



September 26, 2022

Federal Trade Commission
Ms. April Tabor
Office of the Secretary
400 7th St. SW, 5th Floor, Suite 5610
Washington, DC 20024

Re: Endorsement Guides; P204500

Dear Ms. Tabor,

On behalf of the Center for Data Innovation (datainnovation.org), I am pleased to submit this response to the Federal Trade Commission's (FTC) request for comments on proposed revisions to the "FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising."

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, D.C., and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as important data-related technology trends. The Center is a part of the nonprofit, nonpartisan Information Technology and Innovation Foundation.

SUMMARY

Deceptive endorsement advertising is common online, including on social media platforms and in consumer review websites. To protect consumers from deception in endorsements, the FTC should modernize the Guides Concerning the Use of Endorsements and Testimonials in Advertising ("the Guides"). The FTC originally published the Guides in 1980 and last amended it in 2009, before major social media platforms like Instagram and TikTok existed. Revisions should capture how endorsement advertising has changed with a focus on social media, consumer reviews, and advertising disclosures, while maintaining a focus on impactful revisions that promote innovation and protect consumers.

Specifically, the FTC should take the following steps:

1. **Clarify disclosure requirements on social media in Section 255.0(f):** The FTC requires endorsers make "clear and conspicuous" disclosure on social media platforms. However, the ideal methods for disclosure vary across platforms. The FTC should update the Guides to provide guidance on how to make such disclosures on all major social media platforms.



2. **Address ambiguous requirements for the disclosure of material connections in Section 255.5:** The FTC proposes “that an endorser’s material connection need not to be disclosed when it is understood or expected by all but an insignificant portion of the audience” in Section 255.5. This introduces ambiguities regarding who needs to disclose material connections and when. The FTC should define, in measurable terms, when an endorser does not need to disclose a material connection, and it should provide examples that illustrate this distinction.
3. **Expand enforcement action and liability for fake review brokers:** FTC should specifically name review brokers as an intermediary liable for their role in deceptive reviews in proposed Section 255.1(f).

Please find our extended response regarding the proposed revisions below.

Sincerely,

Becca Trate
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Center for Data Innovation
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Section 255.0(f) – "Clear and Conspicuous" Endorsements

The FTC proposes adding Section 255.0(f) to specify that disclosures of material connections must be "clear and conspicuous."¹ It would define a "clear and conspicuous" disclosure as a disclosure that "is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers," introduce specific guidance with respect to visual and audible disclosures, and stress the importance of "unavoidability" when an advertisement involves social media or the Internet.²

This change represents a positive step toward improving disclosure. However, the FTC should strive for improved clarity, relevance, and cohesion in advertising disclosure practices across social media platforms. **To achieve this, the FTC should clarify how best to make disclosures on different social media platforms to take advantage of social media platform innovations.**

Social media platforms regularly add new features to remain relevant to users, and social media advertising advances to meet and interest the audience.³ Innovations impacting advertising on social media include joint posting where two users can share a post together and are both listed as the posting user; platform-generated advertising banners and labels that users can superimpose onto content; and artificial intelligence (AI) that monitors content and can flag violations to a platform's terms of service.⁴ Establishing guidance for all major social media platforms would help advertisers understand how and when to use these features. In addition, this guidance can help emerging social media platforms understand and recognize their obligations for social media advertising while opening the door for continued innovation that improves advertising and disclosure.

Section 255.5 – Ambiguous Requirements for Disclosure of Material Connections

The proposed revisions in Section 255.5 retain the need for disclosure of material connections, or "a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement," and expands the list of material connections that may exist between an endorser and advertiser.⁵ However, a proposed revision also introduces open-ended ambiguity regarding who must disclose and when.

In response to a comment suggesting that sponsorships are expected from some social media influencers, the FTC proposes stating "that an endorser's material connection need not to be

¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288 (proposed July 26, 2022).

² *Ibid.*

³ Arielle Padres, "All Social Media Giants Are Becoming the Same," *Wired*, November 30, 2022, <https://www.wired.com/story/social-media-giants-look-the-same-tiktok-twitter-instagram/>.

⁴ Gemma Ryles, "TikTok now uses AI for user violations – here's what it means for you," *Trusted Reviews*, July 28, 2021, <https://www.trustedreviews.com/news/tiktok-now-uses-ai-for-user-violations-heres-what-it-means-for-you-4154531>.

