

June 22, 2020

## By Electronic Mail

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

## Endorsement Guides, P204500

The Association of National Advertisers (“ANA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for public comments on the regulatory review of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”).<sup>1</sup>

ANA’s mission is to drive growth for marketing professionals, for brands and businesses, and for the industry. Growth is foundational for all participants in the advertising and marketing ecosystem. ANA’s membership consists of more than 1,600 domestic and international companies, including over 1,000 client-side marketers and nonprofit fundraisers and 600 marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). Collectively, ANA member companies represent 20,000 brands, engage 50,000 industry professionals, and invest more than \$400 billion in marketing and advertising annually.

The Guides were originally promulgated forty years ago in connection with an advertising and media landscape that was, in many ways, very different than advertising and media in 2020. The purpose of the Guides – as expressed both in 1980 and the 2009 revisions – has been to provide insight and parameters for companies to comply with the basic principles set forth in Section 5 of the FTC Act: the prevention of unfair or deceptive acts and practices. As the FTC has sought to ensure that the Guides cover the ever-changing landscape of digital and social media advertising, the Guides continue to provide useful direction for complying with the FTC Act.

The success and utility of the Guides can be attributed, at least in part, to the Guides’ encapsulation of two critical manifestations of deception and unfairness as construed by the Commission under the FTC Act. First, the Guides capture the principle that advertisers must have adequate support for claims made about a product or service when the claim is made. As set forth in Section 255.1(d) of the Guides, advertisers are subject to liability for unsubstantiated claims made through endorsements. In other words, an advertiser cannot present in advertising an endorser who makes claims about the advertiser’s product or

---

<sup>1</sup> See Request for Public Comment, 85 Fed. Reg. 10104 (Fed. Trade Comm’n Feb. 21, 2020) (“Comment Request”).

service if the advertiser itself could not lawfully make such claims. Second, the Guides have helped to explain to advertisers how claims can mislead, even if factually true, because of an implied augmentation of authority. In a sense, the authority that comes from an endorser is akin to an “establishment claim” as described by the Commission:

Many ads contain express or implied statements regarding the amount of support the advertiser has for the product claim. When the substantiation claim is express (*e.g.*, “tests prove,” “doctors recommend,” and “studies show”), the Commission expects the firm to have at least the advertised level of substantiation. Of course, an ad may imply more substantiation than it expressly claims or may imply to consumers that the firm has a certain type of support; in such cases, the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers.<sup>2</sup>

Similar to an establishment claim, an endorsement used in advertising carries an implied claim of heightened support. Not only may the endorser be relaying facts or claims about the advertiser’s product or service, but the advertiser, when presenting the endorsement in advertising, also is implicitly communicating a higher level of authority. The consumer does not need to simply rely on the advertiser’s word (which must be substantiated by a “reasonable basis”), but the consumer is also being presented with the word of a customer, an expert, a celebrity, or a third-party organization which may be considered more reliable or trustworthy than the advertiser’s message itself when it comes to assessing the qualities of the advertiser’s product or service.

For forty years, the Guides have been a successful tool enabling consumers to gauge the truthfulness of advertising that comes from the voice of a third party, including the augmented authority attributed to that voice. The utility of the Guides remains high.

Yet, in assessing the weight consumers can reasonably give to an endorsement, particularly in relation to the connections the endorser might have with the advertiser, the Guides have become strained by the speed with which media has changed. Even when enacted, the Guides recognized that there are different types of media in which endorsements and testimonials may appear and that consumer impressions about whether an endorsement or testimonial is being made will be impacted by the medium.<sup>3</sup> Until the 2009 revisions, the Guides largely assessed consumer communications through the medium of television. The updates made to the Guides in 2009 assumed that the world of digital and social media would closely mirror that of television. However, in 2009, the Commission and the public commenters were largely unaware of how important and ubiquitous the influencer industry would become. Influencer marketing

---

<sup>2</sup> See *FTC Policy Statement Regarding Advertising Substantiation* (Nov. 23, 1984) appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

<sup>3</sup> In 1972, the FTC published for public comment proposed *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 37 Fed. Reg. 25548 (1972). In May 1975, the FTC promulgated three sections of the 1972 proposal as final guidelines (16 C.F.R. §§ 255.0, 255.3, and 255.4) and republished three others, in modified form, for additional public comment. 40 Fed. Reg. 22127 (1975); 40 Fed. Reg. 22146 (1975). In January 1980, the FTC promulgated three new sections as final guidelines (16 C.F.R. §§ 255.1, 255.2, and 255.5) and modified one example to one of the final guidelines adopted in May 1975 (16 C.F.R. § 255.0 Example 4). 45 Fed. Reg. 3870 (1980).

did not just appear on the scene. It was present in a relatively rudimentary form in 2009, and the FTC addressed it preliminarily in at least some of its revised examples included in the Guides.<sup>4</sup>

While instructive in many ways, the current Guides do not adequately address current social media realities and related consumer behavior. Instead, they provide several outdated examples that are difficult for many to apply, particularly in the current media landscape. In addition, the current Guides do not reflect influencer marketing as a central feature of modern advertising. Consumers now experience social media more than they do television advertisements,<sup>5</sup> so the FTC must shift the perspective of the Guides and truly consider how consumers use, view, and absorb social media content today.

By 2020, influencer marketing has become one of the most popular forms of advertising and, for many companies, the largest marketing expenditure.<sup>6</sup> Most advertising agencies and brands dedicate entire teams to social media and influencer marketing.<sup>7</sup> The 2009 version of the Guides appears to have been a transition from the world where television dominated to one in which endorsements appearing in “new media” might be jarring or unfamiliar to consumers. In 2009, ANA expressed doubts as to whether the new examples were necessary due to the ongoing evolution of the industry’s self-regulatory efforts.<sup>8</sup> ANA is now even more confident that self-regulation by many of the major social media platforms, as well as enforcement by the National Advertising Division of the BBB National Programs, Inc. (“NAD”), is a viable solution – and such measures are doing an excellent job of developing disclosure tools and addressing new challenges in a fluid and responsive manner. To be sure, enforcement by the FTC has been instructive and a helpful impetus toward self-regulation.<sup>9</sup> However, at this juncture, ANA believes that the FTC should exercise restraint in trying to “update” the Guides. As the past has shown, creating

---

<sup>4</sup> See, e.g., 16 C.F.R. § 255.5 examples 7-9.

