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

Truth in Advertising, Inc. ("TINA.org") welcomes the opportunity to submit comments in conjunction with the Federal Trade Commission's ("Commission" or "FTC") February 21, 2020 request for comment on the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides" or the "Guides").[1] These comments offer several suggestions to enhance the Endorsement Guides, and recommend that the Commission more aggressively pursue endorsers who advertise deceptively online.

While the FTC's Endorsement Guides broadly cover the use of endorsements and testimonials in advertising generally, TINA.org has focused its comments on digital advertising.[2] This comment first explains how social media influencer marketing has changed since the Guides were last updated, and discusses the effectiveness of the Guides in today's online marketplace. The Comment then highlights four social media marketing trends that the Guides ought to address: virtual influencers, disappearing posts, endorsement advertising targeting children, and the use of fake accounts to artificially enhance an influencer's following. Next, the Comment offers several revisions to strengthen the effectiveness of the Endorsement Guides, namely, the incorporation into the Guides of the various other FTC guidance documents, an upfront requirement that advertisers substantiate the adequacy of their disclosures, an explicit extension of the Endorsement Guides to past social media posts, and greater clarity as to the meaning of "Generally Expected Performance in the Depicted Circumstances." The comment then discusses issues relating to consumer reviews, recommending that the Guides be more explicit as to the disclosure requirements relating to incentivized reviews, that review websites ought to disclose if they include incentivized reviews in composite ratings and that the Guides prohibit the practice of review gating. Finally, TINA.org recommends that FTC enforcement actions pursuant to the Endorsement Guides include endorsers and monetary judgments in order to maximize the Guides' deterrent effect.

I. THE RISE OF SOCIAL MEDIA INFLUENCER MARKETING

It has been over a decade since the Endorsement Guides were updated in 2009.[3] When the Commission last updated the Guides, social media was in a relatively nascent stage. Twitter was three years old. Facebook had just over 350 million users.[4] Yelp had less than 8 million reviews.[5] Neither Snapchat nor Instagram even existed.

Much has changed in the intervening 11 years. The market has been inundated with new social media platforms – now there's Snapchat, Instagram, TikTok and Periscope, to name a few. And virtually all social media platforms appear to be experiencing exponential growth.[6]

Not surprisingly, given consumers predilection for these social media platforms, advertising dollars have followed, with advertisers spending billions each year on social media marketing. One of the most effective forms of advertising on these platforms is (and has been) the use of influencers to endorse a company's goods or services. The influencer marketing industry is expected to grow to $15 billion by 2022.[7]

The reason endorsement marketing continues to grow online is simple: it's effective. More than half of young Americans aged 13 to 38 have made a purchase based on the view of someone in their social media feed.[8] Looking at Twitter, for example, there is a 2.7x increase in purchase intent when users are exposed to tweets from brands but there is a 5.2x increase when users are exposed to tweets from brands *and* influencers.[9]

Ultimately, the goal of social media influencer marketing is to engage consumers with ads that feel authentic, and thereby more trustworthy. The effectiveness of such endorsement marketing is due, at least in part, to the fact that influencers rival friends in building trust: 56 percent of Twitter users rely on recommendations from friends while almost an equal number, 49 percent, rely on recommendations from influencers.[10]

And while companies may have historically gravitated to social media influencers who have millions of followers, there has been a growing trend for companies to engage micro-influencers, that is, individuals with relatively small followings. Micro-influencers – usually defined as between 5,000 and 50,000 followers – are now used by 98 percent of companies, and nano-influencers – usually defined as less than 5,000 followers – are used by 69 percent of companies.[11] Endorsements from these lesser-known influencers tend to be inexpensive and allow companies to target specific consumer groups with pinpoint accuracy.

Unfortunately, even within this narrow band of endorsement marketing, there is no end to the number of posts that violate FTC law. Social media is littered with examples of influencers engaged in deceptive, unfair and/or misleading marketing. There are those that fail to clearly and conspicuously identify their posts as marketing material.[12] Others fail to disclose material information, make inappropriate product claims, promote atypical results and/or are not bona fide users of the product(s) they promote, among other things.

Given the limited resources of the FTC, it is understandable that there has not been a bevy of actions against influencers deceptively marketing clothing, makeup or private jets for that matter.[13] However, in recent years there has been an increase in the number of products being deceptively marketed by social media influencers that have the potential to cause real harm to consumers – and especially to minors, who are a prime and susceptible target for this type of digital advertising. Undisclosed ads for alcohol, vaping products and detox teas, get-rich-quick schemes involving crypto assets and multilevel marketing companies, and infomercials targeting toddlers blanket many social media platforms.[14] These types of deceptive, misleading and unfair endorsements do more than simply affect consumers' pocket books – they encourage consumers, many of whom are minors, to engage in risky, unhealthy and, at times, even dangerous behavior.

II. THE EFFECTIVENESS OF THE ENDORSEMENT GUIDES

To date, the Endorsement Guides have failed to effectively curb deceptive social media influencer marketing. Consumer groups, market research, and TINA.org's own experience find poor compliance with the Guides among brands, marketers and influencers alike.[15]

TINA.org regularly comes across influencer posts that fail to comply with the Endorsement Guides.[16] For instance, a March 2018 TINA.org investigation found that hip-hop producer and social media celebrity DJ Khaled had skirted age-gating filters, ignored self-regulatory rules regarding spirits advertising, and violated the alcohol marketing policies of Snapchat, Facebook, Instagram and Twitter by delivering more than 300 undisclosed alcohol endorsements to his followers, many of whom are minors.[17] In response, Diageo, which was one of the alcohol companies whose product (Ciroc) Khaled actively promoted, stated that it was "committed to complying with all laws and regulations, including the FTC's endorsement disclosure guidelines, as well as our rigorous marketing code and policies."[18] But Diageo was simply paying lip service to the Endorsement Guides. A subsequent TINA.org investigation revealed more than 1,700 undisclosed alcohol ads on Instagram posted by 50 social media influencers for Diageo's Ciroc vodka brand.[19] Further, TINA.org's findings showed that when it came to promoting Ciroc, anything was fair game for the company: kids in Ciroc ads, Ciroc-fueled misogynistic ads, a recipe for cannabis-infused strawberry lemonade with Ciroc, and even a booze-drinking Santa who needed to spread the "liquid love."

Images taken from TINA.org's database of Ciroc's deceptive influencer marketing practices.[20]

While more than 90 percent of these endorsements were taken down shortly after TINA.org sent a complaint to the FTC, the deceptive impact and societal harm resulting from these risky and irresponsible spirit ads cannot be overstated.

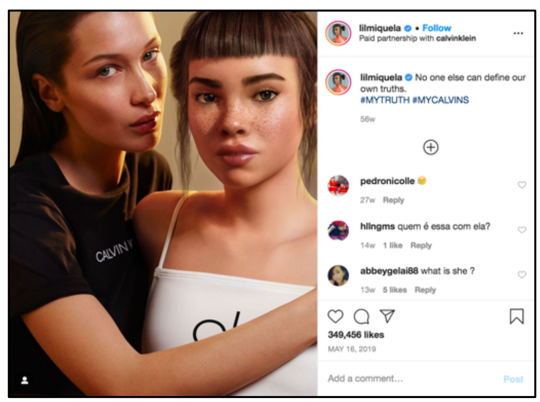
Endorsers struggle with compliance even in the face of multiple communications directly from the FTC, as the Commission's recent action against Teami, *et al.* makes clear.[21] Additionally, in March 2017, the FTC notified more than 40 social media influencers (and an additional 40+ marketers) about their legal obligations to clearly and conspicuously disclose influencers' relationships with brands when promoting products or services.[22] Nearly a quarter ignored the FTC's letters, leading the FTC to follow up with warning letters.[23] Twenty months later, TINA.org conducted a review of the 21 influencers who received warning letters.[24] TINA.org collected more than 1,400 posts from 20 of these influencers, promoting more than 500 companies, that it believed failed to meet the FTC's clear and conspicuous standard for disclosing material connections to promoted brands.[25] These 20 influencers are not unique. They represent only a small portion of the growing cadre of endorsers, including mega, macro, micro, and nano-influencers, who are failing to follow the Endorsement Guides.

As such, updated, clear and direct Endorsement Guides are now more important than ever. The Notice asks the question: "Is there a continuing need for the Endorsement Guides as currently promulgated?"[26] The growth of online endorser marketing, along with the accompanying proliferation of deceptive advertisements by influencers, which now include non-human influencers, only emphasizes the continuing need for the Endorsement Guides. However, the Guides must be updated to address contemporary issues in endorsement advertising, revised to eliminate the unnecessary brevity and vagueness as currently constructed, and amended to reflect a better understanding of marketing tactics and consumer perception relating to both social media influencer advertising and consumer reviews.

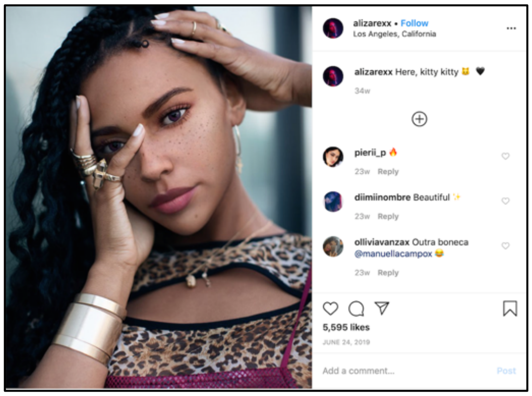
III. CONTEMPORARY ISSUES IN ENDORSEMENT ADVERTISING MUST BE ADDRESSED

A. The Endorsement Guides Must Address the Use of Virtual Influencers

Advertisers are using virtual influencers, also called CGI, or computer-generated imagery, influencers, to promote their brands. These "carefully curated AI-generated personas,"[27] as one source has called them, promote products on social media much the same way human influencers do – by posing with products, tagging promoted companies, and/or naming products or companies in captions. Some are created by the promoted companies themselves, such as KFC's Colonel Sanders,[28] while others are created by independent parties and go on to promote numerous different companies, such as Lil Miquela.[29]



The use of these animated influencers has gained momentum over the last year, a trend that TINA.org expects to continue.[30] Some virtual influencers are so popular that they have accumulated millions of followers – Lil Miquela, for example, has 2.4 million followers.[31] In addition to their popularity, many virtual influencers, including, for example, Aliza Rexx (shown below promoting Lustr jewelry[32]) and Shudu (shown below promoting Ellesse[33]), look human.



