

## MEMORANDUM

**From:** Steven B. Steinborn  
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**Date:** April 9, 2020

**Re: FTC Seeks Public Comment on Endorsement Guides; Comment Period Extended**

On social media and other digital advertising platforms, proper disclosure of material interests between an endorser and the product manufacturer is critical to inform consumers and avoid alleged deceptive advertising practices. The comment deadline for Federal Trade Commission's (FTC) recent request for public comment to inform planned revisions to its *Guides Concerning the Use of Endorsements and Testimonials in Advertising* ("the Guides") has been extended to June 22, 2020. <sup>1/</sup> Comments provide stakeholders an important opportunity to inform and shape the Guides and FTC enforcement policy which are revisited from time to time. <sup>2/</sup> With the social distancing measures now in place, established and emerging social medial platforms are more important than ever before. Not surprisingly, we expect to see ever-growing monitoring and possible enforcement by the FTC, as illustrated by a recent action against detox tea manufacturer Teami suggests.

The Guides, codified at 16 CFR Part 255, provide guidance on what FTC believes is necessary to prevent endorsements and testimonials from being considered unfair or deceptive. The Guides focus significantly on disclosures about the endorser's experience with the product and about material connections between the endorser and the company. FTC extends the Guides to online and social media advertising, and social media advertising and social influencers have been the target of FTC action in recent years, and as recently as last month. FTC has also provided guidance and informal statements that should inform marketers use of these forms of communications.

The FTC has requested comment on 22 specific questions about the utility of the Guides and the potential changes that could strengthen the Guides as a business aid. The questions cover topics including the degree of compliance with the Guides, costs and burdens of compliance, consumer perceptions, how children understand endorsements, solicited or incentivized product reviews, referral links, product review ratings, and what technological, economic, or environmental changes

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<sup>1/</sup> FR Doc. 2020-07173 (filed: Apr. 7, 2020, publication date: Apr. 8, 2020); 85 FR 10104 (Feb. 21, 2020). See also, Press Release, "FTC Seeks Public comment on its Endorsement Guides" (February 12, 2020), available at, <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides>.

<sup>2/</sup> The regulations.gov docket number is FTC-2020-0017.

should be considered. FTC also asks whether some or all of the guidance document “[The FTC’s Enforcement Guides: What People Are Asking](#)” should be formally incorporated into the Guides. Although not specifically requested, interested parties should also consider whether elements of the current Guides should be retired.

In March, FTC announced a settlement with detox tea manufacturer, Teami, over allegedly deceptive advertising and issued Warning Letters against 10 paid Teami social media influencers. <sup>3/</sup> FTC alleges the Teami influencers’ practice of disclosing the paid relationship only after users clicked on the “more” link in the posting failed to adequately disclose the relationship. FTC’s proposed order in the Teami case requires adequate substantiation for health-related claims, requires that endorsers disclose — clearly and conspicuously — when they’ve been paid, requires monitoring of endorsers, and includes a \$15.21 million judgment, suspended upon payment of \$1 million to the FTC.

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We will continue to monitor FTC regulations of endorsements. Should you have any questions, please do not hesitate to contact us.

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<sup>3/</sup> Press Release, “Tea Marketer Misled Consumers, Didn’t Adequately Disclose Payments to Well-known Influencers, FTC Alleges” (March 6, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments>.

## Specific Questions FTC Has Identified for Comment

- (1) Is there a continuing need for the Endorsement Guides as currently promulgated?
- (2) Are any specific provisions of the Guides no longer necessary, and, if so, which provisions and why are they no longer necessary?
- (3) Are the deceptive or unfair practices addressed by the Guides prevalent in the marketplace? Are the Guides effective in addressing those practices? Are there deceptive or unfair practices involving endorsements that are not covered by the Guides? Are there alternatives, such as individual enforcement actions under the FTC Act, which would be more effective or equally effective in addressing those practices? Do the Endorsement Guides describe any practices that are not deceptive or unfair, and if so, which practices and why are they not deceptive or unfair?
- (4) What is the degree of compliance with the Endorsement Guides? What effect, if any, does this have on the continuing need for the Guides? Do covered businesses and others following the Guides' suggestions self-regulate or have voluntary standards or guidance, such as through trade associations, that overlap with the Guides? If so, to what extent, if any, do the Guides support industry self-regulation or voluntary standards?
- (5) What benefits, if any, have the Endorsement Guides provided to consumers? Do the Guides impose any significant costs on consumers?
- (6) What impact, if any, have the Guides had on the flow of truthful or deceptive information to consumers?
- (7) What changes, if any, should be made to the Endorsement Guides to increase their benefits to consumers? How would these changes affect consumer benefits or business costs?
- (8) What burdens or costs, including costs of compliance, have the Guides imposed on businesses? What burdens or costs have the Guides imposed on small businesses in particular? What burdens or costs have the Guides imposed on endorsers? What benefits have the Guides provided to businesses? What benefits have the Guides provided to endorsers?
- (9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on businesses or endorsers? How would these changes affect the benefits provided by the Guides to consumers, businesses, and endorsers?
- (10) Do the Guides overlap or conflict with federal, state, or local laws or regulations? Do the Guides overlap or conflict with any international laws or regulations?
- (11) Have consumer perceptions regarding endorsements changed since the Guides were last revised and, if so, do these changes warrant revising the Guides?
- (12) What modifications to the Guides, if any, should be made to address technological, economic, or environmental changes that have occurred since the Guides were last revised?
- (13) FTC staff periodically updates a business guidance document, "[The FTC's Enforcement Guides: What People Are Asking](#)." Is there guidance in the current version of that document that should be incorporated into the Guides? If so, what and why? Is there guidance in the current version of that document that should not be incorporated into the Guides? If so, what and why?
- (14) How well are advertisers and endorsers disclosing unexpected material connections on social media platforms? Does this depend on the type of material connection? What disclosures of material connections are sufficiently clear (i.e., understandable) to consumers when used in social media?

