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**AMG Capital Management v. FTC**<https://scholar.google.com/scholar_case?case=4368175431588697072&hl=en&as_sdt=6&as_vis=1&oi=scholarr>

The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices in violation of § 5(a) of the Federal Trade Commission Act. The District Court granted the Commission's request pursuant to § 13(b) of the Act for a permanent injunction to prevent Tucker from committing future violations of the Act, and relied on the same authority to direct Tucker to pay $1.27 billion in restitution and disgorgement. On appeal, the Ninth Circuit rejected Tucker's argument that § 13(b) does not authorize the award of equitable monetary relief.

Held: Section 13(b) does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement.

**What Happened and What’s Next?**

*Summary*

In a unanimous ruling, the Supreme Court recently eliminated the ability of the Federal Trade Commission (“FTC”) to seek monetary relief in district court under § 13(b) of the Federal Trade Commission Act (“FTC Act”) – a power the FTC has been exercising since the 1970s.

*What Happened?*   
  
In AMG Capital Management, L LC v. Federal Trade Commission, the FTC ﬁled suit against Petitioner Scott Tucker under § 5(a) of the FTC Act for misleading consumers with certain terms of payday loans. Instead of ﬁrst using the administrative proceedings available to the FTC under § 5 and § 19, the Commission sought a permanent injunction a n d equitable monetary relief (i.e., restitution and disgorgement) in federal court under § 13(b). The FTC did so notwithstanding that the statute expressly authorizes only a “temporary restraining order or a preliminary injunction” or a “permanent injunction.” See 15 U.S.C. § 53(b)(2). The district court directed Tucker to pay $1.27 billion in restitution and disgorgement. The Ninth Circuit aﬃrmed, citing circuit precedent interpreting the statutory text broadly to include the “relief necessary to complete justice, including restitution.”

Despite decades of practice and acceptance by many lower courts, the Supreme Court unanimously reversed and held that Congress did not intend the “permanent injunction” language of § 13(b) to grant the FTC the authority to obtain monetary relief directly in federal court. Relying on standard rules of statutory interpretation, the Court explained that the statute explicitly refers to only injunctions, and injunctions generally do not include awards of monetary relief. Although the Court had interpreted similar language in other statutes (the Emergency Price Control Act and the Fair Labor Standards Act) to encompass monetary relief, the Court held in its opinion that those prior cases did not purport to set forth a universal rule of interpretation and that in the instant case, § 13(b) as a whole indicates that a “permanent injunction” does not include this relief. Congress enacted other provisions that provide for monetary relief, like § 19, around the same time that it enacted § 13(b), but those provisions have important limitations and conditions regarding such relief. The Court thus concluded: “It is highly unlikely that Congress would have enacted” these provisions if § 13(b) was intended to implicitly allow “the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations.”

Moreover, the Court explained that more closely tying the FTC’s powers under § 13(b) to the statutory text “produces a coherent enforcement scheme”, closing its opinion with this observation:

Nothing we say today, however, prohibits the Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority. What’s Next? So what does this mean? At ﬁrst blush, this decision will probably force the FTC to pursue monetary damages and civil penalties via the administrative proceedings called for under § 5(b) of the FTC Act.

But the FTC may still have some tricks up its sleeve, which are not necessarily mutually exclusive:

The FTC can continue to pressure Congress to amend § 13(b) to broaden the scope of relief available under the provision (see also the FTC's October 2020 letter to Congress). The FTC also could promulgate more rules and strengthen existing ones under its rulemaking process (§ 18 of the FTC Act). Acting Commissioner Slaughter announced the formation of a new, centralized rulemaking group in the General Counsel’s oﬃce at the end of March. If the rulemaking group lays the groundwork to issue new rules, then the Commission will have the ability to bring civil suits seeking monetary relief under § 19(a) (1) (consumer redress) or § 5(m)(1)(A) (penalties) for violations of those rules. While developing such rules certainly will take time on the front end, once they are in place, the ability to enforce them through civil suits could lead to a dramatic increase in enforcement actions in federal courts. The Commission may also ramp up its administrative proceedings to secure more binding cease and desist orders. These orders would serve as precedent and could similarly be used to ﬁle civil suits for monetary penalties under § 19(a)(2) (consumer redress) or § 5(m)(1)(B) (the penalty oﬀense, which has been dormant since the 1980’s, but which Commissioner Chopra has recently advocated resurrecting – see this paper).

Whatever the result of these eﬀorts, in the meantime, for many types of cases the FTC will have to use its administrative process to seek monetary relief unless or until Congress amends the statute or new rules are promulgated. The administrative process is much slower and more complex than seeking monetary relief via § 13(b), and it is unclear what the consequences will be. It could be that the ineﬃciency of the process serves as a disincentive to the FTC to act in many cases, or the potential for a lengthy and unpredictable (and therefore potentially more expensive) process deters bad conduct or motivates defendants to settle.

