RULE MAKING PROCEEDING
Project No. P214504

UNITED STATES OF AMERICA
Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20507

TRADE REGULATION RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS	:	RECOMMENDED DECISION May 8, 2024

APPEARANCES: Michael Atleson for the Federal Trade Commission, Bureau of Consumer Protection

Kathryn Dean for Fake Review Watch

Ben B. Beck for a group of academic researchers ("the Researchers")

Lartease M. Tiffith for the Interactive Advertising Bureau

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Recommended Decision (RD) finds that the record does not establish whether or not compliance costs associated with the proposed rule will be minimal.

I. INTRODUCTION

A. Procedural Background

This RD addresses disputed issues of material fact arising in the instant rulemaking proceeding of the Federal Trade Commission (FTC). The procedural history is as follows:

In 2022, the FTC issued an Advance Notice of Proposed Rulemaking, *Trade Regulation Rule on the Use of Reviews and Endorsements*, 87 Fed. Reg. 67424 (Nov. 8, 2022) (ANPR), seeking comment on the need for a rulemaking to address marketing that uses deceptive reviews and endorsements. Previously, the FTC had addressed such deceptive marketing on a case-by-case basis. *Id*. at 67425-26 nn.4-10.

In 2023, the FTC sought public comment on a specific proposed rule with a Notice of Proposed Rulemaking, *Trade Regulation Rule on the Use of Consumer Reviews and*

Testimonials, 88 Fed. Reg. 49364 (July 31, 2023) (NPRM).[1] The proceeding is a so-called Magnuson-Moss rulemaking, authorized pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a,[2] which provides additional procedural steps beyond those of the Administrative Procedure Act, 5 U.S.C. §§ 553, 601 *et seq*., such as presentations by "interested persons" in an informal hearing. The FTC appointed the undersigned Administrative Law Judge to preside over the informal hearing in the proceeding, *Trade Regulation Rule on the Use of Consumer Reviews and Testimonials*, 89 Fed. Reg. 2526 (Jan. 16, 2024) (Hearing Notice); Fed. Trade. Comm'n, Notice Regarding Requests Relating to the Informal Hearing in Project No. P214504, Rule on the Use of Consumer Reviews and Testimonials (Feb. 7, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/notice_regarding_requests_relating_to_informal_hearing.pdf (specifically authorizing the undersigned to "add or modify designated issues of material fact that are necessary to be resolved"); *see also* 16 C.F.R. § 1.13(b)(1)(ii) ("The presiding officer may at any time on the presiding officer's own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to § 1.12(a).").

As the FTC ordered in the Hearing Notice, the hearing before the undersigned Administrative Law Judge in this proceeding commenced on February 13, 2024. The following interested persons appeared: Fake Review Watch; the Interactive Advertising Bureau (IAB); a group of academic researchers (the Researchers); and the FTC Bureau of Consumer Protection (BCP).[3] Following that hearing session, the undersigned designated this issue as a disputed issue of material fact:

"Whether the compliance costs for businesses will be minimal." *See* 89 Fed. Reg. at 2527.

A second hearing session was held on March 6, 2024, to address the designated disputed issue of material fact. Lartease M. Tiffith appeared for IAB, and Michael Atleson appeared for

[1] Shortly before that date, the FTC published revised *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 88 Fed. Reg. 48092 (July 26, 2023), codified at 16 C.F.R. §§ 255.0-.6. The *Guides* are the FTC's administrative interpretations of laws that it enforces. *Id*. at 48103.

[2] *See* Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

[3] The Hearing Notice designated Fake Review Watch; IAB; and the Researchers as "interested persons" to make oral presentations and/or additional documentary submissions during the hearing. *See* 15 U.S.C. § 57a(c)(2)(A) ("an interested person is entitled to present his position orally or by documentary submission (or both)"); 16 C.F.R. § 1.11(e). The undersigned treated BCP as an interested person, as well. All of the foregoing appeared at the first hearing session, and IAB and BCP appeared at the second hearing session.

