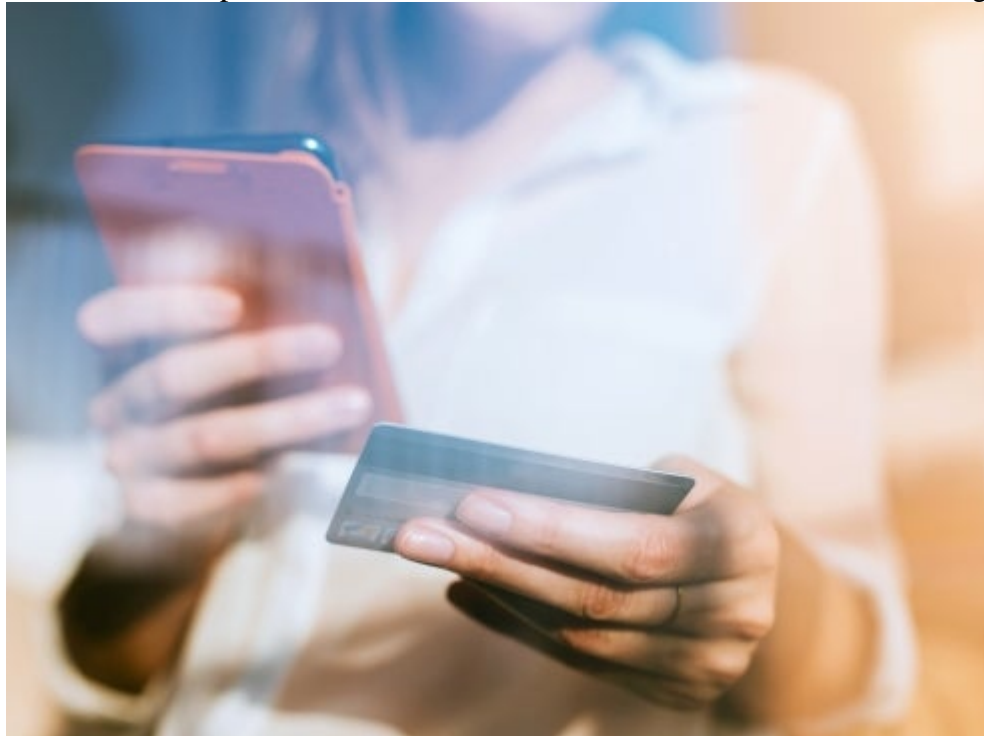


## Updates

August 03, 2023

### FTC Finalizes Updated Guidance for Influencer and Consumer Review Programs



The Federal Trade Commission (FTC) recently finalized updates to its [\*Guides Concerning the Use of Endorsements and Testimonials in Advertising\*](#) (*Guides*), which address the FTC's latest thinking about how the truth-in-advertising standards under the FTC Act apply to endorsement and review-related issues.

#### **The FTC's Updated *Guides***

The updated *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; (3) what counts as "clear and conspicuous" for endorsement disclosures; and (4) when and how to disclose paid and other material connections between brands and endorsers.

The FTC also made more than 40 updates to its FAQs related to the *Guides* (FAQs). More information about select updates follows.

#### **Updated Scope**

- **Social media tags.** The FTC updated the definition of "endorsements" to specify that social media tags "can be" endorsements because tagging a brand in a post may indicate that the poster uses or likes the product or service. However, whether a specific social media tag counts as an endorsement requires a fact-specific review.
- **Virtual influencers.** The updated definition of "endorser" includes anyone that "could be or appear to be" an individual, group, or institution, and applies to fabricated or "virtual influencers." Brands that work with virtual influencers must ensure that their connections are clearly and conspicuously disclosed and otherwise comply with the *Guides*.

- **Influencer, ad agency, and intermediary liability.** The revised *Guides* clarify that endorsers may be found personally liable for statements about a product, service, or brand to the extent that they know or should know that the statements are false, misleading, or unsubstantiated, including if they falsely represent that they personally used a product or service. The *Guides* also clarify that ad agencies, PR firms, review brokers, reputation management companies, and "other similar intermediaries" may be liable for their role in disseminating false, misleading, and unsubstantiated endorsements.

