Consumer Reports

June 22, 2020

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

Re: Endorsement Guides, P204500

Consumer Reports[1] writes to respond to the Federal Trade Commission's ("FTC" or "Commission") request for comment[2] on its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides").

In order for markets to function, buyers need reliable information. While consumers are aware that much of the information available online may be biased or simply inaccurate, they still rely heavily upon online reviews and endorsements. Unfortunately, the FTC's approach to date to address prejudiced and fraudulent reviews has not been sufficient to meaningfully root out online misinformation, especially as new forms of advertising — like social media and influencer marketing — have outpaced the FTC's guidance.[3]

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[1] Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising, CR strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

[2] Federal Trade Commission, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 10104 (Feb. 21, 2020), https://www.federalregister.gov/documents/2020/02/21/2020-03447/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising.

[3] See, Sapna Maheshwari, *Endorsed on Instagram by a Kardashian, but Is It Love or Just an Ad?* N.Y. Times (Aug. 30, 2016), https://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html; Sapna Maheswari, *When Is a Star Not Always a Star? When It's an Online Review*, N.Y. Times (Nov. 28, 2019), https://www.nytimes.com/2019/11/28/business/online-reviews-fake.html.

The FTC needs to substantially expand the scope of the Endorsement Guides to clarify that companies cannot provide inducements to consumers or reviewers to engage in any type of social media engagement — including likes, follows, reposts, hashtags — unless that incentive can be disclosed to people who can view the engagement. In many cases, meaningful disclosure will be impossible, so the practice itself should be forbidden. The FTC should also clearly state that the promotion of content through fake automated or semi-automated social media accounts is prohibited.

The FTC should also commit to stronger enforcement of the Endorsement Guides and to providing updating guidance on a more timely basis. Finally, the Commission should seek out new ways to promote and socialize its endorsement guidance, as there does not appear to be consistent understanding of what types of promotions are allowed and which are not. The FTC will need to take a novel, multi-faceted approach to catch up to the current state of online marketing.

I. Consumers routinely rely upon online information to inform purchasing decisions

Consumers rely on online reviews to make purchasing decisions.[4] And marketers know this: as the defendant in a recent FTC enforcement action pointed out, favorable online ratings "directly translates to sales[.]"[5] According to Pew, 82% of adult consumers consult online reviews, and almost half of those consumers always or nearly always check them before making a new purchase.[6] Those numbers are even higher for consumers under fifty.[7] Consumers' reliance on online reviews is reflected in the fact that favorable restaurant reviews on Yelp correlate with 5-9% increases in revenue.[8] Online reviews are particularly important for more expensive merchandise, where consumers have more to lose if a product turns out to be a dud.[9]

Consumers are generally aware that information available online may be biased or outright wrong:[10] nevertheless, that does not mean they are satisfied with the amount of

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[4] *Local Consumer Review Survey 2019,* BrightLocal (Dec. 11, 2019), www.brightlocal.com/research/local-consumer-review-survey.

[5] In the Matter of Sunday Riley Modern Skincare, LLC, Fed. Trade Comm'n, File No. 192-3008 (Agreement Containing Consent Order) (Oct. 21, 2019), https://www.ftc.gov/system/files/documents/cases/192_3008_sunday_riley_acco_0.pdf at ¶ 10.

[6] Aaron Smith and Monica Anderson, *Online Reviews*, Pew Research Ctr. (Dec. 19, 2016), https://www.pewresearch.org/internet/2016/12/19/online-reviews/ [hereinafter Online Reviews].

[7] *Id.*

[8] Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harvard Business School Working Paper, No. 12-016 at 4 (Sept. 2011), https://www.hbs.edu/faculty/Publication%20Files/12-016_a7e4a5a2-03f9-490d-b093-8f951238dba2.pdf.

[9] *How Online Reviews Influence Sales*, Spiegel Research Center at 7 (June 2017), https://spiegel.medill.northwestern.edu/_pdf/Spiegel_Online%20Review_eBook_Jun2017_Pv2.pdf.