Not only do some virtual influencers look the part, they "act" human as well. In a sampling of virtual influencer posts catalogued by TINA.org, which includes posts by more than 25 different virtual influencers promoting more than 80 companies (including Amazon, Puma, Lexus, Toyota, Dr. Pepper, Porsche, Calvin Klein and KFC, to name a few),[34] many posts show virtual influencers moving, talking, and even eating. Some have boyfriends and New Year's resolutions, others have elaborate backstories that shape who they are and support worthy causes like cancer research. Some are shown spending time with real people, and many emulate human influencers – posing in fashionable clothes next to expensive cars and going to red-carpet events like the Grammys.[35]

In one 2019 study, researchers found that 23 percent of those surveyed said they would describe a CGI influencer as "authentic," 42 percent reported following a virtual influencer without knowing it was a bot account, and 55 percent made a purchase as a result of following a CGI influencer.[36]

Thus, the Guides must directly address the use of virtual influencers in marketing. First and foremost, the Guides must expand the definition of "endorsement." As currently drafted, the Guides state that an endorsement means:

> any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying *personal characteristics of an individual or the name or seal of an organization*) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. *The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution. . . .*[37]

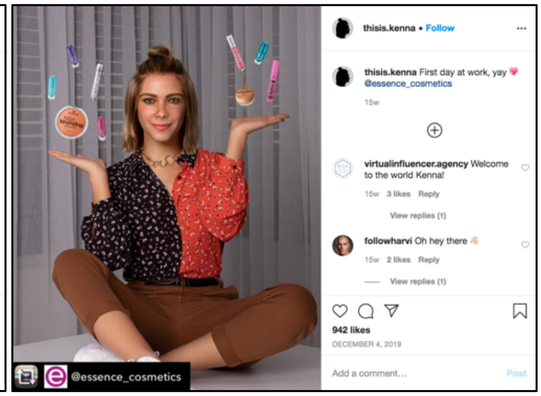
Given that virtual influencers are being used to endorse goods and services, the Guides must be broadened to include this additional type of ad, including both virtual influencers, as well as their owners. A failure to do so could be taken as an indication that bots (and the companies/individuals behind them) are not subject to the Endorsement Guides.

Second, the Guides should make clear that virtual influencers that promote products or services are subject to the same disclosure requirements as humans. That is, if a material connection exists between the creator/owner of the virtual influencer and the brand promoted, it must be clearly and conspicuously disclosed.[38]

Example of a virtual influencer promotional post that does not disclose the material connection between the influencer (Blawko and its creator Brud) and the company (Rcnstrct Studio).[39]

Example of a virtual influencer promotional post that does disclose the material connection between the influencer (Colonel Sanders and its creator KFC) and the company (Dr. Pepper).[40]

Third, because virtual influencers do not have opinions, beliefs or real-life experiences and cannot be genuine users of most products and services they promote, the Guides must address the type of disclosure necessary for these virtual influencers to ignore the principles established in 16 CFR § 255.1 – which require, among other things, that the endorsement reflect the honest opinions of the influencer and that the influencer be a bona fide user of the product at the time the endorsement is made. This issue arises frequently when virtual influencers promote products that are meant to impact or change a human's appearance such as the application of makeup:[41]



Finally, to avoid confusion and the risk of deception, the Guides should require virtual influencers engaged in influencer marketing to disclose that they are not human. Specifically, the Commission should require virtual influencers to clearly and conspicuously disclose that they are bots in all promotional posts.

B. The Endorsement Guides Must Address Short-Lived Content

Some of today's most popular social media platforms, especially among teens and young adults, are ephemeral in nature. That is, the content on these platforms is short-lived – existing, in some cases, for as little as a few seconds before permanently disappearing. Prominent examples for such digital content include Instagram's stories and Snapchat.

Regulatory oversight of such here-today-gone-tomorrow content is incredibly difficult.[42] Indeed, TINA.org's own investigation into DJ Khaled – the "King of Snapchat"[43] – was fraught with issues concerning the capture and collection of deceptive Snapchat endorsements.[44] Between June 2017 and April 2018, TINA.org staff had to monitor Khaled's Snapchat stories seven days a week in order to identify and record instances of deceptive advertising.[45]

Screenshot of DJ Khaled July 17, 2017 Snapchat story.[46]

What became clear after confronting Diageo with the fact that Khaled's Snap stories were rife with deceptive Ciroc ads was that Diageo had completely abdicated its responsibility to appropriately monitor Khaled's endorsements on Snapchat. Significantly, some months earlier, after the U.K.'s Advertising Standards Authority determined that Diageo had failed to ensure a Snapchat marketing campaign was not targeting minors,[47] the company announced that it was suspending all advertising on the platform, stating, "We have now stopped all advertising on Snapchat globally whilst we assess the incremental age verification safeguards that Snapchat are implementing."[48] As TINA.org's investigation made apparent, the company's statement was not quite accurate. Diageo clearly was not taking DJ Khaled's Snap stories (which have no age-gating feature) into consideration, let alone monitoring them.

Regardless of the difficulties associated with monitoring advertising on platforms with transitory content, companies are not permitted to ignore their legal obligations on such sites. Wherever endorsements take place, advertisers must fulfill their duty to ensure that the form, content and disclosures used by endorsers, at a minimum, comply with the law. To that end, the Commission should carefully consider this growing issue, and address advertisers' ever-present obligation to monitor their endorsers regardless of where the advertisements take place.

Additionally, the Commission should address violations from endorsers using vanishing content more seriously. Deceptive endorsements on platforms like Snapchat are difficult to deter: the unlikeliness of being caught means the likelihood of punishment is low.[49] If the FTC is lenient on violators who are caught, then the likelihood of punishment will effectively be zero. As Commissioner Chopra has noted, deterrence will be limited where "the narrow subset of wrongdoers who are caught and attract law enforcement scrutiny will face minimal sanctions."[50]

C. The Endorsement Guides Must Address Endorsements in Marketing Targeted at Children

As the FTC has stated in its .com Disclosures publication,[51] disclosures must be "understandable to the intended audience." The Endorsement Guides should incorporate this guidance, and make clear that there may be certain audiences for whom disclosures do not work to eradicate the deceptive nature of the advertisement.

To illustrate this point, TINA.org draws the Commission's attention to a 2019 complaint TINA.org filed with the FTC regarding Ryan ToysReview, one of the most viewed YouTube channels of all time.[52] TINA.org's investigation revealed that the YouTube channel, which is now called Ryan's World and has more than 25 million subscribers, thousands of posted videos, and more than 30 billion views,[53] deceptively promoted a multitude of products to millions of preschool-aged children by misleadingly blurring the distinction between advertising and organic content for its intended audience: preschoolers under the age of five.

It is well established that children are a vulnerable consumer group.[54] And children under the age of five are a particularly susceptible class. Competent and reliable research makes clear that children under the age of five are unable to identify television commercials and distinguish them from other forms of content."[55] At age five, the distinction between commercials and other content is only possible because of the perceptual cues that are present in television programs, such as verbal separators ("We'll be right back after this message") or because commercials are shorter.[56] Further, even at age five – when children begin to be able to at least identify traditional ads – the selling intent behind the ads is not understood.[57] ("[R]esearchers in many studies have reported that until children are >7 years old, they do not have the ability to detect persuasive intent in advertising."[58]) The perceptual cues present in television programming that allow five year olds to identify ads are completely lacking in YouTube videos that natively embed sponsored content within the program, such as Ryan ToysReview videos.[59] Thus, it is not surprising that preschoolers do not realize that they are being marketed to in these online settings.[60]

> Because [an] audience of ages five and under lacks the capacity to distinguish advertising from content in traditional television programming, it is inconceivable that they would be able to distinguish between sponsored and unsponsored videos on [YouTubeKids]. Even if sponsored videos in [YouTubeKids] were identified as advertising, its audience is too young to comprehend what that means.[61]

In other words, when a YouTube video directed to children under the age of five mixes advertising with program content, the preschool audience is unable to understand or even identify the difference between marketing material and organic content, even when there is a verbal indicator that attempts to identify the marketing content.[62]

Thus, the typical remedy for such blending of advertising and organic content – *e.g.*, disclosures of material connections between the endorser and the seller of the advertised product – does not work in such circumstances as the intended audience is unable to understand them. As such, TINA.org strongly urges the FTC to provide guidance – directly in the Endorsement Guides – to advertisers who target young children.

D. The Endorsement Guides Must Prohibit Manipulation Through the Use of Fake Accounts

As Commissioner Phillips noted, "engaging in . . . deceptive conduct like selling fake followers, distorts the online marketplace, preventing consumers from making informed purchasing decisions and creating an uneven playing field for those that follow the rules."[63] The use of fake accounts deceives and distorts the marketplace in multiple ways. Fake accounts can artificially boost an influencer's following, thereby deceiving brands who hire influencers into believing them to be more influential than they are.[64] Similarly, fake accounts can inflate the popularity of the poster's content, deceiving viewers and potential purchasers of any promoted products.[65] Moreover, the peddlers of fake accounts provide "the means and instrumentalities to commit deceptive acts or practices, which is itself a deceptive act."[66]

Recently, the Commission took action to prevent such behavior. In 2019, the FTC brought and settled charges against Devumi, which sold fake indicators of social media influence, including more than 4,000 fake subscribers on YouTube, over 32,000 fake views on YouTube and more than 800 fake LinkedIn followers.[67] The Commission's enforcement action against Devumi is laudable and TINA.org encourages the Commission to continue on the path against fake accounts by explicitly prohibiting such market manipulation in its Endorsement Guides.

IV. THE ENDORSEMENT GUIDES MUST BE UPDATED TO INCREASE THEIR ULTILITY AND IMPACT

A. The Guides Should Incorporate Other FTC Guidance Documents

In its current form, the Endorsement Guides require disclosures in three scenarios:

(1) When the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, in which case the advertisement should "clearly and conspicuously disclose the generally expected performance in the depicted circumstances;"[68]

(2) When the advertisement presents an endorsement by someone who is not an actual consumer, in which case the advertisement should "clearly and

conspicuously disclose that the persons in such advertisements are not an actual consumers of the advertised product;"[69]

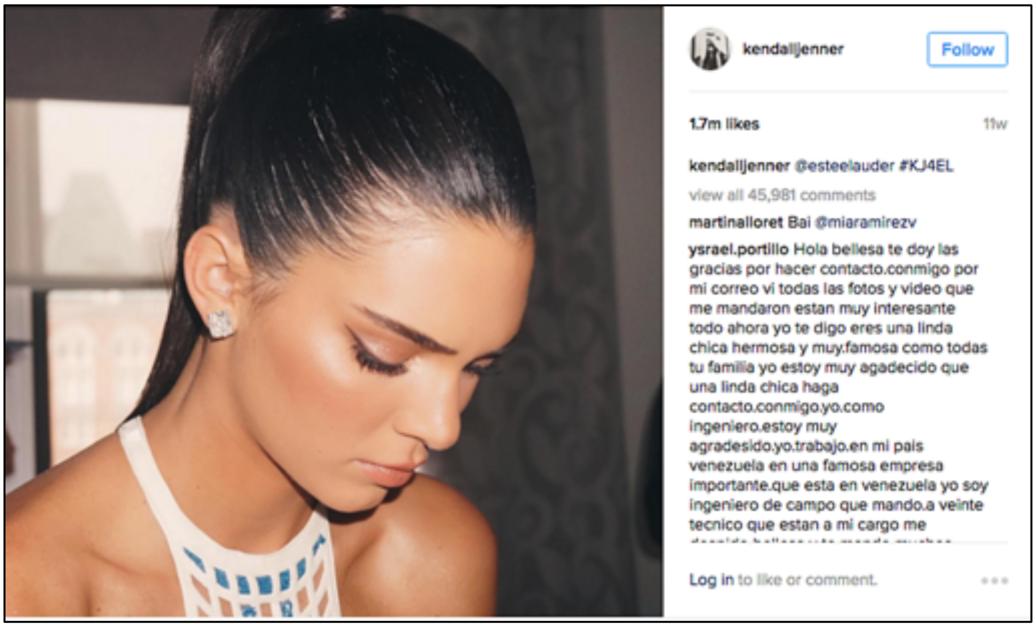
(3) When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), in which case "such connection must be fully disclosed."[70]

The Endorsement Guides then provide several hypotheticals to elucidate when these disclosure requirements are triggered. However, beyond merely stating that disclosures must be "clear and conspicuous" or "fully disclosed" the Guides fail to inform consumers, endorsers and businesses alike as to *what* the disclosure should say and *where* it should be said. For such guidance other FTC publications must be consulted, including, but not limited to, .com Disclosures: How to Make Effective Disclosures in Digital Advertising,[71] The FTC's Endorsement Guides: What People Are Asking,[72] and Disclosures 101 for Social Media Influencers.[73]

Such piecemeal guidance makes it difficult for small businesses, individual influencers, affiliate marketers and multilevel marketing distributors, among others, to ascertain their legal responsibilities. Thus, for the sake of clarity, ease of use, and ultimately, to increase legal compliance, TINA.org recommends that all relevant and pertinent guidance concerning endorsements be consolidated and published in the Endorsement Guides or, at a minimum, incorporated by direct and explicit reference.

