

How Proposed FTC Shift May Affect Influencer Campaigns

By **Gonzalo Mon** (May 26, 2022, 6:26 PM EDT)

The Federal Trade Commission recently proposed changes to their guides concerning the use of endorsements and testimonials in advertising, more commonly known as the endorsement guides.

Although the guides cover a lot of ground, attorneys who work with influencers may know the guides best for the ground rules they establish for influencer campaigns, including the requirement that influencers clearly disclose their connections to the companies they promote.

Those ground rules were last updated in 2009, before the word "influencers" was common in marketing vocabulary. But although the guides themselves haven't been updated since then, the FTC has continued to flesh them out through enforcement actions, warning letters, and various types of business guidance.

The proposed edits follow a request for comments in 2020 and largely serve to collect a lot of the FTC's periodic guidance and put it together in one place with some new examples.

The FTC's May 19 announcement kicks off a 60-day comment period, after which the commission will review the comments and consider whether to make additional changes. Even though it will be at least a few months before that happens, the announcement gives us a good glimpse into what we can expect to see in the final version.

This article outlines a few of the key changes, examines how they relate to previous FTC guidance, and considers what attorneys should be thinking about when they look at new campaigns.

What Is an Endorsement?

The endorsement guides state that if there is material connection between an influencer and the company whose products the influencer endorses, the influencer must generally disclose that connection in a clear and conspicuous manner.

Before we delve into the details about when a disclosure is necessary and how it must be made, it's important to understand what constitutes an endorsement. Many cases are fairly obvious, but the FTC has interpreted the term rather broadly.



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The FTC proposes an example of a woodworking influencer who posts videos of various projects. In some of the videos, the influencer uses "an expensive full-size lathe" that a manufacturer sent him for free. The influencer uses the lathe for several products and comments favorably about it in videos.

The FTC concludes that these favorable comments constitute an endorsement which would, in most cases, require a disclosure — we'll look at a possible exception later.

The idea that favorable comments about a product constitute an endorsement isn't controversial, but the FTC has opined that even more subtle promotions can also constitute endorsements. Consistent with previous guidance, the FTC writes that "when a social media user tags a brand in a post, it generally communicates that the poster uses or likes the brand."

Accordingly, the FTC proposes updating the definition of endorsement to indicate that "tags in social media posts can be endorsements."

Although a tag may trigger a disclosure requirement, it's possible that simply showing a product may not. In one example, the FTC discusses a tennis player who wears clothing bearing the logo of an athletic company with whom the athlete has an endorsement agreement while on a talk show.

The FTC notes that a disclosure will not be required because "the athlete does not mention the clothes or the company during the appearance on the show." Presumably, the same holds true in a social media post.

What Must Be Disclosed?

Influencers may be compensated in different ways and the amount of compensation may vary significantly. For example, influencers may get free products, money, or a share of revenue.

In response to its 2020 request, one commenter asked the FTC to clarify that influencers don't have to disclose "the exact nature or amount" of their compensation, while another thought influencers should be required to say how much they get paid "because it will help star-struck consumers appreciate the lack of honesty in celebrity posts."

Happily, the FTC didn't agree with the second commentator. Instead, the FTC proposes to clarify that "the disclosure of a material connection does not require the complete details of the connection." However, "it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance."

That's somewhat helpful — particularly given the proposed alternative — but it's still not clear exactly how much detail the FTC expects.

Over the years, there has been some debate over what words influencers should use to disclose their connections. For example, the FTC has previously opined that #ad may be sufficient, but that it won't work if it's hidden between other hashtags.

And they've opined that although terms like #sponsored may be sufficient, abbreviations like #spon are not. The proposed revisions don't address these issues, though, so — barring any updates — attorneys who work on these campaigns will need to rely on existing guidance.

How Must the Disclosure Be Made?

The general standard is that disclosures must be clear and conspicuous. Marketers who have lamented that the standard is vague will likely not be happy with the FTC's proposed specificity.

For example, the FTC addresses things like font size, placement, contrast, and time on screen. In general, though, disclosures should be easy to see and understand. The FTC also provides a few examples that shouldn't come as a surprise to those of us who have been following the ocmmission's actions in this space.

In one example, the FTC mentions that an influencer includes a disclosure in her posts, but that in order to see the disclosure, consumers have to click on a link labeled more.

The FTC concludes that this disclosure is not clear and conspicuous. This position is consistent with the FTC's settlement with Teami LLC in 2020. In that case, various influencers — including Cardi B — used the hashtag #TeamiPartner, but consumers wouldn't see it unless they clicked the "more" link on Instagram.

The Teami settlement required "clear and conspicuous" disclosures and went into detail about what that means. For example, the settlement required that a disclosure must appear "very near" the endorsement, presented in a manner that is "unavoidable" by consumers, and it must use understandable language. The FTC clarified that a disclosure "made through a hyperlink, pop-up, interstitial, or other similar technique" is not sufficient. Those concepts seem to be making their way into the guides.