[10] Online Reviews, *supra* note 6.

misinformation online, or that they are curbing their overall reliance upon online reviews. In many cases, one subset of the population may mistrust a particular source of information, while another heavily relies upon it. For example, a 2019 Civic Science poll found that while 69% of Americans surveyed had no trust in influencers, 15% of consumers made a purchase because an influencer recommended a product.[11] The study also found that 66% of survey respondents believed social media influencers should disclose sponsored content "all of the time."[12]

Consumers rely on these online reviews in part because the marketplace is not adequately policed: only about 25% of consumers claim that government regulations help consumers feel confident about their purchases. In contrast, nearly twice as many consumers say that online reviews give them that confidence.[13]

II. Online misinformation is rampant

Consumers place a great deal of faith in online reviews and endorsements because they appear to be unbiased reports from fellow shoppers or social media personalities, but in many instances that faith is misplaced.[14] Biased and downright fraudulent reviews are rampant online. Popular sites are riddled with thousands of dubious reviews, polluting the information available to consumers to make an informed choice.[15] Companies can easily find people willing to post fraudulent reviews on freelancing sites like Fiverr.[16] Even if a site requires confirmation that a reviewer purchased a product, companies often find positive reviews sufficiently valuable to surreptitiously reimburse paid reviewers for the purchase price of their items.[17]

Many of these reviews are clearly deceptive and illegal under the existing Endorsement Guides (as well as the informal FAQ document "The FTC's Endorsement Guides: What People

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[11] Kaitin Augustine, *Nearly Half of Daily Instagram Users Have Made a Purchase Based on an Influencer*, Civic Science (Dec. 3, 2019), https://civicscience.com/nearly-half-of-daily-instagram-users-have-made-a-purchase-based-on-an-influencer/.

[12] *Id.*

[13] Online Reviews, *supra* note 6.

[14] Nicole Lyn Pesce, *This is Exactly How Many Reviews it Takes to Get Someone to Buy Something*, Marketwatch (Oct. 22, 2019), https://www.marketwatch.com/story/this-is-exactly-how-many-reviews-it-takes-to-get-someone-to-buy-something-2017-08-22-12883123.

[15] Joe Enoch, *Can You Trust Online Reviews? Here's How to Find the Fakes*, NBC News (Feb. 27, 2019), www.nbcnews.com/business/consumer/can-you-trust-online-reviews-here-s-how-find-fakes-n976756.

[16] Fiverr, "Results for 'reviews,'" www.fiverr.com/search/gigs?query=reviews&source=main_banner&search_in=everywhere&search-autocomplete-original-term=reviews (accessed June 20, 2020).

[17] Nicole Nguyen, *Her Amazon Purchases Are Real. The Reviews Are Fake*, Buzzfeed News (Nov. 20, 2019), www.buzzfeednews.com/article/nicolenguyen/her-amazon-purchases-are-real-the-reviews-are-fake.

Are Asking" (hereinafter "Endorsement FAQs")[18]). However, because of sporadic and weak enforcement, marketers may find the benefits from false endorsements (which are substantial) may outweigh the relatively low risk and consequences of getting caught. In some cases, companies may simply not know that the FTC has stated that certain advertising practices are illegal.

For whatever mix of reasons, fake reviews and undisclosed endorsements are a widespread problem, as is borne out by recent research. One recent study showed that, for at least some products, up to 30% of reviews are fake.[19] Research from earlier this year had even more dramatic findings — that nearly half of reviews for clothes and apparel are faked — and, on average across all product lines, 39% of the reviews are false.[20]Another study found that online reviews are, overall, untrustworthy through a variety of metrics, including convergence with Consumer Reports ratings and resale value.[21]

Heavy reliance on online consumer reviews leaves consumers vulnerable to fake reviews and inflated star ratings.[22] This vulnerability is compounded when reviews and star ratings are bolstered by a platform endorsement (like an "Amazon's Choice" label).[23] A recent study by the UK watchdog Which? shows that when these metrics are artificially bolstered, consumers were significantly more likely to purchase a product which the group recommended avoiding at all costs.[24] Exposure to a combination of the factors further increased their likelihood of buying the inferior product. As fake review schemes become more sophisticated, for example, by adding fake negative reviews to competitors' products, the harm from purchasing inferior products becomes more difficult to avoid.

