

# FTC Addresses Social Media, Influencers, Consumer Reviews in Proposed Endorsement Guides Amendments

Skadden

05 / 26 / 22

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

**Anthony J. Dreyer**

Partner / New York  
212.735.3097  
anthony.dreyer@skadden.com

**Margaret E. Krawiec**

Partner / Washington, D.C.  
202.371.7303  
margaret.krawiec@skadden.com

**David M. Lamb**

Associate / New York  
212.735.3421  
david.lamb@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

1440 New York Ave., N.W.  
Washington, D.C. 20005  
202.371.7000

On May 19, 2022, the Federal Trade Commission (FTC) voted unanimously to approve and publish for public comment proposed amendments to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides). The Guides assist businesses in conforming their endorsement and testimonial advertising practices to Section 5 of the FTC Act, an increasingly important function given the rise in social media and influencer-based advertising. Indeed, according to the FTC, the proposed changes to the Guides reflect the new ways advertisers use technology to reach consumers, including through social media and product reviews.

The amendments, which were proposed on March 19, 2022, include a number of significant changes to the Guides that will impact both advertisers and those they hire if they are enacted.

## Modifications to Key Definitions

The amendments clarify, modify or define a number of key terms, including the following:

- The definition of “endorsement” is revised to clarify that “marketing” and “promotional” messages can be endorsements, and it specifically notes that tags in social media posts can be endorsements.
- The definition of “endorser” is expanded to include not just “an individual, group, or institution,” as under the current Guides, but also those who **appear to be** individuals, groups or institutions. This change targets so-called “virtual influencers,” or computer-generated avatars with realistic characteristics and personalities that are quickly becoming more and more popular, especially on platforms like Instagram.
- A definition for “clear and conspicuous” is added, defining a “clear and conspicuous” disclosure as one that is “difficult to miss and easily understandable by ordinary people.” Under this definition, the FTC will evaluate the effectiveness of a disclosure from the perspective of members of the target group when an endorsement targets a specific audience.

## New Section Addressing Consumer Reviews

The amendments would add a new section (Section 255.2(d)) addressing both fake consumer reviews and the suppression of negative reviews. The new section would warn advertisers against taking actions that distort or misrepresent what consumers think about their products or services when taking any action with respect to consumer reviews.

The FTC included several examples of what types of review-focused actions can be misleading under this new section, such as buying positive reviews, suppressing negative reviews, deleting negative reviews or engaging in “review gating,” the practice of soliciting customer feedback but only directing those who had a positive experience to leave a review.

## Updated Guidance on Disclosing ‘Material Connections’

The amendments provide updated guidance concerning disclosing “material connections” between advertisers and endorsers. While under the existing Guides, advertisers must “fully” disclose any “connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement,” the Amendments specify that advertisers must “clearly and conspicuously” (as newly defined) disclose any material connection between themselves and endorsers.

# FTC Addresses Social Media, Influencers, Consumer Reviews in Proposed Endorsement Guides Amendments

---

The amendments also include new examples of material relationships, including a business, family or personal relationship, as well as where the advertiser provides payment, free products or services, early access to products or the chance to win a prize to endorsers or reviewers.

## New Sections Clarifying Endorser and Intermediary Liability

The amendments add new sections clarifying when endorsers and intermediaries may be subject to liability for disseminating misleading endorsements. Under the existing Guides, endorsers may be “liable for statements made in the course of their endorsements.” The amendments add a new section clarifying that endorsers may also be liable for making statements that they “know or should know to be deceptive.” Similarly, the amendments include a new section clarifying that marketing firms and other intermediaries may be liable for their role in disseminating endorsements that they “knew or should have known were deceptive.”

## New Section on Endorsements Targeting Children

The amendments add a new section emphasizing that endorsements that target children are of special concern to the FTC, given the likelihood that children will be impacted differently than adults by endorsements in advertising. In order to provide further guidance on this specific topic, the FTC will hold a public event on October 19, 2022, to examine online advertising directed toward children.

## Request for Public Comment

The FTC is accepting online or paper comments on the proposed amendments. Comments must be received by July 18, 2022, and will be published on [Regulations.gov](https://www.regulations.gov).

## Implications

- The amendments represent a broadening of the FTC’s Endorsement Guides, both in terms of the parties it covers (such as intermediaries) and the prohibited activities. While it is in line with recent enforcement actions and public statements, impacted parties should keep in mind that the FTC appears to be intending to crack down even further on what it views as deceptive practices in the endorsement space (particularly in light of the unanimous commission approval of the amendments).
- Advertisers and endorsers that target particular audiences, especially children, should pay particular attention to the proposed changes and ensure that their statements are not deceptive under the new guidance and their disclosures are “clear and conspicuous” from the target audiences’ perspective.
- Companies that collaborate with social media influencers should evaluate whether their relationship is “material” and, if so, assess their disclosure practices to ensure they meet the “clear and conspicuous” standard articulated in the revised Guides.
- Online platforms that solicit consumer reviews or depend on consumer reviews to promote a product should verify the authenticity of the reviews on their platform and ensure that their platform does not privilege positive reviews or suppress negative ones.