

FTC Finalizes Updates to Endorsement Guides, Reflecting Increased Focus on Online Reviews and Social Media Marketing

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This week the FTC announced that it finalized its revisions to the Endorsement Guides, which give advertisers guidance on ensuring that their use of endorsements or testimonials complies with the FTC Act. At the same time, the FTC also announced an updated accompanying guidance document, [“FTC’s Endorsement Guides: What People are Asking.”](#) While the [revised Endorsement Guides](#) still require advertisers to comply with the requirements we previously discussed in our [On Notice series](#), they feature several key additions addressing technological changes in how advertising is conducted, and advertisers’ increased reliance on online reviews, social media, and influencer endorsements.

Some key updates to the Endorsement Guides are described below.

Increased Focus on Online Consumer Reviews

The updated Endorsement Guides specify that advertisers should refrain from “procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, or editing” consumer reviews of their products in a way that distorts or otherwise misrepresents their products. They also include new guidance on the use of incentivized consumer ratings or reviews. Specifically, the updated Endorsement Guides state that even if an incentivized review is accompanied by a sufficiently clear and conspicuous disclosure, “the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating.” In such cases, the average star rating would also need to include a clear and conspicuous disclosure.

These additions reflect the FTC’s increased focus on combating deceptive online reviews – a focus it has made clear in recent years through guides for businesses publishing online reviews ([Guide for Marketers](#), [Guide for Platforms](#)) and actions against advertisers alleging they posted false positive reviews or suppressed negative reviews. For example, earlier this month, the FTC reached a \$4.2M settlement with Fashion Nova, an online fashion retailer, in a case alleging that Fashion Nova suppressed negative reviews from its website.

Based on the FTC’s past guidance, when soliciting and paying for online reviews, companies should avoid:

- (1) asking “for reviews from people who haven’t used or experienced the product or services”;
- (2) asking “your staff to write reviews for your business”;
- (3) asking family and friends for reviews; and
- (4) conditioning any incentive to submit a review on the review being positive.

Further, advertisers should not impose additional barriers to reviews or discourage consumers from submitting a negative review instead of a positive one. For example, if an advertiser does not require a consumer posting a positive review to include their date of purchase, the advertiser should not require a consumer posting a negative review to include their date of purchase either.

Expanded Definitions of “Endorser” and “Endorsement”

The revised Endorsement Guides update the definition of “endorser” to include virtual influencers, such as avatars or digital characters, and update the definition of “endorsement” to include fake reviews, statements by virtual influencers, and tags in social media.

These expanded definitions reflect the rapidly changing technological landscape in which advertising is taking place. The FTC's inclusion of virtual influencers, in particular, will likely become increasingly important as brands continue to explore the use of AI in marketing. While virtual influencers are not all that common yet, many believe this trend may be the future of social media advertising. One particularly famous virtual influencer, Lil Miquela (a brand ambassador for teen retailer PacSun) currently has almost 3 million followers on [Instagram](#), and was named one of Time Magazine's ["25 Most Influential People on the Internet."](#)

New Definition for "Clear and Conspicuous"

As in past versions of the Endorsement Guides, the updated Guides also require that material connections be "clearly and conspicuously" disclosed. But unlike in past versions, the updated Guides include a definition for what does (and does not) constitute a "clear and conspicuous" disclosure. Specifically, the updated Guides clarify that for a disclosure to be "clear and conspicuous" it must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." On social media or the internet, the disclosure must be "unavoidable." The FTC further explains that the disclosure must match the format of the accompanying endorsement. If the endorsement is made visually, the accompanying disclosure must also be made visually; if the endorsement is made audibly, the disclosure must be made audibly. And if the endorsement is made both audibly and visually, the disclosure must be made in the ad's visual and audio portions.

The new Endorsement Guides also instruct that for a visual disclosure to be "clear and conspicuous," it must stand out from accompanying text or other visual elements "by its size, contrast, location, the length of time it appears, and other characteristics," so that it is "easily noticed, read, and understood." For an audio disclosure to be "clear and conspicuous," it must be "delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it."

The new Endorsement Guides further clarify that advertisers may not simply rely on a social media platform's built-in disclosure tool, if the disclosure provided by that tool is not "clear and conspicuous."

All these requirements are consistent with the FTC's past guidance on the use of endorsements on social media. For further discussion of what constitutes a "clear and conspicuous" disclosure under FTC guidance, see our [past post](#) on this topic.

Liability for Endorsers and Intermediaries

Though the previous version of the Endorsement Guides made it clear that advertisers could be liable for deceptive advertising by their endorsers or influencers, the updated Guides clarify that the endorsers or influencers, themselves, and intermediaries (like ad agencies and PR firms) may also be liable for making deceptive endorsements. For instance, the FTC added an example in which an influencer who did not limit their statements to their personal experience using a product and did not have a reasonable basis for their broad claim about a product's efficacy would be subject to liability for the misleading or unsubstantiated representation in the endorsement.

This addition perhaps does not come as a surprise, in light of the FTC's recent [warning letters](#) to individual influencers accused of making deceptive endorsements, which stated that "[i]ndividual influencers who fail to make adequate disclosures about their connections to marketers are subject to legal enforcement action by the FTC." Nonetheless, it's an important reminder that *everyone* involved in the creation of an ad (marketers, agencies, and influencers, alike) has a responsibility to make sure that material connections have been disclosed, and that the endorsement is not otherwise deceptive or misleading.

Special Guidance for Endorsements Directed at Children

The updated Endorsement Guides contain a new section aimed specifically at endorsements in advertisements addressed to children. The Guides state that such endorsements may be of "special concern," due to the "character of the audience." As a result, "[p]ractices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases."

This addition seems to echo recent concerns about the potential effects of social media and influencer advertising on children and teenagers. Marketers whose ads may be aimed at children (or even if not expressly or solely aimed at children, may appeal to children) should be particularly careful with respect to the use of endorsements, reviews, and testimonials.

While the modernized Endorsement Guides do include many key changes, none are all that surprising in light of the past FTC guidance, warning letters, and actions we have discussed on this blog. Watch this space for best practices on using endorsements and testimonials in advertising, and for updates on actions brought under the new Endorsement Guides.

Want to talk advertising? We welcome your questions, ideas, and thoughts on our posts. Email or call us at bvinti@proskauer.com /212-969-3249

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