

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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NetChoice¹ Comments for the Record: FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides" or "Guides")

NetChoice submits these comments for the record for Federal Trade Commission's *Request for Comments on its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides" or "Guides")*.

About NetChoice. NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and free expression. We work to promote the integrity and availability of the global internet and are significantly engaged in privacy issues in the states, in Washington, and in international internet governance organizations.

Comments Overview. In our comments, we outline that the FTC Endorsement Guides should reflect common-sense notions that the influencers, not the platforms, are responsible for the contents of marketing messages and that the Guides should promote industry self-regulation.

We make the following recommendations:

- ▶ The Guides should make clear that liability lies with influencers, not platforms. While the FTC has historically focused its enforcement efforts on advertisers and brands, the Guides are not explicitly clear on this point.

¹ *The views of NetChoice do not necessarily represent the views of its members.*

- ▶ The Commission should eliminate the obligation to make disclosures when they are not necessary. This will help alleviate disclosure fatigue and enable consumers to focus on important disclosures.
- ▶ The Guides should also encourage platforms to develop internal-control mechanisms without assuming liability when some influencers sneak through. Of course, when platforms develop their own policies and fail to abide by them, then the FTC may investigate and take appropriate action. But absent such behavior, the Guides should not penalize companies for making good-faith efforts to prompt third parties into complying with the law. Instead, faithful adherence to these practices should be viewed as industry working in tandem with the FTC to protect consumers. Seen this way, internal-control mechanisms should be treated as a safe harbor that gives businesses the clarity and confidence they need to develop reasonable policies that address concerns without implementing ones that are overly burdensome and harmful to consumers and influencers alike.
- ▶ We encourage the Commission to clarify that Paid Endorsements are permissible in children’s content when they have been sufficiently disclosed in a manner easily recognizable to children. We also encourage the Commission to clarify that audio and in-video copy disclosures can be sufficient.

Introduction: The Endorsement Guides Should Reflect Common Sense

Social media and internet platforms have given consumers access to more products and services than ever before. They have also given influencers, which include many average Americans, opportunities to supplement their income. In some cases, these influencers are household names that have built up massive followings. In other cases, though, these influencers are the moms or dads next door who create videos or posts about everything from cooking to woodworking. To balance a consumer’s right to transparency with these influencers’ opportunity to share their skills and profit from those skills, the FTC must let common sense do the work.

What does that mean?

- ▶ **First**, it means that the Guides must be clear so that everyone—from large platforms to small-time influencers—understand what conduct is permissible and what is not.
- ▶ **Second** and relatedly, that means the Guides must delineate clearly who is responsible. The simplest and most-effective way to do that is to keep liability with those whose actions violate the law: influencers. Although there are times when platforms may be liable—for example, when they help create the content and intentionally encourage influencers not to disclose their affiliations—it is primarily the influencers who violate the law. Consumers will thus be served best when the influencers are held responsible for their own conduct.
- ▶ **Third**, it means the Guides must balance competing interests. If the Endorsement Guides are overly burdensome, they will leave no room for industry self-regulation. Nor will they incentivize industry to raise the bar or respond to new challenges in advertising. Inherent in this balancing is a consideration of practicality and human nature: If the FTC requires too many

disclosures about too many things, then consumers will become like those in California. In that state, companies are required to disclose when their products “may cause cancer.” Because the requirement is so broad, most products—including coffee—carry the warning. As a result, Californians have become desensitized and no longer weigh risks appropriately. So in an effort to help consumers, the state’s law has harmed them through information overload.

Consumers today generally understand that many social media influencers speak in a professional capacity and are compensated for their posts or receive products or services for free. Common sense therefore dictates that the guidelines require only those disclosures that most consumers need to make informed decisions.

Comments’ Scope. The points made below respond to the following questions asked by the FTC. Rather than respond to each question individually, the points instead make general arguments that consider the overlapping nature of the questions.

- ▶ (5) *What benefits, if any, have the Endorsement Guides provided to consumers? Do the Guides impose any significant costs on consumers?*
- ▶ (6) *What impact, if any, have the Guides had on the flow of truthful or deceptive information to consumers?*
- ▶ (7) *What changes, if any, should be made to the Endorsement Guides to increase their benefits to consumers? How would these changes affect consumer benefits or business costs?*
- ▶ (8) *What burdens or costs, including costs of compliance, have the Guides imposed on businesses? What burdens or costs have the Guides imposed on small businesses in particular? What burdens or costs have the Guides imposed on endorsers? What benefits have the Guides provided to businesses? What benefits have the Guides provided to endorsers?*
- ▶ (9) *What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on businesses or endorsers? How would these changes affect the benefits provided by the Guides to consumers, businesses, and endorsers?*

Any Liability Must Remain With Content Creators, Not the Platforms They Use

Overview. As an initial matter, the Guides must be consistent with traditional liability principles found throughout Anglo-American law. This includes the principle that those who violate the law or who harm others should be responsible for their actions. Applying this principle here would mean holding those who post content—including paid influencers—liable for failing to comply with the FTC’s

regulations. It also means that the FTC should **not** shift or expand liability from the content creators to the platforms that host their content.

