



January 30, 2024

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

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

The Interactive Advertising Bureau (IAB) welcomes this opportunity to submit this comment in response to the Federal Trade Commission’s request for public comment on its Initial & Final Notice of Informal Hearing (Hearing Notice) for the Reviews and Testimonials Rule.<sup>1</sup> IAB has been actively engaged in this rulemaking because consumer reviews and testimonials play a critical role in today’s retail and commercial marketplace. Customer trust and communication is critical to IAB’s members, and IAB strongly supports the Commission’s goal of working to improve consumer confidence in the authenticity of the reviews and testimonials that consumers encounter.

However, IAB has serious concerns with the procedures that the Commission has prescribed for the upcoming informal hearing. Absent modification to these procedures, the informal hearing will stifle—not encourage—the required examination of important issues about costs and harmful consequences associated with the proposed rule. IAB raised similar concerns with the Negative Option Rule hearing, and that is precisely what has transpired. Instead of ensuring the informal hearing process is robust and meaningful, the Commission undercut this important step in its ongoing Negative Option Rulemaking, and will do the same thing here by preventing IAB from exercising the right to cross-examination that is set forth in the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (Magnuson-Moss).<sup>2</sup> In doing so, the Commission is circumventing the required rulemaking process, and relying on its own suppositions rather than developing a robust rulemaking record as Magnuson-Moss requires.

This comment sets forth IAB’s specific concerns with the Commission’s reasoning and conclusions in the Hearing Notice, which include that: (1) the Commission incorrectly determined that there are no disputed issues of material fact that merit cross-examination; (2) the procedures for the informal hearing as provided in the Hearing Notice are inconsistent with Magnuson-Moss, its legislative history, and past Commission practice; and (3) the Commission has provided inadequate time for interested persons to prepare for the hearing.

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<sup>1</sup> Rule on the Use of Consumer Reviews and Testimonials, 89 Fed. Reg. 2526 (Jan. 16, 2024) (hereinafter, “Hearing Notice”).

<sup>2</sup> 15 U.S.C. §57a(c)(2).

IAB is concerned that the deficiencies in the procedures that the Commission intends to employ at the informal hearing will result in an underdeveloped record on important issues and ultimately, a final rule that burdens legitimate businesses instead of targeting the bad actors that create and spread fake reviews. As noted above, IAB raised similar concerns with the Commission's approach to the informal hearing that is currently ongoing for the Negative Option Rule. In those proceedings, the Presiding Officer (Administrative Law Judge Carol Fox Foelak) determined that contrary to the Commission's conclusion, there were in fact two disputed issues of material fact that should be addressed at the hearing through cross-examination. Both of those issues related to the costs associated with the proposed rule. Accordingly, at a minimum, the Commission should reassess its conclusion that IAB's proposed disputed issue of material fact related to cost does not warrant cross-examination, as the Presiding Officer for this rulemaking has already determined that issues related to cost meet the standard for cross-examination in a similar context. In addition, IAB respectfully requests that the Commission re-assess the other disputed issue of material fact that IAB has already identified.

To effectuate this relief, IAB requests that the Commission issue a new initial Hearing Notice that applies the appropriate standard for analyzing proposed disputed issues of material fact, provides participants more than thirty minutes to raise important issues at the hearing, allows the presiding officer to issue a recommended decision, invites other interested persons to participate in the hearing through documentary submissions, and delays the hearing by thirty days to allow for meaningful preparation.

#### **I. Background on IAB and Its Engagement in this Rulemaking.**

IAB represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns.<sup>3</sup> Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, IAB develops both technical standards and best practices for our industry. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing.

In its original comment on the Notice of Proposed Rulemaking (NPRM), IAB stated its support for the rule's goals and explained that many of its members were already proactively working to prevent, detect, and stop the proliferation of deceptive reviews and testimonials by bad actors.<sup>4</sup> But at the same time, IAB had several concerns with the Commission's approach. Specifically, IAB identified that several sections of the proposed rule were significantly overbroad such that they swept in the non-deceptive and consumer-friendly practices of legitimate companies. IAB also explained that the proposed rule ran afoul of several statutory rulemaking requirements and would impose costs, burdens, and adverse consequences that the Commission failed to consider. The defects IAB identified included that the proposed rule: (1) failed to satisfy the requirements of Magnuson-Moss by presenting insufficient evidence to demonstrate that all of

