

August 17, 2021

Samuel Levine
Acting Director, Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Acting Director Levine,

We write in support of our complaint dated May 31, 2020 and renew our request that the Commission investigate Smith & Wesson Brands, Inc.'s marketing practices. *Complaint and Request for Investigation of Smith & Wesson Brands, Inc.* (May 31, 2020) ("Complaint"). This submission supplements our complaint with legal authorities supporting our contention that Smith & Wesson's marketing practices are unfair and deceptive. In addition, we provide new materials indicating that Smith & Wesson's engagement of social media influencers violates the Commission's rules.

Our initial complaint focused on the impact of Smith & Wesson's advertising in the context of the 2018 Parkland shooting. Last year, however, our country witnessed yet another tragic example of the consequences of Smith & Wesson's deceptive and unfair marketing—the shooting in Kenosha, Wisconsin, that occurred during protests in the city following the police shooting of Jacob Blake. According to the criminal complaint filed in his prosecution, Kyle Rittenhouse used a Smith & Wesson AR-15 style .223 rifle to kill two men, Joseph Rosenbaum and Anthony Huber, and injure a third. Rittenhouse was there with several armed men who had self-appointed themselves to defend property. See *Washington Post, Before a Fatal Shooting, Teenage Kenosha Suspect Idolized the Police* (Aug. 27, 2020), <https://www.washingtonpost.com/nation/2020/08/27/kyle-rittenhouse-kenosha-shooting-protests/>. According to court documents and news reports, Rittenhouse, who was seventeen at the time of the shooting and who was fixated on law enforcement, had a friend illegally purchase the Military and Police (M&P) rifle for him in May 2020—a few months after he attempted to join the Marine Corps. *Id.* (citing a Marine Corps spokesperson as saying that Rittenhouse was disqualified from service); *The New Yorker, Kyle Rittenhouse, American Vigilante* (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/-rittenhouse-american-vigilante>. Rittenhouse's choice of weapon was not happenstance, it was a product of a directed campaign by Smith & Wesson. Based on our investigation, we believe that Smith & Wesson both targets young males like Rittenhouse and misleadingly associates its weapons with the U.S. military and law enforcement. The evidence strongly suggests that they impliedly misrepresent or overstate that the U.S. military and law enforcement endorse or use Smith & Wesson's M&P assault rifles and they exercise undue

influence over a vulnerable population, exploiting the tendencies of adolescents and young men. This results in concrete harm to innocent third parties.¹

In addition to Smith & Wesson’s marketing of its M&P assault rifles, our research also has uncovered a pattern by Smith & Wesson of engaging social media influencers to promote its firearms. Some of the public posts of these influencers reveal that Smith & Wesson has on numerous occasions provided free firearms to influencers in exchange for reviews and other promotional content. However, the vast majority of the influencer posts that promote Smith & Wesson that we reviewed either contain no disclosure or contain inadequate disclosure of the connection between Smith & Wesson and the influencer. The undisclosed connection between Smith & Wesson and these influencers is unexpected and would materially affect the weight that consumers give to the endorsements. Thus, Smith & Wesson’s influencer marketing practices violate the Commission’s Endorsement Guides.

These practices are both deceptive and unfair under Section 5 of the Federal Trade Commission Act (“FTC Act”). The Commission can and should take all appropriate actions against Smith & Wesson to stop its deceptive and unfair marketing practices and reduce the risk of another tragedy, like the ones in Parkland and Kenosha, from occurring again.

I. Smith & Wesson’s Marketing is Unfair.

Smith & Wesson’s marketing of its M&P rifles is unfair under Section 5. We believe that this marketing has deadly consequences for innocent third parties; exercises undue influence over adolescent and young adult men, who are highly susceptible to such marketing; and is not outweighed by any benefits to consumers.

A company engaging in an “unfair act or practice” violates Section 5. 15 U.S.C. § 45(a). The Commission must show that the act or practice “[1] cause[s] . . . substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition.” *Id.* § 45(n); *see also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (2015).

Substantial injury may be demonstrated by either “very severe harm to a small number of people” or “a small harm to a large number of people.” *In the Matter of Int’l Harvester Co.*, 104 F.T.C. 949 (1984) (finding “serious consumer injury” and unfairness where tractor manufacturer failed to notify its customers of a dangerous condition in its tractors, resulting in “[a]t least one person . . . killed and eleven others burned”); *see also FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (An act or practice can cause “substantial injury” by doing a “small harm to a large number of people, or if it raises a significant risk of concrete harm.”). To determine whether an injury is reasonably avoidable, courts consider “whether consumers had a free and informed choice

¹ Last month, a court permitted a case to go forward against Smith & Wesson where the plaintiffs, victims of the 2019 shooting at the Chabad of Poway synagogue, alleged that Smith & Wesson marked its M&P rifles in violation of California’s unfair business practices law, in a manner attractive to young men predisposed to violence.

that would have enabled them to avoid the unfair practice.” *E.g., FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008) (quoting *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985)). Certain types of seller conduct or market imperfections may unjustifiably hinder consumers’ free market decisions, such as “exercis[ing] undue influence over highly susceptible classes of purchasers,” including adolescents and young adults. *Id.* (quoting FTC, *Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction* (“Unfairness Statement”) (Dec. 17, 1980), appended to *In the Matter of Int’l Harvester Co.*, 104 F.T.C. at 1073 n.12); see also *In the Matter of Ideal Toy Corp.*, 64 F.T.C. 297 (1964) (children); *In the Matter of Travel King, Inc.*, 86 F.T.C. 715 (1975) (the seriously ill).

Finally, a practice generally will not be deemed unfair if any injury caused by the practice is outweighed by offsetting consumer or competitive benefits. As such, the Commission engages in a cost-benefit analysis of the practice in question to determine whether countervailing benefits outweigh any injury. See *Pa. Funeral Dirs. Ass’n v. FTC*, 41 F.3d 81, 89–92 (3d Cir. 1994). “The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.” *Unfairness Statement* at 1073–74; see also J. Howard Beales III, *The Federal Trade Commission’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. Pub. Pol’y & Marketing 192, 196 (2003) (“It is important to consider both the costs of imposing a remedy (such as the cost of requiring a particular disclosure in advertising) and any benefits that consumers enjoy as a result of the practice, such as the avoided costs of more stringent authorization procedures and the value of consumer convenience.”).

