



September 26, 2022

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

Re: *Endorsement Guides, P204500*

Consumer Reports¹ writes to comment on the Federal Trade Commission’s (“FTC” or “Commission”) proposed changes² (“Proposed Revised Guides”) on its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”).

Overall, we are very supportive of the proposed revisions to the Endorsement Guides. The Proposed Revised Guides provide needed clarity on a variety of emerging advertising practices, and reflect a thoughtful balance between flexibility on the one hand and stronger protections for consumers on the other. We are especially supportive of the more specific and realistic requirements for meaningful “clear and conspicuous disclosures” to consumers and for updates tailored to influencer marketing and related tactics on social media. These changes — and others — will provide more reliable guidance to companies and deliver better protections for consumers from misleading information. In general, we urge the Commission not to backtrack on the stronger language included in the proposed changes in response to complaints from industry.

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, 87 Fed. Reg. 44288 (Jul. 26, 2022) (hereinafter “Proposed Revised Text”), <https://www.federalregister.gov/documents/2022/07/26/2022-12327/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising>.

We do have two primary areas where we urge the FTC to issue significant further revisions to strengthen the Guides to reflect the modern advertising ecosystem: (1) platform responsibility and (2) social media engagement. Without additional guidance, we worry that bad faith marketers will be able to deceive consumers and evade accountability using behaviors that are already in common practice today. We also have a number of more targeted comments in response to specific revisions to individual sections of the Endorsement Guides.

I. Platform Responsibility

First, we urge the Commission to provide clearer guidance to platforms that they have legal obligations with regard to deceptive and fraudulent advertising on their services. A significant portion — if not a majority — of the behaviors governed by the Endorsement Guides today takes place on social media platforms. The FTC lacks the capacity to go after every influencer who elides their conflicts of interest in promoting a particular product; platforms arguably have the most practical capacity to prevent Endorsement Guide violations misleading consumers.

For seventeen years, the FTC has held that companies have data security obligations to protect consumers from malicious behavior by third-party actors.³ The Commission has derived this important principle from its Section 5 unfairness authority, which holds that companies are prohibited from engaging in behavior that (1) causes consumers significant injury that is (2) not reasonably avoidable by consumers and (3) is not offset by countervailing benefits to consumers or competition.⁴ In the data security context, the Commission has reasoned that failure to take reasonable remedial actions in response to external threats can cause consumers unavoidable injury that is not outweighed by lower costs or other benefits. Likewise, the FTC should similarly declare that media platforms have reasonable obligations to respond to fraud and deceptive activity by external actors to prevent the resulting harms to consumers using those platforms.

Specifically, we recommend:

- *Clarify that offering inadequate disclosure tools may constitute a deceptive or unfair practice by the platform itself.* Currently the proposed revised text to the

³ Press Release, *BJ's Wholesale Club Settles FTC Charges*, Fed. Trade Comm'n, (Jun. 16, 2005) <https://www.ftc.gov/news-events/news/press-releases/2005/06/bjs-wholesale-club-settles-ftc-charges>; Press Release, *DSW Inc. Settles FTC Charges*, Fed. Trade Comm'n, (Dec. 1, 2005), <https://www.ftc.gov/news-events/news/press-releases/2005/12/dsw-inc-settles-ftc-charges>; Staff Report, *Start with Security: A Guide for Business*, Fed. Trade Comm'n, (Jul. 2017), <https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf>.

⁴ 15 U.S.C. § 45(n).

Endorsement Guides is ambiguous as to who may be liable for using inadequate tools offered by a social media company that do not provide meaningful transparency to consumers. The one new example merely states that when an influencer takes advantage of a poor native disclosure tool offered by a platform, “The disclosure is easy to miss and thus not clear and conspicuous.”⁵ The statement of Chair Khan issued along with the Proposed Revised Guides states that the new text is intended to clarify that inadequate disclosure tools may “leave platforms themselves open to liability.”⁶ Similarly, the narrative introducing the Proposed Revised Guides states that “Platforms may also be exposing themselves to liability depending on the representations they make about these tools.”⁷ However, these statements will presumably not be appended to or easily accessible from the final Endorsement Guides when they are published and made available to marketers on the FTC site.

