazon Reviews Are Too Good to Be Believed. They're Paid For,” *NPR* (July 30, 2018), <https://www.npr.org/2018/07/30/629800775/some-amazon-reviews-are-too-good-to-bebelieved-theyre-paid-for>; Greg Sterling, “Fake Reviews: How Big a Problem Exactly?,” *Uberall* (Oct. 28, 2021), <https://uberall.com/enus/resources/blog/how-big-a-problem-are-fake-reviews>.

the Commission. I'm troubled by the lack of transparency by platforms and the subsequent difficulty in addressing consumer harm. Companies like Amazon, for example, claim that less than 1% of their reviews are inauthentic, but this stands in stark contrast to consumer experiences and third-party estimates.³ Deceptive reviews waste people's time and money. A recent survey has found that consumers estimated having wasted about \$125 in the prior year due to “inaccurate” reviews.⁴

The FTC's work on fake reviews and endorsements is a great example of our “every tool in the toolbox” approach to deterring unlawful conduct in the market. Our Endorsements Guides have been helpful in setting expectations for market participants about our enforcement priorities in this area. After the loss of our Section 13(b) authority the Commission announced a revised Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials last year, allowing the agency to collect civil penalties from those law violators to whom we have provided notice. And now, with this vote, we've begun the process of considering rules that could help ensure that consumers can trust the information they use to buy goods and services, online and offline.

I want to thank BCP's Division of Advertising Practices and the Office of the General Counsel for their partnership and hard work in developing this ANPR. I look forward to hearing more from the public.

Dissenting Statement of Commissioner Christine S. Wilson

Today the Commission votes to issue an Advance Notice of Proposed Rulemaking (“ANPR”) seeking comment on a proposed rule addressing fake and deceptive reviews and endorsements. The FTC has challenged these practices, and platforms have sought to combat them, but deception continues to flourish. I agree that these practices are unlawful, and I have supported the FTC's enforcement and guidance in this area. Notably, the Commission recently authorized additional tools to address these issues—tools that we were chastised for not deploying sooner. Given recent deployment of those tools, as well as ongoing efforts to update our Endorsement Guides, I do not believe that initiating yet another Section 18 rulemaking is the best use of our scarce

³ See *id.*

⁴ Canvas8, “The Critical Role of Reviews in internet Trust,” 2020, Feb. 26, 2020, <https://business.trustpilot.com/guidesreports/build-trusted-brand/the-critical-role-of-reviews-in-internet-trust>.

resources, particularly given the nature of the harm at issue here. And the opportunity cost of launching yet another rulemaking is high, because the division overseeing this rule is also charged with enforcement in the opioids arena. For these reasons, I dissent.

I appreciate that our remedial authority is limited. The Commission cannot obtain civil penalties for first-time violations of Section 5 of the FTC Act, and the Supreme Court's decision in *AMG* ended the Commission's use of Section 13(b) to obtain equitable monetary relief.¹ But the harm that results from the deception at issue is speculative in nature. The ANPR acknowledges that redress in matters involving deceptive review practices can be difficult to calculate, and we know that many retailers and platforms have procedures in place to screen out and reject fake reviews. An endorsement or a review may sway a consumer to purchase a product or service, in part, and should be truthful. But, in cases involving deceptive endorsements or fake reviews, there often is no allegation that the product or service did not perform as represented. The endorsement or review in many cases is not the central claim.²

Moreover, the Commission already has a multi-pronged strategy in place to combat this issue. To educate businesses regarding their obligations, the Commission has published Guides Concerning the Use of Endorsements and Testimonials (“Endorsement Guides”) and a companion business guidance piece. Earlier this year, the Commission sought comment on potential updates and revisions to the Endorsement Guides.³ In October 2021, the Commission issued a Notice of Penalty Offenses which, as explained in the ANPR, may enable the Commission to obtain civil penalties from marketers that use fake or deceptive endorsements

¹ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

² Last year, the Commission issued a Notice of Penalty Offenses for earnings claims and later authorized an Advanced Notice of Proposed Rulemaking seeking comment on a proposed rule. I supported both of those recommendations. Earning claims relate to the core functionality and efficacy of the product or service being marketed. The claims addressed in the earnings claims Notice of Penalty Offenses and the ANPR are typically fraudulent and significant monetary harm often results from the deception. For that reason, I was comfortable seeking comment on that proposed rule.

³ FTC Press Release: FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews (May 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews>.

or reviews.⁴ Commissioner statements issued at that time lauded the resurrection of these types of Notices, describing them as unique tools that the Commission had allowed to languish and that would allow staff to pursue the full range of actions against bad actors.⁵ While the ANPR now downplays their likely impact, the agency invested non-trivial resources in drafting the Notice of Penalty Offenses, identifying potential recipients, and serving it on more than 700 entities.⁶ Rather than churning out another proposed rule, perhaps we should stay the course on these initiatives and devote the incremental resources to enforcement in other critical areas.