A. Smith & Wesson’s Marketing Causes Substantial Harms to Vulnerable Populations.

Smith & Wesson’s advertising of its rifles to adolescent and young adult men has undoubtedly led to destructive consequences. Five of the 10 most destructive mass shootings committed in American history were perpetrated by young, male shooters who were between the ages of 19 and 26. *Complaint* at 7. Four of those five (which includes the Newtown, Aurora, Sutherland Springs, and Parkland shootings) involved the use of an AR-15-style rifle and injured dozens. *Id.* The Parkland shooter used a Smith & Wesson rifle to kill 17 people and injure 17 more; the Aurora shooter also used a Smith & Wesson rifle to kill 12 people and injure 70 more. This has resulted in not only devastating physical injuries but also emotional and psychological trauma for the friends and families of those killed or injured.² These harms are not trivial—they

² Severe emotional and psychological harm that is not “trivial or merely speculative” can be the basis for substantial injury. See *FTC v. Accusearch, Inc.*, 2007 WL 4356786, at *8 (D. Wyo. Sept. 28, 2007), *aff’d*, 570 F.3d 1187 (10th Cir. 2009) (in a case involving the illicit sale of confidential consumer phone records, holding “the evidence presented to the Court regarding the sale of consumer phone records in particular demonstrates a host of emotional harms that are substantial and real and cannot fairly be classified as either trivial or speculative”); *In the Matter of Int’l Harvester*

have severe and lasting effects. *See* Patricia Mazzei, *Parkland: A Year After the School Shooting That Was Supposed to Change Everything*, N.Y. Times (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/parkland-anniversary-marjory-stoneman-douglas.html>.

Worse, the brunt of the harm is borne by innocent third parties, including children, not by the consumers purchasing the rifles. The Commission has been particularly sensitive to such extreme injuries befalling vulnerable and unsuspecting third parties. For example, the Commission alleged that respondents had committed an unfair act or practice by developing and selling “stalking” apps that allowed purchasers to surreptitiously monitor another person’s activities on that person’s mobile phone or computer. *See* Complaint, *Retina-X Studios, LLC*. C-4711 (F.T.C. Mar. 26, 2020). The Commission alleged that this practice resulted in substantial injuries to innocent third parties that were not reasonably avoidable and not outweighed by countervailing benefits. *Id.* at 4. Mass shootings like Parkland committed with Smith & Wesson’s rifles do even greater damage to communities in innumerable ways by diminishing our sense of security and our enjoyment of life, in addition to the unacceptable loss of life—and victims have no reasonable way of avoiding these harms.

B. Smith & Wesson’s Advertising Targets and Exercises Undue Influence Over Adolescent and Young Adult Men.

Adolescent and young adult men are both highly susceptible to product advertising and, in particular, receptive to advertisements that depict impulsive, thrill-seeking behavior. In part, this is because this group is less able to comprehend the nature of the risks involved in such behavior. *See Complaint* at 9–10. We believe that Smith & Wesson exploits these well-documented propensities by publishing advertisements for rifles that appeal to the adolescent and post-adolescent audiences in both form and content. *See Complaint* at 16 (marketing campaign that mimics violent video games, *e.g.*, “first-person shooter” games); *id.* at 18 (marketing campaign that encourages thrill-seeking behavior); *id.* at 20–22 (marketing campaign encouraging parents to start their children shooting M&P assault rifles early, under the guise of safety and family time); *id.* at 20 (marketing on Instagram whose users are disproportionately young). For example, Smith & Wesson’s advertisements promise consumers that they will “Experience More Adrenaline” and encourage them to “Kick Brass.” These advertisements also associate Smith & Wesson’s rifles with both the U.S. military and law enforcement to take advantage of the propensity of adolescent and young adult men to be drawn to the risk-taking associated with militaristic weapons or combat missions.

The Commission has long recognized that adolescents and young adults comprise a class of purchasers highly susceptible to undue influence. Prior enforcement actions demonstrate that advertisements designed to induce children to use dangerous products are unfair. In particular, Smith & Wesson’s marketing strategy toward adolescent and young adult men is reminiscent of

Co., 104 F.T.C. 949 (1984) (“Many of the burn injuries have been major ones, moreover, resulting in . . . lasting psychological harm.”).

tactics adopted by the tobacco industry of using direct marketing aimed at children to increase profits. These tactics famously included using cartoons such as Joe Camel in order to make cigarettes “attractive” to young people. *See In re R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999). The Commission found that these marketing practices were unfair because the “campaign would have a substantial appeal to children and adolescents” and that it “would cause many children and adolescents below the age of 18 to smoke Camel cigarettes.” *Id.* at 50. More recently, the Commission has warned against e-cigarettes that use labeling or advertising that resemble kid-friendly food products, such as juice boxes, candies or cookies. *See Press Release, Fed. Trade Comm’n, FTC, FDA Take Action Against Companies Marketing E-liquids That Resemble Children’s Juice Boxes, Candies, and Cookies* (May 1, 2018), <https://www.ftc.gov/news-events/press-releases/2018/05/ftc-fda-take-action-against-companies-marketing-e-liquids>.³

C. The Substantial Harms That Smith & Wesson’s Marketing Causes Are Not Outweighed By Countervailing Benefits.

Gun violence in America is an epidemic. Recognizing the need to address this “gun violence public health epidemic” earlier this year, the Biden-Harris Administration announced a set of initial actions it would take to help reduce gun violence. *See White House, Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic* (Apr. 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/>. Not only are mass shootings becoming more frequent, they are becoming deadlier. *See James Densley & Jillian Peterson, We Analyzed 53 Years of Mass Shooting Data. Attacks Aren’t Just Increasing, They’re Getting Deadlier*, L.A. Times (Sept. 1, 2019), <https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase>. In addition, they often are perpetrated by young men—the demographic that Smith & Wesson targets. *See Ed. Bd., The Killers in Our Midst*, Wall. St. J. (Aug. 4, 2019), <https://www.wsj.com/articles/the-killers-in-our-midst-11564958792>. Smith & Wesson’s marketing practices, and in particular its apparent targeting of this susceptible group, have contributed to the catastrophic harm that has befallen so many innocent victims of mass shootings. The risk of these harms occurring again could be reduced if Smith & Wesson would take reasonable steps to reform its marketing. For example, Smith & Wesson could do so by tailoring its marketing to target less vulnerable consumers, ceasing the use of military imagery, or highlighting the serious known dangers associated with these weapons. These would not be burdensome or costly reforms. But despite the increasing use of its products to commit terrible acts of gun violence, Smith & Wesson has declined to take any of these actions. The actions would impose costs that clearly do not outweigh the loss of life that has resulted in part from Smith &

³ Older Commission precedents further demonstrate the scrutiny with which the Commission analyzes advertisements that pose a danger to children. *See In the Matter of Uncle Ben’s, Inc.*, 89 F.T.C. 131 (1977) (ad showing a child very close to a stove without close adult supervision); *In the Matter of Mego Int’l, Inc.*, 92 F.T.C. 186 (1978) (ad showing a girl using a child hair dryer near a sink of water without adult supervision); *In the Matter of AMF Inc.*, 95 F.T.C. 310 (1980) (ad showing a youth riding a bike over rough ground, turning into an alley without looking both ways, and entering street a little without stopping and looking).