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[18] *The FTC's Endorsement Guides: What People are Asking*, Fed. Trade Comm'n (last updated Sept. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking

[19] Karen Weise, *A Lie Detector Test for Online Reviewers* (Sept. 29, 2011), https://www.bloomberg.com/news/articles/2011-09-29/a-lie-detector-test-for-online-reviewers.

[20] Eric Griffith, *39 Percent of Online Reviews Are Totally Unreliable*, PCMag.com (Nov. 7, 2019), https://www.pcmag.com/news/371796/39-percent-of-online-reviews-are-totally-unreliable.

[21] Bart de Langhe, Philip M. Fernbach, Donald R. Lichtenstein, *Navigating by the Stars: Investigating the Actual and Perceived Validity of Online User Ratings*, Journal of Consumer Research, Volume 42, Issue 6 at 818-19 (April 2016) https://www.colorado.edu/business/sites/default/files/attached-files/jcr_2016_de_langhe_fernbach_lichtenstein_0.pdf; Jake Swearingen, *Hijacked Reviews on Amazon Can Trick Shoppers*, Consumer Reports (Aug. 26, 2019), https://www.consumerreports.org/customer-reviews-ratings/hijacked-reviews-on-amazon-can-trick-shoppers/.

[22] *The Real Impact of Fake Reviews: A Behavioral Experiment on How Fake Reviews Influence Consumer Choices*, Which? and The Behavioralist (May 2020), 8, https://consumerinsight.which.co.uk/articles/fake-reviews.

[23] *Id.*

[24] *Id.*

Celebrity influencers routinely ignore the Federal Trade Commission's guidance on how to disclose material conflicts of interest when posting about brands on social media.[25] A 2017 survey of the top 50 most-followed celebrities on Instagram found that only about 7% of sponsored content from those pages was in compliance with FTC endorsement guidelines—93% were out of compliance.[26] A separate study of 4,200 posts from 1,000 fashion micro-influencers found that only 14% of the posts were fully compliant with FTC guidelines.[27]

Even savvy consumers and experts can have trouble distinguishing between advertising and other content. Buzzfeed, for example, has run a regular feature entitled "Is This an Ad?" trying to decipher whether a particular piece of content is paid advertising or not.[28] And the law exists not just to protect the most sophisticated consumers — it also exists to protect those less informed and capable of distinguishing an honest review from a paid endorsement.

Moreover, while automated bot accounts and coordinated inauthentic amplification has gotten a tremendous amount of attention in the political misinformation space, the problem is probably more widespread in scope in commercial activites. As *Politico* has reported:

> While roughly 10 percent of the paid-for inauthentic activity bought by the NATO-affiliated group had ties to online political campaigns, the lion's share of online manipulation tools, including the creation and purchase of fake accounts, was tied to commercial purposes.[29]

Online platforms do not have sufficient incentives to police for fraudulent promotion. To the contrary, fake reviews, views, accounts, and other social engagement artificially amplify the metrics by which they are judged by users and investors.[30] Perhaps in part for this reason, social media sorting algorithms tend to prioritize posts that receive more engagement from users with higher followers — providing further incentives for marketers to use deceptive tactics to augment those numbers. This is not a new phenomenon limited to fake accounts on social media. Consumer Reports has been focused on platforms and the role they play in policing (or

