



Proposed Revisions to FTC Endorsement Guides: What You Need to Know

June 28, 2022

Leonard L. Gordon
Partner | 212.370.6252 | llgordon@Venable.com

Alexandra Megaris
Partner | 212.370.6210 | amegaris@Venable.com

VENABLE_{LLP}

1



Agenda

- ✓ What Are the Endorsement Guides?
- ✓ What is Driving These Proposed Revisions?
- ✓ What Would Change Under the Proposed Revisions?

VENABLE_{LLP}

© 2022 / Slide 2

2

What Are the Endorsement Guides?



3

FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

Part IV

Federal Trade Commission

16 CFR 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; Final Rule

Home » Tips & Advice » Business Center » Guidance » The FTC's Endorsement Guides: What People Are Asking

THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING

TAGS: Advertising and Marketing | Endorsements, Influencers, and Reviews | Online Advertising and Marketing | Credit and Finance | FinTech

Answers to questions people are asking about the FTC's Endorsement Guides, including information about disclosing material connections between advertisers and endorsers. The brochure also addresses how those established consumer protection principles apply in social media and influencer marketing.



© 2022 / Slide 4

4

Endorsement Guides Basics: Endorsements Must Be Truthful

- Endorsements must reflect the honest opinion, beliefs, or experience of endorser; should be from bona fide user.
- Endorsers must have been a bona fide user of the product *at the time the endorsement was given*. The endorsement may continue to be used so long as an advertiser has good reason to believe that the endorser remains a bona fide user of the product.
- Endorsements represented to be from “actual customers” should utilize actual customers in both the audio and video or clearly and conspicuously disclose that the persons in such ads are not actual customers of the product.
- Endorsements need not be phrased in the exact words of the endorser, but the endorsement cannot be presented out of context or re-worded so as to distort the endorser’s true opinion or experience with the product.

VENABLE_{LLP}

© 2022 / Slide 5

5

Endorsement Guides Basics: Claims Made by Endorsers Must Be Substantiated

- The endorsement cannot convey an express or implied representation about the product that would be deceptive if made directly by advertiser.
- Advertiser must possess and rely upon adequate substantiation (including, when appropriate, competent and reliable scientific advice) to support the claims made through the endorsements in the same manner it would be required to do if it had made the representation directly.
- Advertiser also should possess adequate substantiation that the endorser’s experience on a central or key attribute of the product is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use.
 - If advertiser does not have substantiation that the endorser’s experiences are typical, the ad should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and an advertiser must have adequate substantiation for that representation.

VENABLE_{LLP}

© 2022 / Slide 6

6

Endorsement Guides Basics: Material Connections Must Be Disclosed

- Advertiser must disclose material connections between itself and its endorsers (e.g., advertiser paid the endorser, gave free product to the endorser, or is related to endorser).
- Advertiser should take reasonable measures to ensure its paid endorsers (including social media influencers) know their obligations to disclose and do in fact properly disclose.

VENABLE_{LLP}

© 2022 / Slide 7

7

Endorsement Guides Basics: Experts Must Be Qualified

- If advertiser represents, directly or implicitly, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing.
- Although the expert can take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of the expert's expertise, including an examination or testing of the product at least as extensive as would be required to support the conclusions presented in the endorsement.
- If the expert endorsement involves a comparison, the comparison must have been included in the expert's evaluation, and where the net impression created by the endorsement is that the advertised product is superior, the expert must in fact have found the endorsed product to be superior.

VENABLE_{LLP}

© 2022 / Slide 8

8

What Is Driving FTC to Revise the Endorsement Guides?

VENABLE_{LLP}

9

FTC Goals in Revising the Guides

- Changes in technology since last update
- Dominance of social media
- Loss of Section 13(b) authority after the Supreme Court's ruling in *AMG Capital Management LLC v. FTC*; FTC is looking for an alternative approaches for penalizing violators.
 - FTC has revived its Notice of Penalty Offense authority in late 2021. Specifically, issued letters putting more than 700 of the country's largest advertisers on notice of the endorsement and testimonial practices FTC has found to be deceptive.



VENABLE_{LLP}

© 2022 / Slide 10

10

What Is the FTC Proposing?



11

Overview of Proposed Revisions

- Changes to certain defined terms expand scope
- Clarification of liability for advertisers, endorsers, and intermediaries
- Consumer reviews
- Product review sites
- Endorsements directed to children
- How to disclose material connections

[Billing Code: 6750-01-P]

FEDERAL TRADE COMMISSION

16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Proposed changes to Guides; request for comments.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) is seeking public comment on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].



© 2022 / Slide 12

12

Proposed Revisions to Defined Terms

- **“Endorsement”**: modified to make clear that tags in social media posts can be endorsements
- **“Endorser”**: modified to indicate that endorsers could simply *appear* to be an individual, group, or institution; therefore, Guides would apply to bots and fake social media accounts.
- **“Clear and conspicuous”**: modified to:
 - stress importance of unavailability;
 - clarify that when the triggering claim is visual, at a minimum the disclosure should be made in the visual portion of endorsement and if claim is audible, at a minimum the disclosure should be made in audible portion; but both types of disclosures always are better;
 - note that when an endorsement targets a specific audience, the effectiveness of the disclosure will be evaluated from the perspective of a member of that group

VENABLE_{LLP}

© 2022 / Slide 13

13

Potential Liability for Violations

- **Endorsers/Influencers**
 - Endorsers could be liable for their own statements, such as when they make representations that they know or should know to be deceptive
 - Endorser does not need to modify or delete past posts so long as posts were not misleading when made, and dates of post are clear
 - Level of due diligence required will depend on their level of expertise and knowledge
 - Liable for failing to disclose unexpected material connections between themselves and an advertiser
- **Intermediaries (ad agencies and PR firms)**
 - Disseminating what they knew or should have known were deceptive, such as ignoring shortcomings of “obvious” claims that they disseminate
 - May be liable for roles with respect to endorsements that fail to disclose unexpected material connections

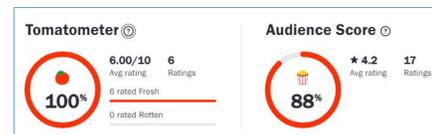
VENABLE_{LLP}

© 2022 / Slide 14

14

Consumer Reviews

- When procuring, suppressing, boosting, organizing, 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.
- However,
 - Sellers are not required to display customer reviews 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 criteria for withholding reviews are applied uniformly
 - Not required to display reviews that are unrelated to the products and services; however, “services” does include customer service, delivery, return, and exchanges



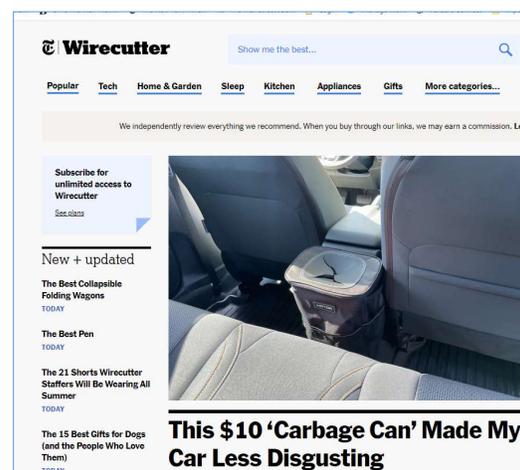
VENABLE_{LLP}

© 2022 / Slide 15

15

Review Sites

- Review gating is deceptive if the result is that posted reviews are substantially more positive than if the advertiser did not engage in gating
- Setting up an apparently independent review site that reviews sellers' own products and competing products is deceptive.
- Paying to boost ranks on third-party sites is deceptive regardless of whether a website makes a claim of independence or objectivity
 - However, they can pay review sites for referrals so long as they are disclosed



VENABLE_{LLP}

© 2022 / Slide 16

16

Disclosures of Generally Expected Results

- Under existing Guides, when an advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the ad must clearly and conspicuously disclose the generally expected performance in the depicted circumstances.
- The proposed Guides would add that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.

Assume that WeightAway is a diet and exercise program and a person appearing in a WeightAway ad says, "I lost 50 pounds in 6 months with WeightAway."

Very few WeightAway users lose 50 pounds in 6 months and the ad discloses, "The typical weight loss of WeightAway users who stick with the program for 6 months is 35 pounds." In fact, only one-fifth of those who start the WeightAway program stick with it for 6 months. The disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program. In other words, even with the disclosure, the ad does not communicate what people who join the WeightAway program can generally expect.

VENABLE_{LLP}

© 2022 / Slide 17

17

Disclosure of Material Connections

- 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, of being paid, or of appearing on television or in other media promotions.
- A material connection can exist regardless of whether the advertiser requires an endorsement for the payment or free or discounted products.
- A material connection does not need to be disclosed with complete details, but the disclosure must be "clear and conspicuous" (as newly defined) and "must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance."

VENABLE_{LLP}

© 2022 / Slide 18

18

Endorsements Directed to Children

- FTC proposes to add a new section to the Guides for endorsements directed to children because “Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.”
- However, the FTC first plans to collect more information and data before issuing specific proposals. It will hold an event on October 19, 2022 to address:
 - 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



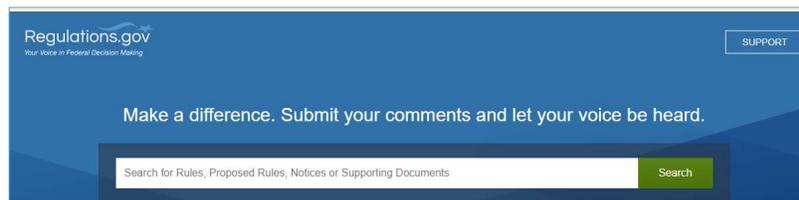
VENABLE_{LLP}

© 2022 / Slide 19

19

What’s Next?

- These are only proposals! Stakeholders have an opportunity to comment on the proposals and shape the final guidelines.
- Comments are due to FTC within 60 days of publication in the Federal Register.
- The next time that FTC is likely to reconsider the Endorsement Guides is in 10 years



VENABLE_{LLP}

© 2022 / Slide 20

20

Questions?



Leonard L. Gordon
Partner
212.370.6252
lgordon@Venable.com



Alexandra Megaris
Partner
212.379.6210
amegaris@Venable.com

VENABLE_{LLP}

© 2022 / Slide 21

21

© 2022 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE_{LLP}

22