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<sup>3</sup> [www.iab.com](http://www.iab.com)

<sup>4</sup> Comment of Interactive Advertising Bureau on Reviews and Testimonials Rule, at 1-2 (Sept. 29, 2023) (hereinafter, "IAB Comment").

the deceptive or unfair acts or practices prohibited by the rule were prevalent; (2) did not reflect any consideration of the costs or harmful consequences for businesses and customers that would result from many portions of the proposed rule; (3) did not evaluate potentially less burdensome alternatives; (4) is not consistent with Section 230 of the Communications Decency Act (Section 230) because it purports to penalize good faith content moderation; and (5) poses First Amendment concerns by restricting non-deceptive speech. Because of these concerns as well as others, IAB requested the opportunity to present its position at an informal hearing and conduct cross-examination on disputed issues of material fact, consistent with Magnuson-Moss.<sup>5</sup> Those disputed issues included whether compliance costs for businesses will be minimal, whether unintended consequences from the proposed rule were unlikely, and whether additional attributes, aside from those the Commission identified, could be combined on a product page without confusing consumers.<sup>6</sup>

On January 16, 2024, the Commission published a notice that announced the informal hearing, and concluded that although IAB had proposed three disputed issues of material fact, none of those issues merited cross-examination.<sup>7</sup> In reaching this conclusion, the Commission applied an incorrect legal standard that it never identified for commenters. IAB has serious concerns with the Commission's refusal to allow development of the record on these important issues. IAB agrees with the Commission's goal of stemming the tide of fake reviews, but seeks to draw out the ways in which the proposed rule is overly broad and will create costs and harmful consequences for industry and consumers that the Commission has not adequately considered.

In addition to denying IAB the ability to develop the record through cross-examination, the Hearing Notice also eliminated the opportunity for other interested persons to participate in the informal hearing. First, the Commission expressly invited only the three hearing participants to submit comments in response to the Hearing Notice, which is contrary to Magnuson-Moss.<sup>8</sup> Second, the Hearing Notice announced that the initial and final hearing notices called for by the Commission's own rules would be collapsed into one, thereby depriving interested persons of an additional opportunity to request cross-examination.<sup>9</sup> Furthermore, the notice explained that the

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<sup>5</sup> IAB Comment, at 14-15.

<sup>6</sup> *Id.* at 15.

<sup>7</sup> Hearing Notice, at 2528-29. The Commission stated that one of IAB's issues did not need to be addressed because it dealt directly with Section 465.3, a section which the Commission has decided not to proceed with at this time. *See* Hearing Notice, at 2528. Accordingly, IAB addresses only the two remaining issues in this comment.

<sup>8</sup> Hearing Notice, at 2529; 15 U.S.C. § 57a(c)(2)(A) (“Subject to paragraph (3) of this subsection, an interested person is entitled . . . to present his position orally or by documentary submission (or both).”).

<sup>9</sup> Hearing Notice, at 2529; 16 C.F.R. § 1.12(a) (stating that the initial notice of informal hearing should include “an invitation to interested persons to submit requests to conduct or have conducted cross-examination or to present rebuttal submissions, pursuant to § 1.13(b)(2), if desired”); *id.* § 1.12(c) (stating that the final notice of informal hearing shall include “[a] list of the interested persons who will conduct cross-examination regarding disputed issues of material fact” . . . “[b]ased on requests submitted in response to the initial notice of public hearing.”).

hearing would consist of only three oral presentations delivered virtually to an Administrative Law Judge (ALJ) from the Securities and Exchange Commission with essentially no authority to resolve any disputed issue. This ALJ was “not anticipated” to make a recommended decision, and her role would be restricted to ensuring the orderly conduct of the hearing, for instance by choosing the order of the presentations, and placing the transcript and comments on the rulemaking record.<sup>10</sup>

The informal hearing should be an opportunity for interested persons to develop the record on key issues in dispute and for the Commission to consider the problems that commenters have identified. IAB is disappointed to see that the Commission appears to be taking the same approach to this informal hearing as it previously did—and is currently taking—in the Negative Option Rulemaking by attempting to cut off participation in the informal hearing, preventing cross-examination of important issues, limiting the authority of the ALJ, and allotting limited time to respond to its determinations. Ultimately, these procedural deficiencies will result in a final rule that disincentivizes businesses from offering consumer reviews or testimonials, which will limit the amount of helpful information for consumers to consider when making purchasing decisions.

