



September 29, 2023

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

**Re: Reviews and Testimonials NPRM, R311003**

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency,” or “FTC”) July 31, 2023 request for comments regarding the notice of proposed rulemaking on the Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (“Proposed Rule”).<sup>1</sup> TINA.org supports this rulemaking proceeding as it is in the public’s interest, particularly in the wake of the Supreme Court’s *AMG Capital Management* decision,<sup>2</sup> as a rule will substantially improve the agency’s ability to combat and deter deception and unfairness with regard to fake reviews, ratings and testimonials.

The central premise of modern consumer protection law is that marketplace dishonesty causes harm to consumers and businesses alike; and, if left unchecked, such behavior impairs the efficient allocation of resources in our economy. There can be no doubt that fake reviews and ratings have exacerbated this problem. As a former Commissioner noted, “Fake reviews distort

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<sup>1</sup> TINA.org reincorporates by reference its January 9, 2023 Comment to the FTC regarding the advance notice of proposed rulemaking on this issue, as well as its June 22, 2020 and September 26, 2022 Comments to the FTC regarding the Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising. TINA.org’s Comment to the FTC regarding Reviews and Endorsements ANPR, P214504 (Jan. 9, 2023), [https://truthinadvertising.org/wp-content/uploads/2023/01/1\\_9\\_23-TINA-Fake-Reviews-Comment.pdf](https://truthinadvertising.org/wp-content/uploads/2023/01/1_9_23-TINA-Fake-Reviews-Comment.pdf); TINA.org’s Comment to the FTC regarding Endorsement Guides, P204500 (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>; and TINA.org’s Comment to the FTC regarding Endorsement Guides, P204500 (Sept. 26, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/09/9\\_26\\_22-TINA-Endorsement-Guide-Comment.pdf](https://truthinadvertising.org/wp-content/uploads/2022/09/9_26_22-TINA-Endorsement-Guide-Comment.pdf).

<sup>2</sup> *AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341 (2021).

our markets by rewarding bad actors and harming honest companies. The problem is growing, and the FTC should attack it.”<sup>3</sup>

The FTC’s current efforts to establish a rule concerning fake reviews will help prevent consumers from being manipulated by the influence of such deception. Fake reviews are an insidious problem because consumers rely heavily on reviews in making their purchasing decisions for millions of products and services. Moreover, it is nearly impossible for consumers and honest businesses to decipher which reviews are fake, especially as AI technology enhances the ability of disreputable businesses to create persuasive reviews. Given that consumers and legitimate businesses are unable to protect themselves from this deceptive marketing tactic, they are reliant on the FTC to prosecute businesses who falsely inflate their online reputations — and a rule will assist the Commission in this endeavor. TINA.org recommends, however, a few adjustments to the Proposed Rule in order to maximize its benefits for consumer protection and fair competition in the marketplace.

## **I. Interest of Commenter**

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

At the center of TINA.org’s efforts is its website, [www.tina.org](http://www.tina.org), which provides information about common deceptive advertising techniques, consumer protection laws, and alerts about specific deceptive marketing campaigns — such as nationally advertised “Built in the USA” vans manufactured abroad;<sup>4</sup> pillows and essential oils falsely marketed as being able to treat chronic diseases;<sup>5</sup> and a delivery meal kit service that falsely advertises free meals.<sup>6</sup> The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions.

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<sup>3</sup> Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter, *In the Matter of Sunday Riley*, Fed. Trade Comm’n, File No. 1923008 (Oct. 21, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1550127/192\\_3008\\_final\\_rc\\_statement\\_on\\_sunday\\_riley.pdf](https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf).

<sup>4</sup> TINA.org’s Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz>.

<sup>5</sup> TINA.org’s MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>; TINA.org’s doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>;

TINA.org’s Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

<sup>6</sup> TINA.org’s HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.