Wesson’s marketing. Accordingly, the benefits that Americans would enjoy from less deceptive marketing would outweigh any potential costs to Smith & Wesson.

As gun violence continues to increase, taking innocent lives, Smith & Wesson continues to profit from firearm sales. In Fiscal Year 2021, the company reported \$1.1 billion in net sales and \$449 million in gross profits. *See* Smith & Wesson, Form 10-K for the fiscal year ended April 30, 2021, at 4. These figures are significantly higher than the corresponding figures for 2020 and 2019. As Smith & Wesson has explained to investors, as part of a strategy to attract civilian customers, it associates its products with the military and law enforcement. *See Complaint* at 15. The company has stated that this “halo [effect]” benefits the M&P brand by adding credibility. The dangers created by Smith & Wesson’s advertising are widely recognized as a problem all over the country. For example, in October 2020, the state of New Jersey subpoenaed Smith & Wesson for various documents, including advertising claims concerning personal protection, defense, safety, or home safety benefits of Smith & Wesson firearms. *See Complaint* at Exhibit 1, *Smith & Wesson Brands, Inc. v. Grewal*, Case No.: 2:20-cv-19047-KM-ESK (D.N.J. Dec. 15, 2020). In addition, as noted above, victims of the 2019 shooting at the Chabad of Poway synagogue filed a case against Smith & Wesson, alleging that Smith & Wesson marked its M&P rifles in violation of California’s unfair business practices law, in a manner attractive to young men predisposed to violence. *See Complaint* at 21-30, 101-103, *Goldstein v. Earnest*, Case No.: 37-2020-00016638-CU-PO-CTL (Cal. Super. Ct. Jun. 15, 2020). These harms that threaten people’s lives are not outweighed by countervailing benefits to consumers or competition.

II. Smith & Wesson’s Marketing is Deceptive.

Smith & Wesson also deceptively markets its M&P rifles by implicitly claiming and/or overstating Smith & Wesson’s affiliation with or endorsement by the U.S. military or law enforcement. In our view, such claims are false or misleading to reasonable consumers, particularly the adolescents and young adults whom the advertisements target. Smith & Wesson’s deceptive marketing has ultimately resulted in real-world harm—exacerbating the risk that susceptible young men will obtain the M&P products and perform tragic acts of violence. The shooters in Parkland, Florida, Poway, California,⁴ and Kenosha, Wisconsin, are all examples of teenage boys, obsessed with law enforcement and the military, who used their Smith & Wesson M&P rifles to commit violence.

Section 5 of the FTC Act prohibits deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a). An act or practice is deceptive if it involves a material misrepresentation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances. *FTC Policy Statement on Deception* at *45 (Oct. 14, 1983) (“Deception Policy Statement”), *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319 (1984).

⁴ The shooter in the Poway, California synagogue shooting had a militaristic manifesto and saw himself as a soldier defending his country. The Poway shooter killed one and injured three using a Smith & Wesson rifle, and many others present in the Synagogue suffered further physical and emotional trauma. *See Complaint* at 21-30, 101-103, *Goldstein v. Earnest*, Case No.: 37-2020-00016638-CU-PO-CTL (Cal. Super. Ct. Jun. 15, 2020).

A misrepresentation is “material” if it is likely to affect a consumer’s choice of a product or conduct regarding a product. *Id.* Certain kinds of representations are presumed to be material, including claims about health and safety. *Id.* at *49. Materiality also is presumed when an express claim is made or when there is evidence that an advertiser intended to make an implied claim. *Id.*; see also *In the Matter of Am. Home Prods.*, 98 F.T.C. 136, 368 (1981).

Reasonableness generally is evaluated from the perspective of the ordinary consumer. However, if the marketing practice targets a particular demographic group, such as minors, deception is instead evaluated from the perspective of a reasonable member of that group. Deception Policy Statement at * 46; see also *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 n.37 (1977) (“The determination of whether an advertisement is misleading requires consideration of the legal sophistication of its audience.”).

A misrepresentation can be express or implied. See *In the Matter of Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *aff’d*, 676 F.2d 385 (9th Cir. 1982). When determining whether an advertisement contains an implied claim, the Commission considers the “overall net impression” of an advertisement, which involves consideration of “the juxtaposition of phrases and images, and the nature of the transaction.” *FTC Enforcement Policy Statement on U.S. Origin Claims* (Dec. 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>. Extrinsic evidence is not needed for the Commission to determine that a reasonable consumer would find an implied claim in the advertisement. *In the Matter of Kraft, Inc.*, 114 F.T.C. 40, 121 (1991); see also *ITT Cont’l Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976).

A. Smith & Wesson’s Marketing Materially Misrepresents its Association with the U.S. Military and Law Enforcement.

Through its marketing for its M&P rifles, Smith & Wesson misrepresents by implication that it is affiliated with the U.S. military and law enforcement. In particular, Smith & Wesson’s advertising includes imagery and messaging that would cause consumers to believe that its products are endorsed by the U.S. military, when there is no evidence that the military uses such products. For example, its advertisements feature images of active-duty soldiers carrying what appear to be M&P rifles. *Complaint* at 13.

These representations are false or grossly overstate the extent to which the U.S. military and law enforcement use these products. Smith & Wesson’s recent 10-K filings indicate that it has not entered into any major contracts to supply M&P rifles to any large domestic military agencies. *Complaint* at 11; see also Smith & Wesson, Form 10-K For the fiscal year ended April 30, 2021, at 9 (stating that 94% of net sales were to domestic consumers). In fact, over the past decade, Smith & Wesson appears to have secured only one contract with the military, which involved the sale of 250 revolvers to the Army in 2012 that appear to have been destined for Thailand. *Id.* at 12. Moreover, only a small percentage of Smith & Wesson’s overall sales are to law enforcement, and those appear to be mostly sales of handguns, not rifles. *Id.* at 15.