## **II. The Commission Incorrectly Concluded that There Are No Disputed Issues of Material Fact.**

IAB strongly disagrees with the Commission’s conclusion that the two disputed issues of material fact identified by IAB are not actually disputed, and that there is “no need for cross-examination.”<sup>11</sup> The Commission asserts two reasons in support of its conclusion: (1) that the proposed disputed issues of material fact are not supported by affirmative evidence provided by IAB that would satisfy the summary judgment standard; and (2) that the proposed disputed issues of material fact raised by IAB are “legislative” facts, rather than “specific” facts.<sup>12</sup> But these are not legitimate bases for finding that there are no disputed issues of material fact in this proceeding. Indeed, neither Magnuson-Moss, nor the Commission’s rules or past practices, require disputed issues of material fact to be so-called “specific” facts, not “legislative” facts, or supported by affirmative evidence from commenters when the Commission has failed to explain the basis for its conclusions in the first place.<sup>13</sup> Instead, Magnuson-Moss simply states that “an interested person is entitled . . . if the Commission determines that there are disputed issues of material fact it is necessary to resolve . . . to conduct . . . such cross-examination of persons as the Commission

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<sup>10</sup> Hearing Notice, at 2529.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2528-29.

<sup>13</sup> *See generally* 15 U.S.C. § 57a; 16 C.F.R. §§ 1.7-1.20; Final Notice of Proposed Trade Regulation Rule Proceedings, Advertising of Ophthalmic Goods and Services, 41 Fed. Reg. 14194, 14195-96 (Apr. 2, 1976) (designating seven disputed issues of material fact covering topics such as economic effects of the rule, whether consumers are likely to be misled by certain practices, and whether disclosures will eliminate the potential for deception); Funeral Industry Practices Proposed Trade Regulation Rule, 41 Fed. Reg. 7787, 7788-89 (Feb. 20, 1976) (designating thirty disputed issues of material fact including topics such as whether the proposed rule would increase prices for customers and whether certain provisions would be “impractical or unwise”).

determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.”<sup>14</sup>

When it submitted its initial comment, IAB had no notice of the Commission’s novel standard for determining whether disputed issues of material fact merit cross-examination. For example, the Commission’s NPRM simply requested that commenters identify “any proposals to add disputed issues of material fact necessary to be resolved during an informal hearing.”<sup>15</sup> IAB followed this instruction, given its concerns about the Commission’s lack of consideration for the overbreadth of the rule and its potential negative consequences for legitimate companies, but the Commission has now dismissed both disputed issues without specifically analyzing whether those facts were disputed in the record, material, and necessary to resolve, which is the statutory standard. As explained in more detail below, (1) IAB’s proposed disputed issues of material fact meet the statutory standard, and (2) the Commission’s newly announced requirements prevent additional development of the record that is necessary for the Commission to issue a proper rule.

**A. *IAB’s Proposed Disputed Issues of Material Fact Are Genuinely Disputed, Material, and Necessary to Resolve.***

In its comment on the NPRM, IAB disputed the Commission’s estimates with respect to compliance costs as well as its finding that unintended consequences from the proposed rule are unlikely. These issues are (1) disputed because the Commission asserts that honest businesses will not be significantly burdened by the proposed rule (while IAB asserts that the overbreadth of the rule will sweep in the practices of legitimate companies) and that unintended consequences from the proposed rule are unlikely (while IAB believes that such consequences are likely to occur and will harm businesses and consumers);<sup>16</sup> (2) material because they raise significant issues that should impact the content of the final rule; and (3) necessary to resolve because without this information, the Commission cannot make an informed and fair determination.

In the Negative Option Rulemaking, the Presiding Officer recognized that issues related to the costs of the rule—specifically whether the proposed rule would have an annual effect on the national economy of \$100 million or more and the amount of the recordkeeping and disclosure costs associated with the proposed rule—turned on “specific facts that can be presented through testimony, cross-examination, and documentary submissions.”<sup>17</sup> Furthermore, the Presiding Officer explained that these issues are “‘necessary to resolve’ because the Commission is required

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<sup>14</sup> 15 U.S.C. § 57a(c)(2)(B) (emphasis added).

<sup>15</sup> Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364, 49364 (July 31, 2023) (hereinafter “NPRM”).

