

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

### FEDERAL TRADE COMMISSION

Advanced Notice of Proposed Rulemaking and Request for Comment on Reviews and Endorsements

P214504

87 Fed. Reg. 67,425

January 9, 2023

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By notice published on November 8, 2022, the Federal Trade Commission (“FTC” or “Commission”) has requested comment on a proposed rulemaking to address certain deceptive or unfair uses of reviews and endorsements.<sup>1</sup> The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus on public attention on emerging civil liberties issues and to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation.<sup>2</sup> EPIC has published reports and filed amicus briefs regarding technology that has not substantiated its explicit crime reduction claims or implicit accuracy claims,<sup>3</sup> petitioned the FTC for rulemaking regarding the privacy and security of consumer

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<sup>1</sup> Trade Regulation Rule on the Use of Reviews and Endorsements, 87 Fed. Reg. 67,424 (advance notice issued Nov. 8, 2022), <https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements> [hereinafter ANPR].

<sup>2</sup> EPIC, About Us (2022), <https://epic.org/about/>.

<sup>3</sup> See, e.g., Electronic Privacy Information Center (EPIC), Screened & Scored in the District of Columbia 21 (Nov. 2022), <https://epic.org/screened-scored-in-dc/> (discussing unsubstantiated crime reduction claims of ShotSpotter); Br. of Amicus Curiae EPIC, Electronic Frontier Foundation, and National Association of Criminal Defense Lawyers, No. A-3078-21T1 (N.J. Super. App. Div. Sept. 26, 2022),

data,<sup>4</sup> filed comments in support of more robust disclosures by law enforcement organizations regarding their use of surveillance technology,<sup>5</sup> and offered testimony on similar topics.<sup>6</sup>

In its Notice, the Commission acknowledges its current limited ability to obtain monetary relief including disgorgement, and proposes promulgating a new trade rule as an effective deterrent to prevent widespread misconduct in this area.<sup>7</sup> Specifically, the Commission asks about the prevalence of undisclosed incentives for positive reviews,<sup>8</sup> the resulting harm to consumers and to competition,<sup>9</sup> the actions taken to facilitate or enable these practices,<sup>10</sup> and extenuating circumstances in which this conduct would not constitute an unfair or deceptive practice.<sup>11</sup>

The Electronic Privacy Information Center (“EPIC”) submits these comments in general support of a trade rule governing reviews and endorsements. EPIC outlines a specific instance of misconduct that should be treated as a violation under the Commission’s proposed rule, in which Amazon has incentivized law enforcement entities to promote its consumer-facing products, without

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<https://epic.org/documents/new-jersey-v-arteaga/> (discussing likely misidentifications of facial recognition systems); Br. of Amicus Curiae EPIC, No. 18-50440 (9th Cir. Mar. 28, 2019), <https://epic.org/wp-content/uploads/amicus/algorithmic-transparency/wilson/US-v-Wilson-EPIC-Amicus.pdf> (discussing unreliability of image scanning algorithm).

<sup>4</sup> FTC Rulemaking on Commercial Surveillance & Data Security, EPIC, <https://epic.org/ftc-rulemaking-on-commercial-surveillance-data-security/> (last visited Jan. 9, 2023).

<sup>5</sup> Comments of EPIC to the New York City Police Department, POST Act Disclosures (Feb. 25, 2021), <https://epic.org/documents/nypd-post-act-disclosures/>.

<sup>6</sup> See, e.g., Testimony of EPIC before D.C. Council Committee on Government Operations and Facilities, Stop Discrimination by Algorithms Act (Oct. 6, 2022), <https://epic.org/documents/epic-sdaa-written-testimony/>; Testimony of EPIC before Massachusetts Joint Committee on the Judiciary, An act to regulate face surveillance (Nov. 23, 2021), <https://epic.org/documents/an-act-to-regulate-face-surveillance-massachusetts/>.

<sup>7</sup> ANPR at 67,425, <https://www.federalregister.gov/d/2022-24139/p-10>.

<sup>8</sup> ANPR at 67,426, <https://www.federalregister.gov/d/2022-24139/p-15> (citing to Complaint at 14, 19-20, *FTC v. A.S. Resch, LLC (Synovia)*, No. 1:19-cv-3423 (offered consumer endorsers with free product in exchange for “especially positive and inspiring” reviews); Complaint at 5-6, 8, *Urthbox, Inc.*, No. C-4676 (Apr. 3, 2019) (deceptively provided compensation for the posting of positive reviews on the BBB’s website and other third-party websites)); id. at Question 1(d) <https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements#p-32> (“paid or incentivized consumer reviews that were required to be positive or required to be negative (if of a competitor’s product)”).