Practical Considerations. This makes practical sense. If the goal is to discourage deceptive content, then the FTC must enforce its guidelines against those most directly responsible for violations—in other words, the least-cost avoiders. Doing otherwise will weaken any deterrence effect because violators will not feel the full consequences of their conduct. As the Guides recognize, shifting liability would also create a moral hazard: Content creators would have fewer incentives to learn what the Guides require, to comply with the Guides in the first place, and to comply with them moving forward.

Legal Considerations. Platforms also have limited knowledge of others' wrongdoing and there are good reasons why under both Section 5 of the FTC Act and Section 230 of the Communications Decency Act ("Section 230") they are not liable when influencers violate their duties under Section 5 in connection with a social media post.

- ▶ **First**, social media platforms typically can't tell whether a post contains an undisclosed endorsement. It's not always apparent from the face of a social media post whether there's an undisclosed connection between the poster and the brand.
- ▶ **Second**, under Section 230 of the Communications Decency Act, a platform, as a provider of an interactive computer service, cannot be treated as the speaker or publisher of information provided by an influencer who has posted content on the platform. So this means that a platform ordinarily cannot be responsible if a content creator posts content and doesn't disclose a relationship with the brand implicated.
- ▶ **Third**, to the extent that platforms voluntarily take steps to facilitate compliance with the Endorsement Guides, such as by offering built-in disclosure tools, those efforts should be commended, not penalized. Under Section 230's "Good Samaritan" provision, voluntary efforts by interactive computer services to restrict objectionable content—including content that violates the Commission's endorsement disclosure requirements—cannot be the basis of liability if taken in good faith.² This provision helps ensure that platforms are incentives to offer compliance tools and guidance to brands and content creators.

Historical Considerations. This is also consistent with the approach the Commission has taken in the Endorsement Guides and FAQs, and in its enforcement actions, which have focused on brands and influencers, rather than the platforms where content is posted.

Unintended Consequences. A review of likely unintended consequences also counsels keeping liability with content creators. We understand that the FTC is likely not targeting small influencers but targeting platforms will have downstream effects that sweep those influencers in with larger entities. Consider that if platforms are held liable—in full or in part—for others' content, then they will exercise

² See 47 U.S.C. 230(c).

undue, highly restrictive caution that burdens small content creators. To be sure, we support businesses making informed choices about the content they host. But we do not support transforming their business models into ones run by lawyers. To the contrary: We believe these platforms and content creators succeed precisely because the government has taken a light-touch regulatory approach. Shifting or expanding liability, however, would force platforms to have their legal teams vet every post.

At first glance, this may not sound horrible. Indeed, legal review of all posts would likely shield the public from potentially deceptive content. But that benefit would come at a steep price.

- ▶ **First**, it would advantage large, profitable content creators. These individuals will have the resources to comply on the front end with the regulations, which means the platforms would be able to review and post their content quickly. On the other hand, small-time content creators will see their content bogged down in legal review. With so much content to review, platforms will understandably privilege content that they believe has already passed legal muster by another team of lawyers; the same cannot be said about the local mom who blogs about home renovations while linking to affiliates like Home Depot.
- ▶ **Second**, the more burdensome the review, the less likely platforms are to host that content in the first place. We can assume, for example, that a platform inundated with thousands, if not millions, of pieces of content will prioritize content that most benefits the platform's bottom line. Faced with increased transaction costs, platforms may be forced to implement internal policies that make it too burdensome or costly for small-time content creators to even bother with posting their content. Consider "DIY Mommy Bloggers": Many of these moms work full-time or part-time jobs and raise kids. Although they should comply with the FTC's guidelines, they should not be forced to comply with the guidelines on the front-end, as well as with a platform's understandable-but-harmful internal policies that seek to insulate the platform from liability. The result? Less content and fewer opportunities for Americans to supplement their income.

