

**FEDERAL TRADE COMMISSION****16 CFR Part 465**

RIN 3084-AB76

**Trade Regulation Rule on the Use of Consumer Reviews and Testimonials**

AGENCY: Federal Trade Commission.

ACTION: Final rule.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) is issuing this final rule and Statement of Basis and Purpose (“SBP”) relating to certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. This final rule, among other things, prohibits selling or purchasing fake consumer reviews or testimonials, buying positive or negative consumer reviews, certain insiders creating consumer reviews or testimonials without clearly disclosing their relationships, creating a company-controlled review website that falsely purports to provide independent reviews, certain review suppression practices, and selling or purchasing fake indicators of social media influence.

**DATES:** This rule is effective October 21, 2024.

**FOR FURTHER INFORMATION CONTACT:**

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**I. Background***A. Advance Notice of Proposed Rulemaking*

On November 8, 2022, the Federal Trade Commission (“Commission” or “FTC”) published an advance notice of proposed rulemaking (“ANPR”) to address certain deceptive or unfair acts or practices involving consumer reviews or testimonials.<sup>1</sup> Specifically, the ANPR discussed: (1) reviews or endorsements by people who do not exist, who did not actually use or test the product or service, or who were misrepresenting their experience with it; (2) review hijacking, where a seller steals or repurposes reviews of another product; (3) marketers offering compensation or other incentives in exchange for, or conditioned on, the writing of positive or negative consumer reviews; (4) owners, officers, or managers of a company (a) 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 (b) soliciting reviews from employees or relatives without instructing them to disclose their relationships; (5) the creation or 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; (6) 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; (7) the suppression of customer reviews by physical threat or unjustified legal threat; and (8) selling, distributing, or buying followers, subscribers, views, and other indicators of social media influence. As part of the ANPR, the Commission solicited public comment on, among other things, whether such practices are prevalent and, if so, whether and how to proceed with a notice of proposed rulemaking

<sup>1</sup> Fed. Trade Comm’n, Trade Regulation Rule on the Use of Reviews and Endorsements, 87 FR 67424 (Nov. 8, 2022) [hereinafter “ANPR”], <https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements>. The ANPR was entitled “Trade Regulation Rule Concerning Reviews and Endorsements.” In order to better reflect its content, the Commission subsequently decided to change the name of the proposed rule to “Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.”

(“NPRM”).<sup>2</sup> The ANPR provided for a 60-day comment period, and the Commission received 42 responsive comments<sup>3</sup> from review platforms and other businesses, trade associations, consumer advocacy organizations, entities dedicated to fighting fake reviews, a public interest research center, a think tank, academic researchers, and individual consumers.<sup>4</sup> Most commenters expressed support for the Commission proceeding with the rulemaking. Five comments expressed the view that a rulemaking was unnecessary, was premature, or should not apply to the commenter’s constituents, or expressed skepticism about the utility of a rulemaking.

### B. Notice of Proposed Rulemaking

Based on an extensive review of the comments received in response to the ANPR, the Commission’s own history of enforcement, and other sources of information, the Commission published the NPRM on July 31, 2023.<sup>5</sup> In the NPRM, the Commission stated that it has reason to believe that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent, including: (1) fake consumer reviews and testimonials, as well as reviews and testimonials that otherwise misrepresent the experiences of the reviewers and testimonialists; (2) the unfair or deceptive reuse or repurposing of consumer reviews; (3) the giving of incentives for reviews conditioned on the sentiment of the reviews; (4) the use of consumer reviews and testimonials written by company insiders without disclosure of their relationships to the company; (5) marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products; (6) seller websites representing that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity; (7) review suppression by unjustified legal threat or physical threat; and (8) the sale and misuse of fake indicators of social media influence for commercial purposes.<sup>6</sup> The Commission identified no disputed issues of material fact; explained its

considerations in developing the proposed rule; solicited additional public comment thereon, including specific questions designed to assist the public in submitting comments; and provided interested parties the opportunity to request to present their position orally at an informal hearing.<sup>7</sup> Finally, the NPRM set out the Commission’s proposed regulatory text.<sup>8</sup>

In response to the NPRM, the Commission received 100 responsive and non-duplicative comments<sup>9</sup> from entities and individuals interested in the proposed rule,<sup>10</sup> which are discussed in sections III and IV. Although some commenters raised concerns and recommended specific modifications or additions to the Commission’s proposal, the majority of commenters generally supported the Commission’s proposal. Three commenters submitted timely requests to make oral statements at an informal hearing (“the hearing requesters”).<sup>11</sup>

### C. Notice of Informal Public Hearing

On January 16, 2024, the Commission published an Initial Notice of Informal Hearing, which also served as the Final Notice of Informal Hearing.<sup>12</sup> The Notice designated the Honorable Carol Fox Foelak, an Administrative Law Judge for the Securities and Exchange Commission, to serve as the presiding officer for the informal hearing and stated that the hearing requesters could speak at the informal hearing, make documentary submissions to be placed on the public rulemaking record, or both. Written submissions were due on or before January 30, 2024. In response to the Notice of Informal Hearing, the Commission received seven comments.<sup>13</sup> The Notice also stated that

the Commission had decided not to proceed with proposed § 465.3,<sup>14</sup> which pertained to the unfair or deceptive reuse or repurposing of a consumer review written or created for one product so that it appears to have been written or created for a substantially different product.

As announced in the Notice of Informal Hearing, the informal hearing began as scheduled on February 13, 2024.<sup>15</sup> Because the Commission had not designated disputed issues of material fact, the February 13 hearing session included no cross-examination or rebuttal submissions but did include oral statements from the three hearing requesters.<sup>16</sup> One of the hearing requesters, the Interactive Advertising Bureau (“IAB”), a trade association, argued that there were two disputed issues of material fact.<sup>17</sup> The other two hearing requesters discussed their comments submitted pursuant to the NPRM. At the conclusion of this hearing session, the presiding officer issued an order inviting further submissions, including specific evidence, concerning whether there were disputed issues of material fact.<sup>18</sup> IAB submitted a letter that described the results from a survey directed to its members—to which eighteen unidentified members responded<sup>19</sup>—regarding the impact of the proposed rule, including their estimated compliance costs.<sup>20</sup>

On February 23, 2024, the presiding officer issued an order finding one disputed issue of material fact, namely, “[w]hether the compliance costs for businesses will be minimal.”<sup>21</sup> However, the February 23 order stated that “[i]t can be argued that . . . even

<sup>14</sup> Hearing Notice, 89 FR 2528.

<sup>15</sup> Members of the public were able to watch the informal hearing live on the Commission’s website, <https://www.ftc.gov>.

<sup>16</sup> A transcript of the February 13 hearing session is available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf) [hereinafter “February 13 Hearing Transcript”].

<sup>17</sup> IAB’s proposed disputed issues of material fact were “whether the compliance costs for businesses will be minimal, particularly if the ‘knew or should have known’ standard is finalized” and “whether the Commission finding that unattended consequences from the NPRM are unlikely is accurate.” February 13 Hearing Transcript at 9.

<sup>18</sup> Order by Presiding Officer Foelak at 2 (Feb. 13, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003aljorder20240213.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240213.pdf).

<sup>19</sup> IAB “represents over 700 leading media companies, brand marketers, agencies and technology companies.” February 13 Hearing Transcript at 6.

<sup>20</sup> Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 20, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabsubmission20240220.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmission20240220.pdf).

<sup>21</sup> Order by Presiding Officer Foelak (Feb. 23, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p311003aljorder20240226.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p311003aljorder20240226.pdf).

<sup>7</sup> *Id.* at 49377–81, 49389–90.

<sup>8</sup> *Id.* at 49390–92.

<sup>9</sup> The Commission also received sixteen comments that were non-responsive and two that were duplicates.

<sup>10</sup> The comments are publicly available on this rulemaking’s docket at <https://www.regulations.gov/document/FTC-2023-0047-0001/comment>.

<sup>11</sup> Fake Review Watch, Cmt. on NPRM at 4–5 (Aug. 8, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0015> (“Fake Review Watch Cmt.”); Interactive Advertising Bureau, Cmt. on NPRM at 14–15 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0101> (“IAB Cmt.”); Researchers at Brigham Young University, Pennsylvania State University, and Emory University, Cmt. on NPRM at 4 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0060> (“The Researcher Cmt.”).

<sup>12</sup> Fed. Trade Comm’n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 89 FR 2526 (Jan. 16, 2024) [hereinafter “Hearing Notice”], <https://www.federalregister.gov/documents/2024/01/16/2024-00678/rule-on-the-use-of-consumer-reviews-and-testimonials>.

<sup>13</sup> The comments are publicly available on this rulemaking’s docket at <https://www.regulations.gov/document/FTC-2024-0004/comments>.

<sup>2</sup> See ANPR, 87 FR 67427.

<sup>3</sup> The Commission also received six unresponsive comments.

<sup>4</sup> The comments are publicly available on this rulemaking’s docket at <https://www.regulations.gov/docket/FTC-2022-0070/comments>.

<sup>5</sup> See Fed. Trade Comm’n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) [hereinafter “NPRM”], <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials>.

<sup>6</sup> See *id.* at 49370–77.

if the actual costs are more than double what the FTC assumed, it would not change the outcome of the rule, and therefore, it is not a ‘disputed issue[ ] of material fact necessary to be resolved.’”<sup>22</sup> The order provided that the presiding officer was nevertheless scheduling an additional hearing session for March 5, 2024, because “an expert witness or proposed testimony from affected firms’ compliance officers or legal counsel” might “shed light on what would be involved with compliance review and implementation” and “could give the FTC a way of better quantifying cost.”<sup>23</sup> The March 5 hearing session was subsequently moved to March 6, 2024 at the trade association’s request.<sup>24</sup>

At the March 6 hearing session, the trade association put on one witness: its Executive Vice President for Public Policy, an attorney, who testified about the results of two limited surveys of its members.<sup>25</sup> FTC staff conducted cross examination. The attorney’s testimony about the surveys<sup>26</sup> did not call the Commission’s cost estimates into legitimate question. Only a small number of unidentified trade association members completed the surveys, and no evidence was submitted to indicate that they were representative of any group, much less all affected businesses.<sup>27</sup> Further, only a few of the survey respondents gave compliance cost estimates, none of which were accompanied by explanation or evidence of their factual bases, and all of which could have been influenced by the trade association’s misconceptions about the law and the proposed rule.<sup>28</sup>

The presiding officer issued a recommended decision on May 8, 2024,

stating that based on the evidence, “it cannot be found whether or not the proposed rule will have compliance costs that will be minimal.”<sup>29</sup> Later in the decision, the presiding officer explained that the evidence “falls short as the basis for a finding that compliance costs would not be minimal” because “a minute sample of businesses that would be affected by the proposed rule responded to the surveys, and there is insufficient information about the nature of those businesses, how they calculated potential compliance costs, and the methodology of the surveys.”<sup>30</sup>

In crafting the final rule, the Commission has carefully considered the comments received and the rulemaking record as a whole, which includes the oral statements made at and documents submitted for the informal hearing. As a result, the final rule contains some changes from the proposed rule. These modifications, mostly clarifications and limitations, discussed in detail in section IV of this document, are based upon input from commenters and careful consideration of relevant law. Section IV also discusses commenters’ recommendations that the Commission declined to adopt, along with the Commission’s reasons for rejecting them. Accordingly, the Commission adopts the proposed rule with limited modifications as discussed below. The rule will take effect October 21, 2024.

## II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 465 pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).<sup>31</sup>

Whenever the Commission promulgates a rule under section 18(a)(1)(B), the rule must also include a Statement of Basis and Purpose (“SBP”) that addresses: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the

acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small businesses and consumers.<sup>32</sup> In this section of the preamble, the Commission summarizes its findings regarding each of these requirements.

### A. Prevalence of Acts or Practices Addressed by the Rule

In its ANPR, the Commission described its enforcement record, demonstrating the pervasiveness of the deceptive or unfair commercial acts or practices involving reviews or other endorsements it was examining.<sup>33</sup> In the NPRM, the Commission cited additional enforcement evidence, including actions brought by State Attorneys General (“AGs”) and private lawsuits, as well as international evidence, and also took notice of additional indications of prevalence that came from commenters.<sup>34</sup>

In support of the finding that fake reviews are prevalent, the NPRM cited to (1) FTC, State, and private cases; (2) statistics from review platforms, a platform insider, academic and other researchers, consumer surveys, investigative journalists, and others about the incidence of fake reviews; (3) information about the pervasiveness of consumer review rings that facilitate the buying, selling, or exchange of fake reviews; (4) the experiences of regulators in other countries and of international bodies; and (5) reporting regarding the use of generative artificial intelligence (“AI”) tools that make it easier for bad actors to write fake reviews.<sup>35</sup> In support of the finding that fake testimonials are prevalent, the NPRM discussed relevant FTC cases, an in-depth Better Business Bureau investigative study that examined fake celebrity endorsements, a celebrity lawsuit involving the fraudulent use of the celebrities’ names, and an FTC consumer alert about fake Shark Tank celebrity testimonials.<sup>36</sup> In support of the finding that misrepresentations of endorsers’ experiences are prevalent, the NPRM cited to FTC cases and a

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Order by Presiding Officer Foelak (Feb. 28, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003\\_alj\\_order\\_3\\_2024.02.28.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003_alj_order_3_2024.02.28.pdf).

<sup>25</sup> A transcript of the March 6 hearing session is available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003informalhearing03062024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf). See also, Interactive Advertising Bureau’s Submission of Exhibits (Mar. 5, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabsubmissionexhibits20240305.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmissionexhibits20240305.pdf).

<sup>26</sup> The presiding officer stated that testimony by the trade association’s “attorney about survey responses is hearsay and will be weighed accordingly.” Order by Presiding Officer Foelak (Mar. 4, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003aljorder20240304-1.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240304-1.pdf).

<sup>27</sup> IAB received eighteen responses to the first survey and nineteen to the second. See Post-Hearing Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Mar. 13, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabposthearingbrief20240313.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabposthearingbrief20240313.pdf).

<sup>28</sup> See Transcript of Informal Hearing on Proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (Mar. 6, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003informalhearing03062024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf).

<sup>29</sup> Order by Presiding Officer Foelak at 5 (May 8, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003aljdecision20240508.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljdecision20240508.pdf). The presiding officer added that, “[u]nquestionably, there is insufficient evidence in the record to make a specific finding as to the size of the compliance costs associated with the proposed rule.” *Id.* at 5 n.9.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> See 15 U.S.C. 57a(a)(1)(B).

<sup>32</sup> 15 U.S.C. 57a(d)(1). In addition, section 22(b)(2) of the FTC Act requires the Commission to prepare a final regulatory analysis. 15 U.S.C. 57b–3(b)(2). The final regulatory analysis is in section VI of this document.

<sup>33</sup> ANPR, 87 FR 67425–26.

<sup>34</sup> NPRM, 88 FR 49370–77.

<sup>35</sup> *Id.* at 49370–72. AI tools make it easier for bad actors to pollute the review ecosystem by generating, quickly and cheaply, large numbers of realistic but fake reviews that can then be distributed widely across multiple platforms. AI-generated reviews are covered by the final rule, which the Commission hopes will deter the use of AI for that illicit purpose.

<sup>36</sup> NPRM, 88 FR 493720–73.

comment by the North American Insulation Manufacturers Association (“NAIMA”) asserting that testimonials by those misrepresenting their experiences with insulation products are plentiful.<sup>37</sup> The Commission concluded that the unfair or deceptive reuse or repurposing of consumer reviews is prevalent, relying upon a prior Commission case and numerous news articles.<sup>38</sup> To show how commonly incentives are given in exchange for reviews with the incentives conditioned on the sentiment of the reviews, the NPRM pointed to FTC and private cases, analyses by researchers of markets for procuring reviews, and the experience of a small business employee commenter who said a competitor was providing incentives for 5-star reviews.<sup>39</sup> The Commission found prevalence of unfair or deceptive insider reviews and testimonials based on its prior cases; a State AG action; statistics from a review platform commenter about how many reviews of businesses were written by their owners, officers, or employees, or their family members; and an individual commenter who relied upon insider reviews in selecting an auto repair shop.<sup>40</sup> The NPRM cited prior cases regarding the prevalent practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products.<sup>41</sup> The Commission found prevalence of suppression of negative reviews on retailer or business websites based on a platform’s comment, a recent FTC case, and what it learned in another investigation about more than 4,500 merchants that were automatically publishing only 4- or 5-star consumer reviews.<sup>42</sup> The NPRM relied upon reports by platform and other commenters, as well as FTC and State AG cases, regarding review suppression by unjustified legal threat or physical threat.<sup>43</sup> Finally, with respect to the prevalence of sales and misuse of fake indicators of social media influence for commercial purposes, the NPRM discussed cases brought by the FTC, a State AG, and private parties, and published reports on social media bots and fake social media accounts.<sup>44</sup>

### *B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair*

The rule is intended to curb certain unfair or deceptive uses of consumer reviews and testimonials. It contains several provisions to promote accuracy and truthfulness in reviews and testimonials and, thus, will allow American consumers to make better-informed purchase decisions. The key provisions of the rule prohibit conduct that is inherently deceptive or unfair, including creating, selling, and buying fake or false reviews or testimonials; buying reviews in exchange for, or conditioned on, their sentiment; and using reviews and testimonials from company insiders that hide their relationships to the company. The rule also includes prohibitions against misleading, company-controlled review websites or entities; unfair or deceptive review suppression practices; and the misuse of fake indicators of social media influence.

### *C. The Economic Effect of the Rule*

As part of the rulemaking proceeding, the Commission solicited public comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits.<sup>45</sup> In issuing the final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, taking into account the effect on small businesses and consumers, as discussed in more detail in sections VI and VIII of this document. The record demonstrates that the most significant anticipated benefit of the final rule is increased deterrence of clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Another significant benefit is the expansion of the remedies available to the Commission, including the ability to more effectively obtain monetary relief. This is particularly critical given the U.S. Supreme Court’s decision in *AMG Capital Management, LLC v. FTC*, which held that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.<sup>46</sup> Post-*AMG*, the Commission’s primary means for obtaining redress is section 19 of the FTC Act. By issuing the final rule, the Commission can obtain such redress based on violations of the rule in one proceeding under section 19(a)(1), which will be significantly faster than the two-step

process for obtaining redress under section 19(a)(2).<sup>47</sup> By allowing the Commission to secure redress more quickly and efficiently, this rule will also allow the Commission to preserve enforcement resources for other mission priorities.<sup>48</sup> As an additional benefit, the rule will enable the Commission to seek civil penalties against violators.<sup>49</sup> Without an efficient way to seek civil penalties, bad actors have little fear of being penalized for using fraud and deception in connection with reviews and endorsements. Increased deterrence will have consumer welfare benefits and will benefit honest competition.<sup>50</sup> Moreover, the final rule is likely to impose relatively small compliance costs on honest businesses.<sup>51</sup>

### **III. Overview of the Comments**<sup>52</sup>

The Commission received 100 responsive and non-duplicative comments in response to the NPRM from a diverse group of individuals (including consumers and law students), industry groups and trade associations, review platforms, retailers, and other businesses, consumer advocacy organizations, and government entities.

In the NPRM, the Commission invited the public to comment on any issues or concerns the public believed were relevant or appropriate to the Commission’s consideration of the

<sup>47</sup> See 15 U.S.C. 57b(a)(1), (2); see also NPRM, 88 FR 49377–78 (discussing impact of *AMG Cap. Mgmt.*).

<sup>48</sup> When the rule has been violated, the Commission can commence a Federal court action and seek to recover money for consumers or obtain an order imposing civil penalties. See 15 U.S.C. 57b(a)(1), 15 U.S.C. 45(m)(1)(A). Without the rule, the path to monetary relief is longer and requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal. Then, to recover money for consumers, the Commission must prove in a separate Federal court action that the violator engaged in fraudulent or dishonest conduct. See 15 U.S.C. 57b(a)(2).

<sup>49</sup> See section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that violators of a trade regulation rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for any injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1).

<sup>50</sup> NPRM, 88 FR 49382–85.

<sup>51</sup> *Id.* at 49385–87; see *infra* sections VI and VIII of this document.

<sup>52</sup> Minor changes to formatting, grammar, and punctuation have been made to some of the comments quoted in this document. These changes do not entail any substantive changes.

<sup>37</sup> *Id.* at 49373.

<sup>38</sup> *Id.* at 49373–74.

<sup>39</sup> *Id.* at 49374.

<sup>40</sup> *Id.* at 49374–75.

<sup>41</sup> *Id.* at 49375.

<sup>42</sup> *Id.* at 49376.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 49376–77.

<sup>45</sup> ANPR, 87 FR 67426–27; NPRM, 88 FR 49387–88.

<sup>46</sup> See *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 82 (2021).

proposed rule.<sup>53</sup> The NPRM also posed twenty-three specific questions for the public.<sup>54</sup> The first two are broad questions addressed in this section III, which also discusses several issues or concerns that commenters raised generally without reference to particular sections of the rule. Responses to the more specific questions in the NPRM are discussed in section IV of this document, a section-by-section analysis of the final rule. Questions relating to the Paperwork Reduction Act (“PRA”) and Regulatory Flexibility Act (“RFA”) and are addressed in sections VII and VIII of this document, respectively.<sup>55</sup>

#### A. Furthering the Commission’s Goal

In Question 1 of the NPRM, the Commission asked whether its proposal would further the Commission’s goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews and testimonials.<sup>56</sup>

Several commenters expressly addressed this question. A review platform and a business that specializes in identifying fake online reviews submitted comments stating that the proposed rule would further the Commission’s goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews.<sup>57</sup> Another review platform commenter answered that there are “numerous advantages of the FTC’s proposed new Rule,” that it is “generally supportive of this intervention overall,” and that the proposed rule “will be helpful to set out clear rules that expressly prohibit practices like writing or purchasing fake reviews, providing compensation or incentives in exchange for reviews, and certain acts of unfair review suppression.”<sup>58</sup> A business commenter similarly answered that the “Proposed

Rule addresses many concerns about unfair or deceptive acts or practices involving consumer reviews and testimonials, such as false and biased reviews.”<sup>59</sup> Both of these commenters also noted areas in which they thought certain provisions of the proposed rule should be adjusted or clarified; those issues are addressed below.<sup>60</sup> A consumer organization said that “[i]n general, . . . the proposed Rule will reduce the incentives for businesses to purchase, disseminate, or sell fake consumer reviews or testimonials,” but thought that the proposed rule should have placed explicit restrictions on third-party review platforms.<sup>61</sup> The Commission notes that this topic is beyond the scope of the rulemaking, which focuses instead on those responsible for inarguably unfair or deceptive acts or practices regarding reviews and testimonials.

#### B. Adoption of the Proposed Rule as a Final Rule

In Question 2 of the NPRM, the Commission inquired whether it should finalize the proposed rule, the reasons for why commenters were in favor of or against the finalization of the proposed rule, and whether the Commission should make any changes to its original proposal.<sup>62</sup>

Only two commenters directly addressed this question. A business commenter agreed that the Commission should finalize the proposed rule.<sup>63</sup> A review platform commenter said it “supports this Rule and would support the Commission finalizing the Rule.”<sup>64</sup> It also suggested adjustments to the Commission’s proposal, which are addressed below in this document.

Numerous individual commenters,<sup>65</sup> trade associations,<sup>66</sup> and consumer organizations<sup>67</sup> expressed general support for the proposed rule. For example, an individual commenter wrote, “I completely agree with the proposal. . . . Because review sections have become so untrustworthy (being impossible to tell whether a company has paid for positive reviews of its own product, or for negative reviews on a rival’s product), review sections have become functionally useless for me. This makes it difficult to purchase any products online, since real consumer feedback is one of the few ways to determine whether I should buy the product or service without first examining it in person.”<sup>68</sup> Another individual stated, “I support the rules as specified, and applaud the FTC’s action in this regard. It is extremely difficult for the consumer to determine the validity of online reviews—even within specific retailers such as amazon. There is little benefit for large online retailers to ensure that reviews are accurate, and this fact is evident in the large number of bogus reviews found on amazon, newegg, youtube and other sites.”<sup>69</sup> A third individual wrote, “I strongly support the rules against fake review

<sup>53</sup> NPRM, 88 FR 49388.  
<sup>54</sup> *Id.* at 49388–89.  
<sup>55</sup> *Id.* at 49388. In addition to soliciting public comment on the NPRM’s PRA and RFA analyses in the PRA and RFA sections, the NPRM also posed two specific questions related to the PRA and RFA analyses. Question 4 inquired whether “the proposed rule contains a collection of information,” and Question 5 asked, “Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?” *Id.* at 49381–86, 49388.  
<sup>56</sup> NPRM, 88 FR 49388.  
<sup>57</sup> Yelp Inc., Cmt. on NPRM at 3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0088> (“Yelp Cmt.”); The Transparency Company, Cmt. on NPRM at 1, 5 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0107> (“Transparency Company Cmt.”).  
<sup>58</sup> Trustpilot, Cmt. on NPRM at 2 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0084> (“Trustpilot Cmt.”).

<sup>59</sup> Family First Life, LLC, Cmt. on NPRM at 2 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0104> (“Family First Life Cmt.”).  
<sup>60</sup> Trustpilot Cmt. at 2–3; Family First Life Cmt. at 2–3.  
<sup>61</sup> Consumer Reports, Cmt. on NPRM at 2–3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0099> (“Consumer Reports Cmt.”).  
<sup>62</sup> NPRM, 88 FR 49388.  
<sup>63</sup> Transparency Company Cmt. at 6.  
<sup>64</sup> Trustpilot Cmt. at 3.

<sup>65</sup> American Dental Association, Cmt. on NPRM at 1 (Sept. 28, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0078> (“ADA Cmt.”); Travel Technology Association, Cmt. on NPRM at 1, 4–5 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0097> (“Travel Tech. Cmt.”).  
<sup>66</sup> Coalition of Civil Society Organizations, Cmt. on NPRM at 1–3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0108>; U.S. Public Interest Research Group Education Fund, Cmt. on NPRM at 2 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0109> (“US PIRG Cmt.”).  
<sup>68</sup> Markey Cmt.  
<sup>69</sup> Anderson Cmt.

and testimonials and fines for businesses and people who write them. As a consumer, I often use reviews to help determine whether a product or service is reliable; the prevalence of fake reviews makes this impossible.”<sup>70</sup> A trade association commented, “The NPRM proposes rules that are appropriately scoped to target the bad actors [who are] intent on committing fraud through fake or deceptive reviews. . . . The NPRM strikes the appropriate balance between enhancing the Commission’s tools to target bad actors and preserving industry flexibility to develop innovative and effective solutions to maintain consumer confidence in reviews.”<sup>71</sup> A consumer organization stated, “The Commission absolutely should finalize the proposed rule to better protect shoppers and hold businesses accountable.”<sup>72</sup>

A number of individual consumers,<sup>73</sup> a review platform,<sup>74</sup> other industry members,<sup>75</sup> and consumer organizations<sup>76</sup> supported the Commission’s proposal, but urged the Commission to go further and impose additional requirements, such as by adding provisions that would apply to third-party review platforms. As noted above, such provisions would be beyond the scope of the rulemaking. Similarly beyond the scope of the rulemaking is an individual’s suggestion that the Commission should restrict the highlighting of testimonials on websites

and prohibit payments for reviews.”<sup>77</sup> A review platform’s comment “applaud[ed] . . . the Commission . . . for its extensive efforts to address the problem of deceptive review practices, as reflected in the Commission’s notice of proposed rulemaking, and . . . fully support[ed] and endorse[d] the Commission’s proposed Rule.”<sup>78</sup> Its suggestions for several provisions are discussed below. A consumer group stated that the proposed rule “is needed” and “addresses an urgent problem: fabricated and otherwise deceptive reviews and ratings of products and services,” but asked for numerous modifications to strengthen it.<sup>79</sup> These proposals are discussed below.

A few individual commenters<sup>80</sup> and industry commenters<sup>81</sup> were supportive of a rule but expressed the need for clarifications or modifications. An individual commenter wrote that “[a]ll of the rules proposed . . . make (common) sense” but identified “a few scenarios that highlight that the language in the proposed rules is a bit ambiguous” and that with “steep penalties like this, guidelines need to be clear, concrete, AND simple so businesses can understand.”<sup>82</sup> Another individual commenter said that the proposed rule “takes great strides,” but that two proposed sections, 465.4 and 465.6, are too restrictive.<sup>83</sup> A retailer wrote, “On the whole, . . . the Proposed Rule contains provisions that are reasonable and would provide additional protection to consumers” but “there are a few provisions . . . that are not well drafted or that need additional language.”<sup>84</sup> Another retailer said that it “supports a tailored rule that focuses on the bad actors that harm consumers,” but that the proposed rule “sweeps

more broadly, extending to the activities of legitimate businesses that do not uncover abuses that they ‘should have’ identified, regardless of their good faith efforts” and that “[s]uch an overbroad rule would have significant unintended negative consequences on legitimate conduct.”<sup>85</sup> An industry organization commented that the proposed rule “is an important step, and we share the Commission’s goal of improving consumer confidence in reviews and testimonials” but “strongly urge[d] the Commission to reexamine . . . [four] provisions” to address what it viewed as First Amendment concerns and for other reasons.<sup>86</sup> The specific suggestions or concerns raised by these and other commenters are addressed below. In particular, whether in the text of the final rule or in the discussion below, the Commission is clarifying the scope or meaning of various rule provisions to cover the specific activities or conduct that harm consumers and avoid ambiguity or overbreadth.

Only four commenters, two individual commenters<sup>87</sup> and two trade associations,<sup>88</sup> said that the proposed rule was unnecessary or unwarranted. One of the individuals, wrote that “the rule seems to be unnecessary as it is unlikely to actually provide the benefit to consumers of removing falsified reviews” because it is difficult to identify and trace fake reviews and “punish[] an offender” and that the proposed rule “also has potential to penalize non-offenders” when competitors purchase “review bombs.”<sup>89</sup> The commenter asserted that the FTC’s estimated benefits are based on faulty assumptions such as that “the entirety of the loss” from false reviews “would be eliminated simply because the rule is enacted.”<sup>90</sup> The commenter said that the FTC should either maintain the status quo or require websites with consumer reviews to include a disclosure that “some reviews may have not been made by genuine customers, may potentially have been paid

<sup>70</sup> Anonymous 1 Cmt.

<sup>71</sup> Travel Tech. Cmt. at 1, 4.

<sup>72</sup> US PIRG Cmt. at 2.

<sup>73</sup> Michael Ravnitzky, Cmt. on NPRM at 1–2 (Aug. 6, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0013> (“Ravnitzky Cmt.”); Adam Foster, Cmt. on NPRM at 1–2 (Sept. 21, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0052> (“Foster Cmt.”); Anonymous 2, Cmt. on NPRM at 1, 4 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0065> (“Anonymous 2 Cmt.”); Anonymous 3, Cmt. on NPRM (Sept. 27, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0069> (“Anonymous 3 Cmt.”).

<sup>74</sup> Yelp Cmt. at 1, 5–8.

<sup>75</sup> Strategic Marketing, Cmt. on NPRM (Aug. 7, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0014>; PerfectRec Inc., Cmt. on NPRM at 1–3 (Aug. 23, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0035>; Mozilla, Cmt. on NPRM at 5–7 (Sept. 28, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0076> (“Mozilla Cmt.”); The Responsible Online Commerce Coalition, Cmt. on NPRM at 2, 4–6 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0086>.

<sup>76</sup> Fake Review Watch Cmt. at 1–4; Truth in Advertising, Inc., Cmt. on NPRM at 2, 4–11 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0083> (“TINA Cmt.”); National Consumers League, Cmt. on NPRM at 2–9 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0096> (“NCL Cmt.”); Consumer Reports Cmt. at 2–11.

<sup>77</sup> Anonymous 3 Cmt.

<sup>78</sup> Yelp Cmt. at 1, 4–8.

<sup>79</sup> TINA Cmt. at 4, 6.

<sup>80</sup> Anonymous 4, Cmt. on NPRM (Sept. 1, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0040> (“Anonymous 4 Cmt.”); Riley Albert, Cmt. on NPRM at 3 (Sept. 21, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0053> (“Albert Cmt.”); Alyssa Frieling, Cmt. on NPRM at 1–4 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0059> (“Frieling Cmt.”).