<sup>9</sup> Id. at 67,427, Question 4, <https://www.federalregister.gov/d/2022-24139/p-41>.

<sup>10</sup> Id. at Question 10, <https://www.federalregister.gov/d/2022-24139/p-47>.

<sup>11</sup> Id. at Question 6, <https://www.federalregister.gov/d/2022-24139/p-43>.

adequately disclosing that affiliate relationship to consumers, and without substantiation for its crime reduction claims. EPIC urges the Commission to re-iterate explicitly and specifically that similar misconduct by companies would be actionable under Section 5 as well as under the Commission’s proposed new trade rule, not only as relates to endorsers failing to disclose affiliation to or benefit received from the selling company but also as relates to endorsers making representations that lack substantiation. Similarly, the Commission should be explicit and specific that a selling company will be held liable for this endorser misconduct even where its endorsers may be beyond the Commission’s traditional jurisdiction.

### **I. Law Enforcement Organizations Promote Specific Surveillance Technology Products and Services for Consumer Use**

Consumers should be able to trust that when their local police department promotes use of a specific product or service that their police department is doing so in the best interests of public safety. Police regularly endorse products either implicitly by giving them away,<sup>12</sup> or explicitly through social media posts<sup>13</sup> and other promotional material endorsing their use.<sup>14</sup> Despite the prevalence of this practice however, more often than not studies fail to support the crime reduction claims touted by the companies selling these products/services.<sup>15</sup> Police are often understood to be the experts on public safety, so police endorsements of specific products carry tremendous weight.

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<sup>12</sup> See, e.g., Will Gonzalez, VCU Police handing out free bike locks to students, faculty, abc8News (Aug. 27, 2022), <https://www.wric.com/community/vcu-police-handing-out-free-bike-locks-to-students-faculty/>; “Auto Theft Prevention Initiative Update!!!”, Montgomery County Department of Police, 4D – Wheaton, <https://www.montgomerycountymd.gov/pol/districts/4D/index.html> (last visited Jan. 9, 2023).

<sup>13</sup> See, e.g., Christopher Frascella, Amazon Ring Master of Surveillance Circus, 73 Fed. Comm. L.J. 393, 417 (May 2021), <http://www.fclj.org/wp-content/uploads/2021/05/73.3.2-Amazon-Ring-Master-of-the-Surveillance-Circus.pdf>.

<sup>14</sup> See, e.g., Jay Stanley, Fast-Growing Company Flock is Building a New AI-Driven Mass-Surveillance System, ACLU (Mar. 3, 2022), <https://www.aclu.org/report/fast-growing-company-flock-building-new-ai-driven-mass-surveillance-system>.

<sup>15</sup> See, e.g., Policing Project NYU School of Law, Ring Neighbors and Neighbors Public Safety Service: A Civil Rights and Civil Liberties Audit 24-25 (Dec. 16, 2021), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61baab9fcc4c282092bbf7c3/1639623584675/Policing+Project+Ring+Civil+Rights+Audit+%28Full%29.pdf> [hereinafter Amazon Ring NYU Audit].

The Commission should consider the market saturation impact of these unsubstantiated endorsements, especially where it is a trusted authority like the local police department handing out products to consumers.

The proliferation of surveillance technologies can uniquely benefit police departments in several ways that are not obvious to the consumer. Departments engaged in promoting surveillance tools are often indirectly self-serving by giving out surveillance technology that police later plan to request data from (bypassing the need for a warrant if making the request to the company or consumer). On the marketplace competition side there are also concerns of network effects that directly benefit both police and tech companies but do not benefit consumers. A surveillance technology company with access to ten video surveillance doorbell cameras on the same street as opposed to only one camera on the street has access to data an order of magnitude greater than a company selling non-networked cameras that save footage locally, even if everyone on the block used those cameras. The Commission should pay special attention to the exponential impact of endorsements where network effects may apply, such as most “smart” (web-enabled) surveillance technology.

Amazon Ring, as one example, has arguably become the default device for video doorbells by virtue of its partnership with thousands of government entities across the country.<sup>16</sup> These kinds of endorsements by law enforcement organizations happen all the time. The violations of the Endorsement Guides have become most clear in the case of Amazon Ring. Under Amazon’s distribution scheme, police departments received discounted Ring cameras to sell at-cost in exchange for promoting downloads of Amazon’s Ring companion app Neighbors. Police

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<sup>16</sup> Amazon Ring NYU Audit at 19 (“Although Ring does not receive a direct financial benefit from its law enforcement partnerships, there is no question that these partnerships set Ring apart and that Ring believes the partnerships benefit it.”).

departments failed to disclose that Amazon Ring staff had editorial authority over public statements made by the police department about the product, and police departments repeated unsubstantiated crime reduction claims.

