FTC Proposes Revisions to its Endorsement Guides and .com Guidance

Posted on July 25, 2022 by Andrew Lustigman, Morgan Spina

The Federal Trade Commission (“FTC”) is set to issue updates to both its Endorsement Guides and .com Disclosure Guidance. The proposed updates to both guidance documents signifies the FTC’s ongoing attention to online and social media advertising, as the regulator takes steps to bring its guidance into focus with contemporary advertising issues.

Endorsement Guides

The FTC is seeking public comment in response to proposed updates to its Endorsement Guides. The Endorsement Guides, first enacted in 1980 and later amended in 2009, are intended to assist marketers in ensuring that their endorsement and testimonial advertising practices comply with the requirements of Section 5 of the FTC Act.

The proposed revisions cover a wide range of issues, ranging from “fake” reviews to influencers concealing that they have been paid to post about a certain product. Below is a summary of some of the key provisions:

- Expanded definition of “endorsement”: The revised definition would clarify that “marketing” and “promotional” messages can be endorsements. For example, when a social media user tags a brand in a post, that could be considered an endorsement as the takeaway is likely that the poster likes the brand that they tag.

- Bots or fake social media accounts: The FTC would note in a footnote that it is a deceptive practice for social media users to purchase or create indicators of social media influence (for example, likes or followers) in order to misrepresent such influence for a commercial purpose.

- New “clear and conspicuous” definition: The revised Guides would define a “clear and conspicuous” disclosure as one that is “difficult to miss (e., easily noticeable and easily understandable by ordinary consumers).” Further, the revised Guides would stated that when the triggering claim is visual the disclosure should be at least visual, when the triggering claim is audible the disclosure should be at least audible, and when the triggering claim is both visual and audible the disclosure should be both visual and audible.

- Built-in disclosure tools: The FTC notes that it supports development of built-in disclosure tools in social media platforms, but cautioned that some of the existing ones are “too poorly contrasting, fleeting, or small, or may be placed in locations where they do not catch the user’s attention.” As such, the FTC notes that platforms should “carefully evaluate their disclose tools and what they say about them to ensure they are not exposing themselves or their users to liability.” Further, disclosures may need to be evaluated from the viewpoint of the target audience.

- Liability: The revised Guides would clarify that endorsers may be liable for their statements when they make representations that they know or should know to be deceptive, and when they fail to disclose an unexpected material connection between themselves and an advertiser. Further, intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements. Such intermediaries may also be liable for their roles in failing to disclosure unexpected material...
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- **Consumer endorsements:** The revised Guides would include a new provision stating that in procuring, suppressing, boosting, organizing, or editing consumer reviews of their products, advertisers should not take actions that effectively distort or otherwise misrepresent what consumers think of their products. There would also be a footnote stating that advertisers are not required to display consumer 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 the criteria for withholding reviews is applied uniformly.

- **Disclosure of material connections:** The revised Guides would clarify that material connections can include business, family, or personal relationships, monetary payments, free or discounted products or services, early access to a protection, or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions.

- **New section regarding endorsements directed to children:** The revised Guides would include a new section acknowledging that “Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.” To provide further guidance, the FTC has scheduled a virtual public event on October 19, 2022 titled “Protecting Kids from Stealth Advertising in Digital Media.”

**.com Disclosures: How to Make Effective Disclosures in Digital Advertising**

The FTC is also seeking public comment on ways to update its .com Disclosures. The .com Disclosures, first published in March 2013, provide guidance to businesses on digital advertising and marketing. In particular, the .com Disclosures instruct that consumer protection laws apply to online advertisers, as they do the advertisers in other media, and that any necessary disclosures must be clear and conspicuous.

In its press release announcing the potential revisions to the .com Disclosures, the FTC states that some companies are incorrectly citing the .com Disclosures to justify dark patterns or other online deceptive behavior, including burying disclosures behind hyperlinks. The FTC is seeking public comment on possible revisions related to the following issues:

- Sponsored and promoted advertising on social media;
- Use of advertising content embedded in games;
- Dark patterns;
- Effectiveness of online disclosures;
- Outdated or unnecessary sections of the current .com Disclosures;
- How the guidance can clarify appropriate use and labeling of hyperlinks;
- How to make qualifying disclosures when consumers must navigate multiple webpages in order to make a purchase;
- Advertising on mobile devices;
- Issues unique to specific audiences or demographics in seeing, hearing, or comprehending disclosures; and
- Advertising that appears in virtual reality or the metaverse.

Public comments must be received on or before August 2, 2022.
Takeaway: The FTC’s proposed updates to both its Endorsement Guides and .com Disclosures reflect a continuing effort to target online and social media marketing that it believes to be misleading and deceptive. Over the past several years, the FTC has focused on advertisers’ use of consumer reviews and endorsements by bringing enforcement actions and sending warning letters to companies it believes are not adequately comporting with existing guidance. These proposed updates suggest that the FTC views these issues with the utmost importance, and is likely to continue enforcement efforts in this space.

Tags: Advertising Law, Bloggers and Influencers, endorsement, FTC, Promotion, Social Media