

## Client Alert

### FTC Issues Long-Awaited Updates to the Endorsement Guides

May 25, 2022

On May 20, 2022 the Federal Trade Commission's ("FTC") Commissioners unanimously approved a request for public comment on proposed updates to its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides" or "Guides"). In the draft revisions, released last week, the FTC seeks to update the Endorsement Guides and provide new examples that reflect advertisers' growing reliance on social media advertising. The Endorsement Guides were last revised in 2009. See 16 CFR pt 255.

The Endorsement Guides require advertisers that feature endorsements made by endorsers with an unanticipated material connection to the advertiser—for example, monetary payment, a sweepstakes entry, or something else of value—to disclose that connection in the advertising. In addition, endorsements must be truthful and accurate, reflecting the endorser's actual experience with the product. Marketers that fail to comply with the Endorsement Guides violate Section 5 of the FTC Act.

In the thirteen years since the Guides were revised, the landscape of social media advertising has transformed with the introduction of new platforms like Instagram and TikTok and the growth of the "social media influencer." Marketers have had to look beyond the Guides to guidance documents such as the [Endorsement Guides FAQs](#), warning letters and consent orders, and other guidance documents to ascertain how to comply with the Endorsement Guides.

Two years after seeking public comment on whether the Endorsement Guides should be revised, the FTC has [finally released its proposed updates](#), drawing from the very same consent orders and other guidance the FTC has developed in the past decade. The most notable proposed changes include:

#### Section 255.0 Purpose and Definitions

- **Modified Definition of "Endorsers":** The definition of "endorsers" was revised to include virtual, fictional influencers, such as computer-generated fictional characters. Additionally, "Tags" in social media posts are considered Endorsements under the Endorsement Guides. Section 255.0(b).
- **Product Definition Now Includes "Brands":** Section 225.0(d) now includes brand as part of its definition for the word, "product".
- **Clear and Conspicuous Disclosure:** The Commission clarified that "Clear and Conspicuous disclosure" should include a disclosure that "is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary customers." While there is no mandate that the disclosure be audible versus visible, the FTC suggests that the disclosure must match the triggering claim. Section 255.0(f).
- **Consumer Review Considered Endorsement When It can be Attributed to the Product's Manufacturer via a Program:** If a consumer receives a free product as part of a marketing program that periodically

provides free products, where the consumer has the option of writing a review, the consumer's review would be an endorsement because of his or her connection to the manufacturer through the marketing program. Section 255.0, Example 7.

- **Social Media Platform Disclosure Tools:** The FTC added an Example 9 to Section 255.0 to caution marketers and influencers that built-in disclosure tools on social media platforms may be inadequate to clearly and conspicuously disclose a material connection.
- **Disclosures Must Be Tailored if a Discrete Group is Targeted:** If an advertiser micro targets a discrete group of consumers, any necessary disclosures will be based on the needs of that discrete group. For example, if the group targeted speaks a specific language, the disclosure needs to be in that language. Section 255.0, Example 11.

### Section 255.1 – General Considerations

- **Liability of Endorsers and Intermediaries:** The FTC added new subsections clarifying the potential liability of endorsers and intermediaries.
  - Liability of Endorsers:** Section 255.1(e) states endorsers may be liable for their statements in situations where they make representations that they know or should know to be deceptive. The level of due diligence required by the endorsers will depend on their level of expertise and knowledge, among other factors. Liability may be imposed on non-expert endorsers when they make 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. A paid endorser and the company paying the endorser are both potentially liable for the endorser's social media post that fails to disclose the endorser's relationship to the company. This applies to paid consultants and not just employees or those hired to be endorsers. Lastly, an endorser can be found liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when they create and disseminate endorsements without such disclosures.
  - Liability of Intermediaries:** Section 255.1(f) will now impose liability on intermediaries such as advertising agencies and public relations firms, for their roles in disseminating what they knew or should have known were deceptive endorsements. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without the necessary disclosures of material connection or by hiring and directing the endorsers who fail to make necessary disclosures.
- **Endorsements with the Image or Likeness of a Person:** The Commission added a new section 255.1(g) stating 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.

- **Responsibility for Old Social Media Posts:** An endorser is not required to go back and modify or delete past social media posts as long as the posts were not misleading when they were made and the dates of the posts are clear and conspicuous to viewers. However, if the posts were later reposted by the endorser or shared by the publisher, the FTC considers that the endorser continues to hold the views expressed in the prior post. Section 255.1, Example 1.

