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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

discussed: (1) reviews or endorsements by people who do not exist, who did not actually use or test the product or service, or who misrepresent their experience; (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 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 on their negative content; (7) the suppression of customer reviews by physical threats, boycotts, or other means; 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 ("NPRM").[2] The ANPR provided for a 60-day comment period, and the Commission received 42 responsive comments[3] from review platforms and other businesses, trade associations, consumer advocacy organizations, entities dedicated to fighting fake 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."

[2] *See* ANPR, 87 FR 67427.

[3] The Commission also received six unresponsive comments.

a public interest research center, a think tank, academic researchers, and individual consumers.[4] 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.[5] 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

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.[7] Finally, the NPRM set out the Commission's proposed regulatory text.[8]

In response to the NPRM, the Commission received 100 responsive and non-duplicative comments[9] from entities and individuals interested in the proposed rule,[10] 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").[11]

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.[12] 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

[7] *Id*. at 49377-81, 49389-90.
[8] *Id*. at 49390-92.
[9] The Commission also received sixteen comments that were non-responsive and two that were duplicates.
[10] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/document/FTC-2023-0047-0001/comment*.
[11] 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, Cmt. on NPRM at 1 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0103* ("Brigham Young Univ. Cmt.").

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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.[13] The Notice also stated that the Commission had decided not to proceed with proposed § 465.3,[14] 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

members responded[19]—regarding the impact of the proposed rule, including their estimated compliance costs.[20]

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."[21] However, the February 23 order stated that "[i]t can be argued that . . . even 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.'"[22] 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."[23] The March 5 hearing session was subsequently moved to March 6, 2024 at the trade association's request.[24]

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.[25] FTC staff conducted cross examination. The attorney's testimony

[19] IAB "represents over 700 leading media companies, brand marketers, agencies and technology companies." February 13 Hearing Transcript at 6.
[20] Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 20, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmission20240220.pdf*.
[21] Order by Presiding Officer Foelak (Feb. 23, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/p311003aljorder20240226.pdf*.
[22] *Id*.
[23] *Id*.
[24] 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*.
[25] A transcript of the March 6 hearing session is available at *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*.

from the proposed rule. These modifications, mostly clarifications and limitations, discussed in detail in Section IV of this document, are based upon input from

endorsements it was examining.[33] 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.[34]

In support of the finding that fake reviews are prevalent, the NPRM

consumer reviews is prevalent, relying upon a prior Commission case and numerous news articles.[38] 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.[39] 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.[40] The w1rTp[8e

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.[45] 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

[45] ANPR, 87 FR 67426-27; NPRM, 88 FR 49387-88.

Section 13(b) of the FTC Act.[46] 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).[47] 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.[48] As an additional benefit, the rule will enable the Commission to seek civil penalties against violators.[49] 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.[50] Moreover, the final rule is likely to impose relatively small compliance costs on honest businesses.[51]

III. Overview of the Comments[52]

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

[46] *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 82 (2021).
[47] *See* 15 U.S.C. 57b(a)(1), (2); *see also* NPRM, 88 FR 49377-78 (discussing impact of *AMG Cap. Mgmt.*).
[48] 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, whict orssghpr csponuies (mnd r)1.7pnatiTJ/TTTn twhovTc 0 Tw (-)Tj0.3d[52

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 proposed rule.[53] The NPRM also posed twenty-three specific questions for the public.[54] 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 VIII

deceptive acts or practices involving consumer reviews.[57] 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."[58] 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."[59] 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. [60] 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.[61] 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

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[57] Yelp Inc., Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0088* (Yeg[(-2 (na)-6 J0 Tc0.006 ,)2nenhe0cnaom06.9 (ae)4.2 ny0Cwt.ionNmaet 1n (Sept.1-5 (2(9,1)5.1 6 28)12.1 023),

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.[62]

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

Numerous individual commenters,[65] trade associations,[66] and consumer organizations[67] 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