<sup>16</sup> NPRM, at 49381 (“Because the proposed Rule is an application of preexisting law under Section 5 of the FTC Act, the Commission expects these compliance costs to be minimal.”); *id.* at 49386 (stating that the most cautious companies would likely only spend 8 hours implementing the proposed rule); *id.* at 49386-87 (describing how some sellers might “overcorrect” in response to the high penalties imposed by the rule but stating that such consequences are “very unlikely”).

<sup>17</sup> Order of Administrative Law Judge Carol Fox Foelak, Negative Option Rulemaking Proceeding (Jan. 25, 2024).

to consider them under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively.”<sup>18</sup> Although IAB does not agree that the other disputed issues of material fact that it proposed in that rulemaking did not warrant cross-examination, the Commission should conclude, in light of the Presiding Officer’s analysis, that at a minimum, IAB’s proposed disputed issue of material fact related to cost merits cross-examination. This issue similarly turns on specific facts and must be considered under Magnuson-Moss.<sup>19</sup>

Applying the statute’s standard for assessing whether a disputed issue of material fact merits cross-examination, it is clear that IAB’s two proposed issues were disputed, material, and necessary to resolve, and that allowing cross-examination would benefit all parties by fostering full and true disclosure of important issues that should inform the content of the final rule:

***1. Whether the compliance costs for businesses will be minimal, particularly if the “knew or should have known” standard is finalized.***

This is a significant issue disputed by IAB. The Commission has concluded with no basis that compliance costs associated with the proposed rule will be minimal simply because “the proposed Rule is an application of preexisting law under Section 5.”<sup>20</sup> In contrast, IAB has explained that legitimate companies will be forced to invest significant resources into ensuring, for instance, that they will not be exposed to civil penalties because they “should have known” that a certain review or testimonial violated the rule. Numerous other commenters have raised similar concerns.<sup>21</sup> A rule that is specifically targeted to the activities of the bad actors that generate high volumes of fake reviews would be significantly more effective in achieving the Commission’s goals. This issue is material because cost (as well as cost/benefit tradeoffs) is a significant consideration that sheds light on the appropriate breadth of the rule. This is an important aspect of the decision to issue a rule that the Commission must resolve under the Administrative Procedure Act (APA) as well as Magnuson-Moss. Through cross-examination, IAB could probe

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<sup>18</sup> *Id.*

<sup>19</sup> 15 U.S.C. § 57b-3(b)(C) (“Each preliminary regulatory analysis shall contain . . . a preliminary analysis of the projected benefits and any adverse economic effects and any other effects” for the proposed rule.).

<sup>20</sup> NPRM, at 49381.

<sup>21</sup> *See, e.g.*, Comment of Nat’l Retail Federation on NPRM, at 2 (Sept. 29, 2023) (“Rather than promote better practices amongst retailers, the Proposed Rule threatens burdensome compliance costs that may make retailers reconsider hosting reviews for their products or services at all.”); Comment of Ass’n of Nat’l Advertisers on NPRM, at 13 (Sept. 29, 2023) (“[The proposed rule] will impose significant costs on legitimate businesses, when a rule targeted at the behavior of these bad actors would be a much more effective and efficient mechanism to address the problem.”); Comment of U.S. Chamber of Commerce on NPRM, at 3 (Sept. 29, 2023) (“The Chamber is concerned that a “knows or should know” or a “knows or could have known” standard allows the FTC to second guess compliance practices after the fact and increase the costs of compliance.”); Comment of Nat’l Automobile Dealers Ass’n on NPRM, at 6 (Sept. 29, 2023) (“[Proposed § 465.5] raises a potentially high compliance burden for businesses and could present a considerable risk of inadvertent noncompliance given the difficulty of determining the scope of this prohibition.”).

the basis for the Commission’s estimate that compliance costs, even in light of the “should have known standard,” will not be significant and draw out any potential flaws in that analysis. Finally, as noted previously, the Presiding Officer for this hearing has already determined in a similar context that cost constitutes a disputed issue of material fact.

2. ***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).***

This issue is also disputed because the Commission has asserted without evidence that unintended consequences, such as a seller overreacting to the fake review provision by displaying no reviews at all, “are very unlikely.”<sup>22</sup> IAB, however, believes that such unintended consequences are likely to occur, particularly because 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. Other commenters have also raised similar concerns.<sup>23</sup> Like compliance costs, this issue is material because it relates to how broad or narrow the rule should be. It is necessary to resolve this issue because without this information the Commission cannot appropriately assess all important aspects of the decision to issue a rule, as required by the APA. Through cross-examination, IAB could elicit information about the basis for the Commission’s conclusion that unintended consequences are unlikely.

