

ALERT

FTC Seeks Comment on Updating Endorsement Guides on Digital Advertising

July 27, 2022

On July 26, 2022, the Request for Comment approved by the Federal Trade Commission (FTC or Commission) in May seeking public input on a number of proposed changes to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides) was published in the Federal Register. The comment deadline is September 26, 2022. The FTC's proposed updates are focused on increasing the agency's regulatory purview over digital advertising – especially digital advertisements directed toward children. While the Endorsement Guides would still require advertisers to clearly and conspicuously disclose any material connections with endorsers, the FTC proposes expanding the Endorsement Guides' definition of "endorser" to include virtual influencers, along with fake endorsements and/or reviews.

Background: The FTC's Endorsement Guides

The FTC published its Endorsement Guides to provide advertisers with regulatory insight about how the agency views various marketing practices involving endorsements and testimonials under Section 5 of the FTC Act. The Endorsement Guides represent FTC guidance and do not possess the force of law. However, business practices inconsistent with the Endorsement Guides could prompt Commission enforcement actions alleging violations of Section 5 of the FTC Act's prohibition on deceptive acts or practices.

The Endorsement Guides currently cover advertising endorsements and testimonials in all media – from magazines and television to blogs and social media. The FTC defines endorsements and testimonials, which it treats equally, as "any advertising message ... that consumers are likely to believe reflects the opinions, beliefs,

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findings, or experiences of a party other than the sponsoring advertiser.” The Endorsement Guides specify that endorsements and testimonials must reflect the honest opinions, beliefs, or experience of the endorser, and they cannot be presented out of context in a manner that could distort the endorser’s experience with the product. Moreover, advertisers must be able to substantiate the claims of their endorsers, and they are subject to liability for any false or unsubstantiated claims.

The Endorsement Guides also require endorsers to disclose any material connections between themselves and a brand “that might materially affect the weight or credibility of the endorsement.” Moreover, advertisements claiming to depict consumers should utilize actual consumers both visually and aurally. If the endorsers depicted in advertisements are not actual consumers, the advertiser must clearly and conspicuously disclose that fact.

Finally, in advertisements involving expert endorsers – individuals or groups possessing superior knowledge of a particular subject – the endorser’s qualifications must give the endorser the relevant expertise that they are represented as possessing.

Proposed Updates to the Endorsement Guides

As the FTC states in the Request for Comment, many of the proposed substantive changes “reflect the extent to which advertisers have turned increasingly to the use of social media and product reviews to market their products.” Accordingly, the proposed changes will impact all businesses using social media to advertise their products, which covers nearly every industry. Industry stakeholders should pay special attention to some of the most significant proposed revisions to the Endorsement Guides:

- Definitional changes, including expanding the definition of “endorser” to include virtual influencers and fake endorsements or reviews and clarifying that promotional messaging and marketing are covered under the Endorsement Guides.
- Classifying the deletion of negative reviews or the decision not to publish negative reviews as a deceptive act or practice under Section 5 of the FTC Act.
- Requiring clear and conspicuous disclosure of any material connections – including business, family, or personal relationships – prior to making an endorsement.
- Adding a section to the Endorsement Guides for endorsements and testimonials directed towards children, noting that such endorsements are “of special concern because of the character of the audience.”
- Clarifying that advertisers, endorsers and intermediaries, and platforms hosting advertisements and endorsements may face liability under the FTC Act for deceptive acts or practices.

A section-by-section summary of the proposed changes to the Endorsement Guides follows.

Section 255.0 – Purpose and Definitions: As noted above, the FTC proposes to clarify that “marketing” and “promotional” messages can also be endorsements. Additionally, it proposes revising the definition of “endorser” to include not just individuals, groups, and institutions, but also those that simply *appear* to be

individuals, groups, and institutions. Accordingly, the revised Endorsement Guides would apply to fabricated or fake endorsers. The definition of “product” would also be revised to include a “brand.”

Additionally, the FTC proposes a new definition for the term “clear and conspicuous” – it must be “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers.” The definition would also give specific guidance on the importance of “unavoidability” when the communication involves social media or the internet. Specifically, when a triggering endorsement claim is visual, the disclosure should at least be visual; when a triggering claim is audible, the disclosure should at least be audible. Further, the FTC proposes clarifying that a disclosure that is both visual and audible is more likely to be clear and conspicuous. Finally, the revised definition would also clarify that when an endorsement targets a specific audience, such as the elderly, the question of whether a disclosure is “clear and conspicuous” will be evaluated from the perspective of members of that group.

Section 255.1 – General Considerations: While the Endorsement Guides currently recognize that advertisers can be held liable for false or unsubstantiated claims made via endorsements, the Commission proposes to clarify that an advertiser may be liable for a deceptive statement made by an endorser even when the endorser is not itself liable. The FTC also proposes to add a new section to the Endorsement Guides explaining the potential liability for intermediaries such as advertising agencies and public relations firms. Specifically, the Endorsement Guides would be revised to note that such intermediaries may be liable if they knew or should have known that they were distributing deceptive endorsements. The proposed changes would also clarify that such intermediaries can be held liable under the FTC Act when they fail to disclose unexpected material connections by either failing to make necessary disclosures or by hiring and managing endorsers who fail to make such disclosures.

The Commission further proposes adding a new section to the Endorsement Guides that would include a general principle that the use of an endorsement with the image or likeness of a person other than the true endorser misrepresents a material attribute of the endorser. The FTC also proposes to revise an example in the Endorsement Guides to clarify that both a paid endorser and the company paying the endorser are both potentially liable for an endorser’s social media post that does not disclose the endorser’s relationship to the advertising company.

Section 255.2 – Consumer Endorsements: The FTC proposes to modify Section 255.2 of the Endorsement Guides to clarify that in procuring, suppressing, boosting, organizing, or editing consumer product reviews, advertisers should not take actions that may distort or otherwise misrepresent how consumers view the products. The proposed changes would note that this is true regardless of whether the reviews are considered “endorsements” under the Endorsement Guides. The Commission also proposes to add a new footnote to Section 255.2 of the Endorsement Guides stating that sellers are not obligated to display consumer reviews that contain “unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, or reviews that the seller reasonably believes are fake,” provided that the criteria for removing or withholding reviews are applied uniformly to all reviews. Additionally, the footnote would clarify that sellers are not required to display reviews that are unrelated to their products or services.

Further, the FTC proposes clarifying that paying purchasers to write positive product reviews is a deceptive practice “because the manufacturer has required that the reviews be positive.” The Commission’s proposal would also add another example to Section 255.2 of the Endorsement Guides that would address “review gating” – a practice that entails “obtaining customer feedback and then sending satisfied and dissatisfied customers down different paths in order to encourage positive reviews and avoid negative reviews.” The new example would clarify that this would be an unfair or deceptive practice if it results in posted reviews being substantially more positive than if the advertiser had not engaged in the practice.

Section 255.4 – Endorsements by Organizations: The Commission proposes adding a new example to Section 255.4 of the Endorsement Guides that would clarify that paid ranking boosts – when a third-party review site provides rankings of various manufacturers’ products and accepts payments in exchange for higher rankings – is a deceptive act or practice “regardless of whether the website makes an express claim of independence or objectivity.” Additionally, the new example would note the potential liability of a manufacturer paying for a boosted ranking and clarify that if a manufacturer pays a review site but not for higher rankings, there should be a clear and conspicuous disclosure regarding the payments.

Section 255.5 – Disclosure of Material Connections: The Commission proposes to specify that disclosures of material connections must be “clear and conspicuous” rather than “fully” disclosed. Additionally, the Endorsement Guides would be amended to clarify that material connections can include business, family, or personal relationships; monetary payments; the provision of free or discounted products or services to the endorser; early access to the product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions. While the disclosure would not require all of the details of a connection, it would need to clearly communicate the significance of the connection such that the public can understand it.

Section 255.6 – Endorsements Directed to Children: Finally, the FTC proposes adding a new section to the Endorsement Guides stating that “Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.”

If you have any questions regarding the Request for Comment, please contact one of the authors listed on this alert.