

# KATTISON AVENUE

## Advertising Law Insights From Madison Avenue and Beyond

Spring 2020 | Issue 2

### Letter From the Editor



We present the spring issue of *Kattison Avenue* amid a period of global struggle and uncertainty. The COVID-19 pandemic has provided an opportunity for reflection and, perhaps, rethinking our post-Coronavirus world.

This edition considers the impact of our collective “new normal” on advertising practices and summarizes recent Federal Trade Commission (FTC) enforcement actions against fake consumer reviews. Looking ahead to businesses returning to normal, we take a deep dive into the world of influencers, examining recent FTC actions and the FTC’s call for updates to the Endorsement Guides, as well best practices for influencer contracts. And we begin to look at how the growing world of augmented reality offers new avenues for marketing to consumers.

We hope all of our clients and colleagues continue to stay safe, strong and healthy. We look forward to seeing you all soon (not just on Zoom)!

Jessica Kraver

### In This Issue

Advertising in the Time of Coronavirus

I Want You to Want Me: Augmented Reality Edition

Driving (Business) Under the Influence

Best Practices for Social Media Influencer Contracts

The FTC Gets Tough With Influencer Marketing Tactics

FTC Continues Battle Against Fake and Biased Consumer Reviews

## Advertising in the Time of Coronavirus

by Jeffrey Wakolbinger

As we release this second issue of *Kattison Avenue*, our world is gripped by the Coronavirus and the COVID-19 pandemic. In what feels like an instant, work, commerce and our very lives have changed in ways many of us could not previously have imagined. March ended with no madness (of the NCAA basketball tournament variety, at least), and baseball’s Opening Day remains TBD. Businesses are adapting and evolving as we all adjust to the new normal of work from home, e-learning and shelter-in-place orders. Unsurprisingly, these changes have had a significant effect on advertising.

Messages have certainly changed. Most of us no doubt have heard how much financial institutions, car makers and household brands care about their consumers (and hope those consumers continue to buy their products!). Some brands have realized messages that may have been well received just a few months ago may not be viewed in the same light in the current environment. Coors Light, for example, [pulled an ad](#) touting its product as the “Official Beer of Working Remotely” for fear that it would be viewed as making light of the (then) new self-quarantining movement. KFC [pulled commercials](#) that showed montages of people licking their fingers in public after eating KFC’s famously “finger lickin’ good” fried chicken.

Then there is the darker side of advertising, with countless sellers seeking to capitalize on the consumer fears through the use of allegedly misleading claims. By the end of February, Amazon [reportedly had pulled over a million products](#) from sellers who apparently were trying to profit from the Coronavirus outbreak. Some sellers were making false claims and pushing fake products that could purportedly prevent or cure the virus. Others were price gouging in-demand items like hand sanitizer, masks and cleaning wipes.



## Advertising in the Time of Coronavirus (cont.)

▶ On March 9, the U.S. Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) [issued warning letters](#) to seven companies for selling unapproved drugs they claimed to prevent or treat COVID-19. These various companies were claiming products such as essential oils, silver, and teas could prevent, treat or cure COVID-19. Citing its policies against promoting harmful hoaxes related to COVID-19 on its platforms, Facebook suspended the use of ads by those seven companies.

Facebook previously announced it was banning ads and listings on the Facebook Marketplace for medical face masks out of concern that people were using the platform to exploit people's concerns about the coronavirus outbreak. On March 19, it added hand sanitizer, surface disinfecting wipes and COVID-19 test kits to the list of banned items.

State attorneys general have taken action against seeking to profit from Coronavirus fears by engaging in allegedly deceptive advertising. On March 10, 2020, for example, Missouri's attorney general [filed suit](#) against former televangelist Jim Bakker for marketing a "Silver Solution" as a treatment for COVID-19. On March 23, California's attorney general issued a [consumer alert](#) about deceptive advertising related to COVID-19. New York's attorney general sent [cease-and-desist notifications](#) to three companies to stop marketing their air purifiers as tools to prevent the spread of Coronavirus.