***B. The Commission Applied a Flawed Standard for Determining If Disputed Issues of Material Fact Merit Cross-Examination.***

In the Hearing Notice, the Commission relied on the legislative history of Magnuson-Moss to assert that in order for disputed issues of material fact to warrant cross-examination, commenters must put forward affirmative evidence that would satisfy the summary judgment standard and demonstrate that those facts are “specific” facts, not “legislative” facts.<sup>24</sup> This standard is not required by Magnuson-Moss or the Commission’s rules, nor was it described in the NPRM, and commenters had no notice of the standard the Commission would apply. Even more importantly, this standard should not be used to determine when cross-examination is warranted at informal

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<sup>22</sup> NPRM, at 49387.

<sup>23</sup> See, e.g., Comment of Amazon.com, Inc. on NPRM, at 5 (Sept. 29, 2023) (“Such an overbroad rule would have significant unintended negative consequences on legitimate conduct.”); Comment of Computer & Commc’ns Indus. Ass’n on NPRM, at 2 (Sept. 29, 2023) (“It is critical that any regulation targets those actually creating fake or false reviews, not the underlying online intermediaries the perpetrators may be using. This will avoid unintended consequences for online review platforms that help people make decisions about where to spend money on goods and services.”); Comment of Trustpilot on NPRM, at 2 (Sept. 29, 2023) (“[T]here are areas of the proposed Rule which we believe need adjustment if they are to be effective whilst avoiding unintended consequences.”); Comment of U.S. Chamber of Commerce on NPRM, at 3-4 (Sept. 29, 2023) (“Section 465.2 may sweep too broadly and create unintended consequences for the important review ecosystem.”).

<sup>24</sup> Hearing Notice, at 2528-29.

hearings when the Commission has failed to adequately explain the basis for its conclusions because it improperly shifts the Commission's burden to justify the rule with vetted and robust evidence to commenters.<sup>25</sup> This will have the effect of relieving the Commission of its obligation under the statute to engage in a meaningful fact-finding exercise that affords adequate notice to commenters of the evidence the Commission is relying on and gives commenters a meaningful opportunity to weigh in on that evidence and the Commission's approach.

IAB closely reviewed the Commission's reasoning for the proposed rule, evaluated that analysis, and identified its concerns with the proposed rule. Those concerns included the Commission's failure to adequately justify the proposed rule and to consider important aspects of its proposal, including significant costs, compliance burdens, and adverse consequences for businesses and consumers. Other commenters expressed similar concerns. But instead of allowing IAB to explore these important issues at the hearing as the statute requires, the Commission asserts that it is IAB's burden to put forward evidence in order to establish that the Commission's findings are genuinely in dispute.<sup>26</sup>

The Hearing Notice reflects the Commission's failure to grapple with IAB's arguments by stating that, "if [the Commission's] findings are otherwise adequately supported by record evidence" the burden is on the commenters to "come forward with sufficient evidence to show there is a genuine, bona fide dispute over material facts that will affect the outcome of the proceeding."<sup>27</sup> But this was precisely the nature of many of IAB's concerns—that the Commission's conclusions about the proposed rule, including that it would not impose significant costs on legitimate companies and that it would not spur unintended consequences for consumers and businesses, were not supported by any evidence in the record. Imposing the summary judgment standard in this context—where the Commission has failed to explain the basis for its conclusions—will thus serve to prevent true and full disclosure of material facts by allowing the Commission to simply declare that its own findings "are sufficiently supported by substantial evidence in the record."<sup>28</sup> It would allow the Commission to unfairly be the judge of its own determinations, and then shift the burden to commenters who do not have access to the full record. In IAB's experience with the Negative Option Rule hearing proceedings, these concerns have played out as the Commission has failed to put forward any evidence in support of the proposed rule at that hearing, despite calls from numerous commenters. This is not the process that Magnuson-Moss contemplated.

