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FTC Revamps the “Guides Concerning the Use of Endorsements and Testimonials in Advertising”

The U.S. Federal Trade Commission (“FTC” or “the Commission”) maintains *Guides Concerning Use of Endorsements and Testimonials in Advertising* to “set forth the general principles that the Commission will use in evaluating endorsements and testimonials” in advertising, marketing, and other promotional messaging.¹ The Guides are issued as “administrative interpretations” in Part 255 of Title 16 of the Code of Federal Regulations.² FTC also maintains a list of frequently asked questions about the Guides on its website.³

On July 26, 2023, FTC adopted revisions to the Guides.⁴ Through the revised Guides, FTC provides: (i) its current interpretation concerning the application of Section 5 of the Federal Trade Commission Act (“FTC Act”); and (ii) guidance to assist businesses and others to ensure their advertising using reviews or endorsements are truthful (*i.e.*, not unfair or deceptive under Section 5).⁵ More broadly, FTC reveals how it intends to grapple with questions that have emerged over the last 15 years, since the Commission last updated the Guides,⁶ as advertising and marketing practices have evolved, especially with respect to the use of social media and other online platforms for advertising and promotion.

FTC issued the highly anticipated revised Guides as part of its periodic review process, which included requests for public comments in February 2020 and July 2022.⁷ Corresponding with the publication of the revised Guides, FTC updated its online business guidance resource that answers frequently asked questions about the Guides.⁸

The revised Guides yield new provisions and minor adjustments to existing ones. Some of the changes stand to make a significant impact on industry, including: (i) refining and establishing new definitions; (ii) providing notice about the potential liability of advertisers, endorsers, and intermediaries; (iii) clarifying the requirements for consumer and expert endorsements, and the disclosure of close material connections;



and (iv) contemplating a different framework for evaluating endorsements targeting children. We briefly discuss the key updates, below.

A. Revised and New Definitions Under the Guides

The revised Guides adopt amended definitions for “endorsements” and “endorsers,” and a new definition of “clear and conspicuous” to help evaluate whether FTC is likely to consider a disclosure to be effective. Notable changes to these definitions are described below.

- “Endorsements” can include tags in social media posts (e.g., a well-recognized professional golfer posts a video of themselves practicing numerous drives off the tee and tags or mentions the golf ball brand in the post) and fake positive reviews used to promote a product.⁹
- “Endorsers” can include a party who may *appear* to be an individual, a group, or an institution.¹⁰ In effect, “endorsers” encompass virtual influencers, writers of fake reviews, and non-existent entities that purport to give endorsements.¹¹
- A disclosure is “clear and conspicuous” if it is “difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers.”¹² For example, it is not clear and conspicuous for a social media influencer who endorses a vitamin product in their social media *posts* to only disclose their connection to the product manufacturer on their social media profile *page* because audiences viewing the paid posts could easily miss the disclosure.¹³ The revised Guides also update an existing example about an athlete endorser who speaks on a television talk show about her experience with vision correction surgery, and who is paid to do so. The Guides now clarify that a disclosure of that payment during the show’s closing credits would not be clear and conspicuous.¹⁴
- Importantly, the “clear and conspicuous” assessment will be evaluated from the perspective of the targeted audience (*i.e.*, the “ordinary consumers”). For example, if a television advertisement promotes a smartphone app to older senior citizens and discloses that the featured senior citizens are actors, then the assessment of whether such an endorsement is clear and conspicuous would consider the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities.¹⁵

B. General Considerations for Potential Liability of Advertisers, Endorsers, and Intermediaries

The revised Guides consider the potential liability of advertisers and intermediaries with respect to representations made through endorsers, and also consider the potential liability of endorsers themselves. Some notable changes are described below.