Advertisers, brands and merchants will continue to adapt in this world, where change happens quickly – and technology allows responses to those changes to happen quickly as well.

---

## I Want You to Want Me: Augmented Reality Edition

By [Katherine Motsinger](#)

Trying to resolve whether art imitates life or life imitates art is about as useful as resolving the chicken versus egg conundrum (definitely the egg). My dad would be the first to tell anyone that Gene Roddenberry's experience as a B-17 pilot in World War II helped inspire the USS Enterprise. In the case of augmented reality (AR) and virtual reality (VR), life undoubtedly took its cue from the cinematic genius of movies like *Back to the Future II*, *The Terminator 2* and *Iron Man*.

Technologies incorporating AR and VR, and their newer cousins mixed reality (MR) and Extended Reality (XR), have been bobbing around the tech sphere for years. With the catalyst of Pokémon Go in 2016, however, AR and VR entered real world mainstream consciousness. Years later, AR and VR aren't quite a facet of everyday life – but they're getting there. Both technologies permit users to interact with their environments in new ways, simultaneously opening new avenues for brands to reach consumers.

At its most basic level, AR places virtual objects in the existing world, either through an app or headgear, like glasses. VR places the user in an entirely virtual world using headgear. In other words, VR permits users to wander around a zoo from the

comfort of their couch, while AR permits users to place a virtual tiger in their living room à la Joe Exotic.

Although VR has a promising future, AR is the favored marketing tool at the moment. Below, we discuss innovative uses of AR in marketing campaigns and the reason marketers are investing in AR. We also begin to touch on legal pitfalls when integrating this technology into a marketing strategy.

### AR Offers Marketers New Avenue for Reaching Consumers

From film to makeup to the happiest place on earth, AR has become a favored promotional tool across industries. Twentieth Century Fox, Universal and Disney all developed AR applications to promote the release of their respective films, allowing app users to browse 7-Eleven with the Merc with a Mouth (*Deadpool 2*) and release baby Blue (*Jurassic World: Fallen Kingdom*) in their local grocery stores. Theme parks, in particular, anticipate that AR will become a new part of in-park guest experiences.

In the retail arena, companies like Ikea and Target have taken the try-before-you-buy concept to a new plane. Rather than anguish over contemplated furniture purchases in-store, consumers now

can virtually drop that velvet orange couch into their living rooms— confirming that, yes, it looked better in the catalog. Similarly, Sephora, Timberland and Orly have launched campaigns that allow customers to try on makeup, clothing and nail polish, respectively, through AR-powered technology.

Meanwhile, brands like Pepsi and Toys ‘R Us have developed interactive AR-based games.

## Why AR?

AR is less expensive compared to VR, and it has more universal appeal. Thanks largely to Apple and Google, AR-based apps are now fairly low-cost to develop. Any iPhone or iPad is capable of running iOS 11 or can install ARKit applications. ARKit is a development platform that allows developers to build AR experiences into their apps and games available on Apple's app store. Other large companies have followed Apple's lead. Recently, Snapchat released new five-minute, five-dollar advertising tools that allow outside companies to customize one of Snapchat's pre-made "lenses" with a logo or brand name that can then be marketed to customers. Moreover, the titans of Silicon Valley have signaled that AR will be a key component of future business plans, and the market has taken notice. Conservatively, the AR market is expected to reach around \$19 billion by 2024<sup>1</sup>.

## Caveat Venditor: Seller Beware

AR offers exciting and innovative new ways of reaching consumers for the savvy marketers. But when marketing departments race ahead of legal departments, businesses may end up on the wrong end of a lawsuit.

