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Federal Trade Commission Releases First Updates to Endorsement Guides in 14 Years

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On June 29, 2023, the Federal Trade Commission (“FTC”) issued long-anticipated updates to its Endorsement Guides, which advise marketers, advertisers, brand ambassadors and social media influencers regarding the agency’s views on the use of endorsements, reviews and testimonials in marketing.

The last major update to the Endorsement Guides occurred in 2009, before advertisers made widespread use of social media, online reviews and artificial intelligence to market their products. The FTC announced in May 2022 that it was seeking public comments on proposed updates to the Endorsement Guides. The newly finalized Endorsement Guides, which incorporate the public’s comments, include the following guidance to advertisers:

- **New Definition of “Endorsement”:** The updated Endorsement Guides expand the definition of “endorsement” to clarify that tags, hashtags, “likes” and other forms of engagement on social media may qualify as endorsements if certain other conditions are met (e.g., the endorser was paid or otherwise compensated by the sponsoring advertiser to post about or interact with the product). Additionally, under the new definition, bots and “virtual influencers” (i.e., AI-generated influencers) may qualify as endorsers, meaning advertisers can be liable for their statements.
- **Expanded Types of “Material Connections”:** The Endorsement Guides have long required endorsers to disclose if they have a “material connection” to the sponsoring advertiser – i.e., a connection that might materially affect an endorsement’s weight or credibility – that a “significant minority of consumers” would not expect. The updated Endorsement Guides highlight various examples of “material connections” that should be disclosed, including (i) business, family, or personal relationships; (ii) the receipt of monetary payments; (iii) the provision of free or discounted products

to the endorser; (iv) early access to a product; and (v) the possibility of winning a prize or monetary payment.

- **New Definition of “Clear and Conspicuous”:** When endorsers have a material connection to the sponsoring advertiser, they must disclose this connection “clearly and conspicuously.” The updated Endorsement Guides now define a “clear and conspicuous” disclosure as one that is “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers.” It must also be “unavoidable.” For example, according to the FTC, if a disclosure is not visible without the viewer having to click “more,” (e.g., on a social media post), then the disclosure is avoidable and therefore is not clear and conspicuous. The Guides further caution advertisers against relying solely on a platform’s built-in disclosure if that disclosure is not sufficiently prominent or unavoidable. Lastly, the revised definition makes clear that a disclosure should appear in the same medium as the triggering claim (e.g., an endorsement made through visual means should contain a disclosure that is at least made visually; and an endorsement that is made through audio means should contain a disclosure that is at least made verbally).
- **Distorting or Misrepresenting Reviews:** The updated Endorsement Guides include a new section on consumer reviews, which requires advertisers to refrain from “procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting or editing” consumer reviews in a way that distorts or otherwise misrepresents their products “regardless of whether the reviews are considered endorsements.” For example, the FTC advises against deleting negative reviews, labeling reviews as “the most helpful” when the retailer (not consumers) make the selection, encouraging positive reviews and discouraging negative reviews, and falsely reporting negative consumer reviews as fake on third-party platforms.
- **Incentivized Reviews:** The new Endorsement Guides clarify that incentivized reviews, even those with clear and conspicuous disclosures, could still be considered deceptive “if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating.” In that case, the Endorsement Guides reason that consumers may be misled if they just look at the inflated overall star rating rather than reading individual reviews with the disclosures. The Endorsement Guides therefore recommend that advertisers should disclose next to every overall star or other summary rating if the rating includes those from reviewers who were given an incentive.
- **Atypical Results:** Building on existing FTC guidance in other contexts, the updated Endorsement Guides emphasize that advertisers must disclose when an endorsement does not demonstrate the typical results of a product or service and must not misrepresent the results consumers can generally expect to achieve. In

such scenarios, the FTC notes that “results not typical” types of disclaimers are likely ineffective and that advertisers should instead “clearly and conspicuously disclose the generally expected performance in the depicted circumstances.”

- **Liability:** The updated Endorsement Guides clarify that while sponsoring advertisers will be liable for any deceptive endorsements, influencers and intermediaries may also be liable. Influencers should ensure they are not misrepresenting a product’s efficacy or their personal views of the product. And endorsers and advertisers must ensure their influencers are making proper disclosures.
- **Responsibility to Monitor Network:** The new Endorsement Guides make clear that companies are responsible for monitoring what their endorsers and intermediaries do online. According to the FTC, advertisers should have “reasonable programs” in place to train and monitor members of their network. Through these programs, companies should (i) explain to their endorsers and intermediaries what they can and cannot say about their products; (ii) instruct them on their responsibility to clearly and conspicuously disclose their connection to the program; (iii) periodically search for what endorsers are saying online; and (iv) take appropriate action if the company finds questionable practices by their endorsers or intermediaries.

In addition to the revised Endorsement Guides, the FTC issued an updated version of a guidance document that answers frequently asked questions about the Endorsement Guides – “FTC’s Endorsement Guides: What People Are Asking.” Last revised in 2017, the new FAQ includes 40 additional questions regarding endorser-related issues.

The FTC also announced on June 30, 2023, an Advance Notice of Proposed Rulemaking proposing a new rule that would, once adopted, provide the FTC with increased enforcement authority to bring actions seeking civil penalties and consumer redress against advertisers that engage in false or misleading practices in use of testimonials and endorsements.

The finalized Endorsement Guides (and the FTC’s notice of proposed rulemaking regarding endorsements) signal that the FTC is continuing its increased scrutiny of endorsement-related practices.

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