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[25] *E.g.*, @aaronrodgers12 (Aaron Rodgers), Instagram post (January 18, 2020), https://www.instagram.com/p/B7eGR47J0KL/.
[26] *93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines*, MediaKix (accessed June 22, 2020), https://mediakix.com/blog/celebrity-social-media-endorsements-violate-ftc-instagram/#gs.rnHFN1w.
[27] *Influencer Marketing Benchmark Report 2020*, Influencer Marketing Hub (accessed June 22, 2020). https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/ (micro-influencers is a marketing industry term for influencers with 1,000 to 100,000 followers or subscribers).
[28] Buzzfeed, "Is This an Ad?," https://www.buzzfeed.com/tag/is_this_an_ad (accessed June 22, 2020).
[29] Mark Scott, Report: *Social Media Networks Fail to Root Out Fake Accounts*, Politico (Dec. 6, 2019), https://www.politico.com/news/2019/12/06/social-media-networks-fake-accounts-report-076939.
[30] Nicholas Confessore et al., *The Follower Factory,* N.Y. Times (Jan. 27, 2018), https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html.

sometimes encouraging) false information for years. In 2013, for example, CR analyzed six leading review platforms (such as Yelp and Angie's List) to assess whether their policies were likely to lead to accurate assessments; to the contrary, CR determined that many of the platforms had policies — such as allowing companies to pay to move well-reviewed products higher in search results — that skewed reviews toward being overly positive.[31]

Deceptive review tactics continue to evolve: last year, Consumer Reports reported on "review hijacking" on Amazon, where retailers take advantage of reviews for other products to make it look like customers have reviewed entirely different products.[32] Sometimes retailers may just switch a new product into a particular listing (while the previous reviews remain the same). In other cases, companies take advantage of an Amazon feature that allows retailers to link together all reviews for different listings. This can make sense if the listings are for essentially the same product, with only minor stylistic differences (say, different colors of the same shirt). However, in many cases retailers link together wholly different products. Worse, some sellers will co-opt others' reviews by linking to other companies' dormant listings without their knowledge. Consumer Reports found dozens of examples of these behaviors on Amazon: when we reported the fraudulent behavior to Amazon, the company generally remedied the problem.[33] However, in other cases that we did not affirmatively flag for the company, the deceptively-linked reviews continued to be presented to potential buyers.

Other deceptive tactics continue to evolve: Prominent influencers engage in "loop giveaways," where they offer a chance of a substantial prize to participants who follow a number of other accounts (those accounts in turn pay the influencer for the expanded reach).[34] Active social media users with large followings are quietly paid simply to post news articles, with the hope that the larger audience and increased ad views will offset the costs.[35] Some would-be influencers are even faking that they have brand deals in order to get the attention of other

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[31] *The Truth About Online Ratings Services*, Consumer Reports (Sept. 2013), www.consumerreports.org/cro/2013/09/online-ratings-services/index.htm.

[32] *Hijacked Reviews on Amazon Can Trick Shoppers*, Consumer Reports (Aug. 26, 2019), www.consumerreports.org/customer-reviews-ratings/hijacked-reviews-on-amazon-can-trick-shoppers.

[33] *Id.*

[34] Taylor Lorenz, *Everyone Is Giving Away Cash on Instagram*, N.Y. Times (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/style/instagram-cash-giveaways-coronavirus.html.

[35] Nicole Kobie, *Publishers Paying George Takei to Promote Stories Isn't Just Weird — It's an FTC Violation*, The Outline (Nov. 15, 2017), https://theoutline.com/post/2491/when-publishers-get-paid-for-promoting-narratives-george-takei-influencers?zd=1&zi=dj4cel4h.

potential brand partners.[36] Others are allegedly extorting companies for promotion deals, threatening negative commentary unless they pony up.[37]