Privacy issues and Intellectual Property (IP) issues present the most obvious pitfalls. Businesses using AR-based technology must be cognizant of the fact that AR apps generally function by using the camera in a consumer's smartphone, meaning that the app potentially takes in vast amounts of activity, visual and perhaps audio data in addition to other data collected through more routine channels. Counsel for these companies should be asking: Is the data collected "personal information" under relevant privacy statutes? How is the data stored? Who has access to the data? Is any of the data being transferred or sold to third parties<sup>2</sup>? If minors are likely to use the app, is it compliant with the Children Online Privacy Protection Act (COPPA)<sup>3</sup>?



With respect to IP, the app may capture copyrighted material or enable users to make derivative works, potentially exposing the company to contributory infringement and related claims. Naturally, licenses will be required with respect to the underlying technology and with any content (images, music, etc.) used in the app. Marketers also may be tempted to engage in guerilla marketing tactics that could yield claims of trademark dilution<sup>4</sup>.

We will examine these legal issues in greater detail in the next issue.

- (1) *Global Augmented Reality & Mixed Reality Market, Forecast to 2024 Introduction of Low-Cost Devices & Increasing Purchasing Power in Developing Countries Spurs Growth* – ResearchAndMarkets.com, BusinessWire (Dec. 2, 2019), <https://www.businesswire.com/news/home/20191202005872/en/Global-Augmented-Reality-Mixed-Reality-Market-Forecast>. Others predict a market size of more than \$100 billion. *Augmented Reality & Virtual Reality Market 2019: Top Key Players, Size Estimation, Industry Share, Business Analysis 2018 and Growth Forecast to 2026*, Fortune Business Insights (March 2020), <https://www.fortunebusinessinsights.com/augmented-reality-ar-market-102553>.
- (2) See, e.g., Cal. Civ. Code § 1798.140(t); Dagatha Delgado, *Cookie Sales Aren't Limited to Girl Scouts: When Advertising Cookies Are "Sales,"* Kattison Ave. (Fall 2019), [https://katten.com/files/677421\\_kattison\\_newsletter\\_fall\\_2019.pdf](https://katten.com/files/677421_kattison_newsletter_fall_2019.pdf).
- (3) See 15 U.S.C. § 6501 et seq.
- (4) See, e.g., Ed M. Koziarski, *The Leak in Your Hometown*, Chicago Reader (Sept. 13, 2010), <https://www.chicagoreader.com/Bleader/archives/2010/09/13/the-leak-in-your-hometown>; Asena Arica, *Burger King Uses Augmented Reality to "Burn That Ad" Digitally*, Digital Agency Net. (Mar. 20, 2019), <https://digitalagencynetwork.com/burger-king-uses-augmented-reality-to-burn-that-ad-digitally/>. The latter campaign was launched in Brazil, beyond the territorial reach of the Lanham Act, but such campaigns easily could be launched in the United States as well.

# Driving (Business) Under the Influence

By David Halberstadter

In 1936, Dale Carnegie's book, *How to Win Friends and Influence People* was published, and became one of the best-selling books of all time. Dale Carnegie could not have known, however, that winning friends and influencing people might be incompatible objectives in the world of social media, influencer-driven marketing.

Social media influencers thrive, and gain followers, in large part as a result of how authentic they seem. Influencers consistently acknowledge the importance of being genuine and reliable in their social media posts. They consider it critical to their success and "reach" that their followers believe that when a social media influencer says he likes or uses a product, it is really true; not because he got paid to say that or received free items for saying so. Likewise, it is important to companies that employ social media influencers as part of their advertising and marketing campaigns that the positive statements made by these influencers, the Instagram photographs they post and the videos they upload to YouTube appear to be organic and authentic; not simply another form of paid advertising.

Therein lies the conflict between "making friends" on social media and "influencing people" to buy the goods and services that social media influencers endorse. As an extension of its basic "truth-in-advertising" principles, the Federal Trade Commission (FTC) has made clear that consumers are entitled to know whether there is any relationship between an influencer and a company that may have played a role in her endorsement of goods or services. The FTC has established a series of [endorsement guidelines](#) that make clear, among other things, that if there is a connection between an endorser and the marketer that consumers might not expect, and it would affect how consumers evaluate the endorsement, that connection should be disclosed.

