Appendix A to Part 136—[Removed]

■ 32. Remove appendix A to part 136.

■ 33. Add subpart D to part 136 to read as follows:

Subpart D—Special Operating Rules for Air Tour Operators in the State of Hawaii

Sec.
136.71 Applicability.
136.73 Definitions.
136.75 Equipment and requirements.

Subpart D—Special Operating Rules for Air Tour Operators in the State of Hawaii

§ 136.71 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart prescribes operating rules for air tour flights conducted in airplanes, powered-lift, or rotorcraft under visual flight rules in the State of Hawaii pursuant to parts 91, 121, and 135 of this chapter.

(b) This subpart does not apply to:

(1) Operations conducted under part 121 of this chapter in airplanes with a passenger seating configuration of more than 30 seats or a payload capacity of more than 7,500 pounds.

(2) Flights conducted in gliders or hot air balloons.

§ 136.73 Definitions.

For the purposes of this subpart:

Air tour means any sightseeing flight conducted under visual flight rules in an airplane, powered-lift, or rotorcraft for compensation or hire.

Air tour operator means any person who conducts an air tour.

§ 136.75 Equipment and requirements.

(a) *Flotation equipment.* No person may conduct an air tour in Hawaii in a rotorcraft beyond the shore of any island, regardless of whether the rotorcraft is within gliding distance of the shore, unless:

(1) The rotorcraft is amphibious or is equipped with floats adequate to accomplish a safe emergency ditching and approved flotation gear is easily accessible for each occupant; or

(2) Each person on board the rotorcraft is wearing approved flotation gear.

(b) *Performance plan.* Each operator must complete a performance plan that meets the requirements of this paragraph (b) before each air tour flight conducted in a rotorcraft.

(1) The performance plan must be based on information from the current approved aircraft flight manual for that aircraft, considering the maximum density altitude for which the operation is planned to determine the following:

(i) Maximum gross weight and center of gravity (CG) limitations for hovering in ground effect;

(ii) Maximum gross weight and CG limitations for hovering out of ground effect; and

(iii) Maximum combination of weight, altitude, and temperature for which height-velocity information from the performance data is valid.

(2) The pilot in command (PIC) must comply with the performance plan.

(c) *Operating limitations.* Except for approach to and transition from a hover, and except for the purpose of takeoff and landing, the PIC of a rotorcraft may only operate such aircraft at a combination of height and forward speed (including hover) that would permit a safe landing in event of engine power loss, in accordance with the height-speed envelope for that rotorcraft under current weight and aircraft altitude.

(d) *Minimum flight altitudes.* Except when necessary for takeoff and landing, or operating in compliance with an air traffic control clearance, or as otherwise authorized by the Administrator, no person may conduct an air tour in Hawaii:

(1) Below an altitude of 1,500 feet above the surface over all areas of the State of Hawaii;

(2) Closer than 1,500 feet to any person or property; or

(3) Below any altitude prescribed by Federal statute or regulation.

(e) *Passenger briefing.* Before takeoff, each PIC of an air tour flight of Hawaii with a flight segment beyond the ocean shore of any island shall ensure that each passenger has been briefed on the following, in addition to requirements set forth in § 91.107, § 121.571, or § 135.117 of this chapter:

(1) Water ditching procedures;

(2) Use of required flotation equipment; and

(3) Emergency egress from the aircraft in event of a water landing.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5).

Polly Trottenberg,

Acting Administrator.

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FEDERAL TRADE COMMISSION

16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Final rule; adoption of revised Guides.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is adopting revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (''the Guides''). The revised Guides include additional changes not incorporated in the proposed revisions published for public comment on July 26, 2022.

DATES: Effective July 26, 2023.

FOR FURTHER INFORMATION CONTACT: Michael Ostheimer (202–326–2699), Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Overview of the Commission's Review of the Guides

The Commission began a review of the Guides pursuant to the agency's ongoing regulatory review of all current rules and guides. In February 2020, the Commission published a **Federal Register** document seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides. 85 FR 10104 (Feb. 21, 2020). Given the disruption caused by the COVID–19 pandemic, the Commission extended the comment period for two months. 85 FR 19709 (Apr. 8, 2020). One hundred eight unique substantive comments were filed in response to the Commission's February 2020 publication.