## Section 255.2 – Consumer Endorsements

- **“Generally Expected Performance” Disclosures:** When the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, not only should the ad clearly and conspicuously disclose the generally expected performance in the depicted circumstances, the proposed Guides now state that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect. Section 255.2(b).
- **Consumer Reviews:** Section 255.2(d), a newly proposed section, would articulate that advertisers are forbidden to make any change to consumer reviews of their products that have the effect of distorting or otherwise misrepresenting what consumers think of their products. Additionally, Example 8 states an advertiser highlighting only glowing reviews and labeling them as “most helpful” where consumers had not actually voted them most helpful is deceptive.
- **“Generally Expected Performance” Under Limited Circumstances:** Clarifies that a “Generally Expected Performance” disclosure can be considered misleading if those results are only true under limited circumstances that are not clearly stated in ad. For example, where outliers can substantially affect the average results, a disclosure of generally expected results based upon a mean computation would be considered misleading. In such circumstances, the disclosure should be based upon median results. Section 255.2, Example 4.
- **Liability for Fake Reviews, Indicators of Influence:** The marketer is not only liable for procuring reviews that are not from bona fide users, but can be liable for any unsubstantiated claims made in those fake reviews. Section 255.2, Example 4.
- **Paying for Positive Product Reviews:** Paying purchasers to write positive product reviews is deceptive regardless of any disclosure of the payment. Section 255.2, Example 9.
- **Review Gating Requirements:** Review gating, practices that involve obtaining customer feedback and then sending satisfied and dissatisfied customers down different paths in order to encourage positive reviews and avoid negative reviews, may be considered an unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice. Section 255.2, Example 11.

## Section 255.4 Endorsements by Organizations

- **Review Sites:** If a manufacturer sets up an apparently independent review website that reviews the manufacturer’s own products and competing products, the FTC considers the website deceptive because it is not independent. Also, if a manufacturer makes payments to the review site but not for

higher rankings, there should be a clear and conspicuous disclosure regarding the payments. Section 255.4, Examples 2-3.

### Section 255.5 – Disclosure of Material Connections

- **Disclosures of Endorsements by Famous Influencers:** Section 255.5 was revised to state that when an endorser’s material connection need not be disclosed when it is understood or expected by all but an insignificant portion of the audience.
- **Content of Disclosures:** A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection so that consumers can evaluate its significance.

### Section 255.6 – Endorsements Directed to Children

- **Child-directed Endorsements:** This entirely new section addresses endorsements directed to children. Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.
- The FTC plans on hosting a virtual event on “Protecting Kids from Stealth Advertising in Digital Media” on October 19, 2022.

While the Guides have not yet been adopted, they are part of the FTC’s ongoing focus on endorsements and testimonials. Earlier this year, the FTC issued a guidance document titled “Featuring Online Customer Reviews: A Guide for Platforms. This [guide](#) establishes basic principles for companies to follow when handling online consumer reviews such as companies should not discourage negative reviews, should not incentivize reviews generally, should maintain up-to-date processes for verifying reviews and identifying fake reviews, and should not edit or remove verified negative reviews. And, late last year, the FTC issued Notice of Penalty Offenses letters to more than 700 of the country’s largest companies. The letters, issued pursuant to FTC Act § 5(m)(1)(B), were an attempt at an alternative approach to civil penalties following the U.S. Supreme Court’s ruling in *AMG Capital Management, LLC v. FTC*. The letters specifically described endorsement and testimonial practices that the FTC has found to be deceptive.

Once the notice is published in the Federal Register, comments will be due within sixty days.

- Parties may file a comment online ([here](#)) or by paper by mailing the comment to Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580. Comments may be hand delivered to Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. Online submissions are preferable.
- The main FTC contact for inquiries related to the proposed update is Michael Ostheimer. He can be reached at (202) 326-2699 or [mostheimer@ftc.gov](mailto:mostheimer@ftc.gov).

- “Endorsement Guides, P204500” must be written on any comment. Additionally, the name and state of the commenter will be placed on the public record and must be included.
- All submitted comments are part of the public record, so no sensitive or confidential information should be included.

Crowell & Moring can offer clients counseling on specific advertising practices discussed in the proposed updates or assist clients in drafting comments on the proposed edits to the Endorsement Guides.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Roy A. Abernathy**

Associate – Washington, D.C.

Phone: +1.202.654.6722

Email: [rabernathy@crowell.com](mailto:rabernathy@crowell.com)

**Helen O. Ogunyanwo**

Counsel – Washington, D.C.

Phone: +1.202.624.2585

Email: [hogunyanwo@crowell.com](mailto:hogunyanwo@crowell.com)