Second, the Commission also bases its denial of cross-examination on the ground that all of the proposed disputed issues of material fact are so-called "legislative" facts, not "specific" facts. According to the Commission, "legislative" facts "combine empirical observation with

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<sup>25</sup> Under Magnuson-Moss, it is the Commission's obligation to determine if the entire record reflects disputed issues of material fact. Individual commenters cannot predict what evidence will be presented by others in the comment record when they file their comments and so cannot be expected to comprehensively identify every disputed issue *ex ante*. By shifting this burden to commenters, the Commission is failing to satisfy this statutory obligation.

<sup>26</sup> *Id.* at 2528.

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.*



application of administrative expertise to reach generalized conclusions” and so they “do not need to be developed through evidentiary hearings.”<sup>29</sup> Even accepting the Commission’s conclusion that it is proper to exclude “legislative” facts, the Commission’s view of such facts is too broad. Almost every piece of evidence in a rulemaking will involve both “empirical observation” and an application of “administrative expertise.” By excluding all such evidence, the Commission would render the fact-finding process of the informal hearing irrelevant.

Furthermore, the Commission misreads *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), which it quotes to assert that “legislative facts” need not be developed through evidentiary hearings.<sup>30</sup> But that quotation describes the typical rulemaking process, and it goes on to state that “[e]videntiary hearings, although not necessary to determine legislative facts, nevertheless may be helpful in certain circumstances. For example, Congress, when it enacted the Magnuson-Moss Act, recognized that special circumstances might warrant the use of evidentiary proceedings in determining legislative facts.”<sup>31</sup> After discussing the Administrative Conference of the United States (ACUS) Recommendation that the Commission cites, the court explains that “a review of this and subsequent ACUS correspondence demonstrates that the term ‘specific fact’ refers to a category of legislative fact, the resolution of which may be aided by the type of adversarial procedures inherent in an evidentiary proceeding with limited cross-examination.”<sup>32</sup>

IAB’s two proposed disputed issues of material fact constitute “specific” facts and their resolution would be aided by cross-examination. For example, how much the rule will cost and whether the rule’s overbreadth will lead to unintended consequences that harm consumers and businesses are questions of fact, not policy judgments. Furthermore, the Presiding Officer in the Negative Option Rule hearing proceedings—the same ALJ serving as the Presiding Officer for this hearing—has already determined that issues related to cost constitute “specific” facts. IAB thus strongly encourages the Commission to reconsider its conclusion, as denying cross-examination on these questions will prevent the development of the record on issues that will help ensure the rule is narrowly tailored and effective in stopping the proliferation of fake and false consumer reviews by bad actors.

### **III. The Informal Hearing the Commission Intends to Provide Is Inconsistent with the Statute, Legislative History and Past Commission Practice.**

In passing Magnuson-Moss, Congress set forth heightened procedural and substantive requirements to ensure that Section 18 rules would be issued based on a well-developed record necessary to support such rules. This process is important because it ensures that significant rules that cut across industries—such as this one—are grounded in a thorough evaluation of all relevant considerations. One of these heightened procedural requirements is the informal hearing process, and numerous specific provisions of Magnuson-Moss indicate that Congress intended this hearing

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<sup>29</sup> *Id.* (international quotations omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1163 (D.C. Cir. 1979).

<sup>32</sup> *Id.* at 1164.

process to be robust and meaningful, so that important issues would be adequately scrutinized by relevant stakeholders. For example, by statute, interested persons are “entitled” to present their positions and to engage in cross-examination or rebuttal submissions on disputed issues of material fact to facilitate “a full and true disclosure.”<sup>33</sup> The statute also provides for a presiding officer who must make a “recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence.”<sup>34</sup> The importance of the hearing process is reinforced by the statute’s provisions for judicial review. If the Commission wrongfully denies or limits cross-examination such that it “preclude[s] disclosure of disputed material facts which was necessary for fair determination,” the resulting final rule can be set aside.<sup>35</sup> An inadequate hearing is thus a deficiency that can jeopardize the legitimacy of the final rule.

The hearing that the Commission intends to provide is not designed to encourage disclosure of information that will help inform the Commission’s final rule. Instead, the Commission is avoiding any substantive engagement with the issues that IAB has raised. The Commission’s erroneous determination that there are no disputed issues of material fact, as discussed above, improperly precludes interested persons’ ability to fully participate in the hearing process via cross-examination and rebuttal submission.<sup>36</sup> The Commission is also failing to provide a mechanism by which interested persons may exercise their statutory entitlement to present their positions “orally or by documentary submission.”<sup>37</sup> Lastly, the Hearing Notice purports to relieve the presiding officer of her statutory duty to make a recommended decision at the hearing’s conclusion.<sup>38</sup> These deviations from the statutory requirements minimize and devalue a hearing process intended to provide an important avenue by which the public may engage in the rulemaking process. And they ultimately serve to prevent any party or individual besides the Commission—including the presiding officer at the hearing—from providing their analysis and weighing in on the proposed rule.