The FTC may also increasingly refer qualiﬁed cases to the Justice Department or Consumer Financial Protection Bureau, or collaborate more frequently with state attorneys general to seek monetary relief under the states’ consumer protection statutes in appropriate cases.

II. **RE: Endorsement Guides, P204500: Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255**

Jim Dudukovich responses to the FTC’s request for public comments to its Guides Concerning the Use of Endorsements and Testimonials in Advertising. (June 2020)

**(1) Is there a continuing need for the Endorsement Guides as currently promulgated?**

The answer to this is a definitive but qualified “yes”. There is absolutely a need for the Guides as noted above; however, this begs the question of what the Guides should say and how they should say it, how and to what extent other resources or publications will supplement the Guides, and whether the choice is between having no Guides or keeping the Guides “as currently promulgated”.

We believe strongly that the Guides as currently written are not clear enough as to their purpose or intent and could be improved greatly with updates to each and every section and updates to the current examples included. We have attached as Exhibit A hereto a redlined version of the current Guides with comments to the current examples. We further propose that the supplemental resources currently in circulation be archived but the relevant portions of them be wrapped directly into the updated Guides to the extent possible in order to give stakeholders a single “source-of-truth”. Perhaps the supplemental guidance the Commission has published could be updated and layered into the language of the Guides themselves to flesh them out and live separately in another document (i.e., apart from the Federal Register), in a location that would be easy to find for all stakeholders, including consumers).

**(2) Are any specific provisions of the Guides no longer necessary, and, if so, which provisions and why are they no longer necessary?**

All provisions are necessary, subject to updates/improvements, including updated examples as noted below.

**(3) Are the deceptive or unfair practices addressed by the Guides prevalent in the marketplace?**

While what constitutes “prevalent” is somewhat subjective, there is no doubt that the prohibited behaviors exist throughout the marketplace, most visibly in digital and social media – arguably the lowest cost/highest reach avenue of marketing.

Are the Guides effective in addressing those practices?

While this is a difficult question to answer without a benchmark for what constitutes “effective,” the Guides undoubtedly help to steer the behavior of some participants in the space; query whether they impact enough of them or whether they impact the ones they impact effectively enough? It seems that the fundamental question we should seek to answer through this process is whether the principles espoused by the FTC Act, the Guides, and all of the supplemental materials that have been published are being violated due to:  ignorance of the Guides, either due to lack of access or lack of awareness of what they are and where to find them;  a lack of understanding of the Guides on the part of stakeholders who are aware of them, including brands/advertisers and influencers who:  don’t understand their obligation/duty to speak truthfully and to disclose material connections well enough; or  misunderstand what actually constitutes a truthful and non-misleading statement (including results that are not typical); or misunderstand when a material connection is unexpected and an affirmative disclosure is required; or understand the above but misunderstand what type of disclosure is sufficient (either in terms of substance, size, prominence, or proximity); or  aren’t clear about who is ultimately responsible for compliance and the role sorts and responsibilities as between brands/advertisers, agencies, influencers, and platforms;

OR disregard for principles that are in fact understood by the violators, either because of ill intent and/or due to a perception that bad behavior is not punished.

These are very different causes and require different remedies. Updating the Guides could help those in the first two groups to better know and understand their obligations and to act accordingly; conversely, it is likely that no changes to the Guides will have any effect on those in the last group, and instead either market forces, private litigation, and (increased) regulatory and governmental enforcement and penalties may be the only potentially effective answer for those.

In other words, parties who intend to violate the law will likely not be deterred by clarifications to the law or to the most simple, straightforward articulation of what the law requires. Thus, the changes to the Guides that are contemplated should be targeted to the first two groups above to maximize access and awareness and to minimize confusion and thus reduce the chances that the FTC Act is violated due to misunderstandings.

**Are there deceptive or unfair practices involving endorsements that are not covered by the Guides?**

Affiliate marketing and the posting of reviews are both highly-used tactics and represent two of the largest areas of potential abuse/violation of the FTC Act that the Guides are intended to cover (discussed in further detail below).

In addition, our collective experience indicates that there exists a disconnect between the Guides and the behaviors of different types of endorsers: employees are different from celebrities, who are different from bloggers or microinfluencers, who in turn are different from affiliate marketers. Attempting to provide meaningful universal guidance can lead to confusion by every one of the foregoing, not to mention the brands who engage with them, the agencies who work with them, and the platforms that host such engagements. This issue could potentially be resolved with clearer guidance that is – at least at a high level – applicable to all, as well as meaningful examples addressing the different roles that different types of endorsers play.

**Are there alternatives, such as individual enforcement actions under the FTC Act, which would be more effective or equally effective in addressing those practices?**

As noted above, whether the Commission and/or Congress wish to expand the ways in which violators of the FTC Act can be held to account is not something we believe is within the scope of the Guides. However, an updated version of the Guides could present an opportunity to highlight new, simplified and modernized processes for calling the Commission’s attention to potential violations. For example, the Commission could implement some form of “flagging” system that would allow users who believe a third-party is engaged in deceptive practices covered by the Guides to identify and submit materials to a dedicated upload site or other location that the Commission would be responsible for reviewing, and the Commission could take action as necessary or appropriate, perhaps in an expedited manner and with publication of the outcomes (including with whatever anonymization would be fair in such circumstances).