<sup>5</sup> See Amy He, *Average US Time Spent with Mobile in 2019 Has Increased*, EMARKETER, <https://www.emarketer.com/content/average-us-time-spent-with-mobile-in-2019-has-increased> (June 4, 2019) (“For the first time ever, US consumers will spend more time using their mobile devices than watching TV, with smartphone use dominating that time spent.”).

<sup>6</sup> See Georgia Wells, Jeff Horwitz, *Instagram’s Content Factories Are Huge—And That’s a Problem for Facebook*, WALL STREET JOURNAL, <https://www.wsj.com/articles/instagrams-content-factories-are-hugeand-a-growing-problem-for-facebook-11569510271> (last updated Sept. 26, 2019) (data indicates that advertisers spent approximately \$373 million on influencer marketing in the first quarter of 2019 – approximately \$265 million of that was spent on influencer content posted to Instagram, an increase in spend of 62% from the same period a year earlier).

<sup>7</sup> See, e.g., Alex York, *How to Build a Dynamic Social Media Team*, SPROUT SOCIAL, <https://sproutsocial.com/insights/social-media-team/> (Feb. 1, 2016) (providing advice on brands creating social media teams and related social media presence).

<sup>8</sup> ANA filed a comment in 2009 on the FTC’s proposed revisions to the Endorsement Guides (*available at* <https://www.ana.net/content/show/id/1804>) (“By introducing examples that raise more questions than they answer, the FTC creates increased uncertainty and is interfering with the development of flexible and organic self-regulatory approaches that are much more likely to work with the emerging technologies and media. Therefore, the FTC should not include these new examples at this time.”).

<sup>9</sup> The FTC often provides additional insight into its own interpretation of Section 5 of the Act and how the Guides relate to current forms of social media and endorsement content. For example, the industry better understood the FTC’s expectation of disclosures in online video endorsements – for both in-video and in-caption disclosures – following the FTC’s consent order in *In re Warner Bros. Home Entertainment, Inc.* See FTC No. 152 3034, *available at* <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter> (Nov. 21, 2016).

new examples that touch on some of the newest trends in marketing is not likely to stay relevant for the next ten years.

Moreover, ANA urges the FTC to embrace the underlying purpose of its guides – to help advertisers understand how the Commission interprets Section 5 of the FTC Act in this area. The FTC should avoid simply “codifying” the array of FAQs and informal guidance documents it has published over the last several years.<sup>10</sup> To the extent the FTC updates the Guides, it should focus on (1) the role of self-regulation, particularly the role of social media platforms that currently offer various disclosure tools that conform to the individual platform; (2) the role of the NAD, and particularly its new Fast-Track SWIFT process that is tailor-made for enforcement in the area of testimonials and endorsements, as well as related areas such as embedded advertising and customer reviews; and (3) “materiality” in relation to the ubiquity of influencer marketing and the core inquiry for purposes of Section 5 enforcement as to whether consumers would actually place materially less weight on a claim if they were aware of some *de minimis* consideration flowing to the endorser. Finally, in addressing the FTC’s inquiry into incentivized reviews, ANA especially urges the FTC to avoid sweeping into the Guides contextual customer marketing in the form of targeted invitations to post reviews as a form of an undisclosed material connection.

#### **I. FTC SHOULD PROVIDE GUIDANCE AS TO HOW COMPLIANCE WITH PLATFORM TOOLS REDUCES ADVERTISER LIABILITY**

Social media platform policies address endorsements and testimonials as well as the need to ensure users that such platforms are distributing truthful and non-misleading content.<sup>11</sup> Since their platform services are frequently used to make endorsements and testimonials and are critical to the influencer marketing industry, social media platforms are increasingly developing tools to allow endorsers to disclose their material connection to advertisers in a clear, conspicuous, and customized manner.

Many social media platforms offer tools that allow users to disclose material connections in a way that is uniquely tailored and optimized for the specific platform and its features. In general, such tools can provide an efficient way for endorsers to disclose material connections in a uniform manner.<sup>12</sup> Users of a particular social media platform become accustomed to seeing disclosures in the same place with the same language, and thereby they better understand when a material connection exists between a brand and

---

<sup>10</sup> For example, in September 2017, the FTC released FAQs regarding the Guides in its “The FTC’s Endorsement Guides: What People Are Asking” (<https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>). In November 2019, the FTC released informal guidelines for influencers in its *Disclosures 101 for Social Media Influencers*, available at [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf).

<sup>11</sup> For example, Instagram’s Community Guidelines restrict users from “post[ing] content that engages in, promotes, encourages, facilitates, or admits to the offering, solicitation or trade of fake and misleading user reviews or ratings.” *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119> (last visited June 5, 2020).

<sup>12</sup> For example, Facebook provides the “branded handshake” tool, Instagram provides the “Paid partnership” tool for static posts and Stories, and TikTok includes a “sponsored” tag within the post caption. The tools appear consistently throughout content posted on the platform so users learn to recognize the tag or badge to identify sponsored content. *See, e.g.*, Todd Spangler, *Instagram Will Add ‘Paid Partnership’ Tag to Sponsored Posts, After FTC’s Warnings to Celebrity Users*, VARIETY, <https://variety.com/2017/digital/news/instagram-paid-partnership-tag-sponsored-ftc-celebrity-warning-1202466310/> (June 14, 2017) (“Partnerships between community creators and businesses are an important part of the Instagram experience, and a healthy community should be open and consistent about paid partnerships . . .”).

endorser. Social media platforms have largely embraced this idea, and disclosure tools are quickly becoming ubiquitous in influencer content. The tools allow for consistent, simple “badges” or statements that communicate a connection between the influencer and a particular brand without impacting the integrity or authenticity of the influencer’s content. This benefits all involved – the platform will see a steady rate of use by influencers (thereby keeping the number of platform users up), influencers will see higher engagement with their posts because they seem more genuine to users (noting that engagement statistics such as Likes, shares, etc., largely impact an influencer’s ability to gain more endorsement deals), and advertisers will obtain better return on their influencer marketing investment if more customers are engaging with the content.