- **Advertisers:** An advertiser may be liable for a deceptive statement even when the endorser is not liable.¹⁶ Accordingly, the revised Guides expect advertisers to provide guidance to their endorsers, monitor the actions of their endorsers for compliance, and take action to correct non-compliance and prevent future non-compliance by their endorsers.¹⁷ FTC, in its corresponding business guidance, provides additional recommendations about advertisers’ monitoring programs. It states that advertisers should have reasonable programs to train and monitor their endorsers, which should include the following elements:
 - (i) Explain what endorsers can (and cannot) say about the products;
 - (ii) Instruct endorsers on their responsibilities for clearly and conspicuously disclosing their connections to the advertiser, including how exactly how they should make the disclosures;
 - (iii) Periodically search for what endorsers are saying; and
 - (iv) Take appropriate action if the advertiser finds questionable practices.¹⁸



- **Endorsers:** The revised Guides include a new discussion of endorsers' potential liability for representations made in the course of their endorsements. Specifically, endorsers may be liable when they: (i) make a representation that they know or should know to be deceptive; (ii) (for non-expert endorsers) make a misleading or unsubstantiated representation regarding a product's performance or effectiveness (e.g., a representation that is inconsistent with the endorser's personal experience or was not made or approved by the advertiser and goes beyond the scope of the endorser's personal experience); or (iii) fail to disclose unexpected material connections between themselves and an advertiser.¹⁹
- **Intermediaries:** The revised Guides also add a new discussion about the potential liability of "intermediaries" for their roles in inappropriate endorsements. Specifically, an intermediary (i.e., advertising agency, public relations firm, review broker, reputation management company, and "other similar intermediaries") may be liable for their role in creating or disseminating endorsements containing representations that they know or should know are deceptive, or that fail to disclose unexpected material connections.²⁰ Like advertisers, FTC recommends that intermediaries have reasonable programs to train and monitor the endorsers that they pay or whose endorsements they direct.²¹

C. Consumer Endorsements

The revised Guides clarify advertisers' responsibilities to substantiate claims in consumer endorsements and how to disclose generally expected performance results. They also provide guardrails to avoid misrepresenting consumer reviews. Some key additions to the Guides are described below.

- An advertiser who employs a consumer endorsement about the performance of an advertised product "must possess and rely upon adequate substantiation" (including competent and reliable scientific evidence, when appropriate) to support both express and implied performance claims made through endorsements.²²
- When an advertiser does not have substantiation that an endorsement is representative of the results that consumers can generally expect to achieve, then the advertiser should "clearly and conspicuously" disclose the generally expected performance results. The revised Guides elaborate that such disclosure should be "in a manner that does not itself misrepresent what consumer can expect. To be effective, such disclosure must alter the net impression of the advertisement so that it is not misleading."²³
- Advertisers should not procure, suppress, boost, organize, publish, upvote, downvote, report, or edit consumer reviews about their products in a manner that has the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements.²⁴ For example, a retailer that enables consumers to review and rate its products on its website using a five-star scale should not suppress or refuse to publish any reviews that contain negative comments or that rated the products fewer than four stars.²⁵

D. Expert Endorsements

The revised Guides refine the parameters for expert endorsements by requiring that such endorsements be supported by an actual exercise of the expertise "that the expert is represented as possessing."²⁶ For example, it would be misleading for a medical doctor to endorse a drug as one that can safely allow consumers to lower their cholesterol by 50 points if such endorsement was based on mere letters from consumers or the results of a rodent study because these materials are not the type of scientific evidence that others with the represented degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.²⁷

E. Disclosure of Material Connections

The revised Guides provide that material connections (i.e., those that might materially affect the weight or credibility of the endorsement) between the endorser and the advertised product should be disclosed clearly and conspicuously if a "significant minority" of the audience does not understand or expect the connection.²⁸ These connections can include:



(i) a business, family, or personal relationship; (ii) monetary payment or the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return; and (iii) other benefits to the endorser such as early access to a product, or the possibility of being paid, winning a prize, or appearing on television or in other media promotions.²⁹

The revised Guides do not quantify “significant minority” of an audience.³⁰ Rather, the revised Guides note that whether a particular connection is (or is not) expected by an audience constitutes a fact-specific inquiry and, in some cases, might require empirical testing.³¹

The revised Guides do not require disclosure of “the complete details of the material connection,” but FTC does expect the disclosure to communicate the nature of the connection clearly and sufficiently for consumers to evaluate its significance.³² For example, a blogger that reviews coffee makers and receives a portion of the sale when consumers purchase the product through their affiliate link should clearly and conspicuously disclose that they receive compensation.³³ The blogger can do so by stating, “I get commissions for purchases made through links in this post” or “paid link” right next to the affiliate link.³⁴