We propose clarifying in this example (or otherwise in the text of the revised Endorsement Guides) that designing inadequate disclosures tools may subject the platform itself to liability — though we disagree that that liability is necessarily contingent upon the representations made about the tools. Providing an inadequate transparency mechanism is a deliberate design choice by a platform that may in and of itself may lead to consumer deception and significant injury to consumers.⁸

- *Clarify that platforms that are commonly used for marketing must offer guidance and rules around endorsements.* The Proposed Revised Guides state that employers, advertisers, and intermediaries all have obligations to provide guidance and training to endorsers to ensure that endorsements are fairly and honestly presented to consumers. Platforms that are frequently used by marketers also should have clear obligations to educate and promulgate and enforce rules around deceptive marketing. Failure to take such rudimentary steps is likely to lead to greater consumer deception and significant injury. The Proposed Revised Guides include new text to elucidate the obligations of intermediaries such as

⁵ Proposed Revised Text at 44298, § 255.0(g)(9)(iii).

⁶ Statement of Chair Lina M. Khan Regarding the Endorsement Guides Review, Commission File No. P204500, https://www.ftc.gov/system/files/ftc_gov/pdf/P204500KhanEndorsementStatement.pdf.

⁷ Proposed Revised Text at 44290, III. Overview of Comments Received in Response to Regulatory Review Notice.

⁸ *Cf. Lemmon v. Snap, Inc.*, No. 20-55295 D.C. No. 2:19-cv-04504-MWF-KS, (9th Cir. May 4, 2021), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/04/20-55295.pdf> (holding Snap liable for designing a platform feature that induced users to engage in unsafe behavior).

“advertising agencies and public relations firms.”⁹ The Commission should include another language to discuss the obligations of media platforms.

- *Clarify that platforms have an obligation to take reasonable steps to remediate abuses on their services.* Platforms are often best positioned to take action to eliminate deceptive marketing behaviors. They are far more technically sophisticated and have access to far more data about endorsers than ordinary consumers browsing their service. The FTC should state that — as with data security — platforms have a reasonable responsibility to take actions to protect users of their service from abuse. Failure to take basic steps to address such abuse should be deemed an unfair business practice, as consumers are clearly harmed by inaccurate information, and they are not reasonably able to avoid it. If the costs of monitoring and remediation that would be passed onto consumers is less than the harm to consumers from the misinformation, then failure to address would meet the third prong of unfairness as well. We recommend adding text to the Proposed Revised Guides indicating as much, along with a representative example (such as where a platform can detect dozens of duplicate reviews are coming from one IP address, leading to an inflated aggregate score that would mislead consumers).
- *Clarify that other platform design choices that incentivize or exacerbate deceptive advertising may also lead to liability.* As with offering inadequate disclosure tools, other design choices by consumers that lead to consumer deception and harm may also lead to Section 5 liability. For example, making recommendations or surfacing content to consumers based on metrics that are known to be inflated distorts the market for information and incentivizes further bad behavior by bad actors. Similarly, designing review platforms where reviews for one product can easily be hijacked and switched to another product by a manufacturer could also potentially be an unfair business practice.¹⁰ The Endorsement Guides should include text indicating that platform design choices that lead to increased deceptive endorsements may be prohibited under Section 5 of the FTC Act.

⁹ Proposed Revised Text at 44298-99, § 255.1(f).

¹⁰ 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/>; Justin Brookman and Maureen Mahoney, Initial Comment of Consumer Reports on Proposed Changes to Guides Concerning the Use of Endorsements and Testimonials in Advertising, (Jun. 22, 2020), at 4-6, (hereinafter “Initial CR Comments”) <https://advocacy.consumerreports.org/wp-content/uploads/2020/06/CR-Comments-on-FTC-Endorsement-Guides-pdf>.

II. Social Media Engagement

We also urge the Commission to provide more specific guidance on a range of social media engagement beyond what is currently covered in the Proposed Revised Guides. Specifically, we request that the Commission clarify that fake endorsements (such as fake followers and likes) are strictly prohibited, and that material incentives for any social media engagement — including likes, follows, reposting, and hashtagging — must be clearly and prominently disclosed by an endorser. Failure to offer bright-line guidance on these common social media tactics will lead to greater impunity by deceptive marketers and endorsers and lead to distorted information in the marketplace.

- *Clarify that fake engagement is a violation of the Endorsement Guides.* The Proposed Revised Guides helpfully make passing note to the notion that purchasing social media followers can be a deceptive practice.¹¹ However, we disagree with the framing that such behavior is not an Endorsement Guides issue. The new text states:

The use by endorsers of fake indicators of social media influence, such as fake social media followers, is not itself an endorsement issue. The Commission notes, however, that it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use them to misrepresent such influence to potential clients, purchasers, investors, partners, or employees or to anyone else for a commercial purpose. It is also a deceptive practice to sell or distribute such indicators to such users.¹²

First, it is incorrect to state that purchasing followers is not an endorsement issue. The act of following an account on social media has the effect of acting as an implied endorsement of that account. People purchase fake followers *for the sole reason* that having a larger number of followers is an indication of popularity, worthiness, and endorsement. In effect, following an account is an endorsement of an endorser, who can then parlay that capital to expand their reach and impact as an influencer. As such, we urge the FTC to reverse its guidance that indicators of social media influence are not an endorsement issue.