<sup>81</sup> Hammacher, Schlemmer and Co., Inc., Cmt. on NPRM at 1–7 (Aug. 21, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0032> (“Hammacher Schlemmer Cmt.”); Amazon.com, Inc., Cmt. on NPRM at 5–13 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0085> (“Amazon Cmt.”); TechNet Cmt. on NPRM at 2–4 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0089> (TechNet Cmt.”); Family First Life Cmt. at 2–16.

<sup>82</sup> Anonymous 4 Cmt.

<sup>83</sup> Frieling Cmt. at 1–4.

<sup>84</sup> Hammacher Schlemmer Cmt. at 1.

<sup>85</sup> Amazon Cmt. at 5.

<sup>86</sup> TechNet Cmt. at 2–4.

<sup>87</sup> Marc Slezak, Cmt. on NPRM at 1–5 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0054> (“Slezak Cmt.”); Sumner Camp-Martin, Cmt. on NPRM at 1–5 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0056> (“Camp-Martin Cmt.”).

<sup>88</sup> National Automobile Dealers Association, Cmt. on NPRM at 1–2 (Sept. 28, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0077> (NADA Cmt.”); Association of National Advertisers, Cmt. on NPRM at 3–7 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0105> (“ANA Cmt.”).

<sup>89</sup> Slezak Cmt. at 1–4.

<sup>90</sup> *Id.* 3.

testimonials, etc.”<sup>91</sup> The other individual commenter said that the “proposed rule is unnecessary because all of the practices considered by the rule ‘are already unlawful under Section 5 of the FTC Act,’ it has potentially massive compliance costs for American businesses” (citing the FTC’s estimated cost), “and the better salutation [sic] is to work with States and review platforms to resolve the issue.”<sup>92</sup> One of the trade associations stated that the “Proposed Rule is [u]nnecessary,” that “current FTC enforcement authority has been effective in addressing such clearly deceptive practices, and there is no indication how or why a trade regulation rule is needed, or how such a rule would more effectively address concerns about such deceptive practices,” and that “a need to alleviate the ‘difficulty’ of obtaining monetary relief under the FTC Act where such authority has never existed, does not provide an adequate basis for the issuance of a Magnuson-Moss rulemaking.”<sup>93</sup> The other trade association asserted that (1) it “does not believe that rulemaking is warranted, wise, or a balanced approach, in part because it raises serious First Amendment concerns;” (2) “a well-designed rule would focus on a defined trade” but the “record to date does not establish that customer reviews, the use of those reviews, or the dissemination of those reviews by commercial platforms is itself a defined trade;” (3) the “FTC should not promulgate a rule solely because the augmented penalties attendant to a rule violation could ostensibly advance a Commission goal generally;” and (4) “the FTC fail[ed] to show how enforcement actions, many of which were settled by consent order, translate into ‘prevalence.’”<sup>94</sup>

The Commission disagrees with the four commenters who said that the proposed rule was unnecessary or unwarranted. The Commission believes that the status quo is inadequate to address consumer harm and that the rule will add deterrence and aid enforcement even though the practices covered by the rule are already unlawful under section 5 of the FTC Act. Greater deterrence and more effective enforcement are legitimate reasons to engage in a rulemaking, whereas difficulties in enforcing a rule against some violators are no reason to eschew

it.<sup>95</sup> Further, the compliance costs estimated by the Commission are greatly outweighed by the estimated benefits to consumers and honest competition. The Commission notes that the harm caused by the acts and practices addressed cut across multiple trades. The Commission addresses potential First Amendment concerns and arguments regarding prevalence below.

#### IV. Section-by-Section Analysis

The following discussion provides a section-by-section analysis of the provisions proposed in the NPRM, and discusses the comments received, the Commission’s responses to the comments, and the provisions adopted in the final rule.<sup>96</sup>

##### A. § 465.1—Definitions

###### 1. Overview

The proposed rule included definitions for the following terms: “business;” “celebrity testimonial;” “clear and conspicuous;” “consumer review;” “consumer testimonial;” “indicators of social media influence;” “officers;” “purchase a consumer review;” “reviewer;” “substantially different product;” “testimonialist;” and “unjustified legal threat.” In Question 6 of the NPRM, the Commission asked whether the proposed definitions are clear and what changes should be made to any definitions. In Questions 11 and 21 of the NPRM, the Commission asked specifically about the definitions of “substantially different product” and “unjustified legal threat,” respectively. In the following definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, relevant comments not otherwise addressed in the discussion of the corresponding substantive provisions of the final rule, and the definitions that the Commission is finalizing.<sup>97</sup>

<sup>95</sup> The Commission is aware that a business could attempt to damage a competitor’s reputation by purchasing fake positive reviews for that competitor and then reporting those reviews to the platform on which they appear. In investigating a fake review matter, FTC staff would take such a possibility into account.

<sup>96</sup> The Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the final rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

<sup>97</sup> Because the Commission is adding additional definitions and not including one proposed definition, the definitions are renumbered in the final rule.

## 2. Definition-by-Definition Analysis

### a. Business

The proposed rule defined “business” as “an individual, partnership, corporation, or any other commercial entity that sells products or services.” This term appeared in the proposed definitions of “celebrity testimonial,” “consumer review,” “consumer testimonial,” and “officers,” and in every substantive section of the proposed rule. For the following reasons, the Commission adopts the definition of “business” largely as proposed, with a minor, non-substantive clarification as described below.

A trade association commenter noted correctly that the Commission’s rulemaking authority is limited to acts or practices “in or affecting commerce.”<sup>98</sup> It recommended that the Commission insert “in or affecting commerce as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44)” in the definition of a “business.”<sup>99</sup> The Commission declines to make this modification. An entity that is selling products or services is engaging in commerce and, even without the commenter’s proposed addition, the acts and practices covered by the final rule are limited to commercial practices.

A consumer advocacy organization commenter argued that the definition of a business potentially liable under the proposed rule was unduly narrow and should be expanded to include “advertisers,” “endorsers,” and “[a]dvertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries.”<sup>100</sup> However, advertisers, advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries all sell products or services and are covered by the Commission’s definition of “business.” To the extent that an endorser is in the business of selling reviews or testimonials, the endorser is covered by the definition. The Commission is therefore not making the proposed change.

A review platform commenter suggested that, to avoid ambiguity, the Commission clarify that “sells products or services” in the definition of “business” applies to each of the types of entities listed in the definition, not just to “any other commercial

<sup>98</sup> National Federation of Independent Businesses, Cmt. on NPRM at 2 (Sept. 12, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0047> (“NFIB Cmt.”).

<sup>99</sup> *Id.*

<sup>100</sup> TINA Cmt. at 6–7.

<sup>91</sup> *Id.* 4.

<sup>92</sup> Camp-Martin Cmt. at 1–2. The commenter said, “In the alternative to the complete abandonment of the proposed rule, Section 465.4 should be amended” and broadened. *Id.* at 1.

<sup>93</sup> NADA Cmt. at 1–2.

<sup>94</sup> ANA Cmt. at 3–7.

entity.”<sup>101</sup> The Commission is adopting this recommendation to clarify the intended scope of the definition.

For the reasons explained in this section, the Commission is finalizing the definition of “business” to mean an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

#### b. Celebrity Testimonial

The proposed rule defined “celebrity testimonial” as “an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known person who purchased, used, or otherwise had experience with a product, service, or business.” The Commission is finalizing the definition of this term—which is used in § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials—with one modification.

A trade association commenter said that the definition of a celebrity endorsement should be clarified to exclude “a situation where a celebrity or celebrity likeness appears or is used by a business as a promotion, without any specific advertising or opinions presented.”<sup>102</sup> The commenter gave the example of an athlete who appears at a business to sign autographs or simply appears, without making any statements or representations about the business.<sup>103</sup> Such situations should not be excluded from the scope of the definition because a business’s use in advertising or promotion of a celebrity or a celebrity’s image can, even without any additional statements, imply that the celebrity has a positive opinion of the business or its products or services and therefore constitute a celebrity testimonial. However, if consumers would not interpret the celebrity’s appearance to reflect the celebrity’s opinions of, beliefs about, or experiences with, a business or its products or services, then the appearance is not a testimonial. That issue is thus highly dependent on specific facts. Further, to take the commenter’s example, it is highly unlikely that a celebrity who does nothing more than sign autographs or appear at a business could violate § 465.2, because such signings or

appearances alone would likely not communicate anything to consumers about the celebrity’s use or experience with a product, service, or business.

A second trade association asserted that the definition of a “celebrity testimonial” does not give advertisers adequate notice as to when a testimonial is a “celebrity” testimonial or a “consumer” testimonial.<sup>104</sup> The commenter requested that the Commission provide further guidance on what constitutes a “well-known” individual.<sup>105</sup> Based upon common usage, well-known individuals include those famous in the areas of entertainment, such as film, music, writing, or sport, and those known to the public for their positions or successes in business, government, politics, or religion. Individuals who earn money through their work as “influencers” are also well known, as are those who have been featured in the news or media. More important, whether someone is well known does not matter for purposes of rule interpretation and enforcement because any provisions that apply to celebrity testimonials also apply to consumer testimonials.

A business commenter suggested replacing “a well-known person” in the definition with a “widely known all-purpose public figure” or “widely known public figure” for the purpose of “clarity.”<sup>106</sup> It said that Black’s Law Dictionary defines the term “all-purpose public figure” to mean “[s]omeone who achieves such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts.”<sup>107</sup> To be “well known,” one need not have such pervasive fame as to be a public figure for all purposes and in all contexts. For example, an influencer may be well known to a subset of individuals interested in a particular subject. The commenter gave no justification for narrowing the definition of a “celebrity testimonial,” and the Commission declines to do so.

A public interest research center commenter said that the definitions of “celebrity testimonials” and “consumer testimonials” should “be broadened to explicitly include non-natural persons, such as businesses and public sector entities.”<sup>108</sup> Although endorsements by such organizations are addressed in the

Commission’s Endorsement Guides,<sup>109</sup> the Commission did not intend for any provision using the term “testimonials” to apply to endorsements by entities. To clarify that the Commission does not intend for any provision using the term “testimonials” to apply to endorsements by entities, the Commission is substituting the word “individual” for the word “person” wherever the word appeared in the Commission’s original proposal.<sup>110</sup> The only section of the rule that applies to endorsements by entities or purported entities is § 465.6, which addresses company-controlled review websites or entities. However, § 465.6 does not apply to consumer or celebrity testimonials.

#### c. Clear and Conspicuous

The proposed rule defined “clear and conspicuous” to mean “that a required disclosure is easily noticeable (*i.e.*, difficult to miss) and easily understandable,” including in eight enumerated ways, listing proposed requirements for “any communication that is solely visual or solely audible,” “[a] visual disclosure,” “[a]n audible disclosure,” and “any communication using an interactive electronic medium,” and providing, *inter alia*, that such disclosures “must use diction and syntax understandable to ordinary consumers,” “must appear in each language in which the representation that requires the disclosure appears,” and “must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.” Based on the following, the Commission is finalizing the definition of this term—which is used in § 465.5, Insider Consumer Reviews and Consumer Testimonials—with one modification.

A trade association commenter suggested not using the terms “diction” and “syntax” in the definition because many of those subject to the rule “may not know the meaning of th[os]e words.”<sup>111</sup> The commenter suggested replacing them with “words” and

<sup>109</sup> See Fed. Trade Comm’n, Guides Concerning Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”), 16 CFR 255.4.

<sup>110</sup> The Commission is using the term “individual” in the context of this rule to mean a single human being. See *Individual* (def. 1), *Dictionary.com*, LLC, <https://www.dictionary.com/browse/individual> (last visited July 5, 2024) (defining “individual” as “a single human being, as distinguished from a group”). The Commission notes that, in the context of a different rulemaking, it has proposed defining “individual” to mean “a person, entity, or party, whether real or fictitious, other than those that constitute a business or government” under 16 CFR 461. See Fed. Trade Comm’n, Trade Regulation Rule on Impersonation of Government and Businesses, 89 FR 15072, 15083 (Mar. 1, 2024).

<sup>111</sup> NFIB Cmt. at 2.

<sup>104</sup> IAB Cmt. at 14.

<sup>105</sup> *Id.*

<sup>106</sup> Family First Life Cmt. at 4–5.

<sup>107</sup> *Id.* at 5. See Black’s Law Dictionary (11th ed. 2019).

<sup>108</sup> Electronic Privacy Information Center, Cmt. on NPRM at 3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0111> (“EPIC Cmt.”).

<sup>101</sup> Yelp Cmt. at 3.

<sup>102</sup> NADA Cmt. at 5.

<sup>103</sup> *Id.*

“grammar.”<sup>112</sup> “Diction” means the choice and use of words.<sup>113</sup> “Syntax” involves the arrangement of words and phrases and is a subset of grammar.<sup>114</sup> The Commission believes that the meaning of “diction” and “syntax” are sufficiently clear.

One trade association commenter asserted that it is unnecessary to have a definition of “clear and conspicuous” because the “phrase . . . has a meaning under FTC jurisprudence.”<sup>115</sup> The definition is based on that jurisprudence and decades of Commission experience policing deceptive and unfair conduct. The Commission believes it is both helpful and necessary that the rule provides more explicit guidance on what does and does not constitute a clear and conspicuous disclosure.

Several commenters asserted that the proposed definition was overly prescriptive and not sufficiently flexible.<sup>116</sup> The Commission disagrees and reiterates that the definition contains basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures at a volume they can hear. The definition merely provides a baseline and provides a great deal of flexibility in what a disclosure should say and how it appears. The basic, enumerated requirements are necessary for a disclosure to be effective.

Two commenters objected to the requirement that internet disclosures be “unavoidable,” an objective standard that depends on whether consumers could have avoided the disclosure, which, per the definition is the case when “a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see” the disclosure.<sup>117</sup> The commenters do not believe that a disclosure has to be unavoidable for it to be effective; they

noted that a staff business guidance document, issued in 2000 and updated in 2013, allowed for the possibility that avoidable disclosures, e.g., those available through a hyperlink, could be clear and conspicuous.<sup>118</sup> The Commission believes that a disclosure is not effective when it is not seen or heard, including when the reason for it not being seen or heard is its avoidability. The staff guidance said that “[d]isclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink,” and the purported independence and objectivity of a reviewer or testimonialist is often integral.<sup>119</sup> Further, some readers misunderstood the staff guidance about the necessity of properly labeling hyperlinks to convey the “importance, nature, and relevance of the information” to which the hyperlinks lead. The staff guidance said that, to be effective, the label of the hyperlink might need to give the essence of the disclosure, with the hyperlink leading to the details.<sup>120</sup> Even had these qualifications been absent, the Commission is not bound by the 2013 staff business guidance, which is currently under review in light of an evolution of views over time regarding online disclosures and avoidability.<sup>121</sup>

One commenter asked whether a disclosure in the first line of a product review would be considered unavoidable.<sup>122</sup> For the purposes of this rule, the Commission would consider such a disclosure to be unavoidable. A different commenter expressed concern that the requirement that a disclosure “stand out” would require new formatting techniques for companies hosting reviews and preclude a disclosure from being in the review itself.<sup>123</sup> For the purposes of this rule,

<sup>112</sup> *Id.*

<sup>113</sup> See *Diction* (def. 2), Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/diction> (last visited July 5, 2024) (defining “diction” as the “choice of words especially with regard to correctness, clearness, or effectiveness”).

<sup>114</sup> See *Syntax* (defs. 1a, 1b), Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/syntax> (last visited July 5, 2024) (defining “syntax” as the “the way in which linguistic elements (such as words) are put together to form constituents (such as phrases or clauses)” and as “the part of grammar dealing with this”).

<sup>115</sup> ANA Cmt. at 11.

<sup>116</sup> IAB Cmt. at 14; U.S. Chamber of Commerce, Cmt. on NPRM at 7–8 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0087> (“Chamber of Commerce Cmt.”); National Retail Federation, Cmt. on NPRM at 10 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0090> (“NRF Cmt.”).

<sup>117</sup> IAB Cmt. at 14; Chamber of Commerce Cmt. at 8.

<sup>118</sup> Fed. Trade Comm’n, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* at 10 (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

<sup>120</sup> *Id.* at 11. (“Although the label itself does not need to contain the complete disclosure, it may be necessary to incorporate part of the disclosure to indicate the type and importance of the information to which the link leads.”)

<sup>121</sup> See Press Release, Fed. Trade Comm’n, *FTC Looks to Modernize Its Guidance on Preventing Digital Deception* (June 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-looks-modernize-its-guidance-preventing-digital-deception>.

<sup>122</sup> Trustpilot Cmt. at 14. The same commenter also raised concerns about the applicability of the definition to ratings and aggregate ratings. *Id.* That is issue is discussed below in the discussion of the corresponding substantive rule provision. See *infra* section IV.E.6 of this document.

<sup>123</sup> NRF Cmt. at 10.

the Commission would consider a disclosure at the beginning of a text-only consumer review to “stand out.”

A trade association said that “the average social media user is familiar with where text is found in any given social media post, and social media platforms already make text visible against a variety of backgrounds” so “[r]equiring the endorsement-disclosure text to differ from other text is not only impractical, but it could actually create confusion for social media users who have grown accustomed to viewing all text related to a post in a certain manner.”<sup>124</sup> The Commission recognizes that, on a social media platform that allows only uniform text, it is not possible to have the text of a disclosure appear in different text. As with a text-only consumer review, the Commission would consider a disclosure at the beginning of such a text-only testimonial to “stand out.” On visual platforms with superimposed text, it is quite possible and reasonable to require that the text of a disclosure “stand out.”

One commenter asserted that being “unavoidable” and being “easily noticed” are ambiguous concepts.<sup>125</sup> The Commission disagrees. “Unavoidable” means that a consumer cannot avoid a disclosure such as by failing to click on a link or by failing to scroll. “Easily noticeable” is a simple and objective standard evaluated from the perspective of a reasonable consumer.

Two commenters asserted that it would be difficult to make clear and conspicuous disclosures required by the proposed rule on a small screen.<sup>126</sup> They did not explain why that would be the case, and the Commission does not believe that compliance with the rule’s disclosure requirement should be difficult on handheld devices.

One commenter asserted that, because of the proposed definition of clear and conspicuous, “[t]here is no need for the FTC to determine whether the resulting speech is rendered deceptive, untrue, or inaccurate.”<sup>127</sup> The Commission disagrees. The only substantive provision for which the definition is relevant is § 465.5. A business would not violate that provision merely by having a disclosure that is not clear and conspicuous. Rather, the business would have to engage in conduct that would be unfair or deceptive in the absence of a clear and conspicuous disclosure (e.g., a corporate officer

<sup>124</sup> *Id.* at 11.

<sup>125</sup> ANA Cmt. at 11.

<sup>126</sup> IAB Cmt. at 14; NRF Cmt. at 11.

<sup>127</sup> ANA Cmt. at 11.

giving a consumer endorsement without disclosing that they are an insider). As discussed below, the Commission is finalizing proposed § 465.5 with a modification to clarify that the provision is limited to conduct that would violate section 5 of the FTC Act.<sup>128</sup> The same commenter also surmised, based on the similarity of the definition of “clear and conspicuous” to the definition of the same phrase in the Endorsement Guides, that the Commission intends that the examples used in the Endorsement Guides would also be examples of violative behavior under the rule.<sup>129</sup> That is not the case. The Endorsement Guides address a broader range of conduct than the rule. Of the three examples in the Endorsement Guides that illustrate whether disclosures are clear and conspicuous, two of them address issues—the payment of influencers and implied typicality—not covered by the rule.<sup>130</sup> The third example involves a disclosure that individuals appearing in a television ad and giving testimonials are paid actors.<sup>131</sup> Such conduct would not be covered by the rule unless the underlying testimonials were fake or false.

One commenter, a trade association, stated that it was “unclear if the Commission has considered any social media platform constraints with respect to the length of posts (*e.g.*, character and time limits),” and asked (1) whether and how hashtags can meet the “clear and conspicuous” requirement, (2) whether “#Ad” is a sufficient visual disclosure of a material relationship,” and (3) that the Commission “provide more examples, including appropriate use of hashtags in disclosures, in its final rule.”<sup>132</sup> Another trade association requested in its comment that the Commission provide “visual examples of ‘insider’ endorsement disclosures that the Commission finds acceptable.”<sup>133</sup> The Commission believes it is not difficult to comply with the rule’s disclosure requirements in the social media context. Depending upon their wording and appearance, hashtags can be clear and conspicuous for purposes of the rule. In a social media post promoting a brand, it might be sufficient to prominently disclose an employee relationship via a hashtag beginning with the brand name and followed by

the word “employee.” Whether “#ad” would be an adequate disclosure would depend on the specific context. It could be adequate at the beginning of a social media post by the testimonialist, but it would likely be inadequate in a television ad or magazine ad featuring the testimonialist. Because the only provision for which the definition is relevant is § 465.5, which addresses the failure to disclose insider relationships, the disclosure could be as simple as the testimonialist describing a product as “my company’s” or “my wife’s company’s.”

A commenter asserted that disclosures “utilizing a social media platform’s built-in disclosure tool should be . . . at least sufficient enough to avoid the risk of penalties under the FTC’s rulemaking authority.”<sup>134</sup> As it has previously said, the Commission supports development of effective, built-in disclosure tools but is concerned that some of the existing tools lead to inadequate disclosures that are too poorly contrasting, fleeting, or small, or may be placed in locations where they do not catch the user’s attention.<sup>135</sup> Whether a business could be subject to civil penalties for social media posts by insiders who utilized a social media platform’s built-in disclosure tool would depend on whether a court would find that the business met the knowledge standard of section 5(m)(1)(A) of the FTC Act.

A trade association’s comment expressed concerns about the proposed requirement that “[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.”<sup>136</sup> The commenter said that “it is unnecessary and duplicative to require video endorsements that include visual and audio components to include both visual and audio disclaimers,” and “requiring an additional visual disclaimer, on top of a disclaimer that an endorser may easily include via audio, is cumbersome, and restricts companies’ marketing capabilities.”<sup>137</sup> On reflection, in the context of this rulemaking and as to the relationships of company insiders, if a

communication makes an endorsement in only its visual or audio portion, then it should be sufficient for a disclosure to appear in the same format as the claim that requires the disclosure. On the other hand, if an endorsement is conveyed in both the audio and visual portions of a communication, then the disclosure should be made in both the audio and visual portions. Consumers can watch a video with the sound off or listen to it without looking at the screen. The Commission is changing the relevant language to, “[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.” This change makes the rule less restrictive while still accomplishing the Commission’s goal of ensuring that consumers are fully informed. A different trade association noted that the “simultaneous disclosure requirement is confusing and would benefit from examples of sufficient simultaneous disclosure.”<sup>138</sup> Because the Commission is not finalizing the simultaneous disclosure requirement contained in the proposed rule, it is not providing further guidance on the meaning of simultaneous.

The second trade association also asked “if a social media influencer posts a video and discloses verbally in the video that they have a brand ambassador relationship with the retailer/brand, is it sufficient to display in the text accompanying the posted video some written disclosure” or would the disclosure “need to be embedded or flash across the video itself.”<sup>139</sup> The rule does not address or apply to an influencer’s disclosure of a brand ambassador relationship. The rule’s only disclosure requirements are in § 465.5 and apply to company insiders. Whether a testimonial in a social media post by a company insider requires a superimposed textual disclosure depends on whether there is an endorsement communicated by the visual portion of the post. If there is an endorsement in the visual portion, there would need to be a disclosure in the visual portion. If the endorsement is communicated only in the audio portion of the post, there would not need to be a disclosure in the visual portion.

#### d. Consumer Review

The proposed rule defined “consumer review” as “a consumer’s evaluation, or a purported consumer’s evaluation, of a product, service, or business that is

<sup>128</sup> See *infra* section IV.E.1 of this document.

<sup>129</sup> *Id.*

<sup>130</sup> 16 CFR 255.0(g)(9) and (11).

<sup>131</sup> 16 CFR 255.0(g)(10).

<sup>132</sup> Retail Industry Leaders Association, Cmt. on NPRM at 5 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0094> (“RILA Cmt.”).

<sup>133</sup> NRF Cmt. at 10.

<sup>134</sup> *Id.*

<sup>135</sup> Fed. Trade Comm’n, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 FR 44288, 44290 (July 26, 2022) (proposing changes to guides and soliciting public comment).

<sup>136</sup> NRF Cmt. at 11.

<sup>137</sup> *Id.*

<sup>138</sup> RILA Cmt. at 5.

<sup>139</sup> *Id.*

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.” The proposed definition also noted that, for the purposes of the rule, consumer reviews include consumer ratings regardless of whether they include any text or narrative. The Commission has determined to finalize the definition of this term—which is used in §§ 465.2 through 465.6—with a minor, technical change.

A comment from a review platform supported the proposed definition, calling it “particularly clear and holistic.”<sup>140</sup>

A comment from an individual asserted that the “definition of ‘consumer’ implies an individual who purchased the product for their own use” and that when a “product is provided by the company seeking a review, for the purposes of it being reviewed, the reviewer is arguably not a consumer.”<sup>141</sup> The Commission disagrees that a “consumer” is necessarily a purchaser. For purposes of the rule, a consumer is a person who purchased, used, or otherwise had experience with a product, service, or business.

A trade association commenter suggested deleting the definition’s element that a consumer review be “published.”<sup>142</sup> It said that a “consumer review should still be considered a ‘review’ before it is publicly displayed by a website or platform.”<sup>143</sup> Although that may be true for some purposes, the Commission declines to make that change. A consumer review that is submitted to a website or platform but never published does not in and of itself deceive consumers, although the failure to publish a review may be deceptive pursuant to paragraphs (a)(1) and (b) of § 465.7. Paragraphs (a)(1) and (b) of § 465.7 are worded in a way that does not limit their application to published reviews, because they relate to suppressed reviews.

A comment from a consumer advocacy organization suggested deleting the portion of the definition that refers to publication to a website or platform “dedicated in whole or in part to receiving and displaying such evaluations.”<sup>144</sup> It asked whether the definition would “only apply to reviews on a website ‘dedicated’ to posting

reviews, such as Yelp” and whether “it include[s] any website where reviews are possibly posted, like Reddit?”<sup>145</sup> The commenter continued, “Would a website be excluded if only a very small portion of the website contained consumer evaluations?”<sup>146</sup> The commenter asserted that “[a]ll fake reviews and ratings that are used to market a product or service should be captured in the . . . Rule—no matter where they are posted.”<sup>147</sup> The definition is not limited to consumer reviews on websites that are dedicated entirely to posting such reviews. It would also cover reviews on a portion of a website, no matter how small a portion, that is dedicated to receiving and displaying such reviews, such as a reviews page or the review sections of product pages on a retailer’s website. The definition would not, however, cover consumer statements about products or services on a website or portion of a website, such as Reddit, that is not dedicated to receiving and displaying reviews. Such free-floating consumer statements are outside of the generally understood context in which content is submitted and published as reviews. Under some circumstances, such statements might be considered “consumer testimonials,” such as when an advertiser has paid for them.

A comment from a review platform raised two issues with the “consumer review” definition.<sup>148</sup> It said that “[b]are ratings provide no context, making them virtually useless for other consumers or to businesses that might use consumer feedback to improve their services” and suggested that “the Commission differentiate between reviews and ratings.”<sup>149</sup> The fact that bare ratings do not provide context does not mean that consumers do not rely on them or on aggregate ratings that include bare ratings. The Commission does not see a reason to distinguish between reviews and ratings for the purposes of the rule, and the commenter did not provide such a reason. The same commenter also expressed “concern[ ] with the definition’s use of the word ‘purported[.]’ . . . which has a negative connotation that feeds into the false narrative that consumer reviews are inherently unreliable” and suggested replacing “purported” with different language.<sup>150</sup> The definition simply recognizes and accounts for the undisputed fact that some reviews are

fake. Just because some reviews are unreliable does not suggest that reviews are generally unreliable. The Commission declines to adopt this recommendation.

To conform with the Office of the Federal Register’s drafting requirements, the Commission is changing a reference to “this Rule” to “this part.”<sup>151</sup>

#### e. Consumer Testimonial

The proposed rule defined “consumer testimonial” as “an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.” The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

A trade association commenter expressed concern that consumers seeing a clearly dramatized television commercial might unreasonably believe that the actors’ scripted lines actually reflected their opinions, beliefs, or experiences and could therefore be considered consumer testimonials.<sup>152</sup> It suggested clarifying the definition by inserting “reasonably in the circumstances” after “that consumers are likely to believe.”<sup>153</sup> The Commission agrees that it would not be reasonable for viewers to consider “an obviously fictional dramatization” to be an endorsement.<sup>154</sup> The Commission does not, however, believe it is necessary to modify the definition. The concept of “reasonable consumers” from FTC jurisprudence<sup>155</sup> is incorporated into the concept of consumers being likely to believe something.

The same public interest research center that commented, as discussed above, that the Commission should broaden the definition of “celebrity testimonials” to explicitly include non-natural persons (such as businesses and

<sup>151</sup> The Commission is making this change throughout the rule, including in §§ 465.2(a), (b), and (c), 465.4, 465.5(a), 465.6, 465.7, 465.8, and 465.9.

<sup>152</sup> NFIB Cmt. at 2–3.

<sup>153</sup> *Id.* at 4.

<sup>154</sup> See Endorsement Guides, 16 CFR 255.0(g)(2).

<sup>155</sup> See, e.g., Fed. Trade Comm’n, *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176–77 (1984) [hereinafter *FTC Policy Statement on Deception*] (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>140</sup> Trustpilot Cmt. at 8.

<sup>141</sup> Anonymous 2 Cmt. at 1.

<sup>142</sup> IAB Cmt. at 13–14.

<sup>143</sup> *Id.*

<sup>144</sup> TINA Cmt. at 7.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Yelp Cmt. at 3–4.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 4.

public sector entities)<sup>156</sup> made the same comment with respect to the definition of “consumer testimonials.”<sup>157</sup> The Commission declines to make that change in the latter definition for the same reason it declined to make it in the former definition.

#### f. Indicators of Social Media Influence

The proposed rule defined “indicators of social media influence” as “any metrics used by the public to make assessments of an individual’s or entity’s social media influence, such as followers, friends, connections, subscribers, views, plays, likes, reposts, and comments.” For the following reasons, the Commission adopts the definition of “indicators of social media influence”—a term which is used in § 465.8, *Misuse of Fake Indicators of Social Media Influence*—largely as proposed, with one modification described below.

A comment from a consumer advocacy organization suggested explicitly including “Saves” and “Shares” within the definition of indicators of social media influence.<sup>158</sup> The commenter explained that the number of times that social media posts are saved or shared serves as indicators of social media influence and that both “Saves” and “Shares” are offered for sale on the internet.<sup>159</sup> Because the NPRM proposed to define the term as “any metrics used by the public to make assessments of an individual’s or entity’s social media influence,” “Saves” and “Shares” were already covered by the definition as originally proposed. However, merely for the purpose of clarification, the Commission is adding them to the listed examples of indicators. The same commenter also suggested that the Commission expand the definition to include engagement metrics that are not publicly visible but that are used to gain an algorithmic advantage.<sup>160</sup> Such non-visible indicators are outside the scope of this rulemaking, and the Commission chooses not to address them at this time.

One review platform commenter suggested that the Commission “simplify the definition to exhaustively list the current metrics that are such indicators.”<sup>161</sup> The commenter continued that “whether a given metric is ‘used by the public to make assessments of an individual’s or

entity’s social media influence’ may become the subject of substantial dispute in future cases . . . in the absence of an exhaustive, disjunctive list of indicators.”<sup>162</sup> The Commission intends the listed indicators to be examples and non-exhaustive, a flexible and efficient approach that avoids having to modify the rule when such metrics change. The Commission has no reason to believe that its approach will result in substantial disputes in its cases.

For the reasons explained in this section, the Commission is finalizing the definition of “indicators of social media influence” to mean any metrics used by the public to make assessments of an individual’s or entity’s social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

#### g. Officers

The proposed rule defined “officers” as “including owners, executives, and managing members of a business.” The Commission is finalizing the definition of this term—which is used in §§ 465.2 and 465.5.

A review platform commenter said that including “managing members” in the definition of “officers” “could suggest that managers are officers.”<sup>163</sup> The commenter also suggested that the definition of “officers” “should be refined to only include ‘senior management members’ of a business,” thereby creating “a clearer distinction between those in a position of leadership versus lower-level employees, or staff that may have the title ‘manager’ without any practical level of control and power to exert influence over others.”<sup>164</sup>

Because a “managing member” is a commonly understood term referring to an owner and senior manager of a limited liability company, and because the term does not refer to all “managers” of a business, the Commission declines to remove “managing members” from the definition of “officer.” As discussed below, the Commission continues to believe it appropriate that §§ 465.2 and 465.5 apply to both officers and managers and is therefore not limiting the definition of “officers” to “senior management members.” A new definition of “managers” is discussed below.<sup>165</sup>

#### h. Purchase a Consumer Review

The proposed rule defined “purchase a consumer review” as “provid[ing] something of value, such as money, goods, or another review, in exchange for a consumer review.” For the following reasons, the Commission adopts the definition of “purchase a consumer review”—a term which is used in § 465.2, *Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials*—largely as proposed, with two modifications described below.