Because of the harm to consumers in terms of unsubstantiated claims and undisclosed affiliations, and because of the harm to competition in terms of market saturation and network effects, the Commission should explicitly incorporate language into its new trade rule that addresses violations of its Endorsement Guides. The fact that the endorsing entity is outside the Commission's traditional jurisdiction should not be a barrier to enforcement, especially as this misconduct relates to the prevalent practice of law enforcement organizations promoting surveillance technology to consumers. To be clear, we are not asking the Commission to seek endorser liability beyond its jurisdiction, but we are urging the Commission to seek liability for the companies who fail to prevent or even actively facilitate their endorsers performing violative behavior.

## **II. The Commission Should Protect the Marketplace from Inadequately-Disclosed Affiliate Relationships, Like the Relationship Between Amazon Ring and Law Enforcement Organizations**

The campaign between the selling company Amazon Ring and its endorsers in local police departments offers one recent example of precisely the kind of misconduct the Commission should explicitly prohibit and take action against. Amazon has encouraged a lack of transparency about benefits received by the endorser, lack of transparency about the seller's editorial authority over the endorser, and unsubstantiated claims about the efficacy of the product endorsed.<sup>17</sup> Although Amazon

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<sup>17</sup> The Commission might also consider deceptive acts or practices (including omissions) in Amazon's representations regarding the privacy policies and security protocols for its Ring products, however these issues are beyond the scope of Endorsement Guide-related misconduct. For example, Senator Markey has implicitly called into question whether Amazon Ring's "so called 'emergency circumstance exception'" to requiring user consent or a warrant is appropriate. See Press Release, Senator Markey's Probe into Amazon Ring Reveals New Privacy Problems (Jul. 13, 2022), <https://www.markey.senate.gov/news/press-releases/senator-markeys-probe-into-amazon-ring-reveals-new-privacy-problems>.

has pledged to reverse these policies, the pervasiveness of the company’s misconduct illustrates why the Commission should clarify liability rules for sellers and why the penalties should be sufficient to incentivize companies to actively manage their endorsers to prevent such misconduct. Amazon Ring is by no means the only example of this concerning trend—for example automated license-plate reader Flock<sup>18</sup> and crime-reporting app Citizen have exhibited similar misconduct.<sup>19</sup>

When an endorser benefits from promoting a product for a company, they must disclose that benefit—and the selling company must be held liable when the endorser does not do so. Amazon Ring offered police departments credit towards purchasing Ring doorbell units which police could then offer to constituents at a lower rate (i.e. offered discounted merchandise to police departments to distribute to consumers) proportionate to the number of Neighbors app downloads in that department’s jurisdiction.<sup>20</sup> This benefit was undisclosed when police departments would encourage

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<sup>18</sup> See, e.g., Stanley note 14 *supra* at 3 (“Vice reported that it obtained emails showing that “Flock works closely with police to try and generate positive media coverage, improve their PR strategy, and ... ‘bring more private cameras into the area.’” Flock has also helped write police press releases, Vice found, and officers appear in Flock promotional videos. Emails obtained by the video surveillance industry research group IPVM show local Texas police referring homeowners associations and other neighborhood groups to Flock, advocating for the company at community meetings, providing the company with neighborhood contact lists, and introducing other police chiefs to company sales managers”); *id.* at 5 (“In particular, IPVM found that Flock’s system misidentified a license plate’s state about 10 percent of the time. Given that state misidentification errors have led to innocent people being terrorized by the police as presumed dangerous criminals, that is a real problem.”).

<sup>19</sup> See, e.g., Belle Lin and Camille Baker, Citizen App Again Lets Users Report Crimes—And Experts See Big Risks, *The Intercept* (Mar. 2, 2020), <https://theintercept.com/2020/03/02/citizen-app/> (“In response to a question about working with authorities, Citizen said it “does not work with law enforcement in any way, shape or form,” but does work with “advisors with backgrounds in public safety.” This does not denote “a formal relationship with any kind of law enforcement,” the statement continued, emphasizing the company’s “independent mission and vision.” In one recent job posting, however, Citizen describes a role dedicated to researching the needs and motivations of its users and “partners in the public sector,” which includes police departments and governments.”); Lil Kalish, The Crime-Tracking App Citizen Sent Staff to the Capitol Riot for Clicks—and That’s Just the Start, *Mother Jones* (Oct. 12, 2021), <https://www.motherjones.com/crime-justice/2021/10/crime-app-citizen-jan-6-insurrection-capitol-leak-scoop/> (“In the first 10 days of January, which included its record-breaking insurrection coverage, documents suggest [Citizen] notified users of close to 30,000 incidents. Based on the specialist’s reports, more than 5,500 of those—almost one in five—may have contained factual errors.”).