B. The Guides Should Require Companies to Substantiate their Position that Disclosures Meet Clear and Conspicuous Requirement

Despite FTC guidance regarding how to legally comply with disclosure requirements in endorsements, TINA.org's experience shows that many advertisers and influencers either choose to ignore the disclosures suggested by the FTC or take creative license with their disclosure obligations. For example, in 2016, cosmetics company Estée Lauder – in response to TINA.org's investigation of the Kardashian/Jenner family's deceptive Instagram promotional posts[74] – took the position that #KJ4EL was a legally sufficient disclosure to inform consumers that Kendall Jenner was paid to endorse the company despite having no readily available data to support such a contention.[75]



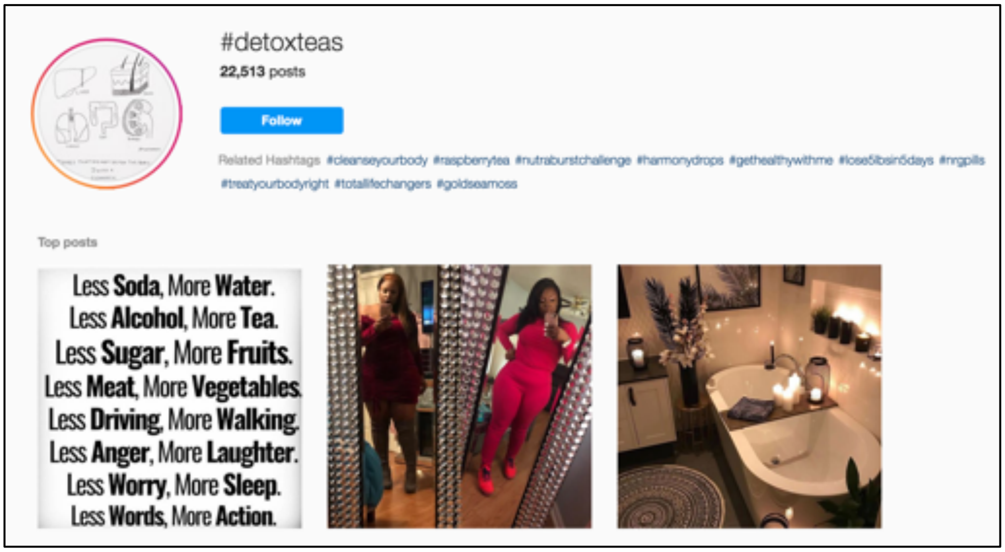
Similarly, with respect to the placement of disclosures in online marketing, the FTC has counseled advertisers to ensure the disclosure is unavoidable by, among other things, not using hyperlinks to communicate information that is integral to the claim, and placing disclosures in social media posts above the fold – *i.e.*, without having to click "more."[76] FTC guidance (and enforcement actions) have further made clear that typicality disclaimers (*i.e.*, "Results not typical" or "These testimonials are based on the experiences of a few people and you are not likely to have similar results") are ineffective at dispelling a reasonable consumer's belief that an endorser's experience is generally representative of what can be achieved.[77]

Nevertheless, TINA.org has collected thousands of multilevel marketing endorsements that deceptively tout atypical earnings representations.[78] Some MLM companies take the position that hyperlinking to an income disclosure statement or including a statement about variable financial results at the end of lengthy promotional videos satisfies their obligations to disclose.[79]

In order to effectively rein in advertisers' use of inadequate disclosures, the Endorsement Guides should not only incorporate suggestions for *how* to properly disclose material information, but also emphasize that advertisers are responsible for ensuring that claims conveyed to consumers in an ad are truthful and substantiated, and that they also are responsible for ensuring that consumers know that what they are viewing is an ad. Highlighting in the Guides that advertisers who use "creative" disclosures must be able to substantiate with reliable data that the net impression of their endorsements are non-deceptive would help to eradicate deceptive and misleading endorsements.[80]

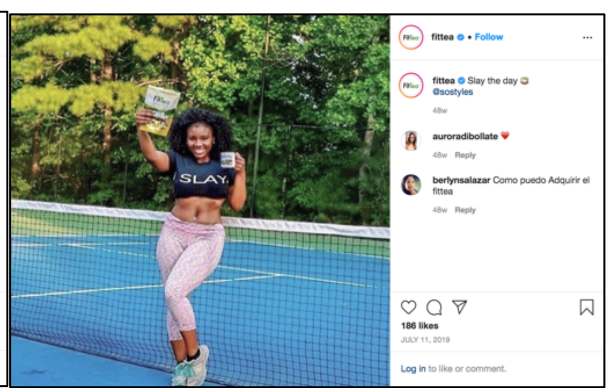
C. The Guides Should Make Clear They Apply to *All* Posts in Publication, Even If Not Recently Published

Deceptive advertisements published on many online platforms can live forever unless deleted or properly edited. Nowhere is this more evident than on social media platforms like Instagram, where old posts – sometimes years old – are presented to consumers on a regular basis. This happens in several ways. First, consumers using hashtag searches are frequently presented with posts that were published weeks, months, or even years prior. By way of example, a June 16, 2020 Instagram search for #detoxteas brings up more than 20,000 posts.



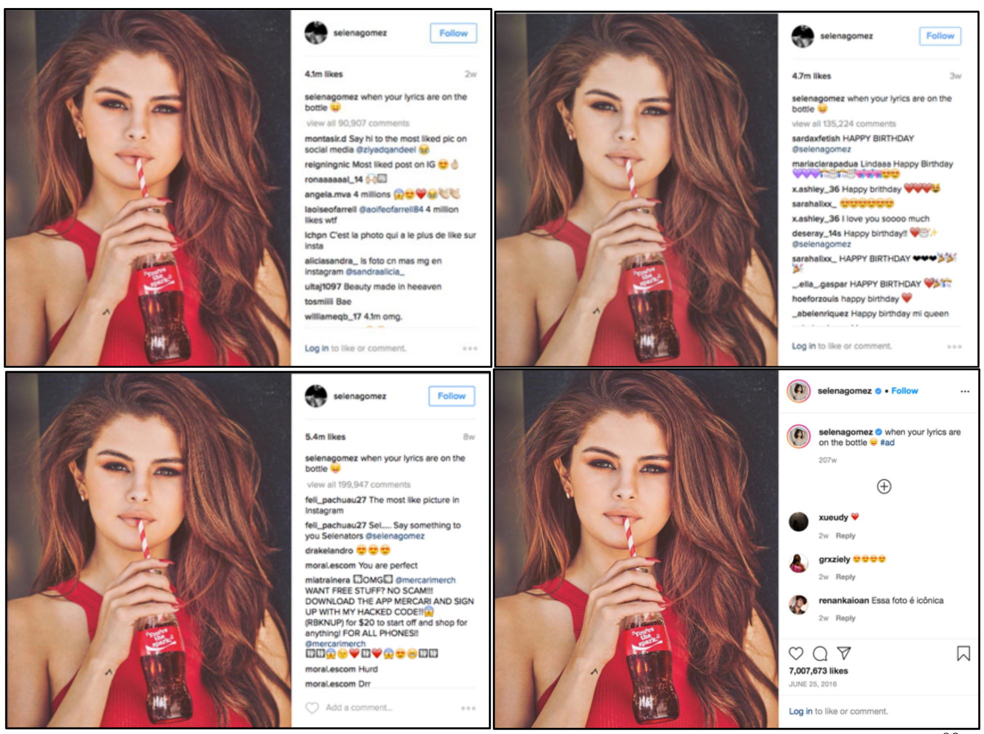
The first two search results are dated October 6, 2019 and November 27, 2019, respectively.[81]

Second, companies re-post influencers' previously published posts as part of more current marketing campaigns, which then resurrects the original post. For example, in July 2018, influencer Sophia Styles Ngwanyia deceptively promoted FitTea.[82] One year later, in July 2019, FitTea re-posted Sophia's original post with a caption that linked to her Instagram page.[83]



Third, many influencers continually gain new followers, who scan historic posts to get acquainted with the influencer. In July 2016, for example, a news outlet reported that, as of that week, celebrity Selena Gomez had nearly 181 million followers across major social networking platforms, "with roughly 200,000 new followers joining every 24 hours."[84]

Gomez's popularity led to one of the most widely liked Instagram posts, a June 25, 2016 undisclosed ad for Coca-Cola, which has continued to garner "likes." As shown below, the post had 4.1 million likes two weeks after it was posted.[85] One week later, the number of likes had grown to 4.7 million.[86] Eight weeks after publication, more than 5.4 million likes,[87] and today, the post has more than 7 million likes.[88]



Gomez eventually added #ad to the post after TINA.org contacted Coca-Cola.[89]

Currently, certain language used in the Endorsement Guides suggests that the guidance applies to recently published advertising materials only (*e.g.*, "the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product," 16 CFR § 255.1(c)). However, as explained above, ads on certain social media platforms are unlike television ads, for example, that only run for a specified period of time. Ads on some platforms continue in perpetuity unless affirmative action is taken to remove them, resulting in consumer deception stretching out over an extended period of time. As such, TINA.org urges the FTC to update the Guides to make it clear that they apply to all promotional endorsements in publication, even if they were initially published months or years prior.

D. The Guides Should Further Clarify the Meaning of "Generally Expected Performance in the Depicted Circumstances"

The Endorsement Guides state that endorsements should "clearly and conspicuously disclose the generally expected performance in the depicted circumstances" when the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve.[90] However, in certain types of marketing, the term "generally expected performance" leaves room for deception. As such, TINA.org urges the FTC to address how 16 C.F.R. § 255.2(b) of the Guides applies to the scenarios described below.

i. Endorsements for financial services or products

Companies advertising financial services and products often use testimonials from customers that report making mighty profits as a result of purchasing the promoted product or service.