⁵ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288 (proposed July 26, 2022)



disclosed when it is understood or expected by all but an insignificant portion of the audience.”⁶ But the proposed revision does not include benchmarks or examples for advertisers or endorsers to determine when an audience would expect sponsored content.

Retaining the need for disclosure and expanding the list of material connections will improve disclosure in the murky world of influencer advertising—a form of endorsement advertising that uses popular online social media celebrities, or influencers, to promote and market products to the influencer’s social media followers. But the open-ended exception for disclosure, without additional guidance, would allow endorsers and advertisers to pick and choose when they are exempt. **To prevent this, the FTC should define, in measurable terms, when an endorser does not need to disclose a material connection and provide examples illustrating this distinction.**

The FTC should work alongside experts and researchers in marketing, advertising, and consumer psychology to develop an evidence-based policy for when to not require these disclosures. For example, the FTC might determine joint posts that originate from both a user’s social media account and a company’s social media account do not require disclosure, since consumers could reasonably assume content originating from a company’s account is an advertisement. If the FTC cannot create reasonable examples that clarify when endorsers do not need to make disclosures, it should remove the ambiguous language.

Sections 255.1(f) and 255.2(d) – Liability for Deceptive and Fake Consumer Reviews

The FTC proposed revisions to the Guides that introduce new liability for individuals or organizations that produce, procure, or disseminate fraudulent consumer endorsements. Fake and misleading consumer reviews have a large impact on e-commerce and presence online. A team of researchers from the University of Baltimore and CHEQ determined that almost 90 percent of e-commerce revenue annually is impacted by reviews.⁷ Yet, around 4 percent of online reviews are fake.⁸ This means nearly \$152 billion in global e-commerce revenue is impacted by fake reviews annually.⁹

Fake reviews also hurt consumers directly. Researchers found that consumers who saw misleading reviews for low-quality products, containing inflated star averages and fake written text on products, were 13 percent more likely to choose these products than consumers who encountered informative reviews.¹⁰ Researchers also estimated that fake reviews cost consumers an additional 12 cents for every dollar spent.¹¹

⁶ Ibid.

⁷ Morgan Stevens and Daniel Castro, “How Policymakers Can Thwart the Rise of Fake Reviews,” (Center for Data Innovation, September 12, 2022), <https://datainnovation.org/2022/09/how-policymakers-can-thwart-the-rise-of-fake-reviews/>.

⁸ Roberto Cavazos, “The Economic Cost of Bad Actors on the Internet: Fake Online Reviews 2021”.

⁹ Ibid.

¹⁰ Jesper Akesson, et al., “The Impact of Fake Reviews on Demand and Welfare,” (working paper presented at NBER Summer Institute 2022, Cambridge, Massachusetts, July 11 – 29, 2022).

¹¹ Ibid.



Currently, Section 255.2(d) states that advertisers are subject to liability for false or unsubstantiated claims made or for failing to disclose material connections in consumer endorsements.¹² The FTC proposes adding two new sections that would extend liability to individual endorsers and to intermediaries. Newly proposed Section 255.1(e) would indicate that endorsers may be liable if the endorser knows or should know their statements are deceptive, or for failing to properly disclose material connections.¹³ Proposed Section 255.1(f) expands liability to intermediaries, such as advertising agencies and public relations firms, for deceptive endorsements.¹⁴

The FTC should commit to stopping the proliferation of fake reviews online by targeting review brokers. Review brokers are fraudsters who recruit individuals, typically on social media sites, to post misleading reviews in exchange for money or free products.¹⁵ **To do this, the FTC should specifically name review brokers as an intermediary liable for their role in deceptive review schemes and bring actions against bad actors.** Stronger enforcement against deceptive review brokers could deter bad actors.

¹² Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. 255.2 (2009), <https://www.federalregister.gov/d/E9-24646>.

¹³ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 Fed. Reg. 44288 (proposed July 26, 2022).

¹⁴ Ibid.

¹⁵ Amazon, "Amazon Targets Fake Review Fraudsters on Social Media," news release, July 19, 2022, <https://press.aboutamazon.com/news-releases/news-release-details/amazon-targets-fake-review-fraudsters-social-media>.