Through its collaborative approach and attention to emerging consumer protection issues, TINA.org has become a trusted source of expertise on matters relating to deceptive marketing and an impactful advocate for consumers. TINA.org regularly draws on its expertise to advocate for consumer interests before Congress, the FTC and other governmental bodies.<sup>7</sup> The organization also appears as amicus curiae in cases raising important questions of consumer protection law.<sup>8</sup> Since its inception, TINA.org has filed legal actions against hundreds of companies and entities, published more than 1,400 ad alerts, written over 1,000 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

TINA.org has specifically investigated companies that use fake reviews, testimonials and endorsements to market their products through their websites, third-party review sites, social media platforms, the metaverse and beyond.<sup>9</sup> TINA.org has been at the forefront of identifying issues surrounding virtual or CGI influencer marketing,<sup>10</sup> and spearheaded an examination into the deceptive marketing use of AI-controlled avatar influencers — particularly those aimed at children.<sup>11</sup> The organization has investigated businesses falsely inflating their star ratings, using fabricated testimonials, and disseminating deceptive endorsements. As such, TINA.org is deeply invested in protecting consumers — especially the most vulnerable — from the serious effects of deceptive marketing through fake reviews and testimonials.

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<sup>7</sup> *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com.*, 117th Congress (2021) (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the Comm. on Com., Sci., & Transp., 117th Congress (Apr. 27, 2021), (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

<sup>8</sup> See, e.g., Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), [https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389\\_19-508%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf); Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), [https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen\\_Amici-Curiae-brief.pdf](https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf).

<sup>9</sup> See TINA.org's Comment to the FTC regarding Reviews and Endorsements ANPR, P214504 (Jan. 9, 2023), [https://truthinadvertising.org/wp-content/uploads/2023/01/1\\_9\\_23-TINA-Fake-Reviews-Comment.pdf](https://truthinadvertising.org/wp-content/uploads/2023/01/1_9_23-TINA-Fake-Reviews-Comment.pdf);

<sup>10</sup> TINA.org's Virtual Influencers Database, <https://truthinadvertising.org/evidence/virtual-influencers-database>.

<sup>11</sup> TINA.org's Complaint Letter to the FTC Regarding Deceptive Marketing on Roblox (April 19, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/04/4\\_19\\_22-Complaint-to-FTC-re-Roblox.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf).

## II. This Rulemaking Is Needed To Deter And Eradicate Rampant Fake Reviews And Bogus Testimonials That Harm Consumers And Honest Businesses

The Proposed Rule addresses an urgent problem: fabricated and otherwise deceptive reviews and ratings of products and services. In every corner of the internet, fake reviews are being posted to business websites, social media platforms, third-party review sites and metaverse experiences. These reviews misrepresent to consumers that a product is better (or worse) than it actually is.

Reviews are an effective marketing tool<sup>12</sup> precisely because consumers rely heavily on reviews to make their purchasing decisions.<sup>13</sup> Indeed, consumers are 270 percent more likely to buy a product with five or more reviews than with no reviews at all, a number that increases with higher-priced products.<sup>14</sup> And while some savvy consumers might be able to detect when a review is fake, or consumer ratings are suspiciously high,<sup>15</sup> most consumers trust online reviews.<sup>16</sup>

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<sup>12</sup> Semila Fernandes et al., *Measuring the Impact of Online Reviews on Consumer Purchase Decisions – A Scale Development Study*, 68 J. RETAILING & CONSUMER SERVS. 1 (Sept. 2022), <https://www.sciencedirect.com/science/article/abs/pii/S096969892200159X> (70% of customers refer to online reviews before finalizing their purchase decisions); Tao Chen et al., *The Impact of Online Reviews on Consumers' Purchasing Decisions: Evidence From an Eye-Tracking Study*, FRONTIERS PSYCH. (June 8, 2022), <https://www.frontiersin.org/articles/10.3389/fpsyg.2022.865702/full> (nearly 60% of consumers browse online product reviews at least once a week and 82% of online consumers read product reviews before making shopping choices).

