

# From Clear and Conspicuous to Unavoidable?

## The FTC's Updated Endorsement and Testimonial Guides

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Regulatory and Litigation Developments for Advertisers and Marketers

# Agenda

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# FTC Announces New Endorsement and Testimonial Guides

- On June 29, 2023, the Federal Trade Commission (the “FTC”) announced that it will be adopting the long-awaited, revised “Guides Concerning the Use of Endorsements and Testimonials in Advertising” as final (the “Guides”). The FTC also announced that it has published updated FAQs: FTC’s Endorsement Guides: “What People are Asking”.
  - Guides last updated in 2009.
  - FAQs last revised in 2017.
  - Both the Guides and the FAQs address changes in technology and the hyperbolic growth of social media and influencer marketing.
- The Guides, which “are advisory in nature,” provide guidance on the Commission’s position on false and misleading endorsements in advertising.
- The FAQs include 40 new questions and numerous new examples designed to reflect the changes in the advertising industry since 2009.

# Revised Definition of Endorsement

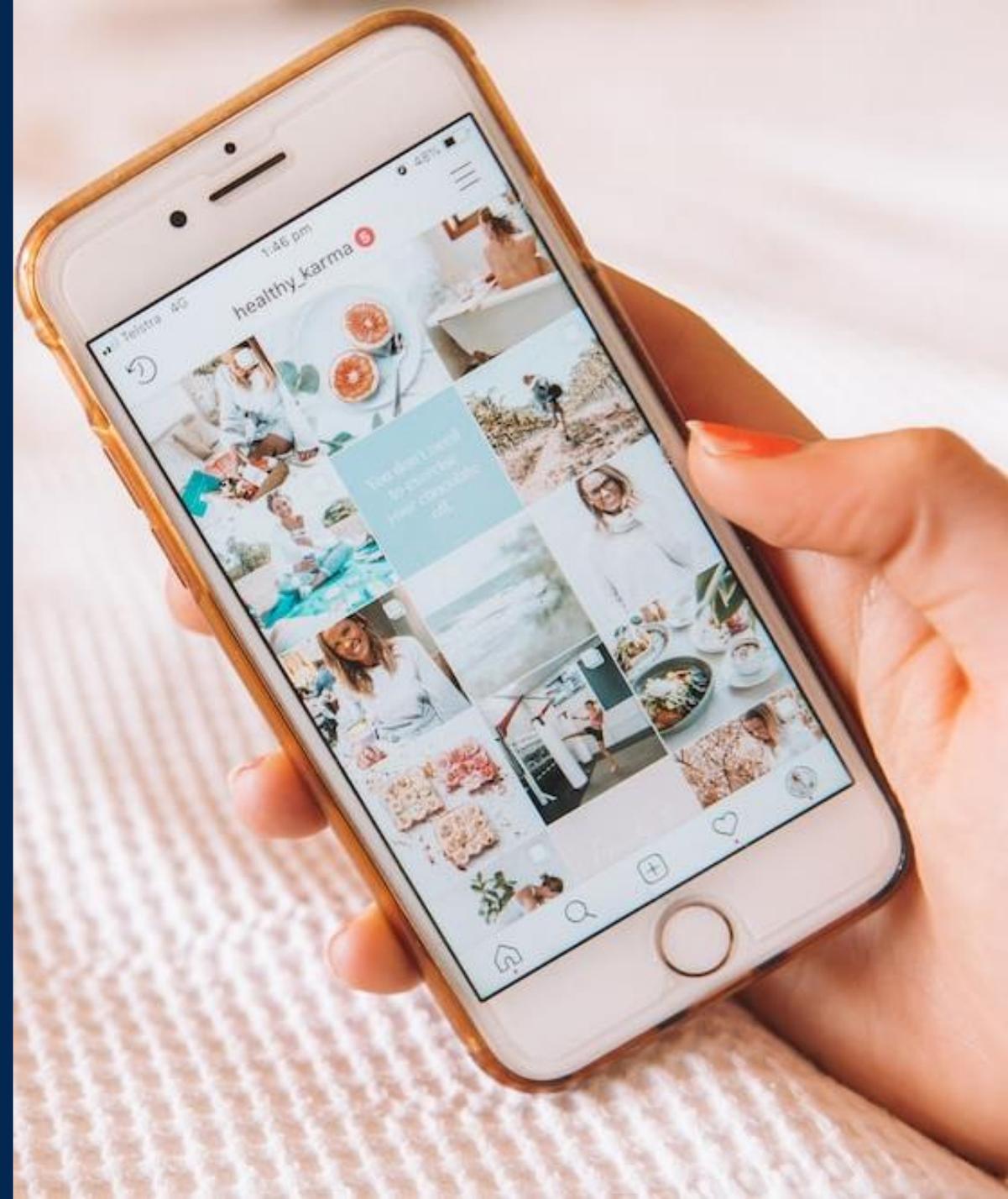
- The 2009 Guides defined endorsement as “an advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser.”
- Now, certain marketing messages and tags “can be” endorsements depending on the circumstances.
  - e.g. fake reviews, online influencers, testimonials, names/seals of organizations.
- When is a tag an “endorsement” that requires a material connection to be disclosed? Look to the FAQs!
- Visual or verbal messages about a product or service don’t automatically constitute endorsements, but they can shape shift into endorsements.
  - A pet food manufacturer decides to feature a consumer’s positive review on the homepage of its website (Section 255.0(g), Example 7).
  - A producer features a film critic’s positive review in marketing campaign for the film (Section 255.0(g), Example 1).
  - Consumer review of a free product.



# Endorsements Guidelines

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1. Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.
  2. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented.
  3. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information about the performance or effectiveness of the product.
  4. The endorser must have been a bona fide user of it at the time the endorsement was given.
    - (e.g.) A picture of an influencer with a product that they have never used can be misleading.
- 



# More Endorsement Examples

1. A television advertisement for a brand of golf balls includes a video of a prominent and well-recognized professional golfer practicing numerous drives off the tee. The video would be an endorsement even though the golfer makes no verbal statement in the advertisement. (Section 255.0, Example 5)
2. An infomercial for a home fitness system is hosted by a well-known actor. During the infomercial, the actor demonstrates the machine and states, “This is the most effective and easy-to-use home exercise machine that I have ever tried.” Even if the actor is reading from a script, the statement would be an endorsement, because consumers are likely to believe it reflects the actor’s personal views. (Section 255.0, Example 6)
3. A consumer is the owner of a “dog influencer” (a dog with a social media account and many followers). If the manufacturer sends the consumer coupons for a year’s worth of dog food and asks the consumer to feature the brand in their dog’s social media feed, any resulting posts that feature the brand would be considered endorsements even though the owner could have chosen not to endorse the product. (Section 255.0, Example 7(iv))



# When Do You Have to Disclose an Endorsement?

- When the connection between the endorser and seller is **material**.
  - The connection must affect the weight or credibility the audience gives to the endorsement.
- When the connection is **unexpected**.
  - A material connection must be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection.
  - Kim Kardashian endorsing Skims (her company) is likely expected and does not require a disclosure.
- The details of the connection don't need to be disclosed (such as what the endorser was paid) but must disclose the nature of the connection so consumers can evaluate its significance.
- Examples:
  - Incentivizing reviews via gifting a free product.
  - A blogger receiving a portion of a sale via an affiliate link.
  - A celebrity athlete receiving free surgery and posting positively about the clinic online.
  - A brand sponsors a trip for an influencer.

# Expanded Types of Material Connections

- The Guides provide several type of material connections that require disclosure including:
  - Business family or personal relationships.
  - The receipt of monetary payments.
  - The endorser's receipt of free or discounted products.
  - Early access to a product.
  - The chance of winning a prize or money.
- Material connections can also include incentivized reviews, employee reviews, and fake negative reviews by competitors.



# Influencer Questions

- **Q: I have a long-term brand relationship and have made multiple posts about it; do I need to make a disclosure every time?**
  - **A:** Each new endorsement could be potentially deceptive if the viewer has not seen prior posts.
- **Q: A company sent me a free product and I made an online post about it. If I buy more of the product with my own money and continue using it, do I need to disclose the initial gift?**
  - **A:** If you have an ongoing relationship with a brand, you should still disclose that relationship even if you buy the brand's product yourself.
- **Q: I'm a brand partner and post a negative review about a competing brand, do I need to disclose my brand partnership?**
  - **A:** Yes. If you criticize a competitor of a brand that you are paid to endorse, you should disclose your paid relationship. It would likely affect the weight and credibility that your audience gives to your negative comments.
- **Q: What if I post a picture and only tag the brands that are featured but don't say anything?**
  - **A:** Tagging a brand you're wearing is an endorsement of the brand and could require a disclosure if you have a relationship with that brand.

# New “Clear and Conspicuous” Standard

- When endorsers have a material connection to the advertiser, they must disclose the connection clearly and conspicuously. This has been true for many, many years.
- Now, however, “clear and conspicuous” is defined as a disclosure that is “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers” and **unavoidable!**
  - A disclosure must stand out from surrounding text or audio by its color, font, size, location, duration, speed, and/or cadence depending on the context and should appear in the same medium as the triggering claim.
- The disclosure must also not contradict the net consumer takeaway, e.g., “sponsored post” label may not be sufficient. Commonly used disclosures that don’t contain the brand or product name may be ambiguous since they may not properly identify the sponsoring advertiser. While #ad or #sponsored may still be effective in certain contexts, the FTC advises that “Sponsored by [BRAND]” or “Promotion by [BRAND]” would be clearer.
- The FTC warns advertisers not to assume that a social media platform’s disclosure tools alone will produce a disclosure that is unavoidable.
  - Standard can change depending on the targeted consumer.
    - Ads targeted to older adults will be evaluated from an older person’s perspective, including those with diminished auditory, visual, or cognitive processing abilities.
    - Ads targeting consumers who speak a particular language require the disclosure to be in the language the target audience will understand rather than in English.

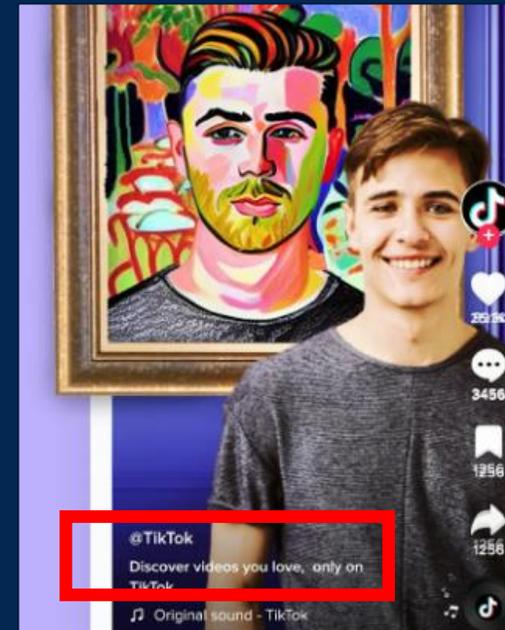
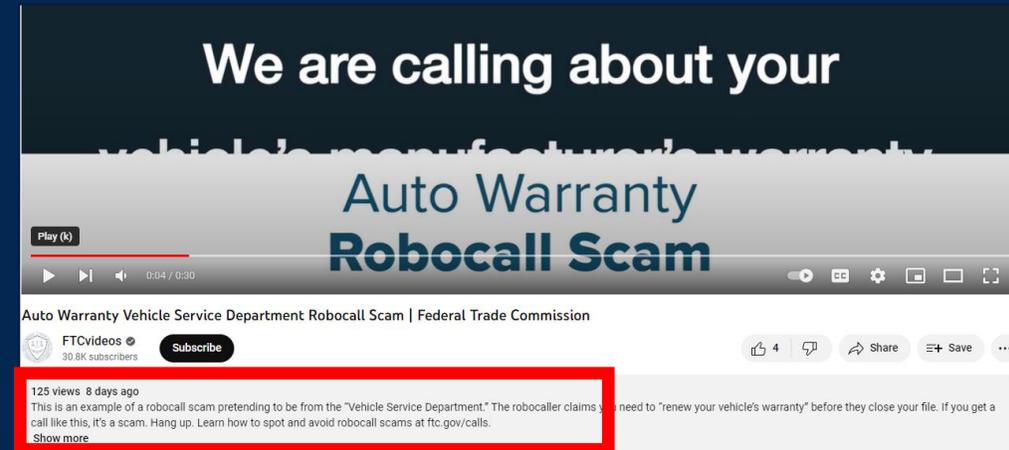
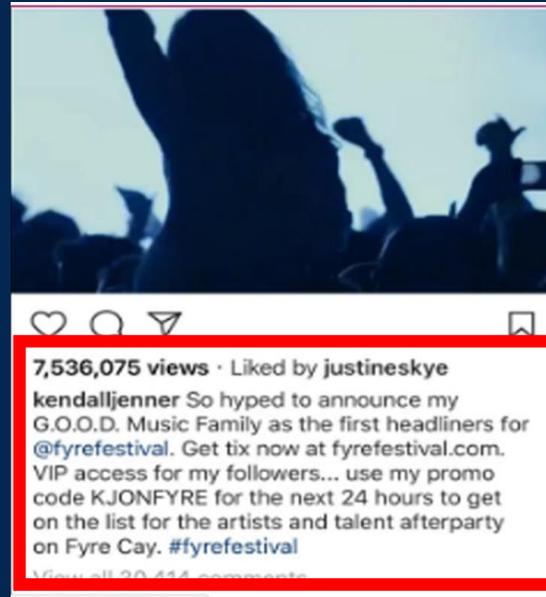
# “Clear and Conspicuous” Examples

1. An influencer who is paid to endorse a vitamin product in their social media posts discloses their connection to the product’s manufacturer only on the profile pages of their social media accounts. The disclosure is not clear and conspicuous because people seeing their paid posts could easily miss the disclosure. (Section 255.0, Example 9)
2. An ad that has a disclosure that is clear and conspicuous when viewed on a computer browser, but it is not clear and conspicuous when the ad is rendered on a smartphone. Because some consumers will view the ad on their smartphones, the disclosure is inadequate. (Section 255.0, Example 11(ii))
3. For streamers, viewers can start watching at any time, and thus they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream, people are more likely to see them no matter when they tune in. Streamers could have a continuous, clear, and conspicuous disclosure appear throughout the entire stream. The FTC also advises that a disclosure be added to any description of the stream before potential viewers click through to it. (FAQ)

# Using Social Media Platforms

- An FTC investigation into a whether a company’s advertising practices are clear and conspicuous would likely consider the following:
- Where was the disclosure(s) **PLACED**?
  - Should catch the users’ attention where they aren’t likely to miss it.
  - For example, if a consumer must click “more” on a social media post to see a disclosure, the disclosure is avoidable and therefore not clear and conspicuous.
  - If a video post, not having the disclosure only at the end.
- How **READABLE** was the disclosure(s)?
  - Simple-to-read fonts with a contrasting background are likely to improve readability.
- Was the disclosure(s) **CLEAR**?
  - Using language that is clear, unambiguous, and understandable to the ordinary reader.
- *The ultimate responsibility for clearly and conspicuously disclosing a material connection rests with the influencer and the brand – not the platform.*

# Default Platform Tools May Not Be Sufficient



# Fabricated Social Media Influence

A new example, Example 13 under Section 255.0(g), makes it clear that purchasing, selling, or distributing fake social media followers or other indicators of social media influence is a deceptive practice.

## Deceptive Trade Practice **X**

- Social media users purchasing or creating “indicators” of social media influence and then use indicators to misrepresent such influence for a commercial purpose.



## Not a Deceptive Trade Practice **✓**

- Purchasing fake likes or followers and not using it for commercial speech, but only for “vanity.”



- (e.g.) A motivational speaker buys fake social media followers to impress potential clients. The use by endorsers of fake indicators of social media influence, such as fake social media followers, is not itself an endorsement issue.
- **However**, it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use them to misrepresent such influence to potential clients, purchasers, investors, partners, employees, or to anyone else for a commercial purpose. (Section 225.0, Example 13)

# Liability

- Any party publishing a deceptive endorsement can be found liable for violating the Guides, including influencers, brand ambassadors, and intermediaries.
- The Guides specify that intermediaries include advertising agencies, public relations firms, review brokers, reputation management companies, and “other similar intermediaries.”
- Companies are responsible for monitoring their network, meaning the online activities of their influencers and intermediaries.
- An endorser can only make claims that the advertiser can make. For example, a company can’t incentivize an influencer to make a deceptive claim about a product or service.
  - An endorser’s truthful claim can still be deceptive if the endorser had an atypical experience or results unless a clear and conspicuous disclosure of average results is provided, because an endorsement must not misrepresent the results consumers can generally expect to achieve. 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.”
  - Influencers should make sure that they are not misrepresenting a product’s efficacy, their personal opinion, or experience with the product.

# Monitoring Obligations

- Companies should have “reasonable programs” in place to train and monitor members of their network.
- These programs should:
  1. Explain to endorsers and intermediaries what can and cannot be said about a product.
  2. Provide guidance and instruction on how to clearly and conspicuously disclose their material connection to the Company.
  3. Require Company employees to periodically search to see what network members are saying online.
  4. Require the Company to take appropriate action if network members engage in questionable practices.
- A formal connection (e.g., a contract) with the endorser is NOT required.
- An advertiser who retweets, shares, or republishes a positive statement made by an unrelated third party despite the lack of a material connection can still be liable for violating the Guides.



# Advertisers Using Consumer Endorsement



- Advertisements presenting endorsements by what are represented, expressly or by implication, to be “actual consumers” should use actual customers, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.
- Advertisers should possess and rely upon adequate substantiation.
  - If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess adequate substantiation for that representation.

# Consumer Product Claims and Reformulated Products

- Performance claims via endorsements.
  - An advertiser must possess and rely upon adequate substantiation, including competent and reliable scientific evidence when appropriate.
  - Applies to both express and implied claims.
- Typicality claims via endorsements.
  - If an advertiser does not have substantiation that an endorser's experience is representative of what consumers will generally achieve, the ad should clearly and conspicuously disclose the expected performance in the depicted circumstances.
- If a product is reformulated, neither the advertiser nor the endorser is required to take down or delete historic posts preceding a product's reformulation. However, if an original post is shared or reposted after the product's reformulation, the advertiser must confirm that the endorser holds the views expressed in the original post about the reformulated product.

# Distortion of Customer Reviews

- **New:** Section 255.2(d) states: “In 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.*”
- This new section, along with the FAQs, expands the Commission’s guidance beyond the disclosure of material connection type issues, setting forth specific practices that are viewed as deceptive:
  - Suppressing or deleting negative reviews.
  - Using positive reviews of a different product sold by the company.
  - Only publishing favorable reviews on third-party review websites.
  - Characterizing reviews as the “most helpful” when that characterization was made by the brand rather than the customers.
    - Sorting reviews from good to bad, e.g., from five stars to one star.
  - Creating or purchasing fake positive reviews OR buying fake negative reviews of a competitor.
  - Offering to pay customers or providing other incentives for writing favorable reviews on third-party websites.
  - Threatening customers who publish negative reviews on third-party websites with legal action.

# Deceptive Use of Customer Reviews



1. A marketer engages in review gating, which involves asking past purchasers to provide feedback on a product and then inviting only those who give positive feedback to post online reviews on one or more websites. This practice “may be unfair or deceptive if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice.” (Section 255.1, Example 11)
  - However, the Commission is not saying or suggesting that businesses cannot ask happy customers for reviews. The deception or unfairness occurs not in the selective asking of customers for reviews, but only when the posted reviews are substantially more positive as a result.
2. A third-party review website has a reporting mechanism that allows businesses to flag suspected fake reviews. The manufacturer routinely flags negative reviews of its products as fake without a reasonable basis for believing that they are actually fake, resulting in truthful reviews being removed from the website. This misuse of the reporting option is an unfair or deceptive practice. If a manufacturer forwards only favorable reviews for its product to a third-party website, or omits unfavorable reviews, it’s engaging in a misleading practice. (Section 255.2, Example 10(ii))

# Review Websites



Review websites that provide rankings of different products but accept payments from manufactures in exchange for higher rankings are deceptive.



**Paid rankings** are inherently deceptive even if the website discloses those payments because the payment determines the actual rankings.

Both the website operator and the manufacturer who paid for the higher ranking may be liable.



If the review website only receives payments via **affiliate links**, this is not inherently deceptive, but it should clearly and conspicuously disclose that it receives such payments.

# Managing Customer Reviews



- 1. Follow-up with customers.** Is there anything wrong with contacting customers who left negative reviews and trying to make them happy? If I succeed, can I ask them to change their reviews?
  - Companies may contact unhappy customers and respond to their concerns. You can also ask them if they'll add updates to their reviews. However, asking them to change or delete their initial negative reviews could mislead readers.
- 2. We give out free products** to a select group of our customers for them to review. We tell them to be honest, whether it's positive or negative, because we just want the reviews to be helpful. Do we still need to disclose which reviews were of products the reviewer received for free?
  - Yes. Knowing that reviewers got the product for free would probably affect the weight your customers give to the reviews, even if you didn't intend for that to happen.
- 3. Can we organize reviews** on our website?
  - If you organize consumer reviews of your products so all the 5-star reviews are first and then all 4-star reviews, etc. regardless of the date of the review, a consumer could be misled of what users think, because it's unlikely the consumer will read through all of the reviews to get to the negative ones. This is true even if you give consumers the option to re-sort the reviews, because many consumers might not realize that the default sort is by star rating.

# Nondeceptive Practices and Incentivized Reviews

Companies can still communicate with or solicit reviewers in nondeceptive ways.

- Notifying customers of inaccuracies in their review.
- Solicit reviews from customers and even pay for such reviews, provided that the customers are not required to write a positive review to receive payment and they understand that there are no negative consequences for writing a negative review
  - **\*NOTE\***: A disclosure that the reviewer has a material connection to the seller is required in connection with such reviews.
- **\*WARNING\***: Incentivized reviews, even those including proper clear and conspicuous disclosures, can still be 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. If such a material increase occurs, the marketer likely would need to provide a clear and conspicuous disclosure to people who see the average star rating”

# Consumer Review Fairness Act (CRFA)

- If an online retailer suppresses negative reviews on its website, the resulting product pages would be misleading. That said, based upon the CRFA, sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the seller reasonably believes are fake, so long as a seller's criteria for not displaying such reviews are applied uniformly to all reviews submitted.
- The FTC also states that sellers are not required to display reviews that are unrelated to their products or services, but customer service is related to the seller's products and services when it's provided by that particular seller's customer service department.
- The CRFA also includes exceptions for reviews that “contain[] the personal information or likeness of another person, or [are] libelous,” content “that is clearly false or misleading,” or “trade secrets or privileged or confidential commercial or financial information,” and the Commission is adding that language to the example.

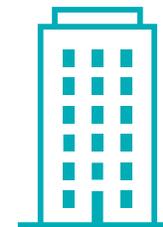
# Expert Endorsements

- An “expert” is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, and which knowledge is superior to what ordinary individuals generally acquire.
- An **expert endorsement** must be supported by an actual exercise of the expertise in evaluating product features or characteristics “with respect to which the endorser has expertise.” The Commission makes clear that the endorser must have exercised the expertise that they are “represented” as possessing.
  - (e.g.) A dermatologist is a paid advisor to a pharmaceutical company and is asked by the company to post about its products on their professional social media account. The dermatologist posts that the company’s newest acne treatment product is “clinically proven” to work. (Section 255.0, Example 3)
    - Before giving the endorsement, the dermatologist received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product.
    - Given their medical expertise, the dermatologist should have recognized the study’s flaws and is subject to liability for their false statements made in the advertisement. The advertiser is also liable for the misrepresentation made through the endorsement.



# Organization Endorsements

- An **organization's endorsement** must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product, it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products.
  - (e.g.) A mattress manufacturer advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind. (Section 255.4, Example 1)



# Employee Endorsements

- Generally, employees should disclose that they work for the company of the product or service that they are reviewing.
- Is a company supposed to monitor its employees' social media posts, when there could be potentially hundreds or thousands of employees?
  - No, but an employer can limit its own liability for employee endorsements by engaging in appropriate training of employees and, if the employer has directed such endorsements or otherwise has reason to know about them, by monitoring them and taking other steps to ensure compliance.
  - **But**, if the company is actively encouraging employee reviews, monitoring is expected for both appropriate disclosures and misleading information.



# Endorsements Aimed at Children

- **New:** Section 255.6 of the Guides addresses advertising targeting children.
- Per the FTC, advertising targeting children “may be of special concern because of the character of the audience” and because “practices that would not ordinarily be questioned in ads directed to adults might be questioned when directed at children.”
- Accordingly, advertisers and endorsers should be particularly careful in their use of endorsements directed to this audience.

# Child Influencers

- Practical issues with child influencer campaigns:
  - Agreement with parents – not kids, so involve parents. Have them attend events and participate with children.
  - Review all posts prior to publication.
  - Need to require adequate and kid-friendly disclosures in clear and simple language—both audio and video, repeat in long videos.
  - Keep child labor laws in mind—Coogan laws protect working children in Hollywood from exploitation and protect a child's income from their parents, but only applies in a few states.

**Ryan ToysReview accused of misleading preschoolers with paid content**

Watchdog group says kids under 5 can't tell the difference between organic and sponsored reviews on YouTube.



# Social Media Contests

- If a company wants to run contests and sweepstakes on social media to incentivize posts using a particular hashtag, it should instruct participants where and how to make the disclosures so that they are clear and conspicuous (e.g., at the beginning of the post).
- The Guides make it clear that company will be responsible for noncompliant sweepstakes run by influencer.
- “#Sweepstakes”, “#Sweeps” or “#Contest” alone is not enough.
  - “#ProductName\_Contest” or “#ProductName\_Sweepstakes” is better.



# Reminder—the FTC Isn’t the Only Game in Town

- Securities Exchange Commission looking at influencers promoting cryptocurrency.
- Section 17(b) of the Securities Act makes it unlawful for any person to promote a security without fully disclosing the receipt and amount of consideration received or to be received.
- SEC has settled several cases of improper celebrity crypto endorsements over the past several years. The [most recent](#) examples involved NBA hall of famer Paul Pierce, Floyd Mayweather, and Kim Kardashian.
- The crux of the SEC’s allegations in this, and similar settlements, is that the celebrities failed to adequately disclose the receipt and amount of the compensation they received for their promotions of securities.
- FINRA has similar regulations for broker-dealers.

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933  
Release No. 10578 / November 29, 2018

ADMINISTRATIVE PROCEEDING  
File No. 3-18906

In the Matter of  
  
FLOYD MAYWEATHER JR.,  
  
Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against Floyd Mayweather Jr. (“Mayweather” or “Respondent”).

II.

# Kim Kardashian and Ethereum Max

- In June 2021, Kim Kardashian posted a story promoting Ethereum Max, a new cryptocurrency token, which contained a link to the Ethereum Max website which featured instructions about how to buy the token.
- “Are you guys into crypto? This is not financial advice but sharing with what my friends told me about Ethereum Max token.”
- Kardashian told her 225 million followers, her “friends” were reducing supply of the token to give back to the entire E-Max community.
- Kardashian’s “friends” had paid her \$250,000 to promote the new token.
- Kardashian labeled her story as an “ad.”
- Labeling her story as an “ad” did not satisfy the SEC’s anti-touting laws, which required that she disclose the nature, source, and amount of compensation she received – directly or indirectly – in exchange for the promotion.
- In October 2022, Kardashian settled with the SEC for \$1,260,000 in penalties, disgorgement, and interest for failing to disclose the \$250,000 payment and agreed not to promote crypto for three years.
- Web 3 version of the classic “pump and dump” – no returns, no chargebacks.
- **Bottom line:** Influencers should engage in due diligence to understand potential legal ramifications of promotions; don’t want to get rich at your followers’ expense.