It is well established that false or misleading endorsements violate the Commission’s prohibition on deceptive marketing practices. Endorsements include any advertising message “that consumers are *likely to believe* reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.” 16 C.F.R. § 255.0(b) (emphasis added). If an advertisement represents that a product is used by an endorser, the endorser must be a bona fide user of the product. 16 C.F.R. § 255.1(c). The Commission routinely exercises its Section 5 authority against marketers that misrepresent that their products are endorsed or used by others, including by using images of celebrities when marketing the products to create the perception of an affiliation. For example, the Commission found that the marketers of acai berry supplements deceptively implied an endorsement by Oprah Winfrey and Rachael Ray by including their images next to an endorsement of the product. *See Central Coast Nutraceuticals, Inc.*, No. 102-3028 (F.T.C. 2012).

The Commission also has made clear that misrepresenting a government affiliation, even when that affiliation is implied, is a deceptive act or practice. *See Complaint, United States v. Sunkey Publishing, Inc.*, No. CV-01444 (N.D. Ala. Sept. 6, 2018) (lead generators representing that they were affiliated with the United States military and that military endorsed a post-secondary school); *Complaint, Fed. Loan Modification Law Ctr., LLP*, No. SACV-09-401 (C.D. Cal. Apr. 3, 2009) (mortgage relief service providers purporting to offer “federal” loan modification and foreclosure relief services); *Complaint, FTC v. Nat’l Awards Serv. Advisory, LLC*, No. CV-10-5418 (N.D. Cal. Nov. 30, 2010) (prize promoters touting affiliation with a government agency).

In particular, the Commission in the past has alleged that marketers misrepresent a government affiliation by using language and images on their marketing materials that are similar to those used by the government. *Complaint, FTC v. Nat’l Awards Serv. Advisory, LLC*, No. CV-10-5418 (N.D. Cal. Nov. 30, 2010) (using false agency names and official-looking seals and imagery, such as watermarks with a circle of stars, the inscription “In God We Trust,” and a bald eagle). Similarly, courts have found deception where an advertiser intended to cause consumers to associate the advertiser with the federal government in order to increase the advertiser’s credibility. *See Order Granting Plaintiff’s Motion for Summary Judgment Against Boaz Minitzer at 7, Fed. Loan Modification Law Ctr., LLP*, No. SACV-09-401 (C.D. Cal. Nov. 17, 2010) (finding deception where a national ad campaign “prominently featured the word ‘federal,’” and defendants used the website www.fedmod.com to market services).

Smith & Wesson does just this, using symbols, imagery, and language associated with governmental agencies in its advertisements, thereby creating the net impression of an affiliation with those agencies. *See Complaint* at 12 (website image of rifles with the text “Military and Law Enforcement”); *id.* at 14 (social media post that includes a patch on a soldier’s uniform that resembles a backwards American flag, part of the US Flag Code that applies to service members’ uniform insignia); *id.* at 15 (marketing campaign that features images of law enforcement service members, M&P rifles and handguns, and the slogans “To Uphold. To Protect. To Defend.”). Moreover, Smith & Wesson’s public statements suggest that this is an intentional strategy to misleadingly associate its products with the U.S. military and law enforcement because it believes

that the “halo [effect]” confers “credibility” on its products from the perspective of civilian consumers. *Complaint* at 15.

These misrepresentations by Smith & Wesson are material. The implication that Smith & Wesson’s rifles are endorsed or used by the United States military makes it more likely that consumers will purchase them. The Commission can also presume materiality based on the evidence that Smith & Wesson is deliberately implying a military association. *See In the Matter of Thompson Med. Co.*, 104 F.T.C. 648 (1984) (“[W]hen evidence exists showing that a seller deliberately made an implied claim, the Commission presumes materiality. The underlying rationale . . . is the assumption that the willingness of a business to promote its products reflects a belief that the consumers are interested in the advertising.”). The company’s public statements regarding its strategy to target civilian consumers by associating its products with the military reflect Smith & Wesson’s belief that those associations are material to consumers.

B. Smith & Wesson Directs its Marketing to Adolescents Who Are More Likely to be Misled.

It appears that Smith & Wesson directs its marketing, at least in part, to adolescents, as reflected in the company’s social media practices. *Complaint* at 13–14, 16. Thus, although Smith & Wesson’s marketing is misleading from the perspective of a reasonable consumer, that deception is amplified when considered from the perspective of an adolescent.

If a marketing practice targets a specific audience, such as adolescents, reasonableness is considered from the perspective of a member of that group. The Commission has recognized the susceptibility of adolescents to deceptive marketing, finding that claims regarding child-directed products can be deceptive when a child reasonably believes them, even if an adult does not. *See, e.g., In the Matter of Hasbro, Inc.*, 116 F.T.C. 657 (1993); *In the Matter of Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991). That is no less true in the false-endorsement or government-imposter context. “Preying on young people who want to serve our country in uniform is particularly troubling Companies that prey on current and prospective service members not only harm military families, but also the broader American public.” *See Sunkey Publishing and Fanmail.com*, No. 162-3211 (F.T.C. Sept. 6, 2018) (separate statement by Commissioner Chopra, joined by Commissioner Slaughter).

The Smith & Wesson advertisements described above and included in the Complaint would mislead a reasonable consumer to believe that M&P rifles are affiliated with or endorsed by the U.S. military or law enforcement. An adolescent is even more likely to believe those associations, as such individuals lack the knowledge and experience to anticipate that the claims could be false. *See In the Matter of Ideal Toy Corp.*, 64 F.T.C. at 310. These young people also are of an age to be interested in joining the military and thus less likely to question—and more likely to be misled by—the false association with the U.S. military.

III. Smith & Wesson’s Marketing Violates the Commission’s Endorsement Guides.

Smith & Wesson also appears to market its firearms through the deceptive use of social media influencers, in violation of the Commission’s Endorsement Guides. *See Guides Concerning the Use of Endorsements and Testimonial Advertising*, 16 C.F.R. §§ 255, *et seq.* (hereinafter, *Endorsement Guides*). Smith & Wesson’s endorsers frequently promote the company’s firearms through a variety of platforms, such as video product reviews, social media posts, and real-world product demonstrations. However, in many cases, the endorsers fail to disclose when they have a material connection to Smith & Wesson, including receiving free firearms, trips, and athletic sponsorships from the company. These marketing practices are likely to mislead reasonable consumers into believing that the endorsements reflect an independent opinion when in reality the endorsers have a material connection to Smith & Wesson. The company’s apparent failure to ensure that its social media influencers adequately disclose their material connection to Smith & Wesson is a deceptive act or practice that runs afoul of clear guidance in the Endorsement Guides and violates Section 5 of the FTC Act.

The Endorsement Guides provide that advertisers must disclose any material connection between an endorser and the advertiser that might materially affect the weight that a consumer gives to the endorsement and that is not reasonably expected by the audience. *Endorsement Guides* § 255.1(d) (“Advertisers are subject to liability . . . for failing to disclose the material connections between themselves and their endorsers.”); *id.* § 255.5.