[62] NPRM, 88 FR 49388.
[63] Transparency Company Cmt. at 6.
[64] Trustpilot Cmt. at 3.
[65] Amelia Markey, Cmt. on NPRM (July 31, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0003* ("Markey Cmt."); Chris Hippensteel, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0006* ("Hippensteel Cmt."); Jeremy Anderson, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0007* ("Anderson Cmt."); Caroline Fribance, Cmt. on NPRM (Aug. 11, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0017* ("Fribance Cmt."); Pia Edborg, Cmt. on NPRM (Aug. 17, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0027* ("Edborg Cmt."); Anonymous 1, Cmt. on NPRM (Aug. 20, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0031* ("Anonymous 1 Cmt.");

of the few ways to determine whether I should buy the product or service without first examining it in person."[68] 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."[69] A third individual wrote, "I strongly support the rules against fake review 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."[70] 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."[71] A consumer organization stated, "The Commission absolutely should finalize the proposed rule to better protect shoppers and hold businesses accountable."[72]

A number of individual consumers,[73] a review platform,[74] other industry members,[75] and consumer organizations[76] 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-

concerns and for other reasons.[86] 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[87] and two trade associations,[88] 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 fak(,)TjE-1 (ons)-1 (.2an)-4 -6 ()-10 (e f)-1

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."[92] One of the trade associations stated that the "Proposed Rule is [u]nnecessary

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.[95] 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.[96]

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

[95] 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.

[96] 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.

threat," respectively. In the following definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, relevant comments not otherwise addressed in

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 c

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

"consumer" testimonial.[104] The commenter requested that the Commission provide further guidance on what constitutes a "well-known" individual.[105] Based upon common usage, well-known individuals include those famous in the areas of entertainment, such as film, music, writing, or sport,

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."[111]

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.[117] 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.[118] The Commission believes that a disclosurcoc 6c o4-blt 0.004i9 bet8 437.4 Tm1.22(ve)4 (s)-1 hA

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.[121]

One commenter asked whether a disclosure in the first line of a product review would be considered unavoidable.[122]

Guides would also be examples of violative behavior under the rule.[129] 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.[130] The third example involves a disclosure that individuals appearing in a television ad and giving testimonials are paid actors.[131] 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 relationsh (i1c -0.002 Tw [(it wron i48-0.003 Tc 0.003 Tw [((2)-33(h a)4 (gs)-1 (c)-6 (a)s)-1 (s)g2duo6 0.003 Tw

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."[134] 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.[135] 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."[136] 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,

endorser may easily include via audio, is cumbersome, and restricts companies' marketing capabilities."[137] 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.

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

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."[142] It said that a "consumer review should still be considered a 'review' before it is publicly displayed by a website or platform."[143] 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."[144] 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?"[145] The commenter continued, "Would a website be excluded if only a very small portion of the website contained consumer evaluations?"[146] 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."[147] 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

[142] IAB Cmt. at 13-14.
[143] *Id*.
[144] TINA Cmt. at 7.
[145] *Id*.
[146] *Id*.
[147] *Id*.

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,

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 public sector entities)[156] made the same comment with respect to the definition of "consumer testimonials."[157] 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—largel.77 0.77c4 (nc)Tc 0 Tw 8.umuenc (tio)2 6 enen , M.77c4 nfmueedicacMenity8(nf)3dfnf, and c

engagement metrics that are not publicly visible but that are used to gain an algorithmic advantage.[160] Such non-visible indicators are outside the scope of this rulemaking, and the Commission chooses not to address them at this time.

the definition of “officers” “should be refined to only include ‘senior management members’ of a

the Commission considers 'value.'"[167] Specifically, it suggested adding "gift certificates," "services," "discounts," "coupons," and "contest entries."[168] Such examples of value were

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."[172] 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.[173] The Commission declines to modify the definition of "reviewer."

j. Substantially Different Product

The proposed rule defined "s

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.[175] 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."[176] 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.[177] 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

[175] Transparency Company Cmt. at 14.
[176] NFIB Cmt. at 4.
[177] State Attorneys General, Cmt. on NPRM at 2-3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0100* ("State AGs Cmt.").

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."[178] 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.[179] 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").[180] Given that such form contracts are already prohibited by the CRFA,[181] 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."[182] 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.[183] 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."[184]

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[178] *Id.* at 2.
[179] *Id.* at 3.
[180] Yelp Cmt. at 5.
[181] Consumer Review Fairness Act of 2016 § 2(b)(1), 15 U.S.C. 45b(b)(1).
[182] Consumer Reports Cmt. at 10.
[183] Family First Life Cmt. at 16.
[184] *Id*.

