

FTC Proposes Changes to Endorsement Guides with Expanded Liability and More Onerous Disclosure Requirements

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In addition to announcing a new COPPA policy statement and related “crackdown” on children’s privacy issues (discussed [here](#)) in its most recent open meeting, the FTC also [proposed changes](#) to the [FTC’s Endorsement Guides](#). The changes would build on and expand previous guidance, including by expressly extending liability to endorsers, intermediaries, and platforms (in addition to advertisers), providing more guidance on how to incentivize and compile consumer reviews, and offering new examples that reflect a less flexible approach to disclosures for consumer endorsements.

Initially proposed in 1972, the Guides have long set guardrails for the use of endorsements and testimonials in advertising, at the time focusing on mediums such as TV, radio, and written publications. The Guides were revised in 1980 and 2009 to address new advertising law principles and reflect more recent uses of endorsements and testimonials. Though the Guides themselves are not trade rules that carry civil penalties, they provide a roadmap of how the FTC will approach enforcement under its Section 5 authority for endorsements and testimonials. Back in February 2020, we [reported](#) that the FTC was seeking public input on potential changes to the Guides to better address the current advertising landscape, including social media influencers. The FTC reviewed over a hundred comments from individuals, academics, trade associations, and companies and presented their proposed revisions during last week’s open meeting.

The proposed changes demonstrate the FTC’s interest in addressing evolving advertising practices and methods targeting consumers of all ages, especially on the internet and through social media. The proposed changes also suggest that this FTC will continue to push the envelope from prior standards in evaluating when advertising will be considered unfair or deceptive under the FTC Act. While not expressly proposed in the revised Guides, the preamble expresses skepticism that existing disclosure tools offered by social media platforms are adequate, for example, where the tools create superimposed disclosures on images that are unlikely to be seen or where disclosures appear above, rather than below, a picture or video where a consumer may not look.

Interested parties have 60 days to comment from publication in the Federal Register, which should occur shortly. Changes proposed include:

- **Define “clear and conspicuous.”** The Guides would include a stricter definition of “clear and conspicuous” which would require disclosures to be unavoidable, particularly by social media

users. The revised definition would also provide that a disclosure must appear through the same means as the triggering claim (*i.e.*, if the triggering claim is made both visually and audibly, then the disclosure must also appear both ways).

- **Expand Liability to Advertisers, Endorsers, Intermediaries, and Platforms.** The proposed Guides clarify that all parties in an advertising transaction may be liable for their role in endorsements. Intermediaries, such as advertising agencies, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements. Additionally, platforms could also be liable for facilitating misrepresentations if they lack appropriate built-in disclosure tools. And as we know from recent FTC [actions](#) and [guidance](#), endorsers (such as influencers) themselves can be liable for their representations.
- **More Detailed Guidance on Consumer Reviews.** Building on recent FTC guidance and enforcement regarding misleading consumer review practices, the revised Guides would clarify that businesses are responsible for the presentation of their consumer reviews and that companies may be liable for moderating consumer reviews in a way that overstates positive reviews while discouraging or disfavoring negative reviews. Proposed examples of misleading conduct include deleting or not publishing negative reviews, buying “fake” reviews, and review gating (*i.e.*, encouraging positive reviews and avoiding negative reviews).
- **Expand Disclosure Discussion on Atypical Results for Consumer Endorsements.** The FTC is proposing to add to existing section 255.2(b) to clarify “that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.” The proposed changes also include new and revised examples, which reflect more stringent expectations related to disclosures of generally expected results where such disclosures qualify a consumer endorsement promoting an atypical result. Moreover, while not expressly acknowledging the change, the FTC also appears to be proposing to delete an existing reference in a footnote stating that “the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement.”
- **Expand the Definition of Endorser.** The FTC proposes that the Guides expand the definition of “endorser” to encompass the emerging trends of advertisers relying on artificial or virtual influencers.
- **Provide Additional Examples for Influencer Marketing.** While the Guides have long specified that material connections must be clearly and conspicuously disclosed, the proposed revisions provide new examples of material connections that necessitate disclosure, including the provision of free or discounted products or the possibility of winning a prize, of being paid, or of appearing on television or in media promotions.
- **Include the Targeted Audience in Evaluation of Disclosure.** When assessing whether a disclosure is clear and conspicuous, the revised Guides would evaluate whether a specific targeted audience would have understood the disclosure. As part of this proposal, the FTC is also considering a section that addresses advertisements specifically targeted to children and the elderly. The FTC announced it will host a workshop to address this issue on October 19, 2022.

While some of the principles embodied in the proposed revisions have been articulated in previous guidance and enforcement, other principles are new. We encourage you to review the proposed changes and assess how they impact your practices related to endorsements and testimonials.

Before the proposed changes to the Guides are finalized, the FTC is required to consider and respond to comments submitted in writing, which as noted above are due within 60 days of publication in the Federal Register.

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