A material connection can take the form of payment of money, but it also can include the provision of other things of value like a free product, travel, or accommodations. *See* FTC, *The FTC’s Endorsement Guides: What People Are Asking*, Federal Trade Commission (Aug. 27, 2020) (hereinafter, *Endorsement Guides FAQs*) (“Knowing that you received free travel and accommodations could affect how much weight your readers give to your thoughts about the product, so you should disclose that you have a financial relationship with the company.”).

A disclosure of a material connection effectively prevents a finding of deception only if the disclosure is clear and conspicuous. *See* FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, at 6 (Mar. 2013). To be clear and conspicuous, a disclosure must use plain and unambiguous language and must be easily noticed and understood by consumers. *Id.* On social media platforms, the Commission has advised that the disclosure should not be hidden below a “more” button or mixed into a list of hashtags at the end of a post. *See Endorsement Guides FAQs* (“[R]equired disclosure should be presented without having to click ‘more.’”); *id.* (#ad disclosure insufficient if “mixed in with links or other hashtags at the end”). On video platforms, disclosures should appear at the beginning of the video. *See id.* Disclosures included only in a video’s description are not clear and conspicuous. *See id.* (“[C]onsumers can easily miss disclosures in the video description.”). Finally, each time an endorsement is published—for instance on different social media platforms—the endorsement should be accompanied by an adequate disclosure. *See id.* (“[E]ach new endorsement made without a

disclosure could be deceptive because readers might not see the original blog post where you said you got the product free from the manufacturer.”).

A. Smith & Wesson’s Social Media Influencers Frequently Fail to Adequately Disclose Their Material Connection to Smith & Wesson.

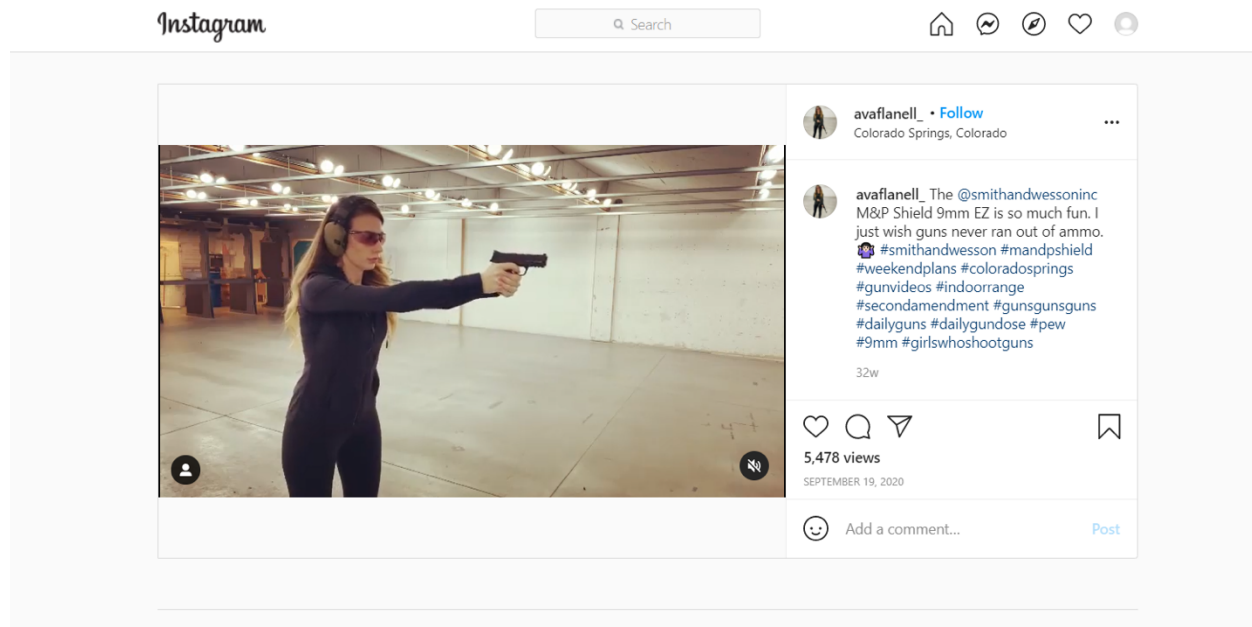
Our investigation indicates that Smith & Wesson engages several social media influencers who do not disclose their material connection to Smith & Wesson. In particular, over the past several years, at least six social media influencers have expressly stated in some form that they have received from Smith & Wesson free firearms or other goods such as travel. The receipt of these benefits likely constitutes material connections that must be conspicuously and clearly disclosed. *See Endorsement Guides* § 255.5 (describing the example of a college student reviewing a gaming system that was received for free); *Endorsement Guides FAQs* (free travel and accommodations must be disclosed). However, these influencers fail to consistently and sufficiently disclose their material connection to Smith & Wesson when endorsing the company’s firearms.

Before detailing the evidence we have uncovered of material connections between Smith & Wesson and numerous influencers, we note that the breadth of Smith & Wesson’s influencer campaign and its failure to ensure that these influencers have made the necessary disclosures suggest there may be other influencers who are also failing to disclose their material connection. Importantly, the examples provided below are based on those instances in which, based on public materials, it is evident that Smith & Wesson provided a material benefit to an endorser that was not adequately disclosed. However, there are many more instances of social media influencers endorsing Smith & Wesson products. *See, e.g.*, The Guy Gear Review (@theguygearreview), Instagram (Jul. 26, 2021), <https://www.instagram.com/p/CRzPwFVL6Lk/>; The Gun Collective (@TheGunCollective), *S&W M&P Shield 380 EZ PC - Is There A Better .380?*, YouTube (Sept. 13, 2019), <https://perma.cc/W7RA-8RKQ>; Colion Noir (@ColionNoir), *FIRST MAG: M&P M2.0 COMPACT 9*, YouTube (Mar. 21, 2018), <https://perma.cc/S7MF-BT43>; Guns.Com (@gunscom), *Smith & Wesson M2.0 Review* (May 24, 2017), <https://perma.cc/7XY-62EG>. None of these endorsers disclosed a material connection to Smith & Wesson. In light of Smith & Wesson’s routine practice, described below, of engaging social media influencers and its failure to ensure that these influencers disclose their material connection to Smith & Wesson, we urge the FTC to investigate whether these influencers also received a material benefit from Smith & Wesson.