An individual commenter wrote, “[r]egarding payment for reviews, the use of . . . discounts on future purchases from the business should be specifically prohibited as well.”<sup>166</sup> A review platform commenter suggested “that the Commission list additional examples of . . . what the Commission considers ‘value.’”<sup>167</sup> Specifically, it suggested adding “gift certificates,” “services,” “discounts,” “coupons,” and “contest entries.”<sup>168</sup> Such examples of value were covered by the proposed definition, which applies to “something of value” provided in exchange for a consumer review” but, for purposes of clarification, the Commission is adding these examples of value in the final definition. The review platform commenter also suggested adding “other incentives,”<sup>169</sup> which the Commission thinks is unnecessary, given that the list is only exemplary and preceded by the words “such as.”

Another review platform commenter suggested using language explicitly stating that the listed examples of “value” are not exhaustive.<sup>170</sup> The Commission believes that, because the phrase “such as” precedes the list of examples, this is already sufficiently clear from the language of the definition.

The proposed definition used the term “goods.” To ensure that terminology is used consistently throughout the rule, the Commission is replacing the term “goods” with the synonymous word “products” in the final definition.<sup>171</sup>

For the reasons explained in this section, the Commission is finalizing the definition of “purchase a consumer review” to mean to provide something

<sup>166</sup> John Christofferson, Cmt. on NPRM (Aug. 16, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0025>.

<sup>167</sup> Yelp Cmt. at 5.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Trustpilot Cmt. at 8.

<sup>171</sup> The Commission is also replacing the term “goods” with the word “products” in the final definition of the phrase “purchase a consumer review” (final § 465.1(m)).

<sup>156</sup> See *supra* Section IV.A.2.b of this document.

<sup>157</sup> EPIC Cmt. at 3.

<sup>158</sup> NCL Cmt. at 3.

<sup>159</sup> *Id.* at 3–6.

<sup>160</sup> *Id.* at 6–8.

<sup>161</sup> Yelp Cmt. at 4–5.

<sup>162</sup> *Id.* at 5.

<sup>163</sup> Trustpilot Cmt. at 12.

<sup>164</sup> *Id.*

<sup>165</sup> See *infra* Section IV.A.3.b of this document.

of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

i. Reviewer

The proposed rule defined “reviewer” as “the author or purported author of a consumer review.” The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

One review platform commenter objected to the use of the word “purported” in the definition of “reviewer,” just as it objected to that word’s inclusion in the definition of “consumer review.”<sup>172</sup> The commenter asserted that “purported” feeds into the false narrative that consumer reviews are inherently unreliable. As discussed above, the use of the word “purported” simply recognizes and accounts for the undisputed fact that some reviews are fake.<sup>173</sup> The Commission declines to modify the definition of “reviewer.”

j. Substantially Different Product

The proposed rule defined “substantially different product” as a product that differs from another product in one or more material attributes other than color, size, count, or flavor. The defined term appeared in proposed § 465.3, Consumer Review or Testimonial Reuse or Repurposing, which the Commission is no longer planning on finalizing.<sup>174</sup> Given that the Commission has decided not to proceed with proposed § 465.3 at this time, it is not including a definition of “substantially different product” in the final rule.

k. Testimonialist

The proposed rule defined “testimonialist” as “the person giving or purportedly giving a consumer testimonial or celebrity testimonial.” None of the comments received addressed the definition of testimonialist. As already discussed in section IV.A.2.b of this document, the Commission is substituting the word “individual” for the word “person” wherever the word appeared in the

Commission’s original proposal. Aside from this minor, clarifying modification, the Commission has determined that it will finalize the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

l. Unjustified Legal Threat

The proposed rule defined “unjustified legal threat” as “a threat to initiate or file a baseless legal action, such as an action for defamation that challenges truthful speech or matters of opinion.” For the following reasons, the Commission adopts the definition—a term which is used in § 465.7, Review Suppression—largely as proposed, with two modifications described below.

The NPRM asked whether “the definition of ‘unjustified legal threat’ is sufficiently clear.” One company’s comment said that the proposed definition was clear.<sup>175</sup> A trade association said “the term ‘unjustified’ is a vague standard that leaves unclear what legal support a business must have for its legal position before it warns the creator of a review of possible legal proceedings.”<sup>176</sup> A comment from State Attorneys General suggested changing “unjustified” to “unfounded, groundless, or unreasonable” in order to provide a more objective legal standard for evaluating the types of legal threats that are not permitted.<sup>177</sup> The Commission agrees in part with this recommendation. As a clarification of what it intended, the Commission is changing “unjustified” to “unfounded or groundless.” Specifically, this change avoids the unintended, potentially broader scope of the term “unjustified,” which is also freighted with subjective considerations, in favor of terms that reflect objective legal standards. For similar reasons, the Commission is not adding “unreasonable,” a term which is unnecessary and not as precise in this particular situation as “unfounded or groundless.”

The State Attorneys General comment also recommended that the definition include “a threat to enforce an agreement that is void, voidable, or unenforceable.”<sup>178</sup> It said that the word “unjustified” may be insufficient to address merchants arguing that their legal threats were justified by their non-disclosure agreements that limit consumer reviews.<sup>179</sup> The change from “unjustified” to “unfounded or groundless” addresses this concern. A

comment from a review platform suggested that the Commission expand the definition to include threats based on form contracts that violate the Consumer Review Fairness Act (“CRFA”).<sup>180</sup> Given that such form contracts are already prohibited by the CRFA,<sup>181</sup> the Commission declines to address them in this rulemaking.

A consumer group’s comment disagreed with the definition’s use of the phrase “baseless legal action” on the basis that it “open[s] just as many questions as the underlying term it attempts to define.”<sup>182</sup> A company’s comment noted that the phrase “a baseless legal action” is vague, and recommend that the Commission instead adopt language that is based upon Rule 11(b)(2) of the Federal Rules of Civil Procedure.<sup>183</sup> Specifically, the commenter recommended changing “a baseless legal action” to “a legal action that is not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law.”<sup>184</sup>

The Commission is partially adopting the commenter’s suggestion by adopting language that is loosely based upon Federal Rule of Civil Procedure 11(b)(2) and (3).<sup>185</sup> However, the Commission is not adopting the phrase “extending, modifying, or reversing existing law or establishing new law” because it is highly doubtful that companies would threaten consumers by asserting that, while no lawsuit is warranted under existing law, they will bring a lawsuit anyway and try to change existing law. Instead, the Commission chooses to clarify the definition by changing “threat to file a baseless legal action” to “legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.”

A review platform commenter was concerned that the proposed definition’s “wording opens the door to bad actors being able to claim defamation on weakly justified grounds and to seek to game the system by deliberately constructing legal terms which can then be deployed to suppress reviews.”<sup>186</sup> The Commission believes that the revised definition addresses this

<sup>172</sup> Yelp Cmt. at 4.

<sup>173</sup> See *supra* Section IV.A.2.d of this document.

<sup>174</sup> Some commenters suggested edits to the definition, such as removing “flavor” from the list of attributes that might not be material, adding other product attributes to that list, or adding flexibility by removing the listed attributes altogether. TINA Cmt. at 6; Amazon Cmt. at 9–10; Chamber of Commerce Cmt. at 6–7; RILA Cmt. at 3; NRF Cmt. at 7–8; IAB Cmt. at 8; ANA Cmt. at 15–16; NRF Cmt. at 8. Other commenters asked questions about how the definition would apply to an updated version of a product or to different scenarios. Magana Cmt.; NADA Cmt. at 5.

<sup>175</sup> Transparency Company Cmt. at 14.

<sup>176</sup> NFIB Cmt. at 4.

<sup>177</sup> State Attorneys General, Cmt. on NPRM at 2–3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0100> (“State AGs Cmt.”).

<sup>178</sup> *Id.* at 2.

<sup>179</sup> *Id.* at 3.

<sup>180</sup> Yelp Cmt. at 5.

<sup>181</sup> Consumer Review Fairness Act of 2016 § 2(b)(1), 15 U.S.C. 45b(b)(1).

<sup>182</sup> Consumer Reports Cmt. at 10.

<sup>183</sup> Family First Life Cmt. at 16.

<sup>184</sup> *Id.*

<sup>185</sup> See Fed. R. Civ. P. 11(b)(2) and (3).

<sup>186</sup> Trustpilot Cmt. at 17–18.

concern, especially given its inclusion of language from Federal Rule of Civil Procedure 11(b)(2) and (3), which is intended to avoid such misuse of the court system. In any event, the Commission is deleting “such as an action for defamation that challenges truthful speech or matters of opinion” because this example is unnecessary and possibly confusing in this context.

For the reasons explained in this section, the Commission is adopting the proposed definition of an “unfounded or groundless legal threat” with clarifying changes. The final definition provides that an “unfounded or groundless legal threat” is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

### 3. Proposed Additional Definitions

In Question 7 of the NPRM, the Commission asked what additional definitions, if any, are needed. In Questions 14 and 18 of the NPRM, the Commission asked whether it should define the terms “managers” and “relatives,” respectively. As discussed below, various commenters suggested that the Commission define the following terms and phrases that appear in the proposed rule: “dissemination,” “manager,” “relative,” and “purchase or procure fake indicators.” One commenter suggested that the Commission define “review hosting” and exclude it from the scope of § 465.2.<sup>187</sup>

#### a. Dissemination

The term “disseminate” appears in both proposed and final §§ 465.2 and 465.5. A comment from a trade association stated that the Commission should define “disseminate” “within Proposed § 465.2(b) to include only the affirmative posting or intentional distribution of reviews, where a company has actual knowledge that the reviews are false or fraudulent in nature.”<sup>188</sup> The commenter continued by saying that “disseminate” should “not include passive actions such as allowing a review to be posted or published on a company’s web page, unless the company has actual knowledge that the review is false or

fraudulent in nature” or “retailers sharing reviews with third-party platforms such as Google.”<sup>189</sup> Within both §§ 465.2 and 465.5, however, “disseminate” applies only to testimonials, not to consumer reviews. One of the basic canons of statutory and regulatory construction is that words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.<sup>190</sup> In §§ 465.2 and 465.5, the Commission intended for the term to have its ordinary, everyday meaning—that is, to spread or to convey something, rather than the proposed definition.<sup>191</sup> Accordingly, the Commission declines to add the proposed definition.

#### b. Manager

The term “manager” appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials, and was undefined. Due to the clarifying changes to § 465.2 that are discussed in further detail below, the term is now included in both final § 465.5 and final § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials.

One business commenter noted that it is unnecessary to define “manager.”<sup>192</sup> An industry organization wrote in its comment that the failure to define the term “manager” “raises concerns about the number of a firm’s employees impacted.”<sup>193</sup> A review platform commenter said that using the term “manager” without any definition is

particularly problematic,<sup>194</sup> noting that someone “may have the title ‘manager’ without any practical level of control and power to exert influence over others. For example, it is possible in a business for a person to have the title ‘manager’ while holding a relatively junior position and without having any employees that directly report to them.”<sup>195</sup> Proposed and final § 465.5(c) address “managers” soliciting or demanding consumer reviews from employees or agents. In this context, the Commission’s intent was for the term “manager” to be limited to those who supervise others. Thus, the Commission is adopting a definition for the term “manager” to make this clarification, which will ensure that § 465.5(c) is not interpreted as more restrictive than the Commission intended.<sup>196</sup>

A business commenter that operates in the insurance-marketing space explained that independent-contractor insurance agents who build their own agencies are referred to as “managers” and asked that the definition of “managers” expressly carve out “managers in the insurance marketing space” or at least clarify that managers are those “who are employed by the company.”<sup>197</sup> As similar situations may arise in other contexts, the Commission is adopting the commenter’s latter recommendation, and clarifying that managers are employees of the businesses.

For the reasons explained in this section, the final rule adopts a definition for the term “manager.” The final rule defines the term “manager” as an employee of a business who supervises other employees or agents and who either holds the title of a “manager” or otherwise serves in a managerial role.

#### c. Relative

The term “relative” appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials. It was undefined in the proposed rule.

Two commenters suggested that the Commission define the term “relative.” A comment from a review platform said that a plain reading of “relative” could cover “an extremely broad range of people” and “is likely to extend to persons who may not be biased since they are in reality not close to the

<sup>187</sup> As discussed below in Section IV.H. of this document, the Commission is adding definitions of two phrases in response to concerns raised by commenters: “fake indicators of social media influence” and “distribute fake indicators of social media influence.”

<sup>188</sup> NRF Cmt. at 3.

<sup>189</sup> *Id.* at 3–4. The Commission elsewhere addresses whether § 465.2 applies to a business allowing reviews to be posted or published on its web page or to retailers sharing reviews with third-party platforms. See *infra* Section IV.B.5 of this document.

<sup>190</sup> See, e.g., *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012); *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) (“Without a statutory definition, we turn to the phrase’s plain meaning at the time of enactment.”); *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 715 (2018) (“Because the Bankruptcy Code does not define the words ‘statement,’ ‘financial condition,’ or ‘respecting,’ we look to their ordinary meanings.”).

<sup>191</sup> *Disseminate*, *Dictionary.com*, LLC, <https://www.dictionary.com/browse/disseminate> (last visited July 5, 2024) (defining “disseminate” as “to scatter or spread widely, as though sowing seed; promulgate extensively; broadcast; disperse”); *Disseminate*, *Merriam-Webster.com* Dictionary, <https://www.merriam-webster.com/dictionary/disseminate> (last visited July 5, 2024) (defining “disseminate” as “to spread abroad as though sowing seed” or “to disperse throughout”); *Disseminate*, *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/disseminate> (last visited July 5, 2024) (defining “disseminate” as “to spread or give out something, especially news, information, ideas, etc., to a lot of people”).

<sup>192</sup> Transparency Company Cmt. at 13.

<sup>193</sup> TechNet Cmt. at 3.

<sup>194</sup> Trustpilot Cmt. at 9.

<sup>195</sup> *Id.* at 12.

<sup>196</sup> If the term were only to appear in § 465.2(c), such a clarification would not be needed. This is because § 465.2(c) also covers employees and agents.

<sup>197</sup> Family First Life Cmt. at 13.

business.”<sup>198</sup> The commenter suggested that the prohibition in § 465.5(c) be limited to close relatives such as immediate family members.<sup>199</sup> A comment from a business organization said that the term “relative” is too vague and that “[i]t 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.”<sup>200</sup> The commenter continued that “[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.”<sup>201</sup>

As discussed below, the Commission believes that some rule provisions should be limited to “immediate relatives.”<sup>202</sup> The Commission is adding a definition of an “immediate relative,” which clarifies that the term refers to a spouse, parent, child, or sibling. In the final rule, the term “immediate relative” is used in §§ 465.2(c) and 465.5(c).

#### d. Purchase or Procure Fake Indicators

The phrase “purchase or procure fake indicators of social media influence” is used in proposed and final § 465.8, Misuse of Fake Indicators of Social Media Influence. The phrase was undefined in the proposed rule.

A consumer advocacy commenter stated that leaving the terms “purchase” and “procure” undefined “leaves ambiguity regarding which types of incentives are restricted,” and suggested defining the phrase “purchase or procure fake indicators of social media influence” to mean “to provide something of value, such as money, goods, or another indicator of social media influence (i.e., [.] a ‘like’), in exchange for a fake indicator of social media influence.”<sup>203</sup> The Commission declines to adopt the commenter’s suggestion.<sup>204</sup> The definition proposed by the commenter would unnecessarily narrow the types of actions that would be covered by the rule to an exchange. In the final rule, the Commission intends for the term “procure” to bear its ordinary, everyday meaning—that is,

to obtain something.<sup>205</sup> Even if there is any ambiguity in the term “purchase,” any exchange of value in order to obtain fake indicators of social media influence would be “procuring” the fake indicators.

#### e. Review Hosting

A retailer submitted a comment suggesting that “review hosting” be defined and excluded from the scope of § 465.2.<sup>206</sup> The commenter suggested the following definition:

*Review hosting* includes but is not limited to activity associated with maintaining a repository of consumer reviews and testimonials for display such as: offering review submission functionality, collecting and moderating reviews, organizing and displaying reviews, aggregating reviews into star ratings, and providing guidance to consumers about how to leave reviews where no incentive is offered.<sup>207</sup>

As discussed below, the Commission did not intend for its proposal to apply to simply hosting consumer reviews.<sup>208</sup> The Commission is therefore, for the purpose of clarification, adopting a definition of the term “consumer review hosting” in order to exclude mere review hosting from certain provisions of the rule. The Commission is not adopting the commenter’s proposed definition because it included activities that go beyond the core of mere review hosting and because it begins with the phrase “include but is not limited to,” which would allow it to include an unknown, larger category of activities. The final rule defines “consumer review hosting” as providing the technological means by which a website or platform allows consumers to see or hear the consumer reviews that consumers have submitted to the website or platform. The exclusion of “consumer review hosting” from certain sections of the rule is discussed below.

#### B. § 465.2—Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials

Proposed § 465.2 addressed fake or false consumer reviews, consumer testimonials, and celebrity testimonials. Based on the following, the Commission has determined to finalize these

prohibitions, with a number of revisions. The following paragraphs discuss comments relating to (1) proposed § 465.2 generally, (2) common language in all three paragraphs, (3) the individual paragraphs, (4) the knowledge standard, and (5) other potential requirements.

Numerous individual commenters wrote about the importance of authentic reviews or testimonials and that fake or false ones should be prohibited.<sup>209</sup> A technology company commenter wrote that it “would welcome rules to prohibit fake reviews and place stronger obligations on businesses who host them to better protect consumers.”<sup>210</sup>

A celebrity commenter wrote that he had “received more than 100 emails from consumers who have been induced to purchase fake products through the mis-use of . . . [his] image and the images of other Shark Tank ‘sharks.’”<sup>211</sup>

A business commenter suggested explaining the “financial consequence of fake reviews,” such as whether it is “~\$50,000 per fake review.”<sup>212</sup> The maximum civil penalty is currently \$51,744 per violation, but courts must take into account the statutory factors set forth in section 5(m)(1)(C) of the FTC Act and may impose much lower per-violation penalties.<sup>213</sup> Ultimately, courts will also decide how to calculate the number of violations in a given case.

#### 1. Common Language in § 465.2(a), (b), and (c)

Proposed § 465.2 consisted of three paragraphs, each of which sought to address unfair or deceptive conduct by

<sup>209</sup> See, e.g., William Hardy, Cmt. on NPRM (July 31, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0002>; Eric Beback, Cmt. on NPRM (Aug. 1, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0005> (“Beback Cmt.”); Hippensteel Cmt.; Anderson Cmt.; Nathan Wilson, Cmt. on NPRM (Aug. 2, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0008>; Fred Foreman, Cmt. on NPRM (Aug. 6, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0012>; Ravnitzky Cmt. at 1; Fribance Cmt.; Ian Wolk, Cmt. on NPRM (Aug. 15, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0020>; Edborg Cmt.; Anonymous 5, Cmt. on NPRM (Aug. 18, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0030>; Anonymous 1 Cmt.; Steven Osburn, Cmt. on NPRM (Aug. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0033> (“Osburn Cmt.”); Ludlam Cmt.; Janette Ponticello, Cmt. on NPRM (Sept. 5, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0042>; Hannah Abbott, Cmt. on NPRM at 1 (Sept. 20, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0051> (Abbott Cmt.).

<sup>210</sup> Pasabi, Cmt. on NPRM at 2 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0103>.

<sup>211</sup> Mark Cuban, Cmt. on NPRM (Sept. 25, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0066>.

<sup>212</sup> Transparency Company Cmt. at 9.

<sup>213</sup> See 15 U.S.C. 45(m)(1)(C).

<sup>198</sup> Trustpilot Cmt. at 12.

<sup>199</sup> *Id.*

<sup>200</sup> Chamber of Commerce Cmt. at 7.

<sup>201</sup> *Id.*

<sup>202</sup> See *infra* Section IV.E.2 of this document.

<sup>203</sup> Consumer Reports Cmt. at 4.

<sup>204</sup> Commenters also expressed concern about or sought guidance on the meaning of the term “procure” as used in proposed § 465.2(c), but they did not expressly suggest that the Commission define the term. The use of the term “procure” in § 465.2 is discussed below in the context of that substantive provision. See *infra* Section IV.B.4 of this document.

<sup>205</sup> See *Procure* (def. 1), Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/procure> (last visited July 5, 2024) (establishing that the word “procure” means, among other things, “to get possession of (something)” or “to obtain (something) by particular care and effort”).

<sup>206</sup> Amazon Cmt. at 7. As discussed below, other commenters also argued that § 465.2 should not apply to merely hosting reviews. See *infra* section IV.B.5 of this document.

<sup>207</sup> *Id.* at 7.

<sup>208</sup> See *infra* section IV.B.5 of this document.

prohibiting specified types of reviews or 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 it, or (3) “that materially misrepresents, expressly or by implication, the [person’s] . . . experience with the product, service, or business.” For the purpose of the following discussion, references to “fake or false” reviews or testimonials cover these three types of reviews or testimonials.

A trade association asserted that the Commission lacked sufficient evidence of prevalence of reviews and testimonials that “materially misrepresent[.] . . . the reviewer’s or testimonialist’s experience.”<sup>214</sup> The trade association asserted that some of the cases cited by the Commission also involved “actual fake reviews” and therefore should not count as evidence of prevalence.<sup>215</sup> The Commission disagrees: a fake or fabricated review misrepresents the purported reviewer’s experience (e.g., that the reviewer used the product and what their experience was). The commenter also asserted that five of the cases cited by the Commission to establish prevalence “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,” and therefore are insufficient to establish prevalence.<sup>216</sup> However, the quoted representations in each of the Commission’s complaints makes clear the nature of the misrepresentations.<sup>217</sup> Furthermore, even if a Commission complaint does not provide all details about a specific misrepresentation, that does not mean that it cannot serve as evidence of prevalence. The Commission thus has a strong basis for its conclusion that reviews and testimonials misrepresenting the

experiences of the reviewers and testimonialists are prevalent.

The same trade association and another one expressed concern that the “prohibition on *all* reviews that are authored by individuals that [sic] ‘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.”<sup>218</sup> As discussed in the NPRM, the Commission’s intent was to prohibit misrepresentations resulting from reviews or testimonials by someone who does not exist or who did not use or otherwise have experience with the product, service, or business.<sup>219</sup> The Commission is unsure of the extent to which there are satirical reviews that could run afoul of the provision as proposed. Nonetheless, upon a review of the comments, the Commission now recognizes that absent an express reference to material misrepresentations, the provision could be interpreted to prohibit other potentially non-deceptive speech, such as the use of virtual influencers.<sup>220</sup> To avoid this unintended consequence, the Commission is clarifying that § 465.2 is limited to prohibiting material misrepresentations. As finalized, the prohibitions in § 465.2 are expressly limited to reviews and testimonials “materially misrepresent[ing], expressly or by implication . . . that the reviewer or testimonialist exists; . . . that the reviewer or testimonialist used or had experience with the product, service, or business that is the subject of the review or testimonial; or . . . the reviewer’s or testimonialist’s experience with the product, service, or business that is the subject of the review or testimonial.”

A different trade association raised several concerns about the common language of proposed § 465.2. It asserted that the provision “would prohibit the use of a dead person’s endorsement because arguably that person does not exist.”<sup>221</sup> The Commission does not interpret a person who “does not exist” to include a person who died after making an endorsement, but that concern should be resolved by the new language regarding material

misrepresentations. The commenter went on to question “what constitutes an ‘actual experience,’” asking whether a person who saw a label had actual experience with it and whether a person who tasted an item purchased at a restaurant but did not visit the restaurant had actual experience.<sup>222</sup> The proposed provision did not use the term “actual experience,” and the persons in the commenter’s posited hypotheticals did have legitimate experience with the product or service but should not misrepresent that experience as more than it was. The commenter also said that “it is unclear if the . . . element—materially misrepresenting the experience with the product or service—relates to the experience or an opinion about the product or service.”<sup>223</sup> It relates to the person’s “experience” with the product or service, that is, what actually happened when they used or otherwise experienced it and not simply their “opinion” of it. The same commenter asked whether “an actor portraying an actual reviewer” is misrepresenting their experience as long as it is “clear that it is an actor portrayal.”<sup>224</sup> The provision does not prohibit using an actor to portray a real testimonialist.

An individual commenter who raised the same concern about whether actors could portray real testimonialists<sup>225</sup> went on to express concerns that the actor “shouldn’t misrepresent who the original person was,” such as by misrepresenting “the effectiveness/health benefits of [a] product by hiring a very fit in shape person.”<sup>226</sup> The Commission has issued guidance stating that “use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.”<sup>227</sup> Nevertheless, the Commission does not intend for § 465.2 to address such misrepresentations.

A consumer organization’s comment requested that the Commission “explicitly indicate that fake . . . ratings are an independent and separate violation from deceptive narrative reviews.”<sup>228</sup> The Commission believes that making this distinction is unnecessary and declines to make this change.

<sup>214</sup> IAB Cmt. at 3.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 4 & n.12.

<sup>217</sup> Complaint at 8–11, 17–18, *FTC v. NextGen Nutritionals, LLC*, No. 8:17-cv-2807 (M.D. Fla. filed Nov. 20, 2017) (testimonials in ads made specific quantified claims of weight loss and blood pressure reduction); *In re Esrin Ve Sheva Holding Corp.*, 132 F.T.C. 736, 737 (2001) (testimonial made specific quantified claims about increased mileage and decreased harmful pollutants); *In re Computer Bus. Servs., Inc.*, 123 F.T.C. 75, 78 (1997) (endorsers made specific quantified earnings claims); *In re Twin Star Prods., Inc.*, 113 F.T.C. 847, 849–51, 853–54 (1990) (endorsements made regarding a weight-loss product, a baldness treatment, and an impotency treatment); *In re National Sys. Corp.*, 93 F.T.C. 58, 61–62 (1979) (testimonials about jobs obtained by graduates of respondents’ schools).

<sup>218</sup> IAB Cmt. at 6; NRF Cmt. at 6.

<sup>219</sup> NPRM, 88 FR 49373.

<sup>220</sup> A virtual influencer is a computer-generated fictional character that can be used for a variety of marketing-related purposes, but most frequently for social media marketing, in lieu of human influencers. See, e.g., Koba Molenaar, *Discover the Top 12 Virtual Influencers for 2024—Listed and Ranked!*, Influencer MarketingHub (Mar. 29, 2024), <https://influencermarketinghub.com/virtual-influencers/>.

<sup>221</sup> ANA Cmt. at 12.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Beback Cmt.

<sup>226</sup> *Id.*

<sup>227</sup> See Endorsement Guides, 16 CFR 255.1(g).

<sup>228</sup> TINA Cmt. at 8.

## 2. § 465.2(a)

Proposed § 465.2(a) would have made it a violation for a “business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial” that is fake or false.

An individual commenter noted that the prohibition “is too specific and it would be easy for a business to find an alternative method not prohibited by the rule.”<sup>229</sup> The commenter posited an example: “a business could have someone next to them tell them their review and someone could transcribe it, technically the business did not create, make, or sell anything and thus would not be in violation.”<sup>230</sup> If a business is paying an individual to transcribe a fake or false review, it is creating or making the review, and would therefore have violated § 465.2(a). Accordingly, the Commission declines to modify the prohibition in response to the commenter’s concern.

A trade association submitted a comment asking the Commission to “confirm that when a real consumer authors the review, the business cannot be said to have written or created it, and thus . . . section [465.2(a)] could not apply.”<sup>231</sup> The Commission is unsure what the commenter means by a “real consumer authors the review.” The provision would apply if, for example, a business employs a “real consumer” to write fifty reviews of a product under different names.

A comment from a retailer that publishes reviews said that “review brokers and other bad actors . . . coordinate the high-volume writing, buying, and selling of fake reviews” and that the rule should apply to those “approaching customers, instructing them on how to create fake reviews and avoid detection, and connecting them with bad actors operating [fake] accounts.”<sup>232</sup> Brokers of fake reviews would generally fall under the provision’s prohibition against selling a consumer review, given that such brokers are generally being paid to provide fake reviews.

A trade association commenter suggested clarifying that “business” in § 465.2(a) “refers to a business that helps to create or sell reviews or testimonials.”<sup>233</sup> Although the paragraph does apply to such businesses, it also applies to a business

that writes or creates fake reviews or testimonials for its own products or services. For this reason, the Commission declines to adopt the commenter’s suggestion.

An individual commenter asked whether the prohibition covers “people who leave reviews in good faith” if “they were getting paid for it.”<sup>234</sup> Neither § 465.2(a) nor any section of the rule imposes liability on individual consumers who write honest reviews, even if they are paid for doing so.

Another individual commenter requested that civil penalties be imposed “on the company for soliciting the reviews, rather than on the reviewer, unless the reviewer knowingly is leaving fake reviews.”<sup>235</sup> Under § 465.2(a), an individual who is in the business of writing, creating, selling, or brokering reviews could be liable for creating consumer reviews that are fake or false. That individual could only be subject to civil penalties if they did so with actual knowledge or knowledge fairly implied on the basis of objective circumstances that they were engaging in an act or practice that is unfair or deceptive and is prohibited by the rule.<sup>236</sup>

An individual commenter expressed concern that “competing parties could potentially create fake reviews on another party in order to give the impression that the party is in violation of the” rule.<sup>237</sup> Although such misconduct is possible, the target of such misconduct would not be liable under § 465.2(a), based on how it is worded. For example, the target would not have been the one who created, wrote, or sold the review, nor would the target have purchased the review. The competitor who engaged in such misconduct might be liable for deceptive or unfair conduct under the FTC Act.

## 3. § 465.2(b)

Proposed § 465.2(b) would have made it a violation for a business to “purchase a consumer review” or “disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial” about “the business or one of its products or services” which “the business knew or should have known” was fake or false.

<sup>234</sup> Wilson Cmt.

<sup>235</sup> Osburn Cmt.

<sup>236</sup> See 15 U.S.C. 45(m)(1)(A) (establishing that the recovery of civil penalties requires a showing of “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule”).

<sup>237</sup> Slezak Cmt. at 1.

A consumer organization commented that, by limiting § 465.2(b) to a business posting reviews or disseminating or causing the dissemination of testimonials about “the business or one of its products or services,” the Commission’s proposal limits liability to the business itself “instead of including other . . . creators or disseminators of deceptive reviews and testimonials.”<sup>238</sup> In response to the commenter’s concern, the Commission notes that those creating or disseminating deceptive reviews and testimonials could be liable under § 465.2(a).

A trade association asked whether a business “disseminates” reviews for its products merely by . . . placing them in advertising/marketing materials.”<sup>239</sup> Section 465.2(b) applies only to the dissemination of testimonials, but if a business includes consumer reviews in its advertising or marketing materials, those reviews become “testimonials” and are covered.

Another commenter requested that the Commission “clarify the limited applicability of ‘to disseminate or cause the dissemination’ in proposed § 465.2(b) so the definition does not wrongly apply to third parties that host or license reviews.”<sup>240</sup> The phrase “to disseminate or cause the dissemination” applies only to testimonials and not to consumer reviews, so it could not apply to third parties that host or license reviews. The only situation in which § 465.2(b) applies to consumer reviews is when a business purchases a consumer review.

## 4. § 465.2(c)

Proposed § 465.2(c) would have made it a violation for a business to “procure a consumer review for posting on a third-party platform or website, about the business or one of its products or services,” which “the business knew or should have known” was fake or false.

Several commenters questioned the scope and “vagueness” of the undefined term “procure” in proposed § 465.2(c).<sup>241</sup> A trade association wrote that “the Commission should explain that a retailer does not ‘procure a consumer review for posting on a third-party platform or website’ simply by requesting that previous customers submit reviews, and then allowing submitted reviews to be posted on the retailer’s own website or sharing customer reviews with Google.”<sup>242</sup> The

<sup>238</sup> TINA Cmt. at 6 n.23.

<sup>239</sup> NRF Cmt. at 5.

<sup>240</sup> CCIA Cmt. at 3.

