

FTC Attorney on Endorsement Guide Compliance

Article By:

Richard B. Newman

Influencer marketing and review websites have attracted a great deal of attention recently by states and federal regulatory agencies, including the FTC. The [FTC's Endorsement Guides](#) addresses the application of Section 5 of the FTC Act to the use of endorsements and testimonials in advertising.

At their core, the FTC Endorsement Guides (the "Guides") reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. The Guides suggest several best practices, including, but not limited to the following:

1. Influencers must be legitimate and bona fide users, and endorsements must reflect honest opinions.
2. Endorsers cannot make claims about a product that would require proof the advertiser does not have. Blogger and brands are potentially subject to liability for claims with no reasonable basis therefor.
3. Clearly and conspicuously disclose material connections between advertisers and endorsers (e.g., a financial or family relationship with a brand)
4. To make a disclosure "clear and conspicuous," advertisers should use plain and unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily. They should not have to look for it. Generally speaking, disclosures should be close to the claims to which they relate; in a font that is easy to read; in a shade that stands out against the background; for video ads, on the screen long enough to be noticed, read, and understood; and for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.
5. Never assume that a social media platform's disclosure tool is sufficient. Some platforms' disclosure tools are insufficient. Placement is key.
6. Avoid ambiguous disclosures like #thanks, #collab, #sp, #spon or #ambassador. Clarity is crucial. Material connection disclosures must be clear and unmistakable.
7. Do not rely on a disclosure placed after a CLICK MORE link or in another easy-to-miss location.
8. Advertisers that use bloggers and other social media influencers to promote products are responsible for implementing reasonable training, monitoring and compliance programs (e.g., educating members about claim substantiation requirements and disclosing material connections, searching for what people are saying and taking remedial action).
9. Statements like "Results not typical" or "Individual results may vary" are likely to be interpreted to mean that the endorser's experience reflects what others can also expect.

Therefore, advertisers must have adequate proof to back up the claim that the results shown in the ad are typical, or clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

10. Brands can ask customers about their experiences and feature their comments in ads. If they have no reason to expect compensation or any other benefit before they give their comments, consult with an [FTC CID and defense attorney](#) to assess whether a disclosure is necessary. If customers have been provided with a reason to expect a benefit from providing their thoughts about a product, a disclosure is probably necessary.

What about affiliate marketers with links to online retailers on their websites that get compensated for clicks or purchases? According to the FTC, the material relationship to the brand must be clearly and conspicuously so that readers will be able to decide how much weight to give the endorsement. In some instances – like when the affiliate link is embedded in a product review – a single disclosure *may* be adequate.

When the review has a clear and conspicuous disclosure of a material relationship and the reader can see both the review containing that disclosure and the link at the same time, readers may have the information they need. However, if the product review containing the disclosure and the link are separated, readers may not make the connection.

Never put disclosures in obscure places, behind a poorly labeled hyperlink or in a “terms of service” agreement. That is not enough. Neither is placing a disclosure below the review or below the link to the online retailer so readers would have to keep scrolling after they finish reading.

Consumers should be able to notice disclosures easily.

U.S. regulators are not the only ones policing influencer disclosures. In fact, the Competition and Markets Authority, the British government agency that regulates advertising, recently sent numerous warning letters to British celebrities and other social media influencers. The [CMA](#) has also recently released its guidelines for influencers.

The FTC has already demonstrated that it monitors accounts of popular influencers. It has also demonstrated that it can and will initiate investigations and enforcement actions. Brands are well advised to review promotional practices, implement written policies and monitoring protocols.

© 2024 Hinch Newman LLP

National Law Review, Volumess IX, Number 266

Source URL: <https://natlawreview.com/article/ftc-attorney-endorsement-guide-compliance>