

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Lina M. Khan, Chair**  
                                 **Rebecca Kelly Slaughter**  
                                 **Alvaro M. Bedoya**

**ORDER DENYING THE PETITION OF THE INTERACTIVE ADVERTISING  
BUREAU REQUESTING POST-HEARING REVIEW OF PRESIDING OFFICER  
FOELAK’S FEBRUARY 23, 2024 ORDER**

**March 22, 2024**

On March 15, 2024, the Commission received a petition (“Petition”), pursuant to 16 C.F.R. § 1.13(e),<sup>1</sup> from the Interactive Advertising Bureau (“IAB”) requesting that the Commission review Presiding Officer Foelak’s February 23, 2024 Order,<sup>2</sup> which denied IAB’s request to designate an additional issue as a disputed issue of material fact at the informal hearing for the proposed Reviews and Testimonials Rule.<sup>3</sup> Having reviewed the contents of the Petition along with the related rulemaking and informal hearing documents, the Commission, for the reasons that follow, hereby DENIES the Petition.

**I. Background**

Pursuant to Section 18 of the FTC Act,<sup>4</sup> the Commission published the notice of proposed rulemaking entitled, “Trade Regulation Rule on the Use of Consumer Reviews and Testimonials” (“NPRM”).<sup>5</sup> This NPRM proposed to prohibit certain specified unfair or

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<sup>1</sup> Paragraph (e) of Rule 1.13 provides interested persons the opportunity to request post-hearing review by the Commission of the Presiding Officer’s rulings.

<sup>2</sup> Order of Presiding Officer Foelak, Negative Option Rule, Rulemaking Proceedings (Feb. 23, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p311003aljorder20240226.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p311003aljorder20240226.pdf) [hereinafter “Order”].

<sup>3</sup> Interactive Advertising Bureau’s Petition for Review of the February 23, 2024 Order, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabpetitionforreview20240315.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabpetitionforreview20240315.pdf) [hereinafter “Petition”].

<sup>4</sup> 15 U.S.C. § 57a.

<sup>5</sup> See Fed. Trade Comm’n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, Notice of Proposed Rulemaking, 88 Fed. Reg. 49364 (July 31, 2023), <https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonial> [hereinafter “NPRM”].

deceptive acts or practices involving consumer reviews or testimonials.<sup>6</sup> The NPRM did not identify any disputed issues of material fact that need to be resolved at an informal hearing and solicited the public’s views on whether there are any such issues.<sup>7</sup> In response, three interested parties submitted requests to present orally at an informal hearing, and IAB requested that the Commission designate three issues as disputed issues of material fact.<sup>8</sup>

On January 16, 2024, the Commission published an initial and final notice of informal hearing (“hearing notice”) that scheduled an informal hearing for February 13, 2024.<sup>9</sup> The hearing notice also explained the Commission’s finding that there were no disputed issues of material fact necessary to be resolved.<sup>10</sup> Specifically, the hearing notice announced that the Commission “decided to not proceed at this time with proposed § 465.3. It is therefore not necessary to address IAB’s proposed disputed issue of material fact relating to the proposed definition of ‘substantially different product.’”<sup>11</sup> As to IAB’s two other proposed disputed issues of material fact, the Commission determined they did “not raise questions of ‘specific fact,’” and thus there were no disputed issues of material fact to resolve at the informal hearing.<sup>12</sup>

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<sup>6</sup> *Id.* at 49380.

<sup>7</sup> *Id.* at 49381.

<sup>8</sup> *See* Fed. Trade Comm’n, Rule on the Use of Consumer Reviews and Testimonials: Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants, 89 Fed. Reg. 2526 (Jan. 16, 2024), <https://www.federalregister.gov/documents/2024/01/16/2024-00678/rule-on-the-use-of-consumer-reviews-and-testimonials> [hereinafter “Hearing notice”]. It designated the Honorable Carol Fox Foelak, Administrative Law Judge for the Securities and Exchange Commission, to serve as the presiding officer of the informal hearing. *Id.* at 2529. It also set out IAB’s three proposed disputed issues of material fact:

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

*Id.* at 2527.

