

Advertising Law

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An In-Depth Look at the FTC’s Updates to the Endorsement Guides—Part 1 of 2

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The Federal Trade Commission (FTC or Commission) finalized its updates to the [Guides Concerning the Use of Endorsements and Testimonials in Advertising](#) Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Endorsement Guides) and published the revised version on June 29, 2023. Together with its announcement of the revised Endorsement Guides, the FTC also announced that it has issued an updated version of its accompanying guidance document to the Endorsement Guides, [FTC’s Endorsement Guides: What People Are Asking](#) FTC’s Endorsement Guides: What People Are Asking (FAQs).

For over four decades, the Endorsement Guides have established the baseline principles and guidelines for using endorsements and testimonials in advertising. Over time, and especially with the meteoric growth of social media and influencer marketing, the FTC has expanded the scope of the Endorsement Guides by making a number of major updates to the Endorsement Guides, once in 2009 and then in the revised version issued last month, in its efforts to maintain the relevance of the Guides and provide clarity on the Commission’s position on false and misleading endorsement practices in the marketplace. The latest updates to the Endorsement Guides represent the culmination of over three years of work by the Commission since it commenced its rulemaking process in February 2020 and largely adopted [the updates that the Commission proposed in May 2022](#). These updates include:

1. Addressing procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting or editing consumer reviews so as to distort what consumers think of a product
2. Addressing incentivized reviews, reviews by employees and fake negative reviews of a competitor
3. Adding a definition of “clear and conspicuous” and saying that a platform’s built-in disclosure tool might not be an adequate disclosure
4. Modifying the definition of “endorsements” to clarify the extent to which it includes fake reviews, virtual influencers and tags in social media
5. Clarifying the potential liability of advertisers, endorsers and intermediaries
6. Highlighting that child-directed advertising is of special concern

In addition to the Endorsement Guides, the FTC’s updated version of the FAQs, which includes 40 new questions and dozens of new examples reflecting significant industry changes that have occurred since the FAQs’ last publication in 2017, expands on the Commission’s views on certain areas of concern, such as when and how to disclose material connections across different platforms, monitoring influencers, platform disclosure tools, and online reviews.

This article is Part 1 of our two-part series analyzing the updates to the Endorsement Guides and the FAQs, specifically those addressing consumer reviews, fake reviews and fake users, and the definition of “endorsement.”

Perhaps the most significant update to the Endorsement Guides is the FTC's inclusion of a new section on consumer reviews, which states, in Section 255.2(d), that "[i]n procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products, 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."

In previous versions of the Endorsement Guides and the FAQs, the FTC generally discussed online reviews in the context of making appropriate disclosure of any material connection between the reviewer and the reviewed product (e.g., receiving free products). The updated Endorsement Guides and FAQs expand the guidance beyond material connection disclosure issues and articulate specific consumer-review practices that the FTC considers deceptive, primarily in the new examples added to Section 255.2 and the new questions and examples included in the FAQs.

These deceptive consumer-review practices include (i) sorting reviews by favorability rating, such as publishing reviews in the order of the number of stars received by the reviews; (ii) deleting or not publishing negative reviews, or featuring only favorable reviews on third-party review sites; (iii) labeling reviews as "the most helpful reviews" when the selection was made by the retailer and not consumers; (iv) buying fake reviews; (v) offering to pay purchasers or providing other incentives for writing positive reviews on third-party review websites; and (vi) threatening reviewers who post negative reviews on third-party websites (e.g., threats of legal action, physical threats or threats to disclose embarrassing information) to coerce them into deleting their reviews.

The FTC clarified that retailers can still engage in certain common practices of content moderation, as noted in Example 8(ii) of Section 255.2(e), including filtering out customer reviews (i) "that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, or reviews that the seller reasonably believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted" or (ii) that are unrelated to the retailer's products or services, noting that the retailer's "customer services, delivery, returns, and exchanges are related to its products and services."

Additionally, the FTC detailed circumstances in which companies can communicate with or solicit reviewers in nondeceptive ways. For example, notifying consumers of inaccuracies in their review is okay. Also, companies can solicit reviews from consumers and even pay for such reviews, provided that the consumers were not required to write a positive review to receive payment and they understood that there would be no negative consequences for writing a negative review (however, an appropriate material connection disclosure should still be made in connection with such reviews). Notably, the FTC warned advertisers against using incentivized reviews, such as gifting products to consumers to write reviews, even if consumers are not required to write reviews and even if consumers make the appropriate disclosure, if such practice materially inflates the advertiser's star rating.

