



March 15, 2024

Via Electronic Filing

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., NW
Washington, DC 20580

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

Chair Khan and Commissioners Slaughter and Bedoya:

The Interactive Advertising Bureau (IAB) submits this petition pursuant to 16 C.F.R. § 1.13(e), which permits any interested person to “petition the Commission for review of a ruling by the presiding officer denying or limiting the petitioner’s ability to conduct cross-examination or make rebuttal submissions upon a showing that the ruling precluded disclosure of a disputed material fact that was necessary for fair determination by the Commission of the rulemaking proceeding as a whole.”¹ IAB petitions for review of the Presiding Officer’s February 23, 2024 order, which denied IAB’s request for the following issue to be designated as a disputed issue of material fact: whether the Commission’s finding that unintended consequences from the NPRM are unlikely is accurate (e.g., for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).² For the reasons described below, this ruling denied IAB and other interested persons the ability to conduct cross-examination, thereby precluding development of the record on a disputed material fact necessary for the Commission’s fair determination of the rulemaking proceeding.

I. Background on IAB’s Proposed Disputed Issues of Material Fact

In IAB’s September 29, 2023 comment on the Notice of Proposed Rulemaking (NPRM) for the Rule on the Use of Consumer Reviews and Testimonials, IAB requested that the Commission hold an informal hearing and that three disputed issues of material fact be designated as such at the hearing.³ Those issues were the following:

1. Whether color, size, count, and flavor are the only attributes that would not confuse consumers when combined on a product page.
2. Whether the compliance costs for businesses will be minimal, particularly if the “knew or should have known” standard in the proposed rule is finalized.

¹ 16 C.F.R. § 1.13(e).

² Order of Presiding Officer Foelak, Rule on the Use of Consumer Reviews and Testimonials, Rulemaking Proceedings (Feb. 23, 2024).

³ Comment of Interactive Advertising Bureau, at 15 (Sept. 29, 2023).

3. Whether the Commission's finding that unintended consequences from the NPRM are unlikely is accurate (e.g., for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).

In its January 16, 2024 notice announcing the informal hearing, the Commission denied IAB's request for the three proposed issues to be designated as disputed issues of material fact.⁴ With respect to the first issue, the Commission explained that it had decided not to proceed with section 465.3, and so that issue no longer needed to be addressed.⁵ With respect to the second and third issues, the Commission concluded the issues were not genuinely disputed and thus did not warrant cross-examination.⁶

IAB responded to that notice with its January 30, 2024 comment, and explained why the two remaining proposed issues were disputed, material, and necessary to resolve, which is the standard set forth in the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (“Magnuson-Moss”) for determining when disputed issues of material fact warrant cross-examination.⁷ IAB incorporates those arguments in this submission.

On February 7, 2024, the Commission referred this request to the Presiding Officer of the hearing.⁸ IAB also separately submitted a petition to the Presiding Officer of the hearing, requesting that she designate these two issues as disputed issues of material fact at the upcoming hearing.⁹ On February 23, 2024, the Presiding Officer designated IAB's second proposed issue—whether compliance costs for businesses will be minimal—as a disputed issue of material fact. However, the Presiding Officer concluded that IAB's third proposed issue—whether unintended consequences would be unlikely—was not “a disputed issue of material fact that would be aided by trial-type factfinding” because it was “not clear what cross examination would illuminate.”¹⁰ IAB submits this petition for review of the Presiding Officer's ruling denying IAB's ability to conduct cross-examination with respect to its third proposed issue.

II. The Presiding Officer's February 23, 2024 Ruling Precluded Disclosure of a Disputed Material Fact that Is Necessary for the Commission's Fair Determination of the Rulemaking Proceeding.

⁴ Rule on the Use of Consumer Reviews and Testimonials, 89 Fed. Reg. 2526, 2528-29 (Jan. 16, 2024).

⁵ *Id.* at 2528.

⁶ *Id.* at 2528-29.

⁷ Comment of Interactive Advertising Bureau, at 4-7 (Jan. 30, 2023).

⁸ Notice Regarding Requests Relating to the Informal Hearing in Project No. P214504, Rule on the Use of Consumer Reviews and Testimonials (Feb. 7, 2024).

⁹ Petition of Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 12, 2024).

¹⁰ Order of Presiding Officer Foelak, Rule on the Use of Consumer Reviews and Testimonials, Rulemaking Proceedings, at 2 (Feb. 23, 2024).

The Commission and Presiding Officer have declined to allow further development of the record on IAB's third proposed disputed issue of material fact, which focuses on harmful unintended consequences that are likely to result from the proposed rule. Those consequences include, for example, that consumers will be deprived of helpful information in reviews due to overdeterrence caused by the rule's overbreadth. In order to show that this issue was genuinely disputed—and provide affirmative evidence per the Commission's assertion that such evidence is required—IAB conducted a survey that gathered evidence on this disputed issue, and presented that evidence in a comment that it submitted on February 20, 2024.¹¹ These survey results (1) constitute affirmative evidence supporting IAB's position that unintended harmful consequences are likely; and (2) demonstrate that this disputed issue is a "specific" fact that "can be presented through testimony, cross examination, and documentary submissions."¹² The Commission has provided no countervailing evidence, including in the NPRM.¹³

For example, the survey results showed that over half of respondents stated they would be somewhat or very likely to "change [their] current review process to delete, suppress, or otherwise display fewer consumer reviews," in light of proposed Section 465.2. These results show that the proposed rule is likely to lead to the suppression of helpful information for consumers, which is an important negative consequence that has not been adequately explored.

Additionally, most businesses indicated that they would be somewhat or very likely to "require reviewers to submit more information to authenticate their identity before leaving a review" in response to proposed Section 465.2. As discussed at the February 16, 2024 hearing by both IAB and the presenting researchers, collecting more personal information from consumers may (i) unnecessarily put consumers' privacy at risk, and (ii) discourage some legitimate reviewers from submitting reviews due to privacy and other concerns. These are both harmful consequences

¹¹ Comment of Interactive Advertising Bureau, at 2-3 (Feb. 20, 2024). Throughout the informal hearing, Staff for the Bureau of Consumer Protection has asserted that IAB's survey is not reliable. These arguments lack merit. IAB engaged a third party, independent survey firm to run the survey. IAB then shared a link to the survey with its members, and specifically sent the link to representatives of the member companies who were most likely to know the answers to the questions. The email transmitting the survey to the members did not provide any detail about IAB's specific concerns or identify the disputed issues of material fact it had proposed. IAB only had a few days to collect responses but in that time, eighteen companies filled out the survey. To further enhance reliability, the survey began with two "screener" questions to ensure respondents displayed or used consumer reviews and testimonials in running their business. If a company did not answer "yes" to at least one of these questions, the company would be screened out. All eighteen companies answered "yes" to at least one of these questions. Finally, the summary of the rule that was provided to respondents was accurate, and simply reflected what was in the NPRM.

¹² Order of Presiding Officer Foelak, Rule on the Use of Consumer Reviews and Testimonials, Rulemaking Proceedings, at 2 (Feb. 23, 2024).

¹³ Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364, 49387 (July 31, 2023) ("The Commission believes such unintended consequences of the proposed Rule are very unlikely.").