

Client Alert: FTC Revises Endorsement FAQs, Provides Additional Answers to Endorsement Disclosure Questions

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The Federal Trade Commission (FTC) has recently released its updated “What People are Asking” FAQs regarding its [Endorsement Guides](#). The FTC’s Endorsement Guides help define what the FTC would consider to be a deceptive practice when using endorsements in advertising. It has been five years since the staff last updated the FAQs – a “lifetime in blog” years, according to the FTC’s [Lesley Fair](#). While this update did not change the fundamentals of the Endorsement Guides, it addresses how the Guides impact some of the issues advertisers are facing today. These include more nuanced questions relating to specific social media sites, greater detail regarding monitoring of endorsement programs, and major “dos” and “don’ts” for ensuring that necessary disclosures are clear and conspicuous.

Social Media

Facebook and Instagram “Likes”: The FTC staff recognized that some sites, like Facebook and Instagram, do not allow disclosures when using a “like” button. In general, the FTC noted that advertisers shouldn’t incentivize use of endorsement features like these that don’t allow for clear and conspicuous disclosures. However, the FTC also noted that failure to disclose incentivized likes “might not be a problem” because “we don’t know at this time how much stock social network users put into ‘likes’ when deciding to patronize a business.”

The FTC staff did highlight practices that would be clearly deceptive with “likes,” such as buying fake “likes.” Guidance is provided that advertisers should be wary of advertising partners who promise to increase the number of “likes,” as the “likes” may come from accounts tied to non-existent people or from persons with no experience with a product or service, both of which would be clearly deceptive.

Incentivized Sweepstakes and Contests on Social Media: The FTC staff reiterated the point made last year with its [Cole Haan closing letter](#) that social media posts to gain entry (or additional entries) in a sweepstakes or contest need endorsement disclosures. It is the staff view that rewarding participants with sweepstakes or contest entries for prizes is a material connection that viewers of the participant's post would not expect, and disclosure is necessary. The FAQs also indicate that for Twitter sweepstakes, requiring entrants to include "#sweepstakes" would be a sufficient disclosure, but "#sweeps" would not.

Employee Profiles on Facebook and Twitter: Employees endorsing a product must include a disclosure *as part of the review*. Employment information in a profile description is an insufficient disclosure, even if the profile is public.

Twitter Use by Well-Known Endorsers: The FAQs recognize that not all tweets from a paid endorser require a disclosure if followers understand that the well-known endorser is paid to endorse the product. However, because follower knowledge can be difficult to ascertain, the FTC recommends including a disclosure.

Pinterest Pins With and Without Captions: Even a pin without a caption may be an endorsement if the pin conveys approval of the product or service. If such a pin was incentivized and such incentive would not be expected by consumers, a disclosure is necessary. Guidance is provided that there is not a set form for making the disclosure, as long as it is clear and conspicuous to the average consumer (see below for general do's and don'ts for making disclosures clear and conspicuous). Adding a simple disclosure like "Company X gave me a [product] to try..." to the pin is likely effective. Additionally, adding the words "Sponsored," "Promotion," or "Paid ad" to the post, or starting a post with "Ad:" or "#Ad" would also likely be effective.

YouTube Video Disclosures: Disclosure on YouTube videos should be placed so that all consumers are likely to see it. A disclosure in the description section of the video alone is not sufficient. The FTC staff recommends at least one disclosure at the beginning of the video, and others may be needed for longer videos. The disclosure may not be obscured by YouTube ads, particularly pop up ads. In addition, the disclosure must remain on the screen long enough to be "noticed, read, and understood."

Monitoring Endorsement Programs

All advertisers with programs incentivizing customers, bloggers or other influencers to make endorsements on its behalf need to have some degree of monitoring in place to ensure compliance with the Endorsement Guides. The FTC staff recognizes that the scope of the monitoring depends on the type of risk of harm associated with the endorsements. For example, the risk of harm for deceptive over-the-counter drug endorsements would be greater than risk of deceptive endorsements for a retailer of household goods or clothing. The key is the advertiser needs to first impose requirements on its endorsers to comply with the Endorsement Guides and then make a reasonable effort to ensure compliance.

According to the FAQs, all endorsement programs must:

1. Explain to members of the program what they can (and can't) say about the products—for example, a list of the health claims they can make for the products;

2. Instruct members of the program on their responsibilities for disclosing their connections to the advertiser;
3. Periodically search for what program participants are saying; and
4. Have and enforce a policy to deal with non-compliant participants.

“Dos” and “Don’ts” of Making Clear and Conspicuous Disclosures

The FAQs reiterate some of the principles the FTC staff expressed in its 2013 updates to its “.com Disclosures” guide to help ensure clear and conspicuous disclosures:

- **DO make disclosures:**
 - In unambiguous language;
 - 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, on the screen long enough to be noticed, read, and understood; and
 - For audio, read at a cadence that is easy for consumers to follow and in words consumers understand.
- **DON’T make disclosures:**
 - Hidden or buried in footnotes;
 - Hidden or buried in blocks of text (if unlikely to be read); or
 - Behind hyperlinks.

Although the new FTC staff FAQs don’t cover all issues with use of endorsements, they provide additional practical guidance. If you have questions about the revised FAQs or about your company’s use of endorsements, please contact one of us.