

Grasping Social Media Ad Regulations: Key FTC Proposals

By **Diego Gutiérrez and Steve Winters** (September 19, 2022)

If you are a social influencer, or you are a company that engages social influencers for online advertising and marketing, here's what you need to know about the Federal Trade Commission's enforcement guide updates.

The Federal Trade Commission recently announced proposed revisions to its endorsement guides. These revisions will affect how influencers and companies approach online endorsements and testimonials — especially on popular online platforms.

This is a three-part series. In this first part, we summarize the proposed revisions. The second part examines the most salient features of the revisions. Finally, we suggest ways to improve your contracts and avoid FTC enforcement actions — i.e., minimize liability and risk on both sides.

Generally, the FTC is aiming to revise its regulations against fake online reviews, the manipulation of online reviews and stealth advertising that targets children. This three-part series focuses on how the potential changes will likely impact social media advertisements and endorsements.

Part One begins with the background on the law and endorsement guides. It also examines the consequences for influencers and their sponsored companies, if they fail to follow the new rules.

On May 19, the FTC voted unanimously to revise its Guides Concerning the Use of Endorsement and Testimonials in Advertising.[1]

On June 3, the agency officially opened its requests for public comment on its published revisions, which updated federal advertisement and endorsement regulations to reflect technological changes and increased reliance on social media platforms to market products or services to consumers.

However, these changes should not surprise those in the marketing industry, given the lack of revisions by the FTC in the past nine years and last year's attempt to modernize the rules before the COVID-19 pandemic disrupted such plans.

The proposed new rules also reflect the agency's concern with the unique risks consumers face due to new technological tactics and techniques certain advertisers employ to create "dark patterns, manipulative user interface designs, and other forms of digital deception," according to the FTC Business Blog.[2]

The new rules will likely have broad implications for those who fail to disclose paid advertisements or collaborations and will increase the agency's regulatory reach in enforcement actions.

Background to the Endorsement Guides and Current Law

The FTC's consumer protection statutes under the Federal Trade Commission Act[3] prohibit misleading, deceptive and unfair advertising, including any public endorsement or



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testimonial advertisement for a product or service.[4]

The FTC's endorsement guides were designed to assist businesses, and eventually, influencers, to comply with Section 5 of the act and to help the FTC determine possible violations.

The FTC has only updated the endorsement guides a few times since their official enactment in January 1980 to reflect technological changes in how businesses reach consumers. 2009 was the last major attempt to modernize the endorsement guides to reflect the rising popularity of social media platforms.

To comply with Section 5 of the act, influencers must clearly state whether they received a free product, payment or service by disclosing statements that establish their relationship with the company.

Phrases or hashtags on the post such as "Thanks to ABC Company for the free product! #ABCCompanyPartner #ad" typically sufficed. The language used by influencers is instrumental in disclosing such material relationship with the brand or company providing the free product, service, payment or any other benefit.

These disclosure requirements were aimed to show transparency in the influencer's review, demonstration, performance or evaluation of the product or service and to alert consumers that the influencer endorsing such product or service is benefiting directly from the company.

Some social media platforms, such as Instagram, have also created integrated tools for their platforms to facilitate disclosure of business relationships and brand collaborations. These tools were often a simple tag, similar to a location geotag on top of a post, and did not prominently and conspicuously display the disclosure for consumers to see.

However, the endorsement guides did not properly address the use of such tools, making it difficult for the FTC or any consumer advocacy groups to show that an influencer or brand is being deceptive when using them.

In the past, FTC investigations into unfair or deceptive endorsement and testimonial ads under the act would typically attempt to find the company, and in some instances the influencer, liable if the advertisement failed to follow the endorsement guidelines.

Because the endorsement guides remain advisory in nature, the government has the burden to show a violation of the law, and thus far no civil penalties have been associated with violating the endorsement guides or not following other published FTC resources.

The FTC's burden of proving that a company's particular use of an endorsement or testimonial, or an influencer's particular way of hiding a disclosure on the post, is deceptive under the law has also made it challenging for the FTC to seek any enforcement actions.