<sup>20</sup> See, e.g., Caroline Haskins, Amazon Requires Police to Shill Surveillance Cameras in Secret Agreement, *VICE: Motherboard* (July 25, 2019, 11:54 AM),

citizens to download the Neighbors app on Twitter.<sup>21</sup> The average consumer would likely believe their local police department was encouraging them to download an app for crime and safety alerts because it is in the best interest of public safety, not because the police department is being compensated for promoting that company's offerings. Even if product discounts were not a part of Amazon Ring's program, it would still be questionable for police departments (or any government entity) to be the vehicle for distributing a company's offerings to consumers.

Amazon Ring also had a shocking level of control over what police departments said about its products as part of the MOUs the company required its law enforcement endorsers to sign:<sup>22</sup>

“All partnerships require police to get all public statements about Ring approved by the company first....Police are also given a series of scripts by Ring which lay out how police are supposed to talk about the company on Neighbors.”<sup>23</sup>

This influence over public statements should be transparent to the consumer, who would otherwise likely assume a police department is speaking for itself and is not subject to editorial review by a private company. Additionally, this demonstrates knowledge of and control over these endorser statements by Amazon Ring—not only was the company failing to manage their endorsers to prevent

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[https://www.vice.com/en\\_us/article/mb88za/amazon-requires-police-to-shill-surveillance-cameras-in-secret-agreement](https://www.vice.com/en_us/article/mb88za/amazon-requires-police-to-shill-surveillance-cameras-in-secret-agreement); Antonio Villas-Boas, Amazon Requires Police Departments To Advertise Ring Home Security Products to Residents In Return for Free Ring Cameras, Bus. Insider (July 25, 2019), <https://www.businessinsider.com/amazon-ring-require-police-advertise-for-free-ring-cameras-2019-7>.

<sup>21</sup> See, e.g., Frascella note 13 *supra*.

<sup>22</sup> Louise Matsakis, Cops Are Offering Ring Doorbell Cameras in Exchange for Info, WIRED (Aug. 2, 2019), <https://www.wired.com/story/cops-offering-ring-doorbell-cameras-for-information/> (quoting a Police Captain as saying to an Amazon Ring employee: “All of the information was copied and pasted directly from your press releases with the exception of the quotes.” and noting that when the Amazon Ring public relations representative insisted changes be made on the police department's Facebook page, they later were).

<sup>23</sup> Caroline Haskins, Ring Says It's Partnered with 405 Police Departments, Here's What We Know, VICE (Aug. 28, 2019), [https://www.vice.com/en\\_us/article/a35vy4/ring-says-its-partnered-with-405-police-departments-heres-what-we-still-dont-know](https://www.vice.com/en_us/article/a35vy4/ring-says-its-partnered-with-405-police-departments-heres-what-we-still-dont-know); see also Letter from Corey Williamsen, Freedom of Info. Officer, Vill. of Bensenville, to Shreyas Gandlur 8 (Aug. 13, 2019), <https://www.documentcloud.org/documents/6359444-Bensenville-IL-Emails.html> (“If media reaches out with questions about the partnership or the Neighbors app, or for assistance with overall PR strategy, please contact Ring's PR Coordinator . . . All public facing messaging and materials must be approved by both parties; either by using approved templates or submitting to Ring PR for approval.”).

misconduct, the company put itself in a position where the endorsers could not perform misconduct without Amazon’s blessing. As such, these MOUs served to facilitate misconduct in violation of the Commission’s Endorsement Guides.

Permitting law enforcement organizations to quote or imply crime reduction claims as a result of use of Neighbors or of Amazon Ring also represents a violation of the Endorsement Guides. The selling company has the burden of substantiating its efficacy claims. One meta-study from MIT found that despite Ring’s claims of reducing crime, “the only study carried out independently of Ring found that neighborhoods without Ring doorbells were actually less likely to suffer break-ins than those with them.”<sup>24</sup> Subsequent reporting on Ring’s own studies further undercuts their validity as substantiation of crime reduction claims.<sup>25</sup> To the extent that law enforcement organizations repeat unsubstantiated claims about crime reduction as a result of use of products (such as Ring or Neighbors), selling companies (such as Amazon Ring) should be liable for those violations of the Endorsement Guides.

