

Is the Influencer Landscape Going to Change? FTC Seeks Public Comments on Its Endorsement Guides

Update

- The Federal Trade Commission (FTC) is extending the deadline to submit public comments as part of the agency's review of its Endorsement Guides. The deadline was originally April 21, 2020; it is now June 22, 2020.
 - In response to requests from potential commenters for additional time to file comments due to the global COVID-19 pandemic, the FTC will soon publish a notice in the Federal Register announcing the comment deadline extension. Instructions for submitting public comments are available [here](#).
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The Bottom Line

- The FTC's decision to review its Endorsement Guides may result in substantial changes to them, including with respect to influencer marketing, affiliate disclosures and consumer reviews. In light of these potential changes, companies that utilize endorsements in their marketing campaigns, as well as endorsers, influencers and affiliates, should consider submitting comments to the FTC. We stand by ready to assist you in filing public comments with the FTC.

The Federal Trade Commission (FTC) recently announced a review of its "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (Endorsement Guides) and that it is seeking public comments on whether changes need to be made to them. While the FTC has been focused on influencer and social media marketing in recent years, it has not updated its Endorsement Guides since 2009 — well before the introduction of new platforms such as Instagram, Snapchat and TikTok.

The FTC's decision to revisit the Endorsement Guides may well herald substantial changes to address recent developments in technology and how consumers perceive new media.

The FTC's Interests

The Endorsement Guides provide guidance to marketers in determining whether their endorsements and testimonials, including consumer, expert and influencer endorsements, comply with Section 5 of the FTC Act. As such, the FTC has stated that it has "particular interest" in the Endorsement Guides' requirement that "material connections" — connections between an endorser and a seller of a product that could affect the weight or credibility of the endorsement — be clearly and conspicuously disclosed.

The FTC also expressed interest in a wide variety of other questions, including:

- Whether children are capable of understanding disclosures of material connections,
- If the Endorsement Guides should address the use of affiliate links by endorsers, and

- What disclosures, if any, advertisers or operators of review sites should make about reviews to prevent them from being deceptive or unfair.
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Specific Questions

In addition to the broad categories, the FTC listed more than two dozen specific questions for which it is seeking comments and evidence and data, such as empirical data, consumer perception studies or consumer complaints, which support the commenters' positions.

Key questions about the Endorsement Guides include:

- Are there deceptive or unfair practices involving endorsements that are not covered?
 - Have consumer perceptions regarding endorsements changed since they were last revised?
 - What is the degree of compliance?
 - What modifications, if any, should be made to address technological, economic or environmental changes that have occurred since they were last revised?
 - Should the FTC incorporate any portion of “The FTC’s Endorsement Guides: What People Are Asking?”
 - How well are advertisers and endorsers disclosing unexpected material connections on social media platforms?
 - Does the sufficiency or insufficiency vary by platform, type of material connection or other factors, and, if so, how?
 - Should they provide more detail on what disclosures of material connections are sufficiently clear or unclear in different social media formats?
 - To what extent do young children understand disclosures of material connections?
 - Do incentives, such as free or discounted products that marketers give to consumers in exchange for posting reviews of their products or services but without specifically requiring that the reviews be favorable, skew or bias the resulting reviews?
 - Are composite ratings (e.g. “five stars”) misleading when they are based on some incentivized reviews, and if so, would a disclosure help?
 - Is there evidence to support or contradict the assertion that consumers who use social media understand that influencers who promote products generally are doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts?
 - Should they address affiliate links?
 - What disclosures, if any, should advertisers or the operators of review websites or review platforms make about the creation, collection, processing or publication of reviews or ratings to prevent those reviews or ratings from being deceptive or unfair?
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Commissioner Chopra’s Separate Statement

In a separate statement that further emphasized the potential for real changes to the Endorsement Guides, Commissioner Rohit Chopra noted his support for a “close and careful review” of the Endorsement Guides

and a “self-critical analysis of the agency’s enforcement approach.” In addition, Commissioner Chopra explained that he hopes the FTC would consider taking steps “beyond the issuance of voluntary guidance,” including by:

- Developing specific rules for technology platforms (such as Instagram, YouTube and TikTok) “that facilitate and either directly or indirectly profit from influencer marketing”;
 - Codifying elements of the Endorsement Guides into formal rules so that violators can be held liable for civil penalties and damages; and
 - Specifying the requirements that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts.
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