

FTC Year in Review

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Frankfurt Kurnit Klein + Selz_{PC}

Topics

- Endorsements
 - *And the FTC's updated Guides, updated Business Guidance, and proposed Rule*
- Junk fees
 - *And the FTC's proposed Rule*
- Health claims
 - *And the FTC's new Business Guidance*
- “Made in USA” claims
 - *And the FTC's new Made in USA Labeling Rule*

Endorsements

“We’re using all available means
to attack deceptive advertising
in the digital age”

-- Samuel Levine, Director, FTC Bureau of Consumer Protection

Endorsements

- FTC proposes new “Trade Regulation Rule on the Use of Consumer Reviews and Testimonials”
- FTC releases updated “Guides for the Use of Endorsements and Testimonials in Advertising”
- FTC releases updated business guidance, “FTC Endorsement Guides: What People are Asking”
- Continued enforcement

FTC's Proposed Rule

- Proposed Trade Regulation Rule on Consumer Reviews and Testimonials (7/23)
 - Codifying well-established standards as well as current FTC thinking
 - Provides a mechanism for obtaining civil penalties (which is now **\$51,744 per violation**)
- A rule is different than guidance
 - Unlike the Endorsement Guides, the terms of a rule are independently enforceable

FTC's Proposed Rule

- “Clear and conspicuous”
 - Disclosures must be “difficult to miss”
 - For audio/video communications, the disclosure must be presented simultaneously in both the audio and the video
 - Online disclosures must be “unavoidable”
 - Disclosures must comply, no matter how you view the content

FTC's Proposed Rule

- Other key topics
 - No use of fake reviews and endorsements
 - Don't use consumer reviews once a product has changed
 - You can't pay for a positive review
 - Disclose "insider" reviews
 - Don't misrepresent that owned review websites are independent
 - Don't improperly suppress consumer reviews
 - Don't misuse indicators of social influence

Updated Endorsement Guides

- FTC releases updated “Guides for the Use of Endorsements and Testimonials in Advertising” (7/23)
 - New FAQs released as well
- Just administrative interpretations of the law, but not independently enforceable

Definitions

- “Clear and conspicuous”
- “Endorsement”
 - Advertising messages that are understood to reflect the endorser’s own opinions and experiences
 - Endorsements can be statements, demonstrations, social media posts, and **even tagging a brand**

What's an “Endorsement”?

- Television commercial for golf balls shows a professional golfer hitting balls off a tee
 - It's an endorsement, even if the golfer **doesn't make any verbal statements** endorsing the product
- Dog food brand sends free product to a dog influencer, asking the influencer to post about the product
 - It's an endorsement, even though the influencer is **not obligated to post**

“Clear and Conspicuous”?

- If you have to **click on more**, it’s not clear and conspicuous
- Don’t assume that a disclosure is clear and conspicuous just because you’re using a **platform’s disclosure tools**
- Disclosures need to be clear and conspicuous on all of the **different devices** on which the advertising will be viewed

“Clear and Conspicuous”?

- FAQ -- Where does a disclosure belong in videos and stories?
 - In both the [video and text](#)
 - A disclosure in the text description or post is not enough
 - Superimpose the disclosure
- FAQ -- What about in-feed, static posts?
 - A disclosure in the text may be fine, but consider whether consumers are only looking at the photo

General Considerations

- Endorsements must reflect the endorser's honest opinions, findings, beliefs, and experiences
- If you present the endorser as an actual user of the product, then the endorser must be a bona fide user
- Advertisers (and others) are responsible for their endorsers
 - Truthful claims and proper disclosures
 - Monitoring and follow-up

General Considerations

- Can you use a model to represent an actual endorser?
 - Yes, so long as you don't misrepresent any **material attributes** of the endorser
- Do you have to take down old social media posts that have become out-of-date?
 - No, so long as it's clear they are old posts, and you're not sharing and boosting them