But influencers design their social media pages — particularly their Instagram accounts — to look like they are more personal than professional and more spontaneous than deliberate. They show the influencers frolicking on the beach, working out at the gym, hanging out with friends, getting ready to go to parties — i.e., the same things that non-influencers post about. The difference, of course, is that the influencers are paid based on what they wear, where they go, the products they use and what they post. Making prominent disclaimers like "PAID ADVERTISEMENT" or "PAID ENDORSEMENT" simply are not compatible with the authentic "feel" that influencers are trying to evoke.

This is why the FTC published its Endorsement Guides with a particular focus on social media influencer marketing. The guidelines include: (1) that influencers must be bona fide users of a product or service, and their endorsements must reflect their honest opinions; (2) that material connections between an influencer and a company must be disclosed prominently; (3) that the disclosure should be unambiguous — for example, consumers will not necessarily understand that "#sp" (meaning "sponsored post") or "Thanks, [Brand]" means the post is sponsored; and (4) that consumers should be able to notice the disclosure easily and not have to search for it.

This last guideline is particularly important, as the size and placement of such disclosures are especially subject to manipulation. For example, consumers viewing Instagram posts or YouTube videos typically only see the first two lines of a post or the title of a video unless they click on a link labeled "more;" and many consumers may not do that. As a result, consumers may view a social media influencer's photographs on Instagram or watch his or her YouTube video without having any idea that the influencer received consideration for his or her postings.

The FTC, therefore, specifically recommends that any material disclosures should be made above the "more" button and should not be buried among other tags, hashtags or links. For videos, the disclosure should be in both the title of the video and as words on the screen during the video itself, according to the Commission.

Many companies that employ social media influencers as part of their marketing campaigns may be under the mistaken belief that the FTC's Endorsement Guides are intended only for the influencers themselves; not so. They are expressly applicable to both advertisers and endorsers, and specifically state: "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." Advertisers, therefore, have a strong interest in ensuring that their influencers do not provoke the FTC's ire.

In September 2017, concerned that these guidelines were not being followed with consistency and regularity, the FTC issued an [updated guidance](#) on social media influencer marketing. The Commission urged, among other things, that influencers clearly disclose when they have a financial or family relationship with a brand, not assume that using a social media platform's

disclosure tool is sufficient, avoid ambiguous disclosures like #thanks, #collab, #sp, #spon, or #ambassador, and not rely on a disclosure placed after a “click more” link or in another easy-to-miss location.

Still, these updated guidelines apparently are not enough. On February 12, Commissioner of the FTC Rohit Chopra issued a [public statement](#) calling for a review of its Endorsement Guides. The Commissioner noted that advertisers and social media platforms are seeking big returns from influencer marketing, which can allow paid advertising to seem more authentic. But, when companies “launder” their advertising by paying an influencer to pretend that his endorsement or review is untainted by a financial relationship, it constitutes illegal “payola.”

“If these companies are also pressuring influencers to post in ways that disguise that their review or endorsement is paid advertising, those advertisers especially need to be held accountable,” Commissioner Chopra opined.

Commissioner Chopra expressed the view that misinformation “is plaguing the digital economy” and that “recent no-money, no-fault FTC settlements with well-known retailers and brands to address fake reviews and undisclosed influencer endorsements

may be doing little to deter deception.” In Commissioner Chopra’s view, the FTC needs to initiate “a close and careful review of the FTC’s non-binding Endorsement Guides and a self-critical analysis of the agency’s enforcement approach.”

After the FTC reviews the public’s comments, the Commissioner hopes it will consider taking stronger steps to police social media influencer advertising (beyond the current non-binding guidance), including: (1) developing requirements for technology platforms that facilitate, and either directly or indirectly profit from, influencer marketing; (2) codifying elements of the existing endorsement guides into formal rules so that violators can be liable for civil penalties and damages; and (3) specifying the requirements that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts.