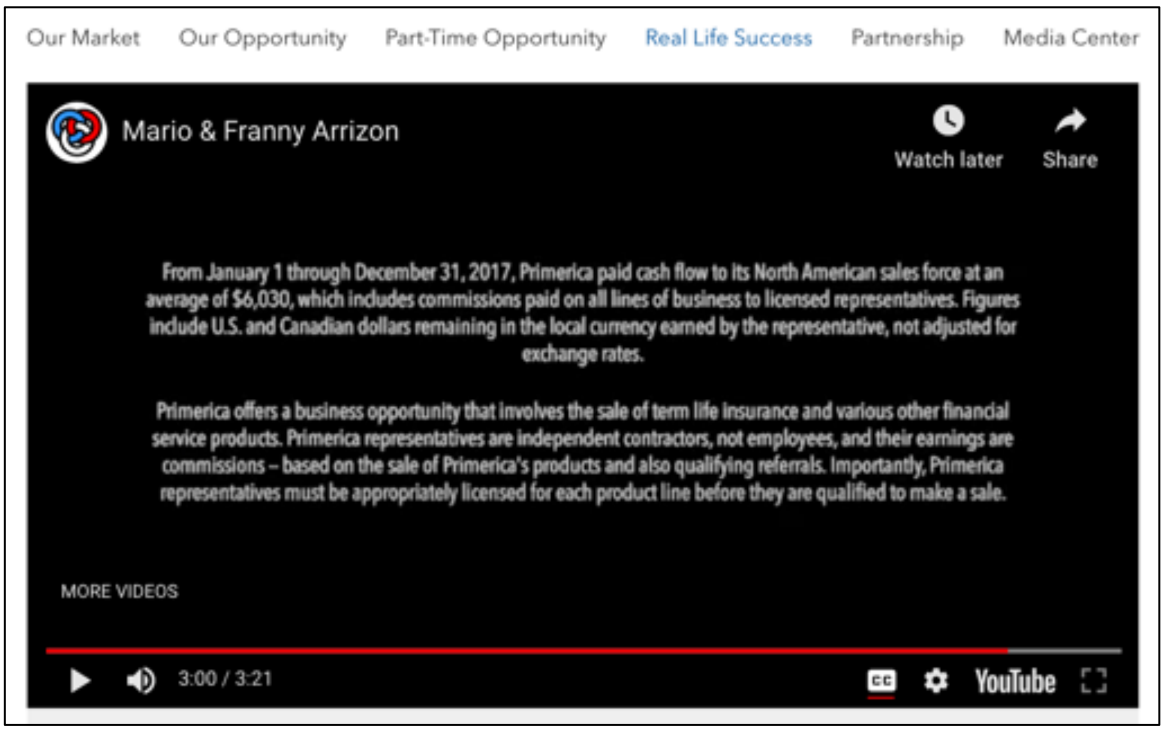
In 2014, for example, a TINA.org investigation into Stansberry & Associates Investment Research, LLC found that it was using hundreds of deceptive testimonials to sell its investment newsletters.[91] Specifically, TINA.org found, among other things, that many of Stansberry's testimonials omitted material information, such as the amount invested, the rate of return on the investment and when the claimed success occurred, making it impossible for consumers to ascertain whether the represented results were generally achievable. Moreover, none of the testimonials provided any information about the inherent risks associated with the various investment strategies. Examples of testimonials used at the time included:

> As subscriber Ron C. in Pennsylvania told us of Jeff's work in this service, "My wife and I have made roughly $22,000 in extra income in three months."
>
> And subscriber Sam D. in Texas said, "I've been harvesting between $1,500 and $3,000 per month in income…I'll be quitting my current job, and I'll enjoy a full retirement at age 43."
>
> One reader who took Porter's recommendation, Steve C. wrote, "I bagged a quick $20,000…one helluva call."[92]

Without providing how much the endorser initially invested, the rate of return or when the investment was made, among other things, a consumer cannot determine whether the reported gains reflect generally achievable results. In this particular case, Stansberry removed the problematic testimonials after receiving a warning letter from TINA.org, but a plethora of other financial products and services – which now include countless crypto asset investment programs – are advertised online. TINA.org urges the FTC to address how16 C.F.R. § 255.2(b) of the Guides applies to financial and investment-like endorsements.

ii. Advertisements for multilevel marketing business opportunities

TINA.org has catalogued thousands of examples of MLM companies and their distributors advertising significant financial gains as a result of joining the company's business opportunity when, in reality, the vast majority of distributors earn little to no money.[93] In order to meet the disclosure requirement set forth in 16 C.F.R. § 255.2(b) – *i.e.*, to clearly and conspicuously disclose the generally expected performance in the depicted circumstances – some companies disclose an average annual payout rather than what an average distributor earns. By way of example, multilevel marketing company Primerica features numerous testimonial videos on its website, many of which tout significant – yet atypical – financial gains. In an apparent effort to cure the deception, the company includes a disclosure at the end of its videos that discloses the average annual amount it has paid to its sales force.[94]



Putting aside the issue of the inadequate placement of the disclosure, the language does not actually tell consumers what the generally achievable results are as it only takes a handful of top earners to skew the financial disclosure. For example, if 1 out of 100 representatives made $1 million and the 99 others made $1 each, the average payout would be $10,000.99 (before expenses, of course). For this reason, TINA.org urges the FTC to make it unmistakably clear that, in the MLM context, "generally expected performance in the depicted circumstances" does *not* mean an overall average payout, but rather what the typical distributor can expect to earn.

iii. Endorsements for healthcare services

Companies advertising healthcare services often use patient testimonials from individuals who have made exceptional medical recoveries to convey the message that seeking and obtaining medical services from the advertiser will save consumers' lives.

In 2018, for example, a TINA.org review of patient testimonials used to promote the 50 cancer treatment centers in the U.S. that spent the most money on advertising in 2017,[95] revealed that 90 percent deceptively used patient testimonials in their marketing materials by promoting anecdotal, atypical patient results without disclosing what the generally expected results for a patient in a similar situation would be.[96]

Specifically, TINA.org's investigation found hundreds of testimonials featuring patients with cancer types that had a less than 50 percent five-year survival rate, being used in direct-to-consumer marketing materials to advance the narrative that treatment at a specific cancer center would provide patients with a therapeutic advantage, allowing them to beat the odds and live beyond five years.

At the time of TINA.org's investigation, the five-year survival rate for lung cancer was 18.6 percent, according to the National Cancer Institute.[97]

One of the cancer centers investigated was for-profit Cancer Treatment Centers of America (CTCA), which was the subject of a TINA.org complaint to the FTC for its ongoing use of such deceptive testimonials, a marketing tactic that led to a 1996 consent agreement between the FTC and the Center.[98] In response to TINA.org, CTCA took the position that cancer and cancer care are extraordinarily complex and thus there are no "generally expected" or "typical" outcomes of cancer care that it can disclose, and that patients and their families are aware of the complexities.[99] Putting aside the fact that

CTCA provided no data to support its assumptions about patients' understandings, if CTCA is correct (which TINA.org disputes), then marketing cancer treatment through the use of atypical patient testimonials is, at a minimum, deceptive.[100]

CTCA's position is likely to be followed by other for-profit medical treatment centers. It is for this reason that TINA.org strongly urges the FTC to make clear in its Endorsement Guides that if an advertiser takes the position that there simply are no typical results, then the advertiser is not permitted to use endorsements in its advertisements unless it has competent and reliable evidence to support the contention that consumers do not believe the endorsement results are typical.[101]

V. THE ENDORSEMENT GUIDES MUST BE UPDATED TO PROPERLY ADDRESS CONSUMER REVIEWS

Online reviews have become a key to success for businesses. Most consumers trust online reviews,[102] and nearly 95 percent of online shoppers read reviews before making a purchase.[103] Companies are obviously impacted by negative reviews.[104] Companies who improve their reviews experience an attendant increase in sales.[105] But products showing no reviews are also disadvantaged compared to similar products with reviews: Consumers are 270 percent more likely to buy a product with five-star reviews than with no reviews at all, a number that increases with higher-priced products.[106] Crucially, the initial reviews received by a product account for nearly all of the increase in purchase likelihood.[107]

The importance of online reviews has made them ripe for deception. Without reviews, a new company can struggle to get off the ground, and an existing company can struggle to launch a new product. Companies are, therefore, incentivized to do whatever they can to generate early, positive reviews.

As Commissioner Chopra noted, this has led to the growth of review fraud: "Fake reviews distort our markets by rewarding bad actors and harming honest companies. The problem is growing, and the FTC should attack it. Regulators around the world are concerned about fake review fraud."[108] Indeed, a Washington Post investigation found that for some popular product categories on Amazon.com, the "vast majority of reviews" were fake.[109] And the FTC recently settled charges against Sunday Riley, alleging that the company's skin-care managers, including Ms. Riley herself, faked reviews on Sephora's website to boost its sales for almost two years.[110] TINA.org agrees with the consensus stance against fake reviews: they are per se deceptive and the Commission should pursue companies soliciting fake reviews.

But the drive to generate reviews has also impacted a grayer area: incentivized reviews. Incentivized reviews are real reviews, but they are not unbiased or necessarily genuine: reviewers write the review because they are receiving something in return (*e.g.*, cash, discounts or free items).[111] In these situations, reviewers are not naturally compelled to share their views on the product, which typically requires an exceptionally good or bad experience to overcome the standard consumer inertia of silence. Moreover, the text of incentivized reviews tends to have a more positive sentiment when compared to organic reviews,[112] and tends to exclude discussions of purchase price, hampering the ability of the review to place the product in its full context.[113] Accordingly, incentivized reviews can mislead consumers in two primary ways: the substance of the review itself can be misleading, and the aggregation of reviews that include incentivized reviews can be misleading.

Recognizing the inherent, substantive deception, many review aggregators have banned incentivized reviews. Yelp has long banned review solicitation as it leads to "deceptively biased content."[114] Google has recently enacted a similar ban, noting that solicited reviews are not unbiased.[115] The Better Business Bureau ("BBB") has a similar prohibition in place.[116] And Amazon, which has historically banned incentivized reviews, even began searching for and deleting incentivized reviews retroactively, noting that they are "less trustworthy."[117] The Commission, too, has recognized this for years. In 2015, the Commission brought its first action relating to incentivized reviews when it charged AmeriFreight with misrepresenting online reviews by failing to disclose that it gave cash discounts to customers to post the reviews.[118] Jessica Rich, Director of the FTC's Bureau on Consumer Protection at the time, put it succinctly: "Companies must make it clear when they have paid their customers to write online reviews," and "[i]f they fail to do that . . . then they're deceiving consumers, plain and simple."[119]

Companies can also generate hundreds of reviews that they would not otherwise receive by offering incentives. For example, the Commission recently pursued UrthBox, which encouraged its customers to post positive reviews of its snack boxes on the BBB website.[120] As noted, the BBB prohibits incentivized reviews and requires customers to certify that they "have not been offered any incentive or payment originating from the business to write the review."[121] Nevertheless, according to the complaint, whenever a customer called UrthBox's customer service line, a representative offered to send them a free snack box if they posted a positive review on the BBB website. As a result, the company's reviews jumped from nine negative reviews in 2016 to 695 reviews in 2017, of which only 68 were negative.

Accordingly, the Endorsement Guides should directly address some of the most pressing problems concerning incentivized reviews. Although the current version of the Endorsement Guides require an endorser to fully disclose connections that "might materially affect the weight or credibility of the endorsement,"[122] the Guides do not clearly state that such a rule extends to consumer reviews posted to websites, and none of the examples directly address such a situation. Moreover, the Guides do not address the issues relating to composite reviews and review aggregation. Nor do the Guides address the issue of "review gating."