<sup>9</sup> *Id.* at 2526.

<sup>10</sup> *Id.* at 2529.

<sup>11</sup> *Id.* at 2528.

<sup>12</sup> *Id.* at 2529.

In its January 30, 2024 comment in response to the hearing notice, IAB requested that its two proposed disputed issues of material fact, unrelated to the definition discussed above, be designated disputed issues of material fact.<sup>13</sup> On February 7, 2024, the Commission issued a notice referring IAB’s request to the Presiding Officer.<sup>14</sup> IAB separately petitioned the Presiding Officer to designate its two proposed issues as disputed issues of material fact.<sup>15</sup> IAB made this request again during the informal hearing.<sup>16</sup> After the informal hearing session on February 13, 2024, IAB submitted a filing in response to Judge Foelak’s invitation to further brief the issues regarding its two proposed disputed issues of material fact.<sup>17</sup>

On February 23, 2024, Judge Foelak found that this filing “provided specific evidence concerning the issue of costs that the proposed rule will impose on businesses” and determined that “[w]hether the compliance costs for businesses will be minimal” was a disputed issue of material fact.<sup>18</sup> However, Judge Foelak declined to grant IAB’s request to designate whether the “unintended consequences of the proposed rule [was] a disputed issue of material fact that would be aided by trial-type factfinding,” stating, “it is not clear what cross examination would illuminate here.”<sup>19</sup>

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<sup>13</sup> Comment from Interactive Advertising Bureau (Jan. 30, 2024), at 4-7, <https://www.regulations.gov/comment/FTC-2024-0004-0008>.

<sup>14</sup> See 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](https://www.ftc.gov/system/files/ftc_gov/pdf/notice_regarding_requests_relating_to_informal_hearing.pdf). (citing 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).”)).

<sup>15</sup> Petition Re: Reviews and Testimonials Rule (16 CFR part 465) (Project No. P214504) (Feb. 12, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabpetition20240212.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabpetition20240212.pdf).

<sup>16</sup> Transcript: Consumer Reviews and Testimonials Rule - Informal Hearing, at 8-10 (Feb. 13, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf).

<sup>17</sup> Order at 1.

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

<sup>19</sup> *Id.* at 2.

## II. Contents of Petition

On March 15, 2024, IAB submitted its Petition requesting that the Commission review Presiding Officer Foelak’s February 23, 2024 Order denying its request that she designate the unintended consequences of the proposed rule a disputed issue of material fact.<sup>20</sup> IAB argues that “further development of the record on” this issue is needed “so that the Commission can issue a properly tailored rule.”<sup>21</sup>

In support of its Petition, IAB discusses a survey it conducted with its members and submitted in this proceeding on February 20, 2024.<sup>22</sup> IAB asserts that the results of this survey “(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.’”<sup>23</sup> Finally, IAB states that “[c]ontrary to the Presiding Officer’s conclusion, cross-examination would illuminate significant additional information about the ways in which companies are likely to react to the proposed rule, and how likely those consequences will be.”<sup>24</sup> Thus, IAB requests that the Commission designate the unintended consequences of the proposed rule a disputed issue of material fact.

## III. The Commission’s Resolution of the Petition

As discussed in both the hearing notice<sup>25</sup> and the Order, “to designate an issue of

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<sup>20</sup> Petition at 1.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* IAB’s comments discussing its survey in detail can be found at: Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 20, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabsubmission20240220.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmission20240220.pdf), and Interactive Advertising Bureau’s Submission of Exhibits – March 5, 2024 (Mar. 5, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/r311003iabsubmissionexhibits20240305.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmissionexhibits20240305.pdf).

<sup>23</sup> *Id.* (internal citations omitted).

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Hearing notice, 89 Fed. Reg. at 2527-28.