Relatedly, we urge the FTC to remove language imposing unnecessary conditions for when purchasing fake followers could be considered a deceptive practice (and also a violation of the Endorsement Guides). The Proposed Revised Rules seem to say that

¹¹ Proposed Revised Text at 44298, § 255.0(g)(13).

¹² *Id.*

purchasing followers will only be deceptive when influencers “use them to misrepresent such influence.” This caveat introduces vagueness that weakens the FTC’s guidance. Instead, the FTC should recognize that purchasing (or creating) fake followers *inherently* is a misrepresentation of endorsement and influence, and should be prohibited per se. If there is some obscure edge case which the FTC deems as a legitimate use case for purchasing fake social media followers, that should be described and presented as an exception to the general rule.

- *Clarify that induced engagement without disclosure is a violation of the Endorsement Guides.* We also urge the Commission to expand its guidance to more explicitly cover material inducements to engage on social media — such as to “like” or “favorite” content. Liking or favoriting a social media post is quite literally an endorsement of that post. However, the Proposed Revised Guides disappointingly make no mention of incentives to like or otherwise engage with social media posts — despite the fact that marketers and influencers routinely engage in tactics to incentive engagement, resulting in distorted perceptions of popularity in the marketplace.¹³ Moreover, platforms regularly use indicia such as likes, clicks, and follower counts in deciding which content to algorithmically surface, leading to strong incentives to artificially inflate such metrics.

We reiterate our suggestion in our previous set of comment that the FTC should clearly state that any incentives for any 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.¹⁴ We also ask the FTC to provide new representative examples of induced engagement that are prohibited by the Endorsement Guides. The Commission could borrow existing examples from the Endorsement Guide FAQs, such as examples around mutual agreements to promote, and social media contests where it is not clear that content was “liked” because a consumer stood the chance to win a prize.¹⁵

- *Take a more expansive view of paid posting.* In several places, the Proposed Revised Guides state that the mere act of posting on social media can be an endorsement and that any material inducements or connections must be clearly and conspicuously disclosed to

¹³ Initial CR Comments at 3-7.

¹⁴ Initial CR Comments at 8.

¹⁵ 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>.

consumers.¹⁶ We support this guidance and the new examples, especially the example that demonstrates that a gamer merely streaming a new video game would be perceived as an endorsement of the product.¹⁷ However, we would encourage the Commission to add additional examples reflecting other less traditional endorsements and emerging social media tactics. For example, we would add an example clarifying that a celebrity merely posting a news story can be an endorsement of the news publisher, and if the celebrity was paid to promote the story, that connection must be clearly and conspicuously disclosed.¹⁸

- *Remove evasive language implying consumers might expect influencers to be paid for their endorsements.* The Proposed Revised Guides disappointingly weaken existing guidance about influencer disclosures, taking the position that social media viewers may expect that influencers are paid to flog certain products.¹⁹ Example 7 in § 255.5 has been weakened as well, conditioning a need for disclosure on a subjective assessment of the expectations of the audience. This cynical reformulation provides little clarity to businesses and affords bad faith actors wiggle room to justify deceptive behaviors. This guidance is also at odds with the guidance described in the previous section that consumers are likely to believe that personal posting on a social media account is likely to be authentic and not paid for — absent disclosures otherwise.²⁰ We recommend the Commission revise this language and revert to the previous bright-line rule that material connections and payment for promotion must be meaningfully disclosed.

III. Section-specific Recommendations

In addition to the two general recommendations for improvements to the Proposed Revised Guides, we also offer the following specific suggestions on individual sections of the new text:

¹⁶ *E.g.*, Proposed Revised Text at 44297, § 255.0(g)(5) (stating a paid social media post would be an endorsement); Proposed Revised Text at 44299, §255.1(h)(3) (stating that a dermatologist paid to promote a remedy on social media is required to disclose consideration); Proposed Revised Text at 44304, § 255.5(c) (stating that a tennis players must disclose material relationship with surgeon in blog post about the company); Proposed Revised Text at 44304, § 255.5(d) (stating that a doctor must disclose payments in social media post about anti-snoring remedy).

¹⁷ Proposed Revised Text at 44297, § 255.0(g)(8).

¹⁸ 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>.