BCP.[4] Mr. Tiffith, in his capacity as an officer of IAB, also testified as the only witness at the hearing session.

BCP and IAB filed post-hearing briefs on March 13, 2024, and responsive briefs on March 18, 2024.

The findings in this RD are based on the record. Preponderance of the evidence was applied as the standard of proof in the absence of any precedential or statutory standard of proof for FTC rulemaking informal hearing proceedings.[5] All arguments and proposed findings that are inconsistent with this RD were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns alleged disputed issues of material fact arising from the NPRM, which proposes to promulgate a trade regulation rule entitled "Rule on the Use of Consumer Reviews and Testimonials," to be codified at 16 C.F.R. §§ 465.1-.9. IAB argues, *inter alia*, that the FTC concluded in its preliminary regulatory analysis (PRA), without any basis, that compliance costs associated with the proposed rule would be minimal.[6]

---

[4] Additionally present were Kathryn Dean for Fake Review Watch and Michael Ostheimer for BCP. Neither participated in examining or cross-examining the witness or otherwise advocating on behalf of their organization.

[5] The substantial evidence standard is applied by a court in reviewing the FTC's factual determinations. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 985 (D.C. Cir. 1985) ("The legislative history of the Magnuson-Moss Act further provides that the substantial evidence standard is to be applied only to the Commission's 'factual determinations' . . . ."). "A factual finding is supported by substantial evidence if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 522 (1981)). When the FTC is reaching its own factual determinations, if the record contains evidence supporting more than one possible factual determination, the agency "base[s] its determination on a 'preponderance' of reliable evidence." *Trade Regulation Rule; Mail or Telephone Order Merchandise*, 58 Fed. Reg. 49096, 49105 n.125 (Sept. 21, 1993); *cf. Steadman v. SEC*, 450 U.S. 91, 98-102 (1981) (concluding that the substantial evidence requirement under the Administrative Procedure Act, 5 U.S.C. § 556(d), means the traditional preponderance-of-the-evidence standard in the agency's decision-making). For this reason, preponderance is the more appropriate standard for this informal hearing. At any rate, "preponderance of the evidence" is a higher standard that "substantial evidence."

[6] *See* 15 U.S.C. § 57b-3(a), (b). To promulgate a rule, the FTC is required to issue a PRA that includes projected costs and benefits. *Id.* Specifically, the PRA must include "projected benefits and any adverse economic effects and any other effects." 15 U.S.C. § 57b-3(b)(1)(C). *See also* NPRM, 88 Fed. Reg. at 49381-87.

In its comments in response to the NPRM, the IAB articulated three instances of what it argued were potential issues of disputed material fact. The FTC decided not to proceed with the proposed section to which one of the three related. 89 Fed. Reg. at 2528. As to the two remaining potential issues, the Hearing Notice summarily found that these comments did not raise disputed issues of material fact.[7] At the first hearing session, IAB reiterated its arguments that there are disputed issues of material act. In dismissing IAB's argument that compliance costs will not be minimal, the FTC stated that its "cost estimates in the NPRM are specific and based on empirical data." 89 Fed. Reg. at 2528. However, during the hearing, IAB presented additional support for its contention that costs would not be minimal. In particular, it provided specific evidence concerning the issue of costs that the proposed rule will impose on businesses. It noted that, in the PRA, the FTC assumed that, for a heightened compliance review by affected businesses, a large business would spend approximately eight hours conducting a one-time review at a cost of $61.54 per hour (a total of $492.32 per business) and a small business would spend one hour at a cost of $33.23. 88 Fed. Reg. at 49386. The basis for these assumptions is unclear. IAB surveyed its member companies, of which eighteen responded, and found that "55.5% of respondents estimate their initial compliance costs—including costs related to employee time, seeking advice of counsel, and technological investments—will be at least $1,000 if the proposed rule goes into effect." IAB's survey and other evidence that was not before the FTC when it issued the Hearing Notice were sufficient to rise to the level of a bona fide dispute.

