

Advertising + Marketing

The Deep Dive: FTC Updates Endorsement Guides for Modern Marketing and Advertising

The Bottom Line

- The FTC has revised its Endorsement Guides to take into account how businesses reach modern consumers in the digital era. Brands, agencies and influencers should revisit their standard policies and practices now to ensure they comply with the FTC's new guidance.
- Many commonly used disclosures, including ones built into platforms, and even standalone hashtags, may no longer be considered sufficient.
- The FTC proposed a new rule to combat misleading consumer review and testimonial practices just a day after releasing the updated Endorsement Guides. More rulemaking – and more enforcement – is coming.

On June 29, the FTC announced [new Endorsement Guides](#) (Endorsement Guides) governing the use of endorsements and testimonials in advertising. The FTC last revised the Endorsement Guides in 2009. After proposing the updates in May 2022, the FTC received thirty substantive public comments. The final Endorsement Guides reflect these comments and include several notable departures from the agency's first proposals that will change marketers', agencies' and influencers' approach to endorsements in the digital era.

A Higher Bar for “Clear and Conspicuous” Disclosures

In the new Endorsement Guides, the FTC articulates a stricter definition for “clear and conspicuous” disclosures, going above and beyond the prior standard that such disclosures be “noticeable and easily understandable” to mandate that online disclosures must be “unavoidable.” “Unavoidable” means that a consumer cannot miss the disclosure and must not be required to click through or take other actions to see material information.

The FTC's illustrative examples make clear that many common forms of disclosures across print, digital, social, and audio advertising are in for a major industry shift.

Placement Matters

The Endorsement Guides explain that disclosures should be placed where ordinary consumers will not miss them and displayed in an easy-to-read font that contrasts enough to stand

out from its background. For example, on an image-centric social media platform, disclosures would not be conspicuous enough if they were included only above a photo, buried at the end of a post's long caption, or in small font that blends into the background. Similarly, for video ads, a disclosure in the corner of the video may be too easy for consumers to miss. Instead, the FTC recommends including audio and visual disclosures if the endorsement is made via both mediums. The FTC also recommends that the disclosure be made upfront or in close proximity to the representation that requires the disclosure, which may mean multiple or continuous disclosures throughout a video. The FTC's guidance states that proper disclosures on platforms such as Instagram Stories and TikTok may consist of clearly contrasting and centrally placed disclosures superimposed onto the video reel.

Ordinary is Relative

The disclosures must be clear and conspicuous to ordinary consumers in the targeted group. If the ad is targeted at older adults, it must account for that demographic's vision or hearing abilities. Similarly, if an ad is in Spanish and targeting Spanish-speaking audiences, the disclosures must also be in Spanish.

When in Doubt, Add the Brand

In its guidance document that accompanies the Endorsement Guides, "[FTC's Endorsement Guides: What People are Asking](#)" (the FAQs), the FTC is now advising that commonly used disclosures that do not contain the brand or product name may be ambiguous, since they do not properly identify the sponsoring advertiser. While the FTC continues to advise that starting a post with "Ad," "Paid ad" or "#ad" or "Advertising;" or "Advertisement" would likely be effective, and that the words "Sponsored" and "Promotion" at the beginning of a post "might" also be effective, it is now saying that disclosures like "Sponsored by XYZ" or "Promotion by XYZ" would be clearer (where "XYZ" is a brand name).

In addition, while the FTC previously advised that the use of #employee to denote an employer-employee relationship "may confuse" consumers, they are now more definitively advising that #employee alone is unlikely to be understood. Perhaps most notably, in a more conservative stance than previously taken by the FTC, hashtags like #freeproduct or #sweepstakes alone would likely not be effective to disclose a gifted product or an incentivized sweepstakes entry. The FAQs recommend the use of disclosures such as "I was given a free [name of product] from XYZ to review," or #XYZ_sweepstakes, in each of these scenarios instead.

Bypass Built-In Tools

The new Endorsement Guides caution that many forms of disclosure built into platforms may not be sufficient. As such, the FTC recommends that brands and influencers add their own disclosures - though the FTC has offered to work with platforms that want to improve their disclosure tools.

Repost at Your Own Risk

The Endorsement Guides also warn against reposting or sharing third-party endorsements or testimonials without proper disclosures attached to the repost. Brands could face liability on a number of fronts, including for failing to disclose the relationship with the influencer if the original post's disclosure was ambiguous or obscured in the repost; or for failing to confirm that the endorser still holds the same opinion of a product whose formulation has changed since the original post.

Results Not Typical

The FTC is particularly focused on misleading ads for weight-loss products and provides several new examples to further clarify what adequate disclosure looks like in that realm, suggesting that enforcement efforts may be focused on this sector going forward. For example, even when brands use a real customer's testimonial, if the results were atypical, they must say so and disclose the expected or typical results based on reliable scientific evidence. Moreover, advertisers cannot pair a testimonial with a misleading image – for example, if a customer went from 300 pounds to 250 pounds but the ad features a 100-pound person, it would be deceptive.

Review Your Review Practices

Fake positive reviews are seen by the FTC as endorsements that require proper disclosures. While fake negative reviews are not technically endorsements, they are also problematic because they can be misleading and deceptive. Further, businesses that report negative reviews as fake without a reasonable basis for doing so are likely engaging in deceptive practices.

Moreover, when procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products, the Guides state that advertisers 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.

Using fake social media followers to indicate greater influence, while not an endorsement issue per se, is still a deceptive practice. The FTC also calls out companies in the business of selling fake followers or other fake indicators of social media influence for engaging in deceptive practices.

The day after releasing the updated Endorsement Guides, the FTC announced a new [proposed rule banning fake reviews and testimonials](#) that would make violators liable for civil penalties. While the final rule will likely provide greater and more granular clarity on the practices that the FTC may find deceptive, businesses should heed the guidance in the Endorsement Guides for now.

Sharing Liability with Influencers

Brands, as well as their PR, marketing, advertising, reputation management and other creative partners, could also be liable if an influencer misrepresents a product's efficacy or their personal experience with the product. Brands or their intermediaries must provide guidance to the influencer on avoiding misleading statements and making proper disclosures. Brands who act in good faith and provide effective guidance may reduce the risk of facing an FTC enforcement action. As such, it is important that brands and agencies properly vet, instruct and monitor their influencer partners for compliance.

"Special Concern" for Children

The Endorsement Guides end with a cautionary warning to advertisers that none of the examples provided apply to advertisements directed at children, which "may be of special concern because of the character of the audience." As the FTC noted in response to comments on the proposed rule, research shows that disclosures do not work for children as they do for adults. Thus, ads that include endorsements and are directed at kids may fall short of the FTC's requirements, even if they include a disclosure that any adult would find clear and conspicuous.

With the release of the updated Endorsement Guides, brands, advertising, PR and marketing agencies, and influencers should revisit their standard policies and practices now to ensure they comply with the FTC's new guidance.

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 Kumar

Partner

212 468 4988

pkumar@dglaw.com

Alexa Meera Singh

Associate

212 237 1479

alsingh@dglaw.com

Elizabeth Gemdjian, a 2023 Summer Associate at Davis+Gilbert, assisted with this alert.