General Considerations

- FAQ -- Does the “clothing rule” apply to social media?
 - If an influencer posts a photo of herself on Instagram wearing a dress, but doesn’t mention or tag the brand, then no disclosure is required
- FAQ – Can you invite friends and family to try out your product?
 - Yes, of course, but they should disclose the connection if they post, even if you’re not suggesting that they do so

General Considerations

- How much monitoring of influencers is required?
 - FTC says you should **monitor regularly** (but doesn't provide more specific guidance than that)
 - If you don't want to monitor regularly, then your influencers' posts should be pre-approved
- What about stories that disappear?
 - If posts can't be effectively monitored, then they should be pre-approved

FTC v. Google & iHeart

- FTC charged Google and iHeart with using misleading DJ endorsements
- DJs promoted their personal experiences with the Google Pixel 4 phone, but they hadn't actually used the phone
 - “It’s my favorite phone camera out there, especially in low light”
 - “It’s also great at helping me get stuff done”
- Consent orders (11/22)
 - Settlements with FTC and states include \$9.4M in penalties



Consumer Endorsements

- A consumer's endorsement about the performance of a product should represent the **typical performance**
 - When promoting atypical performance, you'll need to effectively disclose what the generally expected performance will be
 - Will the disclosure give consumers a true indication of what the performance will be (taking into account geography, outliers, the range of performance, etc.)?
 - General (“results not typical”) or contradictory (“you won't achieve these results”) disclaimers won't work

Consumer Endorsements

- When hosting consumer reviews, advertisers shouldn't **misrepresent or distort** consumers' views
 - Don't solicit in a manner that will skew the reviews
 - Don't pick and choose which reviews to post
 - Don't organize them in a misleading manner
- It's OK to have a reasonable delay for monitoring purposes
 - But don't ask consumers to delete reviews (but transparently updating them is OK, though)
- It's OK to delete inappropriate and irrelevant reviews
 - But reviews about customer service, delivery, etc., are relevant

FTC v. Hey Dude

- FTC charged online shoe retailer with suppressing most consumer reviews that didn't get four or five stars
 - FTC charged the company with violating the Mail Order Rule too
- Consent order (9/23)
 - \$1.95M settlement



Expert Endorsements

- When using expert endorsers, they must have the expertise that they are represented to have
- And they must have exercised that expertise!

Organizational Endorsements

- Endorsements by organizations must reflect the entity's views, after following a proper process
- Don't misrepresent that an organization is independent when it isn't
- Don't pay for better reviews or rankings (regardless of any disclosure that may be included)

FTC v. CRI Genetics

- FTC had numerous concerns about CRI Genetics, including ...
- “Genetics Digest” website
 - Review website (owned by CRI) that published reviews of CRI and other products
 - Even though the website disclosed its affiliation to CRI, the FTC said that wasn’t enough
- Fake consumer reviews
 - Just because it’s loosely based on a real consumer doesn’t mean that it’s a real consumer review
- Consent order (10/23)
 - \$700K civil penalty

Free Review of Ancestry DNA Tests | Genetics Digest

Genetics Digest has a financial connection to products sold via links on our website such as our top choice: CRI Genetics

GENETICS • DIGEST
(index.html)

Disclosure of Material Connections

- If there's a **material connection** between the endorser and the advertiser, that is not reasonably expected by the audience, then it must be disclosed
 - Can be any type of business, family, or personal relationship
 - Can be a payment or any other type of benefit
 - It doesn't matter that the endorser isn't required to provide an endorsement (or that the endorser is free to provide a negative opinion)
- There are connections that are (in theory) immaterial

Disclosure of Material Connections

- What is reasonably expected?
 - Consumers understand a celebrity is paid to appear in a commercial, but that relationship isn't necessarily obvious in social media
- What about obtaining consumer opinions?
 - If they know they're getting something in return, even just appearing in advertising, that's a material connection
- What about star ratings?
 - If star ratings include incentivized reviews, then that should be disclosed

Disclosure of Material Connections

- FAQ -- How long does a material connection last?
 - For a low value product (\$60), a year is probably sufficient
 - For a high value product (a car), disclosures may be required for as long as the influencer owns the car
 - You'll need to align your monitoring with this

FAQ -- What disclosures work?

- #paidforbyxyz
 - It would be clearer if there were spaces between the words
- #endorsement
 - It's not clear it's a paid endorsement
- #gifted
 - Doesn't explain who it was gifted by, e.g., #gifted_by_xyz
- #sweeptakes
 - It should be clearer about the brand connection, e.g., #xyz_sweepstakes

FTC Warning Letters

- FTC sent warning letters to two trade associations and a dozen influencers (11/23)
 - American Beverage Association and the Canadian Sugar Institute hired influencers to promote the use of sweeteners
- Relying on the recent updates, the FTC said the influencers failed to properly disclose their connections, such as . . .
 - Disclosures should be in the post and the video
 - Disclosures be in the audio and video
 - Don't rely on the paid partnership tools
 - #ad is not enough if you don't know who it's an ad for



Children

- FTC added a new section about kids
 - Raised the question about whether this guidance will be effective in advertising directed to kids
- Later, the FTC released a staff paper on concerns about blurred advertising directed to kids (9/23)

Junk Fees

“Look, folks, these are junk fees”

-- President Joe Biden

Proposed Rule on “Junk Fees”

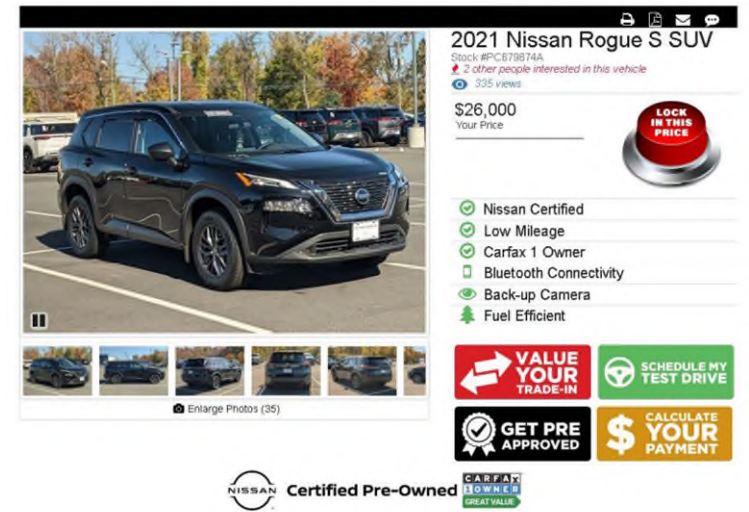
- FTC proposed a rule prohibiting junk fees (10/23)
- Comment period ends tomorrow
- No “hidden fees”
 - Advertising must **disclose the total price**
 - The total price must be **more prominent** than any other pricing information
 - The total price may exclude shipping charges, government charges, and optional charges
- This means no more drip pricing!

Proposed Rule on “Junk Fees”

- No “misleading fees”
 - Don’t misrepresent the nature and purpose of any amount that consumers must pay, including what the fees are for and whether the fees are refundable
 - Clearly and conspicuously disclose any amounts that consumers must pay that are not part of the total price
- What is the FTC concerned about here?
 - Don’t mischaracterize what the fees are (e.g., convenience fee, cleaning fee, service charge, government charges)
 - Don’t mislead people about whether add-ons are needed
 - Don’t leave out necessary purchases

FTC & CT v. Manchester City Nissan

- FTC & CT sued Manchester City Nissan, alleging the auto dealer is charging junk fees (1/24)
 - Advertised certified pre-owned cars for a specific price, but then added a certification fee at the time of purchase
 - Charged consumers for add-ons they didn't agree to
 - Charged “government fees” that were greater than the actual government charges



FTC & WI vs. Rhineland Auto

- FTC & WI charged Rhineland Auto Center with misleading consumers by charging junk fees and charging higher fees in a discriminatory manner
 - Charged additional fees without getting authorization
 - Misled consumers about whether fees were mandatory
- Consent order (11/23)
 - \$1.1M settlement



Health

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“If a company makes a claim about the health and safety benefits of a product, that claim must be based on scientific evidence”

-- FTC Commissioner Rebecca Kelly Slaughter

Health Products Guidance

- Provides guidance on making proper claims about health-related products (12/22)
- Replaces the FTC's dietary supplement guidance from the mid-90s



Health Products Guidance

- Advertisers are responsible for all express and implied claims that are communicated
- Consider the “net impression,” taking into account all elements of the advertising

Example 2:

A magazine ad for a children's nutritional drink features an image of the straw from the drink box encircling a child to create a barrier as another child sneezes in her direction. The image used in the ad likely implies that the product can help protect children from catching colds or other airborne infections.

Health Products Guidance

- If the advertising would be misleading without key qualifying information, that information must be disclosed
- This includes significant limitations on any advertised health benefit and any significant safety concerns

Example 8:

The marketer of a weight-loss supplement cites a placebo-controlled, double-blind clinical study in an ad as demonstrating that the product resulted in an average weight loss of 12 pounds over an eight-week period. The weight loss for the treatment group was, in fact, significantly greater than for the control subjects. However, both the control and test subjects engaged in regular exercise and followed a restricted-calorie diet as part of the study regimen. The ad should make clear that users of the supplement also will need to reduce calories and engage in regular exercise to achieve similar results.

Health Products Guidance

- Disclosures must be presented clearly and conspicuously, so that they are “difficult to miss”
- Disclosures can’t be used to contradict the claim
- Vague qualifying terms aren’t sufficient

Example 13:

A company has results from two studies suggesting that its supplement helps to maintain healthy cholesterol levels. There are, however, significant limitations to each of the studies and a better study is necessary to confirm whether the effect is genuine. The company makes a claim in advertising that “promising, preliminary scientific studies show that our product may be effective in reducing cholesterol.” The use of the words “promising,” “preliminary,” and “may” is unlikely to sufficiently convey the limitations of the science.

Health Products Guidance

- FTC applies a rigorous substantiation standard
- Advertisers should have “**competent and reliable scientific evidence**” to substantiate health-related claims
 - Studies that have been conducted in an objective manner by experts;
 - Generally accepted to yield reliable results; and
 - Sufficient in quality and quantity, based on generally accepted scientific standards, when considered in light of the entire body of evidence
- Randomized, controlled human clinical testing
- Relevant to the specific product and benefit

Example 24:

An advertiser makes an unqualified claim about the anti-clotting effect of a supplement that contains a compound extracted from fruit. There are two human clinical studies supporting the effect and no contrary evidence. One study consists of subjects tested over a one-week period, with no control group. The second study is well-controlled and of longer duration, but shows only a slight effect that isn't statistically significant. Because both studies have significant limitations, they don't substantiate a claim about anti-clotting benefits.

Notices of Penalty Offenses

- FTC sent notices of penalty offenses to about 670 companies making health-related claims (4/23)
- Warned them about making claims without proper substantiation, or they'll be subject to civil penalties

FTC v. Smoke Away

- FTC alleged that Smoke Away deceptively promoted a smoking cessation product
 - “Don’t be a slave to cigarettes anymore. Quit Smoking for good.”
 - Didn’t have competent and reliable scientific evidence for its claims
 - Use actors to portray actual consumer endorsers
- Consent order (6/23)
 - \$7.6 million settlement
 - Permanent ban on marketing treatment products

Carrie - Brooklyn | NY

Smoker Type: **LIGHT**

Successfully Quit: **YES**

"I used it 11 years ago. I took tablets for 2 days and on the 3rd day I had no desire to smoke. I haven't touched a cigarette since February 21st of 2007. I told my son that when he's ready to quit I'll order it for him."