It remains to be seen what public comments the FTC will receive, and what steps it might take to strengthen the rules governing social media influencer marketing. Until then, it would be prudent for companies and influencers alike to take care as they attempt to both “win friends” and “influence people.”



# Best Practices for Social Media Influencer Contracts

By David Halberstadter

The Federal Trade Commission (FTC) is looking at the social media posts of “influencers” with ever-increasing scrutiny. In large part, this is due to the consistent practice of many influencers to limit, disguise or make difficult to find their disclosures that they have received financial or other forms of consideration.

---

Companies employing social media influencers can be held liable for deceptive advertising statements and inadequate disclosures made through endorsements, so it is critical for companies with robust social media advertising campaigns to ensure that the influencers they hire “follow the rules.” This involves entering into contracts that spell out what the influencer can and cannot do and monitoring the influencer’s activities to make sure that he or she is adhering to his or her contractual commitments. This article discusses some of the key contract terms in company agreements with social media influencers.

**1 What are the “deliverables?”** It is always a good idea for any influencer agreement to make clear what the influencer is expected to do. Should he or she deliver an agreed-upon number of posts on agreed-upon social media platforms? Are there deadlines or penalties for late posting? If the company has particular expectations for the influencer’s posts, they should be outlined in the contract. It may also be prudent to require that any posts be subject to the company’s review and approval.

**2 Are there any “content guidelines?”** If the company has specific guidelines that it wants influencers to follow, those guidelines need to be articulated clearly. Such guidelines might include the company’s preferred platform(s) and formats (e.g., narrative posts, photographs, videos, product reviews, etc...). If the company has any preferences regarding the length of such posts — for example, one-minute videos, photographs with captions only or a full documentary-style video “story” — this should be stated, too.

**3 What can’t the influencer do?** All social media sites have their own rules. The influencer, therefore, should be required to adhere to the rules of the platforms on which he or she will post content. The company may not want its influencer to post photographs of or mention its competitors’ products. It may want him or her to avoid politically charged posts or forbid the on-camera use of regular or e-cigarettes, for example. As a corollary, the contract should provide for the company’s right of cancelation based on the influencer’s non-performance, poor performance or breaking brand rule guidelines.

**4 FTC Compliance.** Critically, the contract should make clear that it is the influencer’s responsibility to comply with FTC rules and guidelines. For example, the influencer should be obligated to ensure that when he or she posts about the company’s products or services, he or she clearly discloses his or her “material connection” to the company, including the fact that he or she was given any type of consideration. Moreover, this disclosure should be clear and prominent and made in close proximity to any statements that he or she makes about the company, regardless of any space limitations of the medium.

**5 Miscellaneous Terms.** Unrelated to compliance with the FTC’s Endorsement Guides, there are a number of additional terms that a company should consider including in its agreements with social media influencers. This list includes: (1) the company’s ownership of any content produced by the influencer; (2) if the company will not own the influencer’s content, it should obtain the non-exclusive right to “re-purpose” any such content for any future purposes, at least for a specified period if not in perpetuity; and (3) whether the influencer is exclusive to the company, or whether he or she is permitted to promote competitors’ products (unlikely) or (more likely) his or her own products and services.

Obviously, all of these terms are subject to negotiation, and the company’s leverage is likely to vary with the prominence, fame and negotiating power of the influencer. Of course, there are many other terms that should be included that are typical to any contract, particularly one involving the rendering of personal services. But the provisions discussed above provide a starting point for any well-crafted social media influencer agreement.



## The FTC Gets Tough With Influencer Marketing Tactics

By David Halberstadter

On March 6, — one day after filing its lawsuit — the Federal Trade Commission (FTC) announced that it had reached a settlement with a marketer of teas and skincare products over claims that the company had used both deceptive health claims and endorsements by well-known social media influencers, who did not adequately disclose that they were being paid to promote the company's products.