<sup>13</sup> Greg Sterling, *Report: 'Incentivized Reviews' Effective for Consumers and Brands*, Search Engine Land (Nov. 9, 2018), <https://searchengineland.com/report-incentivized-reviews-effective-for-consumers-and-brands-307919> (“88 percent of US online shoppers ‘believe ratings and reviews to be “extremely or very” important when purchasing a high-consideration product”).

<sup>14</sup> Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, 62 MGMT. SCI. 3393, 3409 (Dec. 2016), [https://dash.harvard.edu/bitstream/handle/1/22836596/luca.zervas\\_fake-it-till-you-make-it.pdf](https://dash.harvard.edu/bitstream/handle/1/22836596/luca.zervas_fake-it-till-you-make-it.pdf) (finding restaurants “have stronger incentives to submit fake reviews when they have relatively few reviews” or have negative reviews).

<sup>15</sup> FROM REVIEWS TO REVENUE, POWER REVIEWS & NORTHWESTERN U. (2015) <https://spiegel.medill.northwestern.edu/wp-content/uploads/sites/2/2021/04/Online-Reviews-Whitepaper.pdf> (“Purchase likelihood then peaks when the average star rating of a product is between 4.2 and 4.5 stars and starts to drop as the star rating approaches a perfect 5,” as consumers become skeptical if a product’s reviews are all positive).

<sup>16</sup> See BBB, *The Power of Reviews and How Consumers Rely on Them to Make Purchases*, MEDIUM (Apr. 20, 2019) <https://medium.com/@BBBNWP/the-power-of-reviews-and-how-consumers-rely-on-them-to-make-purchases-51fcbcebd376> (72% of consumers trust online reviews as much as personal recommendations); Jamie Pitman, *Local Consumer Review Survey 2022*, BRIGHTLOCAL (Jan. 26, 2022), <https://www.brightlocal.com/research/local-consumer-review-survey-2022> (“More consumers are reading online reviews than ever before. In 2021, 77% ‘always’ or ‘regularly’ read them when browsing for local businesses (up from 60% in 2020).”); Erica Turner & Lee Rainie, *Most Americans Rely on Their Own Research to Make Big Decisions, and that Often Means Online Searches*, PEW RSCH. CTR. (Mar. 5, 2020), <https://www.pewresearch.org/short-reads/2020/03/05/most-americans-rely-on-their-own-research-to-make-big-decisions-and-that-often-means-online-searches/> (noting that “[a]n overwhelming majority

Reasonable consumers have the right to assume that reviews and ratings come from other genuine consumers — not bots, imitators, generative AI or the businesses themselves. Further, businesses who follow the law and only post legitimate reviews cannot compete with those who are using false reviews and impermissibly inflating their ratings.<sup>17</sup>

TINA.org’s investigations have uncovered myriad businesses using deceptive reviews and/or testimonials in their marketing — including the kinds of fakery identified in the Proposed Rule. For example, TINA.org examined an investment research company whose reviews reported outrageous earnings claims and posted multiple identical reviews across its website under different reviewer names.<sup>18</sup> TINA.org also investigated numerous related companies using deceptive testimonials to trick elderly consumers into believing that their specious products could treat a number of diseases, including cancer, heart disease and high cholesterol.<sup>19</sup> Another company claimed its supplement could aid children with speech delays, and attributed reviews with impossible results to generic stock photo families.<sup>20</sup> A 2019 investigation into a multilevel-marketing company revealed that 80 percent of the company’s 100 five-star customer reviews on the Better Business Bureau (BBB) came during a one-week period.<sup>21</sup> While many of the reviews admitted that the endorsers worked as distributors for the MLM, others did not.<sup>22</sup> These practices deceive consumers and rob them of their time and money, and unfortunately, the fake review market continues to grow in scope and sophistication.