<sup>241</sup> NRF Cmt. at 4; ANA Cmt. at 12; IAB Cmt. at 4; Amazon Cmt. at 7.

<sup>242</sup> NRF Cmt. at 4.

<sup>229</sup> Albert Cmt. at 3.

<sup>230</sup> *Id.*

<sup>231</sup> IAB Cmt. at 6.

<sup>232</sup> Amazon Cmt. at 6.

<sup>233</sup> Computer & Communications Industry Association, Cmt. on NPRM at 3 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0110> (“CCIA Cmt.”).

Commission did not intend to cover such activities. Instead, the Commission intended to cover a much more limited set of activities: the procurement of fake and false reviews from company insiders. The Commission is therefore revising § 465.2(c) by limiting it to a business procuring consumer reviews “from its officers, managers, employees, or agents, or any of their immediate relatives.”

A trade association’s comment questioned the phrase “its products or services” in the context of what was proposed § 465.2(c).<sup>243</sup> It asked whether the term would apply to all of the products sold by a department store, an online marketplace, or a consignment business.<sup>244</sup> The Commission recognizes that the phrase “its products or services” was ambiguous. In order to address this inadvertent ambiguity, the Commission is making clarifying changes by replacing the phrase “its products or services” with the phrase “the products or services it sells” in § 465.2(b) and (c), as well as in other places where it appears in the rule.<sup>245</sup> The revised language captures what the Commission originally intended and would apply to products sold by a department store, an online marketplace, or a consignment business.

#### 5. § 465.2(d)

Upon consideration of the comments received, the Commission is adding paragraph (d) in § 465.2 to clarify the scope of § 465.2(b) and (c). The Commission recognizes that, when a business sends a broad solicitation to customers to post customer reviews, one or more recipients might also be employees of the business. If any such employee then posts reviews, one might consider those reviews to have been “procured” from the employee. Similarly, the Commission recognizes that broad, incentivized solicitations to the general public or past customers to post about a product on social media could be considered “causing the dissemination” of testimonials. It would not be reasonable to expect a business to know whether such resulting reviews or testimonials were fake or false, and the Commission did not intend to cover those reviews in this section of the proposed rule. Therefore, the Commission is adding § 465.2(d)(1), which clarifies that § 465.2(b) and (c) do not apply to “generalized solicitations to purchasers to post reviews or post testimonials about their experiences

with the product, service, or business that is the subject of the review or testimonial.” By “generalized solicitations,” the Commission means to exempt from § 465.2(b) and (c) solicitations sent to large groups of customers, such as those who purchased a particular item or who became customers during a given time period, where specific customers are not chosen based on the likelihood that they will express a particular sentiment. In contrast, solicitations made only to customers whom the business believes to be happy customers would not be “generalized solicitations” and would therefore be subject to § 465.2(b) and (c).

As the Commission said in the NPRM, § 465.2 does not “apply to any reviews that a platform simply publishes and that it did not purchase.” In other words, the Commission did not intend for § 465.2 to apply to platforms that simply host third-party content and does not believe that the section can be interpreted otherwise. Nonetheless, numerous commenters expressed concern over whether the section covered the mere hosting of third-party content.<sup>246</sup> A number of industry commenters and an individual commenter asked the Commission to expressly exempt those who host consumer reviews created by a third party.<sup>247</sup> Three industry comments asked the Commission to create a safe harbor for review hosting when the company has reasonable processes in place to identify and remove fake reviews.<sup>248</sup> Consistent with its statement in the NPRM, the Commission is adding § 465.2(d)(2) to provide an explicit exemption for “merely engaging in consumer review hosting” from the scope of § 465.2(b) and (c).

A trade association noted that, in the “case of reviews being shared between retailers and third-party platforms,” “it would be unfair to immunize the search platform from liability for the review shared by the retailer, but not to immunize the retailer for the review created by the potential bad actor.”<sup>249</sup> However, a retailer or other entity will

not be liable for sharing consumer reviews unless it would have been liable for displaying those same reviews on its own website.

Two comments raised the issue of hosting both reviews and testimonials. A trade association commenter expressed concern that the Commission should “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.”<sup>250</sup> Another trade association made a very similar comment and “urge[d] the FTC to confirm that liability under this section would require the company to do more than host reviews/testimonials.”<sup>251</sup> As for reviews, § 465.2 will not prohibit an online business that hosts reviews from prompting the submission of reviews from the general public or from organizing, moderating, or aggregating them. Nonetheless, certain unfair or deceptive conduct that involves prompting the submission of reviews or moderation could violate § 465.4 or § 465.7(b), respectively.<sup>252</sup> As for testimonials, it is unclear what hosting scenarios the commenters are contemplating. The Commission is not adding an exemption for “merely hosting testimonials” because there is no provision in the rule that applies to testimonial hosting because testimonials are, by definition, advertising or promotional messages. A business that puts testimonials on its own website is “disseminating” them and is not merely “hosting” them. When such testimonials are fake or false, the business should face potential liability under this paragraph. On the other hand, a business that has on its website a community forum in which consumers can comment about the business and the products or services it sells could be merely hosting the community forum. A comment in the community forum touting one of the business’s products, which was posted by a consumer who was not incentivized to do so and who has no other connection to the company, is not a testimonial in the first place, so it would not fall under § 465.2(b). The same analysis would apply to a business that hosted a section on its website

<sup>246</sup> One industry commenter expressed a general concern that was not tied to a specific provision “that the Proposed Rule imposes liability on companies for the dissemination and/or display of fake reviews that clashes with Section 230 of the *Communications Decency Act*.” TechNet Cmt. at 3. As discussed below, the Commission is including exemptions for mere consumer review hosting in §§ 465.2 and 465.5. See *infra* section IV.B.5 of this document.

<sup>247</sup> See, e.g., NRF Cmt. at 5–6; IAB Cmt. at 6; Amazon Cmt. at 7–9; CCIA Cmt. at 3; Abbott Cmt.

<sup>248</sup> TechNet Cmt. at 2; IAB Cmt. at 5; NRF Cmt. at 7. A trade association also requested a “safe harbor” but did not tie it to any specific provision of the proposed rule. NADA Cmt. at 4.

<sup>249</sup> NRF Cmt. at 6.

<sup>250</sup> IAB Cmt. at 4.

<sup>251</sup> ANA Cmt. at 12–13.

<sup>252</sup> Prompting the submission of consumer reviews that must be positive in order to obtain an incentive could violate § 465.4. Moderation of consumer reviews that results in the suppression of some of them based upon their ratings or their negative sentiment could violate § 465.7(b).

<sup>243</sup> *Id.* at 5.

<sup>244</sup> *Id.* at 5–6.

<sup>245</sup> See §§ 465.5(a), (b), and (c), 465.6, and 465.7(b) of the rule.

where consumers could answer questions posed by other consumers.

A business organization commenter said the Commission should “make clear [that] 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.”<sup>253</sup> Paragraphs (b) and (c) of § 465.2 do not apply to mere consumer review hosting, even if the business prompts review submissions or aggregates star ratings.

The commenter continued by saying that “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,” arguing that “Section 230 [of the Communications Decency Act] . . . broadly immunizes providers of an interactive computer service from liability for presenting third party content.”<sup>254</sup> If a business creates fake or false reviews or testimonials and displays them on its website, it is not presenting third-party content. It could be liable for such reviews or testimonials under § 465.2(a). The commenter made a similar argument with respect to the applicability of § 465.2(b) to a website that displays a fake or false testimonial and thus causes its dissemination.<sup>255</sup> Section 465.2(b) does apply if such testimonials are about the business or one of the products or services it sells. Such testimonials are advertising, not third-party content covered by section 230 of the Communications Decency Act (47 U.S.C. 230).

## 6. Knowledge Standard

Like proposed § 465.2(b) and (c), final § 465.2(b) and (c) are limited to situations in which businesses “knew or should have known” that they were engaging in the conduct that was prohibited. Commenters had varied reactions to this standard, with some finding it appropriate, others finding it too high, and others finding it too low.

A corporate commenter noted that, for the purpose of § 465.2(b) and (c), “[s]hould have known” needs to be the standard.<sup>256</sup> Similarly, an individual commenter recommended that the FTC adopt the “knew or should have known” standard for purposes of § 465.2(b) and (c):

because it: (1) sufficiently effectuates consumers’ shared interest in reducing the prevalence of unfair or deceptive online

consumer reviews and testimonials, (2) avoids unfairly imposing liability on unwitting, blameless business transgressors, and (3) conveniently aligns with the FTC’s existing “has good reason to believe” standard for similar purpose of application of FTC Act Section 5 to the use of endorsements and testimonials in advertising.<sup>257</sup>

However, several commenters objected to the imposition of civil penalties based upon a “should have known” standard, believing that standard would be too onerous.<sup>258</sup> For example, an industry organization said that proposed § 465.2(b) and (c) are “problematic because [they] place[] the onus on the business to have knowledge of the author’s state of mind as to whether their actual experience was expressed. . . , an impossible task for anyone but the” author.<sup>259</sup> The industry organization also claimed that the risk of a civil penalty will “likely . . . compel businesses to drastically limit the consumer reviews or testimonials they seek out or even allow on their websites.”<sup>260</sup> Under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), however, the Commission can seek civil penalties for a rule violation only by showing that a defendant had “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” (hereinafter shortened to “actual knowledge or knowledge fairly implied”). A lower knowledge standard in a Commission rule—such as the “knew or should have known” standard found within certain sections of the proposed rule—does not override the higher standard found in section 5(m)(1)(A) of the FTC Act. The Commission has not suggested otherwise in the course of this rulemaking.

Other commenters objected similarly, saying that “knew or should have known” is too low as a knowledge threshold and that the standard should be actual knowledge, but did not tie their concerns to the imposition of civil penalties.<sup>261</sup> For example, some of the comments expressing concern about a “knew or should have known” standard appeared to focus primarily on the standard’s supposed applicability to, and harsh impact on, websites hosting reviews.<sup>262</sup> As another example, a trade

association commenter recommended “that the Commission define ‘knew,’ as used in . . . § 465.2, as ‘having actual knowledge,’ and remove the ‘should have known’ language.”<sup>263</sup>

Additionally, two commenters advocated for a standard higher than “should have known” but lower than actual knowledge. With respect to activities such as “purchasing” a review, they said that businesses should be held responsible for ensuring the reviews are authentic but recommended a “knew or consciously avoided” standard.<sup>264</sup> One of the commenters asserted that the proposed “should have known” standard “is vague and does not provide adequate specificity about the sorts of actions businesses should take to ensure that they will not be held liable for not detecting that a review they purchased was fake.”<sup>265</sup> The commenter said a “consciously avoided” knowing standard would allow for liability when a business takes no steps to respond to receiving repeated complaints raising red flags about the authenticity of a particular purchased review.<sup>266</sup>

As part of the NPRM, the Commission also inquired whether, instead of the “should have known” standard, the Commission should adopt a “knew or could have known” standard. Only two commenters addressed that proposed standard. An individual commenter said that such a standard would “ambiguously expand the proposed Rule’s prosecutorial scope and possibly open unsuspecting businesses to financial penalties for violations they had no inkling of having committed in the moment.”<sup>267</sup> Another individual commenter, who incorrectly thought the proposed rule provided a private right of action, said that such a standard “provides scienter never used in consumer law” and the “courts could potentially become overwhelmed with an influx of claims.”<sup>268</sup>

Other commenters advocated for a lower standard than “knew or should have known.” An individual commenter did not think that “knew or should have known” was appropriate because it would make it “very difficult to prove” violations and recommended that the Commission require “businesses to be able to show they used reasonable

disagreed, asserting that the “knew or should have known” standard the Commission proposed for § 465.2 will “not unduly burden review platforms.” Travel Tech Cmt. at 4.

<sup>263</sup> NRF Cmt. at 3.

<sup>264</sup> Amazon Cmt. at 9; IAB Cmt. at 5.

<sup>265</sup> Amazon Cmt. at 9.

<sup>266</sup> *Id.*

<sup>267</sup> Poole Cmt. on at 1.

<sup>268</sup> Albert Cmt. at 3.

<sup>257</sup> Poole Cmt. at 2.

<sup>258</sup> IAB Cmt. at 5–6; NRF Cmt. at 2–5; NADA Cmt. at 3–4; Chamber of Commerce Cmt. at 2–3; TechNet Cmt. at 2.

<sup>259</sup> TechNet Cmt. at 2.

<sup>260</sup> *Id.*

<sup>261</sup> Amazon Cmt. at 8; ANA Cmt. at 13; Trustpilot Cmt. at 5, 8; NRF Cmt. at 3; Family First Life Cmt. at 5–8.

<sup>262</sup> Amazon Cmt. at 7–8; ANA Cmt. at 12–13; NRF Cmt. at 2–5. One trade association commenter

<sup>253</sup> Chamber of Commerce Cmt. at 4.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Transparency Company Cmt. at 11.

diligence through policies and procedures to prove that the [ ] reviews are legitimate.”<sup>269</sup> A consumer organization said in its comment that “there is no need for a knowledge or intent requirement under this Rule” as “Section 5 of the FTC Act does not otherwise require the Commission to prove knowledge or intent when enforcing against entities engaging in deceptive practices.”<sup>270</sup> It continued that “the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.”<sup>271</sup>

After reviewing and considering the comments received, the Commission believes that the most appropriate standard for imposing liability under § 465.2(b) and (c) is the “knew or should have known standard.” As discussed above,<sup>272</sup> those paragraphs were not intended to apply to consumer review hosting and § 465.2(d)(2) now contains an explicit exemption for consumer review hosting.<sup>273</sup> Thus, the “knew or should have known” language in § 465.2(b) and (c) will not have a harsh impact on review platforms, as some of the commenters suggested. Eliminating the knowledge standard altogether, however, may indeed have an overly harsh impact on businesses in some circumstances, and the idea garnered almost no public support. For example, it would be unreasonable to hold a company liable for publishing a testimonial when it had no reason to know that the testimonial misrepresented the testimonialist’s experience. The Commission sees no reason why the standard should be higher than “knew or should have known.” The “knew or should have known” standard—which the Commission has used in other rules<sup>274</sup>—thus best achieves the

appropriate, equitable balance between protecting consumers and holding marketers accountable for deceptive conduct while not overly burdening marketers that engage in the responsible use of reviews and testimonials.

Two trade associations’ comments said that if “the Commission . . . 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.”<sup>275</sup> They both said, “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 all.”<sup>276</sup> The Commission has already addressed the knowledge standard found in section 5(m)(1)(A), which applies to the imposition of civil penalties. In the discussion of § 465.2(b) and (c) below, the Commission provides further guidance as to what is intended by “knew or should have known.”

Several other commenters discussed general views about the application of the “knew or should have known” standard. For example, an individual commenter said that “[a] business cannot always reasonably know that a testimonial contains testimony that is fake or false, if the influencer expresses to them that it is true.”<sup>277</sup> The Commission agrees with this assertion.

A comment from a public interest research center said that the “lack of an adequate endorser oversight program should be a per se violation of the ‘know or should have known’ standard as that is tantamount to the company deliberately avoiding knowing.”<sup>278</sup> A consumer organization commenter said

should know that the manufacturer does not have a reasonable basis for the claim’); 16 CFR 436.7(d) (franchise sellers must notify prospective franchisees of any material changes “that the seller knows or should have known occurred”).

<sup>275</sup> IAB Cmt. at 5–6; ANA Cmt. at 13. An individual commenter said that the Commission should “provide some clear and objective criteria or indicators for identifying fake reviews, such as the use of bots, scripts, templates, or multiple accounts, or the lack of verifiable purchase or experience, or the inconsistency with other reviews or information” and this “would help businesses and consumers to distinguish between genuine and fake reviews.” Ravnitzky Cmt. at 1.

<sup>276</sup> IAB Cmt. at 5–6; ANA Cmt. at 13. As explained above, these concerns are unwarranted given that the “should have known” standard has no bearing here on the imposition of civil penalties, for which the Commission must prove that a defendant met the higher knowledge standard of section 5(m)(1)(A) of the FTC Act.

<sup>277</sup> Taylor V, Cmt. on NPRM at 2 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0062> (“Taylor V. Cmt.”).

<sup>278</sup> EPIC Cmt. at 3.

that the following actions should be considered knowledge that a review is fake or false: “failure to meaningfully police” for suspicious review activity, “inducements to provide reviews without clearly instructing the reviewer to clearly disclose material conflicts,” “materially incentivizing reviews where it’s impossible to convey material conflicts (e.g., providing a five-star review with no accompanying narrative on TripAdvisor),” and “failure to take meaningful steps to confirm the existence of the purported celebrity or meaningfully document the celebrity’s purported experience with the product or service.”<sup>279</sup> The Commission encourages businesses to have endorser oversight programs, and whether a company has and follows such a program could impact the exercise of prosecutorial discretion. The Commission does not intend, however, for companies to be liable under this section of the rule based merely on the absence of an oversight program or on these other suggested bases.

A corporate commenter said that “how a business ‘should have known’ that a reviewer does not exist is not apparent,” and posited that, under a “should have known” standard, “perhaps [a] business may be under a duty to reach out to the reviewer, but it is unclear how many resources the business must expend to attempt to contact the reviewer.”<sup>280</sup> First, as noted, § 465.2(d)(2) exempts businesses merely engaging in consumer review hosting from § 465.2(b) and (c). Another key limitation here is the exemption for generalized solicitations under § 465.2(d)(1). That exemption means that businesses can send such solicitations to their customers without creating any investigative obligation for resulting reviews under § 465.2(b) or (c), even if such reviews have been “purchased.”<sup>281</sup>

With respect to “purchased” reviews under § 465.2(b) the rule’s “knew or should have known” standard does not impose a general duty to reach out to the reviewers or investigate whether each resulting review is fake or false. While each case will depend on its specific facts, it is possible that a business may possess clear indications that purchased reviews are likely to be fake or false, in which case a failure to investigate further may trigger liability under the “should have known”

<sup>279</sup> Consumer Reports Cmt. at 5.

<sup>280</sup> Family First Life Cmt. at 6.

<sup>281</sup> Paying for or giving other incentives in exchange for consumer reviews expressing a particular sentiment regarding the product, service, or business that is the subject of the review would violate § 465.4 of the rule.

<sup>269</sup> Annie Horgan, Cmt. on NPRM at 1–2 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0058>.

<sup>270</sup> Consumer Reports Cmt. at 4.

<sup>271</sup> *Id.* at 4–5. An individual commenter disagreed, stating that “the complete removal of a knowledge requirement in favor of a strict liability approach would almost guarantee situations of unwarranted punishment under the proposed rule.” Poole Cmt. at 3.

<sup>272</sup> See *supra* section IV.B.5. of this document.

<sup>273</sup> The final rule would therefore not require a business that is merely hosting consumer reviews on its platform to prove that the reviews it is hosting are legitimate.

<sup>274</sup> Other Commission rule provisions with a “knew or had reason to know” requirement include § 460.8 of Labeling and Advertising of Home Insulation (commonly known as the R-Value Rule), which prohibits non-manufacturers of home insulation from relying on R-value data provided by the manufacturer if they “know or should know” the data is false or not based on proper tests. 16 CFR 460.8; see also 16 CFR 460.19(e) (non-manufacturers are liable only if they “know or

standard. For example, a business that hires a third party to provide free samples of its products to consumers in order to generate reviews, without more, may have no reason to investigate the resulting reviews. However, a business may be on notice that the resulting reviews are likely fake or false if they are submitted too quickly after purchase or many of them are submitted in a very short period of time or refer to the wrong product. As for § 465.2(c), which applies only to reviews by insiders, a possible reason for knowing that such reviews are likely fake or false could be that an insider sent emails to a manager over time that together showed that the insider was using multiple accounts to submit reviews to the same website.

A company that is in the business of identifying fake consumer reviews described ways that a business purchasing or procuring a consumer review should know that the review is fake or false. These indications include the named reviewer not being a customer, the content of the review being vague or odd, many reviews arriving at once, and the use of unnatural language or “keyword stuffing.”<sup>282</sup> A review platform commenter gave similar ways that a business could identify fake reviews, such as “the review text describes a product or service that is not offered by the business, the review clearly references the wrong business name, or perhaps if a review . . . acknowledges that the reviewer has never shopped there.”<sup>283</sup> Although, as previously stated, each case depends on its specific facts, these various indications may indeed suggest that one or more purchased or insider reviews are likely fake or false, in which case a failure to reasonably investigate them may trigger liability under the “should have known” standard.

With respect to testimonials, there may be red flags that should indicate to a business that a testimonial is likely fake or false, and, thereby, would serve as indicia of the fact that the business should have known that the testimonials that it disseminated were fake or false. For example, the Commission alleged that Google asked iHeartMedia, Inc. radio personalities to record product testimonials for a smartphone using a standard script written for Google and refused to provide the radio personalities with the product when requested.<sup>284</sup> If a business provides the text for a testimonial, it

should have a reasonable basis to conclude, based on inquiry or otherwise, that the text is truthful for the testimonialist. A testimonialist asking for the product should cause a business to question whether the testimonialist used the product. If a business knows that a testimonialist is using a competing product, it should inquire into whether a testimonial for its own product is truthful. For example, a business should investigate whether a celebrity testimonial for its new smartphone is false if the testimonial claims the celebrity exclusively uses the smartphone, but the social media post containing the testimonial indicates that the celebrity posted it using a competing smartphone brand.

A review platform said in its comment that, “if procuring fake reviews is the action of a single, rogue employee trying to help the business they work for, on a practical level it may be difficult for a business to have knowledge of” it.<sup>285</sup> The commenter suggested that the Commission consider “whether it is in fact disproportionate for knowledge and liability to be attributed to a business because of the actions of a well-intentioned rogue employee.”<sup>286</sup> Whether a business will be held responsible under the rule for a rogue employee under a “knew or should have known” standard will be a fact-intensive inquiry. While a business may not be aware of every employee’s activities, it should be pay attention to red flags. Assuming that the facts are such that the business should have known of the rogue employee’s actions, whether the business would also be subject to civil penalties would depend on whether a court finds that the business met the actual knowledge or knowledge fairly implied standard of section 5(m)(1)(A) of the FTC Act.

## 7. Other Proposals

Some commenters suggested that the Commission impose additional requirements. Many commenters suggested that third-party platforms featuring reviews should be held responsible for certain conduct, such as for: failing to report businesses that they suspect are posting fake reviews,<sup>287</sup> the “lack of identification verifications,”<sup>288</sup> not posting notices reminding consumers that there is no guarantee of the veracity or accuracy of customer reviews,<sup>289</sup> engaging in review

“manipulation” for advertising purposes,<sup>290</sup> failing to disclose publicly certain information about posted reviews,<sup>291</sup> or failing to employ reasonable measures to root out fraud and deceptive reviews.<sup>292</sup> A review platform suggested imposing requirements on social media companies and internet service providers to address the sale of fake reviews,<sup>293</sup> and a trade association proposed that the Commission require reviewers to identify themselves and that social media sites hosting reviews verify reviewers’ identities.<sup>294</sup> As explained above, the Commission’s intent from the outset of this rulemaking was to focus on clearly unfair or deceptive conduct involving reviews and testimonials. This intent is reflected in, as explained above, the addition of a definition of the term “consumer review hosting” and the explicit exclusion of such mere hosting from the coverage of certain rule provisions. This focus should not be taken to signal that third-party platforms do not bear significant responsibility for combatting fake reviews.

An individual commenter recommended “requir[ing] proof of purchase of [a] product for a consumer to leave a review.”<sup>295</sup> Another individual commenter would have the Commission hold businesses that recruit, direct, and compensate influencers responsible for the influencers’ false or fake testimonials.<sup>296</sup> A third commenter asked that the Commission “ensure there is a way for anyone who is believed to have violated reviewing policies [to have] a chance to reinstate their ability to leave

[www.regulations.gov/comment/FTC-2023-0047-0082](http://www.regulations.gov/comment/FTC-2023-0047-0082).

<sup>290</sup> Wilhelmina Randtke, Cmt. on NPRM at 1 (Sept. 26, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0068>.

<sup>291</sup> Fake Review Watch Cmt. at 2–3.

<sup>292</sup> Consumer Reports Cmt. at 3.

<sup>293</sup> Trustpilot Cmt. at 3, 7.

<sup>294</sup> ADA Cmt. at 2.

<sup>295</sup> Albert Cmt. at 4; *see also* Yann Kakouris, Cmt. on NPRM at 1, 3 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0055>. The commenter also expressed concerns that “violators are too difficult to track,” asserted that civil penalties would somehow deter consumers from posting honest, negative comments about a business, and misunderstood the purpose and use of civil penalties, thinking that a large portion of civil penalties would go to businesses maligned by fake comments. *Id.* at 1–2. A review platform commenter said that the proposed rule “upholds legitimate consumer speech by ensuring that, ‘proposed § 465.2 does not limit legitimate reviews to reviews by purchasers or verified purchasers’ ” and “by preserving anonymous reviews.” TripAdvisor LLC, Cmt. on NPRM at 4–5 (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0092> (“TripAdvisor Cmt.”).

<sup>296</sup> Taylor V. Cmt. at 2.

<sup>285</sup> Trustpilot Cmt. at 9–10.

<sup>286</sup> *Id.*

<sup>287</sup> Anonymous 3 Cmt.

<sup>288</sup> Foster Cmt. at 2.

<sup>289</sup> Frieling Cmt. at 2; *see also* Anonymous 6, Cmt. on NPRM (Sept. 29, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0092>.

<sup>282</sup> Transparency Company Cmt. at 11.

<sup>283</sup> Trustpilot Cmt. at 10.

<sup>284</sup> Complaint at 2–5, *In re Google, LLC*, Nos. C–4783 and C–4784 (F.T.C. Feb. 8, 2023).

reviews.”<sup>297</sup> A consumer organization recommended making clear that “it is a deceptive practice to aggregate fake reviews in a product’s consumer rating” and that “reviews requiring a disclosure should not be included in a product’s rating.”<sup>298</sup> The Commission appreciates these additional suggestions but declines to add any of them to the rule. The suggestions are beyond the scope of the rulemaking, which focuses instead on those responsible for clearly unfair or deceptive acts or practices regarding reviews and testimonials, and which is limited to those acts or practices for which the Commission has evidence of prevalence.

In response to other commenters suggesting that the Commission impose liability on review sites and online retailers, a trade association asked the Commission to make clear that sections 5 and 18 of the FTC Act contain no express authorization for assisting-and-facilitating liability.<sup>299</sup> As this legal issue goes beyond, the context of this rulemaking, the Commission declines to address it here.

#### C. § 465.3—Consumer Review or Testimonial Reuse or Repurposing

Proposed § 465.3 sought to address a business using or repurposing a consumer review written or created for one product so that it appears to have been written or created for a substantially different product. It also sought to cover businesses that caused such use or repurposing.

The Commission received varied comments, both supportive and critical, about this provision.<sup>300</sup> As described above, some commenters also raised concerns about the definition of “substantially different product,” a term that appeared only in this provision and is key to determining the circumstances in which the provision would apply; one of those commenters proposed a disputed issue of material fact related to that definition.<sup>301</sup> The Commission would need to address those concerns before finalizing the provision. As it is not able to resolve those concerns on the current rulemaking record, the Commission has decided not to finalize the provision. If the Commission chooses later to engage in further

rulemaking regarding the provision, it will address the comments at that time.

#### D. § 465.4—Buying Positive or Negative Consumer Reviews

Proposed § 465.4 sought to address businesses providing “compensation or other incentives in exchange for, or conditioned on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.” Based on the following, the Commission has decided to finalize this provision with two modifications.<sup>302</sup>

Comments from a retailer and a trade association expressed that they found the section important and useful. The retailer said, “This section is important to ensure that the rule covers bad actors that seek inauthentic reviews reflecting a particular predetermined sentiment.”<sup>303</sup> The trade association wrote, “Providing compensation in exchange for reviews that must reflect a particular sentiment is a deceptive practice,” and expressed support for “the Commission’s goal of targeting and eliminating this practice.”<sup>304</sup>

Three individual commenters mistakenly thought that proposed § 465.4 banned paid or incentivized customer reviews and were opposed to such a ban. One of them said the proposed provision would “ban reviews which are made by those who have been provided an item,” that “[g]enerally the writer includes a list of sponsors on, or within, their blog/website,” and that “[i]f such sponsorship relationships are eliminated . . . , the ability of writers to review a variety of items will disappear.”<sup>305</sup> The second one wrote, “Section 465.4 of the proposed rule prohibits the incentivization of or compensation on for the creation of consumer reviews or testimonials. . . . [I]t is unnecessarily restrictive.”<sup>306</sup> The third commenter did not support the provision “forbidding paying for reviews” because the practice “does not . . . deceive the public unless the paid review service dictates that the review must be positive.”<sup>307</sup> These commenters misunderstand the nature of § 465.4. First, § 465.4 does not apply to testimonials, only to consumer

reviews, and then only to reviews that appear on a website or portion of a website dedicated to receiving and displaying such reviews. A blogger’s “review” is not considered a consumer review for purposes of the rule; if such a review was incentivized, it would be considered a testimonial. Second, § 465.4 does not prohibit paid or incentivized consumer reviews. It only prohibits paid or incentivized consumer reviews when the business soliciting the review provides compensation or an incentive in exchange for a review expressing a particular sentiment.

In Question 12 of the NPRM, the Commission asked whether the prohibition in § 465.4 should “distinguish in any way between an explicit and implied condition that a consumer review express a particular sentiment.”<sup>308</sup>

A business commenter responded, “Real consumers’ reviews often contain multiple sentiments on what businesses did right and what they did wrong. This is helpful.”<sup>309</sup> The meaning of this comment is unclear.

Another business commenter responded to Question 12 of the NPRM by stating that § 465.4 “should unequivocally prohibit explicit conditions only,” because this would “provide[] a clear standard for businesses and reviewers to follow,” and “the lack of clarity in how the Proposed Rule would prohibit ‘implied conditions’ [would] stifle[] businesses’ ability to encourage and to entice reviews in a legitimate manner.”<sup>310</sup> The Commission disagrees and believes that businesses are capable of soliciting and encouraging reviews without suggesting that the reviews must be positive to obtain an incentive. The commenter also asserted that the Commission “has no experience bringing enforcement actions against a business for allegedly creating an implied condition that a review or endorsement be positive,” referencing the cases the Commission cited in the NPRM.<sup>311</sup> That assertion is incorrect. The respondent in *AmeriFreight, Inc.* did not expressly state that the reviews needed to be positive but only implied it, encouraging past customers to submit reviews 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.”<sup>312</sup> The respondent also told past customers that

<sup>308</sup> NPRM, 87 FR 49389.

<sup>309</sup> Transparency Company Cmt. at 12.

<sup>310</sup> Family First Life Cmt. at 8–9.

<sup>311</sup> *Id.* at 10–11.

<sup>312</sup> *In re AmeriFreight, Inc.*, 159 F.T.C. 1626, 1627–30 (2015).

<sup>297</sup> Osburn Cmt.

<sup>298</sup> TINA Cmt. at 6.

<sup>299</sup> Chamber of Commerce Cmt. at 2.

<sup>300</sup> See, e.g., IAB Cmt. at 7–8; ANA Cmt. at 14; Chamber of Commerce Cmt. at 5–6; Trustpilot Cmt. at 10; Consumer Reports Cmt. at 5–6; Amazon Cmt. at 10; CCLA Cmt. at 3; NRF Cmt. at 7–8; Ravnitzky Cmt. at 2.

<sup>301</sup> See *supra* sections I.C. and IV.A.2.j of this document.

<sup>302</sup> One minor modification is changing “Rule” to “part.”

<sup>303</sup> Amazon Cmt. at 6.

<sup>304</sup> IAB Cmt. at 8.

<sup>305</sup> Alex Rooker, Cmt. on NPRM (Aug. 15, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0019>.

<sup>306</sup> Frieling Cmt. at 2.