The legislative history of the statute also demonstrates that the informal hearing is meant to generate robust evaluation of the issues raised by commenters. For example, the House Report that the Commission cites in the Hearing Notice explains how the Magnuson-Moss rulemaking process was designed to “permit the fullest possible participation in any such rulemaking proceeding and make available to the Commission the widest possible expression of views and data on the issues presented by the proposed rules.”<sup>39</sup> The report goes on to explain that, “[i]t was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on

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<sup>33</sup> 15 U.S.C. § 57a(c)(2).

<sup>34</sup> *Id.* § 57a(c)(1)(B).

<sup>35</sup> *Id.* § 57a(e)(3).

<sup>36</sup> *See id.* § 57a(c)(2)(B).

<sup>37</sup> *Id.* § 57a(c)(2)(A).

<sup>38</sup> *See id.* § 57a(c)(1)(B) (“The officer who presides over the rulemaking proceeding shall make a recommended decision . . .”).

<sup>39</sup> H.R. Rep. No. 93-1606, at 32 (Dec. 16, 1974) (Conf. Rep.).

which the Commission is proceeding and to show in what respect such assumptions are erroneous.”<sup>40</sup> The process the Commission is providing here, however, appears to be designed to achieve the opposite by limiting oral presentations to three commenters, denying IAB’s request for cross-examination, and prohibiting documentary submissions from any interested person except the three hearing participants.

Finally, the ninety-minute hearing format with no cross-examination is not consistent with the Commission’s historically thorough approach to informal hearings in past Section 18 rulemakings, and the Commission has not explained this stark departure. For instance, during the rulemaking process for the Funeral Rule, the FTC held fifty-two days of hearings, in which three hundred and fifteen witnesses testified.<sup>41</sup> The hearings generated 14,719 transcript pages and approximately 4,000 exhibit pages.<sup>42</sup> When considering the Used Car rule, the FTC provided all witnesses an opportunity to make an opening presentation, allowed for cross-examination by representatives of all key stakeholder groups, including used car dealers, the auto rental and leasing industries, and consumer groups, and accepted rebuttal statements after the hearings.<sup>43</sup> More recently, the FTC held a day-long public workshop to explore proposed changes to the Business Opportunity Rule.<sup>44</sup> The workshop was open to the public and welcomed comments from the public as well.<sup>45</sup> The ninety-minute hearing with no cross-examination presents a stark contrast with these prior hearings, and IAB thus strongly urges the Commission to consider a more robust hearing so that it can issue an appropriately targeted rule that stops bad actors while preserving the benefits of reviews and testimonials for consumers and businesses.

#### **IV. IAB Requests More Time to Prepare for the Hearing.**

The Commission’s Hearing Notice raised numerous significant issues, but it has only given the hearing participants two weeks to prepare for the informal hearing following comment submission. This short amount of time is inadequate for IAB and the rest of the hearing participants to prepare meaningfully for the presentation. Accordingly, IAB requests that the Commission delay the hearing by thirty days to allow the parties adequate time to prepare.

#### **V. IAB Reiterates the Points Made in its NPRM Comment.**

Finally, although this comment does not restate all of the points that IAB raised in its original comment, IAB seeks to highlight its concerns in light of the Commission’s decision not to use the informal hearing to examine these important issues. While IAB agrees with the Commission’s decision not to proceed with proposed Section 465.3, IAB also raised significant concerns that other sections of the proposed rule are overbroad, do not satisfy Magnuson-Moss,

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<sup>40</sup> *Id.* at 33.

<sup>41</sup> *Harry and Bryant Co. v. F.T.C.*, 726 F.2d 993, 996 (4th Cir. 1984).

<sup>42</sup> *Id.*

<sup>43</sup> 49 Fed. Reg. 45692, 45693 (1984).

<sup>44</sup> Federal Trade Commission, Business Opportunity Rule Workshop (2009), <https://www.ftc.gov/news-events/events/2009/06/business-opportunity-rule-workshop>.

