



Navigating the Shifting Landscape of Influencers, Social Media, and Testimonials

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Overview

- UDAP Basics
- FTC's Historic Guidance
- Key Principles & Enforcement
- What's Coming – FTC's Most Recent Initiatives

UDAAP Basics

- Endorsement rules are just species of UDAAP rules.
- Section 5 of the FTC Act: No “unfair or deceptive acts or practices in or affecting commerce”
 - Deception: A representation or omission that is likely to mislead a reasonable consumer about a material fact.
 - Unfairness: A practice that causes substantial injury to consumers that is not reasonably avoidable, and where the benefits to competition or consumers do not outweigh the consumer harm.
- Enforced by the FTC’s Bureau of Consumer Protection & Regional Offices
- Don’t forget: Every state enforces its own “Little FTC Act” that prohibits similar conduct

FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

- Since 1980, the FTC has published guidelines, FAQs, and other documents on Endorsements that are to assist businesses and others in complying with the FTC's views regarding the requirements of Section 5 of the FTC Act.
- To provide guidance on Section 5, the FTC has periodically published guidelines and FAQs
- Guidelines and FAQs are not binding rules and regulations, but they illuminate the FTC's interpretation of its "unfair or deceptive acts or practices" standard as it relates to regulating social media and other endorsed content and are influential within the agency.

FTC Guidance: A Timeline

- 2000: Dot Com Disclosures, applying disclosure rules to digital media
- 2009: FTC releases revised Endorsement Guidelines, addressing “results not typical,” “material connections,” and celebrities
- 2013: FTC releases revised Dot Com Disclosures, addressing mobile advertising (among others)
- 2015: FTC provides FAQs, entitled “What People Are Asking” addressing specific applications of endorsements and testimonials in social media advertising
- 2019: FTC releases “Disclosures 101 for Social Media Influencers”

FTC Addresses Social Media *cont.*

- A common theme among all the updates, the FTC requires the advertiser to:
 - Disclose material connections;
 - Ensure endorsements are truthful and not deceptive; and
 - Adequately supervise the influencers/endorsers

Five Basic Prongs to Evaluate

- Five basic concepts:
 - Is it an endorsement?
 - Material connections
 - Disclosure
 - Truth in advertising
 - Third-parties

What is an Endorsement or Testimonial?

- The FTC takes a broad view of an advertisement, including statements that promotes a brand or a product
- "Endorsements" are any advertising that consumers are likely to believe reflects the view of someone other than the sponsoring company.
- The FTC's "Examples" include obvious and non-obvious situations

Disclosure of Material Connections

- Giving anything of value to someone prior to their providing an endorsement, even if posting comments on social media or reviews on a blog, could create a material connection
- The FTC focus is on *whether knowing about a gift or incentive would affect the weight or credibility the audience gives to the endorsement*
- The FTC stance is that *referral fees and commissions on sales generated by links and affiliate marketing commissions also establish material connections that merit disclosure*
- An endorser who is a relative or employee of the marketer must disclose that fact in their endorsement

In the Matter of AmeriFreight, Inc., No. 142 3249, Federal Trade Commission (2015)

- On February 27, 2015, the FTC charged a company with misrepresenting online reviews by failing to disclose that it gave cash discounts to customers to post.
- AmeriFreight, an automobile shipment broker, provided users with a \$50 discount if they reviewed the company, and increased the cost its services by \$50 if they did not. In addition, AmeriFreight represented that they would be automatically entered into a \$100 per month “Best Monthly Review Award” for the most creative subject title and “informative content,” and contacted consumers after their cars had been shipped to remind them of their obligation to complete a review to qualify for the award.
- Because AmeriFreight failed to disclose that the company provided incentives to their consumers in exchange for their reviews, the FTC determined that AmeriFreight deceptively represented that its favorable reviews were based on the unbiased reviews of customers.

In the Matter of Machinima, Inc., No. 1423090, Federal Trade Commission (2015)

- On September 2, 2015, the FTC settled an enforcement action against the website Machinima, Inc. for failing to disclose that it had paid influencers to post videos on the channels Machinima owns, endorsing Microsoft's Xbox One system and games
- Machinima did not require any of the influencers to disclose they were being paid for the content or that Machinima had been paid by Microsoft to have content produced and distributed
- Resulted in a consent agreement, requiring twenty years of FTC supervision, whom is no longer in business as of 2018