FTC v. LasikPlus

- FTC charged LasikPlus with engaging in bait-and-switch tactics when promoting lasik surgery
 - Lasik promoted surgery for less than \$300 per eye, but only a small percentage of patients (6.5%) qualified for that price
 - Some ads also didn't disclose that the price was per eye
- Consent order (1/23)
 - \$1.25 million in consumer redress



FTC Letters to Edible Companies

- FTC & FDA sent cease and desist letters to companies selling edible THC products (7/23)
- They said the companies were endangering children by selling products in packaging that looks like foods that kids eat



Made in USA

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“Made in USA’ means what it says”

-- Samuel Levine, Director, FTC Bureau of Consumer Protection

Made in USA Standards

- FTC “Enforcement Policy Statement on U.S. Origin Claims”
 - “All or virtually all” standard
 - All significant parts and processing must be of U.S.-origin
 - Last substantially transformed in the U.S.
- Made in USA Labeling Rule
 - Codifies the “all or virtually all” standard
 - Applies to product labeling and “mail order” material

Made in USA Standards

- These standards apply to similar terms
 - “Produced,” “manufactured,” etc.
- “Assembled” means something different, though
 - Principal assembly must be substantial and must take place in the U.S.
 - Last substantially transformed here
- More limited claims can work too
 - “Designed,” “painted,” etc.
- Qualified claims are acceptable
 - “Made in America of domestic and imported components”

Made in USA Enforcement

- FTC regularly enforces these standards through formal and informal enforcement actions
- Common themes
 - Promoting U.S. manufacturing operations in a manner that confuses people about whether the products are entirely made here
 - Making broad claims when only certain products U.S.-made
 - Having substantial U.S. content, but not enough to satisfy the “all or virtually all” standard
 - And there’s fraud too . . .

FTC v. Kubota

- FTC charged tractor maker Kubota North America with making false “Made in USA” claims
 - Promoted replacement parts as being made here, even though they were wholly imported
 - Also didn’t have systems in place to track when production moved overseas, so that the claims could be updated
- Consent order (1/24)
 - \$2,000,000
 - Largest ever “Made in USA” civil penalty



FTC v. Instant Brands

- Instant Brands promoted its Pyrex glass measuring cups as “proudly made in the USA”
- FTC alleged that the claim was false
 - To meet increased demand during the pandemic, the company temporarily shifted production of some products to China
- Consent order (1/23)
 - \$129,000 settlement
 - Specific disclosure requirements (simultaneous audio/video, unavoidable online, and on the principal display panel on-pack)



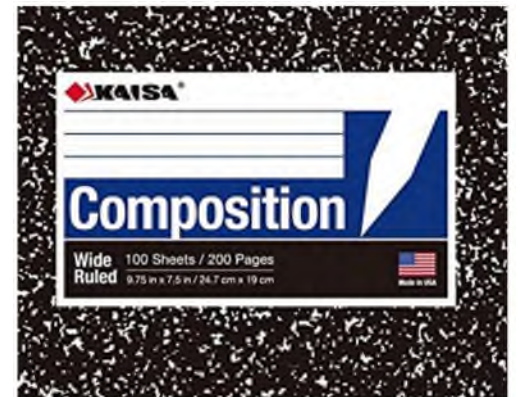
FTC v. Chaucer Accessories

- Chaucer made a variety of U.S.-origin claims
 - Belts that are “Made in USA from Global Materials”
- FTC alleged the qualified claim was misleading
 - The only manufacturing that took place in the U.S. was that the belt straps were attached to the buckles
 - The belts weren’t last substantially transformed here
- Consent order (6/23)
 - \$191,00 settlement
 - Consumer notification



FTC v. Kaisa

- FTC looked into Kaisa’s promotion of its composition books as “Made in USA”
 - Even though the paper was made here, and the product was assembled here, the covers of the books were not
- Closing letter (5/23)
 - Even though the cost of the cover was small relative to the overall manufacturing costs, the FTC said that “a cover is not far enough removed in the manufacturing process from the finished product to be of little consequence, and it is a significant part of the final product”



There's More!

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There's More!

- You'll hear about some other FTC “hot topics” later today
 - Green marketing
 - Dark Patterns
 - ROSCA and subscriptions
 - Artificial intelligence
- Privacy is a hot topic too!
 - Join us at our privacy and tech summit in May

Thanks!

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