On December 16, 2021, the Policing Project at NYU’s School of Law released its civil rights and civil liberties audit of Amazon Ring’s Neighbors app and Ring’s work with law enforcement.<sup>26</sup> In the report, NYU’s Policing Project noted that Ring “committed not to donate devices to policing agencies in the future”,<sup>27</sup> that Ring no longer uses MOUs that give the company say over police

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<sup>24</sup> See, e.g., Mark Harris, Video Doorbell Firm Ring Says Its Devices Slash Crime—But The Evidence Looks Flimsy, MIT Tech. Rev. (Oct. 29, 2018), <https://www.technologyreview.com/s/612307/video-doorbell-firm-ring-says-its-devices-slash-crimebut-the-evidence-looks-flimsy/>.

<sup>25</sup> See, e.g., Cyrus Farivar, Cute videos, But Little Evidence: Police say Amazon Ring Isn’t Much of a Crime Fighter, NBC News (Feb. 15, 2020), <https://www.nbcnews.com/news/all/cute-videos-little-evidence-police-say-amazon-ring-isn-t-n1136026>.

<sup>26</sup> Policing Project NYU School of Law, Ring Neighbors Makes Major Changes to its Interactions with Police as Part of Civil Rights Audit (Dec. 16, 2021), <https://www.policingproject.org/news-main/2021/12/16/ring-neighbors-audit>.

<sup>27</sup> See Amazon Ring NYU Audit note 15 *supra* at 17.

department communications and require confidentiality,<sup>28</sup> and that Ring “agreed to stop citing data regarding Ring’s impact on crime until such data has been verified through independent study” and removed any claims about crime reduction from “all of its marketing and social media materials.”<sup>29</sup>

The Commission should not take these assertions at face value, nor should it find such statements to be sufficient on their own to show that Amazon Ring is ensuring the compliance of its law enforcement endorsers. Indeed, if contractual language requiring compliance with the Endorsement Guides is not sufficient for the selling company to avoid liability for endorser misconduct,<sup>30</sup> then the selling company merely asserting that it will no longer use problematic contract language on its own would surely be inadequate.

Regarding the prevalence of such misconduct, Amazon Ring alone has been installed in millions of homes, with millions of downloads of its companion app, Neighbors, as of 2019.<sup>31</sup> Amazon Ring has partnered with hundreds of police departments, across at least 48 states.<sup>32</sup> Senator Markey’s office maintains that Amazon Ring is actively recruiting public health departments, animal

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<sup>28</sup> Id. at 18.

<sup>29</sup> Id. at 25.

<sup>30</sup> See Section III, *infra*.

<sup>31</sup> Sarah Perez, Amazon’s Ring Partners With National Center for Missing & Exploited Children to Put Missing Posters in Neighbors App, TechCrunch (Dec. 19, 2019), <https://techcrunch.com/2019/12/19/amazons-ring-partners-with-national-center-for-missing-exploited-children-to-put-missing-posters-in-neighbors-app/>. Ring reported a more than five-fold increase in law enforcement partnerships since November 2019. See Markey note 17 *supra*.

<sup>32</sup> Kim Lyons, Amazon’s Ring Now Reportedly Partners with More Than 2,000 US Police and Fire Departments, VERGE (Jan. 31, 2021), <https://www.theverge.com/2021/1/31/22258856/amazon-ring-partners-police-fire-security-privacy-cameras> (noting participating police and fire departments rose from 40 in 2018 to 2,014 in 2020). Some jurisdictions are opting to incorporate Amazon Ring video data into real-time crime centers. See, e.g., Matthew Guariglia, Police in Mississippi to Pilot a Program to Live-Stream Amazon Ring Cameras, Mozilla Found. (Nov. 19, 2020), <https://foundation.mozilla.org/en/blog/police-mississippi-pilot-program-live-stream-amazon-ring-cameras>; Surveillance Compounded: Real-Time Crime Centers in the U.S., ATLAS SURVEILLANCE (updated Nov. 24, 2020), <https://atlasofsurveillance.org/real-time-crime-centers>.

services, and agencies that primarily address homelessness, drug addiction, and mental health, despite Amazon Ring stating that only police and fire departments are currently on its platform.<sup>33</sup>

Regardless of whether these organizations are directly subject to the Commission’s jurisdiction, any violations of the Endorsement Guides that result from Amazon Ring’s inadequate oversight of endorsements of the company’s offerings should create liability for Amazon Ring.