Based in Florida, Teami, LLC (Teami) sells a variety of tea products that purport to promote health and wellness, such as Teami Skinny tea and Teami Colon tea. These teas are also sold together in bundles like the Teami 30 Day Detox Pack. Teami claims in its marketing materials that its products offer a wide range of benefits to consumers, including helping consumers lose weight, fight cancer, clear clogged arteries, decrease migraines and treat and prevent flus.

In addition to advertising on its own website, the company has paid numerous celebrities, including Kylie Jenner, Cardi B and Demi Lovato, as well as other popular influencers, to promote its products on Instagram and other social media sites. For example,

Kathlyn Celeste, a lifestyle, family, beauty and fashion influencer, posted: "I made a commitment to myself to stick to my @teamiblends Detox program everyday for the entire month of May! Every time I'm consistent with it, I lose at least 8 LBS." Patti Stanger, a reality television personality, posted: "I did some research on the @teamiblends 30 day detox and decided to give it a try, because nothing else I've used throughout the years really worked. I'm two weeks into this detox and I can't believe I'm saying this but I've already lost 8 pounds!" And Rasheeda Buckner, a rapper, television personality and fashion designer, posted: "@teamiblends 30 day detox is where it's at for kickstarting weight loss. I've only been drinking this detox now for a week and already lost over 5 pounds and my bloating is gone."

On March 5, the FTC filed a [complaint](#) in the United States District Court for the Middle District of Florida against Teami, LLC (Teami) and the company's owners. The complaint alleged that Teami and its owners made its claims of health benefits without reliable scientific evidence. It further alleged that the social media posts made by the company's influencers failed to prominently disclose that their endorsements were paid for by Teami. The FTC's particular

## The FTC Gets Tough With Influencer Marketing Tactics (cont.)

▶ objection to the social media posts was that followers who read those posts could not see a disclosure that the endorsements were paid-for unless they clicked the “more” option.

Prior to commencing the lawsuit, the FTC had sent warning letters to the influencers that the Commission believed had made inadequate disclosures. In those letters, the FTC stated, in part:

“Although the above Instagram post includes the disclosure ‘#teampartner,’ the disclosure was not visible to followers viewing the post in their Instagram feeds unless they clicked ‘more.’ Thus, it was not clear and conspicuous. In addition, there was no disclosure in the video. Because the video could be viewed without anyone seeing a disclosure, you should disclose any material connection in the video itself and not just the text portion of your post.”

In settling the FTC’s lawsuit, Teami agreed to the entry of a [court order](#) prohibiting the company from making the types of unsupported weight-loss and health claims cited in the complaint. The order also establishes comprehensive guidelines and restrictions for advertisements involving social media influencers or other endorsers, including that a required disclosure must be: (1) “clear”

and “conspicuous,” meaning “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers;” (2) made through the same means through which the communication is presented” (e.g., in any communication made through both visual and audible means, “the disclosure must be presented simultaneously in both the visual and audible portions of the communication;” and (3) must be located “very near the triggering representation.” The order also imposes requirements on the company to monitor its endorsers’ posts.

Finally, the order imposed upon Teami a whopping \$15.2 million judgment, representing the total sales of the challenged products; but that judgment would be “suspended” upon payment of \$1 million because of the defendants’ apparent inability to pay the full judgment.

The FTC has indicated that it intends to pursue other instances of inadequate disclosures made by social media influencers. In the view of the Director of the FTC’s Bureau of Consumer Protection, “Companies need to . . . ensure influencers prominently disclose that they’re getting paid to promote a product.”