Ava Flanell is a shooting instructor with 24,000 YouTube subscribers who has published multiple videos endorsing Smith & Wesson firearms. Flanell’s social media endorsements of Smith & Wesson often fail to disclose her material connection to the company. For example, her video reviews of Smith & Wesson firearms sometimes contain no disclosure. *See* Ava Flanell (@AvaFlanell), *S&W M&P M2.0 Compact - Are You Optic Ready?*, YouTube (Nov. 25, 2020), <https://perma.cc/9A8Y-LVET>. On other social media platforms like Instagram, Flanell routinely fails to disclose her material connection to Smith & Wesson. *See, e.g.*, Ava Flanell (@avaflanell_), Instagram (Mar. 19, 2021) (no disclosure about receipt of free firearm as stated in corresponding

video review, which can be viewed at <https://perma.cc/R4DE-3TSG>), <https://www.instagram.com/p/CMnW0fGLXTD/>; *id.* (Nov. 25, 2020) (tagging Smith & Wesson but otherwise making no disclosure), https://www.instagram.com/p/CIBj_r5pKvH/; *id.* (Sept. 19, 2020) (no disclosure about free travel or pre-release access to this firearm as stated in corresponding YouTube video, which can be viewed at <https://perma.cc/GQP7-VDSX>), https://www.instagram.com/p/CFUeNQiJ_ME/; *id.* (Aug. 18, 2020) (no disclosure about free travel or pre-release access to this weapon as stated in corresponding YouTube video, which can be viewed at <https://perma.cc/GQP7-VDSX>), <https://www.instagram.com/p/CEC2HSvJnGk/>.

Even when Flannell does acknowledge her relationship with Smith & Wesson, her disclosures fail to comply with the Commission's guidance. For example, in a recent video Flannell states that she received free firearms from Smith & Wesson, but she includes this statement only at the end of the nearly 12-minute video. *See, e.g.,* Ava Flannell, *S&W M&P Shield 9 Plus - All New Micro-Compact EDC!*, YouTube (Mar. 15, 2021), <https://perma.cc/R4DE-3TSG>. In another example, Flannell states that Smith & Wesson provided the firearm that she is endorsing only in the video description. *See, e.g.,* Ava Flannell, *The NEW Performance Center M&P 9mm Shield EZ - Is It Worth It?*, YouTube (July 13, 2020), <https://perma.cc/WEV9-7RP3>. Flannell also has stated that Smith & Wesson provides her with other material benefits, including free travel, a tour, and early access to new products. *See, e.g.,* Ava Flannell (@Ava Flannell), *S&W Shield 9mm EZ Review - Is it Like the 380 EZ?*, YouTube (Dec. 12, 2019) (review of Smith & Wesson firearm noting receipt of free travel, tour, and pre-release access to firearms), <https://perma.cc/GQP7-VDSX>.

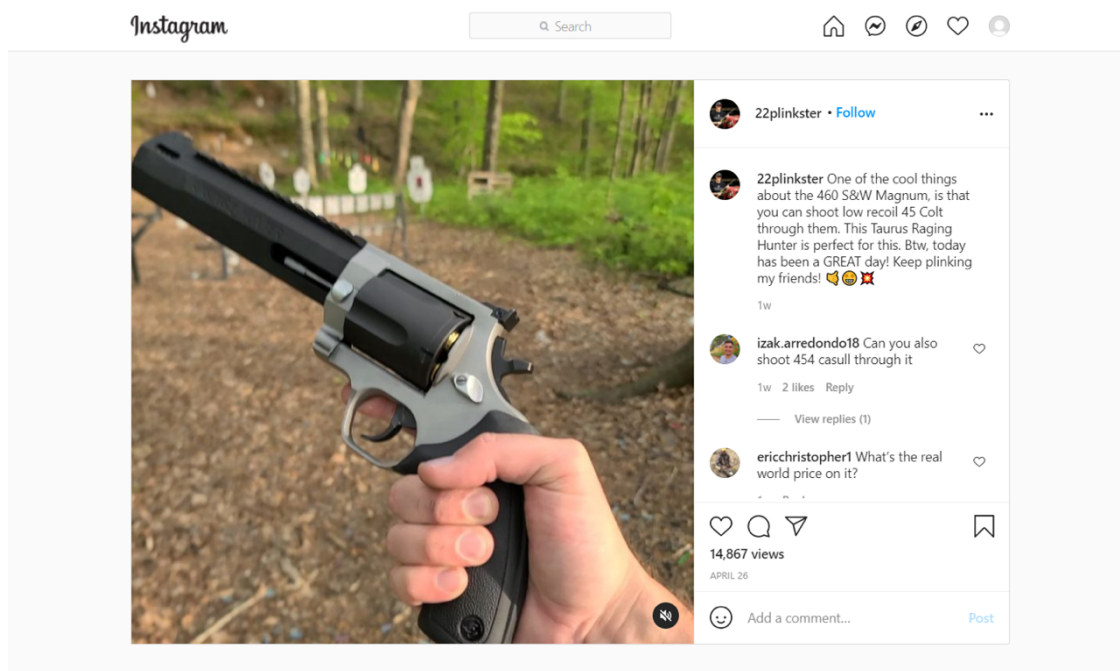


Screenshot of Ava Flannell's Instagram, dated September 19, 2020.

David Nash is a social media influencer whose video reviews of firearms on YouTube have garnered 708,000 subscribers. Nash has published several endorsements of Smith & Wesson firearms without disclosing his material connection to the company. *See* David Nash

(@22plinkster), *SMITH AND WESSON 648 - 22WMR*, YouTube (Apr. 23, 2020) (video featuring Smith & Wesson firearm with no disclosure), <https://perma.cc/X633-C2JA>. On other social media platforms like Instagram, Nash often endorses Smith & Wesson firearms without including any sort of disclosure. See David Nash (@22plinkster), Instagram (Apr. 26, 2021) (video demonstrating Smith & Wesson firearm with no disclosure), <https://www.instagram.com/p/COJbZ12piKI/>; *id.* (Feb. 14, 2021) (post featuring Smith & Wesson firearm with no disclosure), <https://www.instagram.com/p/CLTKY3kJAi6/>.

Even where Nash does note that he received a benefit from Smith & Wesson, his disclosures are insufficient. For example, Nash sometimes states that he received a free firearm from Smith & Wesson—but only in the middle or at the end of the video. See, e.g., David Nash (@22plinkster), *SMITH AND WESSON 41 PERFORMANCE CENTER*, YouTube (Oct. 16, 2015) (stating quickly in the middle of the video that Smith & Wesson sent him the featured firearm and thanking the company at the end of the video), <https://perma.cc/G8RG-W2G7>. And in other videos endorsing Smith & Wesson firearms, Nash notes his connection to the company only in the text description beneath the video. See David Nash (@22plinkster), *Smith and Wesson 629 44 Magnum Hunter*, YouTube (May 31, 2016) (thanking Smith & Wesson at the end of the video but disclosing receipt of free firearm in the video description only), <https://perma.cc/69B4-KUSA>.⁵



Screenshot of David Nash's Instagram, dated April 26, 2021.

