

Re: Endorsement Guides Concerning the Use of Endorsements and Testimonials in Advertising (Regulatory Review; Request for Public Comment, 85 Fed. Reg. 10104) P204500

I. Introduction and Summary

The News Media Alliance (“NMA”), by its attorneys, hereby responds to the above-captioned request for comment related to the Federal Trade Commission (“FTC”) Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guide” or “Guides”).¹

NMA is a member-driven non-profit organization representing nearly 2000 diverse news organizations that publish information using a variety of platforms, including digital only, digital-first and print. NMA members use a variety of methods to sell advertising and promote the information they publish, including print advertising, local and regional website display and video ads, social media sites, search marketing and programmatic advertising. As an association focused on both the significant challenges and opportunities presented by today’s news media environment, the NMA is concerned with policies impacting advertising opportunities, print and digital media revenue streams, and audience development across various media platforms. NMA supports the FTC’s review of the Guides and efforts to ensure that the Guides are updated to reflect the use of new advertising platforms.

The FTC’s Endorsement Guides, known formally as The Guides Concerning the Use of Endorsements and Testimonials in Advertising, have been in existence for nearly four decades. First enacted in 1980, they were last amended in 2009. Although the Guides are advisory in nature, they provide important information to ensure that advertisements using endorsements or testimonials are not deceptive or misleading. The basis of the current proceeding is the FTC’s systemic review of all current FTC rules and guides. In this case, the FTC’s review seeks public and industry comment on, among other things, the connections between an endorser and seller of a product, and how these connections could affect the weight or credibility of the endorsement. Other questions the FTC is seeking comment on range from the prevalence of the practices addressed by the Guides to whether changes in the economy or technology require changes to the Guides.

NMA supports the Commission’s efforts. There have been major changes in the advertising landscape in the past ten years, and it is important that the Guides be updated to reflect these changes.

¹ FTC, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR §255.0(b).

II. Discussion

A. The Guides Are Still Necessary

NMA believes that the Guides remain necessary. Given the proliferation of digital advertising during the past ten years as well as the substantial increase in the use of social media platforms, the information contained in the Guides is arguably more important today than ever. As the number of social media platforms has continued to increase, digital advertising has grown exponentially. As a result, the use of endorsements and testimonials that rely on the statements of individuals to help sell goods and services is widespread and growing. Certain unfair and deceptive practices addressed in the Guides continue to be present. The increasingly popular use of so-called “influencers” in online marketing, as well as the use of sponsored reviews, affiliate links and blog posts have created different types of testimonials and endorsements for products and services, and it is necessary that these methods do not mislead consumers. Because these practices, which the Guides are designed to address, continue to exist, the Guides themselves remain necessary for advertisers, and those who deliver advertisers’ messages, especially those who are new to the business, and should be updated to reflect evolving methods of advertising.

Updating the Guides protects consumers and benefits advertisers. Advertisers rely on the Guides themselves as well as the FTC’s publication *The FTC’s Endorsement Guides: What People Are Asking* (“What People Are Asking”), which is related to the Guides and is updated more frequently to provide answers to questions about the Guides raised by advertisers and endorsers.² Many media companies use this publication to discuss questions that arise when interpreting the Guides. Updating the Guides to include guidance about endorsements used on digital platforms and the growing number of social media sites that have been started since the last update will help these companies—many of whom are not well-versed in traditional advertising law and ethical standards—comply with the requirements addressed in the Guides. New examples that reflect modern marketing techniques will provide additional clarity and helpful information for changing uses of endorsements and testimonials.

B. Practices Addressed by the Guides That Need to Be Clarified

One aspect of the Guides that NMA believes should be clarified is the use of “live reads” by hosts and announcers in audio programming, including online radio and podcasts. Most consumers are familiar with the concept of live reads and understand that hosts and announcers that are specifically promoting a product have been paid to do so. Many NMA members provide podcasts. Because of the nature of podcasts—which are generally audio-only long-form programming—advertisements are generally read by the hosts or participants. Typically, there is a break in the programming content when an advertisement is read, which alerts listeners that something separate from the program content is coming. Therefore, if the host is reading an advertisement that includes an endorsement or testimonial, any unexpected connection between the endorser and advertiser can be disclosed as part of the live read—e.g. thanks to my friends at

² *What People Are Asking* provides answers to frequently asked questions the FTC receives from advertisers, ad agencies, bloggers and others, including questions about endorsements used on social media sites and affiliate marketing. Guidance about these practices which has been included in *What People Are Asking* should be included in updates to the Guides.

XYZ Company for giving me a free trial of their product. The need for any additional disclosure or disclaimer is unnecessary and would be disruptive to the programming.

The Commission also requests input regarding the use of affiliate links by advertisers. NMA members note that the use of affiliate links in digital advertising is very common; however, the manner in which affiliate links are used in editorial content can differ significantly, and the Guides should acknowledge these differences. An article about a topic that is based on the newsworthiness of the matter—for example, a review of a new bank or videogame, or an article on the importance of wearing masks during the coronavirus pandemic—may include a link to a product or service discussed in the article. In other cases, there may be a display ad that includes a link. In both cases, these links take the reader to an affiliate’s site where a product can be purchased. If readers/viewers purchase from the advertiser, the news organization receives a commission. This type of affiliate marketing is not new. It includes the concept of direct response and per inquiry advertisements, which have been used for decades. As an article cited by another commenter in this proceeding states: “The concept of affiliate marketing—where sites get small commissions for referring their readers to sellers—is almost as old as the Internet itself.”³ Although this practice is not addressed in the Guides, it is one of the topics addressed in *What People are Asking*.⁴ That publication advises that a disclosure should be made by an affiliate marketer receiving commissions from an online retailer that the marketer’s site links to so that readers can decide how much weight to give the endorsement.⁵ Many NMA members typically include a statement in or near an article that includes an affiliate link informing readers that if they purchase a product after clicking on a link, the publisher will receive a commission. NMA believes that the use of this type of disclosure for articles reviewing or featuring products that include a link which enables readers to purchase these products complies with the policies underlying the Guides by informing readers of the reviewer or publication’s relationship with the seller. NMA recommends that the guidance set forth in *What People Are Asking* be incorporated in the Guides.

A disclosure is also required where an article contains a specific endorsement and the author is guaranteed a specific payment to feature and promote a product or service or an influencer receives consideration to promote a specific product on a social media site. The Guides should be updated to clarify that for social media posts, which are shorter and displayed differently than longer form editorial content, a clear and conspicuous tag indicating that the post is “sponsored” or “advertisement” is necessary.

C. The Guides Should Be Updated to Make Clear What Disclosures are Needed for Postings and Reviews from Influencers

NMA supports the FTC’s proposals to update the Guides to make clear that for advertisers who provide money or other consideration to influencers to promote their products or

³ <https://www.mouseprint.org/2018/12/10/even-angels-quietly-make-money-referring-buyers-to-sellers/> (cited in Comments submitted by Consumer World (April 7, 2020).)

⁴ <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

⁵ *See id.*