Law enforcement organizations endorsing surveillance products come under regular criticism. One international industry association for surveillance equipment noted that a lack of transparency can harm the industry as a whole and diminish public trust:

“We are troubled by recent reports of agreements [between the selling company and law enforcement organizations] that are said to drive product-specific promotion, without alerting consumers about these marketing relationships. This lack of transparency goes against our standards as an industry, diminishes public trust, and takes advantage of these public servants.”<sup>34</sup>

NYU’s audit of Amazon Ring noted that “there is no question that [Amazon’s partnerships with law enforcement organizations] set Ring apart and that Ring believes the partnerships benefit it.”<sup>35</sup>

More broadly, as the Commission evaluates how it might articulate the scope of its Endorsement Guides, it should consider Amazon Ring’s publicly-reported commitments to cease these behaviors. The Commission should not rely on every home surveillance company voluntarily investing in a civil rights audit and committing to remedying the issues identified;<sup>36</sup> the Commission must implement effective deterrents to prevent similar misconduct in the marketplace. Even if

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<sup>33</sup> See Markey note 17 *supra*.

<sup>34</sup> Alfred Ng, Amazon Ring’s Police Partnership ‘Troubled’ Security Industry Group, CNET (Aug. 8, 2019), <https://www.cnet.com/news/amazon-rings-police-partnerships-troubled-security-industry-group/>.

<sup>35</sup> See Amazon Ring NYU Audit note 15 *supra* at 19.

<sup>36</sup> Indeed, as we have noted elsewhere, while we are optimistic about the future of audits overseen by the Commission itself, historically the Commission’s audits have not been adequately rigorous. See FTC Rulemaking on Commercial Surveillance & Data Security note 4 *supra* at 207-210 (PDF ppg. 210-213), <https://epic.org/ftc-rulemaking-on-commercial-surveillance-data-security/>. There is no reason to believe a voluntary audit undertaken by a company without Commission oversight would be more robust.

Amazon Ring adheres to the voluntary commitments in the NYU audit, we still urge the Commission to prevent similar harms by other companies who seek to leverage relationships with law enforcement organizations to promote their surveillance offerings to consumers in violation of the Endorsement Guides.

Amazon Ring’s decision to engage NYU about its endorsement campaign should not constitute a category of extenuating circumstance that entirely and retroactively absolves a selling company of all liability for violations of the Endorsement Guides. A company should be absolved of further responsibility for endorser misconduct when it issues a public statement disavowing its ties to the endorser, but that should only apply to endorser misconduct that occurs after the public statement is released and disseminated into the marketplace.

### **III. The Commission Should Enact a Trade Rule That Aligns with Its Endorsement Guides**

The Commission protects consumers from purchases resulting from deceptive claims (i.e. the consumers would not have purchased the product had they not been misled) and prevents a race-to-the-bottom in the marketplace by ensuring that honest, law-abiding merchants do not suffer competitive losses as a result of dishonest merchants going unpunished for illegally swindling consumers. Recognizing that these harms to consumers and to competition are just as acute in the context of claims or material omissions made by a merchant’s (or selling company’s) endorsers, the Commission published its Endorsement Guides, to ensure that merely using an influencer or endorser as a proxy does not shield the dishonest merchant from liability for their misconduct. We urge the Commission to state explicitly that this liability attaches to the selling company even if the endorsers themselves may be beyond the Commission’s traditional jurisdiction.<sup>37</sup>

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<sup>37</sup> The Commission’s jurisdiction is traditionally limited to “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(2). Its organic statute defines a corporation as an entity “organized to carry on business for its own

The FTC’s Endorsement Guides, adopted more than a decade ago<sup>38</sup> and enforced vigorously since,<sup>39</sup> require that an endorser promoting a company’s product must disclose any benefit they receive from the selling company in exchange for that promotion,<sup>40</sup> and that the selling company can be liable if the endorser fails to do so.<sup>41</sup> There are additional provisions regarding direct or implicit representations of an endorser’s expertise,<sup>42</sup> and substantiation requirements regarding product performance<sup>43</sup>—indeed the Commission specifically notes that the selling company cannot avoid liability for unsubstantiated claims merely by using an endorser as the mouthpiece to speak those claims.<sup>44</sup>

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profit or that of its members.” 15 U.S.C. § 44. Municipal police departments do not seem to fall within this purview.

<sup>38</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123 (Oct. 15, 2009), <https://www.federalregister.gov/documents/2009/10/15/E9-24646/guides-concerning-the-use-of-endorsements-and-testimonials-in-advertising>.