In July 2022, the Commission published a **Federal Register** document, 87 FR 44288 (July 26, 2022), that discussed the comments it had received in 2020, proposed certain revisions to the Guides, and requested comment on those revisions. Thirty unique substantive comments were filed.[1] After

[1] Comments were submitted by the American Association of Advertising Agencies (''AAAA''), the American Academy of Audiology (''Academy''), the American Optometric Association (''AOA''), the Association of National Advertisers (''ANA''), Bazaarvoice, Inc. (''Bazaarvoice''), BBB National Programs, the Center for Data Innovation (''CDI''), Common Sense Media (''Common Sense''), the Computer & Communications Industry Association (''CCIA''), Consumer Reports, Inc. (''Consumer Reports''), James A. Dudukovich, Esq. (''Dudukovich''), the Entertainment Software

reviewing those comments, the Commission is now making additional changes to the Guides and adopting the resulting revised Guides as final.[2]

II. Review of Comments on Proposed Revisions to the Guides and Additional Changes to Proposed Guides Published in July 2022

Many of the comments received by the Commission were generally supportive of the proposed revisions.[3] One comment urged the FTC not to backtrack in response to complaints from certain commenters.[4] One comment said the Commission should avoid making changes beyond updating examples and providing minor clarifications,[5] but the commenter only raised concerns about a few specific issues.[6] Another comment said the Commission should not use the Guides to communicate the policy interests of the Commission [7] and disagreed with many of the proposed changes.[8] Other commenters supported or opposed discrete revisions or asked for additional changes, guidance, or enforcement, but did not comment upon the proposed changes generally.[9]

What follows is a section-by-section discussion of comments received, the Commission's reactions to the comments, and any resulting changes to the Guides. The discussion also notes additional changes not prompted by the comments but does not flag non-substantive edits intended merely to improve the readability of the examples.

A. Section 255.0 Purpose and Definitions

1. The Significance of the Examples

One commenter assumed significance when an example did not address other possible issues that might arise from the facts described.[10] The Commission is adding a statement to § 255.0(a) noting that the examples in each section of the Guides apply the principles of that section to particular factual scenarios, but they do not address every possible issue the facts or principles might implicate.

2. Definitions of ''Endorsements'' and ''Endorsers''

The Commission proposed revising the definition of an ''endorsement'' to make clear that tags in social media posts can be endorsements. One comment stated addressing tags is beneficial [11] and two comments asserted, correctly, that not all tags are endorsements,[12] with one of them saying the proposed language communicates otherwise.[13] The Commission is therefore revising the language of the definition to clarify that tags and certain other types of communications ''can be'' endorsements. Another commenter assumed the list was exhaustive and if a type of message was not on the list, the Commission did not consider it to be an endorsement.[14] To the contrary, the list is illustrative and not exhaustive.

The Commission proposed revising the definition of an ''endorser'' to include what ''appear[s] to be an individual, group, or institution.'' Two commenters said the proposed revised definition addressing fabricated endorsers is beneficial.[15] A third commenter asked that the Commission make clear using express language or examples that the revised definition applies to virtual endorsers or fabricated endorsers.[16] A fourth commenter said the new language was ambiguous and, if the Commission simply intended to address virtual influencers, then it should use language to specifically address that concept.[17] The Commission does not agree that the new definitional language is ambiguous or addresses only virtual influencers; rather, the new language is intended to also encompass the writers of fake reviews and non-existent entities that purport to give endorsements. The Commission is adding a sentence to Example 12 stating that fake positive reviews used to promote a product are ''endorsements.'' The Commission is also deleting ''or service'' from ''product or service,'' because the term ''product'' includes a ''service.'' [18]

2. Definition of ''Product''

The Commission proposed including a ''brand'' within the definition of a ''product.'' Two commenters supported the inclusion of ''brands'' [19] and another commenter raised concerns its inclusion would complicate whether a third-party review platform should consider a review to be a product review or a service review.[20] The addition of the word ''brand'' to the definition of ''product'' is not intended to address or impact how review platforms categorize reviews of brands.