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(93% of Americans report reading customer reviews and rating at least sometimes when buying a product or service for the first time”); *New Data: 97% of Consumers Depend on Reviews for Purchase Decisions*, POWERREVIEWS (Mar. 19, 2018), <https://www.powerreviews.com/events/consumers-depend-on-reviews/> (noting 97% of consumers consult product reviews before making a purchase).

<sup>17</sup> Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud*, 62 MGMT. SCI. 3393, 3409 (Dec. 2016), [https://dash.harvard.edu/bitstream/handle/1/22836596/luca.zervas\\_fake-it-till-you-make-it.pdf](https://dash.harvard.edu/bitstream/handle/1/22836596/luca.zervas_fake-it-till-you-make-it.pdf) (restaurants were more likely to commit review fraud when they had few or bad reviews); *No Online Customer Reviews Means BIG Problems in 2017*, FAN & FUEL (Dec. 2016), <https://fanandfuel.com/no-online-customer-reviews-means-big-problems-2017/> (“92% of consumers hesitate to make a purchase if there are no customer reviews”).

<sup>18</sup> TINA.org’s Letter to Stansberry & Associates Investment Research, LLC regarding Deceptive Advertising (March 11, 2014), [https://truthinadvertising.org/wp-content/uploads/2016/02/3.11.14-ltr-to-Stansberry\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/02/3.11.14-ltr-to-Stansberry_Redacted.pdf).

<sup>19</sup> TINA.org’s Complaint Letter to the FTC regarding Violations of Stipulated Order in *FTC v. Agora Financial, LLC, et al.*, Case No. 19-cv-03100, D. Md. (June 16, 2021), [https://truthinadvertising.org/wp-content/uploads/2021/06/6\\_16\\_21-ltr-to-FTC-re-Agora-Order-Violations\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2021/06/6_16_21-ltr-to-FTC-re-Agora-Order-Violations_Redacted.pdf).

<sup>20</sup> TINA.org’s Complaint Letter to the FTC regarding Deceptive Advertising of SpeechNutrients speak (March 27, 2013), <https://truthinadvertising.org/wp-content/uploads/2016/02/3.27.13-letter-to-FTC-signed.pdf>.

<sup>21</sup> *Five Reasons the BBB Shouldn’t Be Your Only Stop*, TINA.ORG (Feb. 25, 2020), <https://truthinadvertising.org/articles/five-reasons-the-bbb-shouldnt-be-your-only-stop/>.

<sup>22</sup> *Id.* Notably, the BBB does not factor customer reviews into its grading system, and in fact can have very high ratings for companies even after FTC actions. (*Grading the BBB: Ratings after FTC Actions*, TINA.ORG (Feb. 6, 2017) <https://truthinadvertising.org/articles/grading-bbb-ratings-ftc-actions/>).



In this arena, there is a serious informational imbalance: consumers and honest businesses lack the necessary information and ability to adequately sort fake and misleading reviews from legitimate ones, while businesses engaged in publishing deceptive reviews and ratings will never voluntarily disclose the truth. The Proposed Rule can help address this informational asymmetry by making this deceptive marketing tactic more costly as companies are more likely to comply with the law when the costs of doing so are less than the benefits of noncompliance.

### **III. The Proposed Rule Should Be Clarified And Strengthened To Broaden Its Effectiveness In The Fight Against Fake Reviews**

The Proposed Rule should be clarified and enhanced to increase its efficacy. First, the definition of “businesses” who are liable for violating the Rule should be expanded. Second, the definition of “consumer reviews” should not be limited to reviews posted specifically on dedicated review platforms. Third, the Rule should make clear that it is a deceptive practice to aggregate fake reviews in a product’s consumer rating and that reviews requiring a disclosure should not be included in a product’s rating without a disclosure. Fourth, businesses should be prohibited from expressly or impliedly requesting positive reviews in exchange for compensation. And lastly, the term “flavor” should be excluded from the exceptions to the “color, size, or count” list of “substantially similar products.” Each recommendation is discussed in turn.