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.”<sup>26</sup> This means the issue “must raise ‘specific facts’ that are ‘necessary to be resolved’ and not ‘legislative facts.’”<sup>27</sup> As explained in the hearing notice, “[a]s in summary judgment, the challenging party must do more than simply assert there is a dispute regarding the Commission's findings. If those findings are otherwise adequately supported by record evidence, the challenging party must 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>28</sup>

The Petition focuses on IAB’s survey findings without providing any additional evidence that IAB’s proposed disputed issue of material fact is an issue of “specific fact.”<sup>29</sup> The Petition relies on IAB’s survey results to argue that this issue must be developed on the record so that the unintended consequences of this rulemaking “could be avoided with a more narrowly tailored rule.”<sup>30</sup> However, the Petition provides no explanation to support its assertion that “cross-examination would illuminate significant additional information.”<sup>31</sup> The Commission agrees with Judge Foelak’s Order: it is not clear what cross examination regarding the unintended consequences of the proposed rule “would illuminate here.”<sup>32</sup> As Judge Foelak noted, neither “the FTC’s preliminary finding that the unintended consequences of the rule are very unlikely,”<sup>33</sup> nor IAB’s claims that consequences are likely, are “particularly quantifiable . . . [and] would be difficult to test through cross examination at an evidentiary hearing.”<sup>34</sup> The

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<sup>26</sup> Order at 2 (citing 16 C.F.R. § 1.12(b)(2)).

<sup>27</sup> Hearing notice, 89 Fed. Reg. at 2527–28. (internal citations omitted).

<sup>28</sup> *Id.* at 2528. (internal citations omitted).

<sup>29</sup> *See* Petition at 3–4.

<sup>30</sup> *See id.* at 4.

<sup>31</sup> *Id.*

<sup>32</sup> Order at 2.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

Commission also agrees with Judge Foelak’s concerns that the eighteen responses to IAB’s survey “may be of questionable value when applied” to the number of large and small companies the NPRM estimated could be affected by the rulemaking.<sup>35</sup>

IAB speculates that, if this issue were designated a disputed issue of material fact, it “could” question BCP Staff about the NPRM’s preliminary finding that unintended consequences are unlikely.<sup>36</sup> IAB’s Petition, however, provides no details on the questions it would ask, the specific topics it would explore, which witnesses might choose to appear, or what their testimony may be. In addition, as noted above, IAB’s Petition fails to explain how its third proposed issue is an issue of specific fact as opposed to legislative fact.<sup>37</sup> Without these important details, IAB has failed to demonstrate that the unintended consequences of the proposed rule is a disputed issue of material fact.

The Commission appreciates the comments provided by IAB and others regarding the proposed rule. The Commission will carefully consider these comments in its continued analysis of the proposed rule’s scope, consumer protection benefits, and compliance costs.

For the reasons set out in the hearing notice<sup>38</sup> and the Order,<sup>39</sup> the Petitioner has not demonstrated that the issue raised in the Petition is a disputed issue of material fact the resolution of which would be aided by trial-type fact finding. Therefore, the Petitioner’s request that the unintended consequences of the proposed rule be designated a material issue of disputed fact is

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<sup>35</sup> *Id.* (citing the NPRM, 88 Fed. Reg. at 49386).

<sup>36</sup> *See* Petition at 4.

<sup>37</sup> As noted in *Association of National Advertisers v. FTC*, 627 F.2d 1151, 1163 (D.C. Cir. 1979), the term “specific fact” originated with a recommendation from the Administrative Conference of the United States. ACUS Recommendation 72-5 stated in relevant part, “Congress should never require trial-type procedures for resolving questions of policy or of *broad or general fact*” (emphasis added). *See* ACUS, Recommendation 72-5: Procedures for the Adoption of Rules of General Applicability (adopted Dec. 14, 1972), <https://www.acus.gov/sites/default/files/documents/72-5.pdf>.

<sup>38</sup> Hearing notice, 89 Fed. Reg. at 2527–28.

<sup>39</sup> Order at 2.

denied.

For the foregoing reasons, the Petition is DENIED.

By the Commission:



April J. Tabor  
Secretary

SEAL:  
ISSUED: 3/22/2024