<sup>39</sup> See, e.g., Lesley Fair, Latest FTC Notice of Penalty Offenses tells 700+ national advertisers that deceptive endorsements can lead to financial penalties, FTC Business Blog (Oct. 13, 2021), <https://www.ftc.gov/business-guidance/blog/2021/10/latest-ftc-notice-penalty-offenses-tells-700-national-advertisers-deceptive-endorsements-can-lead>; Lesley Fair, FTC’s Teami case: Spilling the tea about influencers and advertisers, FTC Business Blog (Mar. 6, 2020), <https://www.ftc.gov/business-guidance/blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-and-advertisers>; Lesley Fair, FTC-FDA warning letters: Influential to influencers and marketers, FTC Business Blog (June 7, 2019), <https://www.ftc.gov/business-guidance/blog/2019/06/ftc-fda-warning-letters-influential-influencers-and-marketers>; Lesley Fair, FTC challenges influencer campaign for Warner Bros.’ Shadows of Mordor game, FTC Business Blog (July 11, 2016), <https://www.ftc.gov/business-guidance/blog/2016/07/ftc-challenges-influencer-campaign-warner-bros-shadow-mordor-game>; Lesley Fair, FTC says buyers strung along by deceptive endorsements for guitar DVDs, FTC Business Blog (Mar. 16, 2011), <https://www.ftc.gov/business-guidance/blog/2011/03/ftc-says-buyers-strung-along-deceptive-endorsements-guitar-dvds>.

<sup>40</sup> 16 CFR 255.5; see also The FTC’s Endorsement Guides: What People Are Asking, Fed. Trade Comm’n (2017), <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#disclose>.

<sup>41</sup> 16 CFR 255.1(d); see e.g., Lesley Fair, Hey, Google and iHeartMedia: FTC doesn’t heart deceptive endorsements, FTC Business Blog (Nov. 28, 2022), <https://www.ftc.gov/business-guidance/blog/2022/11/hey-google-iheartmedia-ftc-doesnt-heart-deceptive-endorsements> (holding selling company Google and advertiser iHeartMedia liable for deceptive statements made by radio personality endorsers).

<sup>42</sup> 16 CFR 255.3(b).

<sup>43</sup> 16 CFR 255.2(a).

<sup>44</sup> 16 CFR 255.1(a).

At the outer limits, the FTC notes that it does not intend to bring enforcement actions in response to every minute violation of its Endorsement Guides—a rogue blogger violating the Endorsement Guides would be unlikely to create liability for the selling company, for instance, especially if the selling company can demonstrate it otherwise has a reasonable training, monitoring, and compliance program in place.<sup>45</sup> However, the Commission has brought enforcement actions where the selling company was able to shape the endorser’s commentary.<sup>46</sup> Notably, the Commission has explicitly stated that merely including compliance language in contracts is inadequate for a selling company to evade liability for violations of the Endorsement Guides; the actual conduct of the endorser matters.<sup>47</sup>

There is a possible loophole in the Endorsement Guides in its current form however, which the Commission could easily fix by stating explicitly that endorsements made by non-covered entities that violate the Endorsement Guides will result in liability for the selling company. At present, the Endorsement Guides do not state, nor does the proposed rulemaking state, explicitly that non-covered entities can create liability for covered entities. The Commission should close this loophole so that a selling company cannot evade liability for consumer harm by its choice of endorser. This would ensure that, for example, when police departments repeat unsubstantiated crime reduction claims while peddling surveillance technology and/or fail to disclose to consumers the benefits received in exchange for their promotional behavior, the selling company (e.g. Amazon Ring) can be held liable for that endorser misconduct.

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<sup>45</sup> See The FTC’s Endorsement Guides note 40 *supra*, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#advertisersresponsibilities>.

<sup>46</sup> See, e.g., Fair, FTC challenges influencer campaign for Warner Bros.’ *Shadows of Mordor* game, note 39 *supra*.

<sup>47</sup> See, e.g., Fair, FTC says buyers strung along by deceptive endorsements for guitar DVDs, note 39 *supra*; Fair, FTC’s Teami case: Spilling the tea about influencers and advertisers, note 39 *supra*.

We also urge the Commission to explicitly state that it will apply the existing “clear and conspicuous” standard for disclosures of material connections in this context. It would be inconsistent with the Endorsement Guides<sup>48</sup> and detrimental to consumers for a disclosure of a relationship or received benefit to satisfy the Endorsement Guides’ requirements even if that disclosure was made in a manner that was not clear and conspicuous to consumers. For example, a police department handing out free products or selling them at a discounted rate should disclose to consumers while distributing the units that the department received them for free or at discount from the selling company, not merely say that it’s a grant-funded program nor merely post the disclosure on their website (as the consumer being physically handed the free product may not be aware of the webpage). The selling company should be able to prove that its endorsers complied with these requirements.