A. The Endorsement Guides Should Require Reviewers to Disclose Any Incentives Received to Post a Review

The Endorsement Guides should explicitly require that reviewers of products or services clearly and conspicuously disclose any incentives, including the receipt of free or discounted products/services, received in exchange for posting reviews.

From a legal perspective, the Endorsement Guides technically require a disclosure to accompany incentivized consumer reviews. However, such a requirement may not be apparent to the average reviewer. The Guides require disclosure of connections that "might materially affect the weight or credibility of the endorsement."[123] To understand that this extends to online reviews, a reviewer would need to read several pages back to where the Guides explain that it intends to treat "endorsements and testimonials identically" and that the term endorsement will cover both endorsements and testimonials.[124] Nor do the examples contained in the Guides clearly demonstrate that such a connection should be drawn. Only two examples touch on the subject,[125] and neither clearly make the point.

Though the Endorsement Guides do not directly address incentivized reviews, the FTC guidance document entitled The FTC's Endorsement Guides: What People Are Asking is more explicit and requires incentivized reviews to be accompanied with a disclosure.[126] At minimum, the Commission should incorporate the clarity from this guidance document into the Endorsement Guides. But even still, there is room for further improvement. The Endorsement Guides should presume the materiality of any incentive. The guidance document states that "[i]f you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product." This unequivocal statement applies just to free or discounted products. Elsewhere, the guidance document is more equivocal, potentially undermining the previous statement, noting that "[t]he question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation."[127] Though the FTC notes "it is always safer to disclose," it still misses an important point: it is not just the substance of the review that matters. What is material is the fact that a reviewer left a review when they otherwise may not have. Thus, any undisclosed incentive can be deceptive. The Commission should eliminate the guessing game and simply require that any incentive, no matter how big or small, be disclosed.

B. The Endorsement Guides Should Require Review Aggregators to Disclose If Incentivized Reviews Are Included in Composite Ratings

As discussed above, consumers don't just value the substance of reviews, but also the number of reviews, preferring products with more reviews. Having more reviews not only makes a product appear more popular, but it also provides the consumer some security in believing that other people bought the same product. Certain websites exhibit the same bias in their algorithms, displaying products with more reviews, or better reviews, higher in their results.[128] As it stands, there is nothing requiring review aggregators or algorithms to exclude incentivized reviews from composite scores. Thus, when a consumer looks at a review aggregator's composite score of a company, store, product or service, and sees that its average score is 8/10 with 700 reviews, that consumer would have no way of knowing that some of the reviews – or potentially the vast majority, as was the case in the UrthBox matter – were incentivized.

This is particularly problematic because, in many instances, consumers do not look past the composite score. In effect, this means that the aggregator's composite score *is* a review itself. Indeed, it is much more common to hear individuals discuss a restaurant having five stars on Yelp, or that a product only has two stars on Amazon, than someone noting a particular user's review.

To alleviate this form of deception, the Endorsement Guides should require websites that provide their own endorsements of goods and services through aggregate or consolidate reviews to disclose whether incentivized reviews may be included in their composite reviews. Further, if no disclosure is displayed, the websites should bear the burden of demonstrating that such disclosure is unnecessary to avoid consumer deception.

C. The Endorsement Guides Should Prohibit the Practice of Review Gating

Review gating (or review filtering) occurs when a company solicits feedback from customers and decides, based on their response, whether or not to ask them to leave a review. Customers who had a positive experience are asked to leave a review, while customers who had a negative experience may be sent elsewhere, but are most certainly *not* asked to submit a review. The goal of those employing this scheme is to artificially skew their review results positive and suppress negative reviews, which results in reviews that are not representative of the typical customer experience. The statistics support this effect: review gating leads to a higher – albeit slightly – average rating, with substantially fewer reviews.[129]

Yelp has long banned this sort of review filtering,[130] and, in 2018, Google did as well.[131] The Commission should follow suit and explicitly ban this practice in the Endorsement Guides.

VI. <u>THE ENDORSEMENT GUIDES MUST BE RIGOROUSLY ENFORCED</u>

Regardless of what the Endorsement Guides might say, they are of little import if advertisers and endorsers choose to ignore them. Only through rigorous enforcement will brands and influencers alike pay heed to the Guides. [132]

Since 2011, the FTC has resolved 22 investigations involving social media marketing.[133] In 11 of these cases, the FTC elected not to bring charges against the companies or influencers after its investigations. In the other 11 cases, the FTC entered into consent orders with the companies. Each case resolution required compliance and monitoring from the companies but only four imposed monetary judgments, which have been described as "limited." [134] To date, no FTC action has been taken directly against an influencer who has not also been an agent and/or employee of the marketer.

In the most recent FTC influencer case, a settlement was reached with detox tea marketer Teami, which included a $15.2 million judgment[135] related to inadequate disclosures in the company's influencer campaigns.[136] While TINA.org applauds the Commission's efforts against the company in this action, its decision not to pursue Teami mega-influencer Cardi B is problematic. Like most mega-influencers, Cardi B is as much an established and sophisticated brand as the company she deceptively advertised for. With tens of millions of followers on various platforms,[137] a reported net worth of $24 million[138] and a host of deceptive ads littering her social media accounts, the FTC's decision to permit her (and other influencers like her) to increase her wealth[139] and standing while she deceives her followers is short-sighted.

TINA.org encourages the Commission to do more in this regard. Focusing on highly sophisticated and popular influencers will result in increased deterrence and awareness. Further, it will likely have an outsized, direct impact on the behavior of other less sophisticated endorsers. While influencers may be aware of FTC actions against companies, these actions tend to have no immediate repercussions for influencers, giving them little reason to follow the Endorsement Guides. In the end, only through direct enforcement against influencers will the Commission increase specific deterrence and influencer-awareness of the Endorsement Guides.

* * *

Given the ubiquity of social media and the prevalence of online endorser advertising, it is crucial that the Commission update its Endorsement Guides to be as effective as possible. By utilizing the research and increased knowledge of online and social media advertising, the Commission has that opportunity now. TINA.org strongly urges the Commission to implement the aforementioned suggestions to the Endorsement Guides.

Very truly yours,

Bonnie Patten
Laura Smith
Michael J. Springer
Truth in Advertising, Inc.
P.O. Box 927
Madison, CT 06443

[1] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 35, at 10104 (Feb. 21, 2020) [hereinafter, "Notice"].

[2] With respect to television advertising, TINA.org generally supports Consumer World's April 7, 2020 Comments on the FTC's Endorsement Guides, FTC-2020-0017-0071, but would add that all material connections, including those financial in nature, be clearly and conspicuously disclosed in such marketing.

[3] *See* 74 Fed. Reg. 198, at 53124 (Oct. 15, 2009).

[4] *See* An Open Letter from Facebook Founder Mark Zuckerberg, Dec. 1, 2009, https://www.facebook.com/notes/facebook-app/an-open-letter-from-facebook-founder-mark-zuckerberg/190423927130/.

[5] *See* Why Yelp Has A Review Filter, Oct. 5, 2009, https://blog.yelp.com/2009/10/why-yelp-has-a-review-filter.

[6] Yelp reported 211 million reviews on its site earlier this year. *See* Yelp Fast Facts, https://www.yelp-press.com/company/fast-facts/default.aspx. Facebook has more than 2.5 billion monthly active users, and approximately 70% of U.S. adults have an account. *See* Facebook Reports First Quarter 2020 Results, https://s21.q4cdn.com/399680738/files/doc_financials/2020/q1/Q1'20-FB-Financial-Results-Press-Release.pdf; 10 Facts About Americans and Facebook, https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/. In the United States, 47% of the population uses Instagram, up from 16% in 2014. *See* Britner, Lucy, "Over the influence? The future of social media," just-drinks FUTURES, Vol. 7, https://www.just-drinks.com/analysis/over-the-influence-the-future-of-social-media-just-drinks-futures-vol7-free-to-access_id130573.aspx. And approximately 75% of U.S. adults report using YouTube. *See* 10 Facts About Americans and YouTube, https://www.pewresearch.org/fact-tank/2019/12/04/10-facts-about-americans-and-youtube/.

[7] *See* Schomer, Audrey, Influencer Marketing: State of the Social Media Influencer Market in 2020, Business Insider, (Dec. 17, 2019), https://www.businessinsider.com/influencer-marketing-report.

[8] *See* "Influencer Nation: 86% of Young Americans Want to Become One," Bloomberg (Nov. 5, 2019), https://www.bloomberg.com/news/articles/2019-11-05/becoming-an-influencer-embraced-by-86-of-young-americans.

[9] "New Research: The Value of Influencers on Twitter," Twitter (May 10, 2016), https://blog.twitter.com/en_us/a/2016/new-research-the-value-of-influencers-on-twitter.html; *see also* "Peers Have Influence Over Consumers, Celebrities Don't," Collective Bias (Mar. 29, 2016), https://www.collectivebias.com/post/blog-2016-03-non-celebrity-influencers-drive-store-purchases (finding that only 3% of consumers would consider purchasing a celebrity-endorsed product, while 30% would buy a product endorsed by a non-celebrity influencer.).

[10] *See* "New Research," *supra* n.9; Elliott, Hannah, "'Like' Them or Not, Car Influencers Shape the Way the Industry Sells," Bloomberg (Oct. 25, 2019), https://www.bloomberg.com/news/articles/2019-10-25/the-crazy-lives-of-the-luxury-car-influencers-you-love-to-hate ("Some 88% of consumers trust online recommendations as much as face-to-face recommendations.").

[11] 2019 MediaKix Survey. This is not surprising as market research has "made a definite conclusion: influencers with a high number of followers have lower engagement than those with fewer followers." Influencer Marketing Benchmark Report: 2020, Influencer Marketing Hub (2020).

[12] Some are asked not to disclose their relationship with the brand. *See* Stein, Lindsay, "One in Four Influencers Asked Not to Disclose Paid Promotion,"AdAge (Aug. 10, 2016), https://adage.com/article/cmo-strategy/influencers-asked-disclose-arrangement/305389.

[13] *See, e.g.*, FTC Social Media Actions, TINA.org, https://www.truthinadvertising.org/ftc-social-media-actions/; Kardashian, Summary of Action, TINA.org https://www.truthinadvertising.org /kardashian-summary-action/.

[14] *See, e.g.*, Ciroc, Summary of Action, TINA.org, https://www.truthinadvertising.org/ciroc-summary-action/; DJ Khaled, Summary of Action, TINA.org, https://www.truthinadvertising.org /dj-khaled-summary-action/; MLM Income Claims, Summary of Action, TINA.org, https://www.truthinadvertising.org/mlm-income-claims-summary-action/; Ryan ToysReview, Summary of Action, TINA.org, https://www.truthinadvertising.org/ryan-toys-review-summary-of-action/; Fair, Lesley, "FTC's Teami case: Spilling the tea about influencers and advertisers," FTC (Mar. 6, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers; Digitale, Erin, "Teens Vulnerable to Social-Media Promotion of Vaping," Scope Blog, Stanford Medicine, https://scopeblog.stanford.edu /2020/02/19/teens-vulnerable-to-social-media-promotion-of-vaping/.