The disclosures need not be the same across all social media platforms. Platforms differ in their layouts, functions, features, the content that is distributed on the platform, and the types of endorsements posted on the platform.<sup>13</sup> Although the disclosures need not be the same, the FTC should ensure a general trend across-the-board so that disclosure language and tagging is as consistent as possible. Also, the placement and prominence of the disclosure should be consistent on each individual platform and platforms should take steps to ensure that new users recognize and understand the meaning of disclosures.<sup>14</sup>

Platforms can offer endorsers a variety of different disclosure messages to account for different brand relationships (*e.g.*, “paid partnership with,” “sponsored by,” “gifted by”). For example, Instagram offers a “Paid partnership” tool, whereby the language appears in bold type directly beneath the username and above the in-feed photo or video.<sup>15</sup> It is the second aspect of a post that a user sees when scrolling his or her feed.<sup>16</sup> Facebook offers a “branded handshake” tool whereby users can add “with [COMPANY]” next to his or her name and above his or her content.<sup>17</sup> The FTC should provide detailed guidance for social media platforms, including Instagram, Facebook, Snapchat, Twitter, and TikTok, so these platforms better understand (i) whether their disclosure tools, if any, comply with the Guides; (ii) how the platform should change the placement or language of its disclosure tool to comply with the Guides (if applicable); or (iii) if the platform does not currently offer a tool, the parameters to follow when creating a tool that will generate disclosures in compliance with the Guides.

ANA believes that the use of social media platforms tools will increase compliance, particularly if the FTC provides guidance through the Guides that offers a “safe harbor” for advertisers. With such an incentive directed at advertisers, disclosure tools may lead to increased disclosures, including in-video

---

<sup>13</sup> This applies both to the tools offered by each social media platform as well as the specific disclosures offered by the platform. The placement of a disclosure in a TikTok video will need to differ from a disclosure in a Facebook update. Further, disclosures offered should not be one-size-fits-all since there are several ways a brand may engage an influencer to endorse its product or service that do not involve the exchange of money.

<sup>14</sup> For example, new social media platform users are often given a “tour” of the platform and its features after creating a new account. These new tours should include highlighting the content disclosures in a sample post with a brief explanation that such “tag,” “badge,” etc., indicates that the individual has a business relationship with the brand and was provided an incentive to produce such post.

<sup>15</sup> *Branded Content on Instagram*, INSTAGRAM, <https://help.instagram.com/116947042301556> (last visited June 19, 2020).

<sup>16</sup> Users first see the individual’s profile photograph and username, and the disclosure will appear directly underneath, directly above the photo(s) or video(s). It follows that users become immediately aware from the placement of the disclosure that what they are about to see is sponsored in some way by the identified advertiser.

<sup>17</sup> *Branded Content*, FACEBOOK, <https://www.facebook.com/facebookmedia/solutions/branded-content> (last visited June 19, 2020).

and livestream endorsements – an increasingly popular form of online endorsements that often lack sufficient disclosures. The FTC’s guidance to platforms regarding disclosure tools will likely increase influencer compliance because influencers are themselves experts on platform features and functionality. Influencers are much more likely to understand which tools they must use on a social media platform to comply with disclosure requirements as experts on these platforms than by trying to interpret new examples in the Guides. For example, the FTC’s current guidance on in-video or in-stream disclosures creates a cumbersome requirement that is confusing and less authentic to both the endorsers and consumers. While the concept of regularly disclosing during the course of a video makes sense, the practical execution of this is difficult for advertisers to articulate to their influencers and challenging for influencers to implement in their content. Alternatively, the ease with which an endorser can attach a disclosure by utilizing a platform’s tool promotes compliance. If endorsers can simply check a box when posting on social media to add a disclosure to his or her content, this would eliminate the need for overly complex contractual requirements, avoid misinterpretation of the Guides by influencers not trained in the law, and increase transparency. The result would likely be uniform disclosures with widespread use across various social media platforms.

Allowing platforms to create workable and effective disclosure tools is how the FTC addressed endorsements and testimonials on television, and over time television networks became aware of how to ensure consumers knew that content being shown was an endorsement or testimonial. Similar to the networks clearly communicating an endorsement to viewers, social media platforms understand how users view and absorb content and are in the best position to develop tools to clearly communicate material connection disclosures that capture user attention without impacting the effectiveness of the endorsement.

Promotion of self-regulation through social media platforms, encouraged and guided by the FTC, would be particularly effective in the area of aggregated reviews. Similar to social media platforms, third-party review sites that aggregate product or service reviews for brands, including Amazon and Sephora, have tools to disclose such incentives. For example, similar to Instagram’s “Paid partnership” disclosure tool, review platform BazaarVoice provides a tool to “tag” reviews as incentivized.<sup>18</sup> The tags can be modified and appear opposite the user name and rating, directly above the review itself. Platforms offer similar tools to disclose alongside the overall ratings that certain reviews (*e.g.*, numbers or percentages) were incentivized, thus providing clear and conspicuous notice to consumers that there is a material connection between some reviewers and the brand.<sup>19</sup> As with social media platforms, the FTC should provide input to such review platforms on how to ensure such disclosures comply with the Guides.

Clear and conspicuous disclosure is a performance standard.<sup>20</sup> As the Commission well knows, this means that whether disclosure effectively communicates necessary information is the ultimate question. Integration of guidance for media platforms within the Guides regarding the development and enforcement of customized platform tools for disclosure would promote greater compliance and more self-regulation.

---

<sup>18</sup> *Badges and Incentivized Reviews*, BAZAARVOICE, [https://knowledge.bazaarvoice.com/wp-content/conversations/en\\_US/Display/badges.html](https://knowledge.bazaarvoice.com/wp-content/conversations/en_US/Display/badges.html) (last visited June 5, 2020).