#### **A. The Definition Of “Businesses” Who Are Liable For Rule Violations Should Be Expanded**

The Proposed Rule’s definition of a “business” liable for deceptively marketing fake reviews is unduly narrow. The Proposed Rule limits the definition of “business” to “an individual, partnership, corporation, or any other commercial entity that sells products or services.”<sup>23</sup> This definition should be more inclusive and should more closely mirror the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”). The Endorsement Guides have a more expansive view of who may be liable for deception, including “advertisers,” “endorsers,” and “[a]dvertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries.”<sup>24</sup> A more inclusive definition of “business” will ensure that anyone who is culpable for creating and disseminating fake reviews or ratings on behalf of a business (or to harm a business) may be held liable under

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<sup>23</sup> Proposed Rule § 465.1(a). Additionally, the Proposed Rule establishes that it is a deceptive act for a business to purchase or post misleading consumer reviews “about the business or one of its products or services.” (Proposed Rule § 465.2.) This language also seems to narrow the liability to the business itself, instead of including other potential creators or disseminators of deceptive reviews and testimonials.

<sup>24</sup> Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1 (2023) <https://www.ecfr.gov/current/title-16/section-255.1>.

the Proposed Rule.<sup>25</sup> Additionally, a broader definition of “business” will ensure that all responsible parties in the deceptive review business are properly deterred and provide the FTC with broader discretion to hold all responsible parties accountable — whatever the source.

### **B. The Definition Of “Consumer Review” Should Not Be Limited To Reviews Posted On “Dedicated” Review Platforms**

The Proposed Rule’s definition of “consumer review” is both ambiguous and restrictive. The current definition states that only consumer reviews “published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations”<sup>26</sup> are covered by the Proposed Rule.

This definition raises more questions than answers. What is a dedicated review platform? Does the Proposed Rule only apply to reviews on a website “dedicated” to posting reviews, such as Yelp? Or does it include *any* website where reviews are possibly posted, like Reddit? How much of the website must be dedicated to reviews? Would a website be excluded if only a very small portion of the website contained consumer evaluations? And what about the possibility of reviews in virtual reality experiences that solicit them in closed platform metaverses, like Roblox — would that be included in this definition?

To eliminate such uncertainty, the words “dedicated in whole or in part to receiving and displaying such evaluations” should be removed from the proposed definition so that the proposed definition reads:

*Consumer review* means a consumer’s evaluation, or a purported consumer’s evaluation, of a product, service, or business that is submitted by the consumer or purported consumer and that is published to a website or platform. ...

Regardless of the exact language the FTC decides to use, the definition should not grant amnesty to any site or platform that posts fake reviews and ratings intended to deceive consumers. All fake reviews and ratings that are used to market a product or service should be captured in the Proposed Rule — no matter where they are posted. A clearer definition of “consumer review” in the Proposed Rule will help achieve this goal.

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<sup>25</sup> This Proposed Rule need not include reviewers with no connection to the business at all who merely write reviews for fun or humor purposes, and have no connection or stake in the business, product, or service. *See, e.g.,* Drew Magary, *The 2022 Hater’s Guide To The Williams-Sonoma Catalog*, THE DEFECTOR (Dec. 21, 2022), <https://defector.com/the-2022-haters-guide-to-the-williams-sonoma-catalog>.

<sup>26</sup> Proposed Rule § 465.1(d).

### C. The Rule Should More Explicitly Address Issues Related To Consumer Ratings



Because consumer ratings or symbolic ratings (such as stars, likes, dislikes and hearts)<sup>27</sup> are so commonly relied upon by consumers in making purchasing decisions,<sup>28</sup> the Proposed Rule should explicitly indicate that fake or non-disclosed insider ratings are an independent and separate violation from deceptive narrative reviews. Moreover, like narrative reviews, symbolic ratings — both independently and when aggregated — should feature a clear and conspicuous disclosure of necessary material connections.