Forms of Disclosure – Writing

- The FTC highlights three factors to consider for prominently placing understandable disclosures in written endorsements
- First, disclosure should be close to the endorsement
- Second, disclosures should be in an easily readable font
- Third, disclosures should stand out against the background.
- In other words: If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, the FTC may say the disclosure is not “clear and conspicuous”

Forms of Disclosure - Video and Audio

- Key: disclosure should be in the same medium as the advertising claim
- Disclosures for video should appear on the screen long enough to be noticed, read, and understood
- Guidelines state that it is more likely that a disclosure at the end of the video will be missed, especially if someone doesn't watch the whole video, so FTC recommends placing the disclosure at the beginning of the review, but including multiple disclosures during the video is even better
- Audio disclosures should be read at a cadence that is easy for consumers to follow and in words consumers will understand, and like video disclosures it should not be bypassed.

What Should a Disclosure Say?

- A disclosure should illustrate the consideration for an endorsement, such as payment or a free product, or mention the nature of the connection or dynamic of connection, such as employment with the manufacturer
- For instance, statements like “I work for,” “I got a free product,” “I get paid on leads I generate,” “I get commissions for purchases made through links in this post,” or “I am an employee of” are likely effective.
- An endorsement on Twitter, needs a disclosure in the same message. For example:
 - “#Ad” or “Sponsored” hashtags.
- A disclosure should be made in a way that is consistent with the format and functionality of the social media platform.

Special issue: Contests and Sweepstakes

- Contests and sweepstakes entries, where users post about a brand as the method of entry, requires disclosure, because the user is incentivized, and other users should be advised of that incentive to evaluate the objectivity of the posts.
- The Guidelines advise using terms like “#contest” or “#sweepstakes” as an eligibility requirement to enter through a Tweet, post or pin
- The FTC has warned that merely including an abbreviation like “sweeps” is not sufficient because many people would likely not understand what it mean

Cole Haan and #WanderingSole

- The company asked consumers on Pinterest to post images of Cole Haan shoes with the hashtag “#WanderingSole.” In consideration, Cole Haan entered the users into a sweepstakes to win a \$1,000.
- FTC found the consumers’ actions constituted endorsements, and that the #WanderingSole hashtag did not adequately disclose a material connection between the contestants and the company in connection with a promotional post.
- The FTC did not pursue further action due to lack of prior guidance on social media contests, Cole Haan’s established policies and procedures relating to social media endorsements, and the fact the #WanderingSole contest was short lived and had low user participation rates.

Truthful Advertising

- Truthful advertising is golden rule within the FTC guidelines. Endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser.
- For example:
 - Endorsers should not review products they have not tried
 - Endorsers should not say they liked products they actually disliked
- Advertisers may be subject to liability for false or unsubstantiated statements made through endorsements, as well as failing to disclose material connections between the advertiser and the endorser.

False or Unsubstantiated Claims

- Demonstrably false statements violate FTC regulations.
- Endorsements represented as being from “product users” must be actual users
- Altering an endorsement to blunt the reviewer’s opinion, may be a violation, because it does not fairly reflect the opinion of the endorser.
- FTC Example: A movie critic’s negative review excerpted and taken out of context for a positive advertisement of the movie

False or Unsubstantiated Claims *cont.*

- Endorsers need to have appropriate prior substantiation for claims made
- Atypical results, even if true, cannot be touted unless the typical results are clearly and conspicuously disclosed
 - In 2009, the FTC rescinded their sanction of the use of terms like “results not typical” or “individual results may vary” to show a particular user outcome was not typical. This no longer is permitted
- Two Options:
 - evidence to back up a claim that specific results in an advertisement are typical, or
 - clearly and conspicuously disclose the generally expected outcome of using the product in the circumstances depicted in the advertisement
- The standards are applicable to social media influencers

Monitoring and Corrective Action

- A company could be liable for deceptive acts or practices by their employees and/or incentivized influencers;
- A company can also be liable for the practices of those it relies on to recruit or direct endorsers, including the statements made by the endorsers themselves;
- Think: employees, agents, contractors, public relations firms, marketing network operators, publishers
- Consider compliance and monitoring programs

Monitoring and Corrective Action *cont.*

- OLA members should consider policies and procedures to train and monitor employees and agents
- Policies and procedures governing the use of social media, including strict disclosure requirements;
- The FTC has acknowledged it would be unrealistic to expect a companies to be aware of every single statement made about it on social media, and encourages focus on resources being directed towards compliance and training
- Policies should be communicated to the company's influencer network, including its employees, agencies, publishers and individual influencers. These records should be maintained to prove that they were in fact agreed to.