Thereafter, as noted above, the undersigned designated this issue of disputed material fact: Whether the compliance costs for businesses will be minimal. This issue is the more specific and quantifiable of IAB's proposed disputed issues of material fact and is "necessary to resolve" because the FTC is required to consider it under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively. *See* 16 C.F.R. § 1.13(b) (disputed issues of material fact must be "necessary to resolve").

An additional issue – unintended consequences[8] – proposed by IAB, does not raise an issue of specific fact; it is a general concern that would be difficult to test through cross-

[7] The FTC stated that a disputed issue of material fact must raise "specific facts," and not "legislative facts," and must be not only "material" but also "necessary to be resolved." 89 Fed. Reg. at 2527-29 & nn.13-17. The FTC found that the commenters' proposed disputed issues of material fact "are precisely the sort of questions of policy or broad fact intended to fall under the category of 'legislative facts' . . . . [and] do not raise questions of 'specific fact'." Thus, it found that there are "no 'disputed issues of material fact' to resolve at the hearing." 89 Fed. Reg. at 2528-29.

[8] In the PRA, the FTC considered: whether "an overcautious seller seeking to suppress fake reviews from competitors may choose to display no reviews whatsoever so as not to risk violating the proposed Rule" or the possibility that "a firm may take no action towards suspected fake reviews to avoid a possible rule violation"; it concluded that "such unintended consequences of the proposed Rule are very unlikely" and sought "comment on the likelihood of such effects and information on how to best quantify them." 88 Fed. Reg. at 49386-87.

examination at an evidentiary hearing. To designate an issue of material fact for cross-examination, it must be that "[a] full and true disclosure with respect to the issue can be achieved only through cross-examination." 16 C.F.R. § 1.12(b)(2).

In its post-hearing brief, BCP argues that the record has insufficient evidence to conclude that compliance costs will not be minimal. IAB argues, pointing to record evidence, including its surveys, that costs will exceed the FTC's estimates and will not be minimal. BCP did not offer any evidence to counter the evidence offered by IAB.

II. FINDINGS OF FACT

Based on the evidence, which was limited by procedural constraints imposed by the FTC's procedural rules, it cannot be found whether or not the proposed rule will have compliance costs that will be minimal.[9]

Background

The FTC regards as problematic fake and deceptive reviews and other consumer endorsements of businesses and services as varied as, *e.g.*, restaurants, car repair businesses, and dental practices. Historically, it has addressed such problems with enforcement actions. In this rulemaking, it proposes to adopt a new rule to codify standards. States, localities, and trade groups also address such deceptive business practices by various means.

Organizations of businesses that would be affected by the proposed rule endorse preserving the integrity of consumer reviews by combatting deceptive reviews and endorsements. *See, e.g.,* Comments to the ANPR of Amazon, American Dental Association, Association of National Advertisers, CCIA, Google, the National Automobile Dealers Association (NADA), North American Insulation Manufacturers Association, Trip Advisor, and Yelp; Comments to the NPRM of IAB. However, not all such commenters agree that this rulemaking is the appropriate way to address the problem. *See, e.g.,* Comments to the ANPR of Association of National Advertisers, NADA, and Yelp; Comments to the NPRM of IAB.

At no time during the hearing did BCP offer any evidence as to the issue of disputed material fact designated by the undersigned. It confined itself to cross-examination. In evidence are two exhibits offered by IAB, which are surveys of its members. The first, as noted above, elicited eighteen responses, and the second, nineteen responses. The surveys were offered through Mr. Tiffith, as a witness.

[9] Unquestionably, there is insufficient evidence in the record to make a specific finding as to the size of the compliance costs associated with the proposed rule. In any event, the specific size of the compliance costs was not designated as a disputed material fact.