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.[187]

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."[188] 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."[189] Within both §§ 465.2 and 465.5, however, "disseminate" applies only to testimonials, not to consumer reviews. One of the basic

[187] 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."
[188] NRF Cmt. at 3.
[189] *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.

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.[190] 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.[191] 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."[192] 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."[193] A review platform commenter said that using the term "manager" without any definition is particularly problematic,[194] 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

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directly report to them."[195] 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.[196]

A business commenter that operates in the insurance-marketing space explained that independent-contractor insurance agents who bu(tr)5 (i)-10 (cc)-1 ( )]T Td[(c)4 (ont)Bn.sn tsivews ho bu(ta]TJ-0

range of people” and “

(*i.e.*[,] a ‘like’), in exchange for a fake indicator of social media influence.”[203] The Commission declines to adopt the commenter’s suggestion. [204] The definition proposed by the commenter

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.'"[211]

A business commenter suggested explaining the "financial consequence of fake reviews," such as whether it is "~$50,000 per fake review."[212] 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.[213] 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 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."[214] The trade association asserted that some of the cases cited by the Commission also involved "acohl e 8 Tc 0.0[d1]TJ-0.0a44-6 (i)-6 (o) 8.hl nceJ0 Tc 0 TJ0 Tcrhate(e)4 (oun)-10 (e

prevalence.[215] 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

have experience with the product, service, or business.[219] 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.[220] 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."[221] 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.[222] The proposed

[219] NPRM, 88 FR 49373.
[220] 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/*.
[221] ANA Cmt. at 12.
[222] *Id*.

provision did not use the term “actual experience,” and the persons in the commenter’s posited hypotheticals did have

reviews."[228] The Commission believes that making this distinction is unnecessary and declines to make this change.

2. § 465.2(a)

Proposed § 465.

reviews and avoid detection, and connecting them with bad actors operating [fake] accounts."[232] 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."[233] 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."[234] 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."[235] 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.[236]

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[232] Amazon Cmt. at 6.
[233] Computer & Communications Industry Association, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0110* ("CCIA Cmt.").
[234] Wilson Cmt.
[235] Osburn Cmt.
[236] *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").

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.[237] 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

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).[243] It asked whether the term would apply to all of the products sold by a department store, an online marketplace, or a consignment business.

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

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 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."[253] 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."[254] 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

[253] Chamber of Commerce Cmt. at 4

causes its dissemination.[255] 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

businesses to drastically limit the consumer reviews or testimonials they seek out or even allow on their websites."[260] 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

policies and procedures to prove that the[] reviews are legitimate."[269] 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."[270] It continued that "the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action."[271]

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,[272] 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.[273] 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

[269] Annie Horgan, Cmt. on NPRM at 1-2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0058*.
[270] Consume0058 :e,h.(2Te)]TJ0 T10]TJ

rules[274]—thus best achieves the appropriate, equitable balance between protecting consumers and holding marketers accountable for deceptive conduct while not overly burdening marketers

cannot always reasonably know that a testimonial contains testimony that is fake or false, if the influencer expresses to them that it is true."[277] 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."[278] A consumer organization commenter said 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."[279] 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."[280] First, as noted, §

[277] Taylor V, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0062* ("Taylor V. Cmt.").
[278] EPIC Cmt. at 3.
[279] Consumer Reports Cmt. at 5.
[280] Family First Life Cmt. at 6.

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."[281]

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" 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

[281] 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.

"keyword stuffing."[282] 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."[283] 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

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. [285] 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.”[286] 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 C(i)-2 (mmeie)4lx (e)4 ()e2 (g)2.3 TD[(s) ired flao [(t)-1(t)]TJ1dit

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posted reviews, [291] or failing to employ reasonable measures to root out fraud and deceptive reviews. [292] A review platform suggested imposing requirements on social media companies and internet service providers to address the sale of fake reviews,[293] and a trade association proposed that the Commission require reviewers to identify themselves and that social media sites hosting reviews verify reviewers' identities. [294] 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."