---

## FTC Continues Battle Against Fake and Biased Consumer Reviews

By [Michael Justus](#)

You are shopping online and find what appears to be the perfect product. It has over 200 consumer reviews on a popular website — and nearly all of them are five-star reviews! Too good to be true? Maybe. On February 3, the Federal Trade Commission (FTC) announced a proposed settlement involving allegedly fake consumer reviews for financial products like student loans, personal loans and credit cards. The FTC alleged that LendEDU misrepresented that consumer reviews on its website and third-party websites reflected actual experiences of impartial customers, when in fact, many of the reviews were written or fabricated by LendEDU employees, their family members and friends, or others with connections to the company. The proposed settlement order would prohibit the company from repeating the same types of misrepresentations and require the company to pay \$350,000. The FTC’s LendEDU announcement follows on the heels of similar actions against companies that post fake reviews.

For example, in October 2019, the FTC announced a settlement with Sunday Riley Modern Skincare, LLC., which addressed allegedly fake customer reviews for skincare products. According to the FTC, Sunday Riley Skincare managers and employees not only posted fake reviews on the website of Sephora, the beauty and personal care product store, but continued to do so after getting caught, using a virtual private network (VPN) to hide their identities. Employees were instructed to post five-star reviews for Sunday Riley Skincare products and to “dislike” any negative reviews of the products, so that they would be removed. The proposed order would require Sunday Riley Skincare and its CEO to, among other things, (1) provide each employee with a clear statement of his or her responsibilities to disclose material connections to the company or its products in reviews or endorsements, and (2) obtain a signed agreement of compliance with those responsibilities from each employee.





## FTC Continues Battle Against Fake and Biased Consumer Reviews (cont.)

▶ Similarly, in June 2019, the FTC obtained entry of a stipulated order for permanent injunctive and monetary relief in New York federal court relating to fake paid reviews for weight-loss supplements. The stipulated order settled the FTC's allegations that Cure Encapsulations, Inc. and its owner paid a third-party website to write and post fake five-star reviews. In February 2019, the FTC approved consent orders with two companies and their principals to settle allegations that, in connection with promoting a new

insect repellent during the 2016 Zika virus outbreak, they misrepresented that paid endorsements were independent consumer opinions and that commercial advertising was independent journalistic content. Among other things, the FTC alleged that the companies reimbursed employees and friends for buying and reviewing the product. Under the orders, the respondents must disclose material connections with, and monitor, any endorsers they engage.

### Key Takeaways

Aside from the more obvious takeaways — e.g., don't post fake reviews or pay others to do so — there are a couple of nuggets of wisdom for even the most well-intentioned companies. First, the FTC Endorsement Guides generally do not permit employees to post reviews of their employer's products without disclosing their material connection to the company (e.g., their employee status). Even if employee reviews are real and entirely true, the employment relationship should generally be disclosed. The same rule of thumb applies to reviews or endorsements by friends and family. Second, it may be unwise to make affirmative claims that all customer reviews of your company or its products are impartial, genuine, unbiased, etc. That may be a challenging claim to validate in the modern world of bots, VPN's, purveyors of fake reviews and the like.

When it comes to running a five-star compliance program, it pays to keep a watchful eye on the FTC's enforcement priorities and guidance.



**Doron S. Goldstein**  
Partner  
Co-Chair, Advertising, Marketing  
& Promotions Practice Group  
doron.goldstein@katten.com



**Kristin J. Achterhof**  
Partner  
Co-Chair, Advertising, Marketing  
& Promotions Practice Group  
kristin.achterhof@katten.com

---

*Some of the most recognized companies in the world rely on Katten to safeguard and build value in their IP portfolios. From trademark clearance and transactional due diligence to portfolio exploitation, enforcement and litigation, we enhance the global commercial value of intellectual property and brands.*

# Katten

For more information, contact: Jessica Kraver  
Associate | Intellectual Property Department | Katten Muchin Rosenman LLP  
+1.212.940.6523 | jessica.kraver@katten.com | 575 Madison Avenue | New York, New York 10022

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

©2020 Katten Muchin Rosenman LLP. All rights reserved.  
Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at [katten.com/disclaimer](http://katten.com/disclaimer).  
Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.