Monitoring and Corrective Action *cont.*

- The Guidelines suggest that the scope of a monitoring and disclosure compliance program should correlate proportionally with the amount of risk presented to the consumer. i.e., Medicare programs may require more stringent oversight than Cole Haan shoes
- Four Practices to Consider:
 - (1) Detail to endorsers what they can and cannot say about the Company and its products.
 - (2) Clearly instruct endorsers about their responsibilities for disclosing their connections to the company;
 - (3) Monitor what endorsers are ACTUALLY saying; and
 - (4) Remediate exceptions

FTC v. Teami, LLC (M.D. Fla. 2020)

- Tea & skincare-product company advertised using paid, well-known social media influencers, making health claims.
- After receiving FTC warning letter, company implemented social media policy requiring disclosure, including that disclosures occur before the “more” on Instagram.
- But influencers often did not comply with the company policy, including by putting disclosures below the “more.”
- FTC alleged deception, and that health claims were not substantiated.
- Company paid FTC \$1 million, against 5-year sales of \$15.2 million

What's Next?

- Notice of Penalty Offense on Endorsements
- Proposed amendments to Endorsement guides
- Possible changes to Dot Com Disclosures

Oct. 2021 Notice of Penalty Offense

- On Oct. 13, 2021, the FTC issued “Notice of Penalty Offenses” to more than 700 companies regarding the use of false or deceptive endorsements.
- This “Notice” attempts to use a little-used FTC authority allowing the FTC to charge companies civil penalties for deceptive practices similar to practices in prior administrative adjudication.
- So far, the agency has not brought any enforcement actions relying on this notice.

May 2022 Updates to Guidelines

- On May 19, 2022, the FTC voted unanimously to publish a notice in the Federal Register proposing updates to the current Endorsement Guides
- The FTC's proposed updates to the Endorsement Guides center on companies that post fake positive reviews or delete negative reviews, as well as companies whose disclosures are lacking.
- FTC specifically mentions influencers who are paid, receive free products or services, or have a relationship with a brand but fail to disclose the material connection with the company.

May 2022 Endorsement Updates

- Expanding the definition of “product” to include brands
- Clarifying that marketing and promotional messages, including social media tags, can constitute endorsements;
- Extending the definition of an “endorser” to cover “fabricated endorsers”
- New section to address consumer reviews
- Clarifying that the substantiation requirement to include both express and implied claims;
- Refining the definition of “clear and conspicuous” to mean “difficult to miss ... and easily understandable by ordinary consumers”;
- Clarifying that a material connection can exist regardless of whether an advertiser offers payment or free products to an endorser;
- New section clarifying FTC’s view of potential liability of intermediaries such as advertising agencies and public relations firms;
- Clarifying that an advertiser may be liable for an endorser’s deceptive statement even when the endorser is not liable and adding a new section that explains when endorsers can be liable for their statements;
- New section to address endorsements directed to children.

Endorsement and Endorser – New Proposals

- Key changes to the definition of an “Endorsement”
 - Clarifies that “marketing” and “promotional” messages are endorsements; FTC takes position that tags on social media posts are a form of an endorsement
 - Incentivized negative statement about a competitor and/or its product is not an “endorsement” for purposes of the Guides, however it could be found to be a violation of Section 5 of the FTC Act, as deceptive.
 - Expanding the definition of “endorser” to include virtual influencers, such as computer-generated avatars and fictional characters. i.e. Tony the Tiger, Geico Gecko
- EXAMPLE: A consumer received a coupon for a free trial product based on their prior business relationship with the company and did not ask for a review. If the consumer reviewed the company, the consumer’s unsolicited review would not be an endorsement. However, if the free product is received as part of a marketing program that the consumer is enrolled in, and even if writing a review is not required, the consumer’s review would still be considered an endorsement because of the consumer’s connection to the company’s marketing program

Redefining Clear and Conspicuous

- Adding a definition of “clear and conspicuous” in a new Section 255.0(f), defining a “clear and conspicuous” disclosure as one that “is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers.”
 - It further states that (i) if the triggering claim is visual, then the disclosure should be at least visual, if the triggering claim is audible, then the disclosure should also be audible, and if the triggering claim is both visual and audible, then the disclosure should be both visual and audible, and (ii) when an endorsement targets a specific audience, such as older adults, its effectiveness will be evaluated from the perspective of members of that group
- FTC added a new example to the guide which states “if an ad has a disclosure that is clear and conspicuous when viewed on a computer browser but is not clear and conspicuous when the ad is rendered on a smartphone, the disclosure is inadequate”

