

FTC Announces Regulatory Review of Endorsement Guides – Changes and Enforcement Actions Will Likely Follow

February 26, 2020 – The TMCA

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The FTC recently announced a regulatory review of its Endorsement Guides, which provide guidance to marketers to ensure that endorsements and testimonials for products and services are not misleading, particularly as to whether there is a “material connection” between the endorser and the marketer. The Guides interpret laws the FTC administers, and are therefore advisory in nature, but the FTC can take action under the FTC Act if an endorsement or testimonial is inconsistent with the Guides. The Guides were

last revised in 2009 and have gotten quite a workout in the past decade due to the rise of influencer marketing and the increasing role of consumer reviews in the advertisement and promotion of goods and services. In 2017, the FTC staff issued a helpful set of FAQ's that addressed many of the technological advances that took hold of the marketing world in the prior ten years.

In the Request for Public Comment on the Guides, the FTC is seeking input on a wide range of issues including:

- Whether changes in technology or the economy require changes to the Guides
- Have consumer perceptions regarding endorsements changed since the Guides were last revised and, if so, do these changes warrant revising the Guides
- What disclosures of material connections currently being used in social media are likely not understood by consumers
- Whether incentives in the form of free and discounted products bias consumer reviews, even when a favorable review is not required to receive the incentive
- Whether composite ratings that include reviews based on incentives are misleading, even when reviewers disclose incentives in the underlying reviews
- Whether children are capable of understanding disclosures of material connections
- Are there alternatives, such as individual enforcement actions under the FTC Act, which would be more effective or equally effective in addressing those practices?
- Do the Endorsement Guides describe any practices that are not deceptive or unfair,

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and if so, which practices and why are they not deceptive or unfair?

While the Request for Public Comment also asks whether there is a continuing need for the Endorsement Guides and whether changes should be made to reduce the burdens or costs imposed on businesses or endorsers, the Endorsement Guides will likely endure, even if there are more specific examples given or tweaks about how disclosures should be made. The mention of disclosure of material connections when children are involved is interesting - the Request indicates that “the FTC has received complaints that young children may not understand disclosures of material connections.” This may indicate that more specific guidance or rules may be issued when endorsements or reviews are used to market goods and services to minors. Similarly, the requests regarding alternatives, including individual enforcement actions, and whether any covered practices are not deceptive are both interesting questions that could yield some lively response from cutting edge marketers.

The TMCA will be following continuing developments at the FTC on the Endorsement Guides – stay tuned!