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Locke Lord QuickStudy: New FTC Endorsement Guides: What ?Advertisers and Influencers Need to Know

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For the first time since 2009, the Federal Trade Commission ("FTC") released changes to the FTC's Endorsement Guides, which advise advertisers, brand ambassadors and endorsers (collectively, "endorsers") on what practices may be unfair or deceptive in violation of the Federal Trade Commission Act. The FTC also issued an updated version of its FAQ's?—"FTC's Endorsement Guides: What People Are Asking"?—addressing 40 additional questions, including issues of when and how to disclose material connections of the endorser across different platforms. The new guidelines aim to address the new ways advertisers now reach consumers through social media, online advertising and artificial intelligence.

The FTC highlighted six changes to the Endorsement Guides that merit attention:

- Articulating a new principle regarding not procuring, suppressing, organizing, upvoting, downvoting, or editing consumer reviews in ways that likely distort what consumers really think of a product.
- Addressing incentivized reviews, reviews by employees, and fake negative reviews by competitors.
- Adding a definition of "clear and conspicuous" and warning that a platform's built-in disclosure tool might not be adequate.
- Updating the definition of "endorsements" to clarify that it can include fake reviews/reviewers (real and non-existent entities), virtual influencers, and social media tags.
- Providing a clearer explanation of the potential liability that advertisers, endorsers, and intermediaries face for violating the law.
- Emphasizing special concerns with child-directed advertising.

What qualifies as an "endorsement" under the guidelines? The updated Endorsement Guides expand the definition of "endorsement" to clarify that the rules apply to statements by virtual influencers, fake reviews/reviewers (real and non-existent entities), tags, and "likes" in social media as well as use of a product by an endorser in social media. The new rules are aimed at addressing the changing technological landscape, including the use of AI in marketing. Although the updated Endorsement Guides were driven by the need to address social media and online advertising, the FTC made clear the same rules apply for traditional and online media: whether the audience understands the reviewer's relationship to the company whose products are being recommended.

What constitutes a "clear and conspicuous" disclosure? The Guidelines remain focused on disclosing any material connection of someone writing or otherwise publishing a review or promoting a product or ?business online. An advertisement or endorsement is misleading where it fails to disclose a material connection between the endorser, including when the endorser is an employee or is otherwise paid, provided with a product or given something of value for promoting a product or brand. If a connection is important for a consumer to know in evaluating an endorsement, it must be disclosed.

The updated Endorsement Guides now define a "clear and conspicuous" disclosure as one that is "difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers." The requirement that a disclosure on social media be "unavoidable" is consistent with the FTC's prior guidance. For visual disclosures that accompany visual endorsements, the disclosure must stand out. For written endorsements, it must be clear and conspicuous from the accompanying text "by its size, contrast, location, the length of time it appears, and other characteristics" so that it is "easily noticed, read, and understood." For audio disclosures, which must accompany endorsements made audibly, the disclosure must be "delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it."

For long-form posts, the endorser should disclose in the text whether they received a product for free or received payment or other compensation for the post about the brand, product or service in the text. For short-form platforms, the FTC did not identify any specific required language or hashtag necessary to disclose a connection but hinted that hashtags such as #ad, #sponsored or #client accompanying the content may be adequate to disclose the relationship so long as it is not hidden, obscured, or embedded in a separate link which would require the audience to click-through.

Endorsers and Intermediaries May be Liable for Deceptive Advertising. The updated Endorsement Guides clarify that—in addition to advertisers themselves—endorsers, influencers, brand ambassadors and intermediaries such as advertising and public relations firms may be held liable for deceptive endorsements. This is consistent with the FTC's position taken in recent warning letters to social media influencers making purported deceptive endorsements or failing to make adequate disclosures about material connections with the product or business being endorsed. However, the updated Guides do not release an advertiser of liability if an advertiser elects to retweet, share, or republish a positive statement made by an unrelated party despite the lack of any material connection.

What Guidelines Apply to Online Consumer Reviews? The updated Endorsement Guides articulate "a new principle regarding procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, or editing consumer reviews so as to distort what consumers think of a product" and address "incentivized reviews, reviews by employees, and fake negative reviews of a competitor." Businesses operating online and displaying customer reviews or other endorsements should confirm online reviews are honest and do not deceive potential consumers by:

- Developing standard practices for endorsements and their use in social media to confirm compliance with the standards set forth by the FTC in its updated Endorsement Guides.
- Providing a clear and conspicuous disclosure in accordance with FTC guidance, if any review or endorsement is paid for or otherwise incentivized.
- Not suppressing negative reviews, creating fake reviews or using positive reviews from a different product sold by the company.

- Confirming the company is not buying or otherwise paying for followers or subscribers on any social media platform.
- Not asking staff, family, or friends who have not used or experienced a product or service to write favorable reviews.
- If reviews are selectively displayed, not representing they are the entirety of all reviews of a product.
- Contractually requiring endorsers and partners in e-commerce to make proper disclosures and comply with the FTC's guides.

Endorsements directed to children. New Section 255.6 of the updated Endorsement Guides addresses advertising directed to children, which the FTC states "may be of special concern because of the character of the audience" and that "practices that would not ordinarily be questioned in ads directed to adults might be questioned when directed to children." The Guides do not provide additional guidance on adequate disclosures in children's advertising, but notes that "[r]esearch on children's cognitive development suggests disclosures will not work for younger children." The FTC concluded that additional research is necessary to aid in formulating more specific guidance regarding advertising directed to children.

On the heels of publication of these new guidelines, the FTC issued an Advance Notice of Proposed Rulemaking (ANPR) announcing a new proposed rule that would, once adopted, provide the FTC with ?enhanced enforcement authority to bring actions against advertisers that engage in false or ?misleading practices in use of testimonials and endorsements. The proposed rule would not only ?simplify the FTC enforcement proceedings, but it would also give the agency the right to seek civil ?penalties in the event of violations.?

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