3. Definition of ''Clear and Conspicuous''

The Commission proposed adding a definition of ''clear and conspicuous'' to describe the characteristics necessary to make disclosures effective. A number of commenters supported the definition,[21] with one of them asking for flexibility in how the definition is applied.[22] One commenter asserted that requiring online disclosures to be unavoidable is unlikely to benefit consumers,[23] and another one opposed the definition, arguing for greater flexibility.[24] Some commenters asked for specific guidance about compliant or non-compliant disclosures,[25] and one supported addressing general principles in the Guides and providing more detailed guidance in staff business guidance.[26] The Commission is adopting the proposed definition, which it believes is both useful and flexible. For online disclosures to be effective, they must be unavoidable. The Commission further believes its current approach to endorsement-related guidance makes sense, with the Guides focused on general principles and examples, and the more informal (and more frequently updated) staff guidance focused on

Association (''ESA''), Fairplay for Kids (''Fairplay''), Generation Patient, Inc. (''Generation Patient''), the Hearing Industries Association (''HIA''), the Interactive Advertising Bureau, Inc. (''IAB''), InfluenceLogic, LLC (''InfluenceLogic''), the News/Media Alliance (''N/MA''), the North American Insulation Manufacturers Association (''NAIMA''), the Retail Industry Leaders Association (''RILA''), Tripadvisor LLC (''Tripadvisor''), Trustpilot Group plc (''Trustpilot''), Truth in Advertising, Inc. (''TINA.org''), and by seven individual consumers.

[2] The Guides represent administrative interpretations concerning the application of section 5 of the FTC Act, 15 U.S.C. 45, to the use of endorsements and testimonials in advertising. They are advisory in nature and intended to give guidance to the public in conducting its affairs in conformity with section 5.

[3] AOA at 1, Bazaarvoice at 1, CCIA at 2, 5, Consumer Reports at 1, InfluenceLogic at 1, NAIMA at 1, TINA.org at 1.

[4] Consumer Reports at 1.

[5] ESA at 1.

[6] *Id.* at 2–4.

[7] ANA at 2.

[8] *Id.* at 2–18.

[9] *See, e.g.,* AAAA, Academy, BBB National Programs, CDI, Common Sense, Generation Patient, Tripadvisor, and Trustpilot.

[10] Dudukovich at 3, 6.

[11] BBB National Programs at 3.

[12] ANA at 2, N/MA at 5.

[13] ANA at 3.

[14] Dudukovich at 2.

[15] BBB National Programs at 3, NAIMA at 2.

[16] TINA.org at 3.

[17] ANA at 3.

[18] *See* § 255.0(d). The Commission is also making similar wording changes to §§ 255.0(g)(12), 255.2(a), (b), and (d), and 255.5.

[19] BBB National Programs at 3, NAIMA at 2.

[20] Trustpilot at 2.

[21] AOA at 1–2; BBB National Programs at 3–5; Consumer Reports at 1, 8; Dudukovich at 3; NAIMA at 2; N/MA at 5–6.

[22] N/MA at 5–6.

[23] IAB at 3–4.

[24] ANA at 4.

[25] CDI at 1, Consumer Reports at 8, Dudukovich, ESA at 3, Generation Patient, TINA.org, RILA.

[26] N/MA at 2.

specific questions and issues, such as the use, language, and placement of disclosures of material connections on particular platforms.

4. Examples

The first example of § 255.0 involves a film producer excerpting a film critic's review and placing it in an advertisement. One commenter asserted the excerpted statement is not an endorsement because there is no material connection between the critic and the endorser.[27] The Commission disagrees: a statement can be an endorsement even absent a material connection with the advertiser. The Commission is modifying the example to clarify that, while the critic's review itself is not an endorsement, the excerpt used in the advertisement is an endorsement.

Example 3 concerns a spokesperson who does not purport to speak on the basis of their own opinions and therefore is not considered an endorser. Although no commenters addressed this example, the Commission is clarifying that the spokesperson also does not purport to speak from personal experience.

