

Consumer Finance Monitor (Season 6, Episode 40): A Close Look at the Federal Trade Commission's Updates to its Guides on the use of Endorsements and Testimonials in Advertising and Proposed Rule on the use of Consumer Reviews and Testimonials

Speakers: Alan Kaplinsky, Aliza Karetnick and Michael Ostheimer

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is the weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program.

For those of you who want even more information, either about the topic we're going to be covering today, or for that matter, anything going on in the world of consumer finance, don't forget to refer to our blog, which also goes by the name of Consumer Finance Monitor. We posted the blog since 2011 on the very day that the CFPB became operational, so there is a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on whatever platform you use to access your podcasts, be it Apple Podcasts, Google, Spotify, or any other major podcasts platform. Also, please let us know if you have ideas for other topics that we should cover or other speakers that we should consider inviting.

So let me give you a very brief overview of the topic that we're going to be talking about today, and then I'm going to introduce our guests for today's program and then we will get into it. So we're going to be talking about a topic that the consumer financial services industry has not focused on to a great extent, and those in the consumer finance industry are very, very tuned into every little development at the CFPB. And we cover them in great deal on our blog, Consumer Finance Monitor, and we also cover developments at the Federal Trade Commission, but we haven't really devoted a significant amount of time to talking about an area that the FTC has been regulating and enforcing for years, for a long time.

And very recently, it came out with new guidance in the area that I felt that those of you that are in the consumer finance industry, even those of you who may not be subject to the jurisdiction of the FTC, should be aware of what's going on. Because even though the FTC may not be able to bring an enforcement action against you, there are other regulators out there like the CFPB and also state regulators, and there's no end of troubles that you're going to run into if you adore what we're talking about today.

So without further ado, let me introduce to you our speakers for today. We're very honored to have as our special guest today, someone from the FTC. And it's not just anyone from the FTC, it's the person who is involved in spearheading the effort to develop these guidelines or to update these guidelines that deal with reviews. They deal with endorsements and they deal with a lot of related areas. And our guest today, our very special guest is Michael Ostheimer. He's a senior consumer protection attorney in the FTC's division of Advertising Practices and he's got over 30 years of experience.

He led the FTC's review of the endorsement guides and is leading a rulemaking on deceptive consumer reviews and testimonials. He co-authored the FTC's enforcement policy statement on native advertising and the dotcom disclosures business guidance, and that's an area that the consumer finance industry did really focus on quite a bit several years ago when that got developed. He developed the recently released health products compliance guidance and Mr. Ostheimer's initiated

numerous enforcement cases involving dietary supplements, food, high tech products, tobacco advertising, and I could go on and on.

He graduated from Columbia Law School and went to my undergraduate school, the Wharton School at the University of Pennsylvania, although I'm sure Michael graduated many years after I did. So Michael, very warm welcome to you. Thank you very much for joining us today.

Michael Ostheimer:

Thank you, Alan. Very nice to meet you and to be on your show today.

Alan Kaplinsky:

Thank you. And let me introduce my second special guest, my colleague Aliza Karetnick. She is the practice leader of Ballard Spahr's commercial litigation and dispute resolution group, co-leader of its cross practice manufacturing and consumer products team, particularly relevant to the topic we're talking about today. And co-leader of the class action litigation team. Aliza has particular experience working with companies in the personal care, cosmetics, flavor and food industries, advising manufacturers and retailers that include large branded companies, independent, and emerging companies poised for growth, and industry service providers.

She's often relied upon by her clients to provide guidance on advertising matters, claims substantiation issues, and litigation avoidance measures, which means staying abreast of regulatory changes and keeping current on agency guidance, particularly the recent guidance issued by the FTC. So Aliza, a warm welcome to you as well.

Aliza Karetnick:

Thanks, Alan, and thanks, Michael, for participating on Ballard Spahr's podcast.

Alan Kaplinsky:

Okay, so now let's get into it and I've got a lot of things on my mind, Michael, to question you about and I know you're going to be able to enlighten us. Let's start with a very basic question and that is, what is an endorsement and what are these endorsement guides?

Michael Ostheimer:

Well, before I tell you that, you mentioned disclosures and I'm always required to give a disclosure whenever I appear anywhere, which is basically, what I say is my own views and does not represent the views of the FTC or any individual commissioner. Now back to your question, let me give you a little background, but not too much. The FTC Act is a very broad and general act. Most of the FTC's legal powers in the consumer protection area come from Section Five of the FTC Act, which broadly and generally prohibits businesses from engaging in unfair or deceptive practices.

For a practice to be deceptive, it must involve a material representation or a mission that is likely to mislead consumers who are acting reasonably. What that means and how it applies in different areas has been interpreted through litigated cases and through commission statements. You asked about guides, guides are official interpretations of the FTC Act by the commission. They're voted out by the commission. Guides aren't regulations, so we still have to prove that practices inconsistent with the guide are deceptive or unfair in violation of the FTC Act.

Alan Kaplinsky:

Although, Michael, guides are published in the Federal Register for comment, right?

Michael Ostheimer:

Guides are published in the Federal Register for comment and they ultimately are published in the CFR.

Alan Kaplinsky:

Right. Okay, but they're not considered regs?

Michael Ostheimer:

They're not regulations, they're just guidance. The endorsement guides explain how the FTC Act applies to endorsements in advertising. According to the dictionary, an endorsement is a declaration or statement of one's approval or support for something. But for FTC purposes, an endorsement is an advertising or promotional message that consumers believe reflects the views of someone other than the sponsoring advertiser, the endorser. So if the message isn't disseminated by or on behalf of a sponsoring advertiser or incentivized by an advertiser, then it isn't an endorsement. The endorsement guides consist of a number of general principles and examples illustrating those principles.

One example in the revised guides explains that if a consumer buys a bag of dog food, has no connection to the product seller and posts about or reviews the dog food, it isn't an advertising message, so it's not an endorsement. But if the manufacturer then chooses to feature that consumer's review on their homepage, it then becomes an endorsement. A new example says that a video game influencer paid to stream themselves playing an identified video game and seeming to enjoy it is an endorsement even without an express recommendation. An endorser doesn't have to say, you should try this great game or you should try this great credit card. They can simply communicate it through other actions.

Another new example illustrates an endorsement doesn't require words. It says that a paid social media post by a pro golfer showing a video of them hitting golf balls is an endorsement if the golf balls are identifiable. The revised guides now say that even tags in social media posts can be endorsements.

Alan Kaplinsky:

Okay, so what were the FTC's primary goals, Michael, in making revisions to the endorsement guides this year?

Michael Ostheimer:

The endorsement guides were first issued in 1980 and they were last updated in 2009, we try to review all of our rules and guides at least every 10 years, give or take. A lot can change in 10 years. So in February of 2020, we sought public comment on a number of questions regarding what changes, if any, should be made to the endorsement guides. We received over a hundred comments and our goals were to keep the endorsement guides up to date with the way advertisers now reach consumers to promote products and services.

The prior version of the endorsement guides did not refer to customer reviews or influencers, it didn't even refer to social media. We wanted to update the guides based on these topics. We wanted to update them based on some of the cases we brought since 2009. We also wanted to address other problems we observed in the marketplace. And finally, we wanted to respond to many of the public comments and to the commenters requests for clarifications.

Alan Kaplinsky:

Are customer reviews endorsements? And what do the revised guides say about how customer reviews can be considered to be deceptive or unfair?

Michael Ostheimer:

Well, as I said earlier, customer reviews aren't necessarily endorsements if they aren't incentivized. We consider paid fake reviews, incentivized reviews, and insider and employee reviews to be endorsements. We added a new principle to endorsement guides addressing reviews. That provision says that procuring, suppressing, boosting, organizing, publishing, up voting, down voting, reporting, or editing consumer reviews of a business's products or services. In doing so, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products regardless of whether the reviews are considered endorsements under the guides. Now, that was a long mouthful and it may be a little hard to understand, but basically one shouldn't take actions with respect to reviews that distort what consumers think

about a product or service. We said that principle applies to the manipulation of consumer reviews and we tried to illustrate that principle with a number of different examples.

The first new example involves review gating, which is when a company solicits consumer feedback, usually by email, and then sends satisfied and dissatisfied customers down different paths to encourage positive reviews and avoid negative ones. We said that review gating may be a violation of the FTC Act if it results in the posted reviews being substantially more positive. A second example of the new principle is based on our case against Fashion Nova. Imagine that a retailer's website has various product pages and each product page provides consumers with the opportunity to review the product and rate it on a five-star scale. Each such page displays a product's average star rating and a breakdown of the number of reviews with each star rating followed by the individual consumer's reviews and ratings.

The guides say that such a website is representing that it is providing an accurate reflection of the views of the purchasers who submitted product reviews to the website. If the operator of the website chose to suppress or otherwise not publish any reviews, let's say with fewer than four stars or reviews that contain negative sentiments, the product pages would be misleading as to purchasers' actual opinions of the products. So if somebody, let's see, suppresses all reviews that are three stars or below, we believe that would be deceptive. The guides recognize that there are legitimate reasons, however, for not publishing some reviews such as if they contain profane, obscene, or racist content as long as those criteria are uniformly applied to all reviews, whether they're positive or negative.

A third example, the new principle says it's unfair and deceptive to attempt to coerce consumers to delete their reviews with physical threats, with the disclosure of embarrassing information, with baseless lawsuits such as actions or defamation that challenge truthful speech or matters of opinion or with lawsuits that they do not intend to file. A fourth example of review manipulation says it's deceptive to pay for reviews that are required to be positive or to buy reviews of your competitors that are required to be negative. A fifth example addresses routinely flagging negative reviews as fake without a reasonable basis for doing so.

Besides the new principle, which I've been discussing for the last few minutes, the revised guides have other new guidance regarding consumer reviews. We adjusted the definition of endorsement so that it covers fake reviews. We said that even though a fake negative review of a competitor isn't an endorsement, paying for or writing such a negative review can still be a deceptive practice. There's a longstanding principle in the guides that if there's a connection between an endorser and a marketer that consumers would not expect and which would affect how consumers would evaluate the endorsement, then the connection should be disclosed clearly and conspicuously. A new example explains that incentivized reviews should disclose that the reviewers received incentives. Disclosed incentivized reviews are only okay if it was clear to the reviewers that the company giving them the incentives wouldn't retaliate for their writing honest negative reviews.

Also, even with disclosures in individual reviews, incentivized reviews could still cause deception if they result in materially increased average star rating for a product or service. That's because consumers can make purchase decisions based on the star rating without seeing the disclosures in some reviews. If the average star rating was materially inflated by incentivized reviews, it might be sufficient for the advertiser to have a clear and conspicuous disclosure next to the average star rating saying that many of the reviewers included in the average star rating received incentives. The problem is that there's no mechanism for such a disclosure on any third-party review sites. Another new example in the endorsement guides as revised addresses reviews by company's employees and says that there should be a disclosure of the connection assuming that the reviews are honest reviews by the employees.

Alan Kaplinsky:

Okay, so let's turn now to influencers. What do the guides say about influencers disclosing that they were paid or that they were provided with free products?

Michael Ostheimer:

The principle and the guides about disclosing material connections can apply to influencers. We tried in the revised guides to do a better job of explaining material connections. We now say that they can include monetary payment or the provision of free or discounted products to endorser regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser such as a possibility of being paid. We acknowledge that some

connections may be immaterial because there are too insignificant to affect the weight or credibility given to the endorsements, in which case they don't need to be disclosed, and we now say that a material connection needs to be disclosed when at least a significant minority of the audience for an endorsement doesn't understand and expect a connection. So if almost everyone understands a relationship, then no disclosure is necessary. I can't imagine too many people not knowing that Michael Jordan has a deal with Nike.

As an aside, let me note that what's immaterial and what's understood aren't always easy to answer and our advice is, when in doubt, disclose it. A revised example in the guides says that a skincare influencer can be liable if they failed to disclose that they were paid for their endorsement. Another substantially revised example addresses an influencer who receives an unsolicited gift. A tool manufacturer sent a woodworking influencer a very expensive full-sized lathe in hope that the influencer would post about it. The woodworker uses the lathe for several projects and comments upon it favorably in videos. If a significant minority of the influencer's viewers are unlikely aware that the influencer receive the lathe for free, the woodworker should clearly and conspicuously disclose receiving it for free, a fact that could affect the credibility that viewers attach to the endorsement.

Alan Kaplinsky:

So I now want to talk about the very important area of disclosures and would like to know what does the FTC say about how to make disclosures?

Michael Ostheimer:

The guides have long said that disclosure should be clear and conspicuous, but they haven't said what that means. The revised guides now have a definition of clear and conspicuous. According to guides, it means that a disclosure is difficult to miss, that is easily noticeable and also easily understandable by ordinary consumers. If the claim requiring the disclosure is made visually, then the disclosure should be made visually. If the claim is made audibly, then the disclosure should be made audibly. If the claim is made both visually and audibly, the disclosure should be made both ways. And even if a claim is made only visually or audibly, a simultaneous audible and visual disclosure is much more likely to be clear and conspicuous. A visual disclosure should stand out from any accompanying text, other visual elements so it's easily noticed, read, and understood. An audible disclosure should be delivered in a volume, speed, and cadence so that ordinary consumers can easily hear and understand it. No fast talking.

In communication such as social media or the internet, the disclosure should be unavoidable. The revised guides give a few new examples of what is and isn't clear and conspicuous. These include a disclosure on influencer's profile page, which is not clear and conspicuous and a disclosure that requires clicking more such as an Instagram and if you have to click more, it's not clear and conspicuous. Another new example addresses a social media platforms built-in disclosure tool. It describes a tool that briefly superimposes the disclosure in small white text against a light background on an image and which competes with other superimposed text. It says that the disclosure is easy to miss and not clear and conspicuous. That image is kind of like Instagram stories or Snapchat.

Another new example says that even if a disclosure is clear and conspicuous on a computer, it isn't good enough if it's not clear and conspicuous on a smartphone. And yet another example says that if a marketer reposts a paid social media endorsement, it should add a disclosure if the original post did not have a clear and conspicuous disclosure or if it had a disclosure that does not appear clearly and conspicuously in the repost.

Alan Kaplinsky:

So what about the disclosure language to use, the actual language that should be used, or how disclosures should be made on various platforms?

Michael Ostheimer:

Well, we added a statement in the guides that disclosures of material connections does not require the complete details of the connection, but that it must clearly communicate the nature of the connection sufficiently for consumers to evaluate the

significance. Mostly though, we discuss and explain the nitty gritty of particular disclosures in a separate business guidance document called the FTC Endorsement Guides: What People are Asking, which has staff answers to numerous frequently asked questions on the endorsement guides and as we talk, I may refer to that document as the FAQs. Although the guides are applicable across all platforms, there are nuances to how posts work across platforms that could affect how disclosures should appear.

We say that if you post a YouTube video and it requires a disclosure, it's not good enough to put a disclosure in the video description. We address Instagram disclosures. We say the disclosure in the beginning of the description below a picture could be good enough. However, if the picture on an Instagram post conveys an endorsement without the viewer having to read the accompanying description, and a significant minority of viewers don't read the description, a disclosure description itself would be inadequate. In that circumstance, one might also need a disclosure superimposed over the picture. Also, if an Instagram post makes an endorsement in a video, there should be a disclosure in the video preferably both visually and audibly. On Snapchat or Instagram stories, one would have to superimpose a disclosure just as one can superimpose any other words over the images on those platforms.

The disclosure should be easy to notice and read in the time viewers have to look at the image considering how much other competing text there is to read, how large the disclosure is and how well it contrasts against the image. If the post includes video, the disclosure should be in the video. We see in the staff guidance, we say the disclosure in the TikTok text description is very unlikely to be clear and conspicuous. The text in TikTok is in small print, it doesn't stand out and it often doesn't contrast against the background of the video. Also, TikTok videos often have many competing elements which people would have to watch and they're unlikely to read the text at the same time.

When content creators on TikTok want viewers to read something, they superimpose much larger text over their videos. Viewers can start watching a stream at any time. So if the endorsement is in a stream and you just put the disclosure in one place, consumers tuning into a stream could easily miss it, especially if it's at the beginning of the stream or any single point of the stream. If there are multiple periodic disclosures throughout the stream, people are more likely to see it no matter when they tune in. To be on the safe side, you could have a continuous clear and conspicuous disclosure appear throughout the stream, but that isn't absolutely necessary. This would be particularly true for a stream which is in essence one long endorsement like a video gameplay. If the endorsements are discreet, though, there could be a disclosure right before each endorsement.

As to podcasts like this one, there could be a disclosure before each endorsement. By the way, we have a new example in the guides that what is clearly an ad at the beginning of any podcast doesn't need to disclose because listeners would likely expect that the podcast was compensated. The example continues by stating that the ad might communicate that the host is expressing their own views, in which case the host would truly need hold all of the views expressed. We don't say much in the guides about the language for disclosure. The guides do say the disclosure of a material connection should be clear and conspicuous, but they don't give you guidance as to what they exactly should say. We get into that the nitty gritty of that in the FAQs.

We say that there isn't a special wording that has to be used. The point is to give readers the essential information in words that are easy to understand. The best disclosures are simple like, this is an ad for brand X, this is a video for brand Y, or brand C paid me to tell you about this. A disclosure like, company A gave me name or product to try and I think it's great, gives readers the information they need. Or at the start of a short video, an endorser might say, the products I'm going to use in the video were given to me by their manufacturers.

We said it's fine to start a post with the word ad or sponsored. We said that we think that some disclosures are ambiguous and not good enough, like just saying "thank you" or the words "endorsement" or "consulted" or "gifted" or "ambassador" or "partner", those aren't good enough. We did say however that as disclosure with a brand name like Acme Ambassador or hashtag Acme Partner is likely to be more understandable.

Alan Kaplinsky:

So there's a lot here to unpack, and I know our listeners, the thing I'm sure they've all been thinking about, I know I've been thinking about it as you've been explaining all this. Who's liable for violations and how can a company reduce its potential exposure?

Michael Ostheimer:

Well, we expanded a section of the guides on the potential liability of various parties and for what brands should do. Advertisers are subject to liability for misleading or unsubstantiated statements made by the endorsers or for failing to disclose unexpected material connections between themselves and their endorsers. An advertiser may be liable for a deceptive endorsement even when the endorser is not liable. The revised guides explain that to reduce an advertiser's odds of facing commission enforcement action, it should, one, provide guidance to their endorsers on the need to ensure their statements are not misleading and to disclose unexpected material connections. Two, they should monitor their endorser's compliance, and three, they should take action sufficient or remedy non-compliance and prevent future non-compliance. In the FAQs, we see that it's better and easier to require pre-approval of influencer posts. That way one doesn't need to monitor.

Back to the guides, they say that an endorser may be liable for making a claim that the endorser knows or should know to be deceptive, such as falsely representing that they personally used a product. Endorsers may also be liable for failing to adequately disclose unexpected material connections between themselves and an advertiser, such as when the endorser creates and disseminates social media posts without disclosures. The guides say that advertising agencies, PR firms, review brokers, reputation management companies and other similar intermediaries may be liable for their client roles in creating or disseminating endorsements containing representations that they know or should have known are deceptive. They may also be liable for the roles with respect to endorsements that fail to disclose unexpected material connections whereby disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures.

In a guides example, which involves reviews by companies employees, the example says that to limit its own liability for such posts an employer should engage in appropriate training of its employees to the extent that the employer has directed such endorsements or otherwise has reasons to know about them, it should also be monitoring them and taking other steps to ensure compliance. In the FAQs, we answer a question about what an advertiser should do if it's just sending free unsolicited products and nothing else. We said that the company should ask the influencers to clearly and conspicuously disclose a gift in any resulting social media posts or other endorsements. It should tell the influencers how they should disclose it and ask them to tag the brand. The company should monitor the resulting tagged posts. We understand that there are software solutions to monitor compliance online. The FTC takes no position on their quality and recognizes that software like that might be too expensive for some companies.

To the extent that compliance monitor is needed, whether or not the company should use such software may depend on the types of products and possible claims involved. For example, whether the claims involve health or safety, it may be more important to monitor. Also, even if the only thing the company is sending to influencers are unsolicited free products, it's still on the hook for their deceptive claims. So it should send training materials that describe what influencers can and can't say about their products.

Alan Kaplinsky:

Let me ask you a practical question, and I don't know if you can answer this or not, but how do you find out about people who are violating the law? Do you learn about it through tips that you get from competitors or does it come from your own investigation of independently looking, just looking at all kinds of advertisements to try to red flag things that look fishy to you and then look into them? How does that work, Michael?

Michael Ostheimer:

We have all sorts of sources for investigations. I've had investigations that started from complaints from competitors, complaints from employees or former employees. I've had cases that started based on news articles. We get complaints from Congress people who ask us to look into something. We have a consumer response database that has input from millions of consumers and we often mine that for possible investigations. We sometimes are investigating a company for one thing and we notice that they engaged in a different violation. And as you mentioned, we also sometimes see ads or practices in the marketplace that we ourselves are just skeptical of, and sometimes we actually go out and have a sweep where we review tens or hundreds of ads or websites looking for problematic practices of a specific type.

Alan Kaplinsky:

When you go after somebody, do you just want them to stop the practice? What are the remedies that are typically sought?

Michael Ostheimer:

When we start an investigation, we don't know if someone necessarily violated the law. We want to determine that, whether we think we have a reasonable basis for thinking that they did. As far as the possible remedies go, we usually seek an injunctive relief such as a consent order or a federal district court order, which prohibits a company from engaging in certain practices in the future. With an administrative order, if a company violates administrative order, that's subject to very substantial significant civil penalties for future violations. We used to be able to obtain monetary relief in many cases. We are still able to do so in some circumstances. If a business or another entity received a notice of penalty offenses, which I'll discuss at some other point of this podcast, perhaps, they're subject to potentially civil penalties. And also, if we believe that they engaged in fraudulent practices and we believe we can prove that to a court, we are also able to get monetary relief in a subsequent follow-up action and we sometimes settle such cases for monetary payments at the current time.

Alan Kaplinsky:

Yeah. You mentioned, just to clarify something for our audience, that you used to be able to get more monetary relief. I assume you're referring to the Supreme Court case. I don't remember the caption, but I think it's AMG something. Can you tell our audience what that case is about? The name of the case and briefly what it held?

Michael Ostheimer:

The FTC used to regularly obtain either redress or disgorgement in federal district court for violations of the FTC Act. A case a couple of years ago went to the Supreme Court, a case against AMG, and the Supreme Court ruled that the FTC did not have authority under Section 13B of the FTC Act to get monetary relief.

Alan Kaplinsky:

But as you pointed out, that's just one section of the statute. There are other sections of the FTC Act, which, if you follow them, you are able to get monetary relief.

Michael Ostheimer:

That is correct. We have other ways of getting monetary relief in certain areas and if we believe it's appropriate to do so, even if we aren't able to get monetary relief, there are other ways we're able to make sure that the companies have to pay. In a recent case that I was involved in initially against Google and iHeartRadio, we teamed up with a number of states and we got a settlement order against both iHeart and Google, and the states who joined us, they got monetary payments from those two companies.

Aliza Karetnick:

Michael, you also mentioned notices of offense, and I know that in 2021 and 2022, there were hundreds of those notices sent to hundreds of different companies, both in the financial services sector and also consumer brands. We assume that that came out of or was a reaction to the AMG case in part. Could you maybe touch on that?

Michael Ostheimer:

Well, there's a legal tool that I mentioned involving a notice of penalty offenses where we send that to warn companies about the consequences of using deceptive practices in an area. Under the FTC Act, the commission may notify companies that practices have found to be deceptive or unfair in administrative decisions other than consent orders. The commission can then bring in an action for civil penalties against any company that receives such a notice if it then engages in the same conduct that the notice says is unfair or deceptive.

In October of 2021, the FTC issued a notice of penalty offenses to over 700 major companies, including advertisers, retailers, ad agencies, and others warning them against engaging in certain unlawful review and endorsement practices. The practices included falsely claiming an endorsement by a third-party, misrepresenting whether an endorser is an actual current or a recent user, using endorsement to make deceptive performance claims, failing to disclose an unexpected connection with an endorser and misrepresenting that the experience of the endorser represents consumer's typical ordinary experience.

Alan Kaplinsky:

Let me mention one thing here also, and that is that you don't have jurisdiction over banks, depository institutions or thrift institutions or credit unions. Your authority is over non-banks. But there is another agency, of course, I don't know if I want to call it your sister agency, the Consumer Financial Protection Bureau, that does have enforcement jurisdiction over certain kinds of banks. They have to be large banks, those over a hundred billion in assets and it also has concurrent jurisdiction with you over non-banks. And the other thing I think it's worth noting is the CFPB under the Consumer Financial Protection Act has very robust potential remedies that it can seek, many of them of a monetary nature.

So to whatever extent the FTC might be hamstrung as a result of the AMG case, CFPB, if they were to partner with you, I don't mean to be giving you any ideas, Michael, I'm sure you've thought of it. And even though the CFPB doesn't really have a track record in this area of reviews and endorsements, that's not their bag. They do have the analog to Section Five of the Federal Trade Commission Act, Unfair and Deceptive Acts and Practices, but it's only in the consumer finance area. So to a great extent, you've got broader jurisdiction, it doesn't have to deal with consumer finance, it can be any kind of a consumer product. And you also have jurisdiction over B2B transactions, business-to-business. It doesn't have to be a consumer in a business relating to one another.

And then of course, you mentioned already all the state enforcement agencies that you are able to partner up with in inappropriate circumstances. So I just mentioned that as something that people ought to be aware of that just because you think the FTC, it doesn't have enforcement jurisdiction over you doesn't mean you're totally out of the weeds. And probably a good time, Aliza, to bring you in on that question too, because when we were preparing for the podcast, one of the questions that we chatted about a little bit was, apart from the FTC, are there other risks out there and do you want to mention say something about that?

Aliza Karetnick:

So yes, Alan, there are other risks out there apart from the FTC. While it is true that all brands, all consumer companies should be aware of what the FTC provides both in its guidance but also in its rules. And all companies should have, I think, a general understanding of what is required by Section Five of the act, as Michael explained earlier. There are a number of other risks that are inherent to influencer advertising and social media advertising, which is a great mechanism.

So one of those, for example, would be not tripping any copyright wires using, for example, music in the background of an influencer ad. Not, for example, violating any trademark rules, also not saying anything about a competitor that perhaps would be seen as a violation of the Wenem Act and or making statements about products that are unsubstantiated, because even if an influencer makes a statement about a product that lacks substantiation, and by substantiation, what we really mean is some evidence of results. If you're going to make a representation, if a company makes a representation or a claim about the effect that a product has, there has to be evidence to support that. There has to be substantiation to support that claim. Just as a company can't make that claim, neither can its influencers.

And so these are some of the risks when we talk with our clients. These are some of the risks that we want them to be aware of, and these are some of the risks that they can really hedge against by doing things like educating their influencers and also crafting really well done and protective agreements with the persons or entities that they hire to do their advertising.

Alan Kaplinsky:

Well, thank you, Aliza. I want to go back to you again, Michael. I've got a couple more questions for you before we wrap things up. Are there any other changes in the newly revised endorsement guides that you'd like to highlight for our audience?

Michael Ostheimer:

Well, we adjusted the definition of an endorsement, so it covers virtual influencers. We also add an example about the need to disclose paid links. We added a new principle that the use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser. For example, a website for an acne treatment product could feature testimonials of users who say that the product improved their acne quickly and with no side effects, but instead of using images of actual endorsers, the website accompanies the testimonials with stock photos the advertiser purchased of individuals with near perfect skin. The images misrepresent the improvements to the endorser's complexions. Finally, we added a new principle about children. The commission said that practices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in advertisements involving children.

Alan Kaplinsky:

What else has the FTC been doing to address consumer reviews and endorsements?

Michael Ostheimer:

We brought and continue to bring numerous cases against those who violate the law. A few years ago, we brought an influencer case against a company called Teami, which sold tea products claiming various health benefits, including weight loss. Teami's paid influencers had inadequate disclosures of their material connections. We brought numerous cases involving fabricated consumer reviews, either purchased or written by employees. Their most recent case is against a company called Roomster Corp. Its mobile apps offer listings for room rentals and sublets. Roomster bought tens of thousands of fake four and five star reviews, including for the Apple and Google app stores. The FTC alleged that a company called Earth Box that markets monthly boxes of snacks by mail violated the FTC Act by offering consumers a free snack box if they left positive reviews on certain third-party websites.

We brought cases and challenging gag clause to prevent negative reviews, and we've also challenged a company who saw threats and intimidation to prevent negative reviews. We recently brought a case against the Bountiful Company, which engaged in review reuse fraud on Amazon by linking its newer products with significantly different established products. This made it look like the newer products had more ratings and reviews, higher ratings, or Amazon's choice were number one bestseller badges.

I talked during a separate part of the broadcast about the notice of penalty offenses. We've been doing those. As I said, we sent out over 700 notices of penalty offenses a couple of years ago. But as I also said, a notice of penalty offenses is limited to practices that have been found to be deceptive or unfair and fully litigated administered cases so the practices discussed in the endorsement guides that are not covered by a notice of penalty offenses, and also to obtain a civil penalty, we have to have sent the defendant a copy of the notice of penalty offenses or be able to prove that they otherwise knew about it. So we only sent them out to 700 companies, there are millions of people who could engage in deceptive practices with respect to reviews or testimonials. So we started what is now an ongoing rulemaking to address fake and other egregious reviews and testimonial practices.

People who violate such a rule would be subject to significant monetary civil penalties. At the end of July, we published a notice in the Federal Register seeking comment on a proposed rule. The proposed rule would prohibit businesses from writing or selling consumer reviews or testimonials by someone who doesn't exist, who did not have experience with the product or service, or who misrepresented their experiences. It would also prohibit businesses from procuring such fake reviews, or disseminating such testimonials if the business knew or should have known that they were fake or false. Businesses would be prohibited from using or repurposing a consumer review written for one product so that it appears to have been written for a substantially different product. Businesses would be prohibited from providing compensation or other incentives conditioned on the writing of consumer reviews, expressing a particular sentiment, for example, requiring that reviews be positive.

The proposed rule would also prohibit a company's officers and managers from writing reviews or testimonials of its products or services without clearly disclosing their relationships. It would also prohibit businesses from disseminating testimonials by insiders without clear disclosures to other relationships and would apply to reviews resulting from certain solicitations of employees by officers and managers. Businesses would also be prohibited from creating or controlling a website that claims to provide independent opinions about a category of products or services that includes its own products or services. Businesses

would be prohibited from unjustified legal threats or other intimidation or false accusations to prevent or remove a negative review.

The proposed rule would also bar a business from misrepresenting that reviews on its website represent all reviews submitted when negative reviews are being suppressed. Finally, businesses would be prohibited from selling false indicators of social media influence like fake followers or likes or views. And the proposed rule would also bar anyone from buying such indicators to misrepresent their importance for commercial purpose.

Alan Kaplinsky:

Okay, so Aliza, I wonder if you want to chime in on anything more that Michael said. Or if not, I just have a very general question for you, and that is, what can businesses do to protect themselves? What's the advice that you give to clients about that?

Aliza Karetnick:

Well, with my own disclaimer here in that we're not providing legal advice on this podcast, one thing that we recommend is that every company that relies on or wants to take advantage of consumer reviews, that they develop a truly robust policy for routinely collecting and managing those consumer reviews to make sure that they align with the FTC's guidance and the proposed new rule. It is true that companies should not be manipulating the reviews, should not be pushing positive reviews to the top or pushing negative reviews to the bottom. That would be a violation. It is also true that you have a responsibility, every company has a responsibility to understand what those reviews say and to ensure that they're familiar with the reviews so that they can manage anything that may misstep.

Something else, and I think Michael mentioned this earlier, is really training employees and also we're working closely with third parties who may be assisting in your advertising or who may be managing your reviews, for example. And something that I think often happens in a company, because really their focus is not advertising, their focus is running a business writ large is ensuring that the folks in R&D, the folks in marketing and the folks in legal are really all talking to each other. Employees in those groups have to know what products are out there. They have to know what substantiation is available. And they have to understand what the ads say and whether or not the ads comport not just with the law, but with the products themselves.

So again, the north star here is accuracy, and if companies use that as a guiding principle and really pull all of the various constituents together to talk about the advertising strategy and the various platforms, that's incredibly helpful. Finally, I would say do not rely on the platforms themselves to provide guidance on your disclosures. Look at the FTC's endorsement guides. Look at the examples of what is considered appropriate, clear and conspicuous disclosures on your advertising. That should be what guides you, no pun intended, not what the platforms themselves say is sufficient or adequate for purposes of advertising on those platforms because it may not rise to the appropriate level.

Alan Kaplinsky:

Michael, anything else, information you'd like to impart to our audience before we call it a day?

Michael Ostheimer:

Yes, the FAQs were informed by questions that we get from the public. We welcome questions from brands, businesses, influencers about endorsement-related questions. We have a specific mailbox set up for that purpose, endorsements@FTC.gov. We try to answer almost every question, and I'm usually the one who answers them.

Aliza Karetnick:

I can say from experience and the experiences that clients have had that FTC responds.

Alan Kaplinsky:

Okay. Well, that's unusual for any government agency to have a tool like that. That's great. Okay, I want to thank both of you, but in particular, you, Michael, for taking the time today to share with our audience a lot of information about these guidelines. And it's something, as I said at the beginning of the podcast, consumer financial services companies have not really focused on it that much, but they should be because even if the FTC doesn't have jurisdiction over them, there's a very good chance some other federal or state agency does, and it's just another area of compliance, something else to worry about. I guess that's a good way to end the program. So thank you again, Michael.

Michael Ostheimer:

Thank you. It was a pleasure being on your show.

Alan Kaplinsky:

And thank you, Aliza.

Aliza Karetnick:

Thanks, Alan, and a special thanks to you, Michael, for joining us today.

Alan Kaplinsky:

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