The updated Endorsement Guides specifically discuss fake reviews and fake indicators of social media influence, both of which have been the subject of FTC enforcement actions in the past few years. In addition to calling out buying fake positive reviews as a deceptive practice, the FTC expressly stated that buying fake negative reviews of competitors can be deceptive in violation of Section 5 of the FTC Act. Also, consistent with the FTC's recent actions and

guidance provided in the prior (and current) version of the Endorsement Guides, the FTC included a new example in the Endorsement Guides (Example 13 under Section 255.0(g)), in which it stated that purchasing, selling or distributing fake social media followers or other indicators of social media influence is a deceptive practice.

Interestingly, the FTC is currently seeking to ban fake reviews and fake social media indicators altogether, as well as other egregious forms of deceptive practices relating to endorsements and testimonials, as reflected in the Commission's proposed rule issued a day after the revised Endorsement Guides were announced. The proposed rule would prohibit using fake reviews, repurposing reviews for a substantially different product, suppressing honest negative reviews, paying for positive reviews or social media indicators, paying for negative reviews of a competitor, allowing employees to write reviews without disclosure, and managing a company-controlled review website.

In the prior version of the Endorsement Guides, the FTC defined an endorsement as any advertising message that consumers are likely to believe reflects the honest opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser and provided a representative list. In the updated Section 255.0(b) of the Endorsement Guides, the FTC expands the definition of an endorsement to include marketing and promotional messages, and it expressly added social media tags to the list. However, unlike the earlier draft in the proposed updates from May 2022, the FTC moves away from definitively establishing that such tags and other types of communications on the list **are** endorsements and instead states that they **can** be endorsements. The Commission explains in the Overview section of the Endorsement Guides that the Commission is making such a change in response to comments that it received that not all tags are endorsements.

In the updated FAQs, the FTC further clarifies its position on when a tag is an endorsement that requires a material connection disclosure. If an individual tags the brand of a dress the individual is wearing in their Instagram post, then the tag is an endorsement that triggers a disclosure of the relationship between the individual and the brand if there is one. If, on the other hand, the individual does not tag the dress in the Instagram post, then even if the individual has a relationship with the brand a disclosure is not required because no representation is made about the dress in this context.

In the new and updated examples included in the revised Endorsement Guides and in the FAQs, the FTC tries to make the point that not all visual or verbal messages about a product are endorsements, but they **can** become endorsements. For example, tagging a brand can turn a post into an endorsement as discussed above. Additionally, as noted in the updated Example 1 under Section 255.0(g), a movie review posted by a critic is not an endorsement, but it can become an endorsement if the producer uses an excerpt from the review in its advertisement. Similarly, Example 7 under Section 255.0(g) describes a situation where a purchaser of a dog food posts a review of the dog food that they purchased on the manufacturer's website and the manufacturer features the review on the homepage of the website. While the initial review posted by the purchaser is not an endorsement, the featured review has now become an endorsement even though there is no connection between the purchaser and the manufacturer.

The FTC discusses many other situations in an attempt to provide clarity as to when a consumer's activity constitutes an endorsement, including in the context of receiving free products without a requirement to write a review. In some cases, a reference made by the

consumer about the free product may be an endorsement, such as where the advertiser expects the consumer to mention the product or review the product, whereas the reference may not be an endorsement if the free product received is so small that it “wouldn’t affect the weight and credibility of [the] endorsement.” The FTC did not, however, specify a threshold for what products would be so insignificant that they would not affect the weight and credibility of the endorsement.

With the growing number of ways endorsements can be made online and the weight they hold in the minds of consumers, it’s no surprise that the FTC has expanded its guidance on consumer reviews, fake reviews and fake users, and the definition of “endorsement” in the Endorsement Guides. Advertisers would do well to ensure that their marketing practices in these areas are consistent with these updated guidelines to help avoid potential FTC enforcement. Stay tuned for [“An In-Depth Look at the FTC’s Updates to the Endorsement Guides—Part 2 of 2,”](#) analyzing the FTC’s updates concerning material connection disclosures, the liability of advertisers and endorsers, child-directed advertising, and other areas.

We wish to thank Summer Associate Annie Nguyen for her contributions to this article. We wish to thank Summer Associate Annie Nguyen for her contributions to this article.