

June 22, 2020

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

Re: Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 CFR Part 255 CFR) (Project No. P204500)

Dear Secretary Tabor:

MPA -- The Association of Magazine Media (“MPA”) respectfully responds to the Federal Trade Commission’s (“FTC” or “Commission”) request for comment on the Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”).¹

As the national trade association for the consumer magazine industry, MPA represents more than 500 magazine media brands that span a vast range of genres across print, online, mobile, and video media. Our members inform, inspire, and entertain more than 90 percent of all U.S. adults through the print and digital magazine titles they trust and value most. MPA members publish some of the nation’s best known, well-trusted, and most loved magazines. Our diverse membership also includes publishers of many small, regional, and niche titles serving diverse communities and interests.

Magazine readers trust magazine media because our members have spent years, and in some cases decades, building connected, first-party relationships with consumers, cultivating editorial expertise, and establishing credibility with readers. In fact, as of 2019, traditional media sources such as magazines outpaced online-only, social, and other forms of media in terms of consumer trust.² That credibility exists because magazine publishers take their editorial independence and responsibility seriously.

As magazine media has embraced technological innovation – and expanded sources of revenue – by incorporating video content, developing branded content, and establishing eCommerce partnerships, magazine publishers have taken care to ensure that material information that might impact consumers’ interpretation of a review or influence their purchasing decisions is disclosed to readers. We remain mindful of the FTC’s admonition that “truth in advertising is important in

¹ Request for Public Comment on the Federal Trade Commission’s Endorsement Guides, 85 Fed. Reg. 10104-10107 (February 21, 2020) (“Request for Comment”).

² MPA, *Magazine Media Factbook* 9 (2019), available at: https://www.magazine.org/Magazine/Research_and_Resources_Pages/MPA_Factbook.aspx.

all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media).”³

MPA supports the continued use of the Endorsement Guides as a useful business education tool. We believe that the Endorsement Guides work well as currently promulgated, and that they effectively serve their intended purposes: to set forth the general principles that the Commission will use in evaluating endorsements and testimonials used in advertising, to provide businesses with the basis for seeing that their disclosures effectively communicate relevant information to consumers, enable voluntary compliance with applicable law, and to caution that practices which violate the Guides may result in law enforcement by the FTC.⁴

MPA does not believe that the Endorsement Guides require revision. The Guides refer to longstanding and widely applicable truth-in-advertising principles that have proven adaptable to technological innovation and have enabled the Guides to remain substantially intact for 45 years. As the Commission undertakes its review of the Endorsement Guides, MPA urges it to maintain the Guides’ acknowledgment of the well-understood differences between media that is professionally curated and edited versus that which is consumer-created. MPA also believes that, to the extent the Commission determines that revisions to the Endorsement Guides are necessary, such revisions preserve the compliance flexibility that is a hallmark of FTC disclosure guidance.

I. The Commission’s Regulation of Endorsement and Testimonial Practices Is Robust and Effective

MPA believes that the Endorsement Guides have served the FTC’s consumer protection mission very well over the past 45 years, and that they will continue to do so in their current iteration as nonbinding industry guidance. Although the Commission’s Request for Comment does not overtly contemplate this, Commissioner Chopra encourages the FTC to “consider taking steps beyond the issuance of voluntary guidance,” such as codifying the Endorsement Guides into trade regulation rules that would subject violators to civil penalties and damages.⁵

MPA has been an active participant in numerous FTC consumer protection initiatives over the years.⁶ We appreciate Commissioner’s Chopra’s concerns, but respectfully observe that the Commission has undertaken significant efforts regarding the use of endorsements and testimonials in advertising beyond the issuance of the Endorsement Guides.

The Endorsement Guides, of course, do not exist in a vacuum and have not remained static. In 2017, the Commission addressed the most common questions asked about the Endorsement

³ See “The FTC’s Endorsement Guides: What People Are Asking,” (September 2017), *available at* <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

⁴ See 16 CFR § 255.0, *published at* 74 Fed. Reg. 53138 (October 15, 2009) (“Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.”).

⁵ See Statement of Commissioner Rohit Chopra (February 12, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf. (“Chopra Statement”).

⁶ See *generally* MPA Comments on the Negative Option Rule, Project No. P064202 (December 2, 2019) at 4-5 (summarizing activity in FTC BCP issues).

Guides, including questions pertaining to social media and influencer marketing.⁷ Moreover, the advertising principles covered by the Endorsement Guides and several of the issues identified in the Request for Comment regarding the impact of new technology on advertising practices are already addressed in complimentary guidance documents issued by the Commission. These include the Commission’s “Dot Com Disclosures” guidance,⁸ which was issued in the early 2000s and was updated in 2013 to address technological innovations like the use of smartphones, tablets, and applications.⁹ These also include both general business guidance on Internet advertising¹⁰ as well as the Commission’s 2015 guidance for native advertising practices¹¹ and its 2019 guidance for social media influencers.¹² MPA commends the FTC’s efforts to offer tailored guidance for advertisers, influencers, endorsers, and consumers. MPA likewise commends the FTC’s efforts to update its guidance in accordance with new trends and technology.

Beyond guidance, the Commission engages in direct outreach, for example when it sent out more than 90 letters to social media influencers in 2017 in order to educate them about the Endorsement Guides’ requirement to disclose material connections between the influencer and the brand they endorse.¹³ When sterner outreach is required, the Commission has issued warning letters to influencers and has alerted them that “[i]ndividual influencers who fail to make adequate disclosures about their connections to marketers are subject to legal enforcement action by the FTC.”¹⁴

As noted in the Request for Comment: “The Commission, however, can take action under the FTC Act if an endorsement or testimonial is inconsistent with the Guides,”¹⁵ and the Commission has done so. The Commission has backed up its guidance documents, policy statements, educational letters and warning letters with aggressive law enforcement against alleged endorsement-related misconduct. FTC enforcement in this space has been aggressive and vigorous. In one recent

⁷ See “The FTC’s Endorsement Guides: What People Are Asking,” (September 2017), n. 3, *supra*.

⁸ FED. TRADE COMM’N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING (May 2000), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internetadvertising/0005dotcomstaffreport.pdf>.

⁹ FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-onlineadvertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

¹⁰ FED. TRADE COMM’N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD (September 2000), available at <https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf>.

¹¹ FED. TRADE COMM’N, Native Advertising: A Guide for Businesses (Dec. 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

¹² FED. TRADE COMM’N, Disclosures 101 for Social Media Influencers (November 2019), available at https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

¹³ FED. TRADE COMM’N, *Press Release*, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (April 19, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

¹⁴ FED. TRADE COMM’N, *Press Release*, CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers (September 7, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>; *Press Release*, Tea Marketer Misled Consumers, Didn’t Adequately Disclose Payments to Well-Known Influencers, FTC Alleges (March 6, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments>.

¹⁵ Request for Comment, 85 Fed. Reg. 10104.

endorsement-related case, the FTC secured a stipulated judgment in federal court binding defendants to a suspended \$15 million judgment and requiring defendants to pay the Commission \$1 million.¹⁶ That case, along with other recent cases, also imposes stiff injunctive “fencing in” relief – including requiring defendant marketers to actively monitor their endorsers and ensure their endorsers’ compliance with the court order.¹⁷ The Commission has even secured a six-figure monetary remedy in an endorsement case brought administratively under Part 2 of the Commission’s rules.¹⁸

In sum, MPA believes that the Commission has taken significant steps “beyond the issuance of voluntary guidance” on endorsements and testimonials, and urges the Commission to avoid promulgating overly proscriptive or punitive measures. Codifying the Endorsement Guides as a formal rule, for example, would subject legitimate actors to substantial civil penalties (\$43,000 per violation) and could chill their content creation and information dissemination, thus harming consumers. We respectfully submit that this step is unnecessary and will not enhance the Commission’s consumer protection efforts, as the Commission’s Section 5 authority has proven to be adequate.

II. The FTC’s current review of the Endorsement Guides should reaffirm its previous findings as to professionally edited and curated media content.

Application of the Endorsement Guides posits the threshold question of whether the discussion of a product attribute or a consumer experience constitutes an “endorsement” under the Guides. When the Commission last substantively amended the Endorsement Guides, it explained that:

the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered “sponsored” by the advertiser and therefore an “advertising message.” In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an “endorsement” that is part of an overall marketing campaign?¹⁹

In its revised 2009 Guides, the Commission correctly recognized that the answer to this fundamental question depends on the nature of the advertising media at issue. “In general, under usual circumstances, *the Commission does not consider reviews published in traditional media (i.e., where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages.* Accordingly, such reviews are not “endorsements” within the meaning of the Guides. Under these circumstances, the Commission believes, knowing whether the media entity that published

¹⁶ See *FTC v. Teami, LLC et al., Stipulated Order*, No. 8:20-cv-518-T-33TGW (M.D. Fla. March 17, 2020).

¹⁷ *Id.*; see also *In re Creaxion Corp., Decision and Order*, FTC File No. 172 3066 (Jan. 31, 2019).

¹⁸ See *In re UrthBox, Inc., Decision and Order*, FTC File No. 172 3028 (May 14, 2019).

¹⁹ See 74 Fed. Reg. 53124, 53126 (October 15, 2009).

the review paid for the item in question would not affect the weight consumers give to the reviewer's statements.²⁰

MPA wholeheartedly agrees, and we believe that the Commission's analysis remains correct today. When the Commission last revised the Endorsement Guides, it distinguished "traditional" media (which MPA calls professionally curated media) from then-nascent nontraditional (and oftentimes consumer-created) media on which consumers might encounter product reviews of customer experiences, such as blogs and Internet discussion boards.²¹ What constitutes nontraditional media has evolved since 2009 – from streaming content on Twitch to viral videos on YouTube – and will continue to do so. The fundamental distinction between traditional media, with well-established and understood editorial standards and independence, and consumer-generated content remains the same, however.

This is so even as traditional magazine and newspaper content has become increasingly digitized and has traveled to social media platforms. Consumers may read a product review in a print edition magazine, online at the magazine's website, through the magazine's mobile application, or on a third-party social media platform. Wherever the content is accessed, consumers understand that the publisher exhibits independent editorial responsibility.

As mentioned above, MPA members have spent years honing credibility, objectivity, and trust with their readers. Consumers are comfortable with magazine media practices and transparency, and know that magazine publishers respect consumer expectations in support of our trusted first-party relationship. MPA urges the Commission to continue to recognize the independent editorial role of traditional media.

III. Affiliate Marketing is Generally Beneficial to Both Consumers and Media: Regulatory Restraint is Warranted

In its Request for Comment, the Commission notes that "[s]ome endorsers (including the authors of some product reviews) include affiliate links that can be used to purchase the products they are endorsing" and asks whether, and how, the Endorsement Guides should address the use of such links.²²

Indeed, magazine publishers have embraced significant technological innovation and diversified their revenue models by increasingly entering into affiliate relationships with advertisers or seller platforms and are placing links through which their readers may conveniently purchase products being reviewed or covered in a magazine article.

MPA believes it is at least arguable that eCommerce links in professionally curated media, including extended media platforms, need not disclose that the publisher received a commission on sales through the affiliate link. Commissions earned by magazine publishers from individual sales of products through such links are extremely modest across the board (although a helpful revenue stream in their totality), and do not affect a magazine brand's editorial independence or

²⁰ *See id.* at 53136 (emphasis added).

²¹ *See id.*

²² *See* 85 Fed. Reg. 10106.

credibility. Disclosure that publishers in some cases earn a commission on click-to-buy links is certainly unlikely to impact the weight or credibility of the editorial coverage or to affect a consumer's likelihood to purchase the product. Nevertheless, in light of the 2009 Endorsement Guides, magazine publishers do disclose if they may earn commission on eCommerce transactions. And, in light of the Commission's 2015 Native Advertising Guides, publishers who include branded content in their magazines make sure that readers can differentiate between advertising and editorial content. The guiding principle in all cases is to maintain credibility with our readers.

Affiliate or network marketing practices are addressed in detail in more recently issued FTC guidance that clarifies the 2009 Guides.²³ MPA believes this guidance is sufficient to protect consumers and ensure they are aware of material connections. MPA urges the Commission to ensure that any changes to the treatment of affiliate marketing disclosures in professionally curated media be limited so as to allow flexibility in the use and placement of such disclosures. This is especially important as technological innovation proceeds at a rapid pace.

Magazine media use of eCommerce links benefits consumers. Click-to-buy links are a significant convenience, and consumers actively seek out the curation of products and services by an authoritative, transparent source like a favorite magazine brand. After reading a positive product review from a trusted media source, the consumer can easily buy the desired item immediately without having to search for the item elsewhere.

At the same time, affiliate links also benefit magazine media by helping to finance the content that readers enjoy; this, in turn, allows publishers to keep magazine prices affordable, and helps defray expenses so that critical information offered on digital platforms (such as information related to the COVID pandemic) can be placed in front of paywalls. Affiliate links are a growing revenue source that supports and sustains journalism, and that compliments traditional publisher revenue streams such as subscriptions and advertising. Given the vital role that magazine media plays in disseminating news, cultural, scientific, educational, and informational content to consumers across the country, MPA asks that the Commission not interfere with traditional media's adoption of eCommerce activities.

IV. Flexibility Within the “Clear and Conspicuous” Framework is Appropriate

MPA believes that legal compliance and business flexibility are not mutually exclusive. Ensuring that magazine content does not mislead is both a legal requirement under Section 5 of the FTC Act *and* in magazine publishers' self-interest. Magazine publishers have no intention to undermine the trusted relationship between readers and their magazines.

As the magazine media industry expands platforms to meet consumers wherever they want our content, publishers need discretion to communicate with readers in a way that is tailored to the medium and in line with consumers' preferences. So long as necessary disclosures are clear and conspicuous (or “difficult to miss” – per the requirements of recent Commission orders in

²³ FED. TRADE COMM'N, THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (September 2017), available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides>.

endorsement cases), publishers need flexibility to determine content and placement, whether the disclosures are for affiliate links, or sponsored content, or something new entirely.

Such flexibility is a trademark of the Commission’s guidance on disclosures. The *Dot Com Disclosures* explain that “[t]here is no set formula for a clear and conspicuous disclosure ... Advertisers have the flexibility to be creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to consumers is not misleading.”²⁴ In fact, when promulgating the revised Endorsement Guides in 2009, the Commission elucidated this concept fittingly:

The Commission does not believe, however, that it needs to spell out the procedures that companies should put in place to monitor compliance with the principles set forth in the Guides; these are appropriate subjects for advertisers to determine for themselves, because they have the best knowledge of their business practices, and thus of the processes that would best fulfill their responsibilities.²⁵

Most recently, Commissioner Wilson expressed this sentiment in her dissenting statement to the Commission’s review of the Energy Labeling Rule when she wrote that “the Commission can provide guidance on labelling requirements without dictating such minutiae. Freeing businesses from unnecessarily prescriptive requirements benefits consumers.”²⁶ MPA agrees with Commissioner Wilson’s sentiment and believes that new guidance or the promulgation of a formal rule may handcuff lawful business conduct.

Conclusion

We ask that you keep magazine publishers’ business model in mind and the well-founded historical exception for traditional media’s independent editorial responsibility as you review the Endorsement Guides. The enduring relationship between the magazine publishing industry and readers is built on the fulfillment of consumer expectations and trust. Just as magazine media has evolved with changes in technology and consumer expectations, the Commission’s approach to consumer protection principles for advertising practices should likewise prioritize adaptability.

Further, we firmly believe that publishers must be afforded latitude to communicate with their readers in a way that is tailored to the longstanding expectation of and desire by the reader to receive independent editorial content as part of the trusted first-party relationship with magazine media brands. The Commission should not pursue promulgation of a new Rule that micromanages lawful business conduct and poses no additional efficacy for the Commission’s enforcement

²⁴ See “Dot Com Disclosures,” fn. 7 *supra*.

²⁵ Final Rule; Notice of adoption of revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124-53143 (October 15, 2009) Accessed at: <https://www.govinfo.gov/content/pkg/FR-2009-10-15/pdf/E9-24646.pdf#page=16>.

²⁶ See Dissenting Statement of Commissioner Christine S. Wilson, *Energy Labeling Rule*, Matter No. R611004 (Oct. 22, 2019).

against individual transgressors. Overly prescriptive rules will not enhance business compliance, nor will they benefit consumers.

MPA appreciates the opportunity to share these comments with the Commission on behalf of our membership. As in the past, we stand ready to assist the Commission as it works to protect consumers and guide businesses. If you have any questions about these comments or any other aspects of MPA, please feel free to contact us.

Sincerely,

Rita Cohen
Senior Vice President, Legislative and Regulatory Policy

Emily Emery
Director of Digital Policy