Role of Brand Advertisers

Overview. Read literally, the existing Endorsement Guides can be read to say that advertisers are liable for an endorser's failure to disclose a material connection with the advertiser. This is true regardless of whether the advertiser had knowledge of the deception, or directly participated in the

deception, or had the authority to control the endorser's deceptive practice but allowed the deception to proceed.³

Legal Considerations. This reading lacks any support in law. Under Section 5 of the FTC Act, the FTC does not have authority to penalize companies for "aiding and abetting" others for engaging in deceptive or unfair acts or practices, and this authority cannot be implied.⁴

Historical Considerations. What's more, this reading doesn't reflect the FTC's actual practices. Agency-created guidance, including FAQs, espouse a nuanced approach that advises that advertisers must have "reasonable" programs in place designed to encourage endorsers to comply with their duties to disclose their relationship to the brand and to follow-up if they find questionable practices.

Recommendations. At a minimum, the Endorsement Guides should be modified to align the Guides with the FAQs. Although that change would benefit both industry and influencers, it would be even more useful if coupled with:

- ▶ Recognizing that having terms and policies that (1) inform influencers that brands expect them to comply with their disclosure obligations, (2) providing guidelines to influencers with whom they may engage, (3) making available resources for influencers to understand what is required of them, and (4) having in place monitoring programs are best practices that companies should conduct but that advertisers should not face strict liability for the conduct of an influencer.
- ▶ Announcing that the FTC may choose to investigate and enforce the Guides against advertisers who lack these internal policies and processes. This action would be used to compel the advertisers to follow the best practices discussed in the point above.
- ▶ Using a **reasonableness standard** for all enforcement actions. Even when the brand can be liable, we would recommend that the obligation remains limited to the implementing the reasonable compliance measures outlined in the FAQs. Reasonableness should take into account the nature of the content at issue and should be proportionate to that risk: If an influencer's content does not involve something high risk (like disease prevention claims or money-making programs), the steps the advertiser or brand take to promote Endorsement Guides compliance by the influencer should be proportionately lower. Strict liability for influencer behavior would be legally untenable for the reasons noted above and impractical as well. While a brand may commission a set number of social media posts, the influencer may on his or her own accord choose to create and upload more, and this may occur without the brand's knowledge. Or the influencer may post something with a proper disclosure but later

³ See Endorsement Guides, 16 CFR 255.1(d) ("Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.").

⁴ See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

on change the post and remove or alter the disclosure without the brand's knowledge. Or an influencer may discuss multiple brands in one piece of content, including their own brand(s). There is typically no practical way for a brand to have perfect knowledge or control over the influencers with whom they work. The people who are best able to control the influencers' conduct are the influencers themselves.

The Commission should use its review of the Endorsement Guides as an opportunity to clarify that companies that follow the guidance in the FAQs by establishing and implementing reasonable compliance measures will not be held liable for violations by content creators that occur despite such efforts.

Do Not Require Over-Disclosure

Overview. Consumers today generally understand that many social media influencers speak in a professional capacity and understand they earn income from that.

But because some posts remain unsponsored, as the influencer may be getting revenue solely from paid advertising, and because consumers cannot necessarily tell the difference between the two, we think there remains a valid purpose for retaining the general requirement for disclosure where the connection is not reasonably expected by consumers. What consumers reasonably expect is fact-specific but is the best means of encouraging reasonable compliance with the Guides.

Recommendations. At the same time, the FTC's guidance that those who review products should generally indicate if they received the product for free is outdated. Just as the FTC does not require a book or movie reviewer at the *New York Times* to disclose that she received a free copy of the book she reviewed or a free screening to a movie she reviewed in her review, neither should it require influencers with large followings to disclose that the products they mention were received for free. It is well known that public-relations firms regularly send such influencers free products. So, the FTC should expressly acknowledge that in some cases in social media, no less than traditional media, consumers reasonably expect that a product reviewer obtained the product on a complimentary basis.

By eliminating the obligation to make disclosures when they are not necessary, the Commission will help alleviate disclosure fatigue and help consumers to focus on disclosures when they are most important.⁵ In the context of mortgage disclosures, FTC staff have recognized the importance of

⁵ See, e.g., Natali Helberger, University of Amsterdam Institute for Information Law, *Forms Matter: Informing Consumers Effectively*, at 15, 17 (2013) (demonstrating that too much information can confuse or distract consumers and that bombarding consumers with accumulative information not further understanding of disclosures), available at http://www.beuc.eu/publications/x2013_089_upa_form_matters_september_2013.pdf; UK Better Regulation Executive and National Consumer Council, *Warning: Too Much Information Can Harm*, at 6-7 (2007), available at <http://www.eurofinas.org/uploads/documents/policies/NCB-BRE-Report.pdf>.

streamlined disclosures that exclude less important or confusing information.⁶ That same recognition should apply here.