**Do the Endorsement Guides describe any practices that are not deceptive or unfair, and if so, which practices and why are they not deceptive or unfair?**

One specific area that is not necessarily incorrect but is potentially unclear in the Guides and their supplemental materials concerns actions such as “Liking” or “Following”, and specifically if such actions constitute an “endorsement” and if so what the responsibilities and obligations are of the user who Likes or Follows a post or another user. For example, in Disclosures 101 for Social Media Influencers, guidance is given that “tags, likes, pins, and similar ways of showing you like a brand or product are endorsements.” What does that mean to an influencer? Does it mean that engaging in those actions is unlawful? Or does it mean that it’s only unlawful if they don’t include an affirmative disclosure if they have a material connection to the brand or product? If so, how can they do that? For example, “liking” a post or a brand page on Facebook provides no mechanism by which the user who “likes” it can publish any form of disclosure.

This guidance is perhaps confusing because of the way that “endorsement” is defined in the current Guides; to the untrained eye, which types of endorsements are potentially deceptive or otherwise unlawful is arguably unclear. To that end, at the very least language should be added to that definition in Section 255.0(b) to clarify that not all endorsements must comply with the Guides in order to be lawful – only those endorsements for which a meaningful but unexpected material connection exists between the endorser and the product do. In other words, the dictionary definition of “endorse” is to “declare one’s public approval or support of”; it says nothing about being paid to do so. So if we are to continue to use the term “endorsement” we should try harder to distinguish within the definition (and the coverage of the Guides) between public statements of approval which are independent and those for which a material connection exists between the endorser and the brand being promoted.

**(4) What is the degree of compliance with the Endorsement Guides?**

As noted above, but without any studies or empirical evidence to prove this, our belief is that the degree of compliance by those who know about and understand the Guides is high. However, there exist groups of stakeholders who either (i) don’t know about the Guides, (ii) don’t understand the Guides, or (iii) don’t care about compliance with the Guides or willfully choose not to comply.

What effect, if any, does this have on the continuing need for the Guides?

We believe that the Guides serve an important purpose for the groups in (i) and (ii) above, and that continued revisions and updates to clarify, simplify, publicize, and facilitate access to them would be highly effective.

Do covered businesses and others following the Guides’ suggestions self-regulate or have voluntary standards or guidance, such as through trade associations, that overlap with the Guides? If so, to what extent, if any, do the Guides support industry self-regulation or voluntary standards?

Over the years there have been several trade organizations who have sought to assist the Commission’s efforts in this space by attempting to create consistent practices and encouraging members and others in the space to behave; we can confidently say that none of these organizations ever sought to undermine the Commission’s efforts, and in fact many of their efforts were intended to accomplish much of what’s contemplated by this process. For example, WOMMA’s Guide to Best Practices for Transparency and Disclosure in Digital, Social & Mobile Marketing was for all practical purposes an attempt to simplify and clarify how to comply with the Guides. WOMMA went even further, creating and making available three distinct training modules on compliance, one tailored to brands/advertisers at the company level, one tailored to employees of brands/advertisers (i.e., at the company level it could be used to train employees), and a third tailored to influencers and content creators. [Full Disclosure: Jim Dudukovich authored those training modules as a consultant to WOMMA.] While WOMMA has now been absorbed by the Association of National Advertisers – which has a much broader footprint – the efforts of the ANA here are still significant. There are also some newer organizations which have been formed to assist stakeholders in this space, including the Influencer Marketing Association (with which Jim Dudukovich is also involved).

These organizations can be of great assistance to the Commission throughout this process, both during and following the public comment period, and will likely be more than happy to act as sounding boards and collaborators in identifying areas of improvement for the Guides, including after all public comments have been submitted and certain areas may still be unclear or for which the Commission receives conflicting guidance from these responses. In addition, it is highly likely that these organizations can assist in spreading the word and publicizing any updates to the Guides.

**(5) What benefits, if any, have the Endorsement Guides provided to consumers?**

It’s fair to say that most if not all of the benefits to consumers have flowed indirectly – i.e., the Guides really are not written for consumers, and so the extent to which consumers have benefited has been from a more fair and truthful marketplace as a result of good behavior by others in the endorsement ecosphere (advertisers/brands, agencies, influencers, platforms).

Unsophisticated yet reasonable consumers may not know if content they are seeing is deceptive and may not know the triggers to watch for; they are in many ways at the mercy of the marketplace and those who are engaged in advertising to them. To this point, it could behoove the Commission to consider options for more effectively educating the consuming public so as to make it more difficult for bad actors to fool them.

Do the Guides impose any significant costs on consumers?