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."[298] 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.[299] 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.[300] 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

[298] TINA Cmt. at 6.
[299] Chamber of Commerce Cmt. at 2.
[300] *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; CCIA Cmt. at 3; NRF Cmt. at 7-8; Ravnitzky Cmt. at 2.

"[i]f such sponsorship relationships are eliminated . . . , the ability of writers to review a variety of items will disappear."[305] 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."[306] 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."[307] 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."[308]

A business commenter responded, "Real consumers' reviews often contain multiple sentiments on what businesses did right and what they did wrong. This is helpful."[309] The meaning of this comment is unclear.

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[305] Alex Rooker, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0019*.
[306] Frieling Cmt. at 2.
[307] Anonymous 7, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0021*.
[308] NPRM, 87 FR 49389.
[309] Transparency Company Cmt. at 12.

entitle the consumer to the incentive or bonus."[314] 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.'"[315] 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."[316] 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."[317] A second consumer organization

[314] NRF Cmt. at 8.
[315] ANA Cmt. at 8.
[316] *Id*.
[317] Consumer Reports Cmt. at 6.

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.'"[318] 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

guidance and examples to businesses."[322] The examples, discussed above, by the trade association asking consumers to say how much they "love" something or how much fun they had

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.[324]

The second commenter taking this position pointed to examples in the Endorsement Guides,[325] o( )]TJ 0.208 Tc -0.204 Tw o(w)2n(w)2 ()-1 ()-1teweeewww

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.[333] Another individual commenter inquired about paid review removal without stating a position on the topic.[334] The Commission previously noted that, "[i]n procuring [or] suppressing . . . ng

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 the prospective reviewer not to make such a disclosure. The Commission has determined to finalize proposed § 465.5 with a number of modifications.[337]

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."[338] Another individual commenter shared their experience as an employee: "I was asked to leave

[337] Proposed § 465.5(b) and (c) are being renumbered as final § 465.5(b)(1) and (c)(1).
[338] Anonymous 9, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0023*.

positive reviews in Amazon

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."[345] 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."[346] 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."[347] 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

[345] Amazon Cmt. at 11.
[346] *Id*.
[347] IAB Cmt. at 9.

Endorsement Guides, because such connection would not bias the reviewer's review, and therefore would not make the review misleading."[348]

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."[350] A trade association said that "relatives can include cousins, nieces/nephews, and other more distant familial 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-to-day 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."[351] 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."[352] 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."[353] 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.

[350] Trustpilot Cmt. at 5-6.
[351] RILA Cmt. at 6.
[352] Chamber of Commerce Cmt. at 7.
[353] NRF Cmt. at 9.

reason to

testimonials covered by §

of rogue individuals."[362] Again, whether a business will be subject to civil penalties will depend on whether 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

imputing constructive knowledge."[365] 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."[366] 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,"

[365] Trustpilot Cmt. at 13.
[366] RILA Cmt. at 6.

(2) “did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business,”

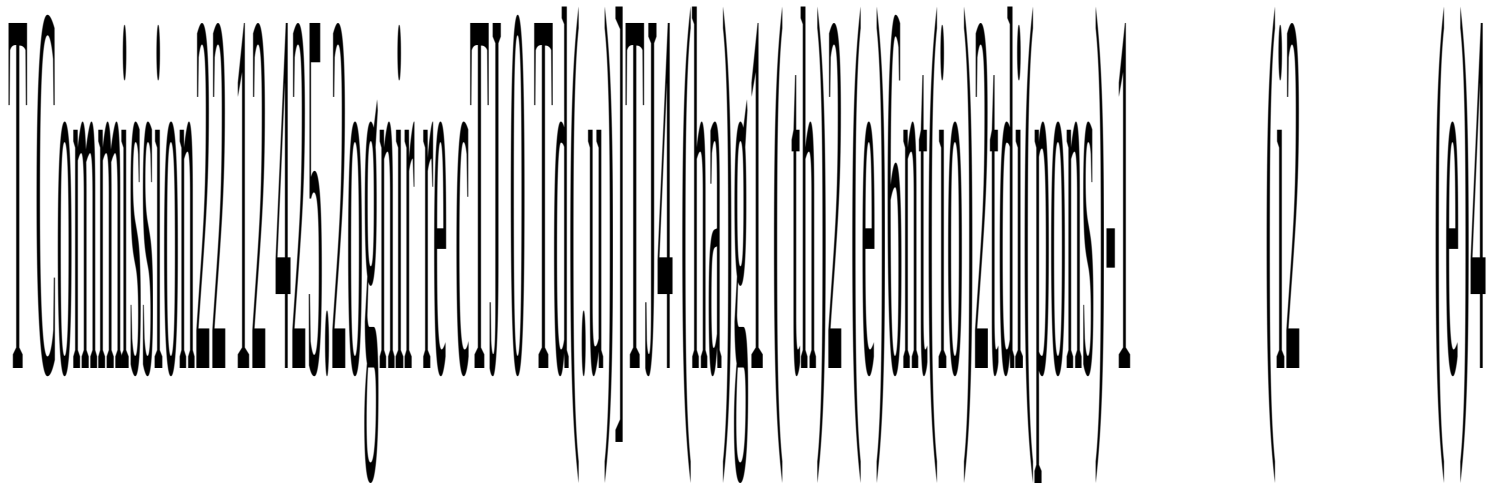
agents seek reviews from their relatives, the officers or managers should instruct the employees or agents to ask their immediate relatives to make disclosures. The officers and managers should also take remedial steps when they know or should know that resulting insider reviews appeared without a disclosure. 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 ta(ynage23//[ol98f23//[osha(23//[o 23//[