What disclosures of material connection currently being used in social media are likely not understood by consumers? Does the sufficiency or insufficiency vary by platform, type of material connection (e.g., a paid post versus a free product), or other factors, and, if so, how? To the extent that these connections are not being adequately disclosed, do the problems tend to be in the substance of the disclosures or in their conspicuousness (e.g., placement, visibility, or audibility)? Should the Guides provide more detail on what disclosures of material connections are sufficiently clear or unclear in different social media formats? Does the fact that Commission Guides are generally reviewed every ten years affect your answer as to whether providing more detail would be helpful?

(15) The FTC has received complaints that young children may not adequately understand disclosures of material connections. To what extent would knowledge of a material connection affect the weight or credibility that young children give to an endorsement? At what age are children capable of making a connection between credibility and a material connection? Does this age differ from the age at which children are capable of identifying advertising? Why or why not and, if so, how? To what extent do young children understand disclosures of material connections? What should advertisers and endorsers appealing to young children know about their intended audience's understanding of a particular endorsement, advertising format, or disclosure? How can disclosures of material connections in media consumed by young children be made clearer or more effective? How, if at all, are your answers to the above questions impacted by parental involvement in the media consumption of young children? What disclosures of material connections should advertisers and endorsers appealing to young children provide to parents?

(16) Some marketers give incentives (e.g., free or discounted products) to consumers in exchange for posting reviews of their products or services without specifically requiring that the reviews be favorable. Do such incentives skew or bias the resulting reviews? Why or why not? If so, how and to what extent do incentives skew or bias the resulting reviews, and what factors may make such impacts more or less likely? Should such incentives be disclosed? Why or why not and if so, how? Does the nature or value of the incentive matter? If so, how? Do such incentives skew composite ratings? Why or why not and if so, how? Do such incentives impact the order in which products or services are presented to consumers on retail or other review platforms? Why or why not and if so, how?

(17) Some consumer reviewers who receive incentives in exchange for their reviews disclose their material connections in their reviews. Are such disclosures adequate when incentivized reviews are included in composite ratings? Why or why not? Are composite ratings that are based in whole or in part on such incentivized reviews misleading? If such composite ratings are misleading: (1) Are there disclosures that could adequately address this concern and if so, what disclosures; and (2) how should the Guides address composite ratings if disclosures are not sufficient or there is not an opportunity for the marketer to make adequate disclosures (e.g., when the reviews and composite ratings appear on a third party's website)?

(18) Some marketers actively solicit customer feedback and send satisfied customers down one path to relevant review sites and send customers with negative sentiment down another path, sometimes into some sort of customer service resolution process. What are the costs and benefits of this practice? Should it be addressed in the Guides and, if so, how?

(19) Some advertisers contend that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts. What evidence is there to support or contradict this assertion and does the answer differ depending on the nature of the material connection? In particular cases, what factors might be considered to determine whether a material connection is unexpected? Do consumer expectations vary by the age of the audience, the product category, the nature of the influencer, the format or substance of the endorsement, or otherwise, and if so, how?

(20) Some endorsers (including the authors of some product reviews) include affiliate links that can be used to purchase the products they are endorsing. Should the Guides address such links, and if so, how? To what extent do consumers expect that these endorsers are compensated for purchases through those links? If so, what compensation arrangements do consumers ordinarily expect? To what extent would knowing of such compensation affect the weight or credibility given to those endorsements? Is there a distinction in terms of either consumer expectations or the weight ascribed to an endorsement between affiliate links to a product's marketer and affiliate links to one or more retailers? If so, how, why, and how should that be addressed?

(21) What disclosures, if any, do advertisers or the operators of review websites or review platforms need to make about the creation, collection, processing, or publication of reviews or ratings in order to prevent those reviews or ratings from being deceptive or unfair?

(22) What other fact patterns or scenarios should be addressed by the Guides and why?