Absolutely not; the only “costs” to consumers are opportunity costs – i.e., any failure of the Guides to push the marketplace into being even more fair and truthful.

**(6) What impact, if any, have the Guides had on the flow of truthful or deceptive information to consumers?**

Advances in technology and the proliferation of social media platforms have radically altered the communication dynamic between advertisers and consumers, facilitating not only two-way communication, but also giving consumers and others, such as influencers, a microphone. When the original Guides were issued, no one could have imagined the scale, scope, and minimal barriers to entry of the current sharing economy. In this regard, there is no doubt that this new world has given advertisers and influencers the ability to flood consumers with messaging at low cost, something that hadn’t previously been contemplated as businesses built their processes (and budgets) for vetting messaging and media plans, and there is also little doubt that the 2009 revisions to the Guides have proven helpful to all stakeholders in navigating this new world.

The Guides have provided a roadmap for brands and influencers in ensuring those with good motives undertake their participation in this space lawfully and in compliance with the FTC Act so that consumers receive truthful information. However, what the Guides have not done – and could never do on their own – is stem the tide of bad actors engaging in deceptive advertising practices because that’s exactly what they wish to do.

**(7) What changes, if any, should be made to the Endorsement Guides to increase their benefits to consumers?**

As noted above, the more clear, user-friendly, and understandable the Guides can be, the more consumers will benefit from the actions of advertisers and influencers.

One material change that could potentially have a direct benefit to consumers might be to further identify the ways that platforms could voluntarily assist in the identification of false or misleading content and/or to facilitate functionality to help make such content compliant through the use of tags, badges, or other indicia that users would recognize to mean that a particular post isn’t truly editorial or organic. Platforms generally do not behave as “publishers” (as described in Section 230 of the Communications Decency Act, 47 U.S.C. §230), and so the Guides’ ability to prescribe or mandate action on their part to ensure compliance is per se limited. However, each of the social media platforms has a vested interest in facilitating a positive user experience, and to the extent the Commission – either through the Guides or otherwise – could work with them to develop some industry standards or practices to better liaise between advertisers, agencies, and influencers, on the one hand, and viewers/users on the other, those efforts could go a long way toward cleaning up the marketplace.

How would these changes affect consumer benefits or business costs?

See above.

**(8) What burdens or costs, including costs of compliance, have the Guides imposed on businesses?**

Per earlier comments, the digital age has made the publishing of messaging fast, easy, and relatively inexpensive for brands/advertisers. While this can work to everyone’s benefit in a macro sense (lower advertising costs can lead to increased competition and lower prices, etc.), it can also inadvertently lead to sloppiness or failure to adhere to established protocols for vetting content prior to distribution, which can lead to consumer harm. The Guides serve an important purpose in disrupting the scope and scale of those negative possibilities by educating brands/advertisers on their responsibilities to be truthful in their messaging tactics. To this end, the Guides do not impose costs on businesses that were not already there and weren’t part of the ecosphere regardless.

However, the Guides – at least in such a form as to be most effective – will also highlight for businesses the need to take certain steps that didn’t really exist in the pre-digital world; this includes the costs associated with putting contracts in place with stakeholders businesses didn’t use to engage with, like many types of influencers, as well as the costs associated with monitoring the activities of those influencers. Describing these costs as attributable to the Guides is misplaced, though; these are costs of doing business, and the Guides’ only role is to ensure businesses understand those obligations and thus account for the steps that lead to those costs as part of their processes and budgeting.

What burdens or costs have the Guides imposed on small businesses in particular?

As the digital age increases competition by lowering barriers to entry for smaller businesses to advertise, accounting for some of the additional costs required to jump into the fray of influencer marketing or native advertising (noted in the immediately preceding paragraph) can represent a much higher percentage of the budget that a small business may have.

What burdens or costs have the Guides imposed on endorsers?

None; to the extent anyone wishes to act as an endorser, any perceived “burdens” to doing so – speaking truthfully, disclosing unexpected material connections, etc. – are part and parcel of that role, and the Guides do nothing to make those responsibilities any more costly or burdensome.

What benefits have the Guides provided to businesses?

As touched on in the General Thoughts section above, the Guides serve an important function in educating businesses about how Section 5 of the FTC Act applies to certain marketing tactics; without the Guides, businesses would have to rely solely on their own interpretations of the Act’s high-level mandates or on guidance given by case law or the published results of investigations by the Commission. This role of the Guides – even if viewed as a “self-help” tool – is invaluable, and will only be improved through further refinement as contemplated hereunder.

What benefits have the Guides provided to endorsers?

Since many endorsers do not have the level of sophistication as businesses, platforms, agencies, or others involved in the endorsement space, and most endorsers are not lawyers and likely don’t have legal counsel retained, the Guides are truly the starting point for them to understand their duties to behave fairly and truthfully in the marketplace. Endorsements could appear to the uneducated as “easy money” with no strings attached, and without the Guides and the constant, ongoing discussion of them that occurs throughout the webisphere, the proliferation of non-compliant behavior would likely be orders of magnitude greater. The Guides represent a win-win in this dynamic in that they serve to educate endorsers, and to the extent they do so effectively, they minimize the Commission’s need to engage in enforcement activity.