## Consumer Reviews

- **Manipulated or distorted consumer reviews.** The FTC makes clear that it views procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer product or service reviews in a way that distorts or misrepresents what consumers think about a product or service as deceptive, regardless of whether the reviews are "endorsements" under the *Guides*. For example, brands should not flag reviews as "most helpful" simply because they are positive and should not invite only those purchasers who give glowing feedback to post online reviews.
- **Paying for reviews.** Paying genuine purchasers to write positive reviews on third-party websites is deceptive, regardless of whether the payment is disclosed, if the positive nature of the review is required. However, if the reviews are not required to be positive and reviewers face no negative consequences for negative reviews, then a clear and conspicuous disclosure of the paid connection would be appropriate.
- **Star reviews.** The updated *Guides* provide more input about the use of "star reviews." For example, suppressing all reviews with fewer than four or five stars would clearly be misleading. Further, it could also be deceptive to use an "average star rating" when incentivized reviews materially increase the star rating unless a clear and conspicuous disclosure is conveyed to consumers with the average rating. The FAQs also state that organizing customer reviews to prioritize five-star reviews may be misleading.
- **Platform review moderation.** The updated *Guides* recognize that brands are not required to display customer reviews that contain unlawful, harassing, abusive, or vulgar content; the personal information or likeness of another person; 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. The FTC clarifies that reviews of a seller's products and services include those regarding customer service, delivery, returns, and exchanges.
- **Proposed FTC rule banning fake reviews and testimonials.** While not in the updated *Guides*, the FTC recently proposed a [rule banning fake reviews and testimonials](#). The rule would prohibit selling or obtaining fake consumer reviews and testimonials, review hijacking, buying positive or negative reviews, insider reviews, company-controlled review websites, illegal review suppression, and selling fake social media indicators. We will publish a separate Update on this proposed rule.

## 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 now explicitly requires disclosures to be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." The revisions emphasize that the disclosure be "unavoidable" when the communication is made via "an interactive electronic medium," such as social media or the internet. For example, if the endorsement disclosure is not visible without clicking on a link labeled "more," then the disclosure is not unavoidable.
- **Third-party disclosure tools.** The *Guides* and FAQs emphasize that social media platform built-in disclosure tools may not always be sufficient to satisfy the clear and conspicuous disclosure requirement discussed above. The FTC encourages advertisers to evaluate whether the use of the tool by itself clearly

and conspicuously discloses the relevant connection, taking into account placement, readability, and clarity.

- **Types of material connections.** The updated *Guides* expand and clarify the relationships that may reflect a "material connection" and require clear and conspicuous disclosure. Examples include being paid for tagging a brand's product while wearing it, friendships or family relationships tied to the brand, early access to product, and the possibility of being paid, winning a prize, or of appearing on TV or in other promotional media content. Ultimately, a material connection must be disclosed when a "significant minority" of the audience for an endorsement does not understand or expect the connection.
- **Typicality claims.** The FTC has previously stated that if an advertiser does not have support that the endorser's communicated experience about a product or service is representative of what consumers will generally achieve, the ad should clearly and conspicuously disclose the generally expected performance. The updated *Guides* clarify that this disclosure should be presented in a manner that does not itself misrepresent what the consumer can expect (e.g., is supported and discloses all conditions) and that such disclosure "must alter the net impression of the advertising so that it is not misleading."
- **Disclosures to children.** The updated *Guides* establish a general principle that advertising addressed to children may raise special concerns and require compliance practices different than those used for advertising to adults. The FAQs state that "advertisers and endorsers should be particularly careful in their use of endorsements directed to this audience."

## Other Topics

- **Compliance and monitoring programs.** The updated *Guides* state that advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements, "even when the endorser is not liable." Expanding upon its prior guidance related to compliance programs and monitoring influencers and endorsers, the FAQs state that advertisers should (1) provide guidance to their influencers to ensure that their statements disclose unexpected material connections and are not misleading; (2) monitor their influencers for compliance; and (3) take action sufficient to remedy noncompliance and prevent future noncompliance. While not a formal safe harbor, the FTC states that such practices should "reduce an advertiser's odds of facing [an FTC] enforcement action."
- **Other points.** The updated FAQs also address podcast endorsements, sweepstakes disclosures, affiliate links, and other topics. Brands that work with influencers (or hire agencies to do so) should become familiar with these updates and train their internal marketers and external agencies on related compliance procedures.

## Looking Ahead

Combined with the FTC's Notice of Penalty Offenses sent in 2021 to hundreds of businesses (allowing for civil penalties for noncompliant endorsement practices by such businesses put "on notice"), these updates to the *Guides* reflect a continued effort by the FTC to hold brands, their intermediaries, and endorsers responsible for influencer, endorser, and customer review-related practices. We expect to see the FTC ramp up enforcement on these issues. Brands should therefore review the *Guides* and FAQs and implement appropriate compliance practices, including by training internal marketing teams and external agencies, updating internal and external policies for influencers and agencies, conducting periodic monitoring, and taking action when problems are identified.

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