"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."[385]

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."[386] A consumer 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."[387] 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."[388] 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."[389] 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,

[385] Chamber of Commerce Cmt. at 6.
[386] *Id*.
[387] Consumer Reports Cmt. at 9.
[388] 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.
[389] NRF Cmt. at 11-12.

even if the company clearly disclosed that the test or comparison was done by an affiliate."[390] 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."[391] 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 misreprese4rm askviewng "cy.pr Thommission



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."[398] 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[399] 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

defamation."[409] 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."[410] It recommended adding "knowing that it is false or with reckless disregard as to its truth or falsity."[411] 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."[412] 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.[413] 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,h2ln iag( )T(ha)4 (tccu)-4 (s)-5 (at)-6(ge)4 (a)4 (t)-2 (e)4 (r)3 (a)4 (t)

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,[418] 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."[419] Although compelling the creation of positive reviews through threats or intimidation may be an unfair or deceptive act or practice, the 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

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

the "Rule should prohibit businesses from suppressing . . . honest negative reviews."[425] A fourth individual commenter wrote that "[b]usiness should be barred from misrepresenting reviews on their websites and from suppressing negative reviews."[426] The State Attorneys General said that, when "a merchant . . . only posts positive consumer reviews on its website, instead of both

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 reviews."[435] 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.[436]

A trade association asked that the Commission "clarify what it means for a review to be "suppressed (i.e., not displayed)."[437] The trade association said that "[m]any businesses that operate websites that display consumer reviews will organize those reviews in reasonable ways

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.*)."[445] 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."[446] 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

[445] Anonymous 4 Cmt.
[446] NFIB Cmt. at 5.

the reviewer's other reviews, "it can be difficult to accurately identify fake reviews."[447] 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."[448] The commenter recommended "revising this provision to add specificity and identify the parameters of what a fake review looks like."[449] A seller does not risk liability if the suppression occurs for a reason other than the review'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.

service, delivery, returns, and exchanges" can be deceptive in violation of Section 5 of the FTC Act.[452]

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."[453] The commenter suggested that, "to preserve the public benefit of reviews that contain instances of objectionable content," the Commission could "

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."[457] 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.[458] 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."[459] 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."[460] 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.[461] A consumer organization commented

[457] TechNet Cmt. at 3.
[458] Superguest Cmt.
[459] Ravnitzky Cmt. at 2.
[460] Rob Levy, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0057*.
[461] Trustpilot Cmt. at 18.

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."[462] 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,"[463] 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."[464] 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[465] 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

[462] Consumer Reports Cmt. at 11.
[463]

their influence or importance for a commercial purpose. Based on the following, the Commission has determined to finalize these prohibitions with certain modifications.[466]

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

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."[470] 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."[471] 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.'"[472] 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

[470] Hammacher and Schlemmer Cmt. at 7.
[471] Amazon Cmt. at 13.
[472] IAB Cmt. at 13.