Affiliate relationships — where a website gets a cut for referring or linking to a product that can be bought on another site (such as Amazon) — have flourished in the years since the FTC's Endorsement Guides were last updated.[38] However, despite guidance in the Endorsement FAQs that affiliate relationships should be disclosed clearly and conspicuously to consumers, that guidance appears to be routinely ignored by marketers. A recent study from Princeton University on affiliate links showed that few companies are compliant with the FTC's disclosure recommendations in the Endorsement FAQs and that consumers by and large do not understand the nature of affiliate relationships.[39] As one example, a Google search for "city birds power tower" (a top-selling piece of weight training equipment) yields numerous links to sites with affiliate relationships to Amazon; however, none of the first several links make clear and conspicuous disclosure of the fact, instead only disclosing the relationship at the bottom of the page, near links to the Privacy Policy (another routinely ignored disclosure).[40] This poor disclosure is in line with Amazon's own affiliate program terms, which require only that affiliate marketers state somewhere on their site that: "As an Amazon Associate I earn from qualifying purchases."[41]

The rapid evolution of online promotional tactics has unfortunately long outstripped the guidance in the Endorsement Guides last updated in 2009. Due to a lack of systemic and aggressive enforcement and ambiguity in legal guidance, consumers are regularly exposed to misinformation, rewarding bad actors and distorting the marketplace of information. As summarized by the *New York Times*, "Even as researchers are finding that reviews are less reliable, more people are relying on them."[42]

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[36] Taylor Lorenz, *Rising Instagram Stars Are Posting Fake Sponsored Content*, The Atlantic (Dec. 18, 2018), https://www.theatlantic.com/technology/archive/2018/12/influencers-are-faking-brand-deals/578401/.
[37] Simon Owens, *Is It Time to Regulate Social Media Influencers?*, N.Y. Intelligencer (Jan. 27, 2019), https://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html.
[38] Peter Kafka, *Amazon Wants to Pay the New York Times and Buzzfeed to Expand So It Can Reach More Shoppers Outside the US*, Vox (May 6, 2019), https://www.vox.com/recode/2019/5/6/18534510/amazon-pay-new-york-times-buzzfeed-expansion-affiliate-wirecutter-strategist; *The Future of Affiliate Marketing*, Streamline Marketing (Sept. 20, 2019), https://streamline-marketing.com/future-affiliate-marketing/.
[39] Arunesh Mathur, Arvin Narayanan, and Marshini Chetty, *Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest*, Proceedings of the ACM on Human-Computer Interaction (Nov. 2018), https://dl.acm.org/doi/10.1145/3274388.
[40] Google search, "city birds power tower," https://www.google.com/search?q=city+birds+power+tower (accessed June 20, 2020).
[41] *Associates Program Operating Agreement*, Amazon Associates (updated March 1, 2020), https://affiliate-program.amazon.com/help/operating/agreement.
[42] David Streitfeld, *Online Reviews? Researchers Give Them a Low Rating*, N.Y. Times (June 7, 2016), https://www.nytimes.com/2016/06/09/technology/online-reviews-researchers-give-them-a-low-rating.html.

III. Updating the Endorsement Guides

We are pleased that the FTC has initiated this long-overdue proceeding to update its Endorsement Guides. This represents an important opportunity for the Commission to more clearly state that all incentivized social media engagement is prohibited without clear disclosure (which in many cases will not be possible).

Given the Commission's constrained resources and capacity for enforcement, the revised Endorsement Guides should err strongly on the side of *clear, simple, bright-line rules* instead of vague, debatable standards that could afford bad faith actors too much wiggle room to justify deceptive behavior. At the margins, clear mandates could rule out defensible practices, but given the abuses we have seen and the inability of the FTC to iterate on its Guides in a routine fashion, more stringent guidance is clearly called for. Clear, bright-line rules will also decrease compliance costs and increase certainty for companies.

A second rule-of-thumb to keep in mind when updating the Endorsement Guides is that consumers are trained by experience to ignore legal disclosures and secondary information, so the Commission should stress that to be effective, disclosure must be clear and prominent in a place where it cannot be ignored. Where this type of disclosure is not possible and a material conflict of interest cannot be conveyed to the consumer, the endorsement should be prohibited.