**(9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on businesses or endorsers?**

As noted throughout this submission, clarifications, modernization, and relevant examples in the Guides will help both businesses and endorsers understand their duties and responsibilities for complying with Section 5 of the FTC Act when engaging in endorsements, and more specifically, will help minimize the costs associated with a lack of understanding of those duties and responsibilities. For example, if the Guides (i) clearly articulate to reasonable endorsers what it means for them to be truthful, (ii) help them not only identify what constitutes a material connection, but when that material connection might be unexpected and require an affirmative disclosure, and (iii) illustrate how such a disclosure could be made, endorsers may not need to engage legal counsel or other resources to assist them. The same is true to some extent with businesses; the clearer the Guides can be, the less there should be a need for defending against enforcement actions or litigation and incurring the associated costs.

How would these changes affect the benefits provided by the Guides to consumers, businesses, and endorsers?

They would make for a fairer marketplace, which benefits everyone except the bad actors.

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

As noted above, any efforts by the Guides to place responsibility on social media platforms who are not acting as publishers for the compliance by platform users with the Guides would likely conflict with Section 230 of the Communications Decency Act.

Further, there has been significant confusion on the part of businesses regarding the creation and implementation of social media policies and guidelines that comply with both the Guides (and thereby with Section 5 of the FTC Act) and the National Labor Relations Act vis-à-vis their employees. To the extent the Guides could be modified to help dispel any confusion over businesses’ responsibility to direct and monitor their employees’ behavior in the endorsement context while not simultaneously potentially censoring protected speech, such clarifications would be helpful.

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

This is a question that has lingered since prior to the revision of the Guides in 2009 – no one on the government, industry, or consumer side has done any credible studies that we are aware of to demonstrate the level of sophistication of consumers with regard to identifying or recognizing the existence of material connections or to distinguishing between editorial and sponsored content (including native advertising), and it appears that the assumption has always been that consumers don’t or can’t evaluate content without the help of affirmative disclosures in all contexts involving sponsored content. [Disclosure: This was one of the primary points raised in Jim Dudukovich’s commentary at the Commission’s public workshop in 2012.]

In its previous request for public comments (72 F.R. 2214, January 18, 2007), the FTC had commissioned two studies, primarily focused on how and whether endorsements communicated efficacy and typicality. At this point we believe it is incumbent upon the FTC to work with industry to commission additional studies that examine consumer perception in today’s digital world to better understand the awareness and recognition by consumers that particular types of content constitute endorsements or sponsored messages, both absent any specific disclosure of a material connection, as well as with varying types of disclosures. In the decade-plus since the last revision of the Guides, the proportion of “digital natives” who consume the majority of their content online has grown by leaps and bounds, and so understanding the baselines of consumer perception is critical to providing relevant and meaningful guidance; only with this information can we assess what the “default” assumptions should be as to when consumer harm occurs.

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

See response immediately above; consumers are undoubtedly more tech-savvy now than they were a decade ago when the Guides were last evaluated and updated, and digital platforms have also evolved both in number, function, and adoption. The Guides should not be revised to specifically address a snapshot in time, or else they risk the danger of certain specific direction quickly becoming obsolete or irrelevant; rather, we should look at the trends over the past decade and to the extent updates can be made to account for these macro shifts in technology and consumer behavior/perception we can better counsel on both current and future states, using examples that can transcend changes in platforms but still drive home the important principles.

Further, the Guides as currently promulgated do not use the term “influencer”, which has become part of the common vernacular for certain types of endorsers. The FAQs reference the term sparingly, and “Disclosures 101 for Social Media Influencers” uses the term in its title; this represents a growing recognition by the Commission of the importance of that term, and we recommend that it be used as appropriate in publications going forward (including in revised Guides themselves).

(13) FTC staff periodically updates a business guidance document, ‘‘The FTC’s Endorsement Guides: What People Are Asking.’’ Is there guidance in the current version of that document that should be incorporated into the Guides? If so, what and why?

Given that these FAQs are not much longer than the Guides themselves, query whether they should live separately from the Guides. We note that the Guides themselves appear to be written without a specific audience, while the FAQs have sections that are targeted at endorsers and other sections that are targeted at advertisers, but do not include any sections targeted to consumers. We believe the most helpful solution would be to incorporate the relevant portions of the FAQs into the Guides themselves where needed and in a way that addresses all relevant audiences, and either archive or do away with the current versions of the FAQs, perhaps publishing a new standalone resource (separate from the Guides) if and when warranted based on developments in the marketplace or in consumer perceptions that somehow are not captured in the updated Guides because they were unforeseen.

Specific comments on those portions of the FAQs that should be wrapped into an updated version of the Guides are attached as Exhibit B hereto.