Expanding Liability Under the New Rules

The FTC continues to believe that endorsements must reflect the honest opinions or experience of the endorser, and they may not convey any representation that would be deceptive if made directly by the advertiser.[5]

This policy approach prompted the agency's press release of the revised guides to also warn

advertisers that the use of integrated tools on social media platforms to regulate advertisements is inadequate. The FTC's criticism of these tools under the revised guides potentially opens up additional liability if influencers, companies and/or the platform at issue do not prominently display the disclosure.

Other revisions aim to clarify current rules and make it easier for the FTC to show the burden of proof of a violation as well as effectively monitor online digital deception.

Samuel Levine, director of the FTC's Bureau of Consumer Protection, stated that the agency's update would allow the agency to crack down on fake reviews and other forms of misleading marketing, especially those targeting younger audiences:

Whether it's fake reviews or influencers who hide that they were paid to post, this kind of deception results in people paying more money for bad products and services, and it hurts honest competitors.

The FTC was seeking public comments on the following issues:

- The use of sponsored and promoted advertising on social media;
- Advertising embedded in games and virtual reality, and microtargeted advertisements;
- The ubiquitous use of dark patterns and manipulative user interface designs used on websites, mobile apps and in digital advertising that pose unique risks to consumers;
- Whether the current guidance adequately addresses advertising on mobile devices;
- Whether additional guidance is needed to reflect the multiparty selling arrangements involved in online commerce and affiliate marketing arrangements;
- How guidance on the use of hyperlinks can be strengthened to better protect consumers; and
- The adequacy of online disclosures when consumers must navigate multiple webpages.

While most of the above proposals are clarifications or additional examples of the endorsement guides' existing principles, other proposals come from public comments previously received in The Federal Register during the FTC's previous attempt in February 2020 to change the rules.

These new principles represent substantive changes that reflect current consumer knowledge and how consumers receive information. To hold both companies and influencers responsible for deceptive advertising, the agency plans to expand or clarify the above principles under the act as follows:

Definition of "Endorsement"

The revision would expand the definition of "endorsement" and hold advertisers liable for an endorser's deceptive statement, even if the endorser is not found to be liable.

Section 255.1(d) of the endorsement guides currently recognizes that advertisers are subject to liability for false or unsubstantiated statements made through endorsements or for failing to disclose material connections between themselves and their endorsers.

However, the FTC is seeking to clarify that this could include statements where the endorser is not found liable by expanding the definition of "endorsement" to include "marketing" and "promotional" endorsements. This could mean that even if an influencer tags a brand in a post, the revised definition would include such a tag as part of the endorsement.

Advertiser Action

The proposal adds guidance on the type of action advertisers should take to ensure endorsers follow FTC rules.

The FTC plans to recommend the type of actions advertisers should take with respect to their endorsers instead of just stating them as examples.

Definition of "Endorser"

The revision would expand the definition of "endorser" and hold endorsers liable for their statements if they fail to disclose their material relationships with advertisers or for making false statements or representations.

Section 255.1(d) currently recognizes that endorsers may be subject to liability for their statements, but adding a new Section 255.1(e) would reflect that endorsers may be liable for their statements "when they make representations that they know or should know to be deceptive."

The FTC is also planning to propose an expansion of the definition of "endorser" from "an individual, group or institution" to those that "appear to be an individual, group and institution" in order to clearly apply to endorsements fabricated by endorsers. Most notably, the definition would also include "virtual influencers."

According to the FTC, the "level of due diligence required by the endorsers will depend on their level of expertise and knowledge, among other factors."

Section 255.1(e) would also say that a:

Non-expert endorser may also be liable when the endorser makes misleading or unsubstantiated representations about performance or efficacy that are inconsistent with the endorser's personal experience or that were not made or approved by the advertiser and that go beyond the scope of the endorser's personal experience.

Additionally, the use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

Need for Substantiation

The revised rules clarify that the need for substantiation applies to both express and implied claims.

Current rules state that when an advertiser does not have proof that an endorser's experience is reflective of what customers will generally achieve, the ad must clearly and

prominently disclose the generally expected performance of the product under the portrayed conditions.

The commission proposes adding a clarification that the information about such expected performance should be presented in a way that does not mislead consumers about what they can expect.

Definition of "Clear and Conspicuous"

The proposal would expand the definition for "clear and conspicuous," and clarify disclosing "material connections" to the advertiser.

