

FEDERAL TRADE COMMISSION

16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Proposed changes to Guides; request for comments.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) is seeking public comment on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES:

Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

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I. OVERVIEW OF THE CURRENT GUIDES

The Guides, 16 CFR Part 255, are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act. Although the Guides interpret laws administered by the Commission, and thus are advisory in nature, proceedings to enforce the requirements of law as explained in the Guides can be brought under the FTC Act. In any such proceeding, the Commission would have the burden of proving that a particular use of an endorsement or testimonial was deceptive under the law.

The Guides define both endorsements and testimonials broadly to mean any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a person other than the sponsoring advertiser. 16 CFR 255.0(b) and (c). The Guides state that endorsements must reflect the honest opinions, findings,

beliefs, or experience of the endorser. 16 CFR 255.1(a) Furthermore, endorsements may not contain any representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. The Guides state that an advertisement presenting consumer endorsements about the performance of an advertised product will be interpreted as representing that the product is effective for the purpose depicted in the advertisement. 16 CFR 255.2(a). They further advise that an advertisement employing a consumer endorsement on a central or key attribute of a product will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve. 16 CFR 255.2(b). If an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances.

The Guides define an expert endorser as someone who, as a result of experience, study, or training, possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. 16 CFR 255.0(e). An expert endorser's qualifications must in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. 16 CFR 255.3(a) Moreover, an expert endorsement must be supported by an actual exercise of that expertise and the expert's evaluation of the product must have been at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. 16 CFR 255.3(b).

The Guides advise that when there is 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. 16 CFR 255.5.

Among other things, the Guides also state that: (1) 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, 16 CFR 255.1(c); (2) 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; and endorsers also may be liable for statements made in the course of their endorsements, 16 CFR 255.1(d); (3) advertisements presenting endorsements by what are represented to be "actual consumers" should utilize actual consumers, or clearly and conspicuously disclose that the persons are not actual consumers, 16 CFR 255.2(a); and (4) an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. 16 CFR 255.4.

II. HISTORY OF THE GUIDES

In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsers and Testimonials in Advertising, 37 FR 25548 (Dec. 1, 1972). Interested parties submitted extensive comment. On May 21, 1975, the Commission promulgated, under the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41–58, three sections of the 1972 proposal as final guidelines (16 CFR 255.0, 255.3 and 255.4) and republished three others

(16 CFR 255.1, 255.2 and 255.5) and modified an example to one of the final guidelines adopted in May 1975 (16 CFR 255.0 Example 4). 45 FR 3870 (Jan. 18, 1980).

As part of its periodic regulatory review, the Commission sought public comment on the Endorsement Guides in January 2007. 72 FR 2214 (Jan. 18, 2007). In November 2008, the Commission discussed the comments received in 2007, proposed certain revisions to the Guides, and requested comment on those proposed revisions. 73 FR 72374 (Nov. 28, 2008). In October 2009, the Commission substantively amended the Guides, adding what are now 16 CFR 255.0(a), 255.1(d) and 255.2(a), significantly modifying the guidance in 16 CFR 255.0(b) and modifying or adding numerous examples. 74 FR 53124 (Oct. 15, 2009).

In February 2020, again as part of its ongoing regulatory review process, the Commission published a Federal Register notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides as well as a number of specific questions focused on the materiality section of the Guides (16 CFR 255.5). 85 FR 10104 (Feb. 21, 2020). In light of the disruption caused by the Coronavirus pandemic, the Commission extended the comment period for two months. 85 FR 19709 (Apr. 8, 2020).

III. OVERVIEW OF COMMENTS RECEIVED IN RESPONSE TO REGULATORY REVIEW NOTICE

The Commission received 108 unique substantive comments in response to its regulatory review notice.¹ Having considered those comments and its own extensive

¹ Approximately seventy-five comments were submitted by individual consumers, most of whom were apparently university students fulfilling class assignments. The remaining

consumer protection experience, the Commission now proposes various amendments to the Guides and invites comments on these proposed changes.

Most commenters noted that the Guides are beneficial and should be retained, and none disagreed. Some commenters criticized the current Guides for striking an appropriate balance between protecting consumers and allowing advertisers to communicate creatively and effect

Those comments are discussed in Part IV⁴ in the context of the specific Guide provisions to which they relate.

In addition, some comments addressed⁵ other issues. For example, some commenters said that the Commission should engage in more vigorous enforcement activities related to the Guide⁶ and greater educational efforts.⁷ Other commenters weighed in on whether the Commission should

inconspicuous. Even a tool that employs disclosure of sufficient size, duration, and contrast could be inadequate if displayed above, rather than below, a picture or video that catches the attention of users scrolling through their feeds. Platforms may be exposing endorsers to liability if users rely on a platform's inadequate tools for their disclosures. Platforms may also be exposing themselves to liability depending on the representations they make about these tools. Given that platforms play a major role in disseminating and monetizing endorsements, and actively encourage endorsers to promote and amplify their posts, the Commission believes they should carefully evaluate their tools and what they say about them to ensure they are not exposing themselves or their users to liability.

IV. SECTION-BY-SECTION DISCUSSION OF PROPOSED REVISIONS TO GUIDES, COMMENTS RECEIVED IN RESPONSE TO FEBRUARY 2020 FEDERAL REGISTER NOTICE, AND REQUESTS FOR ADDITIONAL COMMENT

The Commission believes that the Guides should be retained but that a number of revisions are appropriate. Many of the proposed changes are simply clarifications or additional examples of the principles embodied in the existing Guides. Others enunciate basic principles not expressly set forth in the current Guides but are established in Commission enforcement actions. Several represent substantive changes from the current Guides, based upon increased knowledge of how consumers view endorsements and taking into consideration disclosures that should be retained for video

The Commission seeks comments on these proposed revisions, which are discussed below by Section.

A. Section 255.0 – Purpose and Definitions

The Guides currently begin with a purpose and definitions section.

Current Section 255.0(b) defines an “endorsement” as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. As suggested in a comment, the Commission proposes revising that definition to clarify that “marketing” and “promotional” messages can be endorsements.⁹ When a social media user tags a brand in a post, it generally communicates that the user uses or likes the brand, so, the revised definition would also indicate that tags in social media posts can be endorsements. Section 255.0(b) also currently states that an “endorser” is an individual, group, or institution. The Commission proposes a modification indicating that an endorser could instead simply appear to be an individual, group, or institution. Thus, the Guides would clearly apply to endorsements by fabricated endorsers.

The Commission proposes to add two footnotes to Section 255.0(b). The first footnote would indicate the availability of detailed staff business guidance regarding endorsements that is updated periodically, noting that such staff guidance is not approved by or binding upon the Commission. Numerous commenters asked the

⁹ Non-substantive changes to improve readability to update examples to reflect changes in marketing methods, technology, or society that have occurred since the Guides were last updated or since they were written (e.g., replacing “brochure” with “web page”) are not discussed below.

¹⁰ See Boyd at 7.

Commission to update the Guides more frequently, such as every three years.¹¹ Some commenters asked that the Commission provide detailed guidance in the Guides about acceptable and unacceptable language and placement for disclosures of material connections and their use on particular platforms,¹² while others asked the Commission to continue to allow marketers flexibility in the crafting and placement of necessary disclosures.¹³ Commenters also differed on whether to incorporate FTC staff business guidance into the Guides, with some saying it would be useful¹⁴ and others taking the position that the social media landscape is ever-changing and the Guides should focus on general principles.¹⁵ One commenter suggested cross-referencing staff guidance in the Guides.¹⁶ The Commission believes that its current approach of endorsement-related guidance makes sense, with the Guides focused on general principles and examples, and the more informal and easily updated staff guidance focused on specific questions and issues that arise in this area. The footnote would ensure that people reading the Guides are aware of this additional staff guidance.

¹¹ See, e.g., AIC at 1, 3; and Pharmavite at 2.

¹² See, e.g., CRN at 2-4; Pharmavite at P12/A at 2; and Ana Keltner at 3.

¹³ See, e.g., ESA at 5-6; IAB at 2-3; and MPA at 6-7.

¹⁴ See, e.g., Consumer Reports at 9; CRN at 2; Dovich at 9; Pharmavite at 1-2; and TINA at 12.

¹⁵ See, e.g., ANA at 3; BBB at 3; and NCTA at 2.

¹⁶ See TINA at 12.

The second footnote derives in part from a commenter's suggestion that the Guides address an incentivized endorser denigrating a competitor's product.¹⁷ The footnote would acknowledge that paid or otherwise incentivized negative statements about a competitor's product – whether in the context of a consumer review or otherwise – do not meet the definition of an "endorsement" but that engaging in such disparagement can be a deceptive practice.

The second part of this footnote derives from a commenter's suggestion that the

reworded so as to distort the endorsement. One commenter noted that it was unclear in the example who distorted the endorser's opinion.²¹ The Commission proposes to modify the example to clearly identify the responsible party.

Current Example 5 to Section 255.0 involves a television advertisement in which a professional golfer implicitly endorses a brand of golf balls by being shown practicing her swing using the balls, even though she says nothing in the ad. The Commission proposes expanding this example to illustrate that use of the same video footage in a social media post can be an endorsement if the endorser's name and is tagged or otherwise readily identifiable by viewers.

Example 6 to Section 255.0 currently illustrates how a paid actor hosting a product infomercial and reading from a script can still be making an endorsement. The Commission proposes adding a scenario to this example to show that the same actor can talk about the product without making an endorsement and deleting Example 7, which had also focused on illustrating statements that were not endorsements.

Example 8 to Section 255.0, which would be renumbered as Example 7, currently provides scenarios in which an individual consumer's social media posts would and would not be considered endorsements. Commenters asked for further explanation of the Commission's reasoning.²² The Commission proposes to clarify the example. When a consumer buys the product with their own money under ordinary circumstances and chooses to post about it, the post is not an endorsement under the Guides because the

²¹ See Dudukovich at 17.

²² See ANA at 8-9; and Dudukovich at 17-18.

consumer has no connection to the manufacturer beyond being an ordinary purchaser and her message cannot be attributed to the product's manufacturer. The revised example

Section 255.1(d) currently recognizes that 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. The Commission would indicate that an advertiser may be liable for an endorser's deceptive statement even when the endorser is not liable. The Commission also proposes adding guidance to this subsection on what actions advertisers should take with respect to their endorsers. Such guidance previously only appeared in an example.

Current Section 255.1(d) also recognizes that endorsers themselves may be subject to liability for their statements. Commenters asked for clarification of when endorsers would be liable.²³ The Commission proposes moving the discussion of endorser liability to a new Section 255.1(e) and indicating that endorsers may be liable for their statements such as when they make representations that they know or should know to be deceptive. The level of due diligence required by the endorsers will depend on their level of expertise and knowledge, among other factors. Current Examples 3 and 4 involve endorsers who knew or should have known that their statements were deceptive. Section 255.1(e) would also say that non-expert endorsers may also be liable when the endorser makes misleading or unsubstantiated representations about performance or efficacy that are inconsistent with the endorser's personal experience or that were not made or approved by the advertiser and that go beyond the scope of the endorser's personal experience.²⁴ Current Example 5 involves such an endorser and the

²³ See, e.g., Boyd at 13; and Dudukovich at 18.

²⁴ The Commission would add a cross-reference to Section 255.3 with respect to the responsibilities of an expert endorser.

Commission proposes updating it to better illustrate this principle. Finally, Section 255.1(e) would also note that endorsers may be liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when they create and disseminate endorsements without such disclosures.

A few commenters suggested that Guides deal with the disclosure responsibility of intermediaries such as marketing and pub

The Commission proposes adding a new Section 255.1(g) stating a general principle that the use of an endorsement with image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

The Commission proposes modifying current Example 1 to Section 255.1 to note that an endorser does not need to go back and modify or delete past social media posts as long as the posts were not misleading when they were made and the dates of the posts are clear and conspicuous to viewers. However, the example would state that if the post was later reposted by the endorser or shared by the publisher, it would suggest to reasonable consumers that the endorser continued to hold the views expressed in the prior post.

The Commission proposes adding new Example 7 to illustrate the principle in new Section 255.1(g) involving the use of an image or likeness of a person other than the actual endorser to misrepresent a material attribute of the endorser. These examples involve endorsements for an acne product using an image of a person with much better skin than the actual endorser, a weight-loss product with an image of a person weighing much less than the actual endorser, and a learn-to-read program with a picture of a significantly younger child than the child of the endorser.

C. Section 255.2 – Consumer Endorsements

Section 255.2 of the Guides provides guidance specific to the use of consumer endorsements, commonly referred to as testimonials.

Current Section 255.2(a) addresses the need for adequate substantiation for claims made through endorsements. The Commission proposes clarifying that this need for substantiation applies to both express and implied claims.

Current Section 255.2(b) states that when the advertiser does not have substantiation that an endorser's experience is representative of what consumers will generally achieve, an ad should clearly and conspicuously disclose the generally expected performance in the depicted circumstances. The Commission proposes adding a clarifying statement that this disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.

The Commission proposes adding a new Section 255.2(d) that addresses consumer reviews and articulates a fundamental principle not expressly set forth in the existing Guides. It would state that procuring, suppressing, boosting, organizing, or editing consumer reviews of their products, advertisers should not take actions that have

Finally, the Commission proposes adding an alternative scenario to Example 4 involving an advertisement for a weight-loss program. The addition would explain that a disclosure of typical weight loss limited to only successful participants in the program (e.g., only those who stuck with it for six months), ignoring participants who quit, would be inadequate.

The Commission proposes four new examples to illustrate the proposed new Section 255.2(d).

New Example 8 addresses an online seller suppressing or not publishing product reviews based upon their star ratings or their negative sentiments. The review portions of the seller's product pages are misleading as to purchasers' actual opinions of the products. The example would also provide examples of reviews that need not be published. Finally, the example illustrates that it would be deceptive for a seller to highlight glowing reviews and label them as "most helpful" if consumers had not actually voted them most helpful.

New Example 9 addresses paying purchasers to write positive product reviews.³¹ Such reviews are deceptive regardless of any disclosure of the payment, because the manufacturer has required that the reviews be positive. The proposed example has a cross-reference for when there is no requirement that the reviews be positive and the

³⁰ See Complaint at 1-2, the Matter of Fashion Nova, LLC, No. C-4759 (Mar. 18, 2022), http://www.ftc.gov/system/files/ftc_ag/pdf/1923138C4759FashionNovaComplaint.pdf.

³¹ See Complaint at 8, the Matter of UrthBox, Inc., No. C-4676 (April 3, 2019), https://www.ftc.gov/system/files/documents/cases/172_3028box_complaint_4-3-19_0.pdf

reviewers understand that they are free to write negative reviews without suffering any consequences.

New Example 10 addresses the unfair practice of threatening consumers who post negative reviews to third-party websites in order to coerce the consumers to delete their reviews. Such threats can take the form of legal,³² physical, or other threats. As noted in a new proposed footnote to the Guides, when threats are incorporated into a form contract, they violate the Consumer Review Fairness Act 5 U.S.C. 45b(b)(1).

Several commenters suggested addressing review gating practices that involve obtaining customer feedback and then sending satisfied and dissatisfied customers down different paths in order to encourage positive reviews and avoid negative reviews.³³ New Example 11 discusses a marketer soliciting feedback from all customers and only inviting those who give positive feedback to write online reviews. It says that such disparate treatment may be unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice.

D. Section 255.3 – Expert Endorsements

Section 255.3 provides guidance with respect to expert endorsements.

Current Section 255.3(a) addresses advertisements that represent “directly or by implication” that an endorser is an expert with respect to the endorsement message. The Commission proposes clarifying that this section applies to representations made

³² See *FTC v. Roca Labs*, 1645 F. Supp. 3d 1375, 1394-95 (M.D. Fla. 2018).

³³ See, e.g., BBB at 5; Boyd at 23; Dudulovic at 13; and TINA at 2, but see ANA at 14.

“expressly or by implication.”³⁴ The Commission proposes modifying current Example 2 to clarify that the non-medical “doctor” expert endorser should have relevant expertise and that the non-medical and non-specialized doctors referenced in the example do not necessarily have enough expertise to endorse the product even with a clear and conspicuous disclosure. The Commission also proposes adding current Example 6 – adding a sentence about the potential liability of the expert endorser and the advertiser, including a cross-reference to Section 255.1. The Commission would clarify that what matters is the expert’s “purpose” degree of expertise, not the expert’s actual degree of expertise. Finally, the Commission would also indicate in Example 6 that scientific evidence is expected to support a non-cholesterol lowering claim.

E. Section 255.4 – Endorsements by Organizations

Section 255.4 provides guidance specifically the use of endorsements by organizations.

The Commission proposes to renumber the current example in Section 255.4 as Example 1 and to add two additional examples.

New Example 2 would say that if a manufacturer sets up an apparently independent review website that reviews the manufacturer’s own products and competing products, that website is deceptive because it is not in fact independent.³⁵

³⁴ The Commission proposes making a similar change to Section 255.2(c).

³⁵ See Complaint at 8-9, the Matter of Son Le

Commission proposes specifying that such disclosures must be “clear and conspicuous,” adding a definition of that phrase (as discussed above), and deleting the more ambiguous statement that such disclosures must be “fully” disclosed. It also proposes to delete the existing example from the text of the section and to replace it with more general guidance. A commenter asked for further guidance about what types of relationships could constitute material connections.³⁸ The proposed revised text of Section 255.5 would explain that material connections include a business, family, or personal relationship; monetary payment, the provision of free or discounted products or services to the endorser, including products or services unrelated to the endorsed product; early access to a product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotion. The new guidance would state that a material connection can exist regardless of whether the advertiser requires an endorsement for the payment or free or discounted products.

Several commenters asked that the Commission provide examples of immaterial connections that need no disclosure.³⁹ The Commission proposes instead to recognize in the text of Section 255.5 that some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements.

One commenter suggested that the Commission recognize that, for influencers primarily famous because of their social media presence, their sponsorships are often expected.⁴⁰ Without accepting or rejecting that proposition, the Commission proposes

³⁸ See Boyd at 9.

³⁹ See, e.g., ANA at 10-12; CMA at 2; and NCTA at 10.

⁴⁰ See NRF at 4.

most effective format, placement and wording for disclosures. As discussed below, the Commission also proposes adding a new rule 255.6 addressing endorsements directed to children.

The current Example 3 to Section 255.5 makes clear that consumers would not expect that a celebrity was paid for endorsing a medical procedure during a routine interview on a television talk show, that knowledge of such a financial interest would likely affect the weight or credibility consumers give to that endorsement, and that the celebrity's financial connection to the advertiser should be disclosed. One commenter said that the Guides should indicate that disclosures at the end of a talk show are not clear and conspicuous.⁴⁹ The Commission proposes edits to Example 3 noting that the disclosure should be during the interview and that a disclosure during the show's closing credits is not clear and conspicuous. A different commenter suggested that the Guides say that disclosure obligations exist even if an endorser is not paid for a particular post.⁵⁰ Revised Example 3 would say that, if the celebrity makes the endorsement in one of her social media posts, her connection to the advertiser should be disclosed regardless of whether she was paid for the particular post. The revised example could also illustrate that receipt of free or discounted services can constitute a material connection.

One comment suggested that the Guides address the reuse of an influencer's social media endorsement.⁵¹ Revised Example 3 would also state that, when reusing a celebrity's social media posts in its own social media, an advertiser should clearly and

⁴⁹ See CW at 2-5.

⁵⁰ See Dudukovich at 30, 62.

⁵¹ See IZEA at 1.

conspicuously disclose its relationship to the celebrity (assuming the initial post necessitated a disclosure).

The current Example 4 to Section 255.5 addresses the consumer expectation that an expert endorser would be reasonably compensated for appearing in an ad. The Commission proposes clarifying that the existing guidance applies to traditional ads, such as television ads, and adding an alternative scenario involving a post on the expert's own social media account, a context in which consumers would be less likely to expect that the expert was compensated and more likely to expect that the expert is expressing an independent opinion.

The current Example 5 to Section 255.5 adds a scenario in which restaurant patrons are informed before they enter that they will be interviewed by an advertiser as part of its TV promotion of its new food product. A commenter suggested that we clarify why this information is material.⁵² The Commission proposes explaining that a patron might want to give the product a good review in the hope of appearing on television.

Several commenters said that incentivized reviews need disclosure even if the incentives are not conditioned on the reviews being positive.⁵³ Current Example 6 to Section 255.5 addresses the situation where "extras" who want to work in commercials are recruited to use a product and endorse an infomercial in exchange for compensation and exposure. The Commission proposes expanding the example to address ordinary consumers who are invited to try a product for free and write online reviews of

⁵² See Dudukovich at 24-25.

⁵³ See, e.g., AFSA at 3-4; BBB at 4-5; Boyd at 22; Dudukovich at 12-13; NAIMA at 4-5; and TINA at 21 but see CRN at 4-5.

it in exchange for payment; the example would state the need to disclose this connection

employees about disclosure requirements. The Commission proposes adding an explanation of an employer's obligations, noting that this guidance also applies to online consumer reviews.

The Commission is also proposing the addition of three new examples to Section 255.5.

The first one arises from the request of commenters that the Commission include an example illustrating conditions under which third-party certifications and seals of approval, which typically require payment to the certifying organization to fund the evaluation, do not require a disclosure.⁵⁵ New Example 10, which is a slightly edited version of an example in the Green Guides,⁵⁶ recognizes that consumers would reasonably expect that marketers have paid non-profit, third-party organizations reasonable fees for some certifications and seals.

Second, multiple commenters asked that the Guides address the need to disclose affiliate relationships and the adequacy of affiliate links,⁵⁷ while one commenter asserted that consumers understand such links and that no disclosure is necessary.⁵⁸ New Example 11 addresses the disclosure of affiliate links. It says that a blogger who writes independent content reviewing products and monetizes that content with affiliate links should clearly and conspicuously

Third, new Example 12 recognizes that, as with television commercials, consumers can reasonably expect people appearing in certain newer-form advertisements are compensated for their statements.

G. New Section 255.6 – Endorsements Directed to Children

As discussed above, endorsements directed to children may be of special concern. The Commission proposes adding a section simply acknowledging that fact, as to which

be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write "Endorsement Guides, P204500" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "[t]rade secret or

any commercial or financial information which . . . is privileged or confidential” – as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the legal and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with law and the public interest. Once your comment has been posted publicly on www.regulations.gov as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in its proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. For information on the Commission’s privacy policy, including routine

uses permitted by the Privacy Act, <https://www.ftc.gov/site-information/privacy-policy>.

List of Subjects in 16 CFR Part 255

Advertising, Trade Practices

Accordingly, the Federal Trade Commission proposes to amend Title 16, Chapter I, Subchapter B, of the Code of Federal Regulations as follows:

PART 255 – GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Sec.

255.0 Purpose and Definitions.

255.1 General Considerations.

255.2 Consumer Endorsements.

255.3 Expert Endorsements.

255.4 Endorsements by Organizations.

255.5 Disclosure of Material Connections.

255.6

255. (Purpose and Definitions.)Tj EMC /Span <</MCI26 5 >>BDC /TT0 1 Tf 0.0011 Tc -0.001

Section 5 of the FTC Act (15 U.S.C. 45) 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, marketing, or promotional message (including verbal statements, tags, social media posts, 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.² The party whose opinions, beliefs,

¹ Staff business guidance applying Section 5 of the FTC Act to endorsements and testimonials in advertising is available on the FTC website. Such staff guidance addresses details not covered in these Guides and is updated periodically, but is not approved by or binding upon the Commission.

² A paid or otherwise incentivized negative statement about a competitor’s product is not an endorsement, as that term is used in the Guides. Nevertheless, such statements, including a paid negative review of a competing product, can be deceptive in violation of Section 5.

findings, or experience the message appears to reflect while called the “endorser” and could be or appear to 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 endorsement is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term “product” includes any product, service, brand, 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

communication's visual and audio portions. A disclosure presented simultaneously in

Example 3: In an advertisement for a pain remedy, an announcer unfamiliar to consumers except as a spokesperson for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. The spokesperson purports to speak, not on the basis of their own opinion, 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 automobiles 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. Many consumers are likely to believe this message reflects the driver's personal views, even if the driver does not say so, because consumers recognize the speaker as primarily a racing driver and not merely as a spokesman. Accordingly, consumers may well believe the driver would not speak for an automotive product without actually believing in their statements and having personal knowledge sufficient to form the beliefs expressed. The attribution of these beliefs to the driver makes this message an endorsement under the Guides.

Example 5: A television advertisement for a brand of golf balls includes a video of a prominent and well-recognized professional golfer practicing numerous

drives off the tee. The video would be an endorsement even though the golfer makes no verbal statement in the advertisement.

The golfer is also hired to post the video on their social media account. The post is an endorsement if viewers can readily identify the golf ball brand, either because it is apparent from the video or because it is tagged or otherwise mentioned in the post.

Example 6: An infomercial for a home fitness system is hosted by a well-known actor. During the infomercial, the actor demonstrates the machine and states, "This is the most effective and easy-to-use home exercise machine that I have ever tried. Even if the actor is readi

Example 7: 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. The purchaser posts to their social media account that the change in diet has made their dog's fur noticeably softer and shinier, and that in her opinion, the new dog food definitely is worth the extra money. Because the consumer has no connection to the manufacturer beyond being an ordinary purchaser, their message cannot be attributed to the manufacturer and the post would not be deemed an endorsement under the Guides. The same would be true if the purchaser writes a consumer product review on the manufacturer's website, a retailer's website, or an independent review website.

Assume that rather than purchase the dog food with their own money, the consumer receives it for free because the store routinely tracks purchases and the dog food manufacturer arranged for the store to provide a coupon for a free trial bag of its new brand to all purchasers of its existing brand. The manufacturer does not ask coupon recipients for product reviews and recipients likely would not assume that the manufacturer expects them to post reviews. The consumer's post would not be deemed an endorsement under the Guides because this unsolicited review cannot be attributed to the manufacturer.

Assume now that the consumer is in a marketing program under which participants periodically receive free products from various manufacturers and

can write reviews if they want to do so. If the consumer receives a free bag of the new dog food through this program, their positive review would be considered an endorsement under the Guides because of their connection to the manufacturer through the marketing program.

Example 8: A college student, who has earned a reputation as an excellent video game player, live streams his game play. The developer of a new video game pays the student to play and live stream the new game. The student plays the game and appears to enjoy it. Even though the college student does not expressly recommend the game, the game play is considered an endorsement.

Example 9: An influencer who is paid to endorse a vitamin product in their social media posts discloses their connection to the product's manufacturer only on the profile pages of their social media accounts. These disclosures are not clear and conspicuous because people seeing the paid posts could easily miss the disclosures.

Assume now that the influencer discloses their connection to the manufacturer in the posts themselves, but that in order to see the disclosures, consumers have to click on a link labeled simply "more." Those disclosures are not clear and conspicuous.

Assume now that the influencer relies upon a social media platform's built-in disclosure tool for one of these posts. The disclosure appears in small white text, it is set against the light background of the image that the influencer posted, it competes with unrelated text that the influencer superimposed on the image, and the post appears for only five seconds. The disclosure is easy to miss and thus not clear and conspicuous.

Example 10:

effectiveness of the product, a material change 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 the product 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 is 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 misleading or unsubstantiated statements made through endorsements when there is a connection between the advertiser and the endorser, or for failing to disclose unexpected material connections between themselves and their endorsers. [See § 255.5]. An advertiser may be liable for an endorser's deceptive statement even when the endorser is not liable. Advertisers should: (1) provide guidance to their endorsers on the need to ensure that their statements are not misleading and to disclose unexpected material connections; (2) monitor their endorsers' compliance, and (3) take action sufficient to remedy non-compliance and prevent future non-compliance.

(e) Endorsers may be liable for statements made in the course of their endorsements, such as when an endorser makes a representation that the endorser knows or should know to be deceptive. Also, an endorser who is an expert may be liable for misleading or unsubstantiated representations regarding a product's performance or effectiveness when the representations: (1) are inconsistent with the endorser's personal experience, or (2) were not made or approved by the advertiser and go beyond the scope of the endorser's personal experience. [For the responsibilities of an endorser who is an expert, see §

Assume that, before the reformulation, the contractor had posted an endorsement of the paint to their social media account. Even if the contractor would not use or recommend the reformulated paint, there is no obligation to modify or delete their post as long as the date of that post is clear and conspicuous to viewers. If the contractor reposts or the advertiser shares the contractor's original endorsement after the reformulation, consumers would expect that the contractor continued to hold the views expressed in the original post.

Example 2: In a radio advertisement, a well-known DJ talks about how much they enjoy making coffee with a particular coffee maker in the morning. The DJ's comments likely communicate that they own and regularly use the coffee maker. If they do not own it or use it only during a demonstration by its manufacturer, the ad would be deceptive.

Example 3: A dermatologist is a paid advisor to a pharmaceutical company and is asked by the company to post about its products on their professional social media account. The dermatologist states that the company's newest acne treatment product is "clinical

advertiser is also liable for the misrepresentation made through the endorsement. [See § 255.3 regarding the product evaluation that an expert endorser must conduct.] Even if the study was sufficient to establish the product's proven efficacy, the pharmaceutical company and the dermatologist are both potentially liable if the endorser fails to disclose their relationship to the company. See § 255.5 regarding the disclosure of expected material connections.]

Assume that the expert had asked the pharmaceutical company for the evidence supporting its claims and there were apparent design or execution flaws in the study shown to the expert, but that the pharmaceutical company had withheld a larger and better controlled, non-published proprietary study of the acne treatment which failed to find any statistically significant improvement in acne. The expert's "clinically proven" to work claim would be deceptive and the company would be liable for the claim, but because the dermatologist did not have a reason to know that the claim was deceptive the expert would not be liable.

Example 4: A well-known celebrity appears in an infomercial for a hot air roaster that purportedly cooks chicken perfectly in ten minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the roaster. In each attempt, the chicken is undercooked after twenty minutes and requires forty-five minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the roaster. The celebrity then takes from a second roaster what appears to be perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just twenty minutes, this

In order to limit its potential liability, the advertiser should provide guidance to its influencers concerning the need to ensure that statements they make are truthful and substantiated and the need to disclose unexpected material connections and take other steps to discourage or prevent non-compliance. The advertiser should also monitor its influencers' compliance and take steps necessary to remove and halt the continued publication of deceptive representations when they are discovered and to ensure the disclosure of unexpected material connections. See §§ 255.1(d) and 255.5]

Example 6: The website for an acne treatment features accurate testimonials of users who say that the product improved their acne quickly and with no side effects. Instead of using images of the actual endorsers, the website accompanies the testimonials with pictures of different individuals with perfect skin. The images misrepresent the improvements to the endorsers' complexions.

The same website also sells WeightAway shakes and features an accurate testimonial from an individual who says, "I lost 50 pounds by just drinking the shakes." Instead of accompanying the testimonial with a picture of the actual endorser, who went from 300 pounds to 250 pounds, the website shows a picture of an individual who appears to weigh about 100 pounds. By suggesting that WeightAway shakes caused the endorser to lose one-third of their original body weight, the image misrepresents the product's effectiveness. Even if it is

accompanied by a picture of the actual user, the testimonial could still communicate a deceptive typicality claim.

Example 7: A learn-to-read program disseminates a sponsored social media post by a parent saying that the program helped their child learn to read. The picture accompanying the post is not of the endorser's child. The testimonial is from the parent of a 7-year-old, but the post shows an image of a child who appears to be only 4 years old. By suggesting that the program taught a 4-year-old to read, the image misrepresents the effectiveness of the program.

§ 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 reliable and adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support express and implied claims made through endorsements in the same manner that the advertiser would be required to do if it had made the representation directly, 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 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

otherwise misrepresenting what consumers think of the products, regardless of whether the reviews are considered endorsements under the Guides.

Example 1: A web page 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 web page 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

⁴ Sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content that is inappropriate with respect to race, gender, sexuality, or ethnicity, or reviews that the seller reasonably believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted. Neither are sellers required to display

products or services. Customer service, delivery, returns, and exchanges are related to the seller's products and services.

achieved the claimed results, the advertisement is 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 the endorser's weight loss. The advertiser must have substantiated, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product and that the endorser's weight loss was not caused solely by their dietary restrictions and exercise regimen).

If, in the alternative, the advertisement simply features "before" and "after"

If the ad features the same picture as a 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., “women who use WeightAway lose 15 pounds on average”). A disclosure such as “most women who use WeightAway lose between 10 and 50 pounds” is inadequate because the range specified is so broad that it does not sufficiently communicate what users can generally expect.

Assume that a WeightAway advertisement contains a disclosure of generally expected results that is based upon the mean weight loss of users. If the mean is substantially affected by outliers, then the disclosure would be misleading. For example, if the mean weight loss is 15 pounds, but the median weight loss is 8 pounds, it would be misleading to say that the average weight loss was 15 pounds. In such cases, the disclosure’s use of mean weight loss instead could help avoid deception (e.g., “most users lose 8 pounds” or “a typical user loses 8 pounds.”)

Assume that WeightAway’s manufacturer procured a fake consumer review, reading “I lost 50 pounds with WeightAway,” and had it published on a third-party review website. This endorsement is deceptive because it was not written by a bona fide user. [See § 255.1(c)]. Moreover, the manufacturer would need competent and reliable scientific evidence that WeightAway is capable of causing 50-pound weight loss.

Assume that WeightAway is a diet and exercise program and a person appearing in a WeightAway ad says, "I lost 50 pounds in 6 months with WeightAway." Very few WeightAway users lose 50 pounds in 6 months and the ad discloses, "The typical weight loss of WeightAway users who stick with the program for 6 months is 35 pounds." In fact, only one-fifth of those who start the WeightAway program stick with it for 6 months. The disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program. In other words, even with the disclosure, the ad does not communicate what people who join the WeightAway program can generally expect.

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mix as their own recipes. The results purport to show that the majority believe that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are 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 appears to show a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though none of the patrons

is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers. 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 or post about it on social media, that arrangement should be clearly and conspicuously disclosed. [See § 255.5.]

Example 8: A camping goods retailer's website has various product pages. Each product page provides consumers with the opportunity to review the product and rate it on a five-star scale. Each such page displays the product's average star rating and a breakdown of the number of reviews with each star rating, followed by individual consumers' reviews and ratings. As such, the website is

more positive than if the marketer had engaged in the practice. If, in the alternative, the marketer had simply invited all recent purchasers to provide feedback on third-party websites, the situation would not have been unfair or deceptive, even if it had expressed hope for positive reviews.

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, expressly 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 the endorser is represented as possessing with respect to the endorsement.

(b) Although an expert may, in endorsing a product, take into account factors not within the endorser's expertise (such as cost or price), the endorsement must be supported by an actual exercise of the expertise in evaluating product features or characteristics with respect to which the endorser has expertise and which are relevant to an ordinary consumer's use of the product. 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 to another product or other products, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded, with respect to those features on which the endorser is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least as good 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(e) and Example 3 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 the endorser 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. This 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 audiology) or a physician without substantial experience in the area of hearing might be able to endorse the product, but, at a minimum, the advertisement must clearly and conspicuously disclose 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

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' brands available to consumers, the service must, in fact, have such experience, and have determined, based on its expertise, that the endorsed product's cleaning ability is at least equal to (or superior, if such is the net impression conveyed by the advertisement) that of the leading competitors' products available to consumers. 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 the type of scientific evidence that others with the purported degree of expertise would consider adequate to support this conclusion.

about the product's safety and efficacy. Under such circumstances, both the advertiser and the doctor would be liable for the doctor's misleading

Example 2 A trampoline manufacturer sets up and operates what appears to be an independent trampoline review website. The site reviews the manufacturer's trampolines, as well as those of competing manufacturers. Because the website falsely appears to be independent, it is deceptive. [See § 255.5].

Example 3 Assume that a third party operates a wireless headphone review website that provides rankings of different manufacturers' wireless headphones from most recommended to least recommended. The website operator accepts money from manufacturers in exchange for higher rankings of their products.

Regardless of whether the website makes express claims of objectivity, it is deceptive. [See § 255.5].

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 and that connection is not reasonably expected by the audience, such connection must be disclosed clearly and conspicuously. Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products or services (including products or services unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media programs. Some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. Material connections do not need to be disclosed when they are understood or expected by all but an insignificant portion of the audience for an endorsement. A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance. Additional guidance 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 will 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 the advertisement.

Example 2: A film star endorses a particular food product in a television commercial. 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 the player’s career and during this time the player has risen to their highest level ever in the rankings. The player responds by attributing that improvement to seeing the ball better, even since having laser vision correction surgery at a specific identified clinic. The athlete continues talking about the ease of the procedure, the kindness of the clinic’s staff, the short recovery time, and now being able to engage in a variety of activities without glasses, including driving at

night. The athlete does not disclose~~ing~~ a contractual relationship with the clinic that includes payment~~er~~ for speaking publicly about the surgery. Consumers might not realize that a celebrity discuss~~ing~~ 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~~y~~ consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure~~re~~ during the interview that the athlete has been engaged as a spokesperson~~er~~ for the clinic, this endorsement is likely to be deceptive.

Assume that the clinic uses the tennis player's endorsement in its own social media posts. The clinic should clearly and conspicuously disclose its relationship to the athlete in its posts.

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

Example 4: A television ad for an anti-aging product features a physician who says, "I have seen dozens of products on the market over the years and, in my opinion, this is the best ever." Consumers would expect the physician to be reasonably compensated for appearing in the ad. Consumers are unlikely, however, to expect that an expert endorser like the physician receives a percentage of gross product sales or 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.

Assume that the physician is also paid to post about the product on social media, a context in which consumers might not expect that the physician was compensated and more likely to expect that the physician is expressing an independent, professional opinion. Accordingly, the post should clearly and conspicuously disclose the doctor's connection with the company.

Example 5: In a television advertisement, actual patron of a restaurant, who is neither known to the public or presented as an expert, is shown seated at the counter. The diner is asked for a "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 television promotion of its new "meat-alternative" burger. A patron seeing such a sign might be more inclined to give a positive review of that item in order to appear on television. The advertisement should thus clearly and conspicuously inform viewers that the patrons on screen knew in advance that they might appear in a television advertisement if they gave the burger a good review because that information may materially affect the weight or credibility of the endorsement.

Assume, in the alternative, that the advertiser had not posted the sign and that patrons asked for their opinions about the burger did not know or have reason to believe until after their response that they were being recorded for use in an advertisement. No disclosure is required, even if patrons were also told, after

the interview, that they would be paid for allowing the use of their opinions in advertising.

Example 6: An infomercial producer wants to include consumer endorsements in an infomercial for an automotive ~~ad~~ product not yet on the market. The producer's staff selects several people to work as "extras" in commercials and asks them to use the product and report back, telling them that they will be paid a small amount if selected

9 of § 255.2.] Even if adequate disclosures appear in each incentivized review, the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating.

Example 7: A woodworking influencer posts on-demand videos of various projects to a manufacturer sends the influencer an expensive full-size lathe in the hope that the influencer would post about it. The woodworker uses the lathe for several projects and comments favorably about it in videos. If a significant proportion of viewers are likely unaware that the influencer received the lathe free of charge, the woodworker should clearly and conspicuously disclose receiving it for free, a fact that could affect the credibility that viewers attach to the endorsements. The manufacturer should advise the woodworker at the time it provides the lathe that this connection should be disclosed, and it should have reasonable procedures in place to monitor the influencer's postings for compliance and follow those procedures. [See § 255.1(d).]

Example 8: An online community has a section dedicated to discussions of robotic products. Community members ask and answer questions and otherwise exchange information and opinions about robotic products and developments. Unbeknownst to this community, an employee of a leading home robot manufacturer has been posting messages to the discussion board promoting the manufacturer's new product. Knowledge of this poster's employment likely would affect the weight or credibility of the endorsements. Therefore, the poster

should clearly and conspicuously disclose the relationship to the manufacturer to community members. To limit its own liability for such posts, the employer should be engaged in appropriate training of employees. To the extent that the employer has directed such endorsements or otherwise has reason to know about them, it should also be monitoring them and taking other steps to ensure compliance. [See § 255.1(d).] The disclosure requirements in this example would apply equally to consumer reviews of the product posted on retail websites or review platforms.

Example 9: A college student signs up to be part of a program in which points are awarded each time a participant posts social media about a particular advertiser's products. Participants can then exchange their points for prizes, such as concert tickets or electronics. These incentives could materially affect the weight or credibility of the college student's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

Example 10: Great Paper Company sells recycled paper with packaging that has a seal of approval from the No Chlorine Products Association, a non-profit third-party association. Great Paper Company paid the No Chlorine Products Association a reasonable fee for the evaluation of its product and its manufacturing process. Consumers would reasonably expect that marketers have to pay for this kind of certification. Therefore, there is no unexpected material

connection between the company and the association, and the use of the seal without disclosure of the fee paid to the association would not be deceptive.

Example 11: A coffee lover creates a blog that reviews coffee makers. The blogger writes the content independently of the marketers of the coffee makers, but includes affiliate links to websites on which consumers can buy these products from their marketers. Whenever a consumer clicks on such a link and buys the product, the blogger receives a small portion of the sale. Because knowledge of this compensation could affect the weight or credibility site visitors give to the blogger's reviews, the reviews should clearly and conspicuously disclose the compensation.

Example 12: Near the beginning of a podcast, the host reads what is obviously a commercial for a product. Even without a statement identifying the advertiser as a sponsor, listeners would likely still expect that the podcaster was compensated, so there is no need for a disclosure of payment for the commercial. Depending upon the language of the commercial, however, the audience may believe that the host is expressing their own views in the commercial, in which case the host would need to hold the views expressed. [See § 255.0(b).]

Assume that the host also mentions the product in a social media post. The fact that the host did not have to make a disclosure in the podcast has no bearing on whether there has to be a disclosure in the social media post.

§ 255.6 Endorsements directed to children.

Endorsements in advertisements addressed to children may be of special concern because