The Guides Should Promote Industry Self-Regulation

Overview. The Endorsement Guides must be clear and specific about what behavior is allowed and what is prohibited. But that clarity must not be so comprehensive or so burdensome as to corner the market and squeeze out private self-regulation. Instead, the Guides should provide a general framework that guides the development of industry best practices.

Top-Down Regulation Will Not Work. Consider a lesson from Europe. As we have seen in a related field, and as European regulators have noted themselves, the General Data Protection Regulation 2018 (“GDPR”) is difficult to enforce and has driven private investment from the marketplace. By regulating privacy so comprehensively and by doing so from the top down, the GDPR has left industry and investors without clear notice of what behavior is permissible—a major defect when one considers that the law is meant to be comprehensive. It has also entrenched existing firms that are able to afford the law’s high compliance costs, as well as afford lawyers to defend them when regulators claim they run afoul of the law. Consumers, meanwhile, are left with fewer choices, and because investors have cut and run, consumers are left with products that may have been better had businesses received that capital. Perhaps most relevant here, the law has not achieved what it set out to do, which cautions against crowding out private industry from policing itself.

Promote Self-Regulation. Critics will claim that platforms cannot be trusted to regulate themselves, but that argument misses the mark.

- ▶ **First**, platforms have a vested interest in protecting their own users from being duped. When users lose faith in a platform, they will curtail their use of it. That in turn hurts the platform’s bottom line.
- ▶ **Second**, platforms have an incentive to call out competitors who do not play by the rules. Platforms will not want their deceptive competitors to benefit from their rule-breaking, nor will they want them to drag down consumer faith in platform safety more generally.

⁶ See FTC Staff, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, at 53 (June 2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/improving-consumer-mortgage-disclosures-empirical-assessment-current-and-prototype-disclosure-forms/p025505mortgagedisclosurereport.pdf>. See also Ellen Wauters, Veronica Donoso Navarrete, & Eva Lievens, “*Optimizing Transparency for Users in Social Networking Sites*,” *Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 16.6, at 15-19 (2014) (showing that consumer understanding of terms of use was aided by reducing information content to material terms).

- ▶ **Third**, potential publicity of consumer harm from a platform’s toleration of deceptive content is enough to jolt platforms into taking their, and their competitors’, obligations seriously.

This is not mere speculation; platforms are already at work developing best practices. The Better Business Bureau’s National Advertising Division recently announced a set of best practices for all companies to follow.⁷ These practices not only overlap with the FTC’s Endorsement Guides, but also go beyond them by lowering the bar for consumers to file a complaint that NAD will then investigate.

Private enforcement from industry is also useful in supplementing the FTC’s investigatory and enforcement powers. The agency is not able to investigate all complaints of non-compliance with the Endorsement Guides, let alone monitor industry behavior absent a complaint. By contrast, industry can use internal enforcement mechanisms like NAD’s to penalize conduct that is clearly prohibited by industry standards, as well as conduct that reflects poorly on the industry even if it is not directly spelled out in the best practices.

Private industry also has flexibility to meet new problems that the FTC lacks. At best, notice-and-comment rulemaking takes months; at worst, it can take years. So when a new form of deception arises, the government is constrained in responding. Private industry, on the other hand, is not.

Unintended Consequences. But if the Guides are too comprehensive, none of this will be possible. Indeed, there will be little room for private ordering and best practices if the FTC promulgates Guides that are burdensome and that, because of their scope, will inevitably conflict with any privately developed rules. Again, critics of industry self-regulation may welcome this. But history and common sense show that consumers are protected best when industry has an active hand in raising the bar for all market participants.

Relatedly, if the Guides are flawed or too strict, then the market will suffer during the time it takes the agency to repeal or revise them. This is particularly concerning given that so many Americans rely on platforms to advertise their products. Given that notice-and-comment rulemaking is slow by design, the harm will not be easily or quickly addressed.

All this, then, cautions against revising the Guides to be overly proscriptive or prescriptive. A general framework, like the existing Guides, is a middle ground that gives notice of what is required and gives industry enough leeway to raise the bar—and to move the bar when changing circumstances demand such change.

⁷ Hogan Lovells, *New Process to Move SWIFT-ly at NAD on Some Influencer Claims* (May 13, 2020), <https://www.lexology.com/library/detail.aspx?g=8d5d2ef9-dd77-4fa1-b515-54c94a878d13>.