<sup>45</sup> 74 Fed. Reg. 18712 (2009).

fail to address reasonable alternatives and consequences for businesses, run afoul of Section 230 of the Communications Decency Act, and violate the First Amendment. The Commission still has the opportunity to change its approach to the hearing and use it to develop the record on these issues, as well as others raised by commenters. To that end, IAB highlights several key points that would be productive to explore at a meaningful and revised informal hearing. In addition, IAB incorporates the rest of its original NPRM comment here.

**A. *Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials (§ 465.2).***

IAB agrees with the goal of eliminating fake or false reviews and testimonials. However, IAB has concerns with several aspects of section 465.2. First, with respect to the proposed rule's prohibition on reviews that "materially misrepresent[ ] . . . the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial," IAB has concerns that the Commission has failed to show that such conduct is "prevalent" as required by Magnuson-Moss.<sup>46</sup> Instead, the evidence cited in the NPRM supports a narrowed section focused on actual fake reviews where no consumer used the product purportedly being reviewed. In addition, the proposed rule's vague and overbroad language—such as "disseminating" and "procuring"—require clarification to avoid sweeping in companies that simply host consumer reviews and testimonials. 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.

Section 465.2 is also inconsistent with existing law. Imposing liability on companies like online retailers simply for hosting certain reviews is incompatible with Section 230's protections against civil liability for interactive computer service providers hosting third-party content. Furthermore, Section 465.2 as proposed raises serious First Amendment concerns because it would not satisfy strict scrutiny and would have a significant chilling effect on non-deceptive speech.

**B. *Insider Consumer Reviews and Consumer Testimonials (§ 465.5) Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials (§ 465.2).***

IAB agrees with the overall principle that individuals with a material connection to the advertiser should disclose that connection to consumers. But IAB raised concerns with the Commission's approach to achieving this goal in section 465.5 because the proposed provision does not incorporate the flexibility that is embodied in the Endorsement Guides. The proposed blanket prohibition on certain employees and their family members writing reviews that lack disclosures without regard to the content or context of those reviews would impose penalties in connection with reviews or testimonials that are not deceptive. Raising the knowledge standard in this section to actual knowledge and providing a safe harbor for those companies that comply with

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<sup>46</sup> 15 U.S.C. § 57a(b)(3).

the Endorsement Guides staff guidance would better target companies complicit in the proliferation of deceptive insider reviews and testimonials.

This section also poses serious concerns under the First Amendment. The prohibition broadly applies to “insider” reviews or testimonials regardless of whether that speech is deceptive in context, and is thus not narrowly tailored to a compelling state interest. In addition, this provision would likely have a chilling effect on lawful, non-deceptive speech by imposing liability on businesses for disseminating content of others that the business did not know violated the law.

Finally, IAB remains concerned—to the extent the Commission intends for this provision to apply to online retailers with hundreds of thousands of employees—that the Commission has not demonstrated that this is a prevalent unfair or deceptive practice.

**C. *Review Suppression (§ 465.7).***

IAB has concerns with the Commission’s proposed review suppression provision because it includes a discrete list of reasons for which the suppression of a review is permissible, and indicates that this list is exhaustive. Such an interpretation is problematic for a few reasons. The Commission has not demonstrated that the suppression of reviews for reasons besides negativity is a prevalent deceptive or unfair practice. 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. This discrete list of permissible reasons to suppress reviews is also contrary to Section 230’s protections for websites that engage in content moderation, and raises First Amendment concerns if interpreted to mean that companies are only permitted to suppress reviews for the enumerated reasons. For these reasons, IAB urges the Commission to clarify that this list is not exhaustive.

**D. *Misuse of Fake Indicators of Social Media Influence (§ 465.8)***

IAB reiterates its concern that the Commission has failed to meet the prevalence requirement with respect to this section because the evidence cited in the record exclusively involves the use of “fake” indicators of influence that the seller or purchaser knew were fake, but the proposed rule is significantly broader. Furthermore, the Commission has failed to consider the consequences of this section if interpreted broadly—consumers may lose a useful and non-deceptive 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.

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IAB thanks the Commission for this opportunity to submit these supplemental comments and looks forward to working closely with the Commission on this important topic. Please do not hesitate to contact me at [lartease@iab.com](mailto:lartease@iab.com) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Lartease Tiffith", with a long horizontal flourish extending to the right.

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