<sup>307</sup> Anonymous 7, Cmt. on NPRM (Aug. 15, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0021>.

they should “be creative and try to make your review stand out for viewers to read.”<sup>313</sup>

Two trade associations gave examples of what they asserted were innocuous requests for reviews that could be considered as implying that reviews need to be positive in order to receive an incentive. One said that its members will sometimes automatically contact customers saying, “Tell us how much you loved [product] for 10% off your next purchase!” and that such a request could “be read to violate this Section of the Proposed Rule—even if a negative review would still entitle the consumer to the incentive or bonus.”<sup>314</sup> The other commenter wrote that, if the Commission says that “a business may not implicitly seek positive reviews in exchange for incentives, then the rule could apply to such offers as, ‘Tell us how much you loved your visit to John’s Steakhouse and get a \$5 coupon’ or ‘Tell your friends about all the fun you had at Jane’s Arcade for a chance to win prizes,’” and asserted that such requests are justified because businesses “prefer to use these enthusiastic and positive messages when seeking reviews, as opposed to less inspiring messages like, ‘Write a review and save 10% next time.’”<sup>315</sup> The problem with the enthusiastic and positive messages suggested by these commenters is that consumers receiving them could reasonably take the message that their reviews must be positive and enthusiastic in order to obtain the reward. As the second commenter noted, there are perfectly acceptable, albeit less “inspiring,” alternatives. The second commenter also said that “a reasonable consumer would infer that a business prefers positive reviews, and so even a neutral request such as, ‘Write a review and receive a discount off your next purchase,’ might be construed as impliedly requesting a positive review.”<sup>316</sup> The Commission disagrees. The fact that businesses prefer positive reviews is not a basis on which to conclude that consumers would interpret any such “neutral request” as containing an implied condition that reviews must be positive to receive the offered discount.

A consumer organization said in its comment that, “[w]hen a reviewer feels pressured to express a certain sentiment, regardless of how that pressure was generated, the net result is a deceptive review,” and that there should be “no distinction made between

explicitly and implicit conditioning of compensation or other incentives.”<sup>317</sup> A second consumer organization commenter said that “[i]mplied conditions may be just as salient as express conditions” and quoting *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942), said that, “[i]n interacting with businesses, [t]he ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.”<sup>318</sup> The Commission agrees with both of these commenters.

Advocating for limiting the provision to express conditions, a trade association acknowledged that the NPRM clarified that the provision does not cover review gating,<sup>319</sup> the mere solicitation of positive reviews, or incentivized reviews (except for those required to express a particular sentiment), but argued that, “[r]egardless, the Proposed Rule still could be read to prohibit such behavior—*i.e.*, when a Company solicits a review that it has reason to believe will be positive.”<sup>320</sup> The Commission does not consider this statement to be a fair reading of the provision. Just because a business engages in review gating or otherwise expects reviews to be positive does not mean there is either an express or implied requirement that reviews need to be positive to obtain an incentive. The Commission notes that, although § 465.4 does not cover “review gating,” review gating can nonetheless violate section 5 of the FTC Act.<sup>321</sup>

A review platform commenter said that prohibiting an “implied condition to express a particular sentiment could create a number of gray areas” and “encouraged the FTC to provide guidance and examples to businesses.”<sup>322</sup> The examples,

<sup>317</sup> Consumer Reports Cmt. at 6.

<sup>318</sup> TINA Cmt. at 10. An individual commenter described the pressure they felt to leave a positive review of a car dealership in order to receive a gift card and said that proposed “§ 465.4 should . . . address both explicit and implied conditions of incentivization.” Anonymous 8, Cmt. on NPRM at 3–5 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0061>.

<sup>319</sup> As the Commission explained in the NPRM, “Review gating occurs when a business asks past purchasers to provide feedback on a product and then invites only those who provide positive feedback to post online reviews on one or more websites.” See NPRM, 88 FR 49379.

<sup>320</sup> NRF Cmt. at 9. The commenter went on to ask that “the Rule be revised to only prohibit companies from ‘. . . provid[ing] compensation or other incentives in exchange for . . . consumer reviews explicitly required to express a particular sentiment, whether positive or negative. . . .’” (emphasis in original). *Id.*

<sup>321</sup> See Endorsement Guides, 16 CFR 255.2(d) and (e)(11).

<sup>322</sup> Trustpilot Cmt. at 11.

discussed above, by the trade association asking consumers to say how much they “love” something or how much fun they had are excellent examples of implied conditions.

The Commission has decided to clarify that the rule prohibits businesses from providing incentives conditioned on the writing or creation of consumer reviews expressing a particular sentiment, regardless of whether the conditional nature of the incentive is express or implicit. For this purpose, the Commission is adding the phrase “expressly or by implication” in § 465.4 to clarify that, although the incentive needs to be conditioned on the writing or creation of consumer reviews expressing a particular sentiment in order for conduct to violate § 465.4, the condition may be implicit.

Three commenters argued that the Commission should allow the compensation or incentives addressed in § 465.4 as long as they are disclosed in the resulting reviews. For example, the first commenter wrote, “A reasonable consumer can easily understand that when a reviewer is incentivized or compensated, the content they produce may be skewed in a more positive light. A mere disclaimer is sufficient to stave off misrepresentation.”<sup>323</sup> This statement may be correct for some incentivized reviews when there is no express or implied condition for those reviews to express a particular sentiment. For such reviews, an adequate disclosure that incentives were provided in exchange for the review may be able to cure a misleading impression that the reviews were independent and unbiased. However, such a disclosure does not reveal to consumers the requirement that reviews be positive. In addition, even if an individual review disclosed that it resulted from incentives requiring the review to be positive, such a disclosure would not be effective in instances where a consumer relies on the overall average star rating and does not read all individual reviews. Furthermore, the Commission believes that, if incentives are conditioned on reviews expressing a particular sentiment, many resulting reviews will not be merely misleading but false. For example, the offer of an incentive in exchange for a positive review may lead some reviewers to create positive reviews even when they had a negative experience with the product, service, or business. No disclosure can adequately cure a false review.<sup>324</sup>

<sup>323</sup> Frieling Cmt. at 3.

<sup>324</sup> See FTC Policy Statement on Deception, 103 F.T.C. at 180 (“[P]ro forma statements or

<sup>313</sup> *Id.* at 1628.

<sup>314</sup> NRF Cmt. at 8.

<sup>315</sup> ANA Cmt. at 8.

<sup>316</sup> *Id.*

The second commenter taking this position pointed to examples in the Endorsement Guides,<sup>325</sup> claiming inaccurately that they stand for the proposition that businesses are allowed to offer incentives in exchange for positive reviews.<sup>326</sup> The Endorsement Guides do contain an example involving incentives for reviews conditioned on the reviews being positive: “[a] manufacturer offer[ing] to pay genuine purchasers \$20 each to write positive reviews of its products on third-party review websites.”<sup>327</sup> However, consistent with the Commission’s approach in this section, the Guides provide that “[s]uch reviews are deceptive *even if the payment is disclosed* because their positive nature is required by, rather than being merely influenced by, the payment.”<sup>328</sup>

The third commenter taking this position suggested that it should be acceptable to use a disclosure like, “We asked customers to tell us how much they loved their visit to John’s Steakhouse, and here’s what some of them said! (customers who submitted reviews received a \$5 coupon).”<sup>329</sup> The scenario the commenter describes does not involve consumer reviews. It involves consumer testimonials, which are not covered by § 465.4. Further, it is unlikely that one could make such a disclosure in the context of consumer reviews, given how reviews are usually presented on a business’s own website and the lack of control over the way they are presented on a third-party website. In addition, the disclosure does not communicate that the customers had to “tell how much they loved their visit *in order* to receive a \$5 coupon.” Furthermore, as discussed above, many

disclaimers may not cure otherwise deceptive messages”); *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (“Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.”); Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000), [https://www.ftc.gov/system/files/documents/public\\_statements/297751/000301jpsdeceptoveads.pdf](https://www.ftc.gov/system/files/documents/public_statements/297751/000301jpsdeceptoveads.pdf) (“If a claim is false, a disclosure that provides contradictory information is unlikely to cure the deception.”); *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 n.9 (1st Cir. 2010) (“A statement that studies prove a product cures a certain disease, followed by a disclaimer that the statement is opinion and the product actually does not cure the disease, leaves an overall impression of nonsense, not clarity.”).

<sup>325</sup> Endorsement Guides, 16 CFR 255.5(b)(2), (3), (7), (8), (9), and (11).

<sup>326</sup> Hammacher Schlemmer Cmt. at 3–4.

<sup>327</sup> Endorsement Guides, 16 CFR 255.2(e)(9).

<sup>328</sup> *Id.* (emphasis added).

<sup>329</sup> ANA Cmt. at 8.

incentivized reviews conditioned on consumers saying how much they “loved their visit” are likely false regardless of such a disclosure.

Two commenters, an individual and a review platform, requested that § 465.4 go further and prohibit all incentives given in exchange for reviews regardless of any requirement to express a particular sentiment.<sup>330</sup> An individual commenter would have the Commission “require businesses to disclose any form of incentive that they provide or arrange for reviewers.”<sup>331</sup> These requests are beyond the scope of this rulemaking but are addressed in the Endorsement Guides, which provide that unexpected material connections such as incentives given in exchange for customer reviews without any requirement as to the sentiment of the reviews must be disclosed clearly and conspicuously.<sup>332</sup> The Commission continues to believe that this principle from the Endorsement Guides is an appropriate expression of what incentivized review practices would or would not violate section 5 of the FTC Act. In any event, there is no basis on the current rulemaking record for the Commission to conclude that *all* incentivized reviews should be prohibited or that *all* incentivized reviews should require a disclosure.

Two commenters, an individual and a review platform, recommended that § 465.4 also prohibit offering compensation to remove or change consumer reviews.<sup>333</sup> Another individual commenter inquired about paid review removal without stating a position on the topic.<sup>334</sup> The Commission previously noted that, “[i]n procuring [or] suppressing . . . consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products.”<sup>335</sup> A product marketer paying consumers to change or remove truthful negative reviews may be engaging in an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer’s products. Nevertheless, that act or practice is beyond the scope of this rulemaking.

<sup>330</sup> Anonymous 3 Cmt; Yelp Cmt. at 5–6.

<sup>331</sup> Ravnitzky Cmt. at 1.

<sup>332</sup> Endorsement Guides, 16 CFR 255.5(a) & (b)(6)(ii).

<sup>333</sup> Camp-Martin Cmt. at 4–5; Yelp Cmt. at 7.

<sup>334</sup> Anonymous 4 Cmt.

<sup>335</sup> Endorsement Guides, 16 CFR 255.2(d).

#### E. § 465.5—Insider Consumer Reviews and Consumer Testimonials

Proposed § 465.5 sought to prohibit certain undisclosed insider reviews and testimonials. It had three subparts. Proposed § 465.5(a) would have prohibited an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or one of its products or services that failed to have a clear and conspicuous disclosure of the officer’s or manager’s relationship to the business.<sup>336</sup> Proposed § 465.5(b) would have applied to testimonials, but not consumer reviews. It would have prohibited a business from disseminating or causing the dissemination of a consumer testimonial about the business or one of the products or services by one of its officers, managers, employees, or agents, or any of their relatives, if that testimonial failed to have a clear and conspicuous disclosure of the testimonialist’s relationship to the business or to the officer, manager, employee, or agent, and if the business knew or should have known of that relationship. Proposed § 465.5(c) would have applied to consumer reviews, but not testimonials, and would have been limited to when an officer or manager of a business solicits or demands a consumer review about the business or one of its products or services from an employee, an agent, or a relative of any such officer, manager, employee, or agent. Proposed § 465.5(c) would have prohibited that conduct when (1) the person requesting the review knew or should have known the prospective reviewer’s relationship to the business (or to one of its officers, managers, employees, or agents), (2) the request resulted in a consumer review without a disclosure, and (3) the person requesting the review (a) did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship, (b) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps, or (c) encouraged

<sup>336</sup> Due to an inadvertent drafting error, the regulatory text of proposed § 465.5(a), which addressed an officer or manager of a business writing or creating a consumer review or consumer testimonial about the business or its products or services, only referenced disclosure of the officer’s but not the manager’s relationship to the business. The Commission clearly intended that proposed § 465.5(a) require disclosure of the manager’s relationship as well. See NPRM, 88 FR 49379 (“Proposed § 465.5(a) would prohibit an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or its products or services if the consumer review or consumer testimonial does not have a clear and conspicuous disclosure of the officer’s or manager’s relationship to the business.”).

the prospective reviewer not to make such a disclosure. The Commission has determined to finalize proposed § 465.5 with a number of modifications.<sup>337</sup>

Two individual commenters shared their experiences with insider reviews. One individual commenter “made a purchase based on a glowing review” but “later discovered that the person who wrote the review was, in fact, a salesperson for the same company, receiving a commission based on my purchase,” and the purchase turned out to be “a fraudulent service.”<sup>338</sup> Another individual commenter shared their experience as an employee: “I was asked to leave positive reviews in Amazon . . . and in other sites to boost the number of positive reviews for our products. The CEO asked employees to do this and include family members. In fact, I found the immediate family and friends of the CEO leaving glowing reviews of the product.”<sup>339</sup>

A business commenter said, “If you allow insider reviews, disclosure [of the reviewers’ relationship to the business] should be mandatory.”<sup>340</sup> Another business commenter wrote that “limiting . . . § 465.5(a)–(c) to circumstances in which the requisite disclosure is absent is a fair restriction on businesses that would simultaneously protect consumers all while allowing businesses to effectively advertise.”<sup>341</sup> The commenter noted that the “requirement for clear-and-conspicuous disclosure is used widely throughout federal and state consumer protection laws.”<sup>342</sup> The commenter was also concerned that a rule might “infringe on the ability of employees and independent contractor agents . . . to inform others of their experiences with an employer or principal.”<sup>343</sup> To the extent that the commenter is referring to review websites that specialize in reviewing employers from the perspective of employees, it is obvious that the reviewers are employees or former employees, and no further disclosure appears necessary.

A trade association commented that it “understands the Commission’s concern that in some cases, employees may have an incentive to post positive reviews on behalf of their company’s products,” but the concern “is already addressed through Section 5 and the Endorsement

Guides.”<sup>344</sup> The Commission continues to believe that certain conduct should be addressed by a trade regulation rule even if it can also be addressed through section 5 enforcement actions. Having specific conduct addressed by a rule provides the general public with further clarity as to what steps are necessary to conform its conduct to the requirements of the law, deters prevalent unlawful conduct, and allows the Commission to bring enforcement actions more efficiently and effectively.

A retailer recommended that the provision “be revised to further incorporate a requirement that the ‘insider’ review/testimonial be ‘fake’ or ‘false,’ in order to better target the deceptive acts of bad actors that use their employees to generate fake reviews and testimonials that purport to be from actual customers.”<sup>345</sup> The Commission rejects that suggestion, as the intention of § 465.5 is to address certain inherently biased reviews and testimonials. Fake and false reviews are already addressed by § 465.2.

#### 1. Material Connections

Commenters pointed out what they saw as inconsistencies between proposed § 465.5 and section 5 of the FTC Act. A retailer commenter wrote that proposed § 465.5 was “inconsistent with the longstanding principles in the Endorsement Guides . . . that disclosures must be made when the connection between a reviewer and the sponsoring advertiser is material, meaning it would affect the weight or credibility that consumers give to the endorsement.”<sup>346</sup> A trade association noted in its comment that the section “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” and “would impose civil penalties for reviews or testimonials that are not even deceptive.”<sup>347</sup> Another trade association opined “that a reviewer’s out-of-state second cousin [who] works a minimum-wage job at a retailer would (hopefully) not be a ‘material connection’ requiring disclosure under the Endorsement Guides, because such connection would not bias the reviewer’s review, and therefore would not make the review misleading.”<sup>348</sup> The same trade association and a business organization also commented

that the provision poses concerns under the First Amendment by “broadly prohibiting certain reviews or testimonials by ‘insiders’ regardless of whether that speech is deceptive in context.”<sup>349</sup> The Commission intended for § 465.5 to be limited to unfair or deceptive failures to disclose material connections, and is now clarifying this intent. Specifically, in paragraphs (a) through (c) of § 465.5, the Commission is limiting the covered relationships to “material” relationships. In § 465.5(a) and (b), the Commission is also clarifying that, under certain circumstances, the relationship of a consumer testimonialist may be clear to the audience without disclosure. For example, the audience may already be aware that an executive is associated with a particular company, or the context of an ad may otherwise communicate a relationship with a particular company. Specifically, in § 465.5(b), which applies only to consumer testimonials, the Commission is adding the requirement that “the relationship is not otherwise clear to the audience,” and in § 465.5(a), which involves both consumer reviews and testimonials, it is adding, “unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.” The Commission does not believe that, absent a disclosure, a relationship will ever be clear to consumers in the context of an ordinary consumer review.

#### 2. Relatives

Proposed § 465.5(b) and (c) would have required disclosures in some circumstances involving consumer testimonials or reviews from “relatives” of a company’s officers, managers, employees, or agents. Some commenters voiced concerns pertaining to these requirements.

For example, a review platform, explaining that it prohibits reviews about a business or its products by someone whose immediate family owns or works for the business, asked how businesses would “know whether reviews have been submitted by the extended family (such as the second cousins) of their officers, managers, employees, or agents,” questioned whether it would be proportional to seek penalties when extended family are involved, and suggested “narrowing the scope of the family requirement” to “immediate family.”<sup>350</sup> A trade association said that “relatives can include cousins, nieces/nephews, and other more distant familial

<sup>337</sup> Proposed § 465.5(b) and (c) are being renumbered as final § 465.5(b)(1) and (c)(1).

<sup>338</sup> Anonymous 9, Cmt. on NPRM (Aug. 16, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0023>.

<sup>339</sup> Anonymous 5 Cmt.

<sup>340</sup> Transparency Company Cmt. at 13.

<sup>341</sup> Family First Life Cmt. at 13.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 3.

<sup>344</sup> NRF Cmt. at 9.

<sup>345</sup> Amazon Cmt. at 11.

<sup>346</sup> *Id.*

<sup>347</sup> IAB Cmt. at 9.

<sup>348</sup> NRF Cmt. at 9.

<sup>349</sup> *Id.* at 11; TechNet Cmt. at 3.

<sup>350</sup> Trustpilot Cmt. at 5–6.

relationships,” that “even immediate family relationships (parents, children, siblings) are not always closely held” because “adult siblings are not necessarily in each other’s day-today lives,” and that “it would be more appropriate to substitute the term . . . ‘members of the same household’ as that would suggest individuals that have regular contact with an employee.”<sup>351</sup> A business organization wrote in its comment that the term “relative” is too vague and that “[i]t 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,” concluding that “[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.”<sup>352</sup> A second trade association said in its comment that “relatives” of “any company employee should not be considered ‘insiders’” because “[i]n most cases, such family members would have no incentive to post a fake review.”<sup>353</sup> However, the Commission intended for § 465.5 to address biased reviews and testimonials by insiders or their relatives, not the writing of “fake [or false] reviews,” which is addressed in § 465.2.

To reduce the compliance burden, the Commission is removing relatives from § 465.5(b) and limiting what was originally proposed as § 465.5(c)(1), which is now split into three separate prohibitions. One prohibition addresses officers or managers soliciting or demanding a consumer review from “any of their [own] immediate relatives.” A second prohibition addresses officers or managers soliciting or demanding reviews from employees or agents. A third prohibition addresses solicitations or demands by officers or managers that “employees or agents seek such [consumer] reviews from their relatives.” In such instances the request will likely be a general one (such as “Ask your relatives to review us” or “Get three family members to review us”), although it could also be more specific (such as “Get your spouse to write us a review”). As set forth in § 465.5(c)(1)(i), any reviews resulting from demands that employees or agents solicit their relatives would only be violations if the resulting reviews were written by immediate relatives of the employees or agents.

### 3. Agents

A trade association objected to the inclusion of the undefined term “agents” in proposed § 465.5(b) and suggested its removal. The commenter said that “it is not clear what individuals would be considered ‘agents’ of the business” and the meaning of the term “agent” 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” which “would be particularly important for small businesses.”<sup>354</sup> The Commission intends for the term “agents” in this rule to apply only to those agents that promote the company or its products, such as representatives of advertising agencies, public relations firms, and review management firms. As discussed below, given the clarifications of and limitations to § 465.5(b)(1) and (c)(1), the Commission has no reason to believe that the inclusion of “agents” will “dramatically expand the scope of the compliance programs.”<sup>355</sup>

### 4. Scope

Several comments addressed the scope of proposed § 465.5, including the scope of liability of businesses in the context of insider reviews and testimonials. For example, a trade association asserted that § 465.5 should “be limited to the extent it references employees (or agents) who are not officers or managers, and who were not instructed by their superiors to post reviews.”<sup>356</sup> A retailer asked for a safe harbor that would apply to employee reviews and testimonials “if businesses are not encouraging insider reviews and testimonials.”<sup>357</sup> The Commission intended for the provision to apply to reviews or testimonials by employees or agents who are not officers or managers only when (1) the reviews are requested or solicited by an officer or manager of the business or (2) the testimonials appear in advertising or promotional messages actively disseminated by the business. As discussed in this section, the Commission’s clarifications and limitations should resolve any concerns arising from any broader interpretation.

Two trade associations and another industry organization asserted in their comments that § 465.5 “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.”<sup>358</sup> As the commenters used the word “distributing,” the Commission assumes that these comments pertain to the liability of businesses under § 465.5(b), which prohibits businesses from “disseminating or causing the dissemination of consumer testimonials” by insiders without disclosures. The testimonials covered by § 465.5 are, by definition, a business’s advertising or promotional messages, so the Commission does not consider them to be third-party content. The section covers such testimonials when disseminated by the business itself, by its officers or managers, or in response to solicitations or demands from its officers or managers. With respect to the commenters’ concern that businesses will be liable even when they had no knowledge that the content violated the rule, the Commission discusses below the appropriate application of the “knew or should have known” standard.

A retailer’s comment expressed “significant concerns with this section if the FTC intends to apply it to marketplace service providers with hundreds of thousands of employees.”<sup>359</sup> A trade association said in its comment that, “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” as “[n]one of the cases cited in the NPRM involved this type of company.”<sup>360</sup> With respect to employees, the section applies only to (1) testimonials by employees that the company chooses to disseminate and (2) reviews that are solicited or demanded by company officers or managers. Further, the Commission has sufficient evidence of prevalence as to the use of insider reviews and testimonials,<sup>361</sup> and that evidence need not specifically include examples of companies of every size, such as those “with hundreds of thousands of employees.”

A trade association’s comment “urge[d] the Commission to add a safe harbor . . . that will assure businesses acting in good faith that they will not face civil penalty liability for the actions of rogue individuals.”<sup>362</sup> Again, whether a business will be subject to civil penalties will depend on whether

<sup>354</sup> IAB Cmt. at 10.

<sup>355</sup> See *infra* section IV.E.4 and 5 of this document.

<sup>356</sup> NRF Cmt. at 10.

<sup>357</sup> Amazon Cmt. at 11.

<sup>358</sup> NRF Cmt. at 11; IAB Cmt. at 10; TechNet Cmt. at 3.

<sup>359</sup> Amazon Cmt. at 11.

<sup>360</sup> IAB Cmt. at 9.

<sup>361</sup> See NPRM, 88 FR 49374–75.

<sup>362</sup> IAB Cmt. at 10.

<sup>351</sup> RILA Cmt. at 6.

<sup>352</sup> Chamber of Commerce Cmt. at 7.

<sup>353</sup> NRF Cmt. at 9.

the facts show that the business had actual knowledge or knowledge fairly implied of the violation. A business will not violate the rule—much less be subject to civil penalties—merely because employees write consumer reviews without disclosing their relationship to the business, but it may violate the rule when an officer or manager of the company solicited or demanded such reviews. A business will also not be liable under § 465.5 simply because one of its employees (other than an officer or manager) or agents makes an unsolicited social media post. However, as discussed above, a business might be liable under § 465.2(a) for an employee posting fake testimonials to social media on behalf of the company.<sup>363</sup>

Two commenters addressed general review solicitations from businesses to their customers. A trade association said that “[b]usinesses which seek reviews from their customers generally seek reviews from all customers, and again, do not currently monitor or screen for potential relatives or agency relationships.”<sup>364</sup> A review platform operator wrote in its comment, “An automated review invitation system can operate via integration with, for example, a C[ustomer] R[elationship] M[anagement] platform where customer details are automatically fed through to generate review invitations following on from purchases or experiences. The information within the system could be as minimal as a name and email address. . . . It could therefore be possible for businesses to inadvertently invite persons that are related to an officer, manager, employee, or agent . . . . In practice, it will be difficult to check whether any invitation recipients could fall within the very wide group of persons outlined at [§] 465.5(c), and it will also be difficult to draw a firm line between what types of indicators are sufficient to warrant imputing constructive knowledge.”<sup>365</sup> The Commission did not intend for § 465.5(c) to cover such generalized invitations to past purchasers to write reviews. The Commission is therefore adding language in § 465.5(c)(2) to clarify that § 465.5(c)(1) “does not apply to generalized review solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.” The Commission is making a similar clarification in § 465.5(b)(2)(i); specifically, that § 465.5(b)(1) “does not apply to generalized review solicitations

to purchasers for them to post testimonials about their experiences with the product, service, or business.”

The Commission has also added § 465.5(b)(2)(ii), which exempts “merely engaging in consumer review hosting” from § 465.5(b)(1). Thus, an unsolicited employee review merely appearing on the business’s website cannot violate the provision against disseminating insider testimonials.

A trade association noted that “[l]arge national retail chains collectively employ millions of workers who are also their customers” and “[w]hile a retailer may provide guidance on disclosing their relationship, it should not be liable for policing their customer reviews for posts that may have been submitted by any one of their thousands or millions of employees—who in many cases may be using ambiguous screennames or not be readily identifiable.”<sup>366</sup> The Commission points out that only § 465.5(c) applies to customer reviews by employees, and that provision only applies to employee reviews that an officer or manager has solicited or demanded. If there are no such solicitations or demands, then § 465.5 does not apply to employee reviews. When an officer or manager does solicit or demand a review, the business would only be liable if the officer or manager (1) “encouraged the prospective reviewer not to make . . . a disclosure,” (2) “did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business,”<sup>367</sup> or (3) “knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.” It is only under the last of the three clauses that a business might be liable for any “policing” of reviews, and, as discussed below, any such obligations should not be unduly burdensome.<sup>368</sup>

An industry organization commenter expressed concern that § 465.5 “would require the disclosure of personally identifying information” and impact employees’ privacy.<sup>369</sup> The Commission does not see how the provision requires the disclosure of personally identifying information. Section 465.5 requires the disclosure of unexpected material connections but does not require that employees identify themselves by name. Testimonialists and reviewers could be

anonymous, or use pseudonyms, and include general phrases indicating their relationship to the business, such as “my employer’s product,” “my company’s,” or “my spouse’s company.”

## 5. Knowledge Standard

A number of commenters discussed the “knew or should have known” standard contained in § 465.5(b) and (c). A trade association said that a “‘knew or should have known’ standard . . . [in] § 465.5 aptly reflects that the rule is targeting bad actors that intend to commit fraud through fake reviews.”<sup>370</sup> A consumer organization “advise[d] the Commission against relying on knowledge standards that will introduce unnecessary evidentiary burdens in the enforcement process” and against making it “a condition of liability,” noting that instead “the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.”<sup>371</sup> A review platform said “that ‘should have known’ is too low as a knowledge threshold and this should therefore be limited to ‘knew’, *i.e.*, actual knowledge.”<sup>372</sup> A trade association called the “should have known” standard “vague.”<sup>373</sup> A business commenter also described “should have known” as vague and suggested limiting the knowledge standard to actual knowledge.<sup>374</sup> A trade association and a retailer said that civil penalties should not be based upon a “should have known” standard.<sup>375</sup> The retailer continued, “In the alternative, if the Commission refuses to elevate the knowledge standard for this section, the final rule must provide greater guidance on the sorts of scenarios that would give rise to liability.”<sup>376</sup> Specifically, the retailer asserted that the Commission would have to provide “additional information about when a company or officer/manager ‘should’ know that an ‘insider’ review or testimonial violates the rule.”<sup>377</sup> A trade association wrote in its comment that “the Commission should raise the knowledge standard for this section to actual knowledge,” which “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

<sup>366</sup> RILA Cmt. at 6.

<sup>367</sup> The Commission has slightly modified this clause, changing “did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship” to “did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business” for purposes of clarity.

<sup>368</sup> See *infra* section IV.E.5 of this document.

<sup>369</sup> TechNet Cmt. at 3.

<sup>370</sup> Travel Tech Cmt. at 4.

<sup>371</sup> Consumer Reports Cmt. at 8.

<sup>372</sup> Trustpilot Cmt. at 5, 8.

<sup>373</sup> NRF Cmt. at 9.

<sup>374</sup> Family First Life Cmt. at 15.

<sup>375</sup> NADA Cmt. at 3; Amazon Cmt. at 11.

<sup>376</sup> Amazon Cmt. at 11.

<sup>377</sup> *Id.*

<sup>363</sup> See *supra* section IV.B.2 of this document.

<sup>364</sup> NADA Cmt. at 6.

<sup>365</sup> Trustpilot Cmt. at 13.

businesses that fail to discover and remedy reviews or testimonials by employees, managers, officers, agents, or any of those individuals' relatives that lack disclosures.”<sup>378</sup> The commenter continued, “[r]egardless 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.”<sup>379</sup>

The Commission chooses to retain the proposed “knew or should have known” standard in § 465.5(b)(1) and (c)(1)(ii)(c). First, the Commission notes again that it cannot obtain civil penalties under section 5(m)(1)(A) of the FTC Act for a rule violation unless it proves that a defendant had actual knowledge or knowledge fairly implied that the act or practice is unfair or deceptive and is prohibited by the rule. With respect to § 465.5(b)(1), the provision applies only to testimonials that the business disseminates or causes to be disseminated, *i.e.*, it applies to the business's own advertising and promotional activities. As noted above, § 465.5(b)(1) does not apply to unsolicited social media posts by employees or to social media posts that result from generalized solicitations. The Commission does not expect that a business will ask every potential testimonialist whether they are an agent of the business. There may be red flags, however, that should cause a business to realize that a prospective testimonialist is likely an insider, such as the testimonial featuring an image of that person standing in front of the company's headquarters. If a business routinely asks prospective testimonialists how they became interested in the business or its products, it should not avoid looking at answers that might indicate a covered connection.

With respect to § 465.5(c)(1)(ii)(c), the Commission believes that, if officers and managers of a business request or demand that the business's employees or agents write consumer reviews or solicit or demand that such employees or agents seek such reviews from their relatives, it is more than reasonable to have those officers and managers take on certain responsibilities with respect to those reviews. The employees, agents, and relatives on the receiving end of such requests or demands are likely to assume that their reviews should be positive, which gives such reviews an inherent bias. Therefore, officers and managers should instruct that prospective reviewers make disclosures.

When they demand that employees or agents seek reviews from their relatives, the officers or managers should instruct the employees or agents to ask their immediate relatives to make disclosures. The officers and managers should also take remedial steps when they know or should know that resulting insider reviews appeared without a disclosure. The Commission does not expect an officer or manager to scour every review of the business for possible insider reviews appearing without a disclosure. There may be red flags, however, that should cause officers or managers to inquire further. An example that is at least applicable to smaller companies is a review without a disclosure by someone the soliciting officer or manager recognizes as having the same last name as an employee whom the officer or manager told to obtain reviews from relatives. Another example is an employee sending a soliciting officer or manager a link to the resulting review, in which case the officer or manager should take the time to see if that review has a disclosure. By taking “remedial steps,” the Commission means that the officer or manager should request that the reviewer delete the review or add a clear and conspicuous disclosure to it.

#### 6. Other Suggestions

Commenters recommended that the Commission adopt a number of additional requirements or prohibitions. An individual commenter said that insider reviews should be banned and that disclosures are insufficient to cure them.<sup>380</sup> One consumer group proposed that (1) “non-disclosed insider ratings” should be “independent and separate violation[s] from deceptive narrative reviews;” (2) “symbolic ratings—both independently and when aggregated—should feature a clear and conspicuous disclosure of necessary material connections;” and (3) “reviews requiring a disclosure should not be included in a product's aggregate rating without a disclosure.”<sup>381</sup> Another consumer group suggested the following: (1) § 465.5(a) and (c) should apply to all employees and board members of a business; (2) § 465.5(b) and (c) be extended “to employees or board members of other companies with a material business relationship with the first business;” (3) § 465.5(c) should be extended “to include solicitations or demands of employees of companies with which the business conducts material business;” (4) § 465.5(c) should prohibit “any employee or board member of a business to solicit or

demand from another employee or board member (or relative of an employee or board member) a consumer review about the business or one of its products or services;” and (5) “employees of a business should not be permitted to provide star or numerical reviews that count toward an aggregate or average rating, even if their conflict of interest is otherwise disclosed in an accompanying narrative review.”<sup>382</sup> Some of these proposals go beyond the scope of this rulemaking. Based on its policy expertise, the Commission declines to make any of these changes at this time. The Commission notes, however, that some may, in certain situations, involve unfair or deceptive acts or practices that violate section 5 of the FTC Act.