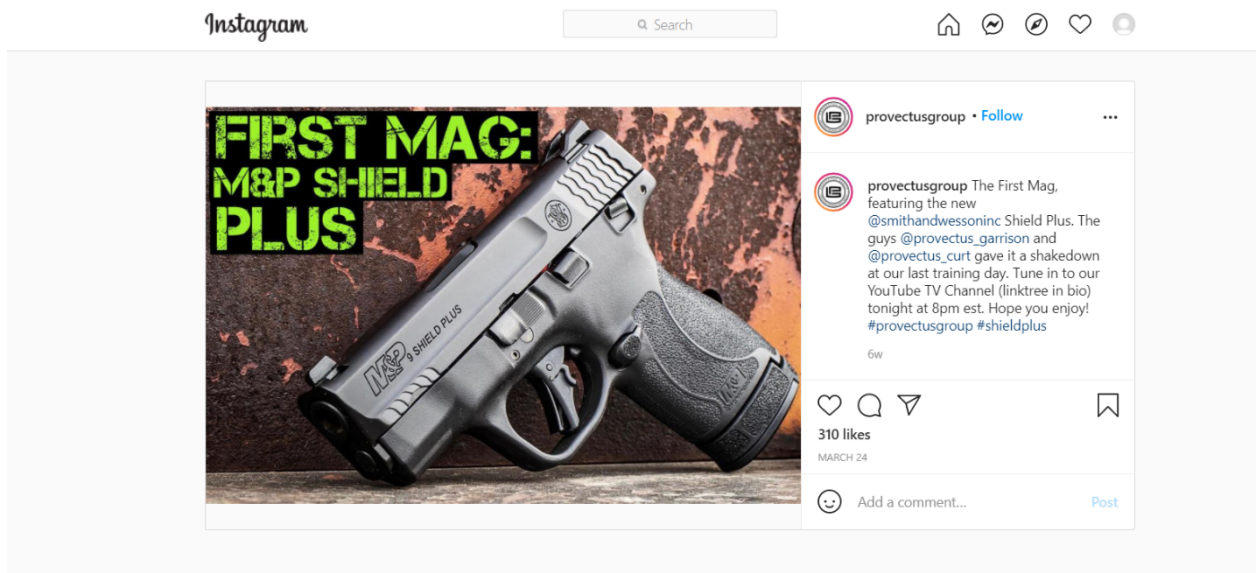
⁵ It appears that Smith & Wesson regularly provides Nash with free firearms that form the basis of his endorsements. See, e.g., David Nash (@22plinkster), *Dual Wielding Smith and Wesson Victory Trick Shots*, YouTube (Aug. 10, 2017) (stating Smith & Wesson sent him the firearms featured in the video), <https://perma.cc/G7S2-BMWQ>; David Nash (@22plinkster), *SMITH AND WESSON VICTORY REVIEW*, YouTube (Jan. 15, 2016) (stating that Smith & Wesson sent him the firearm featured in the video), <https://perma.cc/7PXB-MRNX>.

Nikki Boxler is a social media influencer with over 114,000 followers between Instagram and Twitter. She has endorsed Smith & Wesson firearms on Twitter, without including any sort of disclosure regarding her material connection to the company. *See, e.g.*, Nikki Boxler (@NikkiBoxler), Twitter (Oct. 5, 2020) (post featuring Smith & Wesson firearm received for free with no disclosure), <https://twitter.com/NikkiBoxler/status/1313278364887715843>. Boxler has published this same content on Instagram, and on that platform, she includes a statement that Smith & Wesson provided her with the firearm at issue for free. *See, e.g.*, Nikki Boxler (@nikkiboxler), Instagram (Oct. 5, 2020) (thanking Smith & Wesson for the firearm featured in the photo), <https://www.instagram.com/p/CF9-3MhF7kd/>. She buries this statement below the “more” button—meaning it is not visible to a mobile app user unless he or she affirmatively clicks the button. *See id.*; *see also id.* (Nov. 30, 2020) (stating the weapon featured in the photo was complimentary from Smith & Wesson), <https://www.instagram.com/p/CIPLyZSIXhd/>; *id.* (Nov. 5, 2020) (thanking Smith & Wesson for the firearm featured in the photo), <https://www.instagram.com/p/CHOXMS6Fqu3/>.



Screenshot of Nikki Boxler’s Instagram, dated November 5, 2020, with disclosure of free firearm from Smith & Wesson hidden after “more” button.

Ken Scott is a social media influencer with over 91,000 followers between YouTube and Instagram who publishes video reviews of firearms and shooting instructional videos. Scott consistently fails to include any disclosures in his videos that include endorsements of Smith & Wesson products. See Ken Scott (@Provectus Group), *The M&P Shield Plus | Unboxing and In Depth First Impression*, YouTube (Mar. 16, 2021), <https://perma.cc/LQV4-VB5A>; Ken Scott (@Provectus Group), *The First 100 | The Performance Center 9mm Shield EZ by Smith & Wesson*, YouTube (July 14, 2020), <https://perma.cc/C3ZK-HNZV>; Ken Scott (@Provectus Group), *The M&P 2.0 C.O.R.E. | Everything You Need To Know*, YouTube (May 11, 2020) (same), <https://perma.cc/822Q-MFVU>. Scott similarly fails to include any disclosures when he endorses Smith & Wesson products on other platforms like Instagram. See Ken Scott (@provectusgroup), Instagram (Mar. 24, 2021) (post featuring Smith & Wesson products with no disclosure), <https://www.instagram.com/p/CM0gbHGBRHo/>; *id.* (Mar. 21, 2021) (same), <https://www.instagram.com/p/CMsSMWCh1I3/>; *id.* (July 30, 2020), <https://www.instagram.com/p/CDRen56hKQM/>. However, Scott previously has stated that he received a free trip from Smith & Wesson to tour its factory and try new products. See Ken Scott (@Provectus Group), *The 9mm Shield EZ | Everything You Need To Know*, YouTube (Jan 22, 2020) (stating that Smith & Wesson flew him and other individuals to their factory for a tour and allowed him to shoot their firearms), <https://perma.cc/K59H-RV5Y>. In light of Scott's material connection to Smith & Wesson, as well as Smith & Wesson's continued engagement of social media influencers, the Commission should investigate whether Scott failed to disclose a material connection to Smith & Wesson at the time he published his subsequent video endorsements.



Screenshot of Ken Scott's Instagram, dated March 24, 2021.

In sum, the examples cited above demonstrate that Smith & Wesson is not complying with the Endorsement Guides—in particular its obligation to ensure that its social media endorsers adequately disclose their material connection to Smith & Wesson. We therefore respectfully request that the Commission investigate Smith & Wesson's full range of deceptive and unfair marketing practices, including its deceptive influencer practices.

B. Smith & Wesson Fails to Ensure that its Sponsored Shooters Adequately Disclose Their Material Connections to the Company.

In addition to engaging social media influencers, Smith & Wesson also sponsors two professional competition shooters: **Jerry Miculek** and **Julie Golob**. *See Team Smith & Wesson*, Smith & Wesson (2021) (listing both Jerry Miculek and Julie Golob as sponsored individuals), <https://perma.cc/NMX9-CLSB>; *see also Leaders in Gun Control*, Miculek.com (2021) (Smith & Wesson logo included in the “Our Sponsors” section), <https://perma.cc/86E6-KXD9>; *Julie Golob: Live Life Fully Loaded*, Julie Golob (2021) (Smith & Wesson listed under the “My Sponsors” section), <https://perma.cc/6WZX-WW7S>. Both Miculek and Golob endorse Smith & Wesson firearms on social media without adequately disclosing their material connection to the company.

The fact that these individuals are professional athletes does not absolve them or Smith & Wesson of the obligation to disclose a material connection. Indeed, unless Smith & Wesson can demonstrate that a significant portion of the audience understands that the athlete is being paid to endorse that product, the connection should be disclosed, consistent with the Endorsement Guides. *See Endorsement Guides* § 255.5 (describing the example of a professional athlete endorsing a vision-correcting clinic); *Endorsement Guides FAQs* (whether athlete has to disclose material connection to sponsor “depends on whether his followers understand that he’s being paid to endorse that product,” which can be difficult to determine).

Our investigation shows that Smith & Wesson’s sponsored shooters consistently fail to disclose their material connection to the company, and there is no indication that a significant portion of Miculek’s or Golob’s social media followers are aware of and would expect their material connection to it. In particular, Miculek frequently publishes endorsements of Smith & Wesson products on his social media pages while regularly failing to disclose the material connection between him and Smith & Wesson. *See, e.g.,* Jerry Miculek (@jerrymiculek), Instagram (Apr. 8, 2021) (demonstration of Smith & Wesson AR-15 with no disclosure), <https://www.instagram.com/p/CNaUHETFI9k/>; *id.* (July 19, 2020) (post featuring Smith & Wesson rifle with no disclosure), <https://www.instagram.com/p/CC1B64qlDv0/>; *id.* (Mar. 25, 2020) (demonstration featuring Smith & Wesson firearm with no disclosure), <https://www.instagram.com/p/B-LLIaWlohL/>; *id.* (Mar. 24, 2020) (post featuring Smith & Wesson firearm being shot by Miculek with no disclosure), <https://www.instagram.com/p/B-IRk8rAHBo/>; *id.* (Dec. 9, 2019) (post featuring Smith & Wesson rifle with no disclosure), <https://www.instagram.com/p/B53vODNAmrz/>. Although Miculek often “tags” Smith & Wesson or uses the hashtag “#smithandwesson,” these actions do not clearly communicate to reasonable consumers the material connection between Smith & Wesson and Miculek. *See Endorsement Guides FAQs* (“Followers might not know why you are tagging a dress and some might think you’re doing it just because you like the dress and want them to know.”). These posts are not connected to Miculek’s sponsored shooting competitions. Thus, there is no basis for assuming that a significant portion of the audience for this content is aware of Smith & Wesson’s sponsorship of Miculek.



Screenshot of Jerry Miculek's Instagram, dated April 8, 2021.

Golob similarly endorses Smith & Wesson firearms without sufficiently disclosing her material connection to the company. *See* Julie Golob (@juliegolob), Instagram (Dec. 4, 2020) (no disclosure on a post featuring a Smith & Wesson firearm and tagging Smith & Wesson), <https://www.instagram.com/p/CIY73wxAepA/>. Golob sometimes includes in her social media endorsements the hashtag “#sponsoredathlete,” which also appears in her profile page. However, Golob’s use of this hashtag is insufficient to disclose her material connection to Smith & Wesson. Including this hashtag in Golob’s profile page alone is insufficient. *See Endorsement Guides FAQs* (“[A] disclosure on a profile page isn’t sufficient because many people in your audience probably won’t see it.”). Some of Golob’s endorsements do not include the hashtag at all. Even when Golob does include the hashtag, the disclosure is insufficient because the hashtag almost always appears below the “more” button when viewed on the Instagram mobile app. *See* Julie Golob (@juliegolob), Instagram (Apr. 10, 2021) (#sponsoredathlete appears below the “more” button), <https://www.instagram.com/p/CNgIpZyA6bf/>; *id.* (Mar. 24, 2021) (#sponsoredathlete appears below the “more” button), <https://www.instagram.com/p/CMzgn3fAvg7/>; *id.* (Mar. 15, 2021) (#sponsoredathlete appears below the “more” button), <https://www.instagram.com/p/CMdZUazAxwE/>. Golob also often places this hashtag at the end or in the middle of a string of other hashtags, making it difficult to locate. *See id.* (Nov. 16, 2020) (#sponsoredathlete appears in the middle of four other hashtags), <https://www.instagram.com/p/CHqf93Jgggb/>. Finally, the hashtag does not disclose the material connection to *Smith & Wesson*, particularly with respect to posts or content that feature multiple brands—meaning a reasonable consumer would not understand to which company the hashtag is referring. *See id.* (Mar. 8, 2021) (“#sponsoredathlete” appears in a post that tags Smith & Wesson as well as two other brands), https://www.instagram.com/p/CMLLFB7g8E_/; *id.* (Feb. 7, 2021) (“#sponsoredathlete” appears

in a post that tags nine different brands including Smith & Wesson),
<https://www.instagram.com/p/CLACZI1ghHH/>.



Screenshot of Julie Golob's Instagram, dated December 4, 2020.

* * *

The Commission has the legal authority to investigate and prevent Smith & Wesson's unlawful marketing practices. Under established Commission precedent, these practices are both deceptive and unfair. The need to stop these practices is urgent and clear. Therefore, we urge the Commission to take all appropriate action to ensure that Smith & Wesson's marketing practices never again lead to tragic gun violence.

Respectfully submitted,

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