With these general recommendations in mind, we turn next to specific questions posed by the FTC.

- ▶ **Question:** (10) Do the Guides overlap or conflict with federal, state, or local laws or regulations? Do the Guides overlap or conflict with any international laws or regulations?

Answer: Harmonization in this area, like others, is important, across jurisdictions, especially with respect to specific requirements. Prescriptive requirements (e.g., about particular disclosure language or contractual terms) risk conflicts across jurisdictions, which will increase complexity, burdens, and costs for both brands and influencers. Plus, as we mentioned above, the Guides must not conflict with Section 230 of the CDA.

- ▶ **Question:** (11) Have consumer perceptions regarding endorsements changed since the Guides were last revised and, if so, do these changes warrant revising the Guides?

Answer: Consumers have become far more aware of “influencers” (a word that may not have even existed in 2009) and understand that these influencers often receive free products to review, as well as maintain financial connections with brands.

- ▶ **Question:** (12) What modifications to the Guides, if any, should be made to address technological, economic, or environmental changes that have occurred since the Guides were last revised?

Answer: Platforms now provide tools to assist influencers in their efforts to disclose the existence of a paid endorsement. But these are by no means one-size-fits-all: when relevant and when there’s a material connection to a specific endorsement, influencers still need to provide additional bespoke disclosures.

- ▶ **Question:** (13) FTC staff periodically updates a business guidance document, “The FTC’s Endorsement Guides: What People Are Asking.” Is there guidance in the current version of that document that should be incorporated into the Guides? If so, what and why? Is there guidance in the current version of that document that should not be incorporated into the Guides? If so, what and why?

Answer: Guidance from FTC staff, especially in FAQs, has been a helpful resource. As a general matter, the guidance in the FAQs about what language to use in a disclosure and where it should be located should remain in the FAQs. This more practical and detailed guidance requires frequent updating as technology, consumer perceptions, and business and consumer practices change. The agency can update this guidance as frequently as necessary; whereas, as noted in Question 14, the Commission updates the Guides only once every 10 years or so. At the same time, if the Commission has determined that a particular method or form of disclosure works, or does not work, and this conclusion is unlikely to change over time

as technology, business and consumer practices, and consumer expectations evolve, it should make that clear in the Guides.

- ▶ **Question:** (14) How well are advertisers and endorsers disclosing unexpected material connections on social media platforms?

Answer: Disclosures have become far more prevalent and effective on social media. We commend the FTC for its “Disclosures 101” guidance released in fall of 2019 and encourage it to use social media campaigns of its own to reach influencers to educate them about their responsibilities.

While detailed, specific guidance from the FTC about what language suffices for a disclosure and where and how the disclosure should be placed is essential, this guidance should be included in the FAQs and similar materials that can be, and are, frequently updated, rather than in the Guides themselves. Any guidance should also take account of the fact that users consume content in different ways across different platforms and different media. The format and content of disclosures will therefore differ accordingly.

FTC noted its approval to use terms such as “#AcmePartner” or “Acme Ambassador,” but it's not clear if the term implies paid or unpaid promotion or whether the product was free. It's generally understood that an influencer promoting their own brand/product is obviously an ad, but disclosure practices are inconsistent.

- ▶ **Question:** (15) The FTC has received complaints that young children may not adequately understand disclosures of material connections. To what extent would knowledge of a material connection affect the weight or credibility that young children give to an endorsement?

Answer: The Commission should clarify that endorsements in child-directed content are not by themselves problematic. From that, the Commission should require reasonable disclosures that consider form, content, and audience.

- ▶ **Question:** (19) Some advertisers contend that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts. What evidence is there to support or contradict this assertion and does the answer differ depending on the nature of the material connection? In particular cases, what factors might be considered to determine whether a material connection is unexpected? Do consumer expectations vary by the age of the audience, the product category, the nature of the influencer, the format or substance of the endorsement, or otherwise, and if so, how?

Answer: Consumers increasingly understand that social media influencers get products for review and in many cases are paid by brands to post reviews or other content. While we are not aware of research or studies on the issue, it stands to reason that more frequent users of social media may be more likely to understand this, as a general matter.

Conclusion

We appreciate the opportunity to share our thoughts with the FTC, and to help develop Endorsement Guides that balance a consumer's right to transparency with the internet's opportunities. As always, we welcome the opportunity to further expand upon our comments and answer any other questions that may arise.

Respectfully submitted,

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NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org