<sup>19</sup> For example, BazaarVoice adds a gift icon with the words “Received free product” next to the reviewer’s username. *Id.*

<sup>20</sup> See Statement of Lesley Fair, *Full Disclosure*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/full-disclosure> (Sept. 23, 2014).

**II. FTC ENFORCEMENT OF SECTION 5 IN THE AREA OF ENDORSEMENTS, REVIEWS, AND UNDISCLOSED MATERIAL CONNECTIONS, COMBINED WITH SUPPORT FOR SELF-REGULATION, WILL ENHANCE COMPLIANCE MORE THAN ADDITIONAL EXAMPLES OR REVISIONS TO THE GUIDES**

The FTC and the NAD have been consistent in their aggressive enforcement related to actions covered by the Guides. ANA believes that this consistent treatment has resulted in widespread compliance with the Guides by the advertising industry. Advertisers understand the need to ensure proper disclosure of material connections. Accordingly, the FTC's focus in updating the Guides should be on (i) clarifying *when* disclosures are necessary, and (ii) fostering an increased comfort with using platform tools to effectively make such disclosures with fewer gray areas in language and terminology.

Both advertisers and influencers take compliance with the Guides seriously, and strong self-regulation supported by targeted FTC enforcement is beneficial for the growth of the influencer industry. Advertisers understand the risk to their business and reputation for partnering with influencers who do not adequately disclose their material connections. Similarly, brand partnerships are often a substantial and, in some cases, the only, source of income for professional influencers. Were an influencer to be determined to be subject to an FTC action relating to his or her endorsement activities, the influencer's future brand partnerships would be in jeopardy.<sup>21</sup> Thus, brands and influencers alike are incentivized to comply with the Guides.

An excellent example of where the FTC's enforcement activities has been instrumental in protecting the multi-billion dollar influencer marketing industry is the *Devumi* case.<sup>22</sup> In that case, the Commission took action against the defendants for selling fake indicators of influence (*e.g.*, fake followers, fake "likes") and posting fake reviews. ANA supports the FTC's commitment to protecting consumers while bolstering the burgeoning influencer marketing industry, thereby promoting growth and competition.

Yet, the FTC should couple its enforcement activities with a constant and concerted push toward self-regulation. As currently drafted, the Guides effectively capture the important underlying principles that relate to endorsements and testimonials. The FTC should not use this review process as a means of codifying its various business documents related to endorsement and influencers. Since its last update to the Guides in 2009, the FTC has released guidance on how to comply with the Guides in the ever-changing social media landscape through formal documents (*e.g.*, The FTC's Endorsement Guides: What People Are Asking).<sup>23</sup> The specific and sometimes didactic guardrails set forth in those materials are often

---

<sup>21</sup> A prime example of the precipitous career impact of even one incident is the loss of several endorsement deals by YouTube influencer PewDiePie after he made anti-Semitic comments. See Aja Romano, *YouTube's most popular user amplified anti-Semitic rhetoric. Again.*, VOX, <https://www.vox.com/2018/12/13/18136253/pewdiepie-vs-tseries-links-to-white-supremacist-alt-right-redpill> (Dec. 13, 2018). Another YouTube influencer, Logan Paul, similarly lost large endorsement deals following his video that showed an individual having committed suicide. See Colin Dwyer, *YouTube Limits Relationship With Logan Paul After His Video Depicting Dead Body*, NPR, <https://www.npr.org/sections/thetwo-way/2018/01/11/577293205/youtube-limits-relationship-with-logan-paul-after-his-video-depicting-dead-body> (Jan. 11, 2018).

<sup>22</sup> *FTC v. Devumi, LLC*, FTC Case No. 9:19cv81419 (S.D. Fla. Oct. 18, 2019).

<sup>23</sup> See *The FTC's Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (Sept. 2017); *Disclosures 101 for Social Media Influencers*, FEDERAL TRADE COMMISSION, available at <https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-5081.pdf> (Nov. 2019).

inapplicable to a particular platform or situation. Rather than encouraging self-regulation, those various articulations of specific standards confuse the public, influencers, and companies, and consequently they create tension between the self-regulatory efforts of responsible companies and the Guides. Companies seeking to comply with the performance standards required under the FTC Act can find themselves at odds with very specific yet changing prescriptions in ancillary FTC guidance documents even though they may be effectively communicating with their customers. Those prescriptions can take on a “rule-like” character that frustrates self-regulatory efforts.

Self-regulation enables the advertising industry to adopt the principles set forth in the Guides in a manner that works in every possible scenario. That is why the Guides have been so effective for so many years. The NAD has enforced the Guides over the last decade numerous times.<sup>24</sup> In most of those cases, the NAD has taken a nuanced approach to the situation before it. However, there are times when the NAD takes a rigid approach especially with regard to examples or FAQs promulgated by the FTC.<sup>25</sup> The

---

<sup>24</sup> See, e.g., Pyle Audio, Inc. (NutriChef Vacuum Sealers), Report #6265, *NAD/CARU Case Reports* (Aug. 2019) (recommending the advertiser (Pyle) take reasonable measures to discontinue or modify currently posted online reviews for NutriChef Vacuum Sealer to include a clear and conspicuous disclosure that the reviews are incentivized, and that Pyle take reasonable measures to disclose the material connection between the reviewer and Pyle should it offer incentives to product purchasers in exchange for posting reviews); KARDASHIAN, Kourtney, et. al. (FitTea), Report #6046, *NAD/CARU Case Reports* (Jan. 2017) (recommending that posts by paid endorsers about the FitTea product, including those by the Kardashian sisters, include a disclosure of the material connection); DAISY BRANDS, INC. (Daisy Brand Sour Cream Products), Report #3591, *NAD/CARU Case Reports* (Oct. 1999) (“NAD concluded . . . the advertiser’s label needs some further clarifying language in order to avoid the potential for consumer confusion, and recommended that the labeling be modified to either reflect that payment was made to ATI or clearly communicate that the Gold Medal award is, in fact, based on the evaluation of professional tasters (*i.e.*, experts, who consumers are likely to understand, receive payment for their opinions)”).