F. Endorsements Directed to Children

The revised Guides appreciate there may be special concerns with endorsements in advertisements addressed to children given the character of the audience. These cases may raise scrutiny about advertising practices that otherwise would not ordinarily be questioned in advertisements geared toward adults.³⁵

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This client alert highlights some key and potentially impactful changes to FTC’s *Guides Concerning Use of Endorsements and Testimonials in Advertising*. The revised Guides, the preamble to the final rule in the Federal Register, and the frequently asked questions on FTC’s website all provide additional, valuable insight into, and examples of, the way FTC is likely to apply the statutory prohibition against deceptive or unfair advertising in endorsements and testimonials. We recommend reviewing them in their entirety.

King & Spalding LLP regularly counsels life sciences companies on all issues related to advertising and promotion. Please let us know if you have any questions or concerns regarding this final guidance, or if we can be of any assistance applying this guidance to your advertising and marketing practices.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

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¹ See 16 C.F.R. § 255.0(a).

² *Id.*

³ U.S. Fed. Trade Comm'n, *FTC's Endorsement Guides: What People Are Asking* (June 2023), <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>.

⁴ 88 Fed. Reg. 48092, 48092 (July 26, 2023) ("Final Rule").

⁵ U.S. Fed. Trade Comm'n, Press Release, *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements* (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements>.

⁶ *Id.*

⁷ Final Rule at 48092–93; 87 Fed. Reg. 44288, 44289 (July 26, 2022) (request for public comments on proposed revisions to the Guides); 85 Fed. Reg. 10104, 10104 (Feb. 21, 2020) (request for public comments on the overall costs, benefits, and regulatory and economic impact of the Guides).

⁸ *FTC's Endorsement Guides: What People Are Asking*.

⁹ Final Rule at 48093; 16 C.F.R. § 255.0(b), (g)(5), and (g)(12)

¹⁰ Final Rule at 48093; 16 C.F.R. § 255.0(b).

¹¹ Final Rule at 48903.

¹² *Id.* at 48093–94; 16 C.F.R. § 255.0(f).

¹³ 16 C.F.R. § 255.0(g)(9).

¹⁴ *Id.* § 255.5(b)(3).

¹⁵ *Id.* § 255.0(g)(10).

¹⁶ *Id.* § 255.1(d).

¹⁷ Final Rule at 48095; 16 C.F.R. § 255.1(d).

¹⁸ *FTC's Endorsement Guides: What People Are Asking*.

¹⁹ Final Rule at 48096; 16 C.F.R. § 255.1(e).

²⁰ Final Rule at 48096; 16 C.F.R. § 255.1(f).

²¹ *FTC's Endorsement Guides: What People Are Asking*.

²² Final Rule at 48096–97; 16 C.F.R. § 255.2(a).

²³ Final Rule at 48097; 16 C.F.R. § 255.2(b).

²⁴ Final Rule at 48097–98; 16 C.F.R. § 255.3(d).

²⁵ 16 C.F.R. § 255.3(e)(8).

²⁶ Final Rule at 48099; 16 C.F.R. § 255.3(a).

²⁷ Final Rule at 48099; 16 C.F.R. § 255.3(c)(6).

²⁸ Final Rule at 48099–100; 16 C.F.R. § 255.5(a).

²⁹ 16 C.F.R. § 255.5(a).

³⁰ Final Rule at 48100 n.119. However, FTC has previously taken the position that, in the context of net claim takeaway from an ad, "net takeaway of 10%—or even lower—supported finding that the ads communicated the claims at issue." *Id.* (citing *Telebrands Corp.*, 140 F.T.C. 278, 325 & n.47 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006)).

³¹ *Id.* at 48100.

³² *Id.*; 16 C.F.R. § 255.5(a).

³³ 16 C.F.R. § 255.5(b)(11).

³⁴ *FTC's Endorsement Guides: What People Are Asking*.

³⁵ Final Rule at 48102; 16 C.F.R. § 255.6.