The opportunity cost of yet another rulemaking should not be understated. Importantly, as noted above, the division that has responsibility for endorsements also oversees enforcement of the Opioid Addiction Recovery Fraud Prevention Act. Last year, after an 18-month delay not caused by staff, the Commission announced its first case under this statute.⁷ For the second consecutive year, deaths from overdoses rose dramatically and now exceed the country's peak deaths from AIDS, car crashes, and guns.⁸ Our citizens who

⁴ See www.ftc.gov/enforcement/penalty-offenses/endorsements.

⁵ For example, Commissioner Chopra wrote that "this unique authority in consumer protection enforcement . . . that past Commissioners largely ignored, depriving our hardworking staff of the ability to pursue the full range of actions against bad actors . . . is particularly important given the Supreme Court's recent ruling in *AMG Capital Management*." Rohit Chopra, Prepared Remarks of Commissioner Rohit Chopra, *Regarding the Resurrection of the FTC's Penalty Offense Authority to Deter False Claims by For-Profit Colleges* (Oct. 6, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597178/prepared_remarks_of_commissioner_chopra_re_penalty_offense.pdf. He further observed that "[a]ctivating the FTC's Penalty Offense Authority is one of many examples where the agency needs to put its tools to use, rather than letting them languish." *Id.* Chair Khan agreed, tweeting that "@FTC is resurrecting its Penalty Offense Authority to put companies on notice that certain practices are unlawful and violators will be hit with significant financial penalties." Lina Khan, @linakhanFTC, <https://twitter.com/linakhanftc/status/1445816849430634496>. The Notice of Penalty Offenses for endorsements was issued on Oct. 13, 2021.

⁶ FTC Press Release, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and other Misleading Endorsements* (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements>.

⁷ Christine S. Wilson, Concurring Statement of Commissioner Christine S. Wilson, R360 LLC (May 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022-05-17-R360-Commissioner-Wilson-Statement-FINAL.pdf.

⁸ Noah Weiland and Margot Sanger-Katz, "Overdose Deaths Continue Rising, With Fentanyl and Meth Key Culprits, *NY Times* (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/politics/overdose-deaths-fentanyl-meth.html?action=click&>

suffer from opioid addiction are some of the most vulnerable people in this country; we could use our power and authority to great benefit by devoting more resources to this area.

Although I disagree with its issuance, it is worth noting that staff's approach to this ANPR is laudable. Rather than employing an "everything but the kitchen sink" approach, the ANPR is carefully tailored to focus on practices that are likely to be clear violations of Section 5. For the reasons described in this statement, I cannot support its issuance.

Accordingly, I dissent.

[FR Doc. 2022-24139 Filed 11-7-22; 8:45 am]

BILLING CODE 6750-01-P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 571

RIN 3141-AA68

Audit Standards

AGENCY: National Indian Gaming Commission.

ACTION: Proposed rule; correction.

SUMMARY: The National Indian Gaming Commission inadvertently referred to an incorrect RIN in a recent proposed rule published in the *Federal Register* concerning audit standards. This document corrects that error in the proposed rule.

DATES: This correction is effective November 8, 2022, and is applicable beginning October 21, 2022.

FOR FURTHER INFORMATION CONTACT: Michael Hoenig, 202-632-7003.

SUPPLEMENTARY INFORMATION: The proposed rule on audit standards used an incorrect RIN. The RIN used (RIN 3141-AA72) is assigned to Self Regulation of Class II Gaming Activities. The correct reference for the audit standards regulations is RIN 3141-AA68.

Correction

In proposed rule FR Doc. 2022-11482, beginning on page 33091 in the issue of June 1, 2022, make the following correction. On page 33091, correct the RIN in the document heading to read "RIN 3141-AA68".

pgtype=Article&state=default&module=styln-opioid&variant=show®ion=MAIN_CONTENT_1&block=storyline_levelup_swipe_recirc.

Dated: November 2, 2022.

Michael Hoenig,
General Counsel.

[FR Doc. 2022-24305 Filed 11-7-22; 8:45 am]

BILLING CODE 7565-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2022-0895]

RIN 1625-AA00

Safety Zone; Potomac River, Between Charles County, MD and King George County, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain waters of the Potomac River. This action is necessary to provide for the safety of life on these navigable waters at the old Governor Harry W. Nice/Senator Thomas "Mac" Middleton Memorial (US-301) Bridge during demolition operations from February 1, 2023 through February 14, 2023. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port, Maryland-National Capital Region or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before December 8, 2022.

ADDRESSES: You may submit comments identified by docket number USCG-2022-0895 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Mr. Ron Houck, Sector Maryland-NCR, Waterways Management Division, U.S. Coast Guard; telephone 410-576-2674, email D05-DG-SectorMD-NCR-Prevention-WWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security