#### F. § 465.6—Company-Controlled Review Websites or Entities

Proposed § 465.6 sought to prohibit a business from representing, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions about a category of businesses, products, or services including the business or one or more of its products or services. Based on the following, the Commission has determined to finalize this provision with two limiting modifications.<sup>383</sup>

A business organization, a retailer, and a review platform submitted comments supporting the intent of proposed § 465.6.<sup>384</sup> For example, the business organization noted that it “was supportive of a . . . rule aimed at addressing the practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own product.”<sup>385</sup>

Some commenters argued that, as drafted, the provision was overly broad and would prohibit conduct that was not deceptive or unfair. A business organization said that, as drafted, proposed § 465.6 “. . . could capture retailers that sell their own house brands” and “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.”<sup>386</sup> A consumer

<sup>382</sup> Consumer Reports Cmt. at 7–8.

<sup>383</sup> Two modifications are changing “Rule” to “part” and, as discussed above, changing “its products or services” to “the products and services it sells.” See *supra* section IV.B.4. of this document.

<sup>384</sup> Chamber of Commerce Cmt. at 6; Amazon Cmt. at 12; Trustpilot Cmt. at 4–5.

<sup>385</sup> Chamber of Commerce Cmt. at 6.

<sup>386</sup> *Id.*

<sup>378</sup> IAB Cmt. at 9.

<sup>379</sup> *Id.* at 10.

<sup>380</sup> Anonymous 3 Cmt.

<sup>381</sup> TINA Cmt. at 6 and 8.

organization similarly said that, “as written, . . . [proposed § 465.6] would make it illegal for companies to host any reviews whatsoever so long as some of the reviews touch on a category of business, products, or services the company provides” and would prohibit “customer review forums on sites such as Home Depot and Amazon.”<sup>387</sup> A retailer said that “the plain text of . . . [proposed § 465.6 would] sweep[] in more conduct that is neither deceptive nor unfair—for example, where Company A provides customer reviews authored by others to Company B, without disclosing an ownership relationship.”<sup>388</sup> A trade association wrote that proposed § 465.6 “could be applied to prohibit retailers from representing that any consumer reviews or opinions featured on their own websites are independent, even if they are.”<sup>389</sup> A retailer commented that proposed § 465.6 is “overly broad and would prohibit a business from using a related entity from [sic] testing or comparing products in good faith and publishing those results, even if the company clearly disclosed that the test or comparison was done by an affiliate.”<sup>390</sup> A review platform asked in its comment that the Commission clarify that the section would not “unintentionally lead[] to review sites being unable to host reviews of their own company or sector.”<sup>391</sup> The Commission recognizes and agrees with the above concerns and is making two responsive modifications to narrow final § 465.6 in a way that better reflects the Commission’s intent. The Commission is excluding “consumer reviews” from the scope of final § 465.6 and changing the prohibition against “represent[ing]” to a prohibition against “materially misrepresent[ing].”

A trade association commented that “many retailers host product reviews on their online shopping websites and make no direct claims that the reviews are independent” and asked the Commission to “make clear that it is permissible for retailers to host product reviews on a site they control and

operate.”<sup>392</sup> Assuming that the commenter is referring to retailers hosting independent consumer reviews on a site they operate or control, then this is permissible under § 465.6. If the retailer’s website misrepresents that it provides independent reviews or opinions by experts or organizations, then the retailer could be liable under § 465.6.

Two commenters asked the Commission to adopt a safe harbor provision for disclosures of the relationship between the business and the provider of the purportedly independent reviews or opinions.<sup>393</sup> The Commission’s modifications address this request effectively by providing that businesses do not violate § 465.6 if they are not materially misrepresenting independence. The Commission believes that contradictory disclosures cannot cure a false express claim, such as a false express claim of independence. If a false claim of independence is merely implied, whether a disclosure is adequate to cure it will depend on the net impression of the website or advertisement, *i.e.*, whether it materially misrepresents independence even with the disclosure.

A trade association commented that “[i]t would be helpful to make it clear that . . . § 465.6 only applies to websites or entities whose core service is providing reviews or opinions.”<sup>394</sup> The term “core service” is ambiguous, and it is not clear how one would determine whether it applies to reviews or opinions provided by a given website or other entity. False material claims that a website or entity provides independent reviews or opinions would still be deceptive even if such reviews or opinions are not the website’s or entity’s core service. The NPRM cited a number of cases in which businesses created purportedly independent seals or badges that they then awarded to their own products; the awarding of such seals or badges was clearly not their core business.<sup>395</sup> The NPRM also cited cases involving purportedly independent review websites, and, although such review websites might have appeared to be a “core service,”

the true core business was selling the respondent’s or defendant’s own products.<sup>396</sup> Focusing on the ambiguous term “core services” would likely open the door to manipulation and evasion of the prohibition. The commenter further noted that it would also be “useful to clarify what ‘independent reviews or opinions’ means.”<sup>397</sup> In this context, the term “independent” merely refers to explicit or implicit claims that reviews or opinions are not coming from a business that offers any of the products or services being reviewed or evaluated.

A business organization commenter suggested that the Commission not finalize § 465.6 because “the fraudulent nature of reviews on purportedly independent websites would likely be covered by . . . [§§] 465.2 and 465.5 of the . . . Rule.”<sup>398</sup> Those sections are limited to consumer reviews and consumer or celebrity testimonials and do not apply to reviews, seals, or other opinions by purportedly independent experts, organizations<sup>399</sup> or other entities. Therefore, § 465.6 is not duplicative of either § 465.2 or § 465.5.

#### G. § 465.7—Review Suppression

Proposed § 465.7 sought to prohibit two different types of consumer review suppression.

##### 1. § 465.7(a)

Proposed § 465.7(a) sought to prohibit anyone from using an unjustified legal threat or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or to cause a consumer review or any portion thereof to be removed. Based on the following, the Commission is finalizing § 465.7(a) with several revisions for the purpose of clarity.<sup>400</sup>

A number of commenters supported the provision.<sup>401</sup> The NPRM asked whether it is “appropriate that . . . § 465.7(a) focuses on the specific types of listed threats or activities,” and two

<sup>396</sup> *Id.*

<sup>397</sup> CCIA Cmt. at 3.

<sup>398</sup> Chamber of Commerce Cmt. at 6.

<sup>399</sup> “Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member.” Endorsement Guides, 16 CFR 255.4(a).

<sup>400</sup> One modification is changing “Rule” to “part.”

<sup>401</sup> Anonymous 10, Cmt. on NPRM (Aug. 3, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0009>; TT in PA, Cmt. on NPRM (Aug. 9, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0016> (“TT in PA Cmt.”); Kurt Braun, Cmt. on NPRM (Aug. 17, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0026>; Superguest Cmt.; Tripadvisor Cmt. at 5–6; Consumer Reports Cmt. at 9–10; State AGs Cmt. at 2.

<sup>387</sup> Consumer Reports Cmt. at 9.

<sup>388</sup> Amazon Cmt. at 12. The commenter suggested that the Commission “clarify the regulatory language to make clear that it covers only reviews authored by the owner company or its agents.” *Id.* The Commission is not adopting this approach because § 465.6 is not limited to websites with reviews. It also applies to organizations or entities that misrepresent that they provide independent reviews or opinions (*e.g.*, seals) about a category of businesses, products, or services including the business or one or more of the products or services it sells.

<sup>389</sup> NRF Cmt. at 11–12.

<sup>390</sup> Hammacher Schlemmer Cmt. at 5.

<sup>391</sup> Trustpilot Cmt. at 5.

<sup>392</sup> RILA Cmt. at 7.

<sup>393</sup> Hammacher Schlemmer Cmt. at 6–7 (proposing that the Commission adopt § 465.6 with the addition of the following clause: “unless the business discloses that there is a relationship or affiliation between the business and the website, organization, or entity that it controls, owns, or operates and why the reviews or opinions are ‘independent’, including the steps that the business takes to ensure objectivity or independence in obtaining such reviews or opinions.” (emphasis omitted)); Frieling Cmt. at 4.

<sup>394</sup> CCIA Cmt. at 3.

<sup>395</sup> NPRM, 88 FR 49375.

business commenters responded that it is.<sup>402</sup> One of the commenters said that “[t]his narrow approach protects consumers, all while ensuring clarity for businesses and avoiding the pitfall of ambiguity in the . . . Rule.”<sup>403</sup> However, as already noted above, based on the comments and on the proposed definition for the phrase “unjustified legal threat,” the Commission is adopting a definition for the phrase “unfounded or groundless legal threat,” instead of a definition of the phrase “unjustified legal threat,” as originally proposed.<sup>404</sup>

A trade association commenter noted that “‘intimidation’ means threat of the use of force” so it “duplicates ‘physical threat’” and should be deleted.<sup>405</sup> A review platform commenter questioned why the “proposed text is limited to ‘physical threats’” and said that non-physical threats, such as verbal threats in the form of abusive or coercive language, should not be tolerated and should be acted against.<sup>406</sup> A consumer group’s comment said that “[t]he term ‘intimidation’ seems sufficiently broad to cover most types of threats not otherwise covered by ‘legal’ or ‘physical’ threats.”<sup>407</sup> The Commission disagrees with the first commenter because, in this context, “intimidation” means things other than legal or physical threats. Intimidation can include abusive communications, stalking, character assassination, and sexual harassment when those things are used to intimidate, that is to force someone into or deter someone from taking some action by inducing fear.<sup>408</sup>

Three commenters voiced concerns about the fact that proposed § 465.7(a) included “false accusation[s]” as a type of conduct that could amount to review suppression. A review platform noted that the determination of whether an accusation is false “introduces an element of subjectivity,” and that it would “be preferable to ground this in a legal basis, such as defamation.”<sup>409</sup> A trade association wrote that “a statement by a business about a consumer review or the consumer making a review may sometimes be in order,” and a prohibition on false

accusations should “allow breathing room for First Amendment free speech concerns, such as requiring a guilty mental state from the maker of an accusation before culpability attaches.”<sup>410</sup> It recommended adding “knowing that it is false or with reckless disregard as to its truth or falsity.”<sup>411</sup> A second trade association asserted that proposed § 465.7(a) was “not narrowly tailored to serve a compelling state interest because it applies regardless of the magnitude of the alleged error or intent or state of mind of the business that makes the false statement.”<sup>412</sup> In order to illustrate its point, the second trade association also posited a scenario involving false accusations by a restaurant owner in a private conversation with a disgruntled patron.<sup>413</sup> The owner in the hypothetical did not know the accusations were false and did not act recklessly. In response to these comments, final § 465.7(a) adopts the phrase “a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity,” rather than the phrase “false accusation,” as originally proposed. This change resolves the commenters’ concerns regarding the accuser’s state of mind, clarifies the Commission’s intent that the provision applies only to public accusations, and provides greater clarity, thereby making compliance less burdensome. In response to the concern about subjectivity, the Commission notes that courts can make objective determinations of whether a given accusation is false. One of these commenters also asserted broadly that § 465.7(a) “regulates ‘pure speech,’ not conduct, because it applies to the use of words to convey a message” and that speech is not commercial speech if it does not propose a commercial transaction.<sup>414</sup> This assertion has no basis in First Amendment law and is an overly limited articulation of what counts as commercial speech. When a business makes a public false accusation in response to a consumer review in an attempt to cause the review to be removed, the speech at issue is clearly commercial speech because it is intended to promote the product, service, or business that was the subject of the negative consumer review.

Two commenters, a review platform and a trade association, said that the

provision should be strengthened by also covering attempts to force a consumer review or a portion thereof to be changed or edited.<sup>415</sup> Proposed § 465.7(a) would have prohibited certain acts made in an attempt to, among other things, “cause a consumer review or any portion thereof to be removed.” The Commission believes that, in most cases, changing or editing a review would necessarily require removing a portion of it. Accordingly, the Commission is clarifying that final § 465.7 applies to such modifications of reviews by adding “whether or not that review or a portion thereof is replaced with other content,” immediately after “cause a consumer review or any portion thereof to be removed.”

A trade association’s comment asked that the “Rule be clarified to emphasize that it does not prohibit companies from contacting customers who post negative reviews to resolve the reported issues.”<sup>416</sup> The commenter was concerned that “sensitive customers could argue that such communication from the Company (no matter how innocuous) amounts to intimidation.”<sup>417</sup> The Commission does not believe that a company engages in intimidation by merely contacting customers to resolve reported issues or simply asking satisfied customers to update their reviews. Specifying that a consumer’s concerns will be addressed only if the consumer changes or removes a truthful negative review may be an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer’s products,<sup>418</sup> but that issue is beyond the scope of this rulemaking.

A consumer organization’s comment said that, “[j]ust as businesses may use threats or intimidation to prevent a consumer from leaving a negative review, they may use similar tactics to ensure receipt of a positive review,” thus concluding that § 465.7(a)’s “prohibitions . . . should also apply to compelled creation of positive reviews.”<sup>419</sup> Although compelling the creation of positive reviews through threats or intimidation may be an unfair or deceptive act or practice, the

<sup>402</sup> Transparency Company Cmt. at 14; Family First Life Cmt. at 15.

<sup>403</sup> Family First Life Cmt. at 15.

<sup>404</sup> See *supra* section IV.A.2.1 of this document.

<sup>405</sup> NFIB Cmt. at 4.

<sup>406</sup> Trustpilot Cmt. at 17.

<sup>407</sup> Consumer Reports Cmt. at 10.

<sup>408</sup> See *Intimidate* (def. 3), *Dictionary.com*, LLC, <https://www.dictionary.com/browse/intimidate> (last visited July 5, 2024) (establishing that the word “intimidate” means, among other things, “to force into or deter from some action by inducing fear”).

<sup>409</sup> Trustpilot Cmt. at 17.

<sup>410</sup> NFIB Cmt. at 4.

<sup>411</sup> *Id.* at 5.

<sup>412</sup> ANA Cmt. at 10.

<sup>413</sup> *Id.* at 9–10.

<sup>414</sup> *Id.*

<sup>415</sup> Yelp Cmt. at 7; CCIA Cmt. at 4.

<sup>416</sup> NRF Cmt. at 12.

<sup>417</sup> *Id.*

<sup>418</sup> See Endorsement Guides, 16 CFR 255.2(d).

<sup>419</sup> Consumer Reports Cmt. at 9. Although it does not involve § 465.7(a), a business urged the Commission to “deter meritless legal threats by platforms against providers and users of pro-consumer tools.” Mozilla Cmt. at 6. Such threats are beyond the scope of this rulemaking.

Commission declines to address that practice in this rulemaking at this time.

A dental trade association expressed that, because Federal and State privacy laws prohibit dentists and other health care providers from disclosing patient information, their ability to correct the record when they are themselves a target of deceptive or unfair reviews is limited.<sup>420</sup> The commenter asked the Commission to permit dentists and other health care providers to disclose patient information in response to a review (limited to the scope of the topics addressed in the review) without violating any FTC privacy-based prohibitions.<sup>421</sup> This request is beyond the scope of this rulemaking.

## 2. § 465.7(b)

Proposed § 465.7(b) sought to prohibit a business from misrepresenting, “expressly or by implication, that the consumer reviews of one or more of its products or services displayed on its website or platform represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.*, not displayed) based upon their ratings or their negativity.” Proposed § 465.7(b) enumerated reasons for suppressing reviews that would not be considered suppression based upon their ratings or their negativity, so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review. Proposed § 465.7(b) listed the following valid reasons for review suppression: (1) “the review contain[ed] . . . [(a)] trade secrets or privileged or confidential commercial or financial information, . . . [(b)] libelous, harassing, abusive, obscene, vulgar, or sexually explicit content, . . . [(c)] the personal information or likeness of another person, . . . [(d)] content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class, or . . . [(e)] content that is clearly false or misleading;” (2) “the seller reasonably believe[d] the review is fake;” or (3) “the review is wholly unrelated to the products or services offered by or available at the website or platform.” Based on the following, the Commission has determined to finalize this prohibition with some modifications.<sup>422</sup>

Multiple commenters said that the practice of product sellers suppressing less favorable reviews was problematic. One individual commenter said they were “[d]isgusted by businesses who[] filter/have control over their . . . reviews.”<sup>423</sup> Another individual commenter stated that “[t]he removal of reviews that are critical, but accurate of the service or good creates an illusion and ultimately, defrauds the consumer of their choice,” but also worried about how “the FTC [will] catch companies that delete negative reviews.”<sup>424</sup> A third individual commenter said that the “Rule should prohibit businesses from suppressing . . . honest negative reviews.”<sup>425</sup> A fourth individual commenter wrote that “[b]usiness should be barred from misrepresenting reviews on their websites and from suppressing negative reviews.”<sup>426</sup> The State Attorneys General said that, when “a merchant . . . only posts positive consumer reviews on its website, instead of both favorable and negative reviews, [it] can potentially mislead consumers into believing that such reviews represent most or all of the reviews submitted to the merchant’s website.”<sup>427</sup> A retailer wrote that it “support[s] the goals of section 465.7[(b)], which prohibits sellers from suppressing customer reviews based on their negativity” and “believe[s] that it is critically important that customers not be deprived of useful, negative feedback when deciding whether to purchase a product.”<sup>428</sup>

The NPRM asked whether “it [is] appropriate that proposed § 465.7(b) is limited to circumstances in which reviews are being suppressed based on rating or negativity,” and a business commenter agreed that it was.<sup>429</sup>

A trade association commenter said “that the Commission has . . . failed to satisfy the requirement that the specific unfair or deceptive acts or practices identified in the rule be prevalent.”<sup>430</sup> According to the commenter, “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.”<sup>431</sup> The commenter

“material” misrepresentations. Nonetheless, in the context of § 465.7(b), the Commission believes that all such misrepresentations would likely always be material.

<sup>423</sup> Hippensteel Cmt.

<sup>424</sup> Superguest Cmt.

<sup>425</sup> Ravnitzky Cmt. at 2.

<sup>426</sup> TT in PA Cmt.

<sup>427</sup> State AGs Cmt. at 3.

<sup>428</sup> Amazon Cmt. at 12.

<sup>429</sup> Transparency Company Cmt. at 14.

<sup>430</sup> IAB Cmt. at 11.

<sup>431</sup> *Id.*

understates the significance of the evidence that the Commission considered in finding that the suppression of reviews based upon their rating or sentiment is prevalent. The closing letter to Yotpo, a company that provided review management services, is significant because the investigation revealed that more than 4,500 Yotpo merchant clients were automatically publishing only 4- or 5-star reviews and that most 1-star reviews and 2-star reviews submitted to those merchants were suppressed.<sup>432</sup> The investigation of Yotpo shows that there was widespread suppression of negative reviews. The Commission thus has a strong basis for its conclusion that the suppression of negative reviews on retailer or business websites is prevalent.

A review platform’s comment suggested changing “based upon their ratings or their negativity” to “based upon their ratings or their sentiment” because “reviews can be difficult to categorize as wholly ‘negative’ or ‘positive.’”<sup>433</sup> The Commission intended for the phrase “based upon their ratings or their negativity” to refer to the suppression of reviews based on their ratings or their sentiment. However, in light of the comment, the Commission now realizes that the use of the word “negativity” in this context could be subject to misinterpretation and be construed to imply that a review must be wholly negative for its suppression to be problematic. Accordingly, the Commission is clarifying its original intent by changing “their negativity” to “their negative sentiment.” The commenter also said that “consumer harm may result if someone suppresses a review, regardless of the sentiment expressed in the review.”<sup>434</sup> The Commission is not expanding the rule to address other types of review suppression not based on ratings or negative sentiment. There are numerous legitimate reasons for suppressing consumer reviews, including those listed in § 465.7(b)(1), (2), and (3). Furthermore, such an expansion would be beyond the scope of the rulemaking.

A trade association’s comment requested that the Commission “carve out the use of reviews in marketing materials” because the provision “could effectively prohibit retailers from highlighting any customer reviews in advertising—even though customers understand that advertising normally highlights particularly positive

<sup>432</sup> NPRM, 88 FR 49376.

<sup>433</sup> Yelp Cmt. at 7–8.

<sup>434</sup> *Id.*

<sup>420</sup> ADA Cmt. at 1.

<sup>421</sup> *Id.* at 1–2.

<sup>422</sup> One modification, discussed above, is changing “its products or services” to “the products and services it sells.” See *supra* section IV.B.4. of this document. Another modification discussed above is changing “person” to “individual.” See *supra* section IV.A.2.b of this document. As it has done elsewhere in the rule, the Commission is limiting the misrepresentations prohibited to

reviews.”<sup>435</sup> The Commission did not intend for proposed § 465.7(b) to cover the use of consumer reviews in marketing materials. Specifically, proposed § 465.7(b) was only intended to cover misrepresentations about the body of reviews in a “reviews” section of a website or platform—that is, a portion of a website or platform dedicated in whole or in part to receiving and displaying consumer reviews—and not misrepresentations about whether a highlighted review is “representative.” The Commission is clarifying this by changing “displayed on its website or platform” to “displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews.” The Commission notes however, that the use of non-representative consumer reviews in marketing could be deceptive in violation of section 5 of the FTC Act.<sup>436</sup>

A trade association asked that the Commission “clarify what it means for a review to be “suppressed (*i.e.*, not displayed).”<sup>437</sup> The trade association said that “[m]any businesses that operate websites that display consumer reviews will organize those reviews in reasonable ways to help consumers navigate what might be a large corpus of varying consumer commentary” and that, “[i]f a business takes reasonable steps to organize their reviews, those reviews should not be considered ‘suppressed.’”<sup>438</sup> The Commission agrees that organizing reviews does not qualify as suppressing reviews. The Commission notes, however, that organizing reviews in a way that makes it difficult for consumers to know about or find negative reviews could be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. The commenter also asked that the Commission change “not displayed” to “not displayed or accessible.”<sup>439</sup> The Commission is instead clarifying its original intent by changing “not displayed” to “not displayable,” so that the provision only covers reviews that consumers will be unable to view even

if they were to sort or filter the reviews differently. Another trade association’s comment said that “the Rule should explicitly allow retailers to sort reviews by objective measures unrelated to the positivity of the review, where the sorting method is disclosed.”<sup>440</sup> As modified, § 465.7(b) does not prohibit the sorting or organization of reviews, so the proposed modification is unnecessary.

Four industry commenters argued that there are legitimate reasons for suppressing consumer reviews beyond those listed in proposed § 465.7(b).<sup>441</sup> One of these commenters, a retailer, gave examples of other legitimate reasons for suppressing a review: “describing violence, encouraging illegal activities or misuse of the product, incorporating hyperlinks that could jeopardize customer online safety, or using a language not supported by the website.”<sup>442</sup> Three of the industry commenters said that, by limiting review suppression to the listed reasons, the provision violated the First Amendment and section 230 of the Communications Decency Act,<sup>443</sup> and all four asked the Commission to clarify that the listed reasons are not exhaustive.<sup>444</sup> The Commission agrees that there are legitimate reasons for suppressing reviews beyond those listed and is clarifying that the listed criteria for review suppression are non-exhaustive examples.

Proposed § 465.7(b) provided that suppression was not violative “so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review.” The Commission is clarifying that the criteria must be applied to all reviews equally. Additionally, to be consistent with the above clarification regarding sentiment, the Commission is changing “without regard to the favorability of the review” to “without regard to sentiment.”

An individual commenter asked whether a company could “have a policy of not posting reviews that mention other products” or suppress a review that is “patently false (wrong company, wrong product, wrong

location, *etc.*).”<sup>445</sup> As long as the policy is applied to all reviews equally, those could be legitimate reasons for suppressing reviews.

A trade association commented that one of the listed, acceptable reasons for suppressing reviews is too limited. Specifically, it said that “libelous” reviews would not cover reviews with an oral component that were “slanderous,” and it thus recommended using the word “defamatory.”<sup>446</sup> The Commission intended to cover all defamatory consumer reviews, not just written ones, and the Commission is making that clarification.

Another one of the listed, acceptable reasons for suppressing reviews was that “the seller reasonably believes the review is fake.” A review platform commented that it is important that this criteria “cannot be used by a business to seek to censor consumer reviews based on a valid experience” and said that, without information about the reviewer, the reviewer’s location, and the reviewer’s other reviews, “it can be difficult to accurately identify fake reviews.”<sup>447</sup> One individual commenter wrote that this “is overbroad and gives sellers leeway to suppress reviews at their discretion so long as they claim a belief that said reviews were fake.”<sup>448</sup> The commenter recommended “revising this provision to add specificity and identify the parameters of what a fake review looks like.”<sup>449</sup> A seller does not risk liability if the suppression occurs for a reason other than the reviewer’s rating or negative sentiment. The provision’s phrase “such as” recognizes that it is proper to suppress reviews for legitimate reasons. For this specific enumerated exception, “the seller [only needs to] reasonabl[y] believe[] the review . . . [to be] fake.” Thus, if there are indicia that would lead a reasonable person to believe that the review is fake, the seller would meet this exception.

A different, listed acceptable reason for suppressing reviews was “content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class.” The Commission is changing “protected class” to “intrinsic characteristic” in order to more closely echo the language in the CRFA on which the reason is based.<sup>450</sup>

<sup>435</sup> NRF Cmt. at 12.

<sup>436</sup> An individual commenter said it would be helpful to have rule language “around a business being allowed to highlight specific testimonial reviews on their website as long as there is a disclaimer or prominent indication that the page does not represent all reviews for the business.” Anonymous 3 Cmt. The rule does not prohibit such “highlighting” of specific reviews or testimonials, but the creation of a safe harbor for such highlighting is beyond the scope of the rule. In addition, the Commission believes that the wording of the proposed disclosure is likely inadequate.

<sup>437</sup> IAB Cmt. at 11.

<sup>438</sup> *Id.* at 11–12.

<sup>439</sup> *Id.* at 12.

<sup>440</sup> NRF Cmt. at 13.

<sup>441</sup> IAB Cmt. at 11; Technet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 13.

<sup>442</sup> Amazon Cmt. at 12. A different commenter gave the example of a snowstorm “obstruct[ing] the delivery of a package to a buyer who could claim failure to deliver on time.” TechNet Cmt. at 3. The Commission does not agree that this is a legitimate reason for suppressing consumer reviews.

<sup>443</sup> IAB Cmt. at 12; Amazon Cmt. at 12; NRF Cmt. at 13.

<sup>444</sup> IAB Cmt. at 11; Technet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 12–13.

<sup>445</sup> Anonymous 4 Cmt.

<sup>446</sup> NFIB Cmt. at 5.

<sup>447</sup> Trustpilot Cmt. at 18.

<sup>448</sup> Madeline D’Entrmont, Cmt. on NPRM at 1 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0064>.

<sup>449</sup> *Id.*

<sup>450</sup> See Consumer Review Fairness Act of 2016 § 2(b)(2)(C)(i), 15 U.S.C. 45b(b)(2)(C)(i).

A trade association noted that the “FTC should not prohibit sellers from excluding reviews that solely discuss service experience and do not include comments on the product.”<sup>451</sup> The rule as clarified does not prohibit suppressing reviews that solely discuss customer service as long as the criteria is applied equally to all reviews. The Commission notes, however, that it has expressed the view that suppressing customer reviews about a “particular seller’s customer service, delivery, returns, and exchanges” can be deceptive in violation of section 5 of the FTC Act.<sup>452</sup>

A consumer organization expressed concern that proposed § 465.7(b) “allows businesses to suppress reviews when they contain ‘harassing,’ ‘abusive,’ or ‘obscene’ content, which are highly subjective terms likely to be interpreted broadly by businesses that have a clear interest in suppressing reviews that may harm their public perception.”<sup>453</sup> The commenter suggested that, “to preserve the public benefit of reviews that contain instances of objectionable content,” the Commission could “allow businesses to redact such content but require them to leave the remainder of the review along with any corresponding score or numerical rating available for public consumption.”<sup>454</sup> Appropriate redaction of portions of consumer reviews may be difficult or infeasible in some instances. The Commission declines to impose such a requirement at this time.

The State Attorneys General asked in their comment that the Commission “delete[] the phrase ‘based upon their ratings or their negativity’ at the end of the first sentence.”<sup>455</sup> The State Attorneys General’s reasoning for this request was that the language is unnecessarily limiting and superfluous” because “a company seeking to suppress negative reviews could potentially succeed by offering reasons that are proxies for negativity” and “any legitimate suppression should already be sufficiently covered by the robust carve-outs set forth in § 465.7(b)(1).”<sup>456</sup> The Commission declines to make that change, as the enumerated “carve-outs” do not exhaustively identify every legitimate reason for suppressing reviews.

A business organization asserted that proposed § 465.7(b) “implies a ‘gross feedback score’ must be disclosed along

with the ‘net feedback score,’ which is the actual number of reviews viewable to a user.”<sup>457</sup> The commenter is incorrect, as § 465.7(b) contains no such disclosure requirements.

An individual commenter expressed concern as to how the FTC will “catch companies that delete negative reviews” and suggested offering rewards “for individuals or organizations to help address” the problem.<sup>458</sup> The Commission will use the investigative and law enforcement tools at its disposal to identify bad actors who suppress reviews.

In connection with proposed § 465.7(b), several commenters recommended that the Commission impose additional consumer review-related requirements. An individual commenter asked the Commission to “require businesses to display consumer reviews in a fair and transparent manner, such as by allowing consumers to choose how they want to sort or filter reviews, and by disclosing any criteria or algorithm that they use to rank or highlight reviews.”<sup>459</sup> Another individual commenter said that “companies . . . should be required to maintain and periodically disclose records of review suppression,” which would, at a minimum, “contain the number of reviews suppressed at each rating level and an associated justification.”<sup>460</sup> A review platform recommended the Commission expand the scope of the rule to (1) prevent reviews from “being misquoted and manipulated via quoting select parts of reviews,” and (2) require that the criteria on which consumer reviews are selected for showcasing (e.g., on a website carousel) be made clear.<sup>461</sup> A consumer organization commented that consumers should be able to assume that the reviews that they see on a business’s website are representative of the reviews the business receives, and if “a business wishes to curate reviews, the business should have the burden to transparently communicate the fact and nature of the curation to consumers.”<sup>462</sup> One individual commenter asked that the proposed rule be “extended to include penalties for Pay-to-Play platforms that engage in practices such as manipulating ratings and suppressing negative reviews for businesses that

advertise on their websites,”<sup>463</sup> and another commenter thought the rule should cover “companies that profit from shaming businesses by posting negative reviews while unilaterally determining positive reviews are ‘unverified’—effectively holding any positive sentiment back until the business subscribes to the platform.”<sup>464</sup> Some of these proposed requirements are beyond the scope of this rulemaking, although some of the acts and practices described may be deceptive or unfair in violation of section 5 of the FTC Act. For example, misquoting reviews can be deceptive<sup>465</sup> and showcasing or curating reviews might deceptively represent that the reviews presented are representative or typical of the reviews received. Based on its policy expertise, the Commission declines to address any of these practices in this rulemaking at this time.

#### H. § 465.8—Misuse of Fake Indicators of Social Media Influence

Proposed § 465.8(a) sought to prohibit anyone from selling or distributing fake indicators of social media influence that can be used by persons or businesses to misrepresent their influence or importance for a commercial purpose. Proposed § 465.8(b) sought to prohibit anyone from purchasing or procuring fake indicators of social media influence to misrepresent their influence or importance for a commercial purpose. Based on the following, the Commission has determined to finalize these prohibitions with certain modifications.<sup>466</sup>

Several commenters raised concerns about the meaning of the term “fake” in the context of indicators of social media influence. A trade association asked, “Does ‘fake’ only mean that the likes and followers were created by bots or through fake accounts? If a social media influencer were to recommend that their followers also follow another business’ social media account, would that also be ‘procuring’ of ‘fake’ indicators of social media influence? . . . If the FTC means to capture a specific category of ‘likes,’ ‘follows,’ or other metrics that do not reflect any real opinions, findings, or experiences with the marketer or its products or services, it should make that

<sup>463</sup> Anonymous 11, Cmt. on NPRM (Aug. 16, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0022>.

<sup>464</sup> Anonymous 4 Cmt.

<sup>465</sup> Endorsement Guides, 16 CFR 255.0(g)(1) and 255.1(b).

<sup>466</sup> One modification is changing “Rule” to “part.” Another modification, discussed above, is changing “persons” to “individuals.” See *supra* section IV.A.2.b of this document.

<sup>451</sup> RILA Cmt. at 4.

<sup>452</sup> Endorsement Guides, 16 CFR 255.2(e)(8)(ii).