Substantively, the FTC should more clearly state that any incentives for <u>any</u> social media engagement — including likes, favorites, follows, promoting, reposting, tagging, hashtagging, &c — must be clearly and prominently disclosed by an endorser; if the incentives cannot be meaningfully disclosed to individuals seeing the effect of the engagement, the practice must be prohibited as a deceptive and unfair business practice.

The existing Endorsement Guides contain good guidance — notably Examples 7-9 under *§ 255.5 Disclosure of material connections* describe scenarios where a promotion through social media must disclose a conflict of interest. And the FTC has brought some important cases to delineate the legitimate bounds of social media marketing — though not enough to sufficiently staunch the practice.

But the FTC's guidance must be extended more broadly to encompass other forms of social media promotion. For example, the Endorsement Guides should clearly state that incentives to "like" a brand or post are prohibited, as in the vast majority (if not all) cases, there is no meaningful way to indicate that the like was made for consideration. While this sort of promotion is not specifically addressed in the Endorsement Guides, the Endorsement FAQs do discuss it, though its guidance is disappointingly ambiguous. Rather than tell companies that the Commission will assess each instance individually based on a determination of whether consumers would find "likes" to be material, instead the FTC should instead presume materiality, as companies presumably are in incentivizing them, and flatly prohibit the practice. Hitting a like button is a very light lift for social media users, and in many cases it may be quite easy to provide a small consideration to get someone to do so. Even one deceptive "like" may be persuasive to an individual if they trust the person who made it; at scale, thousands of deceptive likes may broadly confuse users as to the popularity of a product or piece of content.

The FTC should also explicitly state that incentives simply to post or repost content is also prohibited, unless the posting clearly and prominently discloses that incentive. Reposting that does not allow for disclosures — such as "retweeting" — should be prohibited if there has been consideration.

The Endorsement Guides should also explicitly prohibit incentives to "friend" or follow a brand on social media. Artificially amplified social media networks give an artificial view of any brand or follower's popularity, and thus credibility. Moreover, social media algorithms may prioritize content from accounts with a greater number of followers (as with likes and other engagement), providing further incentive to illegitimately boost indicia of popularity.

The Guides should also be updated to clarify that the *simulation* of engagement, through fake accounts and profiles that like, follow, or otherwise promote commercial content are prohibited by law. The FTC brought an enforcement action against Devumi for selling fake engagement to marketers, but it has not to our awareness brought an action against a company for purchasing automated or semi-automated account engagement (though the clear implication of the *Devumi* case is that such behavior is illegal).[43] In any event, the Guides should be updated to clarify that selling or purchasing the use of coordinated inauthentic accounts to market products and services is forbidden.

While its guidance on "likes" is too weak, much of the language in the Endorsement FAQ, is better, and should be formalized into the Endorsements Guides. However, in general the language could be clearer about what is prohibited by the law: rather than state "it's not a good idea" to engage in certain behavior, the language should more clearly state that certain behavior is prohibited.

[43] *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges that Employees Posted Take Online Reviews at CEO's Direction*, Fed. Trade Comm'n (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators.

The FAQs' guidance on social media contests, for example, is reasonable, though it should be expanded to encompass other forms of promotion beyond the use of hashtags (such as friending, following, or liking). The example of including "contest" or "sweepstakes" could well be reasonable disclosure to viewers that the participants are motivated to promote the content by the potential to win a prize.[44] It should be clearly stated, however, that in many cases (such as mandating a participant like or follow a certain brand), that the material conflict of interest cannot be meaningfully disclosed, and so the practice should be broadly prohibited.

Similarly, the FAQs' guidance that mutual agreements to review or promote each others' products should be formalized, though again the final language should be more clear and proscriptive. It should also be more encompassing, to extend to other arrangements to like, follow, promote, or otherwise engage with each other's content.

The Endorsement FAQs also correctly state that affiliate relationships should be clearly and prominently disclosed to consumers, and the Endorsement Guides should be updated to require such transparency. If a publication has a financial motivation to refer consumers to a particular product or brand, a consumer should be told about that incentive so they can make an informed decision about the weight they should afford the referral.

