Insights: Alerts

FTC Updates its Endorsement Guides: How to Engage with Influencers in the Social Media Age

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On the cusp of the July 4 holiday weekend, the Federal Trade Commission announced revisions to its Endorsement Guides, the first update since its 2009 predecessor. While the revised Endorsement Guides are not vastly different from the previous 2009 version, the FTC did increase the depth of guidance around disclosures, influencer engagement, reviews and testimonials, and how advertisers reach consumers in the new media landscape so dominated by social media.

Here are the highlights:

1. Definition of "endorsements." The FTC's definition of an "Endorsement" was broadened to ensure coverage of tags and reviews, specifically including any advertising, marketing or promotional message "that consumers are likely to believe reflects the opinion, beliefs, findings, or experiences" of the endorser. Under this definition, "endorsement" includes fake reviews, virtual influencers, testimonials, social media tags and the name or seal of an organization.

2. Definition of "clear and conspicuous." That disclosures must be made in a "clear and conspicuous" manner has been the touchstone of advertising law for many years. What that actually means and how to comply with this standard depends on context, and there are often questions around how clearly and how conspicuously something must be disclosed. The new Guides, though, specify that a "clear and conspicuous" disclosure is one that "is difficult to miss and easily understandable by ordinary consumers." By this, this FTC means that disclosures should: (1) be unavoidable; (2) stand out from accompanying text by its color, font, size, location, and duration (or volume, speed and cadence if audio); and (3) not contradict other messaging. In short, it is a totality of the circumstances inquiry, meaning that a platform's built-in disclosure tool (e.g., "sponsored post") may not always be adequate.

3. Manipulating the Totality of Consumer Reviews. It has always been the case that advertisers should not edit or manipulate consumer reviews, but advertisers have had some leeway to present consumer reviews in varying formats, and did not necessarily have an obligation to publish every single review that gets submitted. However, the revised Guides specifically prohibit distorting the overall impact of all reviews and feedback received, meaning, for example, that advertisers may not publish only four and five star reviews, while suppressing or declining to publish one and two star reviews. Thus, the FTC's position is that advertisers should not distort or misrepresent consumer sentiment when "procuring, suppressing, organizing, upvoting, downvoting, or editing" consumer reviews.

4. Disclosing Material Connections. Any "material" and unexpected connection between an advertiser and an endorser must be disclosed. "Material" means sufficiently significant to affect the weight or credibility of the endorsement. Material connections, therefore, can include incentivized reviews (e.g., by payment, discounts, free products, early access), reviews by employees, fake negative reviews by competitors and implied endorsements.

5. Potential Liability and Monitoring Obligations. Liability can extend to every link in the chain of an advertiser's

media engagement, including the advertiser, the agency, the influencer, and any intermediary – all can potentially be liable for false advertising or a violation of the Endorsement Guides. The FTC reiterated the advertiser's duty to monitor its endorsers' and influencers' activity. In short:

- An endorser cannot say what the advertiser cannot say directly. This means that an advertiser cannot pay or incentivize an influencer to make a false claim about its product or service if the advertiser could not itself make the same (false) claim.
- If a claim is false, all entities and actors in the chain of publication of the false advertisement can be held liable for it, regardless of positioning: the advertiser, the endorser / influencer, or an intermediary / agency.
- An influencer's truthful claim may be false advertising if it reflects an atypical experience or atypical results with the advertiser's product or service, absent a clear and conspicuous disclosure of expected results. This reinforces the idea that an advertiser cannot pay an influencer to make a claim that the advertiser could not itself make – an advertiser cannot present atypical results in a manner that conveys they are typical, and must include a clear and conspicuous disclosure of the expected results to clarify any potential deception.

6. Children. The FTC added a very short section acknowledging that advertising directed toward children is of "special concern" and that advertising practices directed toward adults that may not be questioned may nonetheless be problematic when directed toward children. The FTC, however, provided no examples, guidance or other detail.

The FTC also updated its "What People are Asking" business guidance document to reflect its updated positions concerning the Endorsement Guide. The FAQ includes 40 questions and answers and provides a wealth of additional examples pertaining to material connections, disclosures and platform tools, incentives, and monitoring influencers.

If you have any questions or concerns about dealing with influencers or advertising law in general (whether compliance or disputes), please feel free to contact Kilpatrick Townsend's Advertising and Marketing team.

Related People



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