<sup>453</sup> Consumer Reports Cmt. at 10.

<sup>454</sup> *Id.*

<sup>455</sup> State AGs Cmt. at 4.

<sup>456</sup> *Id.*

<sup>457</sup> TechNet Cmt. at 3.

<sup>458</sup> Superguest Cmt.

<sup>459</sup> Ravnitzky Cmt. at 2.

<sup>460</sup> Rob Levy, Cmt. on NPRM at 2 (Sept. 22, 2023), <https://www.regulations.gov/comment/FTC-2023-0047-0057>.

<sup>461</sup> Trustpilot Cmt. at 18.

<sup>462</sup> Consumer Reports Cmt. at 11.

intention more clear.”<sup>467</sup> A retailer asked for “confirmation . . . that this provision would not apply where companies award legitimate indicators of influence to certain users upon satisfaction of objective criteria, even if those individuals are later discovered to have circumvented or abused those criteria.”<sup>468</sup> A second trade association said that, “[w]hen . . . indicators are awarded based on legitimate criteria, they serve this informative and non-deceptive purpose” and the “innovative companies that develop these indicators of influence should not be punished if bad actors try to abuse the processes,” so the Commission “should . . . clarify that this section applies to true ‘fake’ indicators of social media influence.”<sup>469</sup> In response to these comments, the Commission is clarifying what it intended as “fake indicators of social media influence.” For this purpose, the final rule includes a definition of the phrase “fake indicators of social media influence” in § 465.1(h), which defines the phrase as indicators of social media influence derived from bots, purported individual accounts not associated with a real individual, accounts created with a real individual’s personal information without their consent, hijacked accounts, or that otherwise do not reflect a real individual’s or entity’s activities, opinions, findings, or experiences. If a social media influencer were to recommend that their followers also follow another social media account, any resulting followers of the second account would not be “fake.” If a company awards legitimate indicators of influence to certain users upon satisfaction of objective criteria reflecting the influence of the users, the company would not be selling “fake” indicators, even if bad actors were able to deceive the company.

Three commenters addressed the section’s lack of a knowledge requirement. A retailer commenter wrote that “a business could be in violation of this provision even if it innocently sold or procured a fake indicator, without knowledge or any indication that the indicator was fake,” which it said “is patently unreasonable.”<sup>470</sup> A second retailer similarly “recommend[ed] that the rule be revised so that it only applies when the seller/buyer knows the indicators are fake.”<sup>471</sup> A trade association suggested “revising this section to

additionally require that the seller or purchaser act ‘with knowledge that the indicators of influence are fake.’”<sup>472</sup> The Commission recognizes that someone could think that they were paying for a promotional campaign to increase their followers but, unbeknownst to the purchaser, the entity offering the campaign was lying and just providing fake followers. It is also possible that a company might bestow a legitimate indicator of social media influence, like a seal, that the company does not know is based upon or derived from fake indicators of social media influence. The Commission is therefore narrowing the provision by adding “that they knew or should have known to be fake” to both § 465.8(a) and (b).

A trade association’s comment asserted that “the Commission failed to meet the prevalence requirement” because “the evidence the Commission . . . cited in the NPRM . . . all relate[s] to the use of actual ‘fake’ indicators of influence that the seller or purchaser knew were fake.”<sup>473</sup> The Commission believes that, with the addition of the definition of “fake indicators” and the knowledge requirement, it has sufficiently addressed the commenter’s concerns.

A trade association expressed concern that the provision would “hold[] retailers vicariously liable for the actions of independent endorsers,” that is, the influencers and other endorsers that they hire.<sup>474</sup> That was not the Commission’s intention. The distribution of fake indicators of social media influence was intended to mean the distribution to individuals or businesses who could use the indicators to misrepresent their influence, not causing the dissemination of social media by users of such fake indicators, e.g., by hiring influencers who happen to have fake followers. The Commission is clarifying this intent by adding a definition of “distribute fake indicators of social media influence” in § 465.1(g).

Although no commenter specifically raised the issue in the context of § 465.8, the Commission is adding the concept of materiality to both § 465.8(a) and (b) in terms of the scope of misrepresentations covered therein, so as to be consistent with other parts of the rule.

A consumer organization said in its comment that the Commission “should clarify that ‘procure’” in § 465.8(b) “includes the creation of automated bot or other fake accounts that ‘follow’ or

‘subscribe’ to an account, artificially inflating the popularity of that account.”<sup>475</sup> The Commission declines to make this change. It is not the creation of the bot or fake account, itself, that the rule makes illegal, but the use of the bot or fake account to follow another user, watch another user’s videos, or create other fake indicia of social media influence. The same commenter said the Commission should “remove the word ‘fake’ from the Rule to clarify that it covers the purchase or procurement of any social media engagement . . . from both real and fake accounts unless those incentives can be disclosed to people who can view the engagement.”<sup>476</sup> The use of incentivized indicia of social media influence is not necessarily deceptive in all cases, and it is beyond the scope of this rulemaking.

Finally, a trade association and a retailer suggested changing the prohibition in § 465.8(a) from selling or distributing fake indicators that “can be used” by persons to misrepresent their influence to those that “are used” by persons to misrepresent their influence.<sup>477</sup> The trade association said that “[a]pplying 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.”<sup>478</sup> Such fake indicators are not physical products that people collect and then use later as desired. Instead, their existence is premised on and limited to situations in which they appear deceptively on a social media site. Therefore, any person or business that obtains fake indicators of social media influence is misrepresenting their social media influence. While some individuals may not be doing so for a commercial purpose, those individuals are excluded from the rule’s scope. Further, a person or entity that is in the business of selling or distributing fake indicia of social media influence is engaging in commerce, and it is unreasonable to posit that no buyers would use such indicia to misrepresent their social media influence for a commercial purpose. The Commission therefore declines to make the suggested modification.

#### *I. § 465.9—Severability*

Proposed § 465.9 provided that the provisions of the rule are separate and severable from one another and that, if any provision is stayed or determined to

<sup>467</sup> ANA Cmt. at 17–18.

<sup>468</sup> Amazon Cmt. at 13.

<sup>469</sup> IAB Cmt. at 13.

<sup>470</sup> Hammacher and Schlemmer Cmt. at 7.

<sup>471</sup> Amazon Cmt. at 13.

<sup>472</sup> IAB Cmt. at 13.

<sup>473</sup> *Id.* at 12.

<sup>474</sup> NRF Cmt. at 13.

<sup>475</sup> Consumer Reports Cmt. at 11.

<sup>476</sup> *Id.*

<sup>477</sup> IAB Cmt. at 13; Amazon Cmt. at 13.

<sup>478</sup> IAB Cmt. at 13.

be invalid, the remaining provisions shall continue in effect. The Commission did not receive any comments regarding proposed § 465.9. The Commission is changing “shall continue in effect” to “will continue in effect” which is more precise. With that clarification, the Commission is finalizing § 465.9.

#### V. Final Rule

For the reasons described above, the Commission has determined to adopt the provisions of §§ 465.1, 465.2, and 465.4 through 465.9 with clarifying or limiting modifications. The Commission declines to finalize proposed § 465.3 regarding consumer review or testimonial reuse or repurposing.

#### VI. Final Regulatory Analysis Under Section 22 of the FTC Act

Under section 22 of the FTC Act, the Commission, when it promulgates any final rule for a “rule” as defined in section 22(a)(1), must include a “final regulatory analysis.” 15 U.S.C. 57b–3(b)(2). The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. 15 U.S.C. 57b–3(b)(2)(A)–(E).

The Commission received several comments that included elements that the Commission identified as specifically in response to the preliminary regulatory analysis. Two trade associations asserted that compliance costs would be higher than estimated by the Commission. These associations stated that the risk of statutory penalties would lead many of their members to engage in compliance activities beyond those assumed for the high-cost compliance scenario in the NPRM.<sup>479</sup> In the preliminary regulatory

analysis, the high-cost compliance scenario assumed an average compliance burden of 8 hours of attorney time for firms with greater than 500 employees. This average is consistent with some firms, especially the largest ones in industries more reliant on reviews and testimonials, choosing to make more extensive improvements to their compliance programs. In addition, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this document. For these reasons, the Commission continues to believe the high-cost scenario likely overestimates compliance costs, and chooses to not modify its estimate of possible compliance costs for that scenario, but it does present a sensitivity analysis below that assesses what effect systematic underestimation of compliance costs would have on the rule’s net benefits to the public.

One individual commenter asserted that the benefits the Commission estimated in the NPRM did not justify the estimated compliance costs because the same results could be obtained using the FTC’s existing section 5 authority.<sup>480</sup> As explained in detail in this final regulatory analysis, the Commission believes that the final rule will increase deterrence of unfair or deceptive acts or practices involving consumer reviews and testimonials relative to relying on its existing authority and that the net benefits of the rule justify its promulgation.

A second individual commenter claimed that it was unreasonable to assume that the rule would eliminate the entire loss to consumers, in terms of choosing products optimally, from the impact of bad information in false reviews. The commenter asserted that deterrence would be only partial because some circumstances would make it difficult to identify such reviews.<sup>481</sup> The Commission believes that its estimate of the benefits of *reducing* manipulated reviews is appropriate, as discussed further below. However, the Commission presents additional sensitivity analysis below that assesses the effect of systematic overestimation of the degree to which the rule would fix review manipulation, and determines that, even conceding that point, the quantified net benefits are highly positive.

Finally, a business offering third-party review fraud detection tools offered research that it claimed showed that the rule would generate benefits of \$180.83 billion and that the benefits would outweigh the costs 100:1.<sup>482</sup> These estimates are similar to those of the Commission.

#### A. Need for, and Objectives of the Final Rule

The Commission believes that the final rule will substantially improve its ability to combat certain specified, clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Although such unfair or deceptive acts or practices are already unlawful under section 5 of the FTC Act, the rule will increase deterrence of such conduct by allowing courts to impose civil penalties against the violators. In addition, the final rule will allow the Commission to seek court orders requiring violators to compensate consumers for the harms caused by their unlawful conduct. The Commission believes that the rule will accomplish these goals without significantly burdening honest businesses and that the rule will provide significant benefits to consumers and honest competitors.

The final rule will allow courts to impose civil penalties under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), against those who engage in the deceptive or unfair conduct that the final rule prohibits. The ability to obtain civil penalties is important because it can be difficult to quantify consumer losses that stem from the use of unfair or deceptive consumer reviews and testimonials. Without civil penalties, persons who engage in such conduct might avoid monetary consequences for their unlawful conduct simply because there is insufficient evidence to link their unlawful conduct to quantifiable losses suffered by consumers. And if there are no monetary consequences, potential wrongdoers have little incentive to refrain from engaging in unlawful practices. Because the final rule will allow courts to impose civil penalties for violations, it provides the deterrence necessary to incentivize compliance with the law, even in cases where it is difficult to quantify consumer harm.

In addition, the final rule is necessary to allow the Commission to recover redress more efficiently to redress consumer harm resulting from the unfair or deceptive use of reviews or testimonials. In 2021, the U.S. Supreme Court in *AMG Capital Management, LLC*

<sup>479</sup> NRF Cmt. at 2–3, 13–14; IAB Cmt. at 5, 15. IAB also raised this issue in the context of the informal hearing discussed above in section I of this document. See, e.g., *Petition by Interactive Advertising Bureau to Designate Disputed Issues of Material Fact* (Feb. 12, 2024), <https://www.ftc.gov/>

[system/files/ftc\\_gov/pdf/r311003iabpetition20240212.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabpetition20240212.pdf). As noted above, the presiding officer at that hearing found that IAB had not shown that compliance costs would be more than minimal.

<sup>480</sup> Camp-Martin Cmt. at 2–3.

<sup>481</sup> Slezak Cmt. at 3.

<sup>482</sup> Transparency Company Cmt. at 6–9.

v. *FTC*<sup>483</sup> ruled that section 13(b) of the FTC Act<sup>484</sup> did not authorize the Commission to seek court orders requiring wrongdoers to return money unlawfully taken from consumers through unfair or deceptive acts or practices or give up the unjust gains they earned from engaging in such unlawful conduct. The *AMG* ruling has made it significantly more difficult for the Commission to return money to injured consumers, particularly in cases that do not involve rule violations.<sup>485</sup>

Since *AMG*, the primary means for the Commission to return money unlawfully taken from consumers is section 19 of the FTC Act, 15 U.S.C. 57b, which provides two paths for consumer redress. The longer path, under section 19(a)(2), typically requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal to a Federal court of appeals. After the conclusion of the administrative proceeding (and any appeal), the Commission must initiate an action in Federal court to obtain monetary relief under section 19 and, in that action, the Commission must prove that the violator engaged in objectively fraudulent or dishonest conduct.<sup>486</sup> In effect, the section 19(a)(2) pathway requires the Commission to file two separate actions to obtain monetary relief.

The more efficient path to monetary relief is under section 19(a)(1), which allows the Commission to recover redress in one Federal court action for violations of a Commission rule relating to unfair or deceptive acts or practices.<sup>487</sup> Only a small portion of the

Commission's past cases challenging unfair or deceptive consumer reviews or testimonials involved rule violations that would allow the Commission to seek monetary relief under section 19(a)(1). With the final rule, however, the Commission will be able to use section 19(a)(1) to obtain redress for consumer losses attributable to violations of the rule.

Overall, outlawing egregious review and testimonial practices in the final rule expands the Commission's enforcement toolkit and allows it to deliver on its mission by stopping and deterring harmful conduct and, in some cases, making American consumers whole when they have been harmed. The unfair or deceptive acts or practices encompassed by this final rule are prevalent and harmful to consumers and honest businesses. Thus, the unlocking of additional remedies through this rulemaking—particularly, the ability to obtain civil penalties against violators and redress for consumers or others injured by the conduct—will allow the Commission to more effectively police and deter harmful review and testimonial practices that plague consumers and honest businesses.

#### *B. Anticipated Costs and Benefits of the Final Rule*

As discussed below, the Commission has determined that the rule's benefits greatly outweigh its costs. The rule promotes accuracy in reviews and testimonials by prohibiting certain unfair or deceptive acts or practices involving reviews and testimonials. Thus, this rule will help the vast majority of American consumers who rely on such reviews and testimonials to make better-informed purchase decisions. The rule prohibits (1) the creation, sale, purchasing, or procurement from insiders of fake or false reviews, and (2) buying of reviews conditioned on the reviews expressing particular sentiments. It also includes prohibitions on fake or false consumer or celebrity testimonials, certain insider reviews without adequate disclosures, misleading company-controlled review websites or entities, certain review suppression practices, and the misuse of fake indicators of social media influence.

In the analysis below, the Commission describes the anticipated impact of the rule. Where possible, the Commission quantifies the benefits and costs. If a benefit or cost is quantified, the Commission indicates the sources of the data relied upon. If an assumption is needed, the analysis makes clear which quantities are being assumed. The Commission measures the benefits and costs of the rule against a baseline in which no rule has been promulgated by the Commission. For the remainder of section VI, and in the interest of brevity, the term "reviews" collectively refers to both reviews and testimonials.

Quantifiable benefits stem from consumer welfare improvements and consumer time savings. With the rule, reviews will be more accurate overall, leading consumers to purchase higher-quality products or products that are better-matched to their preferences. The rule will also lead to more trustworthy aggregate review ratings (e.g., star ratings), leading some consumers to spend less time scrutinizing reviews to determine their validity. Quantifiable costs primarily reflect the resources spent by businesses to review the rule and to take any preemptive or remedial steps to comply with its provisions. Because the rule is an application of preexisting law under section 5 of the FTC Act, the Commission expects these compliance costs to be minimal.

A period of ten years is used in the baseline scenario because FTC rules are subject to review every ten years.<sup>488</sup> Quantifiable aggregate benefits and costs are summarized as the net present value over this ten-year period in Table 1.1. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor raised to the power of the number of years in the future the net benefit accrues.

<sup>488</sup> Fed. Trade Comm'n, Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 FR 41150, 41150 (July 13, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-07-13/pdf/2011-17513.pdf> ("all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review.")

<sup>483</sup> 141 S. Ct. at 1352.

<sup>484</sup> 15 U.S.C. 53(b).

<sup>485</sup> See ANPR, 87 FR at 67425, 67425 n.1 (discussing *AMG Cap. Mgmt.*).

<sup>486</sup> See 15 U.S.C. 57b(a)(2) ("If the Commission satisfies the court that the act or practice to which the cease-and-desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief.")

<sup>487</sup> Certain statutes, such as the Restore Online Shoppers' Confidence Act, 15 U.S.C. 8401–05, include provisions that treat violations of the statute as a violation of a rule for purposes of section 19(a)(1). See 15 U.S.C. 8404(a).

TABLE 1.1—PRESENT VALUE OF NET BENEFITS  
[2024–2033 (in billions)]

	Present value: low-end estimate	Present value: high-end estimate
Total Benefits:		
3% Discount Rate .....	\$67.40	\$269.55
7% Discount Rate .....	57.03	230.44
Total One-Time Costs .....	0.87	0.00
Net Benefits:		
3% Discount Rate .....	66.53	269.55
7% Discount Rate .....	56.16	230.44

1. Estimated Benefits of the Final Rule

This section describes the beneficial impact of the rule, provides quantitative estimates where possible, and describes benefits that are only assessed qualitatively. The quantifiable estimates reflect benefits stemming from the decrease in online review manipulation on third-party platforms or company websites, which covers most of the prohibitions contained in the rule. This analysis does not calculate benefits from the other aspects of the rule—that is, the prohibitions on fake or false celebrity testimonials, company-controlled entities that deceptively purported to provide independent opinions, review suppression, and the misuse of fake indicators of social media influence—because of the limited quantitative research in these areas. Some of these benefits are likely to be substantial. The quantified benefits are presented by benefit category, rather than stemming from a specific provision of the rule, because the relevant provisions have the same end goal—that is, to improve the information available to consumers by reducing the level of review manipulation. Therefore, it is difficult to disentangle the benefits stemming from each provision.

Existing academic literature in economics, marketing, computer science, and other fields documents the importance of online reviews; specifically that the number of online reviews and aggregate ratings are extremely important for consumer purchase decisions. It is widely documented that the presence of online reviews improves consumer welfare via reductions in both search costs and the level of information asymmetry that exists prior to purchase.<sup>489</sup>

<sup>489</sup> See, e.g., Dina Mayzlin, *Promotional Chat on the Internet*, 25(2) Mktg. Sci., 155–63 (2006).

When making purchase decisions, consumers typically have incomplete information on product quality and attributes. Searching for additional information is costly. Consumers incur costs—including time and effort costs—to seek, evaluate, and integrate incoming information. Online platforms where past users share information about their experiences can significantly lower search costs.

Researchers have also demonstrated that consumer reviews create value for consumers beyond a reduction in search costs. Consumers are better able to learn of a product’s quality and attributes when there is free-flowing, non-manipulated commentary from past consumers. Consumer reviews lead to “better” decisions by increasing the level of information available prior to purchase and reducing uncertainty. By the same token, the academic literature also documents that manipulated or fake reviews lead to reductions in consumer welfare by leading consumers to buy low-quality products or otherwise make suboptimal purchase decisions.<sup>490</sup>

A secondary benefit is deterrence of the specified review practices. The rule

<sup>490</sup> See, e.g., Chrysanthos Dellarocas, *Strategic Manipulation of Internet Opinion Forums: Implications for Consumers and Firms*, 52(10) Mgmt. Sci., 1577–93 (2006), <https://www.jstor.org/stable/pdf/20110630.pdf>; Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database*, 122(563) Econ. J., 957–89 (2012); Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, 62(12) Mgmt. Sci., 3412–27 (2016), <https://dash.harvard.edu/handle/1/22836596>; Jonathan Zinman & Eric Zitzewitz, *Wintertime for Deceptive Advertising?*, 8(1) Am. Econ. J. Applied, 177–92 (2016), <https://www.aeaweb.org/articles?id=10.1257/app.20130346>; Imke Reiners & Joel Waldfogel, *Digitization and Pre-purchase Information: The Causal and Welfare Impacts of Reviews and Crowd Ratings*, 111(6) Am. Econ. Rev., 1944–71 (2021), <https://www.aeaweb.org/articles?id=10.1257/aer.20200153>.

is essentially the only means for imposing civil penalties in most cases involving such practices. Civil penalties are not available for conduct that violates section 5(a)’s prohibition on unfair or deceptive acts or practices—rather, a violation of an FTC rule is necessary to impose civil penalties under section 5(m)(1)(a). Civil penalties act as a deterrent to fraud and deception in connection with reviews.<sup>491</sup>

To obtain redress without alleging a rule violation, the Commission must typically first determine in an administrative proceeding that the respondent violated the FTC Act, successfully defend that determination in any appeal to a Federal court of appeals, and then initiate a second action in Federal district court under section 19(a)(2) in which the Commission must prove that the conduct at issue is “one which a reasonable man would have known under the circumstances was dishonest or fraudulent.”<sup>492</sup> Although these requirements are likely to be satisfied in cases involving the conduct covered by

<sup>491</sup> In October 2021, the Commission authorized a Notice of Penalty Offenses concerning endorsement practices that the FTC determined to be unfair or deceptive in prior administrative cases, including falsely claiming an endorsement by a third party; misrepresenting whether an endorser is an actual, current, or recent user; and failing to disclose an unexpected material connection with an endorser. See, e.g., Press Release, Fed. Trade Comm’n, *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-of-businesses-notice-about-fake-reviews-other-misleading-endorsements>. The notice allows the agency to seek civil penalties pursuant to section 5(m)(1)(B) of the FTC Act against a company that received the notice and then engages in conduct that the Commission previously determined to be unfair or deceptive. 15 U.S.C. 45(m)(1)(B).

<sup>492</sup> 15 U.S.C. 57b(a)(2). Depending on the egregiousness of the misconduct and the harm it is causing, the Commission also may seek preliminary injunctive relief in Federal court. 15 U.S.C. 53(b).

the rule, it would take substantially more time and resources, and would significantly delay any redress to consumers, compared to a single Federal court action alleging a rule violation, in which the court adjudicates both whether the defendant violated the rule and, if so, the appropriate amount of monetary relief to award.<sup>493</sup>

Given the prevalence of unfair or deceptive conduct involving reviews and testimonials, the Commission will have no shortage of bad actors to investigate; it can invest the extra resources freed up by the final rule into more investigations and actions with respect to consumer reviews or testimonials. In sum, the potential consumer-redress benefits of the rule are significant: the Commission can put a stop to more inarguably unfair or deceptive consumer reviews, return more money to consumers, and obtain that redress more quickly.

#### a. Consumer Welfare Benefits From Better-Informed Purchase Decisions

The study containing the most direct estimate of welfare losses from review manipulation finds that the presence of fake reviews leads consumers to lose \$0.12 for every dollar spent in an experimental setting.<sup>494</sup> The study considers a limited number of kinds of review manipulation, which notably does not include suppression of negative reviews or misrepresenting the independence of reviews, which might mean that \$0.12 is an underestimate of the effect of the rule. However, the study also measures the effect of complete elimination of inflated star ratings and false written narratives, which might mean that \$0.12 is an overestimate of the effect of the rule. Thus, the Commission believes that a reasonable proxy for the effect of the rule's elimination of much review manipulation is that consumers will gain an estimated \$0.12 for every dollar spent on goods whose online reviews included fake or false ones.

To estimate consumer welfare benefits from better-informed purchase decisions, the Commission first estimates the total amount of sales for

which consumers consult online reviews. U.S. e-commerce sales by retail firms totaled \$1.119 trillion in 2023.<sup>495</sup> The Commission assumes that all online retail sales had some form of user-generated commentary (e.g., on third-party review platforms or on company websites), and that this commentary factored into consumers' purchase decisions for these goods.

Online reviews are also important for commerce that is not conducted online, including for revenues earned by the hospitality industry and by other services. Sales for businesses classified as "Food Services and Drinking Places" by the U.S. Census totaled \$980.15 billion in 2022, which includes revenue from restaurants and bars.<sup>496</sup> The Commission assumes that consumers rely on reviews for only a portion of these sales. Some consumers—particularly those living in rural parts of the country and in smaller cities—may have a small set of familiar food and drink establishments available to them, making online reviews less influential to their decision to patronize a particular one. Moreover, prior research has found that online reviews do not impact revenues of chain restaurants.<sup>497</sup> Accordingly, the Commission assumes that consumers rely on reviews for twenty-five percent of the total revenue generated in the food services and drinking places sector (twenty-five percent of \$980.15 billion, or \$245.04 billion).<sup>498</sup>

Online reviews are also important for sales in other service sectors. In 2022, total revenue was \$316.35 billion for the accommodations sector (which includes hotels and vacation rentals), and total revenue was \$67.70 billion for personal services (including beauty salons, barber shops, health clubs, and non-veterinary

pet care), totaling \$384.05 billion for both sectors.<sup>499</sup> About half of hotel revenue is generated by business travelers, who might rely less on online reviews than leisure travelers do.<sup>500</sup> In addition, pre-paid hotel bookings and vacation rentals booked online are already accounted for in the e-commerce sales figure described above. Furthermore, some consumers may be loyal customers of local salons and other personal services, regardless of these businesses' online reputations. For these reasons, the Commission assumes that a subset of accommodation and personal services revenues is affected by consumer reviews. Similar to the calculation for the food and drinking places industry, the Commission assumes that twenty-five percent of total accommodation and personal care services revenue is impacted by consumer reviews (twenty-five percent of \$384.05 billion, or \$96.01 billion). The total estimated revenue for services impacted by consumer reviews is \$341.05 billion (the sum of \$245.04 billion and \$96.01 billion). Combining the revenue estimates described above yields \$1.461 trillion in estimated sales of goods or services for which consumers incorporate reviews into their decision-making.

Quantitative estimates of the incidence of fake or false reviews vary by source.<sup>501</sup> Nevertheless, at least three prior studies examining the degree of review manipulation as a proportion of businesses or products (rather than as a proportion of reviews) contain similar findings. According to these studies, approximately ten percent of products or businesses have some manipulated

<sup>499</sup> See U.S. Census Bureau, *Service Annual Survey (SAS)*, *supra* note 496 (listing total 2022 revenue of \$316,350,000,000 for NAICS Code 721 and listing total 2022 revenue of \$67,698,000,000 for NAICS Codes 812111 through 812199 and NAICS Code 81291).

<sup>500</sup> See Linchi Kwok, *Will Business Travel Spending Return to the Pre-Pandemic Level Soon?*, Hospitality Net, Sept. 22, 2022, <https://www.hospitalitynet.org/opinion/4112075.html>.

<sup>501</sup> These estimates range from the single digits to over twenty percent. See Tripadvisor, *2023 Review Transparency Report*, <https://www.tripadvisor.com/TransparencyReport2023> (last visited July 5, 2024) (finding that 4.4 percent of review submissions were fraudulent); Trustpilot, *Transparency Report 2024*, [https://assets.ctfassets.net/b7g9mrbfayuu/7p63VLqZ9vmU2TB65dVdnF/6e47d9ee81c145b5e3d1e16f81bba89a/Trustpilot\\_Transparency\\_Report\\_2024.pdf](https://assets.ctfassets.net/b7g9mrbfayuu/7p63VLqZ9vmU2TB65dVdnF/6e47d9ee81c145b5e3d1e16f81bba89a/Trustpilot_Transparency_Report_2024.pdf) (last visited July 5, 2024) (stating that its software removed 6 percent of reviews due to being fake); Yelp, *2023 Yelp Trust & Safety Report* (Feb. 28, 2024), <https://trust.yelp.com/trust-and-safety-report/2023-report> (stating that 16 percent of submitted reviews were marked as "not recommended" by Yelp's software); Devesh Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms*, (Feb. 27, 2023), <https://deveshraval.github.io/reviews.pdf> (Working Paper) (finding that the share of hidden (likely fake) Yelp reviews is as high as 47 percent).

<sup>493</sup> See, e.g., Press Release, Fed. Trade Comm'n, *Marketers of Ab Force Weight Loss Device Agree to Pay \$7 Million for Consumer Redress* (Jan. 14, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/01/marketers-ab-force-weight-loss-device-agree-pay-7-million-consumer-redress> (describing a 2009 settlement of a follow-on section 19(a)(2) action against Telebrands Corp. that was brought after the conclusion of litigation over a 2003 administrative complaint alleging violations of section 5).

<sup>494</sup> See Jesper Akeson et al., *The Impact of Fake Reviews on Demand and Welfare*, National Bureau of Economic Research Working Paper 31836, Nov. 2023, <https://www.nber.org/papers/w31836>.

<sup>495</sup> See U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023*, Feb. 20, 2024, <https://www2.census.gov/retail/releases/historical/ecomm/23q4.pdf>.

<sup>496</sup> U.S. Census Bureau, *Service Annual Survey (SAS)*, Jan. 30, 2024, <https://www.census.gov/programs-surveys/sas.html> (listing total revenue of \$980,153,000,000 for NAICS Code 722 in 2022, the most recent year with data).

<sup>497</sup> See Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harvard Bus. Sch. Working Paper 12-016 (2016).

<sup>498</sup> Twenty-five percent is likely a reasonable estimate based on the difference in revenues for new restaurants and established restaurants. A study conducted by Toast, Inc., found that new restaurants earn approximately \$112,000 in average revenue per year. Justin Guinn, *What is the Average Restaurant Revenue for a New Restaurant?*, <https://pos.toasttab.com/blog/on-the-line/average-restaurant-revenue> (last visited July 5, 2024). This is approximately twenty-five percent of average revenue for restaurants overall (\$486,000, according to the website Eat Pallet, see Shari Mason, *How Much Do Restaurants Make in a Day? Solved*, May 24, 2024, <https://eatpallet.com/how-much-do-restaurants-make-in-a-day>).

consumer reviews.<sup>502</sup> Thus, a basic approximation of total e-commerce sales involving some review manipulation is ten percent of \$1.119 trillion, or \$111.9 billion. Similarly, a basic approximation of review-dependent service industry sales involving some review manipulation is ten percent of \$341.05 billion, or \$34.1 billion.

Importantly, online businesses that engage in review manipulation are likely to earn less revenue than other e-commerce companies. For example, prior research has found that independent firms and sellers offering lower-quality products are more likely to engage in review manipulation.<sup>503</sup> Therefore, e-commerce sales affected by review manipulation are likely to be lower than the \$111.9 billion in sales described above. A more conservative estimate of e-commerce sales involving review manipulation can be obtained by

using price differentials of review-manipulated products versus others. Because products with online review manipulation have price points that are approximately 19 percent of the average price of goods sold online (according to research using data from Amazon),<sup>504</sup> a more conservative estimate of review-manipulated products' revenue is 1.9 percent (19 percent × 10 percent) of all \$1.119 trillion in e-commerce sales, or \$21.26 billion. Because the Commission does not have data on the revenue or quantities sold of review-manipulated products, it assumes that revenue is constant across price points and relies solely on the price differential to approximate revenue. The Commission does not similarly adjust revenues for non-e-commerce firms (e.g., restaurant and hotels) because there is less variation in prices in those industries.

The Commission estimates annual welfare gains by applying the \$0.12 estimate, described above, to the estimated amount of U.S. sales that are likely to have some manipulated consumer reviews, yielding an annual estimate of welfare gains in the range of \$6.64 billion (12 percent of \$55.36 billion, the sum of \$21.26 billion and \$34.1 billion) and \$17.52 billion (12 percent of \$146.0 billion, the sum of \$111.9 billion and \$34.1 billion). Assuming that e-commerce sales increase linearly over the next ten years at the same rate as they did in the past year,<sup>505</sup> the present value of consumer welfare improvements from better-informed purchasing decisions is estimated to be between \$57.03 and \$230.36 billion as described in Table 2.1.

TABLE 2.1—ESTIMATED BENEFITS FROM CONSUMER WELFARE IMPROVEMENTS FROM PURCHASE DECISIONS [2024–2033]

Percent of e-commerce revenue impacted by review manipulation	Total annual welfare improvements from better-informed purchase decisions (in billions)	Total 10-year (2024–2033) welfare improvement, 3% discount rate (in billions)	Total 10-year (2024–2033) welfare improvement, 7% discount rate (in billions)
10 .....	\$17.52	\$230.36	\$196.91
1.9 .....	6.64	67.40	57.03

b. Consumer Time Savings From Increased Reliability of Summary Ratings

The rule's prohibitions against deceptive and unfair consumer review acts and practices would increase the reliability of consumer reviews. The Commission assumes that this improvement in the dependability of reviews will lead consumers to place more trust in aggregate measures (e.g., aggregate star ratings), which many review settings use to summarize

consumer reviews. This in turn will lead some consumers to spend less time scrutinizing individual reviews to detect red flags commonly found in manipulated reviews (e.g., spelling and grammar mistakes, generic highly positive or negative statements, and lack of detail). Therefore, the rule is likely to result in some amount of time savings for consumers who consult online reviews before making purchases.

