Insights: Alerts

Recent Updates to the Federal Trade Commission's Endorsement Guides

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The Federal Trade Commission's crackdown on misleading and deceptive endorsement practices continues, this time with a set of proposed updates to the Endorsement Guides (the "Guides"). The FTC's May 19th proposals come hot on the heels of its recent "Notices of Penalty Offenses" issued to hundreds of major companies, and reinforce FTC's ongoing interest in trying to clean up the social media endorsement landscape.

The proposed amendments include myriad changes to the Guides. While many are important for anyone engaged in influencer marketing, four changes warrant particular attention from advertisers and influencers alike:

- Newly clarified definitions of endorsements and endorsers, particularly on social media;
- Guidance for clear and conspicuous disclosures of material connections;
- Rules for online consumer reviews, testimonials, and feedback; and
- Rules clarifying the scope of potential liability for anyone involved in misleading and deceptive endorsements.

Here's what you need to know.

Tagging a brand counts as an endorsement.
Under the proposed revised Guides, the FTC has expanded the definition of "endorser" to encompass social media users tagging brands in their posts. Such marketing or promotional messages were not covered by the original definition, allowing social media influencers—some of whom have millions of followers—to tell thei fans that they like or support a brand without any corresponding oversight.

Even fictional characters or entities can make endorsements
Endorsers were previously defined as individuals, groups, or institutions. This would appear to cover everyone—but what about fictional characters, bots, AI or some other fictional entity? Human-like influencer bots can have over a million followers. To clarify this issue, the FTC proposes revising the Guides to define endorsers as anyone even appearing to be a real individual, group, or institution. Thus, the use of fictional or artificial, computer-generated endorsers can still trigger application of these rules.

Material connections must be clearly and conspicuously disclosed.
Connections that could materially impact the weight or credibility of an endorsement must be clearly and conspicuously disclosed. This proposed modification to the Guides has two components:

1. What is a "material connection"? Aren't all connections material?

Material connections are connections that are not necessarily obvious and could substantially impact the weight and credibility of an endorsement. If a professor endorses a textbook, it would not be obvious that the textbook's publisher bought her a house. This would very likely impact the weight & credibility of this recommendation because the professor has a clear interest in promoting sales of the textbook.

2. What constitutes a "clear & conspicuous" disclosure, and when do we have to give one?

If a disclosure can be overlooked, it isn't clear & conspicuous enough (slight exaggeration, but there are high standards here). When viewed from the perspective of the reasonable target consumer, disclosures must be both difficult to miss and easily understood. It is best to use both visual and auditory disclosures where possible, but it is imperative to have at least one or the other. Overall, disclosures cannot be clear if they are muddied with any contradictions, mitigations, or inconsistencies.

Remember, such material connection disclosures are only required for material connections that are not obvious or easily assumed. Depending on context, when a social media influencer promotes flat tummy tea, people may reasonably assume they are being paid to do so. However, provisions of gifts or benefits may require clear & conspicuous disclosure. Do not rely on the "everybody knows" defense - better safe than sorry!

No touching consumer reviews!

The Guides reflect FTC's clear policy that manipulating consumer review content or presentation, directly or indirectly, is not cool. Also called "review gating", these practices include offering incentives for positive reviews exclusively, hiding or removing negative reviews, buying "fake" reviews, and including a positive outlier that substantially skews the review average. While minor exceptions exist for baseless harassment incidents, consumer reviews must generally be left undisturbed (even if we don't like or agree with them).

Know your liability risk.

Anyone materially involved in a misleading endorsement, including intermediaries like advertising agencies, have some potential exposure under the proposed language in the Guides. The test for liability is whether a party knew or should have known that the endorsement was deceptive, and is modulated by a party's level of expertise or knowledge. For this reason, it is vital to educate management, employees, and collaborators and ensure compliance with advertising best practices. In addition, platforms could be held liable for facilitating misleading endorsements if they lack appropriate built-in disclosure tools.

These proposed updates to the Guides will be available for public comment for 60 days following publication in the Federal Register.

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