

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

RULE MAKING PROCEEDING

Project No. P214504

RULE ON THE USE OF CONSUMER REVIEWS : ORDER
AND TESTIMONIALS : February 23, 2024

The Federal Trade Commission (FTC) commenced this proceeding with a Notice of Proposed Rulemaking, *Rule on the Use of Consumer Reviews and Testimonials*, 88 Fed. Reg. 49364 (Jul. 31, 2023) (NPRM). The FTC appointed the undersigned Administrative Law Judge to preside over the informal hearing in the proceeding, *Rule on the Use of Consumer Reviews and Testimonials*, 89 Fed. Reg. 2526 (Jan. 16, 2024) (Hearing Notice). A hearing session was held on February 13, 2024, at which 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).

The NPRM did not identify any disputed issues of material fact to be resolved at an informal hearing, and solicited comment on whether there are any such issues. In response, IAB described such alleged issues. 89 Fed. Reg. at 2528. The Hearing Notice briefly addressed IAB's allegations, and concluded that there are no material issues of disputed fact that need to be resolved at an informal hearing. 89 Fed. Reg. at 2528-29. A subsequent, February 7, 2024, Notice addressed the request that the FTC reconsider its ruling; noted that the FTC's rules allow the ALJ to rule on all requests made during the course of the hearing, including adding any issue; denied the reconsideration request without prejudice; and referred the requests to add designated issues of material fact to the undersigned to address in the first instance. 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; see 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).").

IAB urged, and argued at the hearing, that there are material issues of disputed fact, and the undersigned invited further briefing to be filed by February 20, 2024. Hearing Transcript, available at <https://www.ftc.gov/news-events/events/2024/02/informal-hearing-proposed-trade-regulation-rule-use-consumer-reviews-testimonials>. A filing was received from IAB, which provided evidence to support the issues it originally urged in response to the NPRM, and which the FTC referred to the undersigned in its February 7, 2024, Notice. In particular, it provided specific evidence concerning the issue of costs that the proposed rule will impose on businesses. In the preliminary regulatory analysis (PRA) in the NPRM, 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.”

It can be argued that, since the FTC already undertook a PRA that concluded that the benefits of the rule greatly outweigh its costs, 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.” 16 C.F.R. § 1.12(b) (emphasis added). However, if IAB offers an expert witness or proposed testimony from affected firms’ compliance officers or legal counsel to shed light on what would be involved with compliance review and implementation, then the issue could give the FTC a way of better quantifying cost.

IAB also argued that unintended consequences should be designated as an issue of material fact. 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.” 88 Fed. Reg. at 49386-87. The FTC 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.” *Id.* at 49387.

IAB argues, based on its survey, that over half of the respondents said they would be somewhat or very likely to suppress reviews, or even avoid hosting reviews at all, based on the new rule’s liability standards. As such, IAB contends that there is a material factual dispute concerning the FTC’s conclusion that the “unintended consequences of the proposed Rule are very unlikely.”

However, 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). It is not clear what cross examination would illuminate here. The FTC’s preliminary finding that the unintended consequences of the rule are very unlikely is a broad, highly generalized conclusion. The same is true of IAB’s claims, based on eighteen responses, that the consequences are likely. Neither type of response is particularly quantifiable. Thus, it is a question that would be difficult to test through cross examination at an evidentiary hearing. Additionally, the eighteen responses may be of questionable value when applied to the nearly 21,000 large companies and nearly 24.6 million small companies that the FTC estimated would be affected by the rule. *See* 88 Fed. Reg. at 49386. Accordingly, the undersigned will not designate unintended consequences as a disputed issue of material fact that would be aided by trial-type factfinding.

Based on the arguments and factual material presented by IAB, only the issue related to costs will be designated as a disputed issue of material fact:

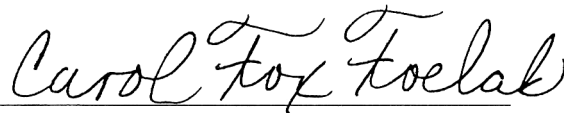
“Whether the compliance costs for businesses will be minimal.” *See* 89 Fed. Reg. at 2527.

This issue turns on specific facts that can be presented through testimony, cross examination, and documentary submissions. This issue is also “necessary to resolve” because the Commission is required to consider any adverse economic effects of the rule and assess significant issues raised by the comments under 15 U.S.C. § 57b-3(b)(2)(C)&(E). *See* 16 C.F.R. § 1.13(b) (disputed issues of material fact must be “necessary to resolve”). This issue is designated under the presiding officer’s authority to “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).” 16 C.F.R. § 1.13(b)(1)(ii). Because the presiding officer may add or modify issues on his or her own motion and because the

Commission referred the reconsideration of the IAB's petition and other requests raised during the hearing to the undersigned, there is no need for a finding of good cause why the issues were not proposed pursuant to § 1.11(e).

The next hearing session on the designated disputed issue will commence on March 5, 2024, at 10:00 a.m. EST. Any witness who testifies will be subject to cross examination. IAB may provide a witness, such as an affected firm's compliance officer or legal counsel or an expert witness, through whom an expert report may be introduced, in support of its arguments. BCP may provide a witness in support of its assumptions as to the compliance costs. IAB and BCP must provide notice concerning their witness[es] and any proposed exhibits by February 28, 2024. IAB, BCP, Fake Review Watch, and The Researchers may cross examine the witnesses. If neither side elects to provide a witness or other evidence, no hearing session will be necessary.

IT IS SO ORDERED.

A handwritten signature in cursive script that reads "Carol Fox Foelak". The signature is written in black ink and is positioned above a horizontal line.

Carol Fox Foelak
Administrative Law Judge