<sup>25</sup> See Pyle Audio, Inc. (NutriChef Vacuum Sealers), Report #6265 at 4, where the NAD purports to articulate the FTC’s position that “[i]ncentivized consumer reviews may be considered endorsements that require the disclosure of any material connection not reasonably anticipated by the consumer” by citing an example appended to Section 255.0 of the Guides added in 2009, which confuses the issue of material connections with the identification of whether a statement is in fact an endorsement made in advertising. This is a prime example of how well-meaning examples promulgated by the FTC in the hope of “modernizing” the Guides can inadvertently lead to incoherence within the self-regulatory process. Example 8 appended to Section 255.0 in 2009 introduced the “new media” idea of “mommy blogging” to describe that a consumer’s posting about the positive efficacy of dog food would not be deemed an endorsement. The three-paragraph example later supposes that if the same consumer was part of a network marketing program (not necessarily online) pursuant to which she regularly receives products to review, then the “positive” review would be deemed an endorsement. The FTC’s example creates confusion by adding to Example 8 the fact that the consumer was given a “free bag of the new dog food through the program.” Because of this extraneous fact from the FTC (*i.e.*, the infusion of the “free bag”), the NAD erroneously interpreted this example as standing for the proposition that a disclosure of a material connection had to be disclosed. However, there is no clear indication in the example or anywhere in Section 255.0 of the Guides that this – *i.e.*, the need to disclose the disclosure of a material connection – would be the FTC’s conclusion. This example is problematic in other ways, too, because it fails to identify the principles that are underlying the outcome. Section 255.0 of the Guides was meant to communicate that advertisers who present an endorsement must ensure that the endorser’s views are in fact her honestly held beliefs, findings, and experiences. In Example 8, the FTC communicates that a blogger who posts something about the efficacy of dog food she bought and ostensibly is reflecting her own opinion and observations might be positive or negative, accurate or inaccurate, true or false, but the statement would not be actionable against anyone under Section 5 of the FTC Act. The FTC adds a free-trial coupon to this example (although it is not clear whether the coupon was paid for by the manufacturer (likely) or the grocery store (unlikely)), and the FTC comes out the same way – that the post is not an endorsement actionable under Section 5 of the FTC Act. Then, in paragraph 3, the FTC introduces the idea of a “network marketing program.” Without any facts about what that program is, who sponsors it, what the terms of it are, the FTC breezily concludes that the very same statement (which now

importance of this dynamic is even more important now because the NAD has introduced its Fast-Track SWIFT process.<sup>26</sup> Under this process, a challenger can bring an action on a single well-defined claim made by an advertiser and obtain a recommendation within about twenty business days. The NAD has made it clear that the type of cases it will look for are instances where advertisers have failed to disclose material connections with regard to reviews, native advertising, or testimonials and endorsements.<sup>27</sup> Given the speed with which these cases will proceed, the NAD will likely be applying a much less nuanced analysis and will be relying on the Guides as the basis for recommending discontinuation on an expedited basis. To foster self-regulation and avoid an overregulation scheme that might impede competition and potentially harm consumers, the FTC should be careful not to revise the Guides in a manner that mandates certain words or certain disclosures in certain places. Given the constantly changing landscape of social media and similar forms of connectivity, the legacy and utility of the Guides requires a great deal of flexibility.

The FTC specifically asked about whether new attention should be placed on children within the Guides. ANA urges the FTC to avoid the temptation to infuse special rules for children's advertising into the Guides. The Guides address core principles of deception and unfairness, including substantiation of claims and the disclosure of material information. The presence of children on social media platforms, most of which are intended for general audiences, not children, is the subject matter of other FTC inquiries.<sup>28</sup> Thus, the Guides are an improper place to create special rules regarding children. Children will always require special attention, and that has been one of the primary pillars of the guidance documents promulgated and enforced by the Children's Advertising Review Unit ("CARU") of the BBB National Programs. CARU has long focused on the blurring effects of media directed to children. Endorsements and testimonials are thoroughly treated in those guidance documents and CARU is attuned to the special power an endorsement has on someone such as a child who is particularly susceptible to suggestion.<sup>29</sup> In fact, given the mission of CARU and the scope of its activity, CARU's self-regulatory rules and procedures likely go beyond those imposed by the FTC. Delving into the area of children in the

---

the FTC characterizes as "positive") is potentially actionable under Section 5 of the FTC Act. There is no explanation why this marketing program should be deemed to be advertising by the dog food manufacturer or whether the manufacturer/advertiser was involved. Yet, the FTC says that her statement is now an endorsement. The NAD might be excused for its mischaracterization of the example because of the example's lack of specificity, its failure to explain the advertising principles at play, and its misplacement within § 255.0. If the FTC meant to make this example relevant to the question of whether participation in a "network marketing program" is a material connection that must be disclosed in connection with an endorsement, it should have placed it in § 255.5 and provided specific details about the factors that make the advertiser (whoever that might be) responsible for reviews posted in connection with such a "network marketing program." Ill-conceived examples that are meant to "update" the Guides by simply infusing "new media" concepts like "blogs" and "network marketing programs" and by failing to tie them to the underlying Section 5 principles at play do a disservice to industry and to the efforts of the self-regulatory system.

<sup>26</sup> See *National Advertising Division Fast-Track SWIFT*, NAD, <https://bbbprograms.org/programs/all-programs/NAD-Fast-Track-SWIFT> (last visited June 7, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> This is captured by the FTC's review of COPPA from 2019. See *New block on the kids? FTC announces COPPA review and workshop*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/new-block-kids-ftc-announces-coppa-review-workshop> (July 17, 2019).

<sup>29</sup> See *Self-Regulatory Program for Children's Advertising*, CARU, available at <https://www.ascreviews.org/wp-content/uploads/2012/04/Self-Regulatory-Program-for-Childrens-Advertising-Revised-2014-.pdf> (providing in-depth guidance on material connections, endorsements, and the blurring of advertising and editorial/program content).

context of the Guides would be a distraction for the Commission and would detract from, and diminish the importance of, the self-regulatory efforts already in place through CARU.