The FTC should also update the Endorsement Guides to clearly state that companies have an obligation to monitor its network of endorsers for potential deceptive practices. The Endorsement FAQs state that the Commission would be unlikely to bring an action against a company if it has a reasonable monitoring program in place. This principle should be adapted into the Guides: The FTC should state that a marketer's failure to reasonably monitor social media influencers and promoters is an unfair business practice under Section 5 of the FTC Act — just as a failure to monitor third parties' data practices may give rise to a Section 5 claim.[45]

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[44] Sara Ines Calderon, *Featured Facebook Campaigns: HP, Stella Artois, Stoli Vodka, Lady Gaga, Monster Galaxy and More*, Adweek (July 18, 2011), https://www.adweek.com/digital/featured-facebook-campaigns-hp-stella-artois-stoli-vodka-lady-gaga-monster-galaxy-and-more/ (Stella Artois invited consumers to "like" their webpage, after which they became eligible for a contest to win free DVDs).

[45] Thomas B. Pahl, *Stick with Security: Make Sure Your Service Providers Implement Reasonable Security Measures*, Fed. Trade Comm'n (Sept. 15, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/09/stick-security-make-sure-your-service-providers-implement; *Mobile Phone Maker BLU Reaches Settlement with FTC over Deceptive Privacy and Data Security Claims*, Fed. Trade Comm'n (Apr. 30, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/mobile-phone-maker-blu-reaches-settlement-ftc-over-deceptive.

Both the Endorsement Guides as well as the Endorsement FAQs are largely silent on platform responsibilities. While Section 230 of the Communications Decency Act provides platforms some liability protections for what users do on their platforms, social media companies should be doing more to combat deception and fraud on their networks. The FTC has noted that some platforms' built-in tools for disclosing conflicts of interest are insufficient;[46] the FTC should state that offering tools that mask deception is itself a deceptive and unfair practice under the law, and it should bring enforcement actions against platforms for this behavior. The Endorsements Guides should also offer more clear guidance to platforms on what standardized disclosure would be compliant with the law.

Also, just as marketers have a duty to police how influencers are promoting their products, platforms should be legally obligated to take reasonable measures to root out fraud and deceptive marketing on its platform — especially when their own sorting algorithms actively incentivize bad behavior. Such an obligation would be consistent with companies' security obligations under Section 5 of the FTC Act to protect systems against abuse by any third party. Some platform responsibility reforms may well be beyond the scope of this effort, though the role that algorithms play in promoting fraudulent engagement is certainly something that should be explored at the Commission's forthcoming workshop on data portability and interoperability.[47]

IV. Going forward

Finally, while updating the Endorsement Guides is a necessary step toward cracking down on evolving deceptive marketing practices, it is hardly a sufficient one. The FTC also needs to commit to stronger enforcement, more regular updating of its guidance, and more effectively socializing its guidance.

The FTC has brought only a handful of cases enforcing the existing Endorsement Guides, despite an ecosystem riddled with misinformation.[48] And the cases it has brought have largely led to little more than slaps on the wrist, without even forcing bad actors to disgorge the

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[46] @FTC (Fed. Trade Comm'n), Twitter (Sept. 20, 2017), https://twitter.com/FTC/status/910599042442375168.
[47] *FTC Announces September 22 Workshop on Data Portability*, Fed Trade Comm'n (Mar. 31, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/ftc-announces-september-22-workshop-data-portability.
[48] *E.g. Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers,"* Fed. Trade Comm'n (March 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through; *FTC v. Reverb Communications*, Docket No. C-4310 (2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/11/101126reverbcmpt.pdf; *FTC v. Legacy Learning Systems*, Docket No. C-4323 (2011), https://www.ftc.gov/news-events/press-releases/2011/06/ftc-approves-final-order-settling-charges-firm-used-misleading.

ill-gotten gains of their fraudulent activity.[49] As we argued in our comment on the Commission's *Sunday Riley* settlement:

> The FTC obviously needs more authority, including first-time penalty authority to sufficiently disincentivize corporate misbehavior, and more staff to bring more cases.[50] The FTC also needs rulemaking to clarify the scope of deceptive marketing, and to empower the FTC to obtain civil penalties for violations.[51] However, in the meantime, the FTC must wield its limited authority more aggressively to demand more consequences of companies that violate the law. If, on the other hand, the FTC thinks that a more aggressive enforcement posture would also be insufficient to address the widespread problem of review fraud, it should admit its limitations and petition Congress for specific legislation to address the issue.[52]

The FTC should also commit to updating the Endorsement Guides more frequently; as noted previously, the Guides, last updated in 2009, have been repeatedly lapped by industry tactics, providing bad faith actors plausible deniability and leaving others without clear rules on how to behave. The Endorsement Guides are not APA regulations, they can be revised much more easily. More regular updates to account for the evolution of industry practices and more clear and precise guidance would be extremely helpful in reining in deceptive marketing schemes.

The FTC should also look to find creative ways to promote the Endorsement Guides and FAQs to marketers, who in many cases may be simply ignorant of the FTC's interpretation of its Section 5 authority. It is notable that many news articles that discuss evolving social media and influencer tactics do not cite the FTC's guidance or the possibility that the discussed behaviors may be, or likely are, illegal.[53] The FTC's "Start with Security" and "Stick with Security"

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[49] *Liu et al. v. Securities and Exchange Commission*, No. 18-1501 (June 22, 2020), https://www.supremecourt.gov/opinions/19pdf/18-1501_8n5a.pdf.

[50] See, Comments of Consumers Union, Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P1812201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0052-d-0018-154961.pdf.

[51] Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 Wm. & Mary L. Rev. at 1144 (2018), https://scholarship.law.wm.edu/wmlr/vol59/iss3/8.

[52] Comments of Consumer Reports, Sunday Riley Modern Skincare, LLC; File No. 192 3008 (Nov. 25, 2019), https://advocacy.consumerreports.org/wp-content/uploads/2019/11/CR-Comment-on-Sunday-Riley-Modern-Skincare-LLC_-File-No.-192-3008-1.pdf.

[53] *E.g.*, Myelle Lansat, *The 75 Celebrities and Influencers Who Make the Most Money Per Instagram Post, Ranked,* Business Insider (Sept. 27, 2018), https://www.businessinsider.com/celebrities-influencers-who-make-the-most-money-instagram-2018-9; Noah Kulwin, *What Is an Influencer? How Do They Make Money? I Asked One So You Don't Have To*, Vox (Mar. 14, 2016),

initiatives were designed to help socialize data security obligations to a broader community who may not know what is required; it would be useful to evaluate what was, and what not, effective in those efforts to inform a similar campaign around endorsement marketing.[54] The FTC should also consider more aggressive press outreach and outreach to companies to better publicize and promote the agency's guidance and enforcement record.

Thank you very much for instituting this proceeding and for considering our feedback how to update the Endorsement Guides. Please contact us if there is anything we can do to support your efforts.

Respectfully submitted,

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https://www.vox.com/2016/3/14/11586964/what-is-an-influencer-how-do-they-make-money-i-asked-one-so-you-dont; Rebecca Jennings, *Meet the Instagrammers Who Try On Clothes So You Don't Have To*, Vox (Oct. 24, 2019), https://www.vox.com/the-goods/2019/10/24/20909950/target-madewell-everlane-try-on-instagram; Shira Ovide, *You Are Being Influenced*, N.Y. Times (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/technology/digital-influencers-coronavirus.html.

[54] *Start with Security: A Guide for Business, Lessons Learned from FTC Cases*, Fed. Trade Comm'n (June 2015), https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf; Thomas B. Pahl, *Stick with Security: Insights into FTC Investigations*, Fed. Trade Comm'n (July 21, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/07/stick-security-insights-ftc-investigations.