

FTC Seeks Public Comment on Proposed Updates to Endorsement Guides

The Bottom Line

- FTC guidance continues to evolve as new forms of marketing gain popularity.
- Companies should do all they can to align their endorsement practices with the FTC's proposed guidance – including with regard to social media, influencers and consumer reviews.
- Interested parties should submit public comment on these proposed updates.
- We will continue to monitor updates, and are happy to assist with filing any comments.

The Federal Trade Commission (FTC) is seeking public comment on proposed updates to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides). The FTC proposed a number of revisions. Some of these revisions are simply clarifications of principles embodied in the existing Endorsement Guides or otherwise established in enforcement actions, while others would substantively change the current Endorsement Guides. These new principles are based on increased knowledge of how consumers view endorsements, including endorsements on social media and in online product reviews.

Definition of Endorser and Endorsement

The FTC proposes clarifying that:

- An “endorser” is not only an individual, group, or institution, but also any entity that *appears* to be one, such as a virtual influencer.
- “Marketing and promotional messages, such as tags in social media posts, can qualify as “endorsements.”
- An “endorsement” does not include paid or otherwise incentivized negative statements about a competitor’s product, but such statements can qualify as a deceptive practice.

Clear and Conspicuous Disclosures

The proposed revisions emphasize that a “clear and conspicuous” disclosure must be difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers:

- When the representation is made through visual means, the disclosure should be made through visual means.
- When the representation is made through audible means, the disclosure should be made in the audible portion.
- Representations made through both visual and audible means must be disclosed in both of those mediums.

Relying *solely* on a social media platform’s built-in disclosure tool may not be sufficient; the FTC believes that some of the existing tools are too fleeting or small, or might be placed in locations where a user will not notice them. For example, a social media tool that superimposes a disclosure over a poorly contrasted photo or superimposes a small disclosure in the bottom left corner of a video for only a few seconds would not be sufficient. Keep in mind that both endorsers (for relying on inadequate tools) and platforms (for making misleading representations about these tools) may be liable here.

Endorsements that target a specific audience should be “clear and conspicuous” to that group. For example, disclosures in an advertisement targeted at older consumers will be evaluated from the perspective of older consumers, including those with diminished auditory, visual or cognitive processing abilities.

Consumer Reviews

The proposed Endorsement Guides state that that advertisers should not take any actions that distort or otherwise misrepresent what consumers think of their products when procuring, suppressing, boosting, organizing or editing consumer reviews of their products (regardless of whether the reviews are considered “endorsements”). That said, advertisers would not be required to display consumer reviews that (i) it reasonably believes to be fake; (ii) contain unlawful, vulgar, explicit or inappropriate content; or (iii) are unrelated to their products or services. According to the FTC, soliciting reviews from only those customers who provide positive feedback and sending unhappy customers down a different path may be a deceptive or unfair practice if it results in the posted reviews being substantially more positive than they otherwise would have been.

The FTC proposes clarifying that, if an advertiser procures reviews from fake (non-bona-fide) users and those reviews appear on a third-party website, the advertiser can be liable for both procuring reviews from fake users, as well as any unsubstantiated claims made in those reviews. For example, a fake review about product performance could expose an advertiser to liability for making a deceptive endorsement (because it was not written by a bona fide user) and false advertising (if not true and substantiated).

Ratings and Review Sites

According to the FTC, it is a deceptive practice for rating and review sites to accept money in exchange for higher rankings and for companies to pay for higher rankings. This is the case even if the site claims to be objective and independent.

Agency Liability

The proposed Endorsement Guides clarify that intermediaries such as advertising agencies and public relations firms may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements. For example, advertising agencies that intentionally engage in deception or that ignore the obvious shortcomings of the claims they disseminate may be liable.

Intermediaries may also be liable for their roles in the publishing of endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without disclosing the material connection or by hiring and directing the endorsers who fail to make necessary disclosures.

Disclosure of Material Connections

The proposed Endorsement Guides expand the definition of a “material connection” to clearly include certain non-monetary benefits to an endorser, such as winning a prize or appearing on television or in other media promotions. While an endorser is not required to provide the exact nature or amount of his or her compensation, the endorser must clearly disclose the nature of his or her connection with the advertiser so that consumers can evaluate the endorsement’s significance.

Children

The FTC proposed adding a new section to the Endorsement Guides, highlighting that child-directed advertising is of special concern and that children may react differently than adults

to endorsements in advertising or related disclosures. For example, it may not be apparent to children when influencers are being paid to promote a product featured in a video or social media post.

To this end, the FTC intends to hold a public event this fall, focusing specifically on children's capacities at different ages to recognize and understand advertising content and distinguish it from other content.

Request for Public Comment

The FTC has requested public comment on these proposed revisions to the Endorsement Guides. Companies have 60 days to file such comments, and comments will be placed on the public record.

We are happy to assist anyone who wishes to file comments.

For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

Allison Fitzpatrick

Partner

212 468 4866

afitzpatrick@dglaw.com

Paavana L. Kumar

Associate

212 468 4988

pkumar@dglaw.com

Alexa Meera Singh

Associate

212 237 1479

alsingh@dglaw.com