Hot Issues in Advertising and Promotions

Friday, February 1, 2019 | 11:00 am to 12:00 pm

Program Description

We will explore the minefield of issues in advertising and promotions law including: TCPA litigation in the post-ACA International world; #Sweeps and the do’s and don’ts of endorsements; the legal risks of emerging technology and much more.

Lead Facilitator

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Facilitators

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- Andrea Shandell, Gannett Co., Inc. | McLean, VA
- Susan Tillotson Bunch, Thomas & LoCicero | Tampa, FL

Program Materials

Gals on Guns, Gaming, Ganja, Geeks and Gadgets (“GGGGG”)
Gambling and Promotions (Susan Bunch)

A. Gambling - Lotteries versus Sweepstakes versus Contests

Although the terms “sweepstakes,” “contests,” and raffles” are thrown around somewhat loosely, they are not interchangeable. Generally, a sweepstakes is a game of chance in which the winner is selected at random, while the winner of a “contest” is determined based on skill-based criteria, whether by judging or otherwise. A “raffle” is promotion in which “chances” (typically tickets) are distributed or sold and the winner selected via random drawing.\(^1\)

The most commonly promoted campaigns are chance-based. The first question is typically whether the promotion is a legal sweepstakes or illegal gambling. A legal sweepstakes includes a prize and chance. However, if a third element of “consideration” is added, the legal game of chance becomes a lottery, a form of illegal gambling. Currently, gambling remains illegal in most states subject to certain exclusions or exception for state sponsored lotteries, tribal gaming and pari-mutuel wagering facilities.

Like most advertising offers, games of chance are regulated at the state level, a legal sweepstakes in one state may well be an illegal lottery another. At the same time, in our connected atmosphere, promotions almost always include digital components and jurisdictional issues are more prevalent than the time of simple brick and mortar enter-to-win sweepstakes.

Generally speaking, “consideration” equates to a purchase or something of value given by the participant. (Hence, the omnipresent “no purchase necessary” verbiage). Consideration can also be present when participants must expend significant time or effort. For example, although requiring an entrant to visit a local store generally is not deemed consideration, requiring that same person to travel 50 miles to the closest participating store very well may be treated as non-monetary consideration because of the degree of effort required and relative expense to the participant. Likewise, requiring an entrant to give up a legal right may constitute consideration.

Unfortunately, neither the governing statutes nor the spare caselaw construing them offer great insight into just how much effort may be required of sweepstakes participants before the balance tips into lottery land. Consequently, this issue must be reviewed on a case-by-case basis.

\(^1\) The character of a promotion is determined not by its title, but by the underlying entry and selection methods. Nevertheless, not terms of art, the author prefers to carefully distinguish between promotion types particularly in Florida, where raffles are limited to non-profits, sweepstakes are potentially regulated by the Department of Agriculture and other forms of gaming are sometimes challenged as gambling.
As an obvious rule of thumb, the greater the degree of effort, the greater the likelihood that it will be deemed “consideration.”

For example:

<table>
<thead>
<tr>
<th>Not Consideration</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toll-free phone call</td>
<td>International call</td>
</tr>
<tr>
<td>Submit entry online or by mail</td>
<td>Text to enter</td>
</tr>
<tr>
<td>Visit local establishment to enter</td>
<td>Travel to another county or city to enter</td>
</tr>
<tr>
<td>Complete brief survey</td>
<td>Complete lengthy survey</td>
</tr>
<tr>
<td>Provide basic contact information</td>
<td>Divulge sensitive or proprietary information</td>
</tr>
</tbody>
</table>

Still other methods may depend on scope and platform. For example, requiring someone to refer other people to the promoter (so-called "viral marketing") raises a greater degree of risk.

If a promotion includes consideration, it will need an “alternative method of entry” (“AME”) to avoid being characterized as illegal gambling. For example, the AME may be the completion and return of a 3x5 card or online entry form. Creativity is always a plus as long as the AME has “equal dignity” with the “consideration” method of entry, i.e., an equal chance of winning. Separate prize pools or entry deadlines, insufficient number of AME devices, more burdensome entry methods for AME participants or inadequately disclosure of AMEs all weigh against “qual dignity.”

**B. Registration Requirements**

In addition to the legal analysis under state gambling laws, promotions may require registration and financial security in certain states. This requirement is completely separate from the lottery analysis and one has no necessary bearing on the other except that when a promotion is registered, the state may reject it if on its face it appears to violate the lottery laws. However, the fact that a promotion is registered does not equate to a finding of lawfulness.

The three states that require registration of certain games of chance promotions are Florida, New York and Rhode Island. However, each state has different thresholds (for aggregate prize values) and requirements.

<table>
<thead>
<tr>
<th></th>
<th>Threshold</th>
<th>Industry</th>
<th>Financial</th>
<th>Exemptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>FL</td>
<td>&gt;$5,000</td>
<td>Consumer goods/services</td>
<td>Required</td>
<td>FCC licensees Limited waivers</td>
</tr>
<tr>
<td>NY</td>
<td>&gt;$5,000</td>
<td>Consumer goods/services</td>
<td>Required</td>
<td>None</td>
</tr>
</tbody>
</table>
It is important to note that these requirements are part of the criminal statutes prohibiting lotteries and gambling and carry with them relevant criminal penalties.

C. Other Quirky States

Sweepstakes laws change frequently, and several states have unique requirements or limitations. For example, Vermont and Washington restrict the use of a stamp to obtain an entry form. Tennessee prohibits requiring a winner to consent to the use of his name or likeness as a condition of receiving the prize. Texas law imposes many restrictions on “in pack,” “matching” and other promotions, including “second chance” drawings and other disclosure requirements.

Other states have special disclosure requirements that may affect what must be included in the rules, what may not be included and where the rules must be distributed. As you might imagine, the more the promotion strays from a simple enter-to-win concept, the greater the additional “lead” time you should allow in which to conduct your legal due diligence.

The applicable requirements are not always restricted to or located in a single gambling statute and may be integrated into other legislative chapters or provisions regulating prize and gift notification, unfair deceptive trade practices, “free” offers, telemarketing rules, industry specific regulatory requirements, and other overlapping rules depending on the offer or campaign, the medium of advertising, the requirements to participate and the specific industry involved. For example, if a participant is required to attend a sales presentation, numerous states impose affirmative disclosure requirements, timing of sales presentation and gift or prize notification or delivery, restrictions on substitution and rain checks, ancillary costs such as shipping, handling, processing, etc., and particularized language requirements/restrictions for written or verbal offer materials.

Consequently, depending on the nature of the promotion, its call to action, medium, industry, and requirements, it may simultaneously implicate one, some, or many of the various state legislative provisions discussed above, in addition to federal provisions discussed below, and compliance with one does not satisfy others.

Of course, as with any offer or advertisement, sweepstakes and other chance promotions are further subject to the more general federal and state consumer laws that generally prohibit false, misleading and unfair advertising and require the disclosure of the “material terms and conditions,” regardless of whether or what gaming-specific laws are triggered. Thus, even if a particular state sweepstakes law requiring disclosure of odds, value, scope, eligibility, sponsor identification and location, etc., are not triggered for one reason or another (for example, if that law is restricted to direct mail campaigns), many of such elements are “material terms” and would be required under general advertising law.

2 While Rhode Island’s statute requires registration only by “retail establishments” promoting their “retail business,” these terms are not defined in the statute and have been construed by the Rhode Island Attorney General to apply not only to online promotions but also to manufacturer and distributor promotions made available via retail establishments regardless of whether the retailer actively promote them.
D. Federal Laws

Additional restrictions may be imposed by federal law to certain promotions. For example, certain promotions that utilize United States mail are subject to additional regulation under the Federal Deceptive Mail Prevention and Enforcement Act (“FDMPEA”), depending largely on content and appearance of the mailing (e.g., sweepstakes mailings, mailings containing facsimile checks and mailings made to look like government documents). In short, the FDMPEA includes certain prohibitions, affirmative disclosures and in some cases a name removal system. It also generally exempts most matter appearing in newspapers, magazines or other periodicals, provided the matter either is not directed to a named individual or does not include an opportunity to make a payment or order a product or service.

E. Connected Promotions

Because the Internet is a global medium, unless you intend to research and comply with the laws of every country in the world, you should limit participation to citizens of the particular countries whose laws have been researched to ensure compliance. Such limitations should be disclosed clearly, not only in the official rules, but in all advertising and entry platforms, ideally as a click-through agreement.

In the not so distant past, Florida viewed the requirement of Internet access to enter as a form of consideration (thus making the promotion an illegal lottery). However, Florida no longer takes that position as reflected in its acceptance of registrations of Internet-only sweepstakes.

While Florida was the only state that took this position, you should be aware that other states could view an Internet-only sweepstakes as requiring consideration and thus illegal. Given the current proliferation of Internet access in American households, this seems unlikely. It is more likely that a state will view a promotion requiring a smartphone or mobile device to be problematic. However, a prudent approach may be to consider having an alternate method of entry (such as a toll-free number or an address where entrants can call or write to request official entry forms).

F. Privacy Issues

It is important that a promotion and its official rules be reviewed in conjunction with and harmonized with the organization’s privacy policy, especially any representations made about the use of user data for marketing purposes or sharing with third parties. The Federal Trade Commission has taken a special interest in the use of personally identifiable information harvested in connection with sweepstakes promotions.

In addition, there are a growing number of state laws directed at protection of personal data as well as existing laws such as the Children's Online Privacy Protection Act (“COPPA”), 15 U.S.C. § 6501 et seq., which essentially prohibits knowingly gathering information from children under the age of 13 unless verifiable parental consent is first obtained.

G. Charitable Promotions

As will be discussed below, promotions that solicit donations or entries for charitable fundraising purposes are also regulated. For example, Florida law strictly regulates raffles and bingo and closely limits those who may assist in their promotion.
II. Charitable Raffles & Gaming

Let’s not forget about raffles. What is more alluring than the chance to get something for (almost) nothing? Perhaps the chance to do so and feel like a philanthropic superstar… Raffle promotions are proliferating across the United States. However, like the laws on charitable solicitations, laws governing charitable gaming vary from one state to the next and even among municipalities, leaving even more layers to peel…

A. Layer 1: Gaming Rules

For example, in some states, it is perfectly legal for a charitable organization to sell raffle tickets for drawings of numerous household goods, services and even real estate.

On the other hand, states like Florida take a stricter approach to games of chance, even those with the purest of intentions. For example, in Florida, certain non-profit entities are permitted to conduct raffles, provided that (1) the drawings comply with Section 849.0935 of the Florida Statutes and (2) the entity has complied with all applicable provisions of Chapter 496 governing solicitation of funds. Florida law imposes a number of restrictions and prohibitions on charitable raffles. Most importantly, perhaps, Florida law prohibits requiring a purchase or donations as a condition of entry. The charity is permitted to include a “suggested minimum donation” in its advertising but it also must conspicuously disclose that no purchase or contribution is necessary. In addition, Florida does not allow raffle drawings conditioned on a minimum number of tickets distributed or donations received and general bars entities from cancelling the drawing. Other restrictions and disclosure requirements apply.

Thus, although Florida law includes a specific statute “authorizing” nonprofit raffles, a closer inspection reveals that the leeway offered is only marginal. No purchase requirements and equal dignity rules apply to raffles much as they do to sweepstakes promotions. If you are planning to raffle off a house in Florida, you might want to adjust your view to a dollhouse – savvy consumers know that they get tickets for free and many won’t be willing to shell out $100 per ticket needed for the promotion to break even.

Other states may require promoters to procure raffles licenses and restrict who can be involved in the administration of the promotion.

Likewise, some states don’t blink at “casino night” to benefit local nonprofits. However, other states take a dim view of any use of equipment that temporarily transforms your clubhouse into a Las Vegas casino. If it looks like a 1-armed bandit, chances are it is off limits in more than 1 location. Ditto for Texas Hold’em and other cardroom games.

B. Layer 2: Charitable Solicitation Rules

And lest we forget, consider the expression “No good deed goes unpunished.” I’m fairly confident that this phrase, attributed to luminaries such as Billy Wilder, Clare Booth Luce, Oscar Wilde and others, was actually a pained reference to the varying and often bewildering statutory requirements, restrictions and prohibition that apply to charitable solicitations across the country.

Local organizations seeking to innovate their fundraising efforts may find themselves doing the “Charleston” only to realize that this is not the fun dance but actually more of a multi-
state dance-a-thon because they have launched a giving campaign online, soliciting donations from anyone, anywhere. Translated loosely, that turns into register with everyone, everywhere.

III. PASPA & Online Sports Betting

In a ruling that could have diverse and sweeping consequences for sports operations as well as for many businesses across the country, the U.S. Supreme Court struck down a 1992 federal law that effectively banned sports betting. Although this ruling does not legalize sports betting, it clears the way for the states to decide whether and if to legalize, regulate and increase revenue by taxing this activity.

While everyone was very excited about the death of PASPA, in reality the dynamics of legalizing online sports betting and other gambling are far more dependent on individual states and their politics and stakeholders.

In Florida, for example, gaming has long been a political football control. Vying for control of the ball are the current authorized pari-mutuel wagering licensees and facilities, the wannabe’s, the Seminole Indian Tribe, and various interests aligning on both sides of the fence. Florida derives considerable revenue via its agreement with the Seminole Indian Tribe and both the tribe and pari-mutuel wagering licensees are interested in protecting their revenue streams.

Bruising battles have been fought over Internet cafes and video gambling restrictions and numerous attempts to introduce other legislation in the gaming area have languished and died in committee.

Because the Florida Constitution “generally” prohibits lotteries, legalizing sports betting would have to be authorized by either the Legislature or by referendum. However, as of the date of this submission, Florida citizens are voting on The Voter Control of Gambling Amendment or “Amendment 3.” If approved, Amendment 3 will give Florida citizens the exclusive power to authorize “casino gambling,” which is broadly defined and would include most sports betting, and the Florida Legislature would no longer be authorized to legalize such activities whether through statute or constitutional amendment. PASPA or no PASPA, proponents of online gambling face numerous obstacles from diverse interests.

Again, Florida is just one of the potentially affected states. The response to PASPA has been less than uniform across the country although numerous states have introduced or signaled willingness to introduce laws expanding the available gaming activities within their jurisdiction with equally variable proposed regulatory schemes.

IV. Fantasy Games

Likewise, recently efforts to pass legislation approving fantasy gaming in Florida have met lingering legislative deaths. While proponents argue that fantasy leagues are skill-based, not chance, the position is not without controversy given the variables that influence the outcome and over which the fantasy leaguers have no control.

Case in point, a New York statute declaring fantasy game to be contests of skill was invalidated last month on the grounds that it violated New York’s constitutional prohibition on
lotteries and “other gambling.” In a lengthy analysis, the White v. Cuomo court rejected attempts to parse the meanings of New York’s statutory and constitutional gambling prohibition, holding that the interactive fantasy league activity contemplated by the challenged statute, notwithstanding legislative pronouncements to the contrary, fell squarely within meaning of “gambling.” Even assuming for summary judgment purposes that skill predominated over chance, the court nevertheless struck down the statute. Like Florida, in addition to lotteries, New York law prohibited betting or wagering on the outcome of contests of skill.

For now, it is a safe “bet” that it’s not safe to bet. Except where it’s already allowed.

V. Regulated/Illegal Goods/Services (Andrea Shandell)

A. General Overview of Best Practices in Advertising Regulated or Illegal Goods or Services. Publishers sell inventory to advertisers that promote lawful products and services. In general publishers rely on the advertisers and advertising agencies to comply with state restrictions on marijuana advertising. Some publishers, often to support relationships with advertisers yet while avoiding providing legal advice, and to the extent they can, will spot check advertisements for compliance with state restrictions, such as disclosures. Some publishers engage in social promotion of branded content relating to regulated or illegal goods or services but place the content in less conspicuous locations.

B. Marijuana

1. Overview. Marijuana is not legal under federal law. Since January 4, 2018, the Department of Justice is under direction to enforce marijuana laws. In general publishers in states where marijuana is legal do take marijuana ads.

2. Federal. Attorney General Jeff Sessions directed all U.S. Attorneys to enforce the laws enacted by Congress and to follow well-established principles when pursuing prosecutions related to marijuana activities, overturning Obama administration guidance to federal prosecutors seen as making prosecutions related to marijuana a low priority.


4. **CBD hemp products.** Cannabidiol (CBD) is concentrated liquid extract of the marijuana plant; is non-intoxicating; and is sometimes recommended to treat chronic pain, epilepsy, loss of appetite, multiple sclerosis symptoms and other conditions.

   a) **Drug Enforcement Agency – Is (CBD) a schedule 1 drug?** It depends. With the Food and Drug Administration’s approval of an epilepsy drug and DEA’s subsequent classification of it as not a schedule 1 drug, it appears that FDA-approved products containing no more than 0.1 percent THC will not be considered illegal marijuana.

   b) **Many states regulate the legality and advertising of CBD.**

5. **Advertising Regulations.** State regulations include age-gating, disclosures of risks, no cartoon characters

   a) **Leafly, cannabis information resource.**


   c) **Digital advertising.**
      (1) Regulations include not unsolicited pop-ups; website must not have content targeted to users under a stated age; must have opt-out

      (2) Some publishers geo-fence or reject national advertising.

      (3) Google and Facebook do not allow marijuana advertising.

      (4) Branded content (native advertising) to the extent it is advocacy or offers information likely is not restricted.

C. **Firearms**

1. **Overview.** Guns sales are permitted in all states by a licensed dealer.

2. **Types of advertiser.** Manufacturer and Seller

3. **Types of advertising.** Include classifieds.

   Google and Facebook do not allow marijuana advertising. But a gun shop can have its own Facebook page and can post on its own page.

4. **Interstate sales.** Must be facilitated by a license dealer.

5. **Taste.** Some publishers don’t run ads on days when there is related news.
D. Gambling

1. Overview. Gambling is permitted in several states. Some states require a responsible gaming message.


2. Advertising regulations.

   a) Brick and mortar establishments generally can advertise even cross state borders.

   b) Online Gambling (NJ, DE, NV) is subject to advertising regulations.

      (1) Regulations include geo-fencing and disclosures that the user must be in state.

   c) Wire Wager Act. [https://www.govinfo.gov/content/pkg/USCODE-2017-title18/pdf/USCODE-2017-title18-partI-chap50.pdf](https://www.govinfo.gov/content/pkg/USCODE-2017-title18/pdf/USCODE-2017-title18-partI-chap50.pdf). Transaction between two states that allow online gambling is permissible. DOJ may consider advertising unlawful when it is paid for by an advertiser that is taking money unlawfully (from users not in a state that allows it). Some publishers consider it best practice not to take advertising from offshore advertisers because of the change that it is taking money from users not in a state that allows online gambling.

VI. Endorsement Guides, Social Influencers and Online Reviews (Sarah Cronin)

   A. Background on guides and updates for blogging/social media

The basic consumer protection statute enforced by the FTC is Section 5(a) of the FTC Act, which declares as unlawful the “unfair or deceptive acts or practices in or affecting commerce ....” 15 U.S.C. § 45(a)(1). “Unfair” practices are defined as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” Id. at § 45(n).

In 2009, the FTC put out its “Guides Concerning Use of Endorsements and Testimonials in Advertising” (Oct. 2009). The Endorsement Guides require that “material connections” between an advertiser and an endorser that consumers would not expect be disclosed. A material connection is one that “might affect the weight or credibility of the endorsement,” for example, that the person giving the endorsement is being paid by the company, received the product for free, is a family member, an owner of the company, or has been provided some other incentive.

In 2017, the FTC put out, “Endorsement Guides: What People are Asking.” Here, the FTC sought to answer questions people were asking about the Endorsement Guides and specifically addressed the application of the Endorsement Guide to social media, stating:

The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the
honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.

In addition, the Guides say, if there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed.

The FTC also weighed in on the issue of endorsements by individuals on social networking sites and bloggers, clarifying that the Endorsement Guides apply to social media and blogs, as well as videos uploaded to YouTube. In sum, no type of media is exempt and any material connection with the person and the company or product should be disclosed (e.g., if a company sends a blogger free earbuds hoping that she will review them, that connection should be disclosed in any review she posts of the earbuds).

B. Recent developments/enforcement scenarios related to social media

The following is a summary of the FTC’s enforcement history related to social media:

- 2014 – FTC brings its first enforcement action specifically related to the use of social media, alleging that the advertising firm Deutsch LA Inc., engaged in deceptive activities, when it had its employees tweet out positive reviews of a handheld gaming device on Twitter without disclosing the material connection between the employee, the agency, and the gaming company.

- 2015 – FTC brings an enforcement action against Machinima Inc., an online entertainment network, which allegedly paid bloggers to promote a gaming system by uploading videos of themselves playing the system to YouTube, without disclosing that they had been paid.

- 2016 – FTC files its first complaint against a brand for its use of social media influencers, alleging that Lord & Taylor gifted a dress to fifty influencers in fashion and then paid them to post pictures of themselves wearing the dress on their Instagram accounts, without disclosing that the influencers’ posts were part of an advertising campaign that they had been paid to participate in.

- 2017 – FTC sends “educational” letters out to more than 90 individual influencers reminding them to clearly and conspicuously disclose their relationship with brands on their social media posts.

- 2017 – FTC bring an enforcement action against CSGC Lotto Inc., an online virtual currency gambling website, and two of its individual officers, alleging that the company provided the officers with free virtual currency to gamble with on the website, and then had them create YouTube videos promoting the company, without disclosing their material connection to the company or that they had been provided the free virtual currency to gamble with.

The FTC did not take any public enforcement actions in 2018 related to social media and influencers, though with the continued prevalence of advertising in social media, as well as the use of influencers to promote brands, there is no guarantee that the same will be true for 2019.
VII. Emerging Technology (Sarah Cronin)

A. AI/bots

California’s new bot law. A new law in California will go into effect on July 1, 2019, that will make it unlawful “for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election.” Cal. Bus. & Prof. Code § 17940, et seq.

“Bot” is defined as “an automated online account where all or substantially all of the actions or posts of that account are not the result of a person.” Id.

Safe harbor. The law does provide a safe harbor, stating that, “[a] person using a bot shall not be liable under this section if the person discloses that it is a bot.” Id. The disclosure required by the safe harbor provision “shall be clear, conspicuous, and reasonably designed to inform persons with whom the bot communicates or interacts that it is a bot.” Id.

Application. The law “does not impose a duty on service providers of online platforms, including, but not limited to, Web hosting and Internet service providers.” Id.

Chatbots? It is currently unclear whether this new law applies to the chatbots commonly employed in customer service applications, e.g., the bots that answer questions on a website or help a user book a flight.

No private right of action, but…. While there is no private right of action built into the law, it is possible that it will be combined with California Business Practice Code Section 17200, et seq., to pursue a violation as an “unfair business practice.”

Other states? California is the first state to pass a law requiring the disclosure of bots, but other states have introduced legislation to regulate the use of bots, including New York and Maryland.

FTC. The FTC is holding a two-day hearing in November 2018 in which it will examine competition and consumer protection issues associated with the use of algorithms, AI, and predicative analytics. The hearing will inform the FTC of the “ethical and consumer protection issues that are associated with the use of these technologies,” among other issues.

B. Computer Generated Image (“CGI”) influencers

CGI influencers may become much more prevalent in the near future. For example, Miquela Sousa (aka “Lil Miquela”) has 1.5 million Instagram followers, is a professional model, can be seen partying in Los Angeles clubs and hanging out with celebrities on Instagram, Facebook, Twitter, and Tumblr, and has released her own single on Spotify. She is also a CGI.

CGI models have already been used to promote brands such as Prada, Dior, Louis Vuitton, Fendi, Chanel, and Rihanna’s beauty brand Fenty.

As the use of CGI to promote products becomes more commonplace, one unresolved question is whether the same FTC disclosure requirements apply to CGI influencers? The FTC has not yet issued any formal guidance with respect to the use of CGI influencers.
As set forth above, as the FTC has made clear that the Endorsement Guides apply to all media, stating that, “[t]ruth in advertising in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs in social media,’” it seems likely that it will find that the same Endorsement Guidelines will apply to CGI influencers as well.

That said, the application of the Endorsement Guidelines to CGI influencers is not straight forward. For example, does a CGI influencer need to disclose that they are not human? Note that the FTC has stated that, “[a]n endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make…. If there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed.” What about the issue of testimonials coming from CGI influencers? Could such a testimonial ever meet the FTC’s standard that the endorsements reflect the honest opinions, findings beliefs, or experience of the endorser? Can the average consumer tell that a CGI is not a real person on her or his own? Would a consumer want to know that the endorsement is coming from the creator of the CGI? Based on the FTC’s past actions, if a reasonable consumer would not be aware that the influencer is not human, then such a disclosure may be necessary.

At some point in the near future, the FTC will likely have to weigh in on how the rules apply to CGI influencers, but how quickly that happens will likely depend on how fast the use of CGI influencers spreads. So keep watching those feeds and make sure to check in on how many followers Lil Miquela is up to at https://www.instagram.com/lilmiquela/?hl=en.

VIII. Post-ACA Int’l v. FCC TCPA Developments (Natalie Harris)

A. TCPA Background and Basics

The TCPA prohibits the use of automated telephone dialing system to call wireless telephone numbers—sometimes referred to as “robocalls”—without having the recipient’s prior express consent.\(^3\) Congress enacted the TCPA in 1991 based on findings that the “use of the telephone to market goods and services to the home and other businesses” had become “pervasive due to the increased use of cost-effective telemarketing techniques.”\(^4\) The TCPA contains a private right of action permitting aggrieved parties to recover at least $500 in damages for each call made in violation of the statute, and up to treble damages for each willful or knowing violation.\(^5\) The TCPA vests the Federal Communications Commission (FCC) with responsibility to promulgate regulations implementing the Act’s requirements.\(^6\) Since the TCPA’s enactment, the FCC has issued a series of rulemakings and declaratory rulings addressing the TCPA’s reach. In 2003, for instance, the FCC concluded that the statute’s restrictions on “mak[ing] any call” using an automated telephone dialing system encompass the sending of text messages.\(^7\) In a Declaratory Ruling and Order issued in 2015 (“2015 Order”), the


\(^5\) Id. § 227(b)(3).

\(^6\) Id. § 227(b)(2).

Commission (with two Commissioners dissenting) addressed 21 separate petitions for rulemaking or requests for clarification.

One issue addressed in 2015 Order was clarification of which devices for making calls qualify as an automated telephone dialing system (“ATDS”). The TCPA defines an ATDS as equipment that “has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator,” and “to dial such numbers.” In the 2015 Order, the FCC construed a device’s “capacity” to encompass its “potential functionalities” with modifications such as software changes—not simply the device’s present capacity. The FCC also addressed the precise functions that a device must have the capacity to perform for it to be considered an ATDS. The FCC confirmed that “predictive dialers” qualify as ATDS. In addition, the FCC explained that the basic function of an ATDS is to “dial numbers without human intervention.” However, the FCC did not go so far as to say that a device is not an ATDS unless it has the capacity to dial numbers without human intervention.

A second issue addressed in the 2015 Order is whether a caller violates the TCPA by calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge. The TCPA specifically permits ATDS calls “made with the prior express consent of the called party.” So, the question was whether called party refers to the intended recipient of the call or the current subscriber. The FCC determined that called party refers to the current subscriber—not the intended recipient of the call. In other words, pursuant to the 2015 Order, in a reassigned number scenario, the called party is the current, nonconsenting holder of a reassigned number rather than a consenting party who previously held the number. The FCC allowed a very limited “safe harbor” to callers using an ATDS to call a nonconsenting holder of a reassigned number. The FCC Order allowed one liability-free, post-reassignment call for callers who lack “knowledge of [the] reassignment” and possess “a reasonable basis to believe that they have valid consent.”

B. D.C. Circuit’s Ruling In ACA International v. FCC

On March 16, 2018 the D.C. Circuit issued a much anticipated opinion in ACA International v. FCC, 885 F.3d 687 (D.C. Cir. 2018) in connection with the 2015 Order. In ACA International, petitioners challenged several FCC actions set forth in the 2015 Order including (1) the explanation of which devices qualify as an ATDS and (2) the FCC interpretation

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9 2015 Declaratory Ruling, 30 FCC Rcd. at 7974 ¶ 16.
10 A predictive dialer is equipment that can dial automatically from a given list of telephone numbers using algorithms to predict when a sales agent will be available.” Id. at 7972 ¶ 10 & n.39.
11 Id. at 7975 ¶ 17.
12 Id. at 7976 ¶ 20.
14 2015 Declaratory Ruling, 30 FCC Rcd. at 7999 ¶ 72.
15 Id. at 8000 ¶ 72.
regarding when a caller violates the TCPA by calling a wireless number previously held by a consenting party but reassigned to a person who has not given consent.16

1. Court sets aside 2015 Order interpretations relating to ATDS capacity and required functions

The court noted that the TCPA definition of ATDS raises two questions: (i) when does a device have the “capacity” to perform the two enumerated functions; and (ii) what precisely are those functions?17 On the “capacity” question, the court diverged from the “present capacity” vs. “potential functionalities” debate from the 2015 Order and focused “more on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?”18 The Court noted that a “device’s ‘capacity’ includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones, under the [FCC’s] approach, meet the statutory definition of an autodialer.”19 The court recognized that under that scenario—where every smartphone qualifies as an ATDS—the statute’s restrictions on autodialer calls assume an eye-popping sweep.”20 The court concluded that such an outcome is “an unreasonable, and impermissible, interpretation of the statute’s reach. The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act’s restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent.”21 Accordingly, the court held that the FCC’s interpretation of “capacity” in the 2015 Order does “not constitute reasoned decision-making and thus would not satisfy the [Administrative Procedure Act] arbitrary-and-capricious review.22

Turning to the precise definition of required ATDS functions, the court noted that the statutory phrase “‘using a random or sequential number generator,’ has generated substantial questions over the years.”23 The question is whether this phrase modifies both “store” and produce.” Is a device an ATDS if it simply stores, and automatically dials a list of random or sequential numbers that it did not generate? In other words, must the device “itself” have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?24 The court concluded that the 2015 Order offered “no meaningful guidance” on this issue.25 The Court noted that the 2015 Order “while speaking to the question in several ways, gives no clear answer

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17 Id.
18 Id. at 696.
19 Id. at 697 (emphasis added).
20 Id.
21 Id.
22 Id. at 699.
23 Id. at 701.
24 Id.
25 Id.
(and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decision-making, espouse both competing interpretations in the same order.” The court also took issue with the FCC’s interpretation of the “human intervention” aspect of an ATDS, noting that “[a]ccording to the Commission . . . the ‘basic function’ of an autodialer is to dial numbers without human intervention, but a device might still qualify as an autodialer even if it cannot dial numbers without human intervention. Those side-by-side propositions are difficult to square.” Accordingly, the court ruled that the 2015 Order interpretation of functions a device must perform to qualify as an ATDS “fails to satisfy the requirement of reasoned decision making. The order’s lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission’s expansive understanding of when a device has the ‘capacity’ to perform the necessary functions. We must therefore set aside the Commission’s treatment of those matters.”

2. Court sets aside 2015 Order interpretations relating to reassigned wireless numbers

Following the 2015 Order, “the reassignment of a wireless number extinguishe[d] any consent given by the number's previous holder and exposes the caller to liability for reaching a party who has not given consent.” However, the FCC created a one time “safe harbor” whereby “[f]or that first call [to a reassigned number], the caller can continue to rely on the consent given by the ‘previous subscriber.’” In ACA International, the court noted that the FCC did “not presume that a single call to a reassigned number will always be sufficient for callers to gain actual knowledge of the reassignment. . . [b]ut it believed that "one call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber.” In reviewing the FCC’s interpretation of the phrase “called party”, the court noted that there are multiple instances within broader the TCPA statute where the term refers to the current subscriber—not the previous, pre-assigned subscriber. In addition, the phrase “intended recipient” does not appear in §227—indicating that there is no justification for the FCC’s equating “called party” with “intended recipient of the call.” Accordingly, the court found that “the Commission was not compelled to interpret ‘called party’ in §227(b)(1)(A) to mean the ‘intended recipient’ rather than the current subscriber. The Commission thus could permissibly interpret ‘called party’ in that provision to refer to the current subscriber.”

The ACA International petitioners also argued that the FCC’s institution of a one-call safe harbor for reassigned numbers was arbitrary and capricious. The court noted that, “[t]he question we face is, why should that [reasonable reliance on consent from prior subscriber]
necessarily stop with a single call? The court noted that the FCC has consistently adopted a “reasonable reliance” approach when interpreting the TCPA’s approval of calls based on prior express consent, but that the FCC “gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message.” The court ultimately “set aside the Commission’s interpretation on the ground that the one-call safe harbor is arbitrary and capricious.” The court also concluded that the law requires “setting aside not only [the FCC’s] allowance of a one-call safe harbor, but also its treatment of reassigned numbers more generally.” The court noted that this broader approach avoids a situation where “a caller is strictly liable for all calls made to [a] reassigned number, even if she has no knowledge of the reassignment.

C. Post-ACA International Developments

1. FCC Further Notice of Rulemaking Relating To Reassigned Number Database

Days after the ACA International decision, the FCC released a Further Notice of Proposed Rulemaking in connection with its efforts to target and eliminate unlawful robocalls. Specifically, the FCC proposes to ensure that one or more databases are available to provide callers with the comprehensive and timely information they need to avoid calling reassigned numbers, and sought public comment on (1) the information that callers who choose to use a reassigned numbers database need from such a database; (2) how to ensure that the information is reported to a database; and (3) the best approach to making that information available to callers. With respect to the TCPA, the FCC sought input on “whether the Commission should adopt a safe harbor from TCPA liability for those callers that choose to use a reassigned numbers database. Specifically, the FCC sought comment on the nature of safe harbor protection including liability from all reassigned-number calls, liability from good-faith reassigned-number calls, liability from reassigned-number calls but only when the database’s information was either untimely or inaccurate.

2. FCC Public Notice Seeks Comment On Interpretation of TCPA In Light of D.C. Circuit’s ACA International Decision

On May 14, 2018 the FCC released a Public Notice seeking comment on the ACA International decision. The FCC sought comment on a number of topics including how to interpret “capacity” in light of the court’s guidance. For example, how much user effort should be

34 Id. at 708.
35 Id.
36 Id. at 705.
37 Id. at 708.
38 Id.
40 Id.
41 Id. *29-30.
42 2018 FCC LEXIS 1496
required to enable the device to function as an automatic telephone dialing system? Does equipment have the capacity if it requires the simple flipping of a switch?\textsuperscript{43} In addition, the FCC sought comment on the phrase “random or sequential number generator”—must an ATDS be able to generate and dial random or sequential numbers or can equipment meet the definition even if it lacks that capacity?\textsuperscript{44} The FCC also seeks comment on the meaning of “automatic” within the term automatic telephone dialing system. In other words, must the dialing of telephone numbers be non-manual? Must an ATDS dial numbers without human intervention? Must an ATDS dial thousands of numbers in a short period of time?\textsuperscript{45} The FCC also sought comment on issues relating to reassigned numbers including: interpretation of the term “called party” for calls to reassigned numbers; Does the “called party” refer to “the person the caller expected to reach”; Or does it refer to the party the caller reasonably expected to reach?; Or does it refer to “the person actually reached, the wireless number's present-day subscriber after reassignment”\textsuperscript{46}; Or does it refer to a “customary user”\textsuperscript{46}; Is a reassigned numbers safe harbor necessary, and if so, what is our specific statutory authority for such a safe harbor?\textsuperscript{46}

3. **Third Circuit Grants Summary Judgment In TCPA Claim In Favor Of Caller in Dominguez v. Yahoo, Inc.**

Plaintiff purchased a cell phone with a reassigned telephone number. The prior owner of the number had subscribed to Yahoo's Email SMS Service, through which a user would receive a text message each time an email was sent to the user's Yahoo email account. Because the prior owner of the number never canceled the subscription, plaintiff received a text message from Yahoo every time the prior owner received an email. Plaintiff unsuccessfully attempted to turn off the SMS notifications, and ultimately received approximately 27,800 text messages from Yahoo over the course of 17 months.\textsuperscript{47} Plaintiff filed a class action under the TCPA. While the case was pending, both the 2015 Order and ACA International decision were released. The Third Circuit ruled that “[i]n light of the D.C. Circuit's holding [in ACA International] we interpret the statutory definition of autodialer as we did prior to the issuance of the 2015 Declaratory Ruling. [Plaintiff] can no longer rely on is argument that the Email SMS Service had the latent or potential capacity to function as an autodialer. The only remaining question, then, is whether [plaintiff] provided evidence to show that the Email SMS Service has the present capacity to function as an autodialer.\textsuperscript{48} The court concluded that plaintiff failed to adduce any evidence of how “the Email SMS System actually did or could generate random telephone numbers to dial.”\textsuperscript{49} The record indicated only that the Email SMS Service sent messages to “numbers that had been individually and manually inputted into its system by a user” and the court determined

\textsuperscript{43} Id. at *3.

\textsuperscript{44} Id. at *5-6.

\textsuperscript{45} Id. at *5.

\textsuperscript{46} Id. at *8-9.


\textsuperscript{48} Id. at *5-6.

\textsuperscript{49} Id. at *8 (emphasis added).
that because of that fact, “[t]he TCPA’s prohibition on autodialers is therefore not the proper means of redress.”

4. Ninth Circuit Vacates Summary Judgment In Favor Of Caller In Marks v. Crunch San Diego, LLC

The device at issue in Marks was a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers. The device captured and stored phone numbers in one of three ways: An operator of the system manually entered a phone number into the system; a current or potential customer responded to a marketing campaign with a text (which automatically provided the customer's phone number); or a customer provided a phone number by filling out a consent form on a client's website. Defendant Crunch used the platform by logging in to the system, selecting the recipient phone numbers, generating the content of the marketing message and selecting the date and time for the message to be sent. Plaintiff received three text messages from Crunch after signing up for a gym membership.

The case turned on whether Crunch’s marketing platform qualified as an ATDS. The court ruled that “because the D.C. Circuit vacated the FCC’s interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains.”

The court rejected Crunch’s argument that an ATDS must be fully automatic, meaning that it must operate without any human intervention whatsoever. Because Crunch did not dispute that the platform dialed numbers automatically, the court determined that the system “had[d] the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the platform.”

The court ruled that the platform’s capacity to “store numbers and dial[] them automatically to send text messages to a stored list of phone numbers as part of scheduled campaigns . . . is sufficient to survive summary judgment” on the issue of whether the platform qualifies as an ATDS. The court concluded that “the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.”

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50 Id. at *10.
51 Marks v. Crunch San Diego, LLC, No. 14-56834, 2018 U.S. App. LEXIS 26883, at *16 (9th Cir. Sep. 20, 2018)
52 Id.
53 Id. at *17.
54 Id.
55 Id. at *20.
56 Id. at *26.
57 Id. at *27.
58 Id. at *27-28.
59 Id. at *3.
On October 3, 2018, the FCC issued yet another Public Notice relating to TCPA interpretation in connection with the recent *Marks v. Crunch San Diego, LLC* decision. The FCC sought “further comment on what constitutes an ‘automatic telephone dialing system.’” The FCC noted the apparent conflict between the Ninth Circuit’s conclusion that the phrase “using a random or sequential number generator” does not apply to equipment that has the capacity “to store numbers to be called” and the D.C. Circuit’s conclusion that the TCPA unambiguously forecloses any interpretation that “would appear to subject ordinary calls from any conventional smartphone to the Act’s coverage.” To the extent the phrase “using a random or sequential number generator” is ambiguous, the FCC sought comment on how it should exercise its discretion to interpret such ambiguities. In addition, the FCC sought comment on the following issues: Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system? What devices have the capacity to store numbers? Do smartphones have such capacity? What devices that can store numbers also have the capacity to automatically dial such numbers? Do smartphones have such capacity? In short, how should the Commission address these two court holdings? Approximately 30 entities provided comment in response to the Public Notice, and the majority advocated for an interpretation of ATDS that is narrower than the meaning adopted in *Marks*. The existing conflict between the Third Circuit and Ninth Circuit interpretations of the ATDS definition suggests that swift action by the FCC is likely.
Federal Trade Commission Act
Section 5: Unfair or Deceptive Acts or Practices

Background
Section 5(a) of the Federal Trade Commission Act (FTC Act) (15 USC §45) prohibits “unfair or deceptive acts or practices in or affecting commerce.” This prohibition applies to all persons engaged in commerce, including banks. The Board has affirmed its authority under section 8 of the Federal Deposit Insurance Act to take appropriate action when unfair or deceptive acts or practices (UDAP) are discovered.

On March 11, 2004, the Board and the Federal Deposit Insurance Corporation (FDIC) issued a joint statement (Joint Statement) regarding the agencies’ responsibilities to enforce the prohibitions against unfair or deceptive trade practices as they apply to state-chartered banks. The Joint Statement contains a discussion of managing risks relating to UDAP and general guidance on measures that state-chartered banks can take to avoid engaging in such acts or practices, including best practices.

Legal Standards
The Joint Statement contained in appendix A of these procedures gives a complete description of the legal standards for both unfair and deceptive practices. The legal standards for unfairness and deception are independent of each other. Depending on the facts, a practice may be unfair, deceptive, or both. The legal standards for UDAP are briefly described below.

Unfair Practices
An act or practice is unfair where
• causes or is likely to cause substantial injury to consumers;
• cannot be reasonably avoided by consumers; and
• is not outweighed by countervailing benefits to consumers or to competition.

Public policy, as established by statute, regulation, or judicial decisions may be considered with all other evidence in determining whether an act or practice is unfair.

Deceptive Practices
An act or practice is deceptive where
• a representation, omission, or practice misleads or is likely to mislead the consumer;
• a consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and
• the misleading representation, omission, or practice is material.

Relationship of UDAP to Other Laws and Ratings
Some acts or practices may violate both section 5 of the FTC Act and other federal or state laws. Other acts and practices may violate only the FTC Act while fully complying with other consumer protection laws and regulations. Therefore, if a potential UDAP violation is found, examiners should consider whether other statutory or regulatory violations have occurred. The Joint Statement specifies laws that warrant particular attention in this regard (see appendix A of these procedures).

Furthermore, when illegal credit practices are identified through a review of UDAP compliance, examiners should consider whether the illegal practices adversely affect the Community Reinvestment Act rating of the institution pursuant to the regulatory requirements of 12 CFR 228.28(c).

Compliance Risk Evaluation
UDAP violations can present significant legal, reputational, and compliance risks for banks. These risks highlight the need for examiners to assess compliance with section 5 of the FTC Act in conjunction with consumer compliance examinations, other related supervisory activities, and consumer complaint investigations. Consistent with the Board’s risk-focused consumer compliance supervision program, compliance with section 5 of the FTC Act should be considered when developing risk assessments, scoping an examination, or when investigating a consumer complaint.

A determination of whether a particular act or practice is unfair or deceptive will depend on an analysis of the facts and circumstances. Although individual violations or complaints may appear isolated, when considered in the context of additional information including other violations or complaints, they may raise potential UDAP concerns.
Furthermore, the prohibition against UDAP not only applies to all products and services offered by banks, but to every stage and activity, from product development to the creation and rollout of marketing campaigns, and to servicing and collections. Therefore, particular focus should be paid to new or modified systems or products and third-party arrangements.
EXAMINATION OBJECTIVES

- To determine the adequacy of the bank’s internal procedures, policies, and controls to ensure consistent compliance with section 5 of the FTC Act.
- To determine if the bank complies with section 5 of the FTC Act, which prohibits unfair and deceptive acts or practices.

EXAMINATION PROCEDURES

In order to fulfill the examination objectives stated above, and consistent with the Joint Statement, examiners should identify the bank’s internal policies, procedures, and controls to be reviewed for UDAP compliance. In particular, the bank’s compliance management systems; advertising and promotional materials; initial and subsequent disclosures; servicing and collections; and management and monitoring of employees and third parties should be reviewed as they relate to the products and services identified as potential areas of concern.

Examiners also should use these procedures in conjunction with the guidance and best practices contained in the Joint Statement to determine whether an unfair or deceptive act or practice has occurred. Specifically, examiners should, as appropriate:

- review previous examinations reports, including consumer compliance, and safety and soundness examination reports;
- review current and prior examination findings regarding the institution’s involvement in acts or practices that violate or may violate section 5 of the FTC Act;
- review the bank’s policies, procedures, and internal controls;
- review a sample of consumer complaints, advertisements and promotional materials, disclosures, customer agreements, and third-party contracts and instructions;
- interview management and staff about the bank’s acts and practices; and
- discuss any examiner concerns with bank management.

Evaluating Compliance Management Programs

A bank’s compliance management program should focus on the avoidance of acts or practices that are unfair or deceptive and on the prompt correction of any such identified acts of practices. The degree of specificity with which a compliance management program should address this area will vary depending on the bank’s size, complexity and product offerings. A small bank that offers a limited number of products through a few branches may not need the kind of specific, documented compliance program needed in a bank engaged in, for example, nationwide mortgage or credit card lending.

Items to Evaluate

1. Determine whether the bank’s policies and procedures include guidance on preventing unfair or deceptive acts or practices.
2. Ascertain whether the bank reviews its practices in the context of federal regulations, policies, and decisions on unfair or deceptive acts or practices.
3. Ascertain whether the bank’s compliance management function looks beyond the identification of individual violations to determine if its practices may be unfair or deceptive.
4. Determine whether the bank trains its employees on the provisions of the FTC Act that prohibit UDAP.
5. Determine whether the bank reviews consumer complaints to identify potential compliance problems and negative trends that have the potential to be unfair or deceptive. Determine whether the bank reviews concentrations of complaints about the same product or about bank conduct in order to identify potential areas of concern.
6. Determine whether the bank has identified any potentially unfair or deceptive acts or practices, and if so, verify that it corrected the identified concerns and provided restitution to affected persons when appropriate.
7. If the bank has identified potentially unfair or deceptive acts or practices, determine if it has implemented changes to prevent future recurrences.
8. Determine whether the bank clearly discloses a telephone number or mailing address (and e-mail address or website if applicable) that consumers may use to contact the bank or its third-party servicers regarding any complaints or inquiries they may have.

9. Determine whether the bank’s management is involved in both the development of new products and services and in decisions to change the terms of or reprice existing products and services.

**Evaluating Advertising and Promotional Materials**

Due to the increasing complexity of certain products, particularly mortgage loans and credit cards, a bank’s advertising and promotional materials should be presented in a clear, balanced, and timely manner, with special attention paid to products targeted toward the elderly, financially vulnerable, or financially unsophisticated. Advertising and promotional materials should present not only the benefits of the products and services, but also any potential risks, such as payment shock or negative amortization. When a bank’s business is largely driven by product marketing and promotion, it should exercise particular caution to avoid potential UDAP.

**Items to Evaluate**

1. Determine whether the bank reviews all advertisements, promotional materials, and marketing scripts to ensure that there is a reasonable factual basis for all representations made.

2. Determine whether the bank reviews all advertisements, promotional materials, and marketing scripts to ensure that these materials do not use fine print, separate statements, or inconspicuous disclosures to correct potentially misleading headlines.

3. Determine whether the bank tailors advertisements, promotional materials, and marketing scripts to take into account the sophistication and experience of the target audience, including the elderly and financially vulnerable.

4. In advertisements, promotional materials, marketing scripts, and recorded telephone conversations, determine whether the bank (or its third-party servicer) makes claims, representations, or statements that may mislead members of the target audience about the cost, value, availability, cost savings, benefits, or terms of the product or service.

5. Determine whether the bank reviews all advertisements, promotional materials, and marketing scripts to ensure that they fairly and adequately describe the terms, benefits, and material limitations of the product or service being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission.

6. Determine whether the bank avoids advertising that a particular service or benefit will be provided in connection with an account if the bank does not intend or is not able to provide the service or benefit to account holders.

7. Determine whether the bank draws the attention of customers to key terms, including limitations and conditions that are important in enabling customers to make informed decisions about whether the product or service meets their needs.

8. When using terms such as “pre-approved,” “guaranteed,” or “fixed rates,” determine whether the bank clearly discloses any limitations, conditions, or restrictions on the offer.

9. Determine whether the bank ensures that costs and benefits of related or optional products and services, such as overdraft protection, are clearly explained and not misrepresented or presented in an incomplete or overly complex manner.

10. Determine whether the bank avoids advertising terms that are not available to most customers, and avoids using unrepresentative examples in advertising, marketing, and promotional materials.

11. Determine whether the bank reviews its website content and navigational process to ensure that the consumer is able to readily obtain the necessary disclosures for its products.

12. Determine whether the bank reviews its advertising and promotional materials to avoid raising UDAP concerns.

**Evaluating Initial and Subsequent Disclosures**

A bank’s disclosures with respect to initial terms and conditions, repricing, and changes in terms should be clear and accurate. The terms and conditions of many credit and deposit products are variable and may change periodically based on external variables, such as changes in the prime rate. Many credit card products have terms that may change or increase automatically following a
specific event, such as an interest rate increase triggered by a consumer’s delinquency with the creditor or another creditor. The disclosures for products with variable terms and conditions such as these should be clearly presented.

Items to Evaluate

1. Determine whether the bank reviews all customer agreements and disclosures to ensure that there is a reasonable factual basis for all representations made.

2. Determine whether the bank’s customer agreements and disclosures fairly and adequately describe the terms, benefits, and material limitations or conditions of the product or service being offered. Limitations may include such things as: a special interest rate that applies only to balance transfers, an expiration date for terms that apply only during an introductory period, or a prerequisite for obtaining particular terms (such as minimum transaction amounts, introductory or other fees, or other qualifications). Conditions may include the ability to cancel without charge a service that was offered on a free trial basis.

3. Determine whether the bank’s disclosures make claims, representations, or statements that may mislead members of the target audience about the cost, value, availability, cost savings, benefits, or terms of the product or service.

4. Determine whether the bank informs consumers in a clear and timely manner about any fees, penalties, or other charges (including charges for any force-placed products) that have been imposed, and the reasons for their imposition.

5. Determine whether the bank clearly discloses that optional or related products and services that are offered simultaneously with credit-such as insurance, travel services, credit protection, and consumer report update services—are not required to obtain credit or are not considered in decisions to grant credit.

6. When making claims about amounts of credit available to consumers, determine whether the bank accurately and completely represents the amount of potential, approved, or useable credit that the consumer will receive.

7. Determine whether the bank clearly informs a consumer when the account terms approved for the consumer are less favorable than the terms advertised or previously disclosed.

8. If the bank reserves the right to change the terms of an account or product, determine whether the bank’s customer agreements clearly disclose that the bank can make future changes to the rate, terms, and conditions otherwise specified in any agreement signed by or given to the consumer. Determine whether the circumstances under which such changes may be made are clearly explained.

Evaluating Servicing and Collections

Servicing and collection activities can present a higher risk of potential UDAP violations because they are often conducted by bank subsidiaries, affiliates or third-party vendors and servicers. Thus, a bank should ensure that its disclosures of servicing and collections activities are accurate and not misleading and that those activities are conducted fairly and in consonance with any disclosures or agreements. For example, statements should clearly indicate when payments are due before any penalties are incurred.

Items to Evaluate

1. Determine whether the bank ensures that its employees and third-party servicers have, and follow, procedures to credit consumer payments in a timely manner.

2. Determine whether consumers are clearly told when and if monthly payments are applied to fees, penalties, or other charges before being applied to regular principal and interest.

3. Determine whether account statements clearly disclose how fees, penalties, other charges, and interest and principal payments affect the account balance and whether they have been calculated in accordance with any written agreements with the borrower.

Monitoring the Conduct of Employees and Third Parties

A bank should have effective risk and monitoring controls for hiring personnel and contracting and maintaining relationships with third parties. The controls should establish responsibilities with third parties for training and monitoring of staff. In addition, the controls should foster a bank’s ability to monitor whether actual practices by its employees and third-party contractors are consistent with the bank’s policies and procedures, applicable laws and regulations, and third-party agreements. In addition, a bank’s monitoring should include a review of training and promotional materials used not only by its employees but also by third parties, to ensure that any UDAP concerns are identified early.

Items to Evaluate

1. Determine whether, through its third-party agreements and internal policies, the bank has effective risk and monitoring controls for select-
ing and managing third-party contractors. Such agreements and policies should outline the degree of monitoring, acceptable error rates, and corrective action provisions for noncompliance. They also should identify issues that would need to be escalated to bank management.

2. Determine whether a bank’s compensation programs for employees and third-party contractors provide incentives for acts or practices that could raise potential concerns, such as compensation programs that steer consumers to particular products to the exclusion of other, potentially beneficial products.

3. Determine whether the bank monitors the training of employees and third parties who market or promote bank products or service loans to ensure that they are adequately trained to avoid making statements or taking actions that might be unfair or deceptive. Monitoring should include a review of training and promotional materials, including telemarketing scripts.

4. Determine whether the bank reviews a third party’s primary interface with consumers, such as reviewing recorded telephone calls or transcripts of online communication.
Appendix: Statement on Unfair or Deceptive Acts or Practices by State-Chartered Banks

The following statement was issued jointly by the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation on March 11, 2004.

Purpose

The Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (the “Board” and the “FDIC,” or collectively, the “Agencies”) are issuing this statement to outline the standards that will be considered by the Agencies as they carry out their responsibility to enforce the prohibitions against unfair or deceptive trade practices found in section 5 of the Federal Trade Commission Act (“FTC Act”) as they apply to acts and practices of state-chartered banks. The Agencies will apply these standards when weighing the need to take supervisory and enforcement actions and when seeking to ensure that unfair or deceptive practices do not recur.

This statement also contains a section on managing risks relating to unfair or deceptive acts or practices, which includes best practices as well as general guidance on measures that state-chartered banks can take to avoid engaging in such acts or practices.

Although the majority of insured banks adhere to a high level of professional conduct, banks must remain vigilant against possible unfair or deceptive acts or practices both to protect consumers and to minimize their own risks.

Coordination of Enforcement Efforts

Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce,” and applies to all persons engaged in commerce, including banks. The Agencies each have affirmed their authority under section 8 of the Federal Deposit Insurance Act to take appropriate action when unfair or deceptive acts or practices are discovered.

A number of agencies have authority to combat unfair or deceptive acts or practices. For example, the FTC has broad authority to enforce the requirements of section 5 of the FTC Act against many non-bank entities. In addition, state authorities have primary responsibility for enforcing state statutes against unfair or deceptive acts or practices. The Agencies intend to work with these other regulators as appropriate in investigating and responding to allegations of unfair or deceptive acts or practices that involve state banks and other entities supervised by the Agencies.

Standards for Determining What is Unfair or Deceptive

The FTC Act prohibits unfair or deceptive acts or practices. Congress drafted this provision broadly in order to provide sufficient flexibility in the law to address changes in the market and unfair or deceptive practices that may emerge.

An act or practice may be found to be unfair where it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” A representation, omission, or practice is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances and is likely to affect a consumer’s conduct or decision regarding a product or service.

The standards for unfairness and deception are independent of each other. While a specific act or practice may be both unfair and deceptive, an act or practice is prohibited by the FTC Act if it is either unfair or deceptive. Whether an act or practice is unfair or deceptive will in each instance depend upon a careful analysis of the facts and circumstances. In analyzing a particular act or practice, the Agencies will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC. The Agencies will also consider factually similar cases brought by the FTC and other agencies to ensure that these standards are applied consistently.

Unfair Acts or Practices

Assessing whether an act or practice is unfair

An act or practice is unfair where it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers.
and (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered in the analysis of whether a particular act or practice is unfair. Each of these elements is discussed further below.

- **The act or practice must cause or be likely to cause substantial injury to consumers.**

  To be unfair, an act or practice must cause or be likely to cause substantial injury to consumers. Substantial injury usually involves monetary harm. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury. An injury may be substantial if it raises a significant risk of concrete harm. Trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair.

- **Consumers must not reasonably be able to avoid the injury.**

  A practice is not considered unfair if consumers may reasonably avoid injury. Consumers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions. Withholding material price information until after the consumer has committed to purchase the product or service would be an example of preventing a consumer from making an informed decision. A practice may also be unfair where consumers are subject to undue influence or are coerced into purchasing unwanted products or services.

  The Agencies will not second-guess the wisdom of particular consumer decisions. Instead, the Agencies will consider whether a bank’s behavior unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.

- **The injury must not be outweighed by countervailing benefits to consumers or to competition.**

  To be unfair, the act or practice must be injurious in its net effects—that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice. Offsetting benefits may include lower prices or a wider availability of products and services.

  Costs that would be incurred for remedies or measures to prevent the injury are also taken into account in determining whether an act or practice is unfair. These costs may include the costs to the bank in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.

- **Public policy may be considered.**

Public policy, as established by statute, regulation, or judicial decisions may be considered with all other evidence in determining whether an act or practice is unfair. For example, the fact that a particular lending practice violates a state law or a banking regulation may be considered as evidence in determining whether the act or practice is unfair. Conversely, the fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair. Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair.

### Deceptive Acts and Practices

**Assessing whether an act or practice is deceptive**

A three-part test is used to determine whether a representation, omission, or practice is “deceptive.” First, the representation, omission, or practice must mislead or be likely to mislead the consumer. Second, the consumer’s interpretation of the representation, omission, or practice must be reasonable under the circumstances. Lastly, the misleading representation, omission, or practice must be material. Each of these elements is discussed below in greater detail.

- **There must be a representation, omission, or practice that misleads or is likely to mislead the consumer.**

  An act or practice may be found to be deceptive if there is a representation, omission, or practice that misleads or is likely to mislead the consumer. Deception is not limited to situations in which a consumer has already been misled. Instead, an act or practice may be found to be deceptive if it is likely to mislead consumers. A representation may be in the form of express or implied claims or promises and may be written or oral. Omission of information may be deceptive if disclosure of the omitted information is necessary to prevent a consumer from being misled.

  In determining whether an individual statement, representation, or omission is misleading, the statement, representation, or omission will not be evaluated in isolation. The Agencies will evaluate it in the context of the entire advertisement, transaction, or course of dealing to determine whether it constitutes deception. Acts or practices that have the potential to be deceptive include: making misleading cost or price claims; using bait-and-switch techniques; offering to provide a product or service that is not in fact available; omitting material limitations or conditions from an offer; selling a product unfit for the purposes for which it is sold; and failing to provide promised services.
• The act or practice must be considered from the perspective of the reasonable consumer.

In determining whether an act or practice is misleading, the consumer’s interpretation of or reaction to the representation, omission, or practice must be reasonable under the circumstances. The test is whether the consumer’s expectations or interpretation are reasonable in light of the claims made. When representations or marketing practices are targeted to a specific audience, such as the elderly or the financially unsophisticated, the standard is based upon the effects of the act or practice on a reasonable member of that group.

If a representation conveys two or more meanings to reasonable consumers and one meaning is misleading, the representation may be deceptive. Moreover, a consumer’s interpretation or reaction may indicate that an act or practice is deceptive under the circumstances, even if the consumer’s interpretation is not shared by a majority of the consumers in the relevant class, so long as a significant minority of such consumers is misled.

In evaluating whether a representation, omission or practice is deceptive, the Agencies will look at the entire advertisement, transaction, or course of dealing to determine how a reasonable consumer would respond. Written disclosures may be insufficient to correct a misleading statement or representation, particularly where the consumer is directed away from qualifying limitations in the text or is counseled that reading the disclosures is unnecessary. Likewise, oral disclosures or fine print may be insufficient to cure a misleading headline or prominent written representation.

• The representation, omission, or practice must be material.

A representation, omission, or practice is material if it is likely to affect a consumer’s decision regarding a product or service. In general, information about costs, benefits, or restrictions on the use or availability of a product or service is material. When express claims are made with respect to a financial product or service, the claims will be presumed to be material. Similarly, the materiality of an implied claim will be presumed when it is demonstrated that the institution intended that the consumer draw certain conclusions based upon the claim.

Claims made with the knowledge that they are false will also be presumed to be material. Omissions will be presumed to be material when the financial institution knew or should have known that the consumer needed the omitted information to evaluate the product or service.

Relationship to Other Laws

Acts or practices that are unfair or deceptive within the meaning of section 5 of the FTC Act may also violate other federal or state statutes. On the other hand, there may be circumstances in which an act or practice violates section 5 of the FTC Act even though the institution is in technical compliance with other applicable laws, such as consumer protection and fair lending laws. Banks should be mindful of both possibilities. The following laws warrant particular attention in this regard:

Truth in Lending
and Truth in Savings Acts

Pursuant to the Truth in Lending Act (TILA), creditors must “clearly and conspicuously” disclose the costs and terms of credit. The Truth in Savings Act (TISA) requires depository institutions to provide interest and fee disclosures for deposit accounts so that consumers may compare deposit products. TISA also provides that advertisements shall not be misleading or inaccurate, and cannot misrepresent an institution’s deposit contract. An act or practice that does not comply with these provisions of TILA or TISA may also violate the FTC Act. For example, consumers could be misled by advertisements of “guaranteed” or “lifetime” interest rates when the creditor or depository institution intends to change the rates, whether or not the disclosures satisfy the technical requirements of TILA or TISA.

Equal Credit Opportunity
and Fair Housing Acts

The Equal Credit Opportunity Act (ECOA) prohibits discrimination in any aspect of a credit transaction against persons on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that an applicant’s income derives from any public assistance program, and the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. Similarly, the Fair Housing Act (FHA) prohibits creditors involved in residential real estate transactions from discriminating against any person on the basis of race, color, religion, sex, handicap, familial status, or national origin. Unfair or deceptive practices that target or have a disparate impact on consumers who are members of these protected classes may violate the ECOA or the FHA, as well as the FTC Act.

8. 15 USC § 1632(a).
9. 12 USC § 4301 et seq.
Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act prohibits unfair, deceptive, and abusive practices related to the collection of consumer debts. Although this statute does not apply to banks that collect their own debts, failure to adhere to the standards set by this Act may support a claim of unfair or deceptive practices in violation of the FTC Act. Moreover, banks that either affirmatively or through lack of oversight, permit a third-party debt collector acting on their behalf to engage in deception, harassment, or threats in the collection of monies due may be exposed to liability for approving or assisting in an unfair or deceptive act or practice.

Managing Risks Related to Unfair or Deceptive Acts or Practices

Since the release of the FDIC’s statement and the Board’s letter on unfair and deceptive practices in May 2002, bankers have asked for guidance on strategies for managing risk in this area. This section outlines guidance on best practices to address some areas with the greatest potential for unfair or deceptive acts and practices, including: advertising and solicitation; servicing and collections; and the management and monitoring of employees and third-party service providers. Banks also should monitor compliance with their own policies in these areas, and should have procedures for receiving and addressing consumer complaints and monitoring activities performed by third parties on behalf of the bank.

To avoid engaging in unfair or deceptive activity, the Agencies encourage use of the following practices, which have already been adopted by many institutions:

Review all promotional materials, marketing scripts, and customer agreements and disclosures to ensure that they fairly and adequately describe the terms, benefits, and material limitations of the product or service being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission. Ensure that these materials do not use fine print, separate statements or inconspicuous disclosures to correct potentially misleading headlines, and ensure that there is a reasonable factual basis for all representations made.

Draw the attention of customers to key terms, including limitations and conditions, that are important in enabling the customer to make an informed decision regarding whether the product or service meets the customer’s needs.

Clearly disclose all material limitations or conditions on the terms or availability of products or services, such as a limitation that applies a special interest rate only to balance transfers; the expiration date for terms that apply only during an introductory period; material prerequisites for obtaining particular products, services or terms (e.g., minimum transaction amounts, introductory or other fees, or other qualifications); or conditions for canceling a service without charge when the service is offered on a free trial basis.

Inform consumers in a clear and timely manner about any fees, penalties, or other charges (including charges for any force-placed products) that have been imposed, and the reasons for their imposition.

Clearly inform customers of contract provisions that permit a change in the terms and conditions of an agreement.

When using terms such as “pre-approved” or “guaranteed,” clearly disclose any limitations, conditions, or restrictions on the offer.

Clearly inform consumers when the account terms approved by the bank for the consumer are less favorable than the advertised terms or terms previously disclosed.

Tailor advertisements, promotional materials, disclosures and scripts to take account of the sophistication and experience of the target audience. Do not make claims, representations or statements that mislead members of the target audience about the cost, value, availability, cost savings, benefits, or terms of the product or service.

Avoid advertising that a particular service will be provided in connection with an account if the bank does not intend or is not able to provide the service to accountholders.

Clearly disclose when optional products and services—such as insurance, travel services, credit protection, and consumer report update services that are offered simultaneously with credit—are not required to obtain credit or considered in decisions to grant credit.

Ensure that costs and benefits of optional or related products and services are not misrepresented or presented in an incomplete manner.

When making claims about amounts of credit available to consumers, accurately and completely represent the amount of potential, approved, or useable credit that the consumer will receive.

Avoid advertising terms that are not available to most customers and using unrepresentative examples in advertising, marketing, and promotional materials.

Avoid making representations to consumers that
they may pay less than the minimum amount due required by the account terms without adequately disclosing any late fees, overlimit fees, or other account fees that will result from the consumer paying such reduced amount.

Clearly disclose a telephone number or mailing address (and, as an addition, an email or website address if available) that consumers may use to contact the bank or its third-party servicers regarding any complaints they may have, and maintain appropriate procedures for resolving complaints. Consumer complaints should also be reviewed by banks to identify practices that have the potential to be misleading to customers.

Implement and maintain effective risk and supervisory controls to select and manage third-party servicers.

Ensure that employees and third parties who market or promote bank products, or service loans, are adequately trained to avoid making statements or taking actions that might be unfair or deceptive.

Review compensation arrangements for bank employees as well as third-party vendors and servicers to ensure that they do not create unintended incentives to engage in unfair or deceptive practices.

Ensure that the institution and its third party servicers have and follow procedures to credit consumer payments in a timely manner. Consumers should be clearly told when and if monthly payments are applied to fees, penalties, or other charges before being applied to regular principal and interest.

The need for clear and accurate disclosures that are sensitive to the sophistication of the target audience is heightened for products and services that have been associated with abusive practices. Accordingly, banks should take particular care in marketing credit and other products and services to the elderly, the financially vulnerable, and customers who are not financially sophisticated. In addition, creditors should pay particular attention to ensure that disclosures are clear and accurate with respect to: the points and other charges that will be financed as part of home-secured loans; the terms and conditions related to insurance offered in connection with loans; loans covered by the Home Ownership and Equity Protection Act; reverse mortgages; credit cards designed to rehabilitate the credit position of the cardholder; and loans with pre-payment penalties, temporary introductory terms, or terms that are not available as advertised to all consumers.

Conclusion

The development and implementation of policies and procedures in these areas and the other steps outlined above will help banks assure that products and services are provided in a manner that is fair, allows informed customer choice, and is consistent with the FTC Act.
§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.
Example 1: A film critic’s review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic’s own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser’s opinion. [See § 255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family’s clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug’s ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer’s statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver’s personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer’s views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit
and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

**Example 8:** A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog’s fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser’s opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser’s views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors’ products, and the advertiser’s contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See § 255.1(b) regarding the “good reason to believe” requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.
**Example 1:** A building contractor states in an advertisement that he uses the advertiser’s exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor’s endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

**Example 2:** A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, “We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best.” The advertisement portrays X typing on each keyboard and then picking the advertiser’s brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser’s keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

**Example 3:** An ad for an acne treatment features a dermatologist who claims that the product is “clinically proven” to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

**Example 4:** A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

**Example 5:** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser’s products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated
representations made through the blogger’s endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.¹

¹ The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser’s experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.
Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

**Example 1:** A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers’ experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, “Notice: These testimonials do not prove our product works. You should not expect to have similar results,” the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

**Example 2:** An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company’s heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company’s heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, “Results not typical” or, “These testimonials are based on the experiences of a few people and you are not likely to have similar results” is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., “the average homeowner saves $35 per month,” “the typical family saves $50 per month during cold months and $20 per month in warm months,” or “most families save 10% on their utility bills.”

**Example 3:** An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (i.e., a 120-point drop in serum cholesterol without any lifestyle changes).

**Example 4:** An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s
experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

If the ad features the same pictures but the testimonialist simply says, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser’s cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser’s cake mix.

Example 6: An advertisement purports to portray a “hidden camera” situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser’s recently introduced breakfast cereal. Even though the words “hidden camera” are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers’ statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.
If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [See § 255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert’s evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors’ products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [See § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an “engineer” implies that the endorser’s professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser’s field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser’s expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the “American Institute of Science.” From its name, consumers would infer that the “American Institute of Science” is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization
(e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

**Example 4:** A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital’s choice – convenience of packaging – is neither relevant nor available to consumers, and the basis for the hospital’s decision is not disclosed to consumers.

**Example 5:** A woman who is identified as the president of a commercial “home cleaning service” states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand’s performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president’s statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors’ products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service’s president makes no mention that the endorsed cleanser was “chosen,” “selected,” or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

**Example 6:** A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product’s safety and efficacy.

§ 255.4    Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its
expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [See § 255.1(d) regarding the liability of endorsers.]

**Example:** A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

### § 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

**Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the “findings” of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in this advertisement.

**Example 2:** A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star’s compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

**Example 3:** During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball
better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company’s clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

**Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

**Example 5:** An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his “spontaneous” opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein “steak.” This notification would materially affect the weight or credibility of the patron’s endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.
Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the “hidden camera” only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer’s staff reviews the profiles of individuals interested in working as “extras” in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer’s infomercial, they will receive a small payment. Viewers would not expect that these “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member’s endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.
The FTC’s Endorsement Guides: What People Are Asking

TAGS: Advertising and Marketing | Endorsements | Online Advertising and Marketing

Answers to questions people are asking about the FTC’s Endorsement Guides, including information about disclosing material connections between advertisers and endorsers.

Suppose you meet someone who tells you about a great new product. She tells you it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product – or has been paid by the company to tout the product. Would you want to know that when you’re evaluating the endorser’s glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission’s (FTC) Endorsement Guides.

The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.

In addition, the Guides say, if there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. For example, if an ad features an endorser who’s a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you’re planning a vacation. You do some research and find a glowing review on someone’s blog that a particular resort is the most luxurious place he has ever stayed. If you knew the hotel had paid the blogger hundreds of dollars to say great things about it or that the blogger had stayed there for several days for free, it could affect how much weight you’d give the blogger’s endorsement. The blogger should, therefore, let his readers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who says she lost 20 pounds in two months using the advertised product. If the advertiser doesn’t have proof that the endorser’s experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), then an ad featuring that endorser must make clear to the audience what the generally expected results are.

Here are answers to some of our most frequently asked questions from advertisers, ad agencies, bloggers, and others.
About the Endorsement Guides

Do the Endorsement Guides apply to social media?

Yes. Truth in advertising is important in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media).

Isn’t it common knowledge that bloggers are paid to tout products or that if you click a link on a blogger’s site to buy a product, the blogger will get a commission?

No. Some bloggers who mention products in their posts have no connection to the marketers of those products – they don’t receive anything for their reviews or get a commission. They simply recommend those products to their readers because they believe in them.

Moreover, the financial arrangements between some bloggers and advertisers may be apparent to industry insiders, but not to everyone else who reads a particular blog. Under the law, an act or practice is deceptive if it misleads “a significant minority” of consumers. Even if some readers are aware of these deals, many readers aren’t. That’s why disclosure is important.

Are you monitoring bloggers?

Generally not, but if concerns about possible violations of the FTC Act come to our attention, we evaluate them case by case. If law enforcement becomes necessary, our focus usually will be on advertisers or their ad agencies and public relations firms. Action against an individual endorser, however, might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.

Does the FTC hold bloggers to a higher standard than reviewers for traditional media outlets?
No. The FTC Act applies across the board. The issue is – and always has been – whether the audience understands the reviewer’s relationship to the company whose products are being recommended. If the audience understands the relationship, a disclosure isn’t needed.

If you’re employed by a newspaper or TV station to give reviews – whether online or offline – your audience probably understands that your job is to provide your personal opinion on behalf of the newspaper or television station. In that situation, it’s clear that you did not buy the product yourself – whether it’s a book or a car or a movie ticket. On a personal blog, a social networking page, or in similar media, the reader might not realize that the reviewer has a relationship with the company whose products are being recommended. Disclosure of that relationship helps readers decide how much weight to give the review.

What is the legal basis for the Guides?

The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising.

The Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities. The Guides themselves don’t have the force of law. However, practices inconsistent with the Guides may result in law enforcement actions alleging violations of the FTC Act. Law enforcement actions can result in orders requiring the defendants in the case to give up money they received from their violations and to abide by various requirements in the future. Despite inaccurate news reports, there are no “fines” for violations of the FTC Act.

When Does the FTC Act Apply to Endorsements?

I’m a blogger. I heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?

No. If you mention a product you paid for yourself, there isn’t an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to its customers.

The FTC is only concerned about endorsements that are made on behalf of a sponsoring advertiser. For example, an endorsement would be covered by the FTC Act if an advertiser – or someone working for an advertiser – pays you or gives you something of value to mention a product. If you receive free products or other perks with the expectation that you’ll promote or discuss the advertiser’s products in your blog, you’re covered. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are covered.

What if all I get from a company is a $1-off coupon, an entry in a sweepstakes or a contest, or a product that is only worth a few dollars? Does that still have to be disclosed?

The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed. For example, being entered into a sweepstakes or a contest for a chance to win a thousand dollars in exchange for an endorsement could very well affect how people view that endorsement. Determining whether a small gift would affect the weight or credibility of an endorsement could be difficult. It’s always safer to disclose that information.

Also, even if getting one free item that’s not very valuable doesn’t affect your credibility, continually getting free stuff from an advertiser or multiple advertisers could suggest you expect future benefits from positive reviews. If a blogger or other endorser has a relationship with a marketer or a network that sends freebies in the hope of positive reviews, it’s best to let readers know about the free stuff.
Even an incentive with no financial value might affect the credibility of an endorsement and would need to be disclosed. The Guides give the example of a restaurant patron being offered the opportunity to appear in television advertising before giving his opinion about a product. Because the chance to appear in a TV ad could sway what someone says, that incentive should be disclosed.

*My company makes a donation to charity anytime someone reviews our product. Do we need to make a disclosure?*

Some people might be inclined to leave a positive review in an effort to earn more money for charity. The overarching principle remains: If readers of the reviews would evaluate them differently knowing that they were motivated in part by charitable donations, there should be a disclosure. Therefore, it might be better to err on the side of caution and disclose that donations are made to charity in exchange for reviews.

*What if I upload a video to YouTube that shows me reviewing several products? Should I disclose that I got them from an advertiser?*

Yes. The guidance for videos is the same as for websites or blogs.

*What if I return the product after I review it? Should I still make a disclosure?*

That might depend on the product and how long you are allowed to use it. For example, if you get free use of a car for a month, we recommend a disclosure even though you have to return it. But even for less valuable products, it's best to be open and transparent with your readers.

*I have a website that reviews local restaurants. It's clear when a restaurant pays for an ad on my website, but do I have to disclose which restaurants give me free meals?*

If you get free meals, you should let your readers know so they can factor that in when they read your reviews.

*I'm opening a new restaurant. To get feedback on the food and service, I'm inviting my family and friends to eat for free. If they talk about their experience on social media, is that something that should be disclosed?*

You've raised two issues here. First, it may be relevant to readers that people endorsing your restaurant on social media are related to you. Therefore, they should disclose that personal relationship. Second, if you are giving free meals to anyone and seeking their endorsement, then their reviews in social media would be viewed as advertising subject to FTC jurisdiction. But even if you don't specifically ask for their endorsement, there may be an expectation that attendees will spread the word about the restaurant. Therefore, if someone who eats for free at your invitation posts about your restaurant, readers of the post would probably want to know that the meal was on the house.

*I have a YouTube channel that focuses on hunting, camping, and the outdoors. Sometimes I'll do a product review. Knife manufacturers know how much I love knives, so they send me knives as free gifts, hoping that I will review them. I'm under no obligation to talk about any knife and getting the knives as gifts really doesn't affect my judgment. Do I need to disclose when I'm talking about a knife I got for free?*

Even if you don't think it affects your evaluation of the product, what matters is whether knowing that you got the knife for free might affect how your audience views what you say about the knife. It doesn't matter that you aren't required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free, so we advise disclosing that fact.

*Several months ago a manufacturer sent me a free product and asked me to write about it in my blog. I tried the product, liked it, and wrote a favorable review. When I posted the review, I disclosed that I got the product for free from the manufacturer. I still use the product. Do I have to disclose that I got the product for free every time I mention it in my blog?*

It might depend on what you say about it, but each new endorsement made without a disclosure could be deceptive because readers might not see the original blog post where you said you got the product free from the manufacturer.
A trade association hired me to be its “ambassador” and promote its upcoming conference in social media, primarily on Facebook, Twitter, and in my blog. The association is only hiring me for five hours a week. I disclose my relationship with the association in my blogs and in the tweets and posts I make about the event during the hours I’m working. But sometimes I get questions about the conference in my off time. If I respond via Twitter when I’m not officially working, do I need to make a disclosure? Can that be solved by placing a badge for the conference in my Twitter profile?

You have a financial connection to the company that hired you and that relationship exists whether or not you are being paid for a particular tweet. If you are endorsing the conference in your tweets, your audience has a right to know about your relationship. That said, some of your tweets responding to questions about the event might not be endorsements, because they aren’t communicating your opinions about the conference (for example, if someone just asks you for a link to the conference agenda).

Also, if you respond to someone’s questions about the event via email or text, that person probably already knows your affiliation or they wouldn’t be asking you. You probably wouldn’t need a disclosure in that context. But when you respond via social media, all your followers see your posts and some of them might not have seen your earlier disclosures.

With respect to posting the conference’s badge on your Twitter profile page, a disclosure on a profile page isn’t sufficient because many people in your audience probably won’t see it. Also, depending upon what it says, the badge may not adequately inform consumers of your connection to the trade association. If it’s simply a logo or hashtag for the event, it won’t tell consumers of your relationship to the association.

I’m a blogger and a company wants me to attend the launch of its new product. They will fly me to the launch and put me up in a hotel for a couple of nights. They aren’t paying me or giving me anything else. If I write a blog sharing my thoughts about the product, should I disclose anything?

Yes. Knowing that you received free travel and accommodations could affect how much weight your readers give to your thoughts about the product, so you should disclose that you have a financial relationship with the company.

I share in my social media posts about products I use. Do I actually have to say something positive about a product for my posts to be endorsements covered by the FTC Act?

Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it’s an endorsement.

You don’t necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it’s an endorsement subject to the FTC Act.

Of course, if you don’t have any relationship with the advertiser, then your posts simply are not subject to the FTC Act, no matter what you show or say about the product. The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.

If I post a picture of myself to Instagram and tag the brand of dress I’m wearing, but don’t say anything about the brand in my description of the picture, is that an endorsement? And, even if it is an endorsement, wouldn’t my followers understand that I only tag the brands of my sponsors?

Tagging a brand you are wearing is an endorsement of the brand and, just like any other endorsement, could require a disclosure if you have a relationship with that brand. Some influencers only tag the brands of their sponsors, some tag brands with which they don’t have relationships, and some do a bit of both. Followers might not know why you are tagging a dress and some might think you’re doing it just because you like the dress and want them to know.

Say a car company pays a blogger to write that he wants to buy a certain new sports car and he includes a link to the company’s site. But the blogger doesn’t say he’s going to actually buy the car – or even that he’s driven it. Is that still an endorsement subject to the FTC’s Endorsement Guides?
Yes, an endorsement can be aspirational. It’s an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (e.g., “I want this car”). If the blogger was paid, it should be disclosed.

*I’m a book author and I belong to a group where we agree to post reviews in social media for each other. I’ll review someone else’s book on a book review site or a bookstore site if he or she reviews my book. No money changes hands. Do I need to make a disclosure?*

It sounds like you have a connection that might materially affect the weight or credibility of your endorsements (that is, your reviews), since bad reviews of each others’ books could jeopardize the arrangement. There doesn’t have to be a monetary payment. The connection could be friendship, family relationships, or strangers who make a deal.

*My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?*

It’s a good idea. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. Many businesses are so diversified that readers might not realize that the products you’re talking about are sold by your company.

*A famous athlete has thousands of followers on Twitter and is well-known as a spokesperson for a particular product. Does he have to disclose that he’s being paid every time he tweets about the product?*

It depends on whether his followers understand that he’s being paid to endorse that product. If they know he’s a paid endorser, no disclosure is needed. But if a significant portion of his followers don’t know that, the relationship should be disclosed. Determining whether followers are aware of a relationship could be tricky in many cases, so we recommend disclosure.

*A famous celebrity has millions of followers on Twitter. Many people know that she regularly charges advertisers to mention their products in her tweets. Does she have to disclose when she’s being paid to tweet about products?*

It depends on whether her followers understand that her tweets about products are paid endorsements. If a significant portion of her followers don’t know that, disclosures are needed. Again, determining that could be tricky, so we recommend disclosure.

*I’m a video blogger who lives in London. I create sponsored beauty videos on YouTube. The products that I promote are also sold in the U.S. Am I under any obligation to tell my viewers that I have been paid to endorse products, considering that I’m not living in the U.S.?*

To the extent it is reasonably foreseeable that your YouTube videos will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required. Also, the U.K. and many other countries have similar laws and policies, so you’ll want to check those, too.

**Product Placements**

*What does the FTC have to say about product placements on television shows?*

Federal Communications Commission law (FCC, not FTC) requires TV stations to include disclosures of product placement in TV shows.

The FTC has expressed the opinion that under the FTC Act, product placement (that is, merely showing products or brands in third-party entertainment content – as distinguished from sponsored content or disguised commercials) doesn’t require a disclosure that the advertiser paid for the placement.
What if the host of a television talk show expresses her opinions about a product – let’s say a videogame – and she was paid for the promotion? The segment is entertainment, it’s humorous, and it’s not like the host is an expert. Is that different from a product placement and does the payment have to be disclosed?

If the host endorses the product – even if she is just playing the game and saying something like “wow, this is awesome” – it’s more than a product placement. If the payment for the endorsement isn’t expected by the audience and it would affect the weight the audience gives the endorsement, it should be disclosed. It doesn’t matter that the host isn’t an expert or the segment is humorous as long as the endorsement has credibility that would be affected by knowing about the payment. However, if what the host says is obviously an advertisement – think of an old-time television show where the host goes to a different set, holds up a cup of coffee, says “Wake up with ABC Coffee. It's how I start my day!” and takes a sip – a disclosure probably isn’t necessary.

**Endorsements by Individuals on Social Networking Sites**

Many social networking sites allow you to share your interests with friends and followers by clicking a button or sharing a link to show that you’re a fan of a particular business, product, website or service. Is that an "endorsement" that needs a disclosure?

Many people enjoy sharing their fondness for a particular product or service with their social networks.

If you write about how much you like something you bought on your own and you’re not being rewarded, you don’t have to worry. However, if you’re doing it as part of a sponsored campaign or you’re being compensated – for example, getting a discount on a future purchase or being entered into a sweepstakes for a significant prize – then a disclosure is appropriate.

I am an avid social media user who often gets rewards for participating in online campaigns on behalf of brands. Is it OK for me to click a “like” button, pin a picture, or share a link to show that I’m a fan of a particular business, product, website or service as part of a paid campaign?

Using these features to endorse a company’s products or services as part of a sponsored brand campaign probably requires a disclosure.

We realize that some platforms – like Facebook’s “like” buttons – don’t allow you to make a disclosure. Advertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures. Whether the Commission may take action would depend on the overall impression, including whether consumers take “likes” to be material in their decision to patronize a business or buy a product.

However, an advertiser buying fake “likes” is very different from an advertiser offering incentives for “likes” from actual consumers. If “likes” are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake “likes” could face enforcement action.

I posted a review of a service on a website. Now the marketer has taken my review and changed it in a way that I think is misleading. Am I liable for that? What can I do?

No, you aren’t liable for the changes the marketer made to your review. You could, and probably should, complain to the marketer and ask them to stop using your altered review. You also could file complaints with the FTC, your local consumer protection organization, and the Better Business Bureau.
How Should I Disclose That I Was Given Something for My Endorsement?

Is there special wording I have to use to make the disclosure?

No. The point is to give readers the essential information. A simple disclosure like “Company X gave me this product to try . . . .” will usually be effective.

Do I have to hire a lawyer to help me write a disclosure?

No. What matters is effective communication. A disclosure like “Company X gave me [name of product], and I think it’s great” gives your readers the information they need. Or, at the start of a short video, you might say, “The products I’m going to use in this video were given to me by their manufacturers.” That gives the necessary heads-up to your viewers.

Do I need to list the details of everything I get from a company for reviewing a product?

No. What matters is whether the information would have an effect on the weight readers would give your review. So whether you got $100 or $1,000 you could simply say you were “paid.” (That wouldn’t be good enough, however, if you’re an employee or co-owner.) And if it is something so small that it would not affect the weight readers would give your review, you may not need to disclose anything.

When should I say more than that I got a product for free?

It depends on whether you got something else from the company. Saying that you got a product for free suggests that you didn’t get anything else.

For example, if an app developer gave you their 99-cent app for free for you to review it, that information might not have much effect on the weight that readers give to your review. But if the app developer also gave you $100, knowledge of that payment would have a much greater effect on the credibility of your review. So a disclosure that simply said you got the app for free wouldn’t be good enough, but as discussed above, you don’t have to disclose exactly how much you were paid.

Similarly, if a company gave you a $50 gift card to give away to one of your readers and a second $50 gift card to keep for yourself, it wouldn’t be good enough only to say that the company gave you a gift card to give away.

I’m doing a review of a videogame that hasn’t been released yet. The manufacturer is paying me to try the game and review it. I was planning on disclosing that the manufacturer gave me a “sneak peek” of the game. Isn’t that enough to put people on notice of my relationship to the manufacturer?

No, it’s not. Getting early access doesn’t mean that you got paid. Getting a “sneak peek” of the game doesn’t even mean that you get to keep the game. If you get early access, you can say that, but if you get to keep the game or are paid, you should say so.

Would a single disclosure on my home page that “many of the products I discuss on this site are provided to me free by their manufacturers” be enough?

A single disclosure on your home page doesn’t really do it because people visiting your site might read individual reviews or watch individual videos without seeing the disclosure on your home page.

If I upload a video to YouTube and that video requires a disclosure, can I just put the disclosure in the description that I upload together with the video?

No, because consumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance
of being clear and prominent if it’s included in the video itself. That’s not to say that you couldn’t have disclosures in both the video and the description.

**What about a disclosure in the description of an Instagram post?**

When people view Instagram streams on most smartphones, longer descriptions (currently more than two lines) are truncated, with only the beginning lines displayed. To see the rest, you have to click “more.” If an Instagram post makes an endorsement through the picture or the beginning lines of the description, any required disclosure should be presented without having to click “more.”

**Would a button that says DISCLOSURE, LEGAL, or something like that which links to a full disclosure be sufficient?**

No. A hyperlink like that isn’t likely to be sufficient. It does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures. The disclosures we are talking about are brief and there is no space-related reason to use a hyperlink to provide access to them.

**The social media platform I use has a built-in feature that allows me to disclose paid endorsements. Is it sufficient for me to rely on that tool?**

Not necessarily. Just because a platform offers a feature like that is no guarantee it’s an effective way for influencers to disclose their material connection to a brand. It still depends on an evaluation of whether the tool clearly and conspicuously discloses the relevant connection. One factor the FTC will look to is placement. The disclosure should catch users’ attention and be placed where they aren’t likely to miss it. A key consideration is how users view the screen when using a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook. Second, the disclosure should use a simple-to-read font with a contrasting background that makes it stand out. Third, the disclosure should be worded in a way that’s understandable to the ordinary reader. Ambiguous phrases are likely to be confusing. For example, simply flagging that a post contains paid content might not be sufficient if the post mentions multiple brands and not all of the mentions were paid. The big-picture point is that the ultimate responsibility for clearly disclosing a material connection rests with the influencer and the brand – not the platform.

**How can I make a disclosure on Snapchat or in Instagram Stories?**

You can superimpose a disclosure on Snapchat or Instagram Stories just as you can superimpose any other words over the images on those platforms. The disclosure should be easy to notice and read in the time that your followers have to look at the image. In determining whether your disclosure passes muster, factors you should consider include how much time you give your followers to look at the image, how much competing text there is to read, how large the disclosure is, and how well it contrasts against the image. (You might want to have a solid background behind the disclosure.) Keep in mind that if your post includes video and you include an audio disclosure, many users of those platforms watch videos without sound. So they won’t hear an audio-only disclosure. Obviously, other general disclosure guidance would also apply.

**What about a platform like Twitter? How can I make a disclosure when my message is limited to 140 characters?**

The FTC isn’t mandating the specific wording of disclosures. However, the same general principle – that people get the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium. The words “Sponsored” and “Promotion” use only 9 characters. “Paid ad” only uses 7 characters. Starting a tweet with “Ad:” or “#ad” – which takes only 3 characters – would likely be effective.

**You just talked about putting “#ad” at the beginning of a social media post. What about “#ad” at or near the end of a post?**
We’re not necessarily saying that “#ad” has to be at the beginning of a post. The FTC does not dictate where you have to place the “#ad.” What the FTC will look at is whether it is easily noticed and understood. So, although we aren’t saying it has to be at the beginning, it’s less likely to be effective in the middle or at the end. Indeed, if #ad is mixed in with links or other hashtags at the end, some readers may just skip over all of that stuff.

**What if we combine our company name, “Cool Style” with “ad” as in “#coolstylead”?**

There is a good chance that consumers won’t notice and understand the significance of the word “ad” at the end of a hashtag, especially one made up of several words combined like “#coolstylelead.” Disclosures need to be easily noticed and understood.

**Is it good enough if an endorser says “thank you” to the sponsoring company?**

No. A “thank you” to a company or a brand doesn’t necessarily communicate that the endorser got something for free or that they were given something in exchange for an endorsement. The person posting in social media could just be thanking a company or brand for providing a great product or service. But “Thanks XYZ for the free product” or “Thanks XYZ for the gift of ABC product” would be good enough – if that’s all you got from XYZ. If that’s too long, there’s “Sponsored” or “Ad.”

**What about saying, “XYZ Company asked me to try their product”?**

Depending on the context of the endorsement, it might be clear that the endorser got the product for free and kept it after trying it. If that isn’t clear, then that disclosure wouldn’t be good enough. Also, that disclosure might not be sufficient if, in addition to receiving a free product, the endorser was paid.

**I provide marketing consulting and advice to my clients. I’m also a blogger and I sometimes promote my client’s products. Are “#client” “#advisor” and “#consultant” all acceptable disclosures?**

Probably not. Such one-word hashtags are ambiguous and likely confusing. In blogs, there isn’t an issue with a limited number of characters available. So it would be much clearer if you say something like, “I’m a paid consultant to the marketers of XYZ” or “I work with XYZ brand” (where XYZ is a brand name).

Of course, it’s possible that that some shorter message might be effective. For example, something like “XYZ_Consultant” or “XYZ_Advisor” might work. But even if a disclosure like that is clearer, no disclosure is effective if consumers don’t see it and read it.

**Would “#ambassador” or “#[BRAND]_Ambassador” work in a tweet?**

The use of “#ambassador” is ambiguous and confusing. Many consumers are unlikely to know what it means. By contrast, “#XYZ_Ambassador” will likely be more understandable (where XYZ is a brand name). However, even if the language is understandable, a disclosure also must be prominent so it will be noticed and read.

**I’m a blogger, and XYZ Resort Company is flying me to one of its destinations and putting me up for a few nights. If I write an article sharing my thoughts about the resort destination, how should I disclose the free travel?**

Your disclosure could be just, “XYZ Resort paid for my trip” or “Thanks to XYZ Resort for the free trip.” It would also be accurate to describe your blog as “sponsored by XYZ Resort.”

**The Guides say that disclosures have to be clear and conspicuous. What does that mean?**

To make a disclosure “clear and conspicuous,” advertisers should use plain and unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily. They should not have to look for it. In general, disclosures should be:

- 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 ads, on the screen long enough to be noticed, read, and understood;

for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.

A disclosure that is made in both audio and video is more likely to be noticed by consumers. Disclosures should not be hidden or buried in footnotes, in blocks of text people are not likely to read, or in hyperlinks. If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don’t meet the “clear and conspicuous” standard. With respect to online disclosures, FTC staff has issued a guidance document, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” which is available on ftc.gov.

*Where in my blog should I disclose that my review is sponsored by a marketer? I’ve seen some say it at the top and others at the bottom. Does it matter?*

Yes, it matters. A disclosure should be placed where it easily catches consumers’ attention and is difficult to miss. Consumers may miss a disclosure at the bottom of a blog or the bottom of a page. A disclosure at the very top of the page, outside of the blog, might also be overlooked by consumers. A disclosure is more likely to be seen if it’s very close to, or part of, the endorsement to which it relates.

*I’ve been paid to endorse a product in social media. My posts, videos, and tweets will be in Spanish. In what language should I disclose that I’ve been paid for the promotion?*

The connection between an endorser and a marketer should be disclosed in whatever language or languages the endorsement is made, so your disclosures should be in Spanish.

*I guess I need to make a disclosure that I’ve gotten paid for a video review that I’m uploading to YouTube. When in the review should I make the disclosure? Is it ok if it’s at the end?*

It’s more likely that a disclosure at the end of the video will be missed, especially if someone doesn’t watch the whole thing. Having it at the beginning of the review would be better. Having multiple disclosures during the video would be even better. Of course, no one should promote a link to your review that bypasses the beginning of the video and skips over the disclosure. If YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous.

*I’m getting paid to do a videogame playthrough and give commentary while I’m playing. The playthrough – which will last several hours – will be live streamed. Would a disclosure at the beginning of the stream be ok?*

Since viewers can tune in any time, they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream people are likely to see them no matter when they tune in. To be cautious, you could have a continuous, clear and conspicuous disclosure throughout the entire stream.

**Other Things for Endorsers to Know**

*Besides disclosing my relationship with the company whose product I’m endorsing, what are the essential things I need to know about endorsements?*

The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

You can’t talk about your experience with a product if you haven’t tried it.

If you were paid to try a product and you thought it was terrible, you can’t say it’s terrific.
You can’t make claims about a product that would require proof the advertiser doesn’t have. The Guides give the example of a blogger commissioned by an advertiser to review a new body lotion. Although the advertiser does not make any claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, she writes that the lotion cures eczema. The blogger is subject to liability for making claims without having a reasonable basis for those claims.

Social Media Contests

My company runs contests and sweepstakes in social media. To enter, participants have to send a Tweet or make a pin with the hashtag, #XYZ_Rocks. (“XYZ” is the name of my product.) Isn’t that enough to notify readers that the posts were incentivized?

No, it is likely that many readers would not understand such a hashtag to mean that those posts were made as part of a contest or that the people doing the posting had received something of value (in this case, a chance to win the contest prize). Making the word “contest” or “sweepstakes” part of the hashtag should be enough. However, the word “sweeps” probably isn’t, because it is likely that many people would not understand what that means.

Online Review Programs

My company runs a retail website that includes customer reviews of the products we sell. We believe honest reviews help our customers and we give out free products to a select group of our customers for them to review. We tell them to be honest, whether it’s positive or negative. What we care about is how helpful the reviews are. Do we still need to disclose which reviews were of free products?

Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if you didn’t intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It’s also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than reviewers who bought the products. If that’s the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer’s games. We’re going to have these reviewers announce at the beginning of each video (before the action starts) that it’s “sponsored by XYZ” and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think that XYZ is a neutral third party and won’t realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, “Sponsored by [name of the game company],” that would be good enough.

Soliciting Endorsements

My company wants to contact customers and interview them about their experiences with our service. If we like what they say about our service, can we ask them to allow us to quote them in our ads? Can we pay them for letting us use their endorsements?
Yes, you can ask your customers about their experiences with your product and feature their comments in your ads. If they have no reason to expect compensation or any other benefit before they give their comments, there's no need to disclose your payments to them.

However, if you've given these customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them that you want their honest opinion. In fact, even if you tell your customers that you aren’t going to pay them but that they might be featured in your advertising, that opportunity might be seen as having a value, so the fact that they knew this when they gave the review should be disclosed (e.g., “Customers were told in advance they might be featured in an ad.”).

I’m starting a new Internet business. I don’t have any money for advertising, so I need publicity. Can I tell people that if they say good things about my business on Yelp or Etsy, I’ll give them a discount on items they buy through my website?

It’s not a good idea. Endorsements must reflect the honest opinions or experiences of the endorser, and your plan could cause people to make up positive reviews even if they’ve never done business with you. However, it’s okay to invite people to post reviews of your business after they’ve actually used your products or services. If you’re offering them something of value in return for these reviews, tell them in advance that they should disclose what they received from you. You should also inform potential reviewers that the discount will be conditioned upon their making the disclosure. That way, other consumers can decide how much stock to put in those reviews.

A company is giving me a free product to review on one particular website or social media platform. They say that if I voluntarily review it on another site or on a different social media platform, I don’t need to make any disclosures. Is that true?

No. If you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product.

Does it matter how I got the free product to review?

No, it doesn’t. Whether they give you a code, ship it directly to you, or give you money to buy it yourself, it's all the same for the purpose of having to disclose that you got the product for free. The key question is always the same: If consumers knew the company gave it to you for free (or at a substantial discount), might that information affect how much weight they give your review?

My company wants to get positive reviews. We are thinking about distributing product discounts through various services that encourage reviews. Some services require individuals who want discount codes to provide information allowing sellers to read their other reviews before deciding which reviewers to provide with discount codes. Other services send out offers of a limited number of discount codes and then follow up by email to see whether the recipients have reviewed their products. Still others send offers of discount codes to those who previously posted reviews in exchange for discounted products. All of these services say that reviews are not required. Does it matter which service I choose? I would prefer that recipients of my discount codes not have to disclose that they received discounts.

Whichever service you choose, the recipients of your discount codes need to disclose that they received a discount from you to encourage their reviews. Even though the services might say that a review is not “required,” it’s at least implied that a review is expected.

What Are an Advertiser's Responsibilities for What Others Say in Social Media?
Our company uses a network of bloggers and other social media influencers to promote our products. We understand we’re responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser’s responsibility for substantiating objective product claims, explain to members of your network what they can (and can’t) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

It’s unrealistic to expect you to be aware of every single statement made by a member of your network. But it’s up to you to make a reasonable effort to know what participants in your network are saying. That said, it’s unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

Our company’s social media program is run by our public relations firm. We tell them to make sure that what they and anyone they pay on our behalf do complies with the FTC’s Guides. Is that good enough?

Your company is ultimately responsible for what others do on your behalf. You should make sure your public relations firm has an appropriate program in place to train and monitor members of its social media network. Ask for regular reports confirming that the program is operating properly and monitor the network periodically. Delegating part of your promotional program to an outside entity doesn’t relieve you of responsibility under the FTC Act.

What About Intermediaries?

I have a small network marketing business. Advertisers pay me to distribute their products to members of my network who then try the product for free. How do the principles in the Guides affect me?

You should tell the participants in your network that if they endorse products they have received through your program, they should make it clear they got them for free. Advise your clients – the advertisers – that if they provide free samples directly to your members, they should remind them of the importance of disclosing the relationship when they talk about those products. Put a program in place to check periodically whether your members are making those disclosures, and to deal with anyone who isn’t complying.

My company recruits “influencers” for marketers who want them to endorse their products. We pay and direct the influencers. What are our responsibilities?

Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

What About Affiliate or Network Marketing?

I’m an affiliate marketer with links to an online retailer on my website. When people read what I’ve written about a particular product and then click on those links and buy something from the retailer, I earn a commission from the retailer. What do I have to disclose? Where should the disclosure be?
If you disclose your relationship to the retailer clearly and conspicuously on your site, readers can decide how much weight to give your endorsement.

In some instances – like when the affiliate link is embedded in your product review – a single disclosure may be adequate. When the review has a clear and conspicuous disclosure of your relationship and the reader can see both the review containing that disclosure and the link at the same time, readers have the information they need. You could say something like, “I get commissions for purchases made through links in this post.” But if the product review containing the disclosure and the link are separated, readers may not make the connection.

As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. The closer it is to your recommendation, the better. Putting disclosures in obscure places – for example, buried on an ABOUT US or GENERAL INFO page, behind a poorly labeled hyperlink or in a “terms of service” agreement – isn’t good enough. Neither is placing it below your review or below the link to the online retailer so readers would have to keep scrolling after they finish reading. Consumers should be able to notice the disclosure easily. They shouldn’t have to hunt for it.

Is “affiliate link” by itself an adequate disclosure? What about a “buy now” button?

Consumers might not understand that “affiliate link” means that the person placing the link is getting paid for purchases through the link. Similarly, a “buy now” button would not be adequate.

What if I’m including links to product marketers or to retailers as a convenience to my readers, but I’m not getting paid for them?

Then there isn’t anything to disclose.

Does this guidance about affiliate links apply to links in my product reviews on someone else’s website, to my user comments, and to my tweets?

Yes, the same guidance applies anytime you endorse a product and get paid through affiliate links.

It’s clear that what’s on my website is a paid advertisement, not my own endorsement or review of the product. Do I still have to disclose that I get a commission if people click through my website to buy the product?

If it’s clear that what’s on your site is a paid advertisement, you don’t have to make additional disclosures. Just remember that what’s clear to you may not be clear to everyone visiting your site, and the FTC evaluates ads from the perspective of reasonable consumers.

Expert Endorsers Making Claims Outside of Traditional Advertisements

One of our company’s paid spokespersons is an expert who appears on news and talk shows promoting our product, sometimes along with other products she recommends based on her expertise. Your Guides give an example of a celebrity spokesperson appearing on a talk show and recommend that the celebrity disclose her connection to the company she is promoting. Does that principle also apply to expert endorsers?

Yes, it does. Your spokesperson should disclose her connection when promoting your products outside of traditional advertising media (in other words, on programming that consumers won’t recognize as paid advertising). The same guidance also would apply to comments by the expert in her blog or on her website.

Employee Endorsements
I work for a terrific company. Can I mention our products to people in my social networks? How about on a review site? My friends won’t be misled since it’s clear in my online profiles where I work.

If your company allows employees to use social media to talk about its products, you should make sure that your relationship is disclosed to people who read your online postings about your company or its products. Put yourself in the reader’s shoes. Isn’t the employment relationship something you would want to know before relying on someone else’s endorsement? Listing your employer on your profile page isn’t enough. After all, people who just read what you post on a review site won’t get that information.

People reading your posting on a review site probably won’t know who you are. You definitely should disclose your employment relationship when making an endorsement.

On her own initiative and without us asking, one of our employees used her personal social network simply to “like” or “share” one of our company’s posts. Does she need to disclose that she works for our company?

Whether there should be any disclosure depends upon whether the “like” or “share” could be viewed as an advertisement for your company. If the post is an ad, then employees endorsing the post should disclose their relationship to the company. With a share, that’s fairly easy to do, “Check out my company’s great new product ….” Regarding “likes,” see what we said above about “likes.”

Our company’s policy says that employees shouldn’t post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they are hired. But we have several thousand people working here and we can’t monitor what they all do on their own computers and other devices when they aren’t at work. Are we liable if an employee posts a review of one of our products, either on our company website or on a social media site and doesn’t disclose that relationship?

It wouldn’t be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products. Also, if you learn that an employee has posted a review on the company’s website or a social media site without adequately disclosing his or her relationship to the company, you should remind them of your company policy and ask them to remove that review or adequately disclose that they’re an employee.

What about employees of an ad agency or public relations firm? Can my agency ask our employees to spread the buzz about our clients’ products?

First, an ad agency (or any company for that matter) shouldn’t ask employees to say anything that isn’t true. No one should endorse a product they haven’t used or say things they don’t believe about a product, and an employer certainly shouldn’t encourage employees to engage in such conduct.

Moreover, employees of an ad agency or public relations firm have a connection to the advertiser, which should be disclosed in all social media posts. Agencies asking their employees to spread the word must instruct those employees about their responsibilities to disclose their relationship to the product they are endorsing, e.g., “My employer is paid to promote [name of product],” or simply “Advertisement,” or when space is an issue, “Ad” or “#ad.”

My company XYX wants to tell our employees what to disclose in social media. Is “#employee” good enough?

Consumers may be confused by “#employee.” Consumers would be more likely to understand “#XYZ_Employee.” Then again, if consumers don’t associate your company’s name with the product or brand being endorsed, that disclosure might not work. It would be much clearer to use the words “my company” or “employer’s” in the body of the message. It’s a lot easier to understand and harder to miss.
Using Testimonials That Don’t Reflect the Typical Consumer Experience

We want to run ads featuring endorsements from consumers who achieved the best results with our company’s product. Can we do that?

Testimonials claiming specific results usually will be interpreted to mean that the endorser’s experience reflects what others can also expect. Statements like “Results not typical” or “Individual results may vary” won’t change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or
2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

How would this principle about testimonialists who achieved exceptional results apply in a real ad?

The Guides include several examples with practical advice on this topic. One example is about an ad in which a woman says, “I lost 50 pounds in 6 months with WeightAway.” If consumers can’t generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, “Most women who use WeightAway for six months lose at least 15 pounds.”

Our company website includes testimonials from some of our more successful customers who used our product during the past few years and mentions the results they got. We can’t figure out now what the “generally expected results” were back then. What should we do? Do we have to remove those testimonials?

There are two issues here. First, according to the Guides, if your website says or implies that the endorser currently uses the product in question, you can use that endorsement only as long as you have good reason to believe the endorser does still use the product. If you’re using endorsements that are a few years old, it’s your obligation to make sure the claims still are accurate. If your product has changed, it’s best to get new endorsements.

Second, if your product is the same as it was when the endorsements were given and the claims are still accurate, you probably can use the old endorsements if the disclosures are consistent with what the generally expected results are now.

Where can I find out more?

The Guides offer more than 35 examples involving various endorsement scenarios. Questions? Send them to endorsements@ftc.gov. We may address them in future FAQs.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, How to File a Complaint, at consumer.ftc.gov/media to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the
Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

September 2017
An act to add Chapter 6 (commencing with Section 17940) to Part 3 of Division 7 of the Business and Professions Code, relating to bots.

[ Approved by Governor September 28, 2018. Filed with Secretary of State September 28, 2018. ]

LEGISLATIVE COUNSEL’S DIGEST


Existing law regulates various businesses to, among other things, preserve and regulate competition, prohibit unfair trade practices, and regulate advertising.

This bill would, with certain exceptions, make it unlawful for any person to use a bot to communicate or interact with another person in California online with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election. The bill would define various terms for these purposes. The bill would make these provisions operative on July 1, 2019.

Vote: majority  Appropriation: no  Fiscal Committee: yes  Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 6 (commencing with Section 17940) is added to Part 3 of Division 7 of the Business and Professions Code, to read:

CHAPTER 6. Bots

17940. For purposes of this chapter:

(a) "Bot" means an automated online account where all or substantially all of the actions or posts of that account are not the result of a person.

(b) "Online" means appearing on any public-facing Internet Web site, Web application, or digital application, including a social network or publication.

(c) "Online platform" means any public-facing Internet Web site, Web application, or digital application, including a social network or publication, that has 10,000,000 or more unique monthly United States visitors or users for a majority of months during the preceding 12 months.

(d) "Person" means a natural person, corporation, limited liability company, partnership, joint venture, association, estate, trust, government, governmental subdivision or agency, or other legal entity or any
17941. (a) It shall be unlawful for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election. A person using a bot shall not be liable under this section if the person discloses that it is a bot.

(b) The disclosure required by this section shall be clear, conspicuous, and reasonably designed to inform persons with whom the bot communicates or interacts that it is a bot.

17942. (a) The duties and obligations imposed by this chapter are cumulative with any other duties or obligation imposed by any other law.

(b) The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(c) This chapter does not impose a duty on service providers of online platforms, including, but not limited to, Web hosting and Internet service providers.

17943. This chapter shall become operative on July 1, 2019.