Example 4 discusses an ad for automobile tires featuring a well-known professional automobile racing driver. Given the driver's expertise in automotive products, the Commission believes many consumers would likely think what the driver says about the positive attributes of the tires reflects the driver's personal views based on having personal knowledge about the tires. One commenter took issue with the Commission's revised language that consumers would likely think the driver's statement was based upon personal knowledge or experience.[28] The Commission disagrees with the commenter. Many consumers would likely think a professional racer would not speak for a product within their field of expertise without actually believing in those statements. The Commission is, however, further editing the example to make it internally consistent.

The Commission proposed adding an alternative scenario to Example 5 involving a golfer who was ''hired'' to post a video to social media of them driving a particular brand of golf ball. One commenter said the example was helpful in demonstrating that images can be endorsements.[29] Another commenter said not every social media post by a golfer showing golf balls is an endorsement and the Commission should make it clearer that it is an endorsement because the golfer was hired.[30] Although the Commission believes the example was clear as written, it is making it even clearer by describing the social media post as a ''paid post.''

Example 6 is about an actor who says a home fitness system is ''the most effective and easy-to-use home exercise machine that I have ever tried.'' One commenter asserted this would only be deceptive if the actor had not used the machine.[31] The example is intended to illustrate why this statement is an endorsement and is not intended to address all the ways the statement could be deceptive or who could be liable for any such deception. The Commission notes, however, there are multiple ways in which the statement could be deceptive, including not representing the actor's actual opinions or misleading consumers as to the machine's effectiveness or ease of use.

Example 7 illustrates several scenarios in which a consumer's expressed views of a brand of dog food would or would not be considered an endorsement. In the first scenario, a consumer with no connection to the manufacturer decides to buy the product and post about it or review it online. The proposed revised example said certain statements by the consumer are not an endorsement. One commenter suggested the Commission clarify that the consumer purchased the product with the consumer's own money, and the example now does so.[32] Another commenter asked whether the consumer's review would be an endorsement if the manufacturer highlighted the review on its homepage.[33] The Commission is adding a sentence to the example stating that a featured review would be considered an endorsement. The Commission is also deleting a statement about whether the consumer's review would otherwise be an endorsement if posted on a manufacturer's or retailer's website. Such a conclusion may depend on specific legal and factual issues.

Example 7 includes an alternative scenario in which the consumer participates in a marketing program in which participants agree to periodically receive free products from various manufacturers and can write reviews if they want to do so. One commenter supported the example,[34] and two others questioned whether the reviews are endorsements given that they are entirely optional.[35] To clarify this issue, the Commission is making two changes. First, it is modifying the example to state the participants had agreed to write reviews of the free products and the reviews were therefore endorsements. Second, the Commission is adding a second alternative scenario in which an influencer receives a valuable, unsolicited product and is asked, but not required, to endorse the product. The Commission believes any resulting posts would be endorsements even though the influencer could have chosen not to endorse the product.

One commenter indicated support for proposed new Examples 8 through 11.[36]

Proposed Example 8 explains a video game influencer who is paid to play and live stream a game is implicitly endorsing the game by appearing to enjoy playing it. One commenter could not understand why the player's enjoyment is relevant.[37] The Commission is modifying the example to clarify that the player's apparent enjoyment is implicitly a recommendation.

To illustrate disclosures that are not clear and conspicuous, the Commission proposed adding Example 9, which contains several paragraphs. Paragraph (ii) involves an influencer disclosing their connection to a manufacturer in social media posts written such that consumers have to click on a link labeled ''more'' in order to see the disclosure. The example is based on the Commission's case against Teami, LLC, and its owners.[38] Two commenters supported the example [39] and a third asked the Commission to explain why the disclosure is unlikely to be noticed, read, or understood.[40] The Commission is clarifying the example by stating that, if the endorsement is visible without having to click on the link labeled ''more,'' but the disclosure is not visible without the viewer doing so, then the disclosure is not unavoidable and thus is not clear and conspicuous.

Proposed Example 10 posits that, when an ad is targeted to older consumers, whether the disclosure is clear and conspicuous will be evaluated from the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities. One

[27] Dudukovich at 3.

[28] ANA at 4.

[29] BBB National Programs at 5.

[30] ANA at 4–5.

[31] Dudukovich at 3.

[32] Tripadvisor at 6–7.

[33] Trustpilot at 4–5.

[34] