

Endorsement Enforcement: FTC Updates Endorsement Guides and Proposes Rule that Would Impose Penalties Up to \$50k Per Violation

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When it comes to regulating endorsements, testimonials, and reviews, the FTC has made clear—many times over—that it does not intend to take its foot off the gas anytime soon. In the most recent, and significant, reminder of the FTC’s interest in this area, on June 29, 2023, it released its long-awaited finalized updates to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Endorsement Guides”), along with related business guidance. The next day, on June 30, 2023, the FTC went a step further by proposing a new Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, which, if enacted would impose penalties of up to \$50,120 per violation for deceptive uses of reviews. In this alert, we summarize what retailers and e-commerce companies need to know.

Evolution of The Endorsement Guides

A Guide for the Times: the “New” Endorsement Guides are More than 30 Years in the Making

Since their original publication in 1980, the Endorsement Guides have warned companies against soliciting or incentivizing reviews or endorsements that might mislead consumers into believing they are unbiased opinions.

The last major update to the Guides occurred in 2009, when the FTC incorporated considerations relating to then-new forms of digital media, such as blogs and online message boards. In 2010, the FTC published “What People are Asking” (“FAQ’s”), an informal staff publication companion to the Endorsement Guides focused on answering advertisers’ frequently asked questions about endorsements.

Since then, [the FTC has continued to update the FAQs](#) to address how its Endorsement Guides apply to sponsored content on social media, and to address other practical concerns in the evolving digital marketing landscape (such as whether “likes” count as endorsements, and whether built-in disclosure tools on social media platforms can satisfy disclosure requirements). Since 2019, the FTC instituted more than a dozen enforcement actions—mostly against advertisers, but also against agencies and those it considers ‘endorsers’—for disseminating misleading sponsored content on digital media. Signaling that the tide was beginning to turn in the Agency’s focus on endorsements, in October 2021, it flooded 700 “Notices of Penalty Offenses” on companies to give them “actual knowledge” that certain deceptive endorsement-related conduct could result in steep penalties. Earlier this year, the FTC secured a \$4.2 million settlement with a retailer it accused of deleting and suppressing less-than-stellar reviews.

In May of 2022, the FTC issued proposed updates to the Endorsement Guides, which, *inter alia*

, included heightened standards for “clear and conspicuous” disclosures, expanded definitions of “endorsement” and “endorsers,” gave additional guidance concerning reviews based on the receipt of in-kind compensation - such as free or reduced-price products - and included a new section regarding advertisements containing reviews aimed at children.

Few Changes Made between Proposal and Publication

The finalized Endorsement Guides mostly track these proposed updates. Specifically:

Expanded Definitions: The FTC made further efforts to clarify to what extent the term “endorsement” includes fake reviews and virtual influencers. Verbal statements, tags in social media posts, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual, and the name or seal of an organization can all equal endorsements. Additionally, an “endorser” could be or appear to be an individual, group, or institution. From proposal to press, the FTC maintained that the term “endorser” explicitly includes fake reviewers, including bots.

Clear and Conspicuous Disclosures: The proposed definition of clear and conspicuous disclosures, which aligns with recent FTC orders, was retained. Disclosures should be difficult to miss, easily understandable, and issued in the same format as the representation; it is not sufficient to merely rely on any given social media platform’s built-in disclosure tools, nor is it sufficient to link to disclosures in social media posts.

Liability: The Endorsement Guides clarify that advertisers can be held liable for false statements by endorsers and for deceptive statements, including those that reflect atypical results. Additionally, reviewers could be responsible when falsely claiming to use a product or service. The definition of intermediaries that can be held liable includes ad agencies, PR firms, review brokers, reputation management companies, and similar entities. However, this liability may require a showing of knowledge or constructive knowledge.

Review Manipulation: Advertisers engaging in practices such as editing, distorting, suppressing, boosting, or selectively publishing of consumer reviews in a way that misrepresents or distorts consumer views can be held liable. This guidance was modified to include examples not only of procuring, suppressing, and editing reviews, but also upvoting, publishing, or selectively publishing reviews in a way that distorts or misrepresents consumer views.

Compensating Reviewers: The FTC notes that some connections between endorsers and the companies for whom they are creating content may be so obvious that compensation need not be disclosed “because such payments likely are ordinarily expected by viewers.” Further, while some discounts or in-kind methods of compensation may not be considered material, the precise threshold for when a discount becomes material is not specified. The materiality of connections and discounts may vary case-by-case.

Increased Concern for Children: The revised Guides retained the newly-added explicit expression of concern regarding endorsements directed at children. However, the FTC declined to suggest parameters for such endorsements and merely indicates that practices that would not ordinarily be questioned in advertisements addressed to adults might be questioned if they are directed at children.

Notice of Proposed Rulemaking on a Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

On the heels of issuing the finalized updated Endorsement Guides, the FTC issued a brand-new proposed Trade Regulation Rule (“Rule”) governing endorsements, testimonials, and reviews. The NPRM follows a November 2022 Advanced Notice of Proposed Rulemaking (“ANPR”) on the Use of Reviews and Endorsements, which had alerted the public that the FTC was considering the Rule. The ANPR also solicited input from the public and industry groups concerning the content of the forthcoming Rule, including how to flesh out “clearly deceptive or unfair practices” related to fake reviews, and issues relating to review hijacking, undisclosed paid-for or solicited reviews, negative review suppression, and the actors involved with all of the above.

The proposed Rule details several prohibited actions, listed below, each of which have previously been flagged by the FTC as areas of concern. What is unprecedented about the Rule is not the conduct it prohibits-but the penalties it provides. Specifically, the Rule, if enacted, would provide for penalties of up to \$50,120 per violation.

Prohibited or restricted actions include:

False or Fabricated Reviews: Writing, creating, selling, or procuring/purchasing a review or consumer or celebrity testimonial: (1) by a reviewer that does not exist; (2) by a reviewer who did not have an experience with the product/service/business at issue; or (3) that materially misrepresents the reviewer’s experience with the product/service/business at issue. For businesses that unwittingly display a fake review, the Rule imposes a “knows or should have known” standard-a standard on which the FTC has requested input.

“Review Hijacking”: Recycling or repurposing a consumer review created for a substantially different product than the product for which it is displayed. This conduct, known as “review hijacking,” is a recent area of interest for the FTC. Specifically, in a complaint filed earlier this year, the FTC alleged that by manipulating product pages to link reviews to products for which they had not been submitted, one company misrepresented the nature of the reviews, the number of Amazon reviews, and the average star ratings of some products, and whether products were number one best sellers or had earned an Amazon Choice badge.

Purchasing Specific Feedback: Providing compensation or other incentives in exchange for reviews expressing a particular sentiment, whether positive (i.e., for one’s own brand) or negative (i.e., for competitors).

Employee Endorsers: For “insiders” (officers, managers, employees, agents, or relatives) to create or solicit reviews without clearly disclosing their relationships to the business. The proposed Rule is limited to when the business knows or should know the reviewer’s relationship to the business or one of its officers, employees, or agents.

Failing to Disclose Business Relationships: Failing to disclose that a business providing reviews is related to the business being reviewed, or otherwise misrepresenting the relationship between such businesses.

Review Suppression or Deletion: Suppressing negative reviews (with some exceptions for content control).

Fake Clout: Selling or purchasing “fake indicators of social media influence” (e.g. fake followers, fake subscribers, fake views, and other similar inauthentic indicators of such influence).

As part of its rulemaking process, in publishing the NPRM, the FTC requested comments from the public. Such comments may be submitted online or via mail and will be due 60 days from publication of the NPRM in the Federal Register.

Conclusion

The FTC’s midsummer output makes one thing clear: it does not intend to let up on prosecuting bad actors that enlist deceptive review practices. If anything, the Agency appears to be gearing up to increase its efforts; and if the Rule is enacted, resulting steep penalties could be expected, depending on the severity of the conduct sought to be punished. Retailers should use this opportunity to carefully take stock of their current practices to ensure that they, and the influencers and review platforms they work with, are in compliance with the FTC’s most recent guidance.

For more information, please contact a member of Benesch’s [Litigation Practice Group](#), along with our [Retail & E-Commerce](#) industry team.