

What Brands Need To Know About Consumer Reviews In 2024

By **Holly Melton, Roy Abernathy and Helen Ogunyanwo** (January 5, 2024, 2:08 PM EST)

Testimonials, endorsements and consumer reviews have been on the Federal Trade Commission's radar for years. But as advertising practices evolve and new guidance and rules are released, brands may find it difficult to keep up with the changing landscape.

Below, we offer a comprehensive, in-depth examination of the laws, rules and guidance of which advertisers should be aware when advertising by way of testimonials, endorsements and consumer reviews.

Since this area will continue to be an enforcement priority in 2024, there is no time like the present to ensure your house is in order.

The Consumer Review Fairness Act

In December 2016, President Barack Obama signed the Consumer Review Fairness Act into law.

The act prohibits companies from using contractual provisions that: bar or restrict a person's ability to provide an honest review of a company's products or customer service; impose a penalty or fee against a consumer who provides an honest review; or require a person to waive intellectual property rights in the content of their reviews. Any contract that incorporates these types of provisions is deemed void from inception.

The act does not, however, prevent companies from prohibiting or removing reviews that contain confidential or private information; libelous, harassing, obscene or offensive content; information unrelated to the company's products or services; or reviews that are clearly false and misleading. Note: Disagreeing with an opinion does not render it false and misleading.

Congress gave the FTC and state attorneys general authority to enforce the act. Importantly, violation of the act is treated as violation of an FTC trade regulation rule.

This means that the FTC is authorized to seek a civil penalty for each violation, or for each day of an ongoing violation. Today, the civil penalty amount per violation is \$50,120, and will likely be adjusted upward in early 2024.



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The Endorsement Guides

Originally issued in 1980 and previously updated in 2009, the "Guides Concerning the Use of Endorsements and Testimonials in Advertising," known as the Endorsement Guides, have long been concerned with ensuring that endorsements and reviews reflect honest, typical experiences with products, and that material connections between advertisers and endorsers are disclosed.

The Endorsement Guides have always sought to provide guidance on how the use of reviews and endorsements may be considered unfair or deceptive in violation of Section 5 of the FTC Act. The 2009 updates were issued in response to a market shift toward bloggers and other "word of mouth" marketers, celebrity endorsers and consumer-generated content.

Those updates eliminated a safe harbor that used to exist for product claims that did not reflect typical results as long as a disclaimer was provided, and also clarified that both the advertiser and the endorser can be held liable for claims in endorsements and for failure to disclose material connections.

Since the 2009 updates, the marketing landscape has drastically changed again, introducing the proliferation of and reliance on social media advertising, including the use of celebrities and influencers, and the massive expansion of online, readily accessible consumer reviews.

The shift in the marketing landscape has also introduced a host of issues and concerns not addressed in 2009, such as tagging on social media platforms, fake reviews, nonexistent entities, suppression of consumer reviews, and endorsements directed to children.

Thus, after a three-year-long review process, the FTC published its updated 2023 Endorsement Guides on June 29, 2023. But, what's new?

First, the FTC updated its approach to disclosures, requiring the disclosure of unexpected material connections and strengthening the definition of "unexpected" to "when a significant minority of the audience" does not understand or expect a connection.

Second, the commission makes explicitly clear that the "clear and conspicuous" requirement for material connection disclosures means the disclosure is "difficult to miss" and "easily understandable" by consumers, adding several new examples to further delineate these expectations.

And, the FTC clarified that compliance with social media platform guidelines does not necessarily mean a disclosure is clear and conspicuous. Further, although the Endorsement Guides likely already encompassed ordinary consumer reviews, the 2023 update makes their inclusion abundantly clear.

We offer a section-by-section analysis of the changes to the Endorsement Guides below:

Section 255.0: Purpose and Definitions

Application of the Endorsement Guides

This establishes that the Endorsement Guides do not address every possible issue and that the examples listed only apply to the principles of the section in which they are presented.

Endorsements

The definition of "endorsement" now includes "marketing" or a "promotional message for a product." A tag in a social media post can also be considered an endorsement. The definition of endorser is expanded to include something that appears to be an individual, group or institution that is targeting fabricated endorsements.