#### 1. Fake Consumer Ratings Should Constitute an Independent Rule Violation

A fake consumer rating should be considered a separate and independent rule violation from a fake narrative review. The proposed definition of “consumer review” currently subsumes ratings within fake narrative reviews stating that, “[f]or the purposes of this Rule, consumer reviews include consumer ratings regardless of whether they include any text or narrative.”<sup>29</sup> However, a business that posts a fake consumer rating should be liable for a separate violation of the Proposed Rule independent from any violation resulting from a fake narrative.

In many instances, consumers rely exclusively on rating systems to narrow the selection of goods and services that they will consider purchasing, and only after they have restricted their possible choices through aggregate ratings will consumers then explore narrative or text reviews. As such, ratings carry an outsized and significant role in a consumer’s decision of which products and services to purchase. The ability to deter companies from engaging in this multifaceted review fraud will only occur when costly penalties, or the possibility thereof, are exacted on the businesses engaged in these deceptive acts. Thus, the FTC should not be frugal when it comes to determining which acts of deception warrant a possible violation of the Proposed Rule.

<sup>27</sup> The FTC should consider ratings broadly to include likes, hearts, or other non-verbal, symbolic ratings.

<sup>28</sup> See Dave Fedewa, *Use Star Ratings to Inform Durable Goods Redesign and Spur Growth*, MCKINSEY & CO. (Apr. 4, 2022), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/use-star-ratings-to-inform-durable-goods-redesigns-and-spur-growth> (“Consumer reviews, often in the form of star ratings on a one-to-five scale, are an increasingly important driver of consumer goods unit sales and revenue growth.”).

<sup>29</sup> Proposed Rule § 465.1(d).



## **2. Nonobjective Consumer Ratings Should Feature The Same Disclosures Required for Reviews**

Aggregated and individual consumer ratings should contain disclosures if such ratings correspond to reviews that require such disclosures under the Proposed Rule. Otherwise, the ratings may mislead consumers. The Proposed Rule identifies some nonobjective reviews or testimonials that may be posted as long as a disclosure is included, but the need for a corresponding disclosure with regard to nonobjective consumer ratings made in conjunction with these types of narrative reviews is not mentioned. Specifically, Proposed Rule § 465.5 addresses insider consumer reviews and testimonials, which must be accompanied by “a clear and conspicuous disclosure” of the material connection to the business but does not address ratings. Clear and conspicuous disclosures of material connection are necessary when a “significant minority of reasonable consumers”<sup>30</sup> would not otherwise know of the connection — that same requirement should hold true for ratings.

The Agency’s Endorsement Guides are instructive on this point. Specifically, the Endorsement Guides provide an example regarding incentivized reviews in consumer ratings, stating:

Even if adequate disclosures appear in each incentivized review, the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating. If such a material increase occurs, the marketer likely would need to provide a clear and conspicuous disclosure to people who see the average star rating.<sup>31</sup>

In the Proposed Rule, a disclosure in individual and aggregate consumer ratings should be required any time a disclosure would be needed for a narrative review.

### **D. Businesses Should Not Imply That Reviews Must Express A Particular Sentiment When Soliciting Reviews In Exchange For Money Or Free Gifts**

The Rule should prohibit businesses from creating conditions that expressly state or imply that a consumer must write a review expressing a particular sentiment in exchange for compensation or other incentives. While Proposed Rule § 465.4 is clear that directly requiring consumers to write a positive or negative review in exchange for compensation is prohibited, the Rule could more clearly state that a business should not *imply* such a direction to consumers either.

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<sup>30</sup> FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>31</sup> 16 C.F.R. § 255.5(b)(6)(ii), <https://www.federalregister.gov/d/2023-14795/p-366>.