Is there guidance in the current version of that document that should not be incorporated into the Guides? If so, what and why?

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

As noted in the “General Thoughts” section above, as well as in the response to Question (3), we believe that failures to disclose unexpected material connections can result from ignorance of the Guides and the responsibilities they describe, or from awareness but misunderstanding of them, or from deliberate intent to deceive, and that the focus of any revision to the Guides should be on the first two categories. We do not have any data to indicate the level to which advertisers and endorsers are currently falling short, nor do we have any data to indicate the level to which consumers are being deceived and/or harmed by such shortcomings. However, we firmly believe that the manner in which the Guides are revised and publicized can go a long way toward compliance through awareness, simplification, and harmonization.

Does this depend on the type of material connection?

Yes. Influencers who make a living through endorsements are often more well-versed in their responsibilities to disclose material connections and work harder to do so.

On the other hand, employees are often unclear of their responsibilities and thus may not know about their duty to disclose their relationship when promoting their employer – a situation in which they believe they are doing a good thing, but are unknowingly violating the Guides and Section 5 of the FTC Act. Further aggravating the employee situation is the commonly understood use of a small set of disclosure hashtags - #Ad, #Paid, and #Sponsored – none of which are perfectly appropriate for disclosing an employment relationship. An hourly employee, for instance, might think to him or herself that posting something positive about his or her employer on his or her Facebook page or tweeting something positive isn’t an “ad”, is not something they are being specifically and independently “paid” for, and obviously isn’t part of a “sponsored” relationship, and so he or she may believe they are exempt from using any of those, and absent clear direction from his or her employer about how to make a disclosure more comfortably and accurately, this can be a source of failure to comply.

Employees as well as members of loyalty programs or other recipients of consumer incentives also are likely not experts in how and when to make disclosures when posting reviews of products, and that is an area that the Guides ideally would articulate clearly and specifically; our suggestions for this are in our responses to Questions (16) and those that follow.

Affiliate marketers are an entirely separate and distinct set of endorsers who frequently do not completely comply with the principles espoused by the Guides, likely, at least in part, because the Guides do not have specific direction to them. The FAQs discuss affiliate marketing, but now that we have a decade of experience since the 2009 updates to the Guides, this would be a perfect opportunity to spell out the specific do’s and don’ts for affiliate marketers directly in the Guides. Some suggestions for this are below, in our responses to Questions (20) and (21).

What disclosures of material connections are sufficiently clear (i.e., understandable) to consumers when used in social media?

As the Commission has acknowledged over time, certain hashtags most likely do the job, so long as they are explanatory (i.e., the hashtag itself is an indication of the existence of a material connection) and are not buried or placed such that they will not be seen by users/viewers. We as a group recognize that hashtags were not originally developed for this purpose, but the way the digital space has evolved this is a function that they can perform. Likewise, we recognize that not all platforms include the sort of functionality that permits the clear and conspicuous placement of an acceptable hashtag (discussed further below).

Our belief is that hashtags can serve this purpose where they can be used in a way that is sufficiently clear and understandable to consumers. For instance, we believe that:

#Ad #Paid #Sponsored #[NAME OF BUSINESS] Employee #IWorkFor[NAME OF BUSINESS] #[NAME OF BUSINESS]Partner

are all acceptable for this purpose.

We also believe that “inline” disclosures – provided they are prominent enough within a social post – are also acceptable, e.g., “I was given [NAME OF PRODUCT] to try for free, and . . . .” or “I work for [NAME OF BUSINESS] and . . . .”

Where we believe we see the most opportunity for improvements to the Guides and their effectiveness are in the express endorsement by the Commission of these hashtags (or others that fit within the idea of being explanatory) and inline disclosure tactics within the Guides themselves, along with clear and simple direction about the types of placements of them that are acceptable to make them clear and conspicuous.

We also see an opportunity for the Commission to outline opportunities for platforms to make material connection disclosures easier through native functionality. This doesn’t mean that the platforms should lose their protections under Section 230 of the CDA, but rather that they should be encouraged to develop simple tools that endorsers can use within their respective platforms to make disclosures consistent and easy. As noted above, each of the platforms has a vested interest in facilitating a good user experience, and that alone should be incentive for them to offer aids to their user base to distinguish between organic content and sponsored content (endorsements), so long as by doing so they do not thereby become held responsible as the “publisher” of any content that utilizes (or doesn’t utilize) that functionality.

What disclosures of material connection currently being used in social media are likely not understood by consumers?

Affiliate marketing disclosures (discussed in more detail below) are consistently inadequate (both in substance and formatting). In addition, it seems common for endorsers to use #[NAME OF BRAND] or #[BRAND SLOGAN] as a means of disclosing a material connection, which neither does.

Does the sufficiency or insufficiency vary by platform, type of material connection (e.g., a paid post versus a free product), or other factors, and, if so, how?