# After *AMG*, FTC Turns to New Enforcement Methods

- After the Supreme Court's ruling in *AMG Capital Management LLC v. FTC*, which limited the Commission's authority under Section 13 to pursue monetary relief, the FTC is looking for alternative approaches for penalizing violators.
- The Commission is authorized to take action against misleading advertising by utilizing civil investigative demands, cease and desist orders, injunctive relief, and civil penalties.
  - Civil penalties can be up to \$50,120 per violation if a Notice of Penalty Offenses was previously issued.
- Because of *AMG*, the FTC has been issuing numerous Notice of Penalty Offenses in order to put advertisers on notice.
- The FTC can also issue new rules which allows it to pursue civil penalties.
  - Speaking of new rules...

## Recent Notices

### Penalty Offenses Concerning Substantiation

The FTC has issued a Notice that it has determined that certain acts or practices concerning substantiation of product claims are deceptive or unfair and violate the FTC Act.

### Penalty Offenses Concerning Money-Making Opportunities

The FTC has issued a Notice that it has determined that certain acts or practices used to attract participants to money-making opportunities are unfair or deceptive, and violate the FTC Act.

### Penalty Offenses Concerning Endorsements

The FTC has issued a Notice that it has determined that certain acts or practices in the use of endorsements and testimonials are deceptive or unfair and violate the FTC Act.

# Proposed Rule: Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

- On June 30, 2023, one day after the Guides were announced, the FTC issued 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.
- Received comments from major industry players such as Google, Amazon, Yelp, Trustpilot, and TripAdvisor.
- The proposed rule would prohibit advertisers from:
  1. Using fake reviews or testimonials.
  2. Reusing or repurposing consumer reviews for a substantially different product.
  3. Paying for positive reviews or social media indicators.
  4. Suppressing honest negative reviews or paying for negative reviews of a competitor.
  5. Letting employees write reviews without proper disclosures.
  6. Inflating social media influence via purchased “likes,” followers, etc.

# Proposed Rule Cont.

## 1. Fake Reviews

- Includes leaving a review by a non-existent person, someone who did not actually experience the product/service or misrepresented their experience.
- Fake celebrity endorsements.
- Does not apply to third-party review platforms that display reviews from other sites, unless the company knew or should have known that the reviews they procured were false.

## 2. Reusing or Repurposing Reviews

- “Review hijacking,” a practice where companies use a consumer review written for one product so that it appears as if the reviews are for a substantially different product.

## 3. Buying Positive or Negative Reviews

- Paying or giving incentives to a person in exchange for a specific review.
- Either purchasing positive reviews for a company’s own use or incentivizing others to give negative reviews of a competitor.

# Proposed Rule Cont.

## 1. Employee Review of Employer's Product/Service

- Reviews written by officers, managers, employees, and their relatives need to include the appropriate clear and conspicuous disclosure.

## 2. Review Suppression

- Use of threats or intimidation to suppress negative reviews.
- But reviews containing discriminatory, harassing, false/misleading, or disclosing confidential information can still be suppressed.

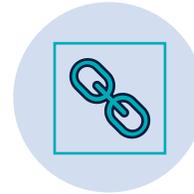
## 3. Indicators of Social Media Influencer

- Distribution or purchase of followers, friends, subscribers, views, likes, reposts, and comments that are used for a commercial purpose.

# Examples of Deceptive Practices in the Proposed Rule



Preparing signed testimonial reviews before the customer received the product.



Linking new products to more successful, established products that had more ratings and better reviews as to mislead the consumer.



Offering consumer endorsers free product in exchange for “especially positive and inspiring” reviews.



Using testimonials from employees that appear to be from ordinary consumers.



A company operating a purportedly independent, scientific research website that endorsed a supplement sold by the same company.



Buying tens of thousands of fake “followers” on Instagram and thousands of fake “likes” on Instagram and other social media to create a false appearance of popularity in its advertising to consumers.

# Main Takeaways

1. Companies should be reviewing their advertising practices to avoid violating the new Guides and Proposed Rule.
2. Social media tags and similar communications can now be endorsements.
3. “Clear and conspicuous” disclosure standard incorporates “unavoidable.”
4. Expanded definition of material connections.
5. Increased scrutiny on use of consumer reviews and review websites.
6. Advertisers explicitly liable for misleading or unsubstantiated endorsements even when the endorser is not liable.

# Questions? Contact Us



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