The Commission should also explicitly apply all of the provisions of the Endorsement Guides in this context, not merely the failure to disclose a material relationship. Repeating unsubstantiated claims, even if the endorser genuinely believes them, is actionable under the Endorsement Guides precisely because it still results in consumer harm—that is no less true when it is a surveillance technology company hoodwinking police departments into repeating unfounded claims about crime reduction. Similarly, implicit representations about the expertise of public servants (and other entities beyond the traditional scope of the Commission’s jurisdiction) are just as relevant as those of doctors or other “expert” endorsers, and should result in similar liability for selling companies that misuse that implicit expertise.

A selling company that would otherwise be subject to FTC regulation has not been able nor should now be able to evade liability for deceptive trade practices by using endorsers who may be

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<sup>48</sup> See, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising note 38 *supra* at 53,137, <https://www.federalregister.gov/d/E9-24646/p-234>.

beyond the FTC's jurisdiction, just as the Commission has made clear that using an endorser as a mouthpiece does not absolve the selling company of liability. If the selling company did not adequately train, monitor, and ensure the compliance of its endorsers with the Commission's Endorsement Guides,<sup>49</sup> the Commission should bring an enforcement action against that selling company.

Regarding remedies sought by the Commission, civil penalties would be appropriate, as the Commission has already issued a Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials, which explicitly includes unsubstantiated claims (even if the endorser genuinely believes them) as well as failing to disclose connections between the endorser and the selling company if such a connection materially impacts the weight or credibility of the endorsement and if the consumer would not reasonably expect it.<sup>50</sup> It is also appropriate given recent repeated efforts to diminish the Commission's authority to obtain equitable monetary relief under its traditional Section 5 authority.<sup>51</sup> Rather than issuing ad hoc Consent Orders and waiting for further consumer harm to occur, the Commission should implement market-wide Rules that will allow its staff to seek immediate civil penalties once violations of its Endorsement Guides have become apparent.

We support the Commission's proposal to implement a Trade Rule that aligns with its longstanding Endorsement Guides, but urge the Commission to ensure no loopholes allow for dishonest merchants to evade liability by their choice of endorsers, nor to limit its rulemaking to the

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<sup>49</sup> Recalling that the mere existence of contractual language requiring compliance has been demonstrably insufficient to absolve the selling company of liability for endorser misconduct.

<sup>50</sup> FTC, Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials, [https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty\\_offenses-endorsements.pdf](https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty_offenses-endorsements.pdf) (last visited Jan. 9, 2023).

<sup>51</sup> See ANPR note 1 *supra* at 67,425, <https://www.federalregister.gov/d/2022-24139/p-10>.

failing to disclose an association but rather to carry forward the full scope of the Endorsement Guides.

**IV. The Commission Should Explicitly State That Companies Are Liable Under Section 5 and Would Be Liable Under Its New Trade Rule for Violative Endorsements Made by Law Enforcement Organizations**

Although we maintain that any endorser creates liability for the company whose offerings it promotes while violating the Endorsement Guides (e.g. a public health department repeating an unsubstantiated claim in promoting a product or service), in particular we urge the Commission to be explicit that companies that seek to utilize law enforcement organizations to promote their surveillance-related offerings will be held liable for endorser misconduct, both under Section 5 and under the Commission's new Trade Rule. In any of these instances, a government entity endorsing a product or service may carry more weight than an influencer, as many consumers look to government entities as authorities on the matters over which they have responsibility (e.g. public safety, education or youth development, public health, etc.).

As noted above, the Endorsement Guides have existed for more than a decade and the Commission has vigorously enforced them throughout that time—it should not be a surprise to a selling company that it is responsible for its promoters' violations of the Endorsement Guides. Similarly, the Endorsement Guides serve as an articulation of the Commission's authority under Section 5 to bring enforcement actions against unfair or deceptive acts or practices within the specific context of endorsers, influencers, and testimonials—as such, this endorser misconduct would also constitute Section 5 violations.

As a final note, we urge the Commission to consider whether local government entities constitute consumers and as such unfair or deceptive practices employed in selling to local governments (not merely practices employed by local governments as endorsers, as we argue above) would also fall within the purview of a trade rule based on the Endorsement Guides.

Respectfully submitted, this the 9th day of January 2023, by:

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