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5 Takeaways from the FTC's Updated Endorsement Guides

By Tiffany Ferris, Joseph Lawlor, Suzie Trigg, Kayla Cristales, and Emily Ketterer

Last week on June 29th, the Federal Trade Commission (FTC) released long-awaited revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides" or "Guides"), which were last updated in 2009.[1] The revised Endorsement Guides largely track a proposed draft released in May 2022. In addition to the Guides, the FTC also released helpful FAQs (officially known as "FTC's Endorsement Guides: What People Are Asking") that cover dozens of scenarios that brands and influencers may encounter.[2]

The Endorsement Guides are not law in themselves, but instead provide the FTC's guidance for complying with its rules and enforcement authority. This newest edition of the Endorsement Guides has a particular focus on consumer reviews and review manipulation, which are also the subject of a proposed FTC rule that was released on June 30, 2023. The FTC is clearly signaling that its enforcement efforts will target deceptive consumer review practices. The Endorsement Guides also include greater guidance on required material connection disclosures for endorsers (especially as it relates to social media advertising), a discussion of intermediary liability, and an emphasis on child-directed advertising. This article highlights five key takeaways for brands that utilize endorsements and testimonials in their advertising.

1. Accept the good reviews with the bad reviews.

The FTC has prioritized truth and transparency in consumer reviews in recent years,[3] but it has now added a new subsection to the Endorsement Guides to address reviews. According to the Guides, brands should not procure, suppress, boost, organize, publish, upvote, downvote, report, or edit consumer reviews of products, and they should not "take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements under the Guides."[4]

To illustrate this new principle, the Commission provided the following examples of misleading practices:

- Forwarding only positive product reviews to third-party review websites;[5]
- Suppressing or not publishing reviews with fewer than four stars or negative sentiments on product pages;[6]
- Labeling a review as "most helpful" if the review was selected by the brand and not by other consumers, as implied by the "most helpful" moniker;[7]
- Paying purchasers to write positive reviews of products on third-party review websites;[8]
- Threatening consumers who post negative reviews with physical threats, disclosure of embarrassing information, baseless lawsuits, or lawsuits that a brand does not actually intend to file;[9]
- Flagging negative reviews of its product as fake using a third-party review website's reporting mechanism without a reasonable basis for believing they are fake;[10] and
- Requesting only purchasers who provided very positive feedback to post reviews to third-party websites.[11]

The new FAQs detail several additional scenarios where an online review program could run afoul of the FTC's rules. These examples include an advertiser stacking all 5-star reviews first, then 4-star, 3-star, 2-star, and 1-star, regardless of their posting date, as this could distort a consumer's understanding of what users of the product think because consumers are unlikely to parse through all of the reviews to see the negative ones. Another provided example is an advertiser who provides its consumers with free products in order to increase the number of reviews and requests their honesty but fails to disclose which reviews were connected to free products. Per the FAQs, reviewers who are given free products may be incentivized to give more positive reviews, which may distort the overall product rating and mislead consumers. [12]

Brands may suppress reviews, however, per the updated Guides, that "contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; the personal information or likeness of another person; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the seller believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted."[13]

2. Material connection disclosures should be "unavoidable."

The FTC has long advised that material connections between brands and endorsers must be disclosed in a "clear and conspicuous" manner. This disclosure requirement is the reason for the ubiquitous "#ad" on social media posts, but in an ever-changing marketplace, the Guides include an updated discussion of the "clear and conspicuous" standard. The Endorsement Guides now state that a clear and conspicuous disclosure should be "unavoidable," which means "difficult to miss" and "easily understandable by ordinary consumers."[14]

For primarily visual communications, such as a Pinterest post, disclosures should be made in the image itself. Visual disclosures should be set apart by size, contrast, location, length of appearance time, and other methods of distinction from distracting elements. For audio-driven media like podcasts, the disclosure should be made audibly, and the disclosure's volume, speed, and cadence should make it easy to hear and understand by "ordinary consumers." For video platforms, such as TikTok and YouTube, there should be simultaneous visual and audible disclosures when the endorsement is made visually and audibly.[15] For example, putting #ad in a TikTok video description is insufficient. Instead, the material disclosure should be superimposed text over the video (and an audible disclosure may also be necessary if the endorsement is made audibly). Moreover, while platforms may have built-in disclosure tools, those methods may not meet FTC standards and there is no safe harbor for using a platform's tools. Helpfully, the FAQs provide specific guidance for disclosure issues that pop up on common platforms like TikTok, Snapchat, YouTube, Twitter, Facebook, and Instagram.[16]

Brands are also wise to heed the FTC's call to ensure disclosures are "easily understandable." The FTC states that tagging a brand is not an effective disclosure, since a person can tag a brand for any number of reasons. Instead, the disclosure must communicate that the post, like, video, or other communication is an advertisement. The FTC continues to endorse the use of "#ad," but brands and influencers can be creative in the language they use as long as it is "easily understandable." The FTC's guidance on this issue is particularly helpful, because choosing appropriate terminology is not always intuitive. For example, the FTC takes the position that terms like "ambassador," "partner," and even "#endorsement" are not sufficient, because these terms may be ambiguous to consumers.

3. Put influencer policies in place and in action.

Internal policies for influencer marketing programs have been an industry best-practice for years.[17] Now, the FTC has weighed in on what those policies should include and the benefits to advertisers with appropriate policies. At a minimum, advertisers should: (i) provide guidance to endorsers on how to make truthful claims and how to properly disclose material connections; (ii) monitor endorsers for compliance; and (iii) take remedial action when they are non-complaint.[18]

While this may be familiar territory for many brands running influencer marketing programs, the FTC notes that taking steps to inform, monitor, and remedy in good faith "should reduce an advertiser's odds of facing a Commission enforcement action."[19] Simply *having* a written policy will not be enough for compliance. Brands should make a "good faith" effort to educate influencers on appropriate claims and disclosures, review content and platforms, and take down or revise non-compliant endorsements.

Although the updated Endorsement Guides provide the basic outline for an internal influencer policy, the scope of any particular policy depends on the specifics of a campaign. For example, a brand that uses influencers to promote a health product may need to provide more guidance to influencers than a brand promoting a new clothing line. This is due to the brand's heightened responsibility to substantiate health claims.[20] [21]

4. Review your contracts with outside agencies for compliance obligations and indemnification protections.

The new Endorsement Guides explicitly discuss liability for intermediaries – which include advertising agencies, public relations firms, review brokers, and reputation management companies – for their role in disseminating deceptive endorsements, failing to disclose material connections between brands and endorsers, and for facilitating the circulation of obviously incorrect or misleading claims.[22] For instance, an advertising agency that asks their employees to promote clients' products should make sure they aren't asking employees to say something that is not true, e.g., endorsing a product that they have not used. An employee posting truthfully should also clearly and conspicuously disclose their relationship to the client. The FAQs offer the following model disclosure language for employees: "My employer is paid to promote [name of product]" or, if space is limited, "Advertisement," "Ad," or "#ad." If an employee does not comply, the agency may share legal liability.[23]

This, again, is no great shift in the FTC's enforcement policy as it was already pursing intermediaries for deceptive endorsement practices.[24] However, this new provision provides greater notice to advertising agencies, marketing companies, public relations firms, and social media platforms of their potential liability and provides a reminder to brands to ensure that their contracts are clear on any indemnification protections and the role that each party will play in compliance.

5. If you advertise to minors, keep a close watch on this evolving area.

The Endorsement Guides contain two sentences relating to child-directed advertising that simply state that endorsements in advertisements directed at children may be of special concern due to the character of the audience and that "[p]ractices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases."[25] Some public comments to the Commission urged for specific guidelines and examples for proper disclosures in child-directed advertising, but the FTC decided not to provide granular guidance on this issue. Based on research presented to the Commission on the limitations of children's cognitive abilities, it concluded that "disclosures will not work for younger children."[26] The FAQs do not provide additional guidance, but instead state that advertisers and endorsers "should be particularly careful in their use of endorsements directed to this audience."[27]

According to the FTC, it is "exploring next steps" in this area, and during an October 2022 workshop, FTC Chair Lina Khan announced that the Commission would be considering updates to its rules implementing the Children's Online Privacy Protection Act (COPPA). Therefore, while the Endorsement Guides do not offer much guidance in this area, they signal that the FTC is particularly concerned about the use of influencers and "stealth advertising" tactics that target children, because children's lesser cognitive capacity may render an advertisement "deceptive" due to their inability to recognize advertising content.

[1] https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-proposed-rule-banning-fake-reviews-testimonials
[2] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking
[3] *See* Sunday Riley Modern Skincare, Fashion Nova, and Roomster FTC settlements.
[4] Endorsement Guides, 2023 Subsection 255.2(d)
[5] Endorsement Guides, 2023 Subsection 255.2(e) Example 4(vii)
[6] Endorsement Guides, 2023 Subsection 255.2(e) Example 8(i)
[7] Endorsement Guides, 2023 Subsection 255.2(e) Example 8(iii)
[8] Endorsement Guides, 2023 Subsection 255.2(e) Example 9
[9] Endorsement Guides, 2023 Subsection 255.2(e) Example 10(i)
[10] Endorsement Guides, 2023 Subsection 255.2(e) Example 10(ii)
[11] Endorsement Guides, 2023 Subsection 255.2(e) Example 11
[12] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#onlinereviewprograms
[13] Endorsement Guides, 2023 Subsection 255.2(e) Example 8(ii)
[14] Endorsement Guides, 2023 Subsection 255.0(f)
[15] *Id*.
[16] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#disclose
[17] *See* National Advertising Division Decisions – The Coldest Water (Case #7023R) & Goli (Case #7059).
[18] Endorsement Guides, 2023 Subsection 255.1(d)
[19] *Id*.
[20] www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf
[21] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#advertisersresponsibilities
[22] Endorsement Guides, 2023 Subsection 255.0(f)
[23] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#employeeendorsements
[24] *See* *FTC v. Marketing Architects, Inc.,* No. 2:18-cv00050 (D. Me. Feb. 6, 2018) and *In the Matter of Machinima, Inc.*, No. C-4569 (Sept. 2, 2015).
[25] Endorsement Guides, 2023 Section 255.6
[26] https://www.ftc.gov/news-events/events/2022/10/protecting-kids-stealth-advertising-digital-media
[27] https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#disclose