Other Definitions

The definition of "product" not only includes a product, service, company or industry, but now also a brand. As discussed above, the Endorsement Guides now list a definition for "clear and conspicuous," which means a disclosure is hard to miss and easily comprehensible by ordinary consumers. The disclosure should also be made through the same means as the representation — i.e., visual, audible, etc.

Updated Examples

The updated Endorsement Guides include new examples covering various types of disclosures, connections that may exist between a consumer and a manufacturer, types of endorsements, and clarification on the target audience for disclosures.

Section 255.1: General Considerations

Liability of Endorsers

This clarifies that advertisers are subject to liability for "failing to disclose unexpected material connections between themselves and their endorsers," and that endorsers can be liable for representations in their endorsements that they know or should know are deceptive.

Examples may include falsely representing that they personally used a product and making misleading or unsubstantiated representations regarding a product's performance or effectiveness.

Heightened Liability of Advertisers

Advertisers can be liable for a deceptive endorsement even when the endorser is not liable. Advertisers are also expected to provide guidance to and monitor their endorsers to ensure compliance with the Endorsement Guides, and take "action sufficient to remedy noncompliance and prevent future noncompliance."

Liability of Intermediaries

Advertising agencies, review brokers, public relations companies, reputation management firms and other such intermediaries may be liable for creating or promulgating endorsements containing representations that they know or should have known are deceptive.

They may also be liable for endorsements that fail to disclose unexpected material connections, by, for example, disseminating advertisements without required disclosures or by hiring and directing endorsers who do not make these disclosures.

Endorsements With the Image or Likeness of a Person

Using another person's image or likeness — that is not the actual endorser — is considered deceptive if it misrepresents a material attribute of the endorser.

Updated Examples

The new examples cover different ways endorsements can be deceptive and how endorsers and their advertising agencies can be liable.

Section 255.2: Consumer Endorsements

Substantiation

Substantiation requirements apply to both "express and implied" claims made through endorsements.

"Generally Expected Performance" Disclosures

Where the experience of the endorser is not representative of what a consumer generally will achieve, the advertiser must still clearly and conspicuously disclose the expected performance in the depicted circumstances.

The FTC clarified that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect. To be effective, the disclosure must alter the net impression of the advertisement so that it is not misleading.

Suppression of Consumer Reviews

Advertisers cannot use social media tools or other means to distort or misrepresent how consumers view their products, regardless of whether the reviews would be considered endorsements under the Endorsement Guides.

Updated Examples

The new examples cover appropriate disclosures for generally expected results, removing and/or suppressing unfavorable reviews and ratings, paying for positive endorsements, third-party reviews, disclosing material connections, and review gating requirements.

Section 255.3: Expert Endorsements

Clarifying and Broadening Expertise

The endorser's actual expertise is not important. Rather, the expertise that the endorser claims to possess is the focus, broadening what qualifies as expertise.

Section 255.4: Endorsements by Organizations

Updated Examples

The new examples address company-controlled review entities, such as a firm creating a website falsely

appearing to be independent or a third-party review website accepting bribes from a firm. These types of relationships are considered misleading, and disclosure is an inadequate remedy.

Section 255.5: Disclosure of Material Connections

Material Connection

A material connection may include a business, family or personal relationship. The connection can include monetary payment or discounted products, regardless of whether the advertiser requires an endorsement in return. A material connection may also include other benefits, such as early access to products or the receipt of prizes.

Disclosure

A material connection needs to be properly disclosed when "a significant minority of the audience for an endorsement does not understand or expect the connection." A disclosure must communicate the nature of the connection sufficiently clearly for consumers to be able to evaluate its significance.

Updated Examples

The new examples cover endorsers receiving products free of charge, use of environmental seals of approval, use of affiliate links in blogs, commercials in podcasts, and paid-for product ranking or testing.

Section 255.6: Endorsements Directed to Children

Special Concern

The FTC added section 255.6 to emphasize that advertisements to children may be of special concern due to the nature of a child audience. However, the section merely provides a broad statement suggesting that compliance with the Endorsement Guides' recommendations for adult audiences may not be sufficient where the target audience is children.