[15] Colin Campbell & Pamela E. Grimm, "The Challenges Native Advertising Poses: Exploring Potential FTC Responses and Identifying Research Needs," 38 Journal of Public Policy & Marketing 1, 110–23 (2019); *see also* Maheshwari, Sapna "Endorsed on Instagram by a Kardashian, but Is It Love or Just and Ad?" New York Times (Aug. 30, 2016), https://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html; Main, Sami, "A Third of Publishers Don't Comply with FTC Rules for Native Ads, According to MediaRadar," AdWeek (Feb. 28, 2017), http://www.adweek.com/digital/a-third-of-publishers-dont-comply-with-ftc-rules-for-native-ads-according-to-mediaradar/; Swant, Marty, "Publishers Are Largely Not Following the FTC's Native Ad Guidelines," AdWeek (Apr. 8, 2016), http://www.adweek.com/digital/publishers-are-largely-not-following-ftcs-native-ad- guidelines-170705/; Arunesh Mathur, Arvind Narayanan, 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, Vol. 2, No. CSCW, Article 119, at 2 (Nov. 2018) (hereinafter, "Study on Affiliate Advertising") ("[O]nly ~10% of all affiliate marketing content on both YouTube and Pinterest contains accompanying disclosures."); "The State of Disclosure Amongst Instagram Influencers," Inkifi (2018), https://inkifi.com/state-of-disclosure/ (finding only 25% of accounts made disclosures compliant with the Endorsement Guides); Influencer Marketing Benchmark Report: 2020, Influencer Marketing Hub (2020) ("Only 14% of Influencers are Currently Fully Compliant with Legal Guidelines.").

[16] *See* "TINA.org's Social Media Influencer Actions," TINA.org (July 18, 2019), https://www.truthinadvertising.org/tina-orgs-social-media-influencers-actions/.

[17] *See* DJ Khaled, Summary of Action, TINA.org, https://www.truthinadvertising.org /dj-khaled-summary-action/.

[18] Letter from Diageo to TINA.org (Apr. 9, 2018), https://www.truthinadvertising.org/wp-content/uploads/2018/04/Diageo-Response-4-9-18_Redacted.pdf.

[19] *See* Letter from TINA.org to FTC (Dec. 10, 2018), https://www.truthinadvertising.org/wp-content/uploads/2018/12/12_10_18-letter-from-TINA-to-FTC-re-Diageo-Ciroc_Redacted.pdf. Similarly, in February 2020, TINA.org sent a complaint letter to the FTC concerning the web-based lingerie company Savage X Fenty – a joint venture between Rihanna and TechStyle, Inc. – after TINA.org's investigation revealed, among other things, that Savage X Fenty influencers were marketing its products without clearly and conspicuously disclosing their material connections to the company as required by FTC law. *See* Savage x Fenty, Summary of Action, TINA.org, https://www.truthinadvertising.org/savagexfenty-summary-action/.

[20] *See* Ciroc Deceptive Influencers Marketing Database, TINA.org, https://www.truthinadvertising.org/ciroc-influencer-database/.

[21] *See* "FTC's Teami case: Spilling the tea about influencers and advertisers," FTC (Mar. 6, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers (noting that "[t]he influencer's endorsement of the Teami product invariably appeared within the post's video or photo or within the first two or three lines of the post's caption" notwithstanding warning letters from the FTC and Teami's own social media policy).

[22] "FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship," FTC (Apr. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.

[23] "CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers," FTC (Sept. 7, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

[24] Instagram Influencers, Summary of Action, TINA.org, https://www.truthinadvertising.org/influencers-ftc-complaint-summary-action/.

[25] *See* Instagram Influencer Database, TINA.org, https://www.truthinadvertising.org/instagram-influencer-database/.

[26] Notice, at 10105.

[27] Powers, Katie, "Virtual Influencers Are Becoming More Real—Here's Why Brands Should Be Cautious," American Marketing Association (June 20, 2019), https://www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious/.

[28] Wohl, Jessica, "KFC Pokes Fun at Instagram Influencers with a Colonel Sanders Version," AdAge (Apr. 9, 2019), https://adage.com/article/cmo-strategy/kfc-pokes-fun-instagram-influencers-colonel-sanders-version/2163246. KFC's Colonel Sanders also promotes other brands, including, for example, Dr. Pepper. *See id.*

[29] Shieber, Jonathan, "The Makers of the Virtual Influencer Lil Miquela, Snag Real Money from Silicon Valley," TechCrunch (Apr. 24, 2018), https://techcrunch.com/2018/04/23/the-makers-of-the-virtual-influencer-lil-miquela-snag-real-money-from-silicon-valley/.

[30] *See* "Reality Check: TINA Calls on FTC to Address Virtual Influencers," TINA.org (June 22, 2020), https://www.truthinadvertising.org/reality-check-tina-callson-ftcto-address-virtual-influencers.

[31] Lil Miquela Instagram page, https://www.instagram.com/lilmiquela/?hl=en.

[32] Aliza Rexx Instagram post (June 24, 2019), https://www.instagram.com/p/BzHLRBmlbZO/. The same image appears on Lustr's Instagram page. *See* Lustr Instagram post (June 25, 2019), https://www.instagram.com/p/BzJdPukp2Im/.

[33] Shudu Instagram post (Feb. 14, 2019), https://www.instagram.com/p/Bt3yZR7hfuQ/.

[34] Virtual Influencer Database, TINA.org, https://www.truthinadvertising.org/virtual-influencers-database/.

[35] *See, e.g.*, video capture of Lil Miquela Instagram post (July 19, 2019), https://www.truthinadvertising.org/wp-content/uploads/2020/06/Lil-Miquela-Sang-Bleu-7_19_19.mp4 (moving and talking); screen capture of Lil Miquela Instagram post (Mar. 15, 2020), https://www.truthinadvertising.org/wp-content/uploads/2020/06/3_15_20i-LP.png (eating); screen capture of Lil Miquela Instagram post (Sept. 10, 2019), https://www.truthinadvertising.org/wp-content/uploads/2020/06/Lil-Miquela-Orly-12_10_19.png (boyfriend); screen capture of Kenna's Instagram post (Jan. 2, 2020), https://www.truthinadvertising.org/wp-content/uploads/2020/06/Kenna-1_2_20-LP.png (New Year's resolutions); screen capture of Amanda Bims Instagram post (May 26, 2020), https://www.truthinadvertising.org/wp-content/uploads/2020/06/Amanda-5_26_20-LP-i.png (elaborate backstory); screen capture of Magazine Luiza Instagram post (Feb. 17, 2020), https://www.truthinadvertising.org/wp-content/uploads/2020/06/magazineluiza-maisa-2_17_20.png (with real people); screen capture of Shudu Instagram post (Feb. 10, 2019), https://www.truthinadvertising.org/wp-content/uploads/2020/06/Shudu-ee-2_10_19.png (red carpet at the Grammy Awards).

[36] "Bot or Not," TBH, Fullscreen Tech Community (Oct. 16, 2018), https://fullscreen.com/wp-content/uploads/2019/01/Fullscreen_CGI-Influencers_Bot-Or-Not.pdf.

[37] 16 C.F.R. § 255.0 (emphasis added).

[38] *See* 16 C.F.R. § 255.5.

[39] Lawko Instagram post (July 17, 2019), https://www.instagram.com/p/B0B3MoElRy5/ (edited to remove inappropriate comment from image). This same image was posted on the company's Instagram page. *See* RCNSTRCT Studio Instagram post (July 18, 2019), https://www.instagram.com/p/B0EabkXjqqC/.

[40] KFC Instagram post (Apr. 10, 2019), https://www.instagram.com/p/BwFgL2OAhig/.

[41] Shudu Instagram post (Feb. 5, 2018), https://www.instagram.com/p/Be0ldl7F-Pu/; Kenna Instagram post (Dec. 4, 2019), https://www.instagram.com/p/B5qAFDxBXuz/; Imma Instagram post (Oct. 15, 2019), https://www.instagram.com/p/B3o8avhjP-M/.

[42] Baker, Dillon, "DJ Khaled and the FTC's Snapchat Problem," Fast Company (Aug. 30, 2016), https://www.fastcompany.com/3063239/dj-khaled-and-the-ftcs-snapchat-problem.

[43] *Id*.

[44] *See* DJ Khaled, Summary of Action, TINA.org, https://www.truthinadvertising.org/dj-khaled-summary-action/.

[45] *See* "DJ Khaled Snapchat Database," TINA.org, https://www.truthinadvertising.org/dj-khaled-snapchat-database/.

[46] *See, e.g.*, DJ Khaled Snapchat Story (July 17, 2017), https://www.truthinadvertising.org/wp-content/uploads/2018/02/DJK-07-17-2017-Clip-2.mp4.

[47] *See* "ASA Ruling on Diageo Great Britain Ltd," Advertising Standards Authority (Jan. 3, 2018), https://www.asa.org.uk/rulings/diageo-great-britain-ltd-a17-390017.html.

[48] Handley, Lucy, "Diageo pulls Snapchat advertising globally as UK bans alcohol ad for appealing to under-18s," CNBC (Jan. 3, 2018), https://www.cnbc.com/2018/01/03/diageo-pulls-snapchat-adverts-globally-as-uk-bans-captain-morgan-ad.html.

[49] *See* Wright, Valerie, "Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment," The Sentencing Project (Nov. 2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf (noting that "by increasing the certainty of punishment, potential offenders may be deterred by the risk of apprehension").

[50] Statement of Commissioner Rohit Chopra, *In the Matter of Sunday Riley*, Comm. File No. 1923008 (Oct. 21, 2019), at 3, https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf).

[51] .com Disclosures: How to Make Effective Disclosures in Digital Advertising, FTC (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[52] Letter from TINA.org to FTC, dated Aug. 28, 2019, https://www.truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf.

[53] Ryan's World YouTube Channel, https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w.

[54] Lapierre, Matthew A., *et al.*, "The Effect of Advertising on Children and Adolescents," Pediatrics 140, no. Supplement 2, at S153 (November 2017), https://doi.org/10.1542/peds.2016-1758V ("For decades, researchers have recognized children as a vulnerable consumer group because of their budding developmental abilities."); Campbell, Angela J., "Rethinking Children's Advertising Policies for the Digital Age," Georgetown University Law Center, at 40 (2017), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2969&context=facpub ("Because they are just developing their cognitive capabilities, children are more trusting than adults and thus, more vulnerable to 'commercial pitches' by program hosts, a practice known as 'host selling.'").

[55] John, Deborah Roedder, "Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research," Journal of Consumer Research 26, 183 (Feb. 1, 1999), https://doi.org/10.1086/209559; Campbell *supra* n.54, at 36–37; Reid, Rita-Marie Cain,

"Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach," American Business Law Journal 51, no. 4 (2014) 721, at 725, https://doi.org/10.1111/ablj.12038.

[56] *See* Reid, *supra* n.55.

[57] *Id.*

[58] Lapierre, *supra* n.54; John, *supra* n.55; World of Adcraft: The government video game that teaches kids about the perils of advertising, May 10, 2010, https://slate.com/business/2010/05/admongo-thegovernment-video-game-that-teaches-kids-about-the-perils-of-advertising.html ("The FTC says it couldn't design the content for younger kids because at that age [younger than eight] the little moppets aren't yet capable of understanding persuasive intent—or even the difference between advertising and editorial content. But doesn't that suggest those younger kids are even more in need of the FTC's protection?").

