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**July 2023**



## **14 Years Later: FTC Updates The Endorsement Guides**

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On June 29, 2023, the Federal Trade Commission (FTC) announced its much anticipated and long-awaited updates to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides). The Guides, which have not been revised since 2009, provide FTC guidance on advertising practices that may be unfair or deceptive in violation of Section 5 of the FTC Act (15 U.S.C. 45). At the heart of the Guides are basic truth-in-advertising principles that endorsements and testimonials must be honest and not misleading.

In updating the Guides, the FTC took into account recent enforcement proceedings and public comments filed since the FTC announced the proposed updates in May 2022. The revised Guides are intended to provide clarity and updates to the previous guidance, in light of current advertising trends and the continually evolving landscape of social media and technology. The updated Guides make a number of significant revisions, including the following key changes.

### **Expanded Definition of “Endorsement”**

The updated Guides expand the definition of “endorsement” to clarify, among other things, that tagging a brand in social media could constitute an endorsement. Fake positive reviews that are used to promote a product are also “endorsements.”

### **Clarity on Material Connections**

While a basic tenet of the Guides has long been the requirement to make “clear and conspicuous” disclosure of a material connection between the advertiser and the endorser, the updated Guides include new examples of what may constitute a material connection that would require disclosure. The examples include the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on a television commercial, as well as earning money through affiliate links.

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## *Definition of “Clear and Conspicuous”*

Unlike the previous Guides, the updated Guides add a definition of “clear and conspicuous,” which means that disclosures must be difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers. Examples in the Guides clarify that disclosures at the bottom of a social media post, where consumers have to click “more” in order to see them, are not sufficient as they are not “unavoidable.” The Guides also caution that reliance solely upon a social media platform’s built-in disclosure tool may not be enough if the disclosure is not sufficiently prominent, easy to see and easy to read. In addition, whether a disclosure is clear and conspicuous will be evaluated from the perspective of the targeted consumer.

## *Liability of Advertisers, Endorsers and Intermediaries*

While advertisers can obviously be held liable for their deceptive endorsement practices, the updated Guides clarify that advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries may be liable for their roles in creating or disseminating endorsements containing representations that they know or should know are deceptive. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures. Endorsers such as influencers can also be liable for their representations.

## *Consumer Ratings and Reviews*

The updated Guides articulate new principles regarding a company’s practices with regard to procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products. Specifically, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements under the Guides. Examples include deleting or suppressing negative reviews, offering incentives for positive reviews, and “review gating” (i.e., encouraging positive reviews and discouraging negative reviews).

The updated Guides acknowledge that an advertiser may edit customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; the personal information or likeness of another person; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the advertiser reasonably believes are fake. However, such editing criteria for withholding reviews must be applied uniformly to all reviews submitted, whether negative or positive.

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If a consumer has been incentivized by an advertiser to provide numerical or star ratings and the advertiser then includes those incentivized ratings in the average ratings, such inclusion could be deceptive if the incentivized ratings materially increase the average rating.

### **Endorsement Directed to Children**

The updated Guides note special concerns with endorsements in child-directed advertisements because of the character of the audience. In such cases, practices might be questioned that would not otherwise be scrutinized in advertising directed to adults. While the FTC has noted that it is “exploring next steps,” the updated Guides provide no further guidance or insight on the issue.

### **Updated FAQs**

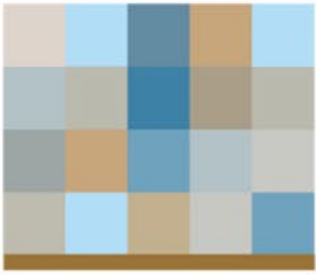
In addition to the updated Guides, the FTC also issued an updated version of its guidance document, the *FTC’s Endorsement Guides: What People are Asking*, which answers frequently asked questions. Last revised in 2017, the FAQs primarily address when and how to make disclosure of material connections. The updated version includes 40 additional questions and updates to numerous others. Issues addressed include guidance for influencers on when and how to make disclosures across different types of platforms, views on brand monitoring of influencers and platform disclosure tools, and guidance relating to online reviews.

### **So Where Are We Now?**

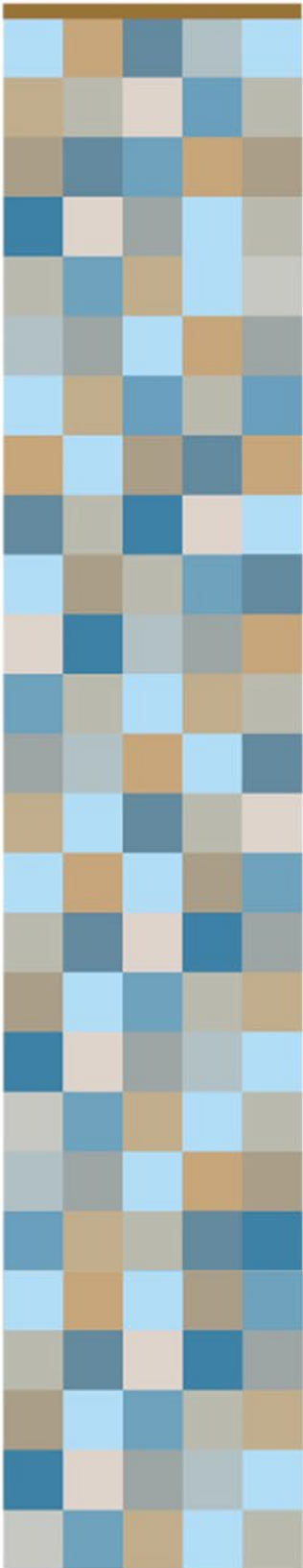
While the updated Guides and FAQs include significant changes, many of them have been previewed in FTC enforcement actions, warning letters and business guidance over the past few years. As deceptive endorsements and reviews have been hot topics for regulatory enforcement in recent years, the FTC’s commitment to enforcement in this area has been reinforced by the updated Guides – as evident by the particular focus on deceptive review practices, including incentivized reviews, reviews by employees and fake reviews, the expanded definition of an “endorsement”, and what it really means to make a “clear and conspicuous” disclosure. Now is a good time to review your internal and external influencer and social media disclosure policies to ensure compliance before the FTC takes the next step to test the application of the updated Guides.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at [tarenth@moritthock.com](mailto:tarenth@moritthock.com).

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