See comment above; the sufficiency of a specific method of disclosure – and arguably the need for a disclosure in the first place – depends on not only the type of material connection, but also the impact that type of material connection would have on the weight or credibility readers ascribe to a particular post. A significant and material difference exists between, for example, (i) an endorser whose only material connection is that he or she received a free product valued at $5 but has no ongoing relationship with the manufacturer of the product and receives nothing additional in exchange for posting a positive review vs. a negative one, and (ii) an influential entertainment personality who is paid $500K to promote a particular product and does so on a personal-looking page.

To the extent that these connections are not being adequately disclosed, do the problems tend to be in the substance of the disclosures or in their conspicuousness (e.g., placement, visibility, or audibility)?

Both. Disclosures are often non-explanatory (e.g., #[NAME OF BRAND]) and/or placed in hard-to-see places or buried within other content such that they are not readily apparent.

Should the Guides provide more detail on what disclosures of material connections are sufficiently clear or unclear in different social media formats?

Absolutely. Per the answer above regarding standard “approved” forms of disclosure, as well as the response to Question 7 above and as noted elsewhere herein, to the extent platforms could be encouraged to voluntarily standardize tools and native functionality to disclose material connections that endorsers could use, much of the confusion around disclosure could be mitigated.

Does the fact that Commission Guides are generally reviewed every ten years affect your answer as to whether providing more detail would be helpful?

Too much can and does happen in ten years to review the Guides at those intervals; ideally this next iteration will rely upon learnings and experiences from the past decade to provide clearer and more adaptable guidance, but we should shorten the periods between re-evaluation.

**(15) The FTC has received complaints that young children may not adequately understand disclosures of material connections. To what extent would knowledge of a material connection affect the weight or credibility that young children give to an endorsement? At what age are children capable of making a connection between credibility and a material connection? Does this age differ from the age at which children are capable of identifying advertising? Why or why not and, if so, how? To what extent do young children understand disclosures of material connections? What should advertisers and endorsers appealing to young children know about their intended audience’s understanding of a particular endorsement, advertising format, or disclosure? How can disclosures of material connections in media consumed by young children be made clearer or more effective? How, if at all, are your answers to the above questions impacted by parental involvement in the media consumption of young children? What disclosures of material connections should advertisers and endorsers appealing to young children provide to parents?**

No response other than what’s set forth in response to Question 19 below.

**(16) Some marketers give incentives (e.g., free or discounted products) to consumers in exchange for posting reviews of their products or services without specifically requiring that the reviews be favorable. Do such incentives skew or bias the resulting reviews? Why or why not?**

We believe that these types of incentives likely skew results, even if no contractual requirement is put in place between the marketer and the reviewer to post a positive review; the simple reason is that reviewers will naturally want more bites at the apple and are likely to believe that posting a negative review will blacklist them from further opportunities.

If so, how and to what extent do incentives skew or bias the resulting reviews, and what factors may make such impacts more or less likely?

See above. With respect to what factors might make this less likely, if marketers were clear up front that posting a negative review will not impact eligibility for receiving an incentive then perhaps this tendency to skew toward positive reviews might be tempered. However, consumers may generally feel like posting a negative review could impact their respective reputations for any future incentive programs from other marketers.

Should such incentives be disclosed? Why or why not and if so, how?

Yes they should be disclosed, using whatever method is appropriate and accepted for the particular platform. Does the nature or value of the incentive matter? If so, how?

This is difficult to determine, but odds are that the nature and value of the incentive matter. If the incentive is valuable it would seem logical that consumers might feel more obligated to only post positive reviews. If the incentive is nominal, it could arguably tip the scales in the other direction (e.g., a consumer might be so offended by the minimal value of the incentive that they use the review as an opportunity to badmouth the marketer).

Do such incentives skew composite ratings? Why or why not and if so, how?

They likely do, in much the same way that any material connection skews composite ratings; the tendency for shoppers to often look only at aggregate or composite ratings makes this even more potentially misleading; if a marketer offers swag in exchange for posting reviews and some significant portion of the individual reviews that are averaged together to get the aggregate rating are from incentivize reviewers, then consumers making purchase decisions based on those aggregate ratings alone (without digging in to the individual reviews) are arguably being misled.

Do such incentives impact the order in which products or services are presented to consumers on retail or other review platforms? Why or why not and if so, how?

Many platforms have sorting functions and often will rely on factors like “Highest rated” to rank products and make purchase decisions.

**(17) Some consumer reviewers who receive incentives in exchange for their reviews disclose their material connections in their reviews. Are such disclosures adequate when incentivized reviews are included in composite ratings? Why or why not?**

See above; disclosures within individual reviews may be meaningless if shoppers look only at the composite reviews.

Are composite ratings that are based in whole or in part on such incentivized reviews misleading?

Most likely they are.

If such composite ratings are misleading: (1) Are there disclosures that could adequately address this concern and if so, what disclosures; and (2) how should the Guides address composite ratings if disclosures are not sufficient or there is not an opportunity for the marketer to make adequate disclosures (e.g., when the reviews and composite ratings appear on a third party’s website)?