Liability of Endorsers and Intermediaries

- The FTC added two new subsections to Section 255.1—subsections (e) and (f)—regarding the potential liability of endorsers and others. According to FTC:
 - Endorsers may be liable for making statements that “they know or should know to be deceptive.”
 - The level of due diligence required depends on the endorsers’ “level of expertise and knowledge, among other factors.”
 - Endorsers may be liable for making misleading or unsubstantiated representations about performance or efficacy that are inconsistent with their personal experience or that were not made or approved by the advertiser.
 - Intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements.
 - FTC proposed modifying Example 1 to Section 255.1 to clarify that an endorser does not need to go back and delete past social posts that were not misleading when made, the dates are clear, and posts not re-posted.

Consumer Reviews

- Proposed Guidance also covers conduct that suppresses, distorts, or otherwise misrepresents consumer reviews.
- Guidance builds on recent enforcement
- Examples of practices FTC warns may be unlawful:
 - deleting or not publishing reviews,
 - buying fake reviews,
 - harassing customers who make negative reviews
 - “review gating” (i.e., obtaining customer feedback and encouraging only positive reviews)
- The FTC advised companies not to use star ratings that include incentivized reviews
- But may remove reviews with inappropriate content, or that are unrelated to their products or services.

In the Matter of Fashion Nova, LLC

- Online fashion retailer Fashion Nova used a third-party online product review management interface to automatically post four- and five-star reviews to its website and hold lower-starred reviews for the company's approval.
- FTC alleged that conduct was deceptive.
- Settlement included order barring company from suppressing customer reviews and requiring it pay \$4.2 million.
- The case is the FTC's first involving a company's efforts to conceal negative customer reviews.
- NOTE: CFPB issued a compliance bulletin in March 2022 taking the view that discouraging or hiding consumer reviews violated CFPB's UDAAP authority.

Expert Endorsements

- FTC added new examples to Section 255.4, providing guidance specific to the use of endorsements by organizations:
 - If a company sets up an apparently independent review website that reviews the company's own products and competing products, FTC views that website as deceptive because it is not in fact independent.
 - FTC says paying to boost rankings on independent companies is deceptive
 - If a company makes payments to a review website for affiliate link referrals, FTC says there should be a clear and conspicuous disclosure regarding the payments.

Disclosure of Material Connections

- Proposed Updates:
 - The disclosure of material connections must be “clear and conspicuous”
 - Material connections can include a business, family or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser, including products or services unrelated to the endorsed product; early access to a product; or the possibility of winning a prize,
 - A material connection can exist regardless of whether the advertiser requires an endorsement for the payment or the free or discounted products.
 - Disclosure does not require complete details, but “must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.”
- Additional guidance examples:
 - If a celebrity has a material connection to an advertiser whose product is being discussed during a talk show, the disclosure should be made during the interview; a disclosure during the show’s closing credits is not sufficient, as it is not clear and conspicuous.
 - If a celebrity makes an endorsement in one of her social media posts, her connection to the advertiser should be disclosed regardless of whether she was paid for the particular post.
 - Including incentivized reviews’ star ratings in an average star rating for a product could be deceptive even if adequate disclosures appear in each incentivized review.

Endorsements Directed at Children

- “Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.”
- The FTC plans to hold a public event on October 19, 2022, to examine the methods being used to advertise to children online.
- The FTC’s event description, specific topics include:
 - Children’s capacity at different ages and developmental stages to recognize and understand advertising content and distinguish it from other content
 - The harms to children resulting from their inability to recognize advertising
 - What measures should be taken to protect children from blurred content in digital marketing
 - The need for and efficacy of disclosures as a solution for children of different ages, including the format, timing, placement, wording and frequency of disclosures

FTC's June 2022 .com RFI

- Issues raised by online technologies, activities, or features, such as sponsored and promoted advertising on social media platforms, advertising content embedded in games, and dark patterns;
- Whether the current Guidance adequately addresses mobile advertising;
- Whether further guidance concerning multi-party selling arrangements is needed;
- Whether the Guidance adequately addresses how to make qualifying disclosures when consumers must navigate multiple webpages to complete purchases;
- Whether the Guidance should address issues related to advertising that appears in virtual reality or the metaverse;
- How the guidance on the use of hyperlinks can be made more effective; and
- What existing guidance is outdated or unnecessary, and what guidance should be clarified, expanded, strengthened, or limited.

Questions/Discussion

If you would like to ask a question, you can ASK or type your question into the CHAT feature NOW.