¹⁹ Proposed Revised Text at 44303, § 255.5(g)

²⁰ Proposed Revised Text at 44304, § 255.5(d)

Section 255.0 — Purpose and Definitions

- We strongly support the revised guidance on the meaning of the term “clear and conspicuous” in § 255.0(f). We also suggest adding another example to the Endorsement Guides demonstrating that large blocks of text within a video advertisement that ordinary consumers do not possess the capacity to digest in real time (such as are commonly seen in commercials for pharmaceutical products) are not adequate “clear and conspicuous” disclosures for Endorsement Guide purposes.
- We support the change to Example 5 that paying a celebrity to post information to their personal social media account must be disclosed. We also recommend including an example of a celebrity paid by a media outlet merely to post a link to a news story and potentially other novel examples of when social media postings constitute endorsements.
- We support replacing Example 7 with the proposed addendum to Example 6 — the new guidance is considerably more clear. We support the changes to Example 8 (now example 7) as well as the new Examples 8-11.
- We appreciate the guidance in Example 12 that bad faith anti-endorsements of a competitor’s product can be a deceptive practice, however we suggest the Commission provide more concrete guidance on when exactly such a review would be deceptive. We would argue that *any* negative review of a direct competitor’s product presents a material conflict of interest, necessitating at the very least disclosure of said conflict to consumers reading the review.
- As discussed above, we recommend revising the text of § 255.0 and Example 13 to clarify that purchasing fake followers and other engagement is *per se* a deceptive practice and violation of the Endorsement Guides.

Section 255.1 — General Considerations

- We support the general guidance in § 255.1(d) that advertisers have obligations to instruct endorsers, monitor conduct, and remediate bad behaviors. We also support clarifying in § 255.1(f) that intermediaries also have obligations to prevent abuses by advertisers and endorsers as well. We recommend adding the

guidance around platform accountability discussed above in Part I to this comment as well.

- We support the inclusion of the principle contained in § 255.1(g) that the use of others' likenesses in an endorsement may be deceptive, though the current text is vague and its import was not immediately intuitive until reviewing the subsequent examples. Examples 6 and 7 are instructive, though there appears to be a math error in Example 6(ii). Additionally, though the issue does not relate directly to the Endorsement Guides, it may also be helpful to refer marketers to state right-of-publicity laws that prohibit the use of individuals' names or likenesses without their permission.

Section 255.2 — Consumer Endorsements

- We support the addition of the next text in § 255.2(d) to clarify that curation of reviews may be misleading to consumers. We recommend clarifying in the body of that paragraph that services that appear to allow for open reviews would be presumed by consumers to not be curated in ways that artificially inflate the perceived popularity of a product. On the other hand, if a service simply lists a handful of testimonials on its website, a consumer would reasonably expect that those reviews were chosen by the company because they were positive.
- We support the principle in § 255.2(c) and Example 4(v) that posting fake reviews to third-party sites is a deceptive practice. We would add that selectively posting *bona fide* positive testimonials received by a company to third-party review sites would also constitute a deceptive practice since the consumers themselves had not made the decision to post the review to the external sites and the company has the capacity to exercise discretion over which reviews to post.
- We support the principle in Example 10 that threatening “legal action or physical threats” for negative reviews would constitute an unfair business practice, but we would expand it beyond violence or litigation to other less drastic coercive measures as well.
- In general we support the other new guidance and examples in this section.

Section 255.3 — Expert Endorsements

- In general we support the new guidance and examples in this section.

Section 255.4 — Endorsements by Organizations

- In general we support the new guidance and examples in this section.

Section 255.5 — Disclosure of Material Connections

- As discussed above, we recommend removing the following sentence in § 255.5: “Material connections do not need to be disclosed when they are understood or expected by all but an insignificant portion of the audience for an endorsement.” This language weakens existing guidance, introduces unnecessary ambiguity, and allows bad-faith actors to take advantage of the lack of certainty in the law. We recommend removing the related language from Example 7 as well. Instead, material connections should always be disclosed to consumers.
- On the other hand, we support the various examples that clarify that people expect personal social media to be authentic, and have different expectations with regard to personal posts as opposed to appearances in a television commercial.²¹
- We support the three new examples added to § 255.5.
- Finally, we strongly urge the Commission to update the Proposed Revised Guides to be clear that material inducements to engage with social media — such as likes, favorites, follows, promoting, reposting, tagging, and hashtagging — must be clearly and prominently disclosed by an endorser, as we discuss in detail in Part II of this comment. 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.

Respectfully submitted,

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²¹ See *supra* n. 16.