[59] Reid, *supra* n.55, at 8 ("'By blurring the boundaries between advertising and entertainment, advertisers may simply overwhelm the defenses children are still in the process of building.'").

[60] Lapierre, *supra* n.54, at S153.

[61] Campbell, *supra* n. 54, at 36–37 (noting that this publication reports the age of children who cannot distinguish traditional ads from other forms of content as five and under, whereas other sources report the age as under five); *see also* Soontae An & Susannah Stern, Mitigating the Effects of Advergames on Children, 40 J. of Advertising 43, 50 (2011) (an experiment designed to test the effect of "ad breaks," *i.e.*, disclosing that an advergame is a commercial, on children aged eight to eleven, found that the inclusion of an ad break did not increase children's understanding that the purpose of the advergame was to sell a product).

[62] *See* An & Stern, *supra* n.61, at 50.

[63] Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Keynote at the ANA/BAA Marketing Law Conference: The FTC and the Digital Marketplace: Highlights from the Last Year (Nov. 5, 2019), https://www.ftc.gov/public-statements/2019/11/keynote-commissioner-noah-joshua-phillips-anabaa-marketing-law-conference.

[64] Complaint, Dkt. 1, at 4, *Federal Trade Commission v. Devumi, et ano.*, 19-CV-81419 (S.D. Fl. Oct. 2019); *see also* "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 Fake Online Reviews at CEO's Direction," FTC (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators.

[65] *Id.*

[66] *Id.*

[67] *Id*.

[68] 16 C.F.R. § 255.2(b).

[69] 16 C.F.R. § 255.2(c).

[70] 16 C.F.R. § 255.5.

[71] .com Disclosures, *supra* n.51.

[72] The FTC's Endorsement Guides: What People Are Asking, FTC (Sept. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[73] Disclosures for Social Media Influencers, FTC (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

[74] Letter from TINA.org to FTC, dated Aug. 25, 2016, https://www.truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf.

[75] Sometime later, Kendall Jenner edited her May 5, 2016 Instagram post promoting Estée Lauder to add #EsteeModel to the caption (as shown below). *See* Kendall Jenner Instagram post (May 5, 2016, https://www.instagram.com/p/BFCu_sCjo-V/.

[76] .com Disclosures, *supra* n.51; The FTC's Endorsement Guides, *supra* n.72.

[77] 16 C.F.R. § 255.2(b).

[78] *See, e.g.*, MLM Income Claims, Summary of Action, TINA.org, https://www.truthinadvertising.org/mlm-income-claims-summary-action/; Team National, Summary of Action, TINA.org, https://www.truthinadvertising.org/team-national-summary-action/

[79] *See, e.g.*, Decision of The Direct Selling Self-Regulatory Council re Team National, Case No. 3-2019 (Aug. 21, 2019), at 7, https://www.truthinadvertising.org/wp-content/uploads/2019/09/DSSRC-Team-National-decision.pdf ("In response to this TINA challenge of its advertising and marketing claims, the Company informed DSSRC that it clearly and conspicuously posts an income earnings disclaimer at the bottom of its website with a hyperlink to the income earnings disclosure.").

80 Such a requirement would be consistent with 16 C.F.R.§255.2 n.105, wherein the Commission states that this level of substantiation will "avoid the risk of the initiation of [a law enforcement] action," but would go one step further in that it would make it clear that all advertisers using disclosures not specifically recommended by the FTC must possess proper substantiation *prior* to using the disclosure and publishing the advertisement, not simply to avoid litigation.

81 SavvyEcoLiving Instagram post (Oct. 6, 2019), https://www.instagram.com/p/B3S0kMNJO1d/:

India Darrisaw Instagram post (Nov. 27, 2019), https://www.instagram.com/p/B5Xp8toBhdq/:

[82] Sophia Styles Ngwanyia, MBA Instagram post (July 27, 2018), https://www.instagram.com/p/Blvg317ACGH/.

[83] FitTea Instagram post (July 11, 2019), https://www.instagram.com/p/BzyT3RnBtCu/.

[84] https://www.digitalmusicnews.com/2016/07/22/selena-gomez-550000-one-social-media-post/

[85] *See* France, Lisa Respers, "Selena Gomez: Reigning queen of Instagram," CNN (Sept. 28, 2016), https://www.cnn.com/2016/09/28/entertainment/selena-gomez-instagram/index.html.

[86] Resnikoff, Paul, "Selena Gomez Charges $550,000 for One Social Media Post" Digital Music News (July 22, 2016), https://www.digitalmusicnews.com/2016/07/22/selena-gomez-550000-one-social-media-post/.

[87] *See* screenshot of Selena Gomez Instagram post (Sept. 2016), https://www.truthinadvertising.org/wp-content/uploads/2016/09/Coca-Cola-1-Selena.png.

[88] Selena Gomez Instagram post (July 25, 2016), https://www.instagram.com/p/BHF4NdhhOmc/.

[89] "Ad or Not? Coke and Ms. Gomez," TINA.org (Sept. 2, 2016), https://www.truthinadvertising.org/ad-not-coke-ms-gomez/.

[90] 16 C.F.R. § 255.2(b).

[91] Stansberry & Associates, Summary of Action, TINA.org, https://www.truthinadvertising.org/stansberry-and-associates/.

[92] TINA.org's List of Problematic Testimonials used to Promote Stansberry & Associates, TINA.org, https://www.truthinadvertising.org/wp-content/uploads/2014/03/TINA.orgs-List-of-Problematic-Testimonials-used-to-Promote-Stansberry-Associates.pdf.

[93] Mariano, Joseph, Pres. of Direct Selling Association, "Learning and Building on Collective Experience, Direct Selling News (Sept. 1, 2016), https://www.truthinadvertising.org/wp-content/uploads/2018/02/Learning-and-Building-on-Collective-Experience-Direct-Selling-News-Mariano.pdf ("We must increase our efforts to ensure prospective distributors are fully aware -- clearly and unashamedly -- that for most, direct selling can provide supplemental income. Most distributors will not realize a replacement income, let alone a lavish lifestyle.").

[94] "Mario & Franny Arrizon," Primerica Films, http://www.primericabusinessopportunity.com/public/businessopportunity/primerica-real-life-success.html; Primerica Income Claims Database, TINA.org, https://www.truthinadvertising.org/primerica-income-claims-database/.

[95] Cancer Centers, Summary of Action, TINA.org, https://www.truthinadvertising.org/cancer-centers-summary-action/.

[96] Many of the testimonials used by the cancer centers in their marketing materials also featured treating physicians. For this reason, TINA.org, together with a group of medical professionals, published a paper in the 2020 American Society of Clinical Oncology (ASCO) Book entitled *Direct-to-Consumer Advertising for Cancer Centers and Institutes: Ethical Dilemmas and Practical Implications*, available at https://ascopubs.org/doi/pdf/10.1200/EDBK_279963. In this publication, TINA.org strives to educate the medical oncology community about the popular

use of – and inherent risk in – patient testimonials, and join our co-authors in making recommendations for oncologists and cancer centers to ensure that marketing to patients is not deceptive or misleading.

[97] CTCA Database, TINA.org, https://www.truthinadvertising.org/cancer-treatment-center-america-database/; Screenshot of CTCAInstagram post (June 8, 2016), https://www.truthinadvertising.org/wpcontent/uploads/2018/07/Russel-Lung-Cancer-CTCA-Instagram.png.

[98] Letter from TINA.org to FTC, dated Oct. 22, 2018, https://www.truthinadvertising.org/wp-content/uploads/2018/10/10_22_18-Complaint-Letter-to-FTC-re-CTCA_Redacted.pdf.

[99] Letter from CTCA to TINA.org, dated Mar. 28, 2019, https://www.truthinadvertising.org/wp-content/uploads/2019/04/CTCA-TINA-Response-Letter_03-28-19.pdf.

[100] Letter from TINA.org to CTCA, dated Apr. 10, 2019), https://www.truthinadvertising.org/wp-content/uploads/2019/04/4_10_19-ltr-from-TINA-to-CTCA_Redacted.pdf.

[101] As TINA.org explained to CTCA, if, as the company stated, every patient's cancer treatment is inherently atypical, then CTCA's only legal option is to stop using patient testimonials. CTCA is not permitted to circumvent FTC law to lure patients to its for-profit centers with atypical testimonials simply because cancer treatment is complex. *See id.*

[102] *See* "Recommendations from Friends Remain Most Credible Form of Advertising Among Consumers," Global Trust in Advertising Report, Nielsen (Sept. 28, 2015), https://www.nielsen.com/eu/en/pressreleases/2015/recommendations-from-friends-remain-most-credible-form-of-advertising/ (noting that 66% of respondents indicated that they trust consumer opinions posted online); Bright Local Consumer Review Survey 2019, BrightLocal (Dec. 11, 2019), https://www.brightlocal.com/research/local-consumer-review-survey/ (finding that 89% of 35–54 year-olds trust online reviews *as much* as they trust personal recommendations); Sterling, Greg, "Report: 'Incentivized reviews' effective for consumers and brands," Search Engine Land (Nov. 9, 2018), https://searchengineland.com/report-incentivized-reviews-effective-for-consumers-and-brands-307919 (noting that "88 percent of US online shoppers believe ratings and reviews to be 'extremely or very' important when purchasing a high-consideration product. That number drops to 42 percent for low consideration items.") (internal quotation marks omitted).

[103] *See* "Most Americans rely on their own research to make big decisions, and that often means online searches," FactTank, Pew Research Center (Mar. 5, 2020), https://www.pewresearch.org/fact-tank/2020/03/05/most-americans-rely-on-their-own-research-to-make-big-decisions-and-that-often-means-online-searches/; *see also* "How Online Reviews Influence Sales," Spiegel Research Center (June 2017), https://spiegel.medill.northwestern.edu/_pdf/Spiegel_Online%20Review_eBook_Jun2017_FINAL.pdf [hereinafter "Spiegel Report"]; *see also* Bright Local Consumer Review Survey 2019, *supra* n.102 (finding 82% of consumers read online reviews for local businesses, with 52% of 18–54 year-olds saying they "always" read reviews, and the average consumer reads 10 reviews before feeling able to trust a business); Hoeffler, David, "Study: Do consumers trust incentivized reviews?," Bazaarvoice Blog (Oct. 29, 2018), https://www.bazaarvoice.com/blog/consumers-trust-incentivized-reviews/ (finding more than three in four (77%) of online shoppers in the U.S. read product reviews before purchasing for more than half the products they buy); Statement of Commissioner Chopra, *In the Matter of Sunday Riley Commission*, *supra* n.50, at 1 ("[C]onsumers rely on reviews in making purchasing decisions.").

[104] *See* "State of Online Reviews," Podium, https://www.podium.com/resources/podium-state-of-online-reviews/ (finding that 3.3 is the minimum star rating of a business that consumers would consider engaging in); "2018 ReviewTrackers Online Reviews Survey," reviewtrackers (2018), https://www.reviewtrackers.com/reports/online-reviews-survey/ ("Customers don't really trust businesses with lower than 4-star ratings. 80 percent of consumers say the star ratings they trust the most are 4.0, 4.5, and 5 stars."). But consumers are also suspicious of companies that are *too* highly rated. *See* Spiegel Report, *supra* n.103, at 10.