What about the tools that various social media platforms have developed to help influencers make disclosures? The FTC has cast doubt on those tools several times over the past few years, and those doubts are repeated here.

Specifically, the FTC is "concerned 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." This comment suggests that some tools may be OK, but the FTC doesn't name any names.

Is a Disclosure Always Required?

Although, as discussed above, influencers must generally disclose the connections they have to the companies whose products they endorse, the FTC leaves room for the idea that a disclosure may not be necessary if consumers are likely to understand or expect that the influencer has a connection to the company whose products she is endorsing. That concept exists in the current guides, though the FTC provides some additional commentary in the proposed edits.

When the endorsement guides were last updated in 2009, it's likely that many people did not understand that influencers were being paid to promote products on social media. That has probably changed, to a certain extent, as the use of influencers has become more prevalent.

One commenter responding to the 2020 request suggested that the FTC update the guides to acknowledge that for some famous influencers, sponsorships are often expected and, therefore, that a disclosure may not be necessary.

The FTC said in its commentary that "without accepting or rejecting that proposition," it proposes stating that an endorser's material connection need not be disclosed "when it is understood or expected by all but an insignificant portion of the audience."

That language is carried through to the woodworking influencer example discussed above. The FTC writes that if "a significant proportion of viewers are likely unaware that the influencer received the lathe free of charge," the influencer should disclose that he got it for free.

Although this line of commentary may provide marketers with some hope that they can loosen their disclosures requirements, it's barely a glimmer. Marketers and the FTC are likely to disagree over what "all but an insignificant portion of the audience" are likely to understand or expect, and proving that could be difficult.

Context will matter — and each case has to be considered individually — but in most campaigns, a disclosure will be the safer option.

What About Kids?

The FTC received comments expressing widely diverging opinions about the use of influencers when marketing to children and whether children are able to understand the types of disclosures that the FTC seems to be comfortable with for an adult audience. Ultimately, the FTC did not take a position on this, noting that they would benefit from more evidence than provided in the comments in order to develop specific guidance or best practices.

Accordingly, FTC staff plans to hold a public event to gather research and expert opinion on:

- Children's capacities at different ages and developmental stages to recognize and understand advertising content and distinguish it from other content;
- The need for and efficacy of disclosures as a solution to the problem facing children of different ages; and
- If disclosures can be efficacious, the most effective format, placement, and wording for disclosures.

Stay tuned for more guidance in this area.

What About Claims Made by Influencers?

Although the FTC investigations involving influencer campaigns over the past decade have generally focused on the issue of whether influencers have adequately disclosed their connection to the companies they endorse — and most of the proposed edits touch on that same issue — it's also important to keep in mind that companies can be held liable if influencers make claims that the companies couldn't otherwise substantiate themselves.

The FTC proposes to update an existing example of an influencer that is asked to post a review of a body lotion. Although the advertiser does not make any claims about the lotion's ability to cure skin conditions, the influencer claims that the lotion cures eczema.

The FTC writes that the advertiser could be liable for any misleading or unsubstantiated representations in the post, even though the advertiser didn't provide or approve them.

As with the current guides, the FTC encourages advertisers to provide guidance to influencers to help ensure they don't make any problematic claims or fail to make necessary disclosures. Advertisers should also monitor influencers' compliance and "take steps necessary to remove and halt the continued publication of deceptive representations when they are discovered and to ensure the disclosure of unexpected material connections."

What Now?

As noted above, many of the FTC's proposed edits serve to compile some of the guidance we've seen in enforcement actions, warning letters and various types of business guidance over the past decade.

For attorneys who have been following this area closely and adapting their advice to comply with that guidance, adapting to the updated guides shouldn't be a heavy lift. But if you've missed a few steps, now may be a good time to catch up.

Here's a quick checklist:

- Ensure that your company clearly tells influencers exactly how they need to disclose their relationship to the company, including what words to use and where those words should appear. This shouldn't just be buried in your contract. Provide easy-to-read guidelines that your influencers can find without having to wade through legal language.
- Consider whether it makes to provide guidelines about what influencers can and can't say about your products, so that you can avoid problematic claims. In some cases, you may also want to require influencers to participate in a training session.
- In many cases, it makes sense to require influencers to submit posts to you for approval before they go live. Make sure that whoever is reviewing those posts is trained to spot problems with the posts. Needless to say, they should not approve any post in which the influencer that includes a problematic claim or fails to include a necessary disclosure.
- Establish procedures to monitor influencers to ensure they comply with the law. (This is particularly important if you don't preapprove posts.) If you find problems, make sure that you move quickly to address them. Contact the influencers and tell them to fix the problem. In the meantime, make sure you don't promote the problematic posts.

If you haven't taken a close look at how your company conducts its influencer campaigns recently, this settlement should provide you a good reason to do so. Check your agreements with influencers and your internal policies and make sure you plug any obvious holes.

And if you want to have input on the next version of the guides, you have the next two months to submit comments.

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