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."[473] 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.[474] 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

[473] *Id*. at 12.
[474] NRF Cmt. at 13.

‘follow’ or ‘

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 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)(1)-(2). The final regulatory analysis must contain (1) a concise statement of the need for,

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.[479] 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.[480] As explained in detail in this final regulatory

[479] 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*. As noted above, the presiding officer at that hearing found that IAB had not shown that compliance costs would be more than minimal.
[480] Camp-Martin Cmt. at 2-3.

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.

to return money to injured consumers, particularly in cases that do not involve rule violations.[485]

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.[486] 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.[487] 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

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[485] *See* ANPR, 87 FR at 67425, 67425 n.1 (discussing *AMG Cap. Mgmt.*).
[486] *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.").
[487] 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).

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.[488] Quantifiable aggregate benuuau tiincouletFgg igeiul ulgher

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.[489]

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 othe (a)4s by lea ( )-10 (pa)09eon 1 (i)-2 (l)-2 -1 (p4 (nd e)4 (f)3 (f))3

penalties under Section 5(m)(1)(a). Civil penalties act as a deterrent to fraud and deception in connection with reviews.[491]

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."[492] Although these requirements are likely to be satisfied in cases involving the conduct covered by 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.[493]

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

[491] In October 2021, the Commission authorized a Notice of Penalty Offenses concerning endorsement

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.[494] The study considers a limited number of kinds of review manipulation,

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.[496] 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.[497] 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).[498]

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.[499] About half of hotel revenue is generated by business travelers, who might rely less on online reviews than

[496] 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).
[497] *See* Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harvard Bus. Sch. Working Paper 12-016 (2016).
[498] 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)

leisure travelers do.[500] 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.[501] 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

[500] *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*.

[501] 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* (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), .506 TJe2.4

some manipulated consumer reviews.[502] 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.[503] 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),[504] a more conservative estimate of review-manipulated products' revenue is 1.9 percent (19 percent x 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

[502] *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).

[503] *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*; Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation*, 104(8) Am. Econ. Rev. 2421-55 (2014).

[504] *See* Davide Proserpio et al., *How Fake Customer Reviews Do—and Don't—Work*S7(504)Ta Tc 0.c Tc 0.c Tc 0.or0 1 4

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.[506] 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.[507] 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.[508] This analysis does not incorporate time spent by consumers researching reviews of 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.

[506] *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*.
[507] *See* Int'l Post Corp., *Cross-Border E-Commerce Shopper Survey 2022*, Jan. 2023, *https://www.ipc.be/-/media/documents/public/publications/ipc-shoppers-survey/onlineshoppersurvey2022.pdf*.
[508] *See* BrightLocal, *Local Consumer Review Survey 2019*, Dec. 11, 2019, *https://www.brightlocal.com/research/local-consumer-review-survey-2019*.

Accurate online reviews have been shown to improve competition. Several studies have found that online reviews are particularly important for independent and newer firms.[511] Ratings

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").[514] 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.[515]

With heightened compliance review, the Commission assumes that lawyers at large companies, whose time is valued at $70.08 per hour,[516] 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

[514] *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*

rule. It assumes that small company owners, whose time is valued at $33.48,[517] 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

b. Other Impacts of the Rule

[517] *See* Payscale, *Average 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.

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 wpar-1 (t)-2 ( )]TJ-0.9

scenarios, if the Commission both systematically underestimates compliance costs and systematically overestimates the effectiveness of the 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

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.[519] 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."[520] 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.[521] 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.

[519] NPRM, 88 FR 49388.
[520] Transparency Company Cmt. at 10.
[521] *See* 5 U.S.C. 605(b).

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 than an average small business will spend, at most, one hour on compliance review, incurring a cost of $33.48.[522] 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

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[522] *See infra* Section VIII.F

unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent. The rule will

those required to express a particular sentiment; and (3) potential liability when an agent's review or testimonial appears without a disclosure.[526] 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 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.

[526] *Id*. at 2, 5-6, 8-9, 10.

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.[527] On the one hand, it is possible that, across all

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)

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,

(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, (e)-1oR ( )Tj/TT1 1 Tf0 Tt s

(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

(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

§ 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