Proposed Rule on the Use of Consumer Reviews and Testimonials

On June 30, 2023, the FTC released a notice for a proposed trade regulation rule, the first FTC rule that would be related directly to endorsements, reviews, and testimonials, titled "Rule on the Use of Consumer Reviews and Testimonials."

The rule would prohibit deceptive conduct involving consumer reviews and testimonials. The rule aligns with the FTC's 2023 Endorsement Guides, and will prohibit:

1. Fake consumer reviews and testimonials;
2. Review hijacking, or applying reviews for one product to a materially different product;
3. Purchasing reviews;
4. Insider reviews without disclosure;
5. Company-controlled review entities;
6. Review suppression; and
7. Misuse of indicators of social media influence, such as fake followers or views.

The proposed rule is a formal step from the FTC to address alleged ongoing noncompliance, particularly in the consumer review space.

If promulgated — which is a virtual certainty — the final rule will allow the FTC to seek civil penalties against violators of up to \$50,120 per violation, as well as to seek other monetary relief via Section 19 of the FTC Act, following an administrative complaint resulting in a cease-and-desist order.

The public comment period for the proposed rule closed on Sept. 29, 2023, and the FTC received 118 comments. The FTC is expected to issue the final rule in 2024.

Enforcement by States

In 2014, before the Consumer Review Fairness Act was signed into law, California enacted California Civil Code Section 1670.8, otherwise known as the "right to gripe" law.

The law prohibits contractual provisions waiving a consumer's right to make any statement about his or her experience in connection with the purchase or lease of consumer goods. In 2016, the state of Maryland enacted a similar law.

In addition, a number of states including Massachusetts, New Jersey, Oklahoma and South Carolina have unsuccessfully attempted to enact "right to gripe" laws.

In 2022, Tennessee legislators attempted to enact a law that would have made posting a factually false online review about a business a violation of the state's Consumer Protection Act. And even without a separate law addressing reviews, many states consider the suppression or misuse of reviews to violate state consumer protection laws.

While we have not seen a flurry of enforcement activities by state regulators regarding consumer review practices, we have observed a recent wave of class actions in California.[1]

In a nutshell, the class action plaintiffs argue that the terms of use associated with the defendants' websites include anti-disparagement clauses, unlawfully suggesting to consumers that their access could be revoked based on negative consumer reviews.

Plaintiffs argue that these terms violate California Civil Code Section 1670.8, rendering them unlawful and therefore violative of California's unfair competition law, California Business and Professions Code Section 17200.

Why Brands Should Care

E-commerce and the associated online endorsements, reviews and testimonials continue to proliferate.

Corporations regularly engage in these types of marketing practices to reach massive amounts of consumers because recommendations from others, including celebrities and ordinary people, can be extremely persuasive.

Federal and state regulators have made clear that review practices will be carefully scrutinized, and class action plaintiffs have figured out a way to get into the mix. And with the proposed rule, the FTC will soon be able to seek civil penalties directly from federal courts.

But wait, civil penalties are a possibility today! Many brands may recall the U.S. Supreme Court's April 2021 decision in AMG Capital Management LLC v. FTC.

Even though the FTC had invoked Section 13(b) of the FTC Act to go directly to federal court to seek monetary relief for violations of Section 5 of the FTC Act — including violations of the Endorsement Guides — for decades, the Supreme Court ruled that Section 13(b) only permits the FTC to seek an injunction in federal court.

After that decision, the FTC began more regularly invoking its notice of penalty offense authority under Section 5(m)(1)(b) of the FTC Act, which permits the FTC to seek civil penalties from a court where a defendant engages in conduct that violates a prior cease and desist order — including orders against any other company — with actual knowledge that such practice is unfair or deceptive.

Importantly, in October 2021, the FTC sent hundreds of companies notice of penalty offense letters, which informed companies of a number of practices involving the use of testimonials, endorsements and reviews that are considered unfair or deceptive.

Thus, even while we are waiting for the rule to be enacted, companies can still be subject to civil penalties. Given the risk of significant penalties associated with noncompliance, now is the time for corporations to review their marketing policies with a specific eye toward influencer endorsement and consumer review practices.

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[1] <https://www.crowell.com/en/insights/client-alerts/i-cant-say-what-new-wave-of-class-actions-target-consumer-review-terms-and-conditions>.