Implied conditions may be just as salient as express conditions. In interacting with businesses, “[t]he ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.”<sup>32</sup> Just as the Commission evaluates the “mosaic” of deceptive advertisements,<sup>33</sup> prohibiting the implied conditions of an exchange of a positive or negative review for compensation will give the Commission more discretion in evaluating rule violations on a case-by-case basis.

Moreover, providing consumers with an incentive to review or rate a good or service inherently impacts the likelihood that the review and/or rating will be positive.<sup>34</sup> A study of incentivized reviewers who were explicitly directed to “provide accurate, honest descriptions” still were influenced by the incentives:

Because there was no reason for incentivized customers to have had a different experience with the products than their non-incentivized counterparts, one might expect that the incentives would not influence the content of reviews — but our experiments demonstrated otherwise. Simply knowing you’ll receive a reward for writing a review makes the process more enjoyable, which makes you more likely to write a positive review.<sup>35</sup>

Knowing that incentivized reviews tend to be more positive, implied messaging by businesses may be just as effective at garnering positive reviews as express instructions. As such, the Proposed Rule should make clear that express *and* implied messaging that improperly requires positive (or negative) reviews or ratings are impermissible.

#### **E. The Rule Should Eliminate “Flavor” From The Exceptions In The Definition Of “Substantially Different Product”**

The Rule should not automatically allow companies to repurpose reviews or ratings for different product flavors as a product’s “flavor” can drastically change a consumer’s experience. Thus, repurposing reviews or ratings for one “flavor” to another may deceive consumers.

While the text of the NPRM concedes that for some consumers, flavor may be a significant difference for otherwise similar products,<sup>36</sup> the Proposed Rule excludes flavor from the list of “material attributes.” So although Proposed Rule § 465.3 would prohibit businesses from

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<sup>32</sup> *Aronberg v. Fed. Trade Comm’n*, 132 F.2d 165, 167 (7th Cir. 1942).

<sup>33</sup> *Fed. Trade Comm’n v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).

<sup>34</sup> See Kaitlin Woolley & Marissa A. Sharif, *What Happens When Companies Pay Customers to Write Reviews?*, HARVARD BUS. REV. (June 25, 2021), <https://hbr.org/2021/06/what-happens-when-companies-pay-customers-to-write-reviews>.

<sup>35</sup> *Id.*

<sup>36</sup> 88 Fed. Reg. 49379 (C).

repurposing or causing the repurposing of a consumer review created for one product so that it appears to have been created for a substantially different product, the Proposed Rule’s definition of “substantially different product” is “a product that differs from another product in one or more material attributes other than color, size, count, or flavor.”<sup>37</sup>

Because the flavor of a product may be a significant and material attribute, it should not be automatically excluded from consideration when analyzing whether goods are substantially different products or not. Rather, the more prudent course would be to consider flavor comparisons on a case-by-case basis. Omitting “flavor” from the exception to the definition of “substantially different product” does not mean flavor will always be substantially different; it just means it won’t automatically be considered substantially similar.<sup>38</sup>

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TINA.org strongly supports the Commission’s rulemaking to address fake reviews. The Proposed Rule will substantially improve the agency’s ability to combat and deter deception and unfairness in an area of marketing that consumers frequently use to make purchasing decisions. Some areas of the Proposed Rule need to be strengthened to maximize its potency, but overall the Rule will empower the FTC to more effectively protect consumers and honest businesses from fabricated reviews and ratings.



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<sup>37</sup> Proposed Rule § 465.1(j).

<sup>38</sup> For instance, Starbucks is currently refuting a lawsuit alleging that its Refreshers drinks do not contain some of the fruit ingredients in the drinks’ names by claiming that the drink names simply refer to different “flavors.” (*Kominis v. Starbucks Corp.*, 2023 U.S. Dist. LEXIS 164875, at \*12 (S.D.N.Y. Sep. 16, 2023) (“Starbucks argues that the Products’ names accurately describe the *flavors* as opposed to the *ingredients* of the Products.”).)