[105] *See* "A.G. Schneiderman Announces Settlement with Machinima and Three Other Companies for False Endorsement," New York State Office of the Attorney General, Press Release, (Feb. 11, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-machinima-and-three-other-companies-false (noting that a Harvard Business School study estimated that a one-star rating increase on Yelp translated to an increase of 5%–9% in revenues for a restaurant); "When Is a Star Not Always a Star? When It's an Online Review," (Nov. 28, 2019), https://www.nytimes.com/2019/11/28/business/online-reviews-fake.html (noting that an increase of just one star in a rating on Amazon correlates with a 26% increase in sales, according to a recent analysis by the e-commerce consulting firm Pattern).

[106] *See* Spiegel Report, *supra* n.103, at 6–7; "No online customer reviews means BIG problems in 2017," Fan & Fuel (Dec. 2016), https://fanandfuel.com/no-online-customer-reviews-means-big-problems-2017/ ("92% of consumers hesitate to make a purchase if there are no customer reviews."); Michael Luca & Georgios Zervas, "Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud," Management Science Vol 62, No. 12, at 3409 (Dec. 2016) (finding restaurants "have stronger incentives to submit fake reviews when they have relatively few reviews" or have negative reviews).

[107] *See* Spiegel Report, *supra* n.103, at 11; *see also* Georgios Askalidis & Edward C. Malthouse, The Value of Online Customer Reviews, RECSYS 155–58 (2016), https://dl.acm.org/citation.cfm?id=2959181 ("[T]he conversion rate of a product can increase by as much as 270% as it accumulates reviews . . . with the first 5 reviews driving the bulk of the aforementioned increase."); Lev Muchnik, Sinan Aral, and Sean J. Taylor, Social Influence Bias: A Randomized Experiment, 341 Sci. 647, 649 (2013), https://science.sciencemag.org/content/341/6146/647 (finding a single initial positive "upvote" creates a "herd effect" that results in a 25% higher average rating for that item at the end of a 5-month observation window compared to an initial negative "down-vote").

[108] *See* Statement of Commissioner Chopra, *In the Matter of Sunday Riley Commission*, *supra* n.50, at 1.

[109] Dwoskin, Elizabeth, "How merchants use Facebook to flood Amazon with fake reviews," Washington Post (Apr. 23, 2018), https://www.washingtonpost.com/business/economy/how-merchants-secretly-use-facebook-to-flood-amazon-with-fake-reviews/2018/04/23/5dad1e30-4392-11e8-8569-26fda6b404c7_story.html ("For example, of the 47,846 total reviews for the first 10 products listed in an Amazon search for "bluetooth speakers," two-thirds were problematic, based on calculations using the ReviewMeta tool. So were more than half of the 32,435 reviews for the top 10 Bluetooth headphones listed. Diet pills and other supplements also generated large numbers of problematic reviews. Just 33 percent of the reviews for the top 10 testosterone boosters listed on Amazon appeared legitimate, and only 44 percent of reviews for the top listed weight-loss pills, according to data crunched from ReviewMeta.").

110 *See* "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 Fake Online Reviews at CEO's Direction," FTC (Oct. 21, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators.

111 *See* Penaflorida II, Rexly, "The Case Against Incentivized Reviews," reviewtrackers (May 20, 2019), https://www.reviewtrackers.com/blog/incentivized-reviews/.

112 *See* Maria Petrescu, Kathleen O'Leary, Deborah Goldring, and Selima Ben Mrad, "Incentivized reviews: Promising the moon for a few stars," Journal of Retailing and Consumer Services, at *8 (Oct. 10, 2016), https://doi.org/10.1016/j.jretconser.2017.04.005 ("[T]he text of the reviews posted by incentivized influencers had a positive sentiment in a higher proportion than that of actual buyers."). It should be noted that in the study, while the text of incentive reviews skewed positive, it had no effect on the "star" rating of the product. The authors offer multiple explanations for this occurrence, such as "the exchange theory model of interpersonal communication and the reviewers' process of weighing costs versus benefits," and "consumers' importance placed on the text of the reviews." However, the study focused on a single product, and it might simply be because, for this product, the "stars" synced up. In any event, this is an area for which more research is necessary.

113 *Id.* at 4.

114 "What is Yelp's Review Solicitation Policy?", Yelp.com, https://www.yelp-support.com/article/What-is-Yelp-s-review-solicitation-penalty?l=en_US; *see also* Sollitto, Vincent, "Why Yelp Doesn't Condone Review Solicitation," Yelp.com (July 31, 2017), https://blog.yelp.com/2017/07/yelp-doesnt-condone-review-solicitation.

115 "Get reviews on Google," https://support.google.com/business/answer/3474122?hl=en&ref_topic=6001257 ("Reviews are only valuable when they are honest and unbiased. (For example, business owners shouldn't offer incentives to customers in exchange for reviews.)").

116 *See* "How to Submit a Review on BBB.org," Better Business Bureau (May 24, 2019), https://www.bbb.org/article/blog/20025-how-to-submit-a-review-on-bbborg ("The terms and conditions state reviewers can't have a personal affiliation with the business or have received incentives or compensation for those reviews.").

117 *See* Perez, Sarah, "Amazon makes good on its promise to delete incentivized reviews." TechCrunch (Nov. 23, 2016), https://techcrunch.com/2016/11/23/amazon-made-good-on-its-promise-to-delete-incentivized-reviews/.

118 *See* "FTC Stops Automobile Shipment Broker from Misrepresenting Online Reviews," FTC (Feb. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/ftc-stops-automobile-shipment-broker-misrepresenting-online.

119 *Id.*

120 *See* "It's unwise to incentivize positive skewed reviews," FTC (Apr. 3, 2019), https://www.ftc.gov/news-events/blogs/business-blog/2019/04/its-unwise-incentivize-positive-skewed-reviews.

[121] *Id.*

[122] 16 C.F.R. § 255.5.

[123] *Id.*

[124] 16 C.F.R. § 255.0.

[125] The first – located several pages before the discussion of material connections without a reference thereto – "assume[s] that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so." *See* 16 C.F.R. § 255.0, Example 8. The example is used to show a situation in which a review would "be considered an Endorsement under the Guides." *Id.* It does not explain that the reviewer would need to disclose that she received the product for free because it would constitute a material connection or whether the situation is unique to the joining of a marketing program.

The second example – also located pages before the section discussing of material connections, but this time referring to such section – involves moviegoers verbally giving reviews after having just seen a movie. *See* 16 C.F.R. § 255.2, Example 7. However, giving a verbal review to an advertiser is a far cry from writing a review online. Moreover, the Guides use this to demonstrate a situation in which the advertiser using the testimonial must make the disclosure, not the individuals providing the review.

[126] *See* The FTC's Endorsement Guides, *supra* n.72. The FTC's Endorsement Guides note:

> [I]f you've given . . . customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them that you want their honest opinion. In fact, even if you tell your customers that you aren't going to pay them but that they might be featured in your advertising, that opportunity might be seen as having a value, so the fact that they knew this when they gave the review should be disclosed (*e.g.*, "Customers were told in advance they might be featured in an ad.").
>
> . . .
>
> [I]t's okay to invite people to post reviews of your business after they've actually used your products or services. If you're offering them something of value in return for these reviews, tell them in advance that they should disclose what they received from you. You should also inform potential reviewers that the discount will be conditioned upon their making the disclosure. That way, other consumers can decide how much stock to put in those reviews.
>
> . . .
>
> The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed. For example, being entered into a sweepstakes or a contest for a chance to win a thousand dollars in exchange for an endorsement

could very well affect how people view that endorsement. Determining whether a small gift would affect the weight or credibility of an endorsement could be difficult. It's always safer to disclose that information.

[127] *See id.*

[128] *See* Statement of Commissioner Chopra, *In the Matter of Sunday Riley Commission*, *supra* n.50, at 2 ("Marketers may use fake reviews to influence algorithms and recommendation engines that can determine whether or not a consumer ever sees a product or service listing.").

[129] *See* "Does Review Gating Impact Star-Ratings?," GatherUp (Oct. 17, 2019), https://gatherup.com/blog/does-review-gating-impact-star-ratings/.

[130] *See* "Don't Ask for Reviews," Support Center, Yelp.com, https://www.yelp-support.com/article/Don-t-Ask-for-Reviews?l=en_US.

[131] *See* Format Specific Criteria, Google.com, https://support.google.com/contributionpolicy/answer/7411351?hl=en&ref_topic=7422769 ("Don't discourage or prohibit negative reviews or selectively solicit positive reviews from customers. Don't include promotional or commercial content. Don't offer or accept money in exchange for reviews. Don't solicit reviews from customers in bulk.").

[132] *C.f.*, Dissenting Statement of Commissioner Rebecca Kelly Slaughter, Regarding the Matters of Sandpiper/PiperGear and Patriot Puck, at 2 (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514780/sandpiper_patriot_puck_slaughter_dissenting_statement-4-17-19.pdf.

[133] FTC Social Media Actions, TINA.org (updated May 28, 2020), https://www.truthinadvertising.org/ftc-social-media-actions/.

[134] *See* Statement of Commissioner Chopra, *Regarding the Endorsement Guides Review* (Feb. 12, 2020), https://www.ftc.gov/public-statements/2020/02/statement-commissioner-rohit-chopra-regarding-endorsement-guides-review ("[I]t is not clear whether our actions are deterring misconduct in the marketplace, due to the limited sanctions we have pursued.").

[135] Upon the payment of $1 million, the judgment will be partially suspended.

[136] *See* "FTC's Teami case: Spilling the tea about influencers and advertisers," FTC (Mar. 6, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers.

[137] Cardi B Instagram page, https://www.instagram.com/iamcardib/?hl=en (68.9 million); Cardi B Facebook page, https://www.facebook.com/TheCardiBFanClub/ (16.5 million); Cardi B Twitter page, https://twitter.com/iamcardib (12.5 million); Cardi B TikTok page, https://www.tiktok.com/@iamcardib (2.7 million); Cardi B YouTube Channel, https://www.youtube.com/channel/UCxMAbVFmxKUVGAll0WVGpFw (12.6 million).

[138] Cardi B Net Worth, Celebrity Net Worth, https://www.celebritynetworth.com/richest-celebrities/models/cardi-b-net-worth/.

[139] Patten, Bonnie, "Will the Fyre Starters Finally Get Burned," TINA.org (Jan. 31, 2019), https://www.truthinadvertising.org/will-the-fyre-starters-finally-get-burned/ (noting payments of "$1.2 million to IMG Models, $299,000 to DNA Model Management and $275,000 to Kendall Jenner"); *see also* Trustee's Fourth Omnibus Application for an Ex-Parte Order, Dkt. No. 68, *In re Fyre Festival LLC*, No. 17-11883 (MG) (Bankr. S.D.N.Y. Jan. 25, 2019); Randles, Jonathan, "Kendall Jenner Settles Lawsuit Over Fyre Festival," The Wall Street Journal (May 20, 2020), https://www.wsj.com/articles/kendall-jenner-settles-lawsuit-over-fyre-festival-11589991702.