Approximately eighty percent of Americans are online shoppers.<sup>506</sup> Of those who shop online, fourteen percent

shop online more than once a week, twenty percent shop online once a week, twenty-three percent shop online once every two weeks, twenty-five percent shop online once a month, and the remainder do so every few months.<sup>507</sup> Different age groups of online shoppers spend various amounts of time reading reviews before making a purchase decision. On average, younger consumers spend more time reading reviews than older consumers.<sup>508</sup> This analysis does not incorporate time spent by consumers researching reviews of

<sup>502</sup> See Nan Hu et al., *Manipulation of Online Reviews: An Analysis of Ratings, Readability, and Sentiments*, 52(3) Decision Support Systems 674–84 (Feb. 2012) (finding that 10.3 percent of books sold on Amazon had manipulated reviews); Luca, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, supra note 490 (finding that ten percent of Boston restaurants had filtered 5-star reviews on Yelp) (Table 3, row 4); Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms*, supra note 501 (finding that 9.7 percent of businesses with reviews or complaints with the Better Business Bureau are of low quality, where fake reviews inflate ratings) (Table III, column 3, row 1).

<sup>503</sup> See, e.g., Sherry He et al., *The Market for Fake Reviews*, 41(5) Mktg. Sci. 896 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3664992](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664992); Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation*, 104(8) Am. Econ. Rev. 2421–55 (2014).

<sup>504</sup> See Davide Proserpio et al., *How Fake Customer Reviews Do—and Don't—Work*, Harvard Bus. Rev., Nov. 24, 2020, <https://hbr.org/2020/11/how-fake-customer-reviews-do-and-dont-work>. The authors find that products sold on Amazon with manipulated reviews are typically in the \$15 to \$40 price range. The midpoint of this range (\$27.50) represents 19 percent of the average product's price (\$142.74, according to one study see Semrush Inc., *Amazon Pricing Study: The Most Expensive Products, Category Volatility, and Seasonal Price Shifts*, Mar. 22, 2022, <https://www.semrush.com/blog/amazon-pricing-study>).

<sup>505</sup> E-commerce sales increased by 7.6 percent from 2022 to 2023. See U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023*, supra note 495. Using growth in the past year to predict future e-commerce sales results in a more conservative estimate than using a longer time frame. E-commerce sales experienced higher annual growth rates prior to 2021 (14 percent from 2018 to 2019, 43 percent from 2019 to 2020, and 14

percent from 2020 to 2021) and grew 7.7 percent from 2021 to 2022. This analysis does not project revenues for non-e-commerce industries because linear trends during recent years are unique to the pandemic and are unlikely to be accurate for future years.

<sup>506</sup> See Pew Research Center, *Online Shopping and E-Commerce*, Dec. 19, 2016, <https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce>.

<sup>507</sup> See Int'l Post Corp., *Cross-Border E-Commerce Shopper Survey 2022*, Jan. 2023, <https://www.ipc.be/-/media/documents/publications/ipc-shoppers-survey/onlineshoppersurvey2022.pdf>.

<sup>508</sup> See BrightLocal, *Local Consumer Review Survey 2019*, Dec. 11, 2019, <https://www.brightlocal.com/research/local-consumer-review-survey-2019>.

restaurants, hotels, and other goods and services that are not purchased online because of the limited amount of information available regarding consumers' total time spent on such activities.

According to the Bureau of Labor Statistics, the average hourly wage in 2023 was \$31.48.<sup>509</sup> Recent research suggests that individuals living in the United States value their non-work time at eighty-two percent of average hourly earnings.<sup>510</sup> Thus, Americans overall value their non-work time at \$25.81 per hour on average.

The survey data does not specify whether consumers were surveyed regarding the time spent reading reviews before the purchase of a single product or whether the question

concerned the purchase of multiple products. This analysis assumes that the time listed in the survey results pertains to the purchase of a single product. It also assumes that the implementation of the rule will reduce the time spent reading reviews by ten percent.

Combining the above figures results in \$2.49 billion in consumer time savings per year, or a present value of \$33.53 billion to \$39.19 billion over a 10-year period, as described in Table 2.2.

In addition, there are likely to be other utility-related benefits consumers receive when reading nonmanipulated online reviews or consulting more accurate aggregate summary measures, such as increased satisfaction (apart from purchasing decisions) and

decreased frustration. The Commission is not able to quantify these benefits.

Finally, some consumers may spend more time reading reviews if reviews are less likely to be fake or otherwise manipulated. This increase in time spent reading reviews may offset any time savings from the increased reliability of summary ratings. Therefore, the Commission presents another scenario in Table 2.2 where consumers do not gain any benefits from time savings. However, as before, there are likely to be additional benefits that are difficult to quantify (e.g., decreased frustration) that result from reading more accurate reviews, likely yielding positive net benefits related to reading reviews even when consumers spend more time doing so.

TABLE 2.2—ESTIMATED BENEFITS FROM TIME SAVINGS  
[2024–2033]

Scenario 1—Improved Reliability of Aggregate Measures Reduces Overall Time Spent Reading Reviews	
Number of online shoppers, age 18–34 <sup>a</sup> .....	60,467,204
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 18–34 .....	0.336
Number of online shoppers, age 35–54 <sup>a</sup> .....	67,273,832
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 35–54 .....	0.231
Number of online shoppers, age 55+ <sup>a</sup> .....	78,920,814
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 55+ .....	0.167
<hr/>	
Total amount of time all online shoppers spend reading online reviews before making a purchase decision (in hours) .....	48,991,116
Total amount of time U.S. online shoppers spend reading online reviews per year (in hours) <sup>b</sup> .....	1,728,406,578
Value of time for online shoppers (per hour) .....	\$25.81
Percentage of time saved .....	10%
Total annual time savings .....	\$4,461,017,378
Total 10-year (2024–2033) time savings, 3% discount rate (in billions) .....	\$39.19
Total 10-year (2024–2033) time savings, 7% discount rate (in billions) .....	\$33.53
Scenario 2—Increase in Time Spent Reading Reviews Offsets Time Savings from Improved Reliability of Summary Measures	
No quantifiable benefit .....	\$0

<sup>a</sup> 80% of age-specific total U.S. population (Source: Pew Research Center, U.S. Census).

<sup>b</sup> Adjusting for online shopping frequency (Source: International Post Corporation).

c. Benefits Related to Competition

Accurate online reviews have been shown to improve competition. Several studies have found that online reviews are particularly important for independent and newer firms.<sup>511</sup> Ratings are more influential for these firms because consumers do not have strong prior beliefs as to their quality. New entrants whose sales benefit from

online reviews typically offer higher quality goods and services. On the other hand, lower-quality firms often experience revenue losses with more online review activity.<sup>512</sup>

Relatedly, fake, false, and manipulated online reviews allow companies to surpass competitors. One study found that it only takes 50 fake reviews for a seller to pass any of its

competitors in terms of visibility (e.g., via rankings or search results).<sup>513</sup> It follows that by curbing the number of fake, false, or manipulated reviews, the rule would benefit consumers by improving the competitive environment for legitimate firms selling higher-quality products (i.e., those who do not rely on review manipulation to sell their goods). While the benefits resulting

<sup>509</sup> Bureau of Labor Statistics, *May 2023 National Occupational and Wage Estimates, United States*, [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm) (listing mean hourly wage of \$31.48 for all occupations).

<sup>510</sup> See Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. of Econ. Survs. 198–203 (2016), <https://doi.org/10.1111/joes.12107>.

<sup>511</sup> See Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, *supra* note 497 (finding that chain restaurants have declined in market share as Yelp penetration has increased); Gregory Lewis and

Georgios Zervas, *The Welfare Impact of Consumer Reviews: A Case Study of the Hotel Industry*, <https://economics.sas.upenn.edu/sites/default/files/filevault/u475/tawelfare.pdf> (Working Paper) (finding that demand for independent hotels is more sensitive to reviews on Tripadvisor); Brett Hollenbeck, *Online Reputation Mechanisms and the Decreasing Value of Chain Affiliation*, 55(5) J. of Mktg. Resch. 636–54 (2018), <https://www.jstor.org/stable/26966532> (finding that branded, chain-affiliated hotels' premiums over

independent hotels have declined substantially largely due to online reputation mechanisms).

<sup>512</sup> See Limin Fang, *"The Effects of Online Review Platforms on Restaurant Revenue, Consumer Learning, and Welfare"* 68(11) Mgmt. Sci. 7793–8514 (2022).

<sup>513</sup> See Theodoros Lappas et al., *The Impact of Fake Reviews on Online Visibility: A Vulnerability Assessment of the Hotel Industry*, 27(4) Inf. Sys. Research 940–961 (2016), <https://pubsonline.informs.org/doi/abs/10.1287/isre.2016.0674>.

from improvements in the competitive environment are difficult to quantify, the Commission believes they are likely to be substantial.

2. Estimated Costs of the Final Rule

This section describes the costs associated with the rule, provides quantitative estimates where possible, and describes costs that are only assessed qualitatively. While the Commission only quantifies benefits from reduced review manipulation and not the other rule provisions above, the Commission quantifies compliance costs for all aspects of the rule.

a. Compliance Costs

The acts and practices prohibited by the rule are unfair or deceptive under section 5 of the FTC Act. The rule targets acts or practices that are clear violations of section 5, and businesses that are already compliant will not experience any additional compliance costs as a result of the rule. Moreover, the FTC routinely provides guidance to businesses on complying with FTC law, which will make the implications of the rule easy to understand for a wide range of businesses. Finally, in response to the comments, the Commission has both narrowed and clarified the rule requirements relative to the proposed rule (see section IV of this document). Accordingly, one of the scenarios reflected in Table 3.1 assumes that businesses will spend a *de minimis* amount of time interpreting the rule and make no changes to their current policies.

However, because businesses now face the potential for civil penalties if

they engage in conduct that violates the final rule, businesses may choose to incur additional administrative burdens to ensure compliance. The Commission presents another scenario in Table 3.1 where businesses notify their employees of the rule, conduct a review of their processes, and take any steps they deem important to ensure compliance. For firms that already comply with section 5 of the FTC Act, these steps might be out of caution so as not to risk the possibility of violating the rule. For example, some sellers may currently flag and remove reviews on their websites that they reasonably believe are fake. While this practice would not amount to a violation of the relevant rule provision (§ 465.7(b)), the rule may lead some businesses to choose to take extra steps to verify the inauthenticity of such reviews before suppressing them. A business may also decide to notify its employees of the rule. For example, if certain employees are responsible for posting new product pages or managing the company’s social media presence, business owners may wish to notify these employees to ensure compliance. Although cautious firms may elect to conduct additional compliance review, the rule would not require any additional recordkeeping or notices beyond what is required by section 5 of the FTC Act.

For the heightened compliance review scenario in Table 3.1, the Commission makes assumptions about the number of businesses impacted and the number of person-hours involved in compliance activities. In 2021, there were approximately 34.77 million total firms in the United States. Of these firms,

19,688 had 500 or more employees (“large companies”), and the remaining 34.75 million had fewer than 500 employees (“small companies”).<sup>514</sup> The Commission assumes that all 19,688 large companies had some form of online consumer review presence (e.g., on third-party business platforms such as Yelp or Google Reviews, or on their own websites). It assumes that 74 percent of the 34.75 million small companies (25.71 million companies) had an online consumer review presence.<sup>515</sup>

With heightened compliance review, the Commission assumes that lawyers at large companies, whose time is valued at \$70.08 per hour,<sup>516</sup> will spend eight hours conducting a one-time review of the rule and notifying employees whose role involves creating new product pages, managing the company’s social media presence, and any other relevant practices covered by the rule. It assumes that small company owners, whose time is valued at \$33.48,<sup>517</sup> and are less likely have formal compliance programs, spend one hour doing the same.

In addition, some companies may spend time reviewing their automated processes to ensure that they comply with the rule. These costs, which companies might incur just once or on a recurring basis, are likely to be minimal. The Commission does not quantify these process-related costs because, among other things, the Commission does not know the number of firms that might undertake such a review.

The total estimated costs are tabulated in Table 3.1.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS

	2024 Only
<b>Scenario 1—No Review</b>	
No cost .....	\$0
Total cost .....	\$0
<b>Scenario 2—Heightened Compliance Review</b>	
Number of large companies (in thousands) .....	19.69
Cost per hour of rule review and related activities .....	\$70.08
Number of hours of rule review and related activities .....	8
Subtotal (in millions) .....	\$11.04
Number of small companies with online reviews (in thousands) .....	25,715.23
Cost per hour of rule review and related activities .....	\$33.48

<sup>514</sup> See U.S. Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry*, <https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html> (last visited July 5, 2024) (listing 6.29 million total firms with at least one paid employee) and U.S. Census Bureau, *Nonemployer Statistics*, <https://www.census.gov/programs-surveys/nonemployer-statistics.html> (listing 28.48

million firms with no paid employees) (last visited July 5, 2024).

<sup>515</sup> Seventy-four percent of small businesses have at least one Google review. See BrightLocal, *Google Reviews Study: How Many Reviews Do Local Businesses Need?*, Oct. 31, 2018, <https://www.brightlocal.com/research/google-reviews-study/>.

<sup>516</sup> See Bureau of Labor Statistics, *Occupational Outlook Handbook: Lawyers*, <https://www.bls.gov/ooh/legal/lawyers.htm> (last visited July 5, 2024).

<sup>517</sup> See Payscale, *Average Small Business Owner Salary*, [https://www.payscale.com/research/US/Job=Small\\_Business\\_Owner/Salary](https://www.payscale.com/research/US/Job=Small_Business_Owner/Salary) (last visited July 5, 2024) (reporting median base salary of \$69,648 for small business owners). We assume small business owners work 2,080 hours per year.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS—Continued

	2024 Only
Number of hours of rule review and related activities .....	1
Subtotal (in millions) .....	\$860.95
Total cost (in millions) .....	\$871.98

#### b. Other Impacts of the Rule

There are several other potential effects from the rule. While the proposed requirements are far from onerous, there is the possibility that some sellers may “overcorrect” in response to the penalties available for rule violations. For example, a firm may encounter an excess of fake, negative reviews from a competitor. While § 465.7(b) permits the suppression of reviews that the seller reasonably believes are fake, an overcautious seller seeking to suppress fake reviews from competitors may choose to display no reviews whatsoever so as not to risk violating the rule. Alternatively, such a firm may take no action towards suspected fake reviews to avoid a possible rule violation. Both of these hypothetical scenarios would likely hurt the information environment for consumers. The Commission believes that such unintended consequences of the rule are very unlikely, especially in light of how the rule has been clarified and narrowed in response to the comments.

#### C. Reasonable Alternatives and Explanation of Why Particular Alternative Chosen

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the final rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our low-end estimate above, the present value of quantified benefits for consumers from the rule’s requirements over a 10-year period using a 7% discount rate is estimated at \$57.03 billion. The present value of quantified costs for covered firms of complying with the rule’s requirements over a 10-year period using a 7% discount rate is estimated at \$0.83 billion. This generates an estimate of the present value of quantified net benefits equal to \$56.16 billion using a discount rate of 7%. Using the upper-end assumptions discussed in the preceding analysis

results in net benefits of \$230.44 billion using a discount rate of 7%.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of compliance costs, the Commission calculates costs and benefits in a scenario where all labor costs turn out to be ten times larger than the parameter values in the heightened compliance review scenario. For both small and large companies, the number of hours of rule review and related activities are increased by a factor of ten. All benefits and other cost parameters are unchanged in this analysis. With these new parameters, compliance review will cost \$8.72 billion in 2024, and the present value of quantified net benefits will be equal to \$48.31 billion using a discount rate of 7%. Thus, while the Commission believes compliance costs in the heightened compliance scenario are likely overestimates, even if they are instead severe underestimates, the quantified net benefits are highly positive.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic overestimating of the effectiveness of deterrence, the Commission calculates costs and benefits in a scenario in which the rule only partially eliminates the welfare losses to consumers caused by the various types of review manipulation covered by the rule. For this scenario, the Commission instead assumes that consumers will gain an estimated \$0.04, rather than \$0.12, for every dollar spent on goods whose online reviews included fake or false ones, the minimum welfare improvement reported for partial elimination of review manipulation in the study on which these estimates are based.<sup>518</sup> Under this scenario, the present value of quantified net benefits under a 7% discount rate is \$18.14 billion instead of \$56.16 billion. Combining the two scenarios, if the Commission both systematically underestimates compliance costs and systematically overestimates the effectiveness of the

<sup>518</sup> See Akesson, *The Impact of Fake Reviews on Demand and Welfare*, supra note 494 (reviews for inferior products that had inflated star ratings but accurate written narratives caused consumers to lose \$0.04 in welfare for every dollar spent).

rule in preventing review manipulation, the present value of quantified net benefits under a 7% discount rate is \$10.29 billion. Thus, even if the main compliance cost estimates above are underestimates and the main welfare benefits above are overestimates, the quantified net benefits are highly positive.

One alternative to the final rule would be to terminate the rulemaking and rely instead on the existing tools that the Commission currently possesses to combat the specified review and testimonial practices, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act. Failing to strengthen the set of tools available in support of the Commission’s enforcement program against unfair or deceptive consumer reviews or testimonials would deprive it of the net benefits outlined above.

The Commission expects unquantified benefits to outweigh unquantified costs for this rule. As noted above, the benefits from several rule provisions are unquantified, while the compliance costs of all rule provisions are quantified. Thus, the quantified net benefits of \$56.16 billion above likely underestimate the benefits to the public. Furthermore, these estimates are robust to uncertainty. Even assuming systematic underestimation of compliance costs and systematic overestimation of the rule effectiveness, the quantified net benefits are large and positive. Therefore, this regulatory analysis indicates that adoption of the rule will result in benefits to the public that outweigh the costs.

#### VII. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501 *et seq.*, requires Federal agencies to seek and obtain Office of Management and Budget (“OMB”) approval before undertaking a collection of information directed to ten or more persons. As part of the NPRM, the Commission noted that the proposed rule did not contain an information collection requirement. However, for the purpose of confirmation, in Question 4 of the NPRM, the Commission nonetheless asked commenters whether the proposed rule contained a collection

of information.<sup>519</sup> One commenter responded, “Yes, it does. It contains our research and others’ research, as well as valuable estimates to harm/costs for all 3 parties: consumers, businesses, and government.”<sup>520</sup> The Commission believes that this commenter was addressing whether the NPRM was collecting information, as opposed to whether the proposed rule would contain a collection of information within the meaning of the PRA. No other comments responding to the NPRM or Notice of Hearing addressed this question. While the Commission finalizes the proposed rule with some limiting modifications and clarifications based on the comments it received, it has not added any new requirements that would collect information from the public. Accordingly, the Commission has determined that the final rule neither includes a new collection of information, nor modifies an existing collection of information.

### VIII. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 *et seq.*, requires an agency to provide an Initial Regulatory Flexibility Analysis (“IRFA”) with a proposed rule and a Final Regulatory Flexibility Analysis (“FRFA”) with a final rule, if any, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.<sup>521</sup> The purpose of a regulatory flexibility analysis is to ensure that an agency considers potential impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities.

In the NPRM, the Commission provided an IRFA, stating its belief that the proposal will not have a significant economic impact on small entities, and soliciting comments on its burden estimate. In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press and other releases. The Commission received comments from small businesses and associations that represent small businesses. In order to reduce compliance burdens on small businesses and other small entities, the Commission finalizes the proposed rule with some limiting modifications and clarifications as described in section IV of this document.

The Commission believes that the rule will not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. The rule primarily prohibits certain unfair or deceptive acts or practices involving consumer reviews or testimonials and does not impose a reporting or recordkeeping requirement upon businesses. In addition, the Commission does not anticipate these changes will impose any additional significant additional costs upon small businesses. Specifically, as discussed in further detail below, the Commission anticipates that an average small business will spend, at most, one hour on compliance review, incurring a cost of \$33.48.<sup>522</sup> Therefore, the rule imposes no new significant burdens on law-abiding small businesses. The Commission has determined, nonetheless, that it is appropriate to publish an FRFA to identify the impact of the rule on small entities. Therefore, the Commission has prepared the following analysis:

#### A. Reasons for the Rule

The Commission describes the reasons for the rule in section VI.A. of this document. The FTC’s law enforcement, outreach, and other engagement in this area indicate that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent. The rule will benefit consumers and legitimate businesses without imposing significant burdens.

#### B. Statement of the Objectives of, and Legal Basis for, the Rule

The Commission describes the objectives for the rule in section VI.A of this document. The legal basis for the rule is section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

#### C. Issues Raised by Comments, the Commission’s Assessment and Response, and Any Changes Made as a Result

One individual commenter accepted the Commission’s estimated compliance costs on small businesses but said it was unfair that “small companies with online reviews would bear almost all of the [rule’s] estimated compliance

costs.”<sup>523</sup> As the Commission stated in the NPRM, it is likely that only a minority of small businesses would elect to conduct optional compliance review and the total compliance costs for small businesses is likely to be significantly lower than the Commission’s estimate.<sup>524</sup>

One trade association simply asserted that certain provisions of the proposed rule could be detrimental to small businesses but did not specifically address the IRFA.<sup>525</sup> This commenter expressed concern about: (1) civil penalty exposure for failing to stop the actions of undiscovered third parties providing reviews and testimonials appearing on a business’s website; (2) a subsequent broadening of the proposed rule to prohibit incentivized reviews other than those required to express a particular sentiment; and (3) potential liability when an agent’s review or testimonial appears without a disclosure.<sup>526</sup> The Commission addresses these specific concerns in section IV of this document and has narrowed the rule or provided clarification as appropriate.

The Commission does not believe that it needs to make any changes to its IRFA in response to these comments.

Section IV provides a section-by-section analysis that discusses the provisions proposed in the NPRM, the comments received, the Commission’s responses to the comments, and any changes made by the Commission as a result.

#### D. Comments by the Chief Counsel for Advocacy of the SBA, the Commission’s Assessment and Response, and Any Changes Made as a Result

The Commission did not receive any comments from the Chief Counsel for Advocacy of the SBA.

#### E. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The final rule could impact small entities that currently have, or might potentially, solicit consumer reviews or disseminate consumer testimonials. It could also impact small entities that use celebrity testimonials or have a social media presence. It is likely that the rule will primarily affect businesses that sell products or services directly to consumers. For example, the rule is less likely to impact small entities that manufacture niche raw materials for other businesses or small agricultural

<sup>519</sup> NPRM, 88 FR 49388.

<sup>520</sup> Transparency Company Cmt. at 10.

<sup>521</sup> See 5 U.S.C. 605(b).

<sup>522</sup> See *infra* section VIII.F of this document.

<sup>523</sup> Camp-Martin Cmt. at 2–3.

<sup>524</sup> NPRM, 88 FR 49388.

<sup>525</sup> IAB Cmt. at 1–15.

<sup>526</sup> *Id.* at 2, 5–6, 8–9, 10.

firms that do not sell directly to consumers. Nevertheless, for a conservative estimate of total costs, the Commission assumes that the rule will impact all industry classes of small entities.

As described in section VI.B.2 of this document, there are approximately 34.75 million small businesses in the United States. Prior research has found that 74 percent of small businesses have at least one Google review.<sup>527</sup> On the one hand, it is possible that, across all platforms (beyond Google reviews), a higher percentage of small businesses have consumer reviews or testimonials, celebrity testimonials, or a social media presence. On the other hand, it is likely that many of these firms do not interact with reviews and such passive firms would not be affected by the rule. The Commission does not have the appropriate data to refine this estimate. Therefore, its best estimate is that no more than 25.71 million (74 percent × 34.75 million) small businesses will be impacted by the rule.

#### *F. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements*

The rule contains no reporting or recordkeeping requirements. Therefore, many law-abiding businesses are likely to incur no additional compliance costs with the rule.

As described in section VI.B.2 of this document, a cautious firm may elect to undertake additional compliance review due to the potential for civil penalties for rule violations. If every small business impacted by the rule conducts one hour of compliance review, each firm would incur \$33.48 of compliance costs, which reflects the estimated hourly earnings of a small business owner.<sup>528</sup> Therefore, under the conservative estimate of heightened compliance review for all small businesses, costs to small businesses would total \$860.95 million (25.71 million × \$33.48). Because it is likely that only a minority of small businesses will elect to conduct optional compliance review, total compliance costs for these entities are likely to be significantly lower than this estimate.

#### *G. Description of Steps Taken To Minimize Impact of the Rule on Small Entities*

In response to comments, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this

document, which should minimize further any economic impact on small entities. In its IRFA, the Commission described an alternative to the proposed rule, namely, to rely on the Commission's previously existing tools, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act, to combat the specified review and testimonial practices. The Commission believes that promulgation of the rule will result in greater net benefits to the marketplace while imposing no additional burdens beyond what is required by the FTC Act. As described in further detail in section VI.B.1.c of this document, the rule will not only result in significant benefits to consumers but also improve the competitive environment, particularly for small, independent, or new firms. Therefore, the rule appears to be superior to this alternative for small entities.

#### **IX. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 16 CFR Part 465**

Advertising.

■ For the reasons set forth above, the Federal Trade Commission amends 16 CFR Chapter I by adding part 465 to read as follows:

#### **PART 465—RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS**

Sec.

- 465.1 Definitions.
- 465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.
- 465.3 [Reserved]
- 465.4 Buying positive or negative consumer reviews.
- 465.5 Insider consumer reviews and consumer testimonials.
- 465.6 Company-controlled review websites or entities.
- 465.7 Review suppression.
- 465.8 Misuse of fake indicators of social media influence.
- 465.9 Severability

**Authority:** 15 U.S.C. 57a.

#### **§ 465.1 Definitions.**

(a) *Business* means an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

(b) *Celebrity testimonial* means an advertising or promotional message

(including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known individual who purchased, used, or otherwise had experience with a product, service, or business.

(c) *Clear and conspicuous* means that a required disclosure is easily noticeable (*i.e.*, difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as social media or the internet, the disclosure must be unavoidable. A disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes members of that group.

(d) *Consumer review* means a consumer's evaluation, or a purported consumer's evaluation, of a product, service, or business that is submitted by

<sup>527</sup> See *supra* note 515.

<sup>528</sup> See Payscale, *Average Small Business Owner Salary*, *supra* note 517.

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. For the purposes of this part, consumer reviews include consumer ratings regardless of whether they include any text or narrative.

(e) *Consumer review hosting* means providing the technological means by which a website or platform enables consumers to see or hear the consumer reviews that consumers have submitted to the website or platform.

(f) *Consumer testimonial* means an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.

(g) *Distribute fake indicators of social media influence* means the distribution of fake indicators of social media influence to individuals or businesses who could use the indicators to misrepresent their influence.

(h) *Fake indicators of social media influence* means indicators of social media influence generated by bots, purported individual accounts not associated with a real individual, accounts created with a real individual's personal information without their consent, or hijacked accounts, or that otherwise do not reflect a real individual's or entity's activities, opinions, findings, or experiences.

(i) *Immediate Relative* means a spouse, parent, child, or sibling.

(j) *Indicators of social media influence* means any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

(k) *Manager* means an employee of a business who supervises other employees or agents and who either holds the title of a "manager" or otherwise serves in a managerial role.

(l) *Officers* include owners, executives, and managing members of a business.

(m) *Purchase a consumer review* means to provide something of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

(n) *Reviewer* means the author or purported author of a consumer review.

(o) *Testimonialist* means the individual giving or purportedly giving a consumer testimonial or celebrity testimonial.

(p) An *unfounded or groundless legal threat* is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

#### **§ 465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.**

(a) It is an unfair or deceptive act or practice and a violation of this part for a business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial that materially misrepresents, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(b) It is an unfair or deceptive act or practice and a violation of this part for a business to purchase a consumer review, or to disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial, about the business or one of the products or services it sells, which the business knew or should have known materially misrepresented, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(c) It is an unfair or deceptive act or practice and a violation of this part for a business to procure a consumer review from its officers, managers, employees, or agents, or any of their immediate relatives, for posting on a third-party platform or website, when the review is about the business or one of the products or services it sells, and when the business knew or should have known that the review materially

misrepresented, expressly or by implication:

(1) That the reviewer exists;

(2) That the reviewer used or otherwise had experience with the product, service, or business that is the subject of the review; or

(3) The reviewer's experience with the product, service, or business that is the subject of the review.

(d) However, paragraphs (b) and (c) of this section do not apply to:

(1) Reviews or testimonials that resulted from a business making generalized solicitations to purchasers to post reviews or testimonials about their experiences with the product, service, or business; or

(2) Reviews that appear on a website or platform as a result of the business merely engaging in consumer review hosting.

#### **§ 465.3 [Reserved]**

#### **§ 465.4 Buying positive or negative consumer reviews.**

It is an unfair or deceptive act or practice and a violation of this part for a business to provide compensation or other incentives in exchange for, or conditioned expressly or by implication on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.

#### **§ 465.5 Insider consumer reviews and consumer testimonials.**

(a) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to write or create a consumer review or consumer testimonial about the business or one of the products or services it sells that fails to have a clear and conspicuous disclosure of the officer's or manager's material relationship to the business, unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.

(b)(1) It is an unfair or deceptive act or practice and a violation of this part for a business to disseminate or cause the dissemination of a consumer testimonial about the business or one of the products or services it sells by one of its officers, managers, employees, or agents, which fails to have a clear and conspicuous disclosure of the testimonialist's material relationship to the business, when the relationship is not otherwise clear to the audience and the business knew or should have known the testimonialist's relationship to the business.

(2) However, paragraph (b)(1) of this section does not apply to:

(i) Generalized solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business, or

(ii) Merely engaging in consumer review hosting.

(c)(1) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to solicit or demand a consumer review about the business or one of the products or services it sells from any of their immediate relatives or from any employee or agent of the business, or to solicit or demand that such employees or agents seek such reviews from their relatives, when:

(i) The solicitation or demand results in an officer's or manager's immediate relatives, an employee or agent, or the immediate relatives of an employee or agent writing or creating such a review without a disclosure of the reviewer's material relationship to the business, and

(ii) The officer or manager:

(A) Encouraged the prospective reviewer not to make such a disclosure,

(B) Did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business, or

(C) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.

(2) However, paragraph (c)(1) of this section does not apply to generalized solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.

#### **§ 465.6 Company-controlled review websites or entities.**

It is an unfair or deceptive act or practice and a violation of this part for a business to materially misrepresent, expressly or by implication, that a

website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions, other than consumer reviews, about a category of businesses, products, or services including the business or one or more of the products or services it sells.

#### **§ 465.7 Review suppression.**

It is an unfair or deceptive act or practice and a violation of this part:

(a) For anyone to use an unfounded or groundless legal threat, a physical threat, intimidation, or a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity, in an attempt to:

(1) Prevent a review or any portion thereof from being written or created, or

(2) Cause a review or any portion thereof to be removed, whether or not that review or a portion thereof is replaced with other content, or

(b) For a business to materially misrepresent, expressly or by implication, that the consumer reviews of one or more of the products or services it sells displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.*, not displayable) based upon their ratings or their negative sentiment. For purposes of this paragraph, a review is not considered suppressed based upon rating or negative sentiment if the suppression occurs based on criteria for withholding reviews that are applied equally to all reviews submitted without regard to sentiment, such as when:

(1) The review contains:

(i) Trade secrets or privileged or confidential commercial or financial information,

(ii) Defamatory, harassing, abusive, obscene, vulgar, or sexually explicit content,

(iii) The personal information or likeness of another individual,

(iv) Content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another intrinsic characteristic, or

(v) Content that is clearly false or misleading;

(2) The seller reasonably believes the review is fake; or

(3) The review is wholly unrelated to the products or services offered by or available at the website or platform.

#### **§ 465.8 Misuse of fake indicators of social media influence.**

It is an unfair or deceptive act or practice and a violation of this part for anyone to:

(a) Sell or distribute fake indicators of social media influence that they knew or should have known to be fake and that can be used by individuals or businesses to materially misrepresent their influence or importance for a commercial purpose; or

(b) Purchase or procure fake indicators of social media influence that they knew or should have known to be fake and that materially misrepresent their influence or importance for a commercial purpose.

#### **§ 465.9 Severability.**

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions will continue in effect.

By direction of the Commission.

**April J. Tabor,**  
*Secretary.*

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