

WEBSTER, CHAMBERLAIN & BEAN, LLP – NONPROFIT ALERT

Federal Trade Commission – Update to Endorsement Guidelines

The Federal Trade Commission (“FTC”) has issued a revised Endorsement Guidelines (hereafter, “Updated Guidelines”) nearly a year after seeking public comment on its initial proposal. The Updated Guidelines are not themselves law but describe the principles that the FTC uses to determine whether endorsements are deceptive under the FTC Act. These new Guidelines are intended to heighten enforcement against deceptive online endorsements, primarily in social media.

Introduction

On June 29, the FTC announced an updated version of its Guidelines Concerning the Use of Endorsements or Testimonials in Advertising. The FTC followed this announcement with the release of a proposed new rule that would prohibit certain types of conduct with respect to consumer reviews or testimonials.

These Updated Guidelines are targeted primarily at the proliferation of digital advertising and the evolving role of “influencers” in endorsing products.¹ However, the Updated Guidelines include several notable revisions and new examples that would have important implications for associations.

Clear and Conspicuous Disclosure – New Definition

One of the most notable changes in the Updated Guidelines is the inclusion of a new definition for “clear and conspicuous.” The FTC Act requires that if disclosure of information is necessary to prevent an advertisement from being deceptive, that disclosure has to be “clear and conspicuous.” Under the prior Guidelines, the test – in essence – was that if a consumer could easily notice, read, and understand the disclaimer it would be regarded as clear and conspicuous.

The Updated Guidelines go further, defining clear and conspicuous as a disclosure that is “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers.” In order for an online disclosure to be “effective, [it] must be unavoidable.” This means that an online platform’s built-in disclosure tool may not be sufficient under the new definition. For example, if an endorsement is visible without having to click on a secondary link (e.g. “click here for more,” which generally was considered enough under the prior definition) then it is likely sufficient because it is not “difficult to miss.”

¹ FTC Chair Lina M. Khan, in a May 2022 statement, said that the “revisions come at a time when influencer marketing is becoming increasingly prevalent and as consumers increasingly rely on online consumer reviews to decide what to buy.”

Broader Liability for Endorsers and Intermediaries

Most notably for the association context, the Updated Guidelines include new language reflecting the FTC's effort to broaden the potential liability of both endorsers and intermediaries. The Guidelines have long required that intermediaries disclose unexpected material connections between themselves and endorsers. Under the prior Guidelines, a connection between the endorser and seller of an advertised product had to be disclosed when it is "not reasonably expected by the audience." The FTC has updated this statement in the Guidelines to say that a "material connection needs to be disclosed when a significant minority of the audience for an endorsement does not understand or expect it." Generally, this increases the likelihood that a disclosure will be required.

The FTC appears to be focusing here primarily on "material connections" in the context of online influencers. This is reflected in FTC Chair Lina Khan's statement last year in advance of the FTC's approval of a request for public comment on proposed amendments to the Guidelines: "Influencers who are paid, receive free product or services, or have a relationship with a brand sometimes fail to disclose that material connection, hoping to appear more authentic to consumers."

So, while the FTC's main focus in changing this wording seems to be on heightening enforcement against online influencers who fail to disclose material connections in marketing products, the language still has meaningful implications for associations acting as intermediaries or endorsers. More to the point, an organization's endorsement "must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization." 16 CFR § 255.4.

Association "Seals of Approval" – New Examples

A new Example 10 appears in the Updated Guidelines which speaks directly to the question of association "seals of approval" for certain products. The Example states that the use of an environmental "seal of approval" from a non-profit, third-party association that charges manufacturers a reasonable fee for the evaluation of their products does not necessitate a disclosure regarding the fee.

The FTC's reasoning here is that in this situation a disclosure is not required because consumers reasonably expect this kind of connection – that is, when they see a "seal of approval" from an association, they assume that the manufacturer has paid money to the association to have it review and give its "seal" to the product in question. More broadly, this indicates that other kinds of association programs that are similar to "seals of approval" will not require disclosure either because consumers will be regarded as reasonably expecting material connections or because – in the case of nonprofits – it is less likely the decision to award the seal "was impacted by the payment."²

² 16 CFR 255, 88 FR 48092, Example 10. The Example supposes a paper company that sells photocopy paper with packaging that has a seal of approval from a non-profit third party association. The paper company pays the association a reasonable fee for the evaluation of its product and its manufacturing process. The Example states that

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Interestingly, however, the FTC has also added a new Example 14 which suggests disclosure may still be required in some circumstances. This Example illustrates a situation in which an Internet Service Provider (ISP) advertises that it has the “Fastest ISP Service” as determined by the “Data Speed Testing Company.” If the ISP commissioned and paid for the analysis of its Internet speed, then that relationship should be clearly disclosed. Likewise, if the “Data Speed Testing Company” is not a “bona fide independent testing organization with expertise” in the subject matter, the endorsement would be considered deceptive. This example shows that the FTC draws a line between bona fide association “seals of approval,” which are more common in the marketplace and frequently encountered by consumers, and the more behind-the-scenes type relationships between companies that consumers are not ordinarily privy to which will more often require disclosure.

Conclusion

The FTC’s release of the Updated Guidelines shows that it is critical for organizations to have clear policies on the use of disclosures when the organization acts as an endorser or intermediary. While the new examples suggest that disclosures will not always be necessary, it will be important to look at each issue on a case-by-case basis to determine whether disclosure is called for under the Updated Guidelines.

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consumers should reasonably expect that marketers have to pay for this kind of certification and so there is no unexpected material connection and no need for disclosure.