### III. IN CONTEMPLATING CHANGES TO THE GUIDES, THE FTC SHOULD REVIEW AND CLARIFY “MATERIALITY” OF CONNECTIONS

Materiality is an essential component of enforcement authority under Section 5 of the FTC Act. In fact, materiality is one component of the three-part test to determine whether a claim is deceptive.<sup>30</sup> A representation, omission, or practice is “material” if it is likely to impact a consumer’s decision regarding a product or service.<sup>31</sup> Examples of material representations, omissions, and practices include costs, benefits, or restrictions or availability about a product or service.<sup>32</sup> These impact consumer choice, and injury occurs where the consumer would have chosen differently about a product or service *but for* the deception.<sup>33</sup> Materiality is thus key to finding potential consumer injury – the basis for FTC enforcement under Section 5.<sup>34</sup>

Though essential, materiality as a feature of the analysis often has not been applied by the FTC, especially in the context of “material connections.”<sup>35</sup> The FTC should clarify that not every “connection” is “material.” The initial purpose of the disclosure requirements in the Guides was to make clear to consumers when there is a “connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.”<sup>36</sup> However, since releasing the Guides, FTC action and guidance on disclosures has blurred the line between what is and is not material.<sup>37</sup>

---

<sup>30</sup> According to the FTC, determining whether a representation, omission, or practice is “deceptive” is based on the following factors: (1) the representation, omission, or practice must mislead or be likely to mislead the consumer; (2) the consumer’s interpretation of the representation, omission, or practice must be reasonable under the circumstances; and (3) the misleading representation, omission, or practice must be material. *See FTC Policy Statement on Deception* (Oct. 14, 1983), *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>31</sup> *See American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff’d*, 695 F.2d 681 (3d Cir. 1982) (“A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer’s decision to purchase the product.”).

<sup>32</sup> *See FTC Policy Statement on Deception* (October 14, 1983), *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For example, in its *Disclosures 101 for Social Media Influencers* (available at [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf)), FTC guidance further minimizes the materiality aspect of connections between brands and influencers. When explaining the circumstances that require disclosure, the FTC instructs influencers to “disclose the relationship *if you got anything of value* to mention a product,” implying that *anything* from a brand would trigger disclosure. The document also states that disclosure is required if a brand provides the influencer with “other perks” to mention a product. Importantly, none of this guidance explains to the influencer that these requirements only apply where the *value* or *perks* are *material*. As a result, anyone reading this guidance would believe that disclosures are required in all instances where *any* connection exists between the brand and influencer, which conflicts with the materiality requirement.

<sup>36</sup> 16 C.F.R. § 255.5.

<sup>37</sup> For example, in its *The FTC’s Endorsement Guides: What People Are Asking*, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>, the FTC provides feedback that very nominal incentives could trigger disclosure requirements. See excerpt below:

Advertisers fear that nearly any minor activity with an endorser requires a disclosure, which contradicts the materiality threshold at the root of the Guides. The FTC should therefore reaffirm materiality as a key factor when requiring disclosures and make clear in the Guides that not every relationship between an endorser and advertiser constitutes a material connection.

In particular, *de minimis*, incidental consideration likely lacks materiality. With proper guidance from the FTC, advertisers and endorsers will understand when something is of truly *de minimis* value and therefore disclosure is not required. The FTC's examples about disclosing a connection where a free product is exchanged often include products of high value (*e.g.*, Example 7 in Section 255.5, where the endorser receives a videogame system; Example 9 in Section 255.5, where the endorser receives concert tickets and electronics). In many instances, there is no true business relationship between the brand and the endorser. Brands often "seed" free product to endorsers or "friends" of the brand, often to dozens or hundreds of individuals. The recipient is not required to post about the product. In addition to seeding product, brands often seed offers, such as nominal coupons (*e.g.*, "\$5 off your next purchase") to endorsers. The brand does not require the endorser to post about the coupon or the product he or she uses the coupon to purchase. Some brands cannot seed their product (or seeding would be too expensive), but instead distribute corporate promotional products, apparel, and event access as a way to "get the word out." In these examples, the connection between the endorser and brand is arguably so *de minimis* that disclosure should not be required. The FTC should clarify these distinctions in the Guides.

Sweepstakes entries and other similar incentives may also be areas where the FTC needs to reassess whether it has properly addressed materiality. In some instances, such as the case of *AmeriFreight*<sup>38</sup>, a chance to win a prize *drives the content of the review*. ANA is not suggesting that there would never be situations where the prize offer is so great in value that a reasonable person might consider the review incentivized by that offer to be material. However, to assume that every request that might be incentivized with something as potentially valueless as a chance to win a nominal prize constitutes a *material* connection appears to force speech unnecessarily.<sup>39</sup> To address this, the FTC should revise the Guides to

---

Also, even if getting one free item that's not very valuable doesn't affect your credibility, continually getting free stuff from an advertiser or multiple advertisers could suggest you expect future benefits from positive reviews. If a blogger or other endorser has a relationship with a marketer or a network that sends freebies in the hope of positive reviews, it's best to let readers know about the free stuff.

*Even an incentive with no financial value might affect the credibility of an endorsement and would need to be disclosed.* The Guides give the example of a restaurant patron being offered the opportunity to appear in television advertising before giving his opinion about a product. Because the chance to appear in a TV ad could sway what someone says that incentive should be disclosed.

(emphasis added)

<sup>38</sup> *In re AmeriFreight, Inc.*, FTC Matter No. 142 3249 (Feb. 27, 2015).

<sup>39</sup> The assumption that every potential benefit, no matter how *de minimis*, is enough to constitute a "material connection" is contrary to the way in which states have generally interpreted lottery law in the U.S. For example, activities requiring minimal effort on the part of the registrant are unlikely to constitute consideration in a sweepstakes, including visiting a store on one occasion, watching a television show, or listening to a song. *See, e.g.*, *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1404 (E.D. Cal. 1994) (sweepstakes participants required to travel to store to deposit entry form is not consideration); *see also* Lac du

build “materiality” back into the determination of whether disclosure of a “material connection” is necessary.