See response to Question 21 below.

**(18) Some marketers actively solicit customer feedback and send satisfied customers down one path to relevant review sites and send customers with negative sentiment down another path, sometimes into some sort of customer service resolution process. What are the costs and benefits of this practice?**

This arguably represents a “typicality” issue, if positive reviews are posted in one place and negative reviews are handled elsewhere (offline) and not posted or fed into the composite or aggregate ratings.

Should it be addressed in the Guides and, if so, how?

This could and should be covered within the overall construct of consumer endorsements (currently in Section 255.2). If marketers are soliciting customer reviews and then presenting them to the world but weeding out negative reviews, that should be disclosed to visitors to the site.

**(19) Some advertisers contend that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts. What evidence is there to support or contradict this assertion and does the answer differ depending on the nature of the material connection?**

See comments above about the need for research/studies to accurately assess baseline consumer understandings.

In particular cases, what factors might be considered to determine whether a material connection is unexpected?

One factor is the particular influencer’s reputation for being a paid spokesperson; there are well-known influencers who virtually everyone knows are getting paid for products they promote. However, as the “level” or notoriety of the influencer goes down into the middle-tier and micro and nanoinfluencers, it is probably less likely that such a presumption will be made.

Do consumer expectations vary by the age of the audience, the product category, the nature of the influencer, the format or substance of the endorsement, or otherwise, and if so, how?

Age certainly plays a role, but we can’t say with precision what that role is and what ages represent thresholds of awareness. Younger people are generally held to a legal standard indicating a lower ability to comprehend certain things and an inability to enter into binding contracts, but at the same time are in many ways more tech savvy. These factors arguably conflict in circumstances where a young person knows that an influencer he or she follows is probably getting paid for promoting a product (even in the absence of any affirmative disclosure) but doesn’t care and wants to acquire that product because of the badge value of having something that an influential person they follow is touting.

On the other end of the spectrum, the older population may not understand the web of material connections that exists within the framework of online product reviews and may be more vulnerable to misleading advertising practices.

**(20) Some endorsers (including the authors of some product reviews) include affiliate links that can be used to purchase the products they are endorsing. Should the Guides address such links, and if so, how?**

Absolutely. As noted above, affiliate marketing is one of the largest areas of abuse in this ecosystem, and it is common for affiliate marketers to rely on vague, general, qualified disclosures that are buried on profiles, at the bottom of pages, or behind links that users won’t click on. The issues raised in the Legacy Learning Systems Inc. case should be highlighted and hardcoded into the Guides themselves.

To what extent do consumers expect that these endorsers are compensated for purchases through those links?

Given the continued blurring of the line between editorial and sponsored content and the ongoing evolution of native advertising tactics, multi-level marketing schemes, and consumer reliance on reviews to make purchase decisions, we believe consumer understanding of affiliate marketing is very low.

If so, what compensation arrangements do consumers ordinarily expect?

Unknown.

To what extent would knowing of such compensation affect the weight or credibility given to those endorsements?

This is arguably the most crucial disclosure we can think of; if someone is advising you that a product works well or is their favorite, knowing when you read those views that they are going to get compensated if you purchase the product is as material as it can get.

Is there a distinction in terms of either consumer expectations or the weight ascribed to an endorsement between affiliate links to a product’s marketer and affiliate links to one or more retailers? If so, how, why, and how should that be addressed?

Unknown, but it’s possible that an affiliate link to a retail platform might seem less sketchy/connected to the average consumer because it looks like a link out to an unrelated third party.

**(21) What disclosures, if any, do advertisers or the operators of review websites or review platforms need to make about the creation, collection, processing, or publication of reviews or ratings in order to prevent those reviews or ratings from being deceptive or unfair?**

To the extent the platform is aware that some reviews are incentivized or otherwise based on material connections, the fairest way to manage them might be to separate the two (independent and biased reviews) and generate averages for each and potentially combined, but with a notation of the proportion of each that make up the combined aggregate. This is likely unrealistic though, and most likely would discourage honesty in disclosing material connections (or in the recommendations by marketers for reviewers to disclose them) because marketers would want as many positive reviews as possible to be classified as unbiased. Were it to be implemented, though, one way might be for platforms to include checkboxes in the review field to indicate whether the reviewer has any connection to the product’s marketer (other than as an independent purchaser/user), and the checkboxes could be used to put each review into the appropriate bucket.

A more viable and simple solution, albeit not as effective and meaningful, would be to require (or recommend) such platforms to include blanket statements clearly and conspicuously that some ratings may be from individuals who were incentivized to write them and that shoppers should take that into account.

**(22) What other fact patterns or scenarios should be addressed by the Guides and why?**

Some principles of native advertising practices dovetail closely with principles set forth in the Guides, and it could be helpful to take whatever steps would be appropriate to harmonize the guidance given for endorsements with the guidance given for native advertising.