Minimal – Applicable Standard

The FTC's PRA expects compliance costs to be "minimal." NPRM, 88 Fed. Reg. at 49381, 49386. However, "minimal" is not defined in the FTC Act or the FTC's rules. Accordingly, the undersigned must rely on a dictionary definition – "very small." *See, e.g.*, https://www.merriam-webster.com/dictionary/minimal – "relating to of being a minimum such as . . . the least possible . . . [or] very small or slight"; Webster's New World Dictionary, Third Ed. 1988 – "smallest or least possible"; Webster's Third New International Dictionary, 1971 – "the least possible in size, number, or degree: extremely minute."

Costs

The PRA estimates of compliance costs are explained in the NPRM, 88 Fed. Reg. at 49385-87, and summarized in Table 3.1 at 88 Fed. Reg. 49386. The estimates are partly based on credible reference sources, *e.g.*, the United States Bureau of Labor Statistics, to determine the going rate of legal counsel at a company. NRPM, 88 Fed. Reg. 49386 and nn.249-250. But the rest of the PRA estimates are based on assumptions, *e.g.,* that lawyers at large companies will spend eight hours conducting a one-time review of the proposed rule and notifying appropriate employees of steps to be taken. The basis for the assumptions remains unclear: BCP did not offer any evidence, and it could not be compelled to do so. *See Revisions to Rules of Practice*, 86 Fed. Reg. 38542, 38544 (July 22, 2021) (amending the Rules of Practice to "remove procedures to allow the presiding officer to compel the attendance of persons, require the production of documents, or require responses to written questions"[10]).

As noted above, offered by IAB and in evidence, are two surveys of IAB membership. Eighteen unidentified companies responded to the first, and nineteen, to the second. A portion of the respondents indicated that their costs would be many thousands of dollars. For example, the median estimated cost for each company that responded to the second survey was $121,000, more than 200 times the NPRM's estimate. Also, some respondents pointed out that implementing the rule would require more than review by lawyers, possibly requiring the assistance of web developers, business and compliance analysts, human resource personnel, and review moderators; and even acquiring new hardware and software. Some of these costs, such as review moderation, software maintenance, periodic training of employees and contractors, and legal support, could be ongoing.

IAB's evidence articulates obvious questions concerning the assumptions in the PRA. However, a minute sample of businesses that would be affected by the proposed rule responded to the surveys, and there is insufficient information about the nature of those businesses, how they calculated potential compliance costs, and the methodology of the surveys. The evidence thus falls short as the basis for a finding that compliance costs would not be minimal.

In sum, IAB offered evidence that was deficient to support a finding of fact, and BCP offered no evidence (and the undersigned could not compel it to do so). However, the FTC's

[10] "The Commission believes that these procedures are unnecessary for the conduct of effective informal hearings in rulemaking proceedings and are inconsistent with the informal nature of such proceedings." 86 Fed. Reg. at 38544.

rules of practice applicable to informal hearings in rulemaking proceedings do not specify the burden of going forward to place the burden of proof either on FTC staff or on the interested party[ies]. *Compare* 16 C.F.R. § 3.43(a) (specifying the burden of proof in enforcement proceedings) *with* 16 C.F.R. § 3.2 (Rules in Part 3 do not apply to "proceedings for the promulgation of . . . substantive rules and regulations.") Accordingly, no finding can be made that compliance costs would be, or not be, minimal.

III. RECORD CERTIFICATION

It is certified that the record on which the findings of fact in this RD are based includes evidence from testimony taken in the hearings of February 13 and March 6, 2024; documentary exhibits admitted in evidence by the undersigned; and the rulemaking record to date. *See* 16 C.F.R. § 1.18(a).

IV. ORDER

This Recommended Decision is issued and shall become effective in accordance with and subject to the provisions of Section 1.13(d) of the FTC's rules for trade regulation rulemaking, 16 C.F.R. § 1.13(d). This ends the informal hearing portion of the Trade Regulation Rule on the Use of Consumer Reviews and Testimonials rulemaking proceeding.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge