



September 29, 2023

Honorable April Tabor, Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave NW  
Suite CC-5610 (Annex F)  
Washington, DC 20580

**Re:   Reviews and Testimonials NPRM, R311003; Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.**

The Attorneys General of the District of Columbia and the States of Pennsylvania and Illinois, along with the Attorneys General of Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii<sup>1</sup>, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Vermont, and Wisconsin (collectively “State Attorneys General”) submit these comments in response to the Notice of Proposed Rulemaking (“Notice”) concerning the Federal Trade Commission’s (“FTC”) proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (“Rule”). The State Attorneys General, as the chief law enforcement officers in their respective states, commend the FTC for its comprehensive review of the use of deceptive reviews and testimonials in the online marketplace, and support the FTC’s stated objective in proposing this Rule, which is to “deter certain clearly unfair or deceptive acts or practices involving consumer reviews or testimonials, and expand the remedies available to it in instances where such practices are uncovered.”<sup>2</sup> The comments by the State Attorneys General, as set forth below, address the “Review Suppression” sections of the Rule—in particular, §§ 465.7(a) and (b), and § 465.1(l). We recommend several changes to these provisions, guided by our experience from our consumer protection cases, in an effort to strengthen them and further their laudable goals.

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<sup>1</sup> In addition to the Hawaii Attorney General, the Hawaii Office of Consumer Protection joins in this comment.

<sup>2</sup> Proposed Rule at 49377.

## I. Prohibition on Threats and Harassment

The Rule first seeks to tackle the issue of consumer review suppression by prohibiting certain types of threats and other forms of harassment to prevent the creation of a consumer review or cause the removal of all or part of a review. Under proposed § 465.7(a), it is an unfair or deceptive act or practice and a violation of this Rule: “(a) for anyone to use an unjustified legal threat or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or cause a consumer review or any portion thereof to be removed.” In accordance with proposed § 465.1(l), an “unjustified legal threat” is defined as “a threat to initiate or file a baseless legal action, such as an action for defamation that challenges truthful speech or matters of opinion.”

The State Attorneys General strongly endorse the FTC’s efforts to address this type of review suppression, whether it is carried out by legal, physical, or other types of threats. As reported in the Notice, the FTC received comments from several entities in response to an advance notice of proposed rulemaking published by the FTC on November 8, 2022. For example, Yelp, a major review platform, said in its comments that it “constantly confronts” the use of “abusive and questionable or unjustified legal threats” to suppress reviews.<sup>3</sup> Also, the Transparency Company, an entity dedicated to fighting fake reviews, said that every year thousands of lawyers are hired to intimidate the authors of negative reviews.<sup>4</sup> And, in a case against Roca Labs, Inc., the FTC successfully challenged as unfair the defendants’ threats to enforce—and their actual enforcement of—non-disparagement clauses in form contracts that were intended to suppress customers’ negative reviews.<sup>5</sup>

Such evidence led the FTC to conclude that this type of review suppression is prevalent, which was the impetus for this provision. Indeed, many consumers who post negative reviews are simply expressing their honest opinions and are often motivated by a genuine desire to warn others about their experiences. When merchants retaliate against consumers who post negative reviews, such as by hiring lawyers to threaten legal action against the consumers, these threats, even if not carried out, can have a chilling effect by bullying consumers into removing their reviews, even if they were fully justified in posting the reviews in the first place. Given how prevalent and nefarious this type of review suppression is, the State Attorneys General agree with the FTC that this provision is necessary.

However, the State Attorneys General respectfully recommend the FTC amend this provision by changing it to: “(a) for anyone to use an *unfounded, groundless, or unreasonable legal threat—including a threat to enforce an agreement that is void, voidable, or unenforceable*—or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or cause a consumer review or any portion thereof to be removed;” (emphasis added). The State Attorneys General believe that changing “unjustified” to “unfounded, groundless, or unreasonable” would provide greater clarity through a more objective legal standard for evaluating the types of legal threats that are not permitted under

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<sup>3</sup> *Id.* at 49376.

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

<sup>5</sup> *Id.*

this provision. In addition, we believe that the added language that refers to agreements that are void, voidable, or unenforceable strikes the right balance between prohibiting threats to enforce agreements that are unenforceable and allowing for bona fide legal threats, such as those to enforce agreements that are enforceable/non-voidable.

This recommended change is motivated by concerns about companies requiring consumers to enter into onerous non-disclosure agreements (“NDAs”) that limit consumer reviews, either as part of a transaction or in return for obtaining full or partial refunds for their purchases. Such agreements may be voidable under the Consumer Review Protection Act, 15 U.S.C. § 45b, which is enforceable both by the FTC and State Attorneys General, and which generally invalidates form contracts that impede consumer reviews. The use of NDAs to quash consumer reviews may also violate state consumer protection laws, as alleged in a recent case brought by the District of Columbia against SmileDirectClub, Inc.<sup>6</sup> The recommended change is intended to ensure that merchants are prohibited from using legal threats to enforce NDAs that violate applicable law. The use of the word “unjustified,” in the current version of the Rule, may be insufficient to address this concern because merchants would likely argue that their legal threats were *justified* by their NDAs. Indeed, SmileDirectClub made such an argument in its motion to dismiss the District of Columbia’s lawsuit, asserting that “no reasonable consumer would view a company exercising its legal or equitable rights in good faith in a court of law to constitute an unfair trade practice.” (MTD p. 29).

If the FTC agrees to our recommendation to amend proposed § 465.7(a) with our proposed language, then proposed § 465.1(l) would also need to be amended by replacing “unjustified” with “an unfounded, groundless, or unreasonable legal threat—including a threat to enforce a provision that is void, voidable, or unenforceable,” as the defined phrase.

## **II. Prohibition on Curated Website Reviews**

The Rule also addresses review suppression by prohibiting a merchant from representing on its website that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity. Under proposed § 465.7(b) it is an unfair or deceptive act or practice and a violation of this Rule: “(b) for a business to misrepresent, expressly or by implication, that the consumer reviews of one or more of its products or services displayed on its website or platform represent most or all of the reviews submitted to the website or platform when reviews are being suppressed (*i.e.*, not displayed) based upon their ratings or their negativity.”

The State Attorneys General strongly support the FTC’s efforts to ensure that merchants do not mislead consumers about the reviews posted on their websites. A merchant that only posts positive consumer reviews on its website, instead of both favorable and negative reviews, can potentially mislead consumers into believing that such reviews represent most or all of the reviews submitted to the merchant’s website. Merchants that post consumer reviews on their websites should be truthful and transparent about the scope of such reviews and what they represent.

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<sup>6</sup> *District of Columbia v. SmileDirectClub Inc. et al*, 2022-CAB-005671, D.C. Superior Court.

Although the State Attorneys General agree with most of the proposed Rule as drafted, we respectfully suggest that the FTC amend this provision by deleting the phrase “based upon their ratings or their negativity” at the end of the first sentence because it is unnecessarily limiting and superfluous. Under the rule as written, a company seeking to suppress negative reviews could potentially succeed by offering reasons that are proxies for negativity. For example, a merchant could potentially avoid violating the rule by claiming that it removed reviews not because they were negative, but rather because they violated provisions of its contracts or policies relating to the content of reviews. To avoid circumvention of the rule, we propose that the rule not limit the reasons for the suppression so as not to create a potential loophole for merchants to avoid accountability for seeking to artificially curate their reviews. Moreover, any legitimate suppression should already be sufficiently covered by the robust carve-outs set forth in §465.7(b)(1).

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For the foregoing reasons, the undersigned State Attorneys General strongly endorse the FTC’s effort to address the issue of review suppression, which is prevalent in the online marketplace. We respectfully urge the FTC to consider our suggested changes to the proposed Rule, which stem from our experience with online merchants using unfair and deceptive practices against consumers. We look forward to continuing our partnership with the FTC in our shared mission of protecting consumers and are hopeful that the final rule, once enacted, will enhance protections for consumers and ensure a more competitive and equitable marketplace.

**BY THE UNDERSIGNED:**



BRIAN L. SCHWALB  
District of Columbia Attorney General



KWAME RAOUL  
Illinois Attorney General



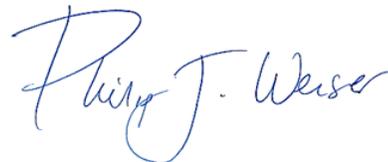
MICHELLE A. HENRY  
Pennsylvania Attorney General



TREG TAYLOR  
Alaska Attorney General



KRISTIN K. MAYES  
Arizona Attorney General



PHILIP J. WEISER  
Colorado Attorney General



WILLIAM TONG  
Connecticut Attorney General



KATHLEEN JENNINGS  
Delaware Attorney General



ASHLEY MOODY  
Florida Attorney General



ANNE E. LOPEZ  
Hawaii Attorney General



MANA MORIARTY  
Executive Director  
Hawaii Office of Consumer Protection



AARON M. FREY  
Maine Attorney General



ANTHONY G. BROWN  
Maryland Attorney General



KEITH ELLISON  
Minnesota Attorney General



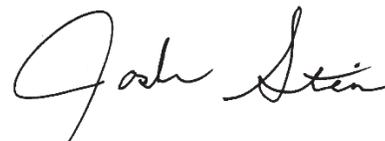
AARON D. FORD  
Nevada Attorney General



MATTHEW J. PLATKIN  
New Jersey Attorney General



LETITIA JAMES  
New York Attorney General



JOSH STEIN  
North Carolina Attorney General



GENTNER DRUMMOND  
Oklahoma Attorney General



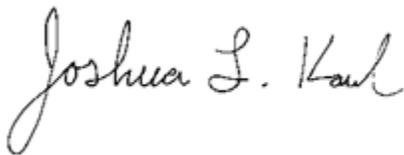
ELLEN F. ROSENBLUM  
Oregon Attorney General



PETER F. NERONHA  
Rhode Island Attorney General



CHARITY R. CLARK  
Vermont Attorney General



JOSHUA L. KAUL  
Wisconsin Attorney General