In response to public comments requesting further guidance on the requirements for "clear and conspicuous" advertisement disclosures, the FTC proposes a new definition of what constitutes a disclosure that "is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers."

The new definition will also provide specific guidance with respect to visual and audible disclosures. Such proposals will stress the importance of "unavoidability" when the communication involves social media, and instruct that the disclosure should not be contradicted or mitigated by, or inconsistent with, anything in the communication.

Section 255.5 of the revised guides also explains that material connections can include a business, family or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser, including products or services unrelated to the endorsed product; early access to a product; or the possibility of winning a prize, of being paid or of appearing on television or in other media promotions.

The new guidance would state that a material connection can exist regardless of whether the advertiser requires an endorsement for the payment or free or discounted products.

The above changes reflect the FTC's desire to strengthen its grip on false or deceptive advertisements and expand the types of individuals and entities from whom it could seek recourse.

One of the last times the FTC reviewed and attempted to crack down on influencer advertising on Instagram was in 2017, when the agency sent over 90 letters to influencers and marketers to remind them that following a clear disclosure of relationships with brands is necessary when endorsing any product on social media.

The fact that both can be liable is why brands need to shore up their current form of agreement, if any, or start using one. This will better protect brands from liability for false advertising or other related claims.

Before making the revisions final, the FTC placed the revised guides on record for public comments for 60 days, which were due Aug. 2. Three weeks later, the FTC decided to seek further public comments on how children are affected by digital advertising and marketing messages.

Stealth advertising in children's digital media has become such a big concern that the FTC will hold a virtual event on Oct. 19 on "Protecting Kids from Stealth Advertising in Digital Media." The public will have until Nov. 18 to submit comments on this topic, and that will likely delay the FTC's final revisions and publication to the guides.

If necessary, the FTC may use the public's feedback on the proposed updates and make further revisions to implement the suggestions. The public can usually make additional comments, but the agency is not required to respond to comments made during the reply period.

Although the rules will only change once the FTC finalizes the public comment period and formally updates its endorsement guidelines, regardless of the final revisions, companies should nevertheless develop an internal guide for the company and the social media influencer to follow and enter into written agreements with influencers regarding required disclosures.

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[1] Although the Guides Concerning the Use of Endorsements and Testimonials in Advertising (published under 16 C.F.R. § § 255.0-255.5) is the FTC's seminal guide providing the rules to assist advertisers in meeting their legal obligations when using online paid endorsements and testimonials, the FTC also publishes other resources delineating these rules for specific readers such as influencers, companies, and the general public. This three-part series will reference the following guides:

- The FTC's Endorsement Guides: What People Are Asking, updated on August 27, 2020, is a set of frequently asked questions ("FAQs") related to the Endorsement Guides and provides detailed examples of how the FTC applies the Endorsement Guides to social media influencer endorsements.
- Disclosures 101 for Social Media Influencers, published in November 2019, is a resource that aims to help virtual influencers comply with FTC rules and regulations and reminds them of their responsibility in making advertisement disclosures.
- .com Disclosures: How to Make Effective Disclosures in Digital Advertising, revised in March 2013, addresses disclosure issues specific to the internet and social media. This resource also provides FTC staff guidance concerning what specifically makes a "clear and conspicuous" online disclosure as required and enforced under the FTC Act.
- Enforcement Policy Statement on Deceptively Formatted Advertisements and Native Advertising: A Guide for Businesses, both published in December 2015, are guides that provide some rules about how, where, and when advertisers must make disclosures. While the FTC avoided any further attempt to define commercial speech in the native advertising context, the Native Advertising Guide further clarified that (1) transparency is a critical concern to the FTC, (2) some native ads are so commercial in nature that additional disclosures are not required, and (3) if the disclosure is necessary to prevent deception, the disclosure must be clear and prominent.

[2] See Lesley Fair, "FTC calls for a reboot on business guidance about digital advertising," FTC Business Blog, (June 3, 2022) <https://www.ftc.gov/business->

[guidance/blog/2022/06/ftc-calls-reboot-business-guidance-about-digital-advertising.](#)

[3] 16 C.F.R. § § 255.0-255.5

[4] See 15 U.S.C. Section 45.

[5] 16 C.F.R. § 255.1.