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FTC Proposes Updated Guidance for Influencer and Consumer Review Programs

To encourage transparency and compliance with the Federal Trade Commission (FTC) Act and address current practices and trends, the FTC first published the *Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides)* in 1980 and then amended them in 2009. The *Guides* reflect the FTC's position on applying the FTC Act to endorsement-related issues.

The FTC's Proposed Revisions

The FTC's proposed revisions to the *Guides* expand or clarify guidance related to (1) who can be considered an endorser, what qualifies as an endorsement, and who can be liable if the endorsement is deceptive; (2) consumer review practices; and (3) when and how to disclose paid and other material connections between brands and endorsers, among other topics. More information about select proposed revisions follows.

Updated Scope

- **Virtual influencers.** The updated definition of "endorser" would apply to anyone that "could be *or appear to be* an individual, group, or institution" to cover "fabricated" and virtual influencers. Virtual influencers include digital-only characters with brand-generated backgrounds and personality traits, who sometimes have extensive followers. In other words, brands that work with virtual influencers would need to disclose their connection and otherwise comply with the *Guides*.
- **Social media tags.** The updated definition of endorsement would apply to social media user tags because tagging a brand in a post generally indicates that the poster uses or likes the product or service.
- **Endorser liability.** While the FTC has previously stated that endorsers and influencers must comply with the *Guides* and truth-in-advertising standards, the proposed updates clarify that endorsers may be found personally liable for statements about a product, service, or brand to the extent that they knew or should have known that the statements were false, misleading, or unsubstantiated.
- **Ad agency and intermediary liability.** The FTC also proposes clarifying that ad agencies, public relations firms, and other intermediaries may be liable for their role in disseminating false, misleading, and unsubstantiated endorsements.

Consumer Reviews

- **Manipulated consumer reviews.** Consistent with guidance issued early this year, the FTC makes it clear that it views procuring, suppressing, boosting, organizing, or editing consumer product or service reviews in a way that distorts or misrepresents what consumers think about a product as deceptive, regardless of whether the reviews are "endorsements" under the *Guides*. For example, brands should not flag reviews as "most helpful" just because they are positive.
- **Platform review moderation.** The proposed FTC updates explicitly recognize that brands are not required to display customer reviews that contain unlawful, abusive, or vulgar content, or content that is inappropriate regarding race, gender, sexuality, or ethnicity, or reviews that the brand reasonably believes are fake, provided that the criteria for withholding or removing the reviews are "applied uniformly to all reviews submitted." Brands are also not required to display reviews that are not related to their products and services, and the FTC clarifies that reviews related to customer service, delivery, returns, and

exchanges are related to the seller's products and services.

Disclosure Practices

- **"Clear and conspicuous" disclosure.** The FTC's updated definition of "clear and conspicuous" disclosure for purposes of conveying paid or other "material connections" between endorsers and brands would more explicitly define such disclosure as "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." The proposed revisions emphasize that the disclosure be "unavoidable" when the communication is made via social media or the internet.
- **Disclosures to children.** The FTC signals that endorsements in advertising addressed to children may raise special concerns and require different compliance practices than those used to advertise to adults. The proposed revisions do not address advertising to children in detail, but an upcoming FTC event on October 19, 2022, will look into children's ability to understand advertising content at different developmental stages and the efficacy and format of disclosures.

Looking Ahead

The FTC seeks public comments on the proposed revisions within 60 days of publication in the Federal Register. In the meantime, brands should continue to review and tune their social media and influencer marketing programs to manage legal and public relations-related risks.

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