ANA is not suggesting that a return to “first principles” by focusing on “materiality” will remove the need for disclosure in many cases. To the contrary, reassessing “materiality” in the influencer era will require an updated understanding of influencer marketing both within the industry and as a matter of social behavior. The continued growth of influencer marketing results in new forms of content and dissemination that cannot be governed by a one-size-fits-all set of rules. Affiliate marketing, subscription box services, live streams, and similar marketing tactics present unique issues of when to disclose and how to disclose.

“Affiliate marketing” monetization models illustrate the complexity of this inquiry. Affiliate marketing platforms incentivize endorsers to drive traffic to the platforms, but consumers are largely unaware of these incentives.<sup>40</sup> Liketoknow.it, for example, is a mobile application through which endorsers are invited to curate products on their respective pages in exchange for compensation based on purchases made through their Liketoknow.it page.<sup>41</sup> The rules regarding disclosure requirements in such affiliate marketing platforms are unclear.

“Subscription box” models also provide new challenges. Subscription box services such as FabFitFun and Birchbox have become increasingly popular.<sup>42</sup> Consumers sign up to receive boxes of various products selected by the box service shipped to their home in regular increments (*e.g.*, monthly, quarterly). To promote their boxes, box services engage influencers to endorse their services and, in many cases, to feature in social media posts products included in the subscription box. Brands, however, have no direct relationship to the endorser – their agreement is with the box service. While such contracts between the box service and influencer may include requirements that endorsers comply with the Guides, the advertiser of the product being endorsed has no relationship with the endorser and cannot control statements made about its products or the need to make disclosures. The FTC should clarify that the affiliate and endorser,

---

Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480, 486 (W.D. Wis. 1991) (listening to a radio program, watching a television program, or visiting a store on one occasion without being required to make a purchase or pay a fee is likely not consideration).

<sup>40</sup> See Dean Hund, Emily, *The Influencer Industry: Constructing And Commodifying Authenticity On Social Media* (2019). Publicly Accessible Penn Dissertations (“LikeToKnowIt was more obvious, as influencers’ followers had to join the service in order to use it and Instagram posts using the technology usually featured a “liketoknowit” link and hashtag, but it capitalized on a social action central to Instagram—liking photos—and thus barely disturbed the established influencer-audience dynamic. Pulling off this technological and social feat meant that RewardStyle accomplished what others who had tried to enter this space could not: finding a way to commercialize social media users’ self-presentations without making it seem, to audiences, overtly commercialized.”).

<sup>41</sup> An illustration of how affiliate marketing might work in this situation: A well-known influencer posts a photograph of her newly decorated kitchen and encourages her followers to follow her page on Liketoknow.it to shop for products featured in the photograph. The follower visits the influencer’s Liketoknow.it page and purchases one of the featured products. The influencer receives a payment through the Liketoknow.it platform (Reward Style) equal to a specified percentage of the price for which the follower purchased the featured product. The company that manufactures and sells the product featured in the influencer’s post – which the follower purchased – had no direct relationship with the influencer. It is not clear whether the influencer should disclose that she will receive compensation for the purchase of products featured on her Liketoknow.it page.

<sup>42</sup> See Elizabeth Segran, *Inside the \$2.6 Billion Subscription Box Wars*, FAST COMPANY, <https://www.fastcompany.com/90248232/inside-the-2-6-billion-subscription-box-wars> (Oct. 17, 2018) (noting Birchbox’s 2.5 million subscriber base and FabFitFun’s \$41.8 million revenue in 2016).

not the advertiser, are responsible for compliance because the advertiser has no knowledge or control. Similarly, the FTC should provide guidance on how endorsers must comply with aspects of the Guides (e.g., making truthful statements about a product) even where no direct relationship exists between the endorser and the brand.

Central to the FTC's reexamination of "materiality" in the context of the Guides is what consumers consider "material." Although ANA is not aware of any empirical data with regard to this perception, the FTC should seek to understand how the ubiquitous presence of influencer marketing and widespread use of social media over the last decade have changed perceptions about what might affect the weight consumers give to the opinions of third party endorsers, especially with well-recognized influencers.

With literally thousands of influencers populating an ever-growing industry<sup>43</sup>, consumers have come to understand what an influencer is and that influencer marketing is big business.<sup>44</sup> ANA members face the threat of "fake" influencers.<sup>45</sup> Influencers gain popularity based on value of the content they produce, which is often linked to the brands featured in such content. However, influencers increasingly seek to gain popularity by creating content that states or implies a direct connection with a particular brand where, in fact, none exists. In other instances, influencers continue to endorse a brand or product without disclosure even after the contractual relationship with the advertiser expires, implying a continued partnership.<sup>46</sup> In essence, influencers recognize that consumers place value on the partnerships and business that an influencer can attract. Being associated with a brand gives the influencer more influence.<sup>47</sup> Thus, in many instances, consumers are drawn to influencers because of their connections with brands not despite them.

Indeed, brands often need to police these "fake" influencers in order to live up to contractual obligations to their own influencers. Thus, there is a symbiotic relationship that is promoting self-regulation on this front. The public increasingly understands that influencers are compensated for whatever they are touting,

---

<sup>43</sup> Studies estimate that over 500,000 influencers exist on the Instagram platform alone. See Blake Droesch, *Is Everyone on Instagram an Influencer?*, EMARKETER, <https://www.emarketer.com/content/is-everyone-on-instagram-an-influencer> (Mar. 5, 2019).

<sup>44</sup> Influencers are a powerful marketing tool, and consumers recognize this – studies even indicate that aside from friends, influencers are often the second most influential tool to impact a consumer's choice about a brand or product. See Joele Forrester, *Leveraging Communities: Consumers Want to Feel Closer to Their Favourite Brands*, TALKING INFLUENCE, <https://talkinginfluence.com/2020/05/29/90-consumers-crave-closer-ties-to-their-favorite-brands/> (May 29, 2020).

<sup>45</sup> See Jaqueline Zote, *What are fake influencers and how can you spot them?*, SPROUTSOCIAL, <https://sproutsocial.com/insights/fake-influencers/> (July 23, 2019).

<sup>46</sup> ANA seeks clarity from the FTC on this point, noting that brands no longer have a contractual relationship with these influencers and are often no longer policing his or her compliance with the Guides.

<sup>47</sup> This is evidenced by Instagram hiding the number of "Likes" on a post. While many users looked at the number of "Likes" an influencer received as a way to determine his or her legitimacy, followers focus more on the content and partnerships featured on the influencer's page. Hiding "Likes" was, in part, a way for Instagram to combat the influx of "fake" followers, which decreases the value of the platform and can cost brands money when relying on such statistics to hire a particular influencer. See Megan Graham, *Fake Followers In Influencer Marketing Will Cost Brands \$1.3 Billion This Year, Report Says*, CNBC, <https://www.cnbc.com/2019/07/24/fake-followers-in-influencer-marketing-will-cost-1point3-billion-in-2019.html> (July 24, 2019).

and influencers increasingly want to tie themselves publicly to brands. This naturally promotes more disclosure of connections between brands and endorsers, not less.<sup>48</sup>

Whereas leading up to the 2009 revisions to the Guides the assumption was that influencers were trying to seem “grassroots” and unaffiliated, there is now a growing consumer culture that respects the affiliation of influencers with brands.<sup>49</sup> This is similar to the dynamic that has long been recognized within the Guides pertaining to celebrities.<sup>50</sup> Consumers increasingly expect influencers to be compensated for their endorsements. As with well-known celebrities, these influencers often have millions of fans and followers due to their unique personality or traits. Assuming that every influencer marketing campaign is an attempt at “astroturfing” is out of step with the current state of the industry, forces unnecessary speech, and threatens competition.<sup>51</sup>

#### IV. UN-INCENTIVIZED REVIEW-GATING POSES NO RISK OF CONSUMER INJURY

The FTC appears to suggest in its Comment Request that encouraging a happy customer to write a review is unlawful. If the FTC is in fact considering such a conclusion, ANA strongly disagrees. In fact, asking happy customers to “tell a friend” is as old as advertising itself. Likewise, if a customer has indicated that she is unhappy with a product or service, there is no doubt that it would behoove the marketer to find out what it can do better and how it can regain the customer’s trust. It would make no sense, however, for the marketer to be forced to ask a dissatisfied customer to write a review or “tell a friend.”

The same is as true online as it would be on Main Street. There are many contextual tools marketers use to determine whether a consumer is happy with a product or service.<sup>52</sup> Accordingly, there should not be any inherent requirement that an advertiser refrain from offering the happy customer a link to a review page. Assisting the customer in finding where to “spread the word” is pro-consumer and pro-competition. Moreover, there should be no requirement that such facilitation be disclosed because promoting one’s business is pro-competition and does not itself raise any issues of deception or unfairness. ANA recognizes that there may be situations where reviews are incentivized in some significant way and

---

<sup>48</sup> “Fake” influencers should be distinguished from merely unaffiliated bloggers who desire to talk about a branded product or services. “Fake” influencers use the #ad or similar notation to confuse consumers into thinking that they are in fact affiliated with the brand. Influencers and celebrities actually have begun to use tags such as #NotAnAd so as to avoid the impression that they are a paid influencer.

<sup>49</sup> See Stephanie Leishman, *How Instagram Influencers Use the Paid Partnership Feature*, AGORA PULSE, <https://www.agorapulse.com/blog/instagram-influencers/> (Apr. 12, 2020) (“Now, it seems that followers expect the Instagram influencers they follow to talk about products only when they’re paid to do so, to the point that when the influencer is seen with a product she is not paid to promote, she has to clarify the nature of the relationship (or lack thereof).”)

<sup>50</sup> See, e.g., 16 C.F.R. § 255.5 examples 2-3.

<sup>51</sup> See *Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/public-statements/2020/02/statement-commissioner-rohit-chopra-regarding-endorsement-guides-review> (Feb. 12, 2020) (Commissioner Chopra appears to assume that the “\$8 Billion” spent on influencer marketing in 2019 is virtually all attributed to “astroturfing.”).

<sup>52</sup> While sales are a large indicator of consumer satisfaction, brands are creative in collecting consumer opinion in ways that consumers are not always aware of. For example, brands track mentions of their product or brand on social media, study comments posted on influencer content, and review the performance of both brand and influencer posts to identify consumer engagement with certain products or services.

therefore are likely to be “material” as to how the reader would weigh the opinion of the reviewer. Also, advertisers who make it impossible or difficult for customers to post a negative review or who impede such negative reviews while encouraging positive reviews may also give rise to scrutiny.<sup>53</sup> There is no need for additional action about so-called “review-gating” to the extent consumers have merely been asked to share a positive experience through a review.

\* \* \*

For the reasons set forth above, ANA urges the Commission not to make substantial changes as it revisits the Guides. They have served their purpose well and continue to provide a solid foundation for self-regulation and the development of the important and growing influencer industry. The FTC should encourage and foster the use of social media platform tools through the articulation of elements that would constitute clear and conspicuous disclosure but leave to the platforms the job of defining exactly how best to implement those elements, which can evolve as these platforms and services change over time. ANA also identified reasons why self-regulation depends on the FTC’s continued targeted enforcement along with a light touch, avoiding didactic recommendations about specific disclosures. ANA identified areas in which the Commission may wish to improve the Guides, but in so doing, it should keep in mind its underlying core principles, including the concept of “materiality,” which is essential to a Section 5 violation. Finally, ANA has specifically addressed the issue of “review-gating,” which can be entirely pro-consumer and pro-competition if done correctly. There should not be any blanket prohibition against offering happy customers an invitation to write a review.

Respectfully submitted,

/s/John P. Feldman  
Keri Bruce  
Jason Gordon

Counsel to the Association of National Advertisers

cc: Daniel Jaffe, Executive V.P., Association of National Advertisers

---

<sup>53</sup> See *In re AmeriFreight, Inc.*, FTC Matter No. 142 3249 (Feb. 27, 2015) (customers were offered an augmented discount if they were the winner of a “best monthly review” contest, thus expressly or implicitly promised incentives for positive reviews).