



February 12, 2024

Via Electronic Filing

Presiding Officer Foelak
c/o Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Reviews and Testimonials Rule (16 CFR Part 465) (Project No. P214504)

Dear Presiding Officer Foelak,

The Interactive Advertising Bureau (IAB) respectfully submits this response to the Staff of the Bureau of Consumer Protection’s (BCP Staff) February 7, 2024 letter, which addressed IAB’s January 30, 2024 comment.¹ IAB strongly disagrees with BCP Staff’s characterization of IAB’s position, including (1) that it misunderstands the applicable knowledge standard for civil penalties; (2) that its proposed disputed issues of material fact are entirely dependent on the “should have known” standard and the threat of civil penalties; and (3) that it ignored the Notice of Proposed Rulemaking’s (NPRM) Preliminary Regulatory Analysis. In this letter, IAB corrects these misstatements for the record.

I. IAB Did Not Misunderstand the Law.

In its original comment on the NPRM, and in its supplemental comment in response to the Commission’s announcement of the informal hearing, IAB raised concerns about the costly and harmful effects of the proposed rule’s inclusion of a “should have known” standard.² IAB explained that legitimate companies would need to invest significant resources to comply with the proposed rule in order to avoid being exposed to civil penalties because they “should have known” that a review or testimonial violated the proposed rule.³ IAB also explained that the proposed rule would result in unintended negative consequences—particularly because the proposed rule would impose civil penalties even where a company lacked actual knowledge that a particular review or testimonial violated the proposed rule.⁴ IAB raised these serious concerns because the proposed rule expressly states, for example, that “[i]t is an unfair or deceptive act or practice and a violation of this Rule for a business to purchase a consumer review, or to disseminate or cause the

¹ See Submission of Staff for the Bureau of Consumer Protection to Presiding Officer Foelak (Feb. 7, 2024) (hereinafter, “BCP Staff Letter”).

² See Comment of Interactive Advertising Bureau on Reviews and Testimonials Rule, at 3-5, 10 (Sept. 29, 2023) (hereinafter, “IAB Comment”); Supplemental Comment of Interactive Advertising Bureau on Informal Hearing Notice, at 6-7 (Jan. 30, 2024) (hereinafter, “Supplemental IAB Comment”).

³ See Supplemental IAB Comment, at 6; see also IAB Comment at 5.

⁴ See Supplemental IAB Comment, at 7; see also IAB Comment at 5.

dissemination of a consumer testimonial or celebrity testimonial, about the business or one of its products or services, which the *business knew or should have known*: (1) was by a reviewer or testimonialist who does not exist; (2) was by a reviewer or testimonialist who did not use or otherwise have experience with the product, service, or business that is the subject of the review or testimonial; or (3) materially misrepresents, expressly or by implication, the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.”⁵

IAB recognizes that under Section 5(m)(1)(A) of the FTC Act, the Commission can obtain civil penalties for a rule violation only if it shows the violator had “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”⁶ But that does not change the fact that the proposed rule would enable the FTC to seek civil penalties even if a company was unaware that a particular review or testimonial violated the proposed rule. For example, a business could be subject to civil penalties if (1) it were deemed to have violated the rule because it should have known that a review or testimonial it purchased or disseminated was fake or false, and (2) the company had knowledge fairly implied that purchasing or disseminating fake or false reviews or testimonials in circumstances where it should have known they were fake or false is an unfair or deceptive practice prohibited by the rule. In this scenario, even a company that lacked actual knowledge that the review or testimonial at issue was fake or false could still be subject to civil penalties even without actual knowledge that such conduct violated the rule.

However, if the Commission is taking the position that the knowledge standard in Section 5(m)(1)(A) means that a company must have actual knowledge that the review or testimonial in question violated the proposed rule (e.g., because it was “fake” or “false” or authored by an “insider”) before being subject to civil penalties, then IAB agrees and the rule should be clarified accordingly, in both Sections 465.2 and 465.5.⁷

II. IAB's Proposed Disputed Issues of Material Fact Are Not Contingent on the Threat of Civil Penalties.

Even accepting BCP Staff's position that no company would be exposed to civil penalties in a scenario where it is not actually aware that a particular review or testimonial violated the proposed rule, IAB's disputed issues of material fact are based on numerous other features of the

⁵ Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364, 49391 (July 31, 2023) (hereinafter “NPRM”) (emphasis added).

⁶ 15 U.S.C. § 45(m)(1)(A).

⁷ It is not clear why BCP Staff's letter compares the knowledge standard in the proposed rule to the strict liability standard for Section 5 violations. *See* BCP Staff Letter, at 2. Among other reasons, the proposed rule would allow the Commission to obtain civil penalties for violations of *the rule*, whereas penalties are generally not available for Section 5 violations *without a rule*. For this reason, the knowledge standard incorporated into the rule should be higher, and IAB does not agree that the “should have known” standard is high enough. IAB has accordingly argued that specific sections of the rule be revised to incorporate an actual knowledge standard instead of “should have known” (e.g., Sections 465.2 and 465.5) or no knowledge standard at all (Section 465.8).

proposed rule.⁸ The Presiding Officer should not credit BCP Staff’s attempt to sweep aside IAB’s proposed disputed issues by mischaracterizing them as being based solely on the rule’s incorporation of a “should have known” standard and the threat of civil penalties. As IAB has stated in prior submissions, its two proposed disputed issues of material fact are the following:

- Whether the compliance costs for businesses will be minimal, particularly [but not limited to] if the “knew or should have known” standard is finalized; and
- Whether the Commission’s finding that unintended consequences from the NPRM are unlikely (e.g., for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).

IAB has serious concerns with the “knew or should have known” standard, and thus highlighted that language in framing the first proposed disputed issue as well as in its January 30, 2024 submission. But to be clear, IAB also identified numerous other specific features of the proposed rule that will contribute to significant compliance costs and unintended negative consequences, irrespective of the applicable knowledge standard for civil penalties. For example, IAB’s September 29, 2023 comment explained how Section 465.2’s use of vague language like “disseminate[s]” and “procure[s]” appears to sweep in the activities of legitimate companies like online retailers that host consumer reviews and testimonials or engage in other activities like organizing, moderating, aggregating, and prompting the submission of reviews and testimonials.⁹ The comment explained how this overbroad language is likely to lead to negative consequences that the Commission had not considered such as “over-incentiviz[ing] the suppression of reviews and testimonials,” “depriv[ing] consumers of useful and non-deceptive information about products,” “limit[ing] the ability of new online companies to use reviews and testimonials to promote themselves,” harming consumer privacy by forcing companies to adopt “authentication measures that require additional personal information from consumers before allowing them to review a product,” and imposing “significant costs on legitimate businesses.”¹⁰ IAB reiterated these concerns in its January 30, 2024 comment.¹¹ With respect to Section 465.5, IAB noted that the ambiguity in the term “agent” will require companies to “dramatically expand the scope of [their] compliance programs . . . in order to mitigate their risks under this section.”¹² None of these concerns is dependent upon the applicable knowledge standard for obtaining civil penalties and thus remain disputed by IAB, even accepting BCP Staff’s position regarding knowledge.

⁸ BCP Staff Letter, at 3 (refencing IAB’s “mistaken belief” that “several provisions of the proposed rule would impose civil penalties even when a company is not aware that a review or testimonial violated the rule”).

⁹ IAB Comment, at 4.

¹⁰ *Id.* at 4-5.

¹¹ Supplemental IAB Comment, at 12 (“This provision is likely to lead to negative consequences such as the suppression of reviews that contain information valuable to consumers, use of authentication methods that may negatively impact consumer privacy, and imposition of significant compliance costs on businesses with little to no reduction in the number of fake reviews disseminated.”).

¹² IAB Comment, at 10.

Furthermore, IAB raised concerns that if Section 465.7(b) were interpreted as setting forth an exhaustive list of permissible reasons to suppress a review, then the Commission had failed “to consider the unintended negative effect of prohibiting legitimate and non-deceptive review moderation practices, which will in turn cause confusion for consumers.”¹³ IAB also highlighted this concern in its January 30, 2024 comment.¹⁴ This concern similarly has nothing to do with the “should have known” standard or the threat of civil penalties. Instead, IAB’s concern relates to the fact that the list of reasons for which a review can permissibly be suppressed could be interpreted as being exhaustive, which would unduly restrict companies’ ability to engage in good faith content moderation.

Finally, with respect to Section 465.8, IAB described how indicators of influence “frequently serve as a useful and non-deceptive source of information for consumers who value the opinions of individuals with ‘influence’ on a specific platform or regarding a certain subject matter.”¹⁵ However, Section 465.8, if not narrowed to apply only when sellers or purchasers act with knowledge that indicators of influence are fake, would likely “dissuade companies from developing indicators of social media influence in order to avoid potential liability for the actions of bad actors.”¹⁶ IAB reiterated this concern in its January 30, 2024 comment.¹⁷ This concern, like those described above, is not related to the threat of civil penalties or the applicable knowledge standard for obtaining them, and thus remains disputed even accepting BCP Staff’s position for the sake of argument.

III. IAB Did Not Ignore the NPRM’s Preliminary Regulatory Analysis.

Finally, IAB disagrees with BCP Staff’s assertion that it has “failed” to address the NPRM’s Preliminary Regulatory Analysis (PRA).¹⁸ This statement is false. In fact, IAB specifically referenced the PRA in its Supplemental Comment in its analysis of why the two proposed disputed issues of material fact should be designated as such. For example, with respect to the disputed issue related to compliance costs, IAB quoted from the PRA to show how the Commission had concluded without any basis that compliance costs with the proposed rule would be minimal simply because “the proposed Rule is an application of preexisting law under Section 5.”¹⁹ IAB also cited the Commission’s unsupported estimate that at most, companies would spend

¹³ *Id.* at 11.

¹⁴ Supplemental IAB Comment, at 13 (“The Commission’s prescriptive list of reasons for which reviews can be permissibly suppressed sweeps in conduct far outside the suppression of negative reviews, and could hamper companies’ efforts to engage in legitimate, non-deceptive review moderation practices.”).

¹⁵ IAB Comment, at 13.

¹⁶ *Id.*

¹⁷ Supplemental IAB Comment, at 13 (“Furthermore, the Commission has failed to consider the consequences of this section if interpreted broadly—consumers may lose a useful and nondeceptive source of information if the breadth of this rule discourages companies from developing or awarding indicators of social media influence to avoid potential liability for the actions of bad actors.”).

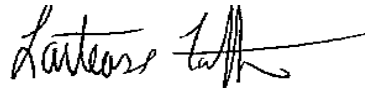
¹⁸ BCP Staff Letter, at 2-3.

¹⁹ Supplemental IAB Comment, at 6 (quoting NPRM, at 49381, part of the PRA).

8 hours total implementing the proposed rule.²⁰ Similarly, for the disputed issue related to unintended consequences, IAB again quoted the Commission's PRA, which concluded that unintended consequences such as an overcautious seller seeking to suppress fake reviews choosing to display no reviews whatsoever so as not to risk violating the proposed rule or a firm taking no action towards suspected fake reviews to avoid a possible rule violation were "very unlikely."²¹ IAB specifically explained its concern that the Commission had drawn these conclusions without evidence, and cited the precise parts of the PRA that included these conclusions. Thus, BCP Staff's assertions that IAB ignored the PRA are incorrect.

Finally, BCP Staff should not be permitted to shift the Commission's burden of justifying the rule to commenters like IAB. IAB's concerns specifically relate to the lack of substantiation for the estimated costs and harmful consequences likely to flow from the proposed rule. BCP Staff have attempted to deflect that concern by arguing that IAB has "ignored" the analysis in the NPRM. As demonstrated above, however, that is not the case, and IAB thus urges the Presiding Officer to designate disputed issues of material fact and require the Commission to put forward a witness and evidence in support of its conclusions.

Sincerely,



Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

²⁰ *Id.* at 5, n. 16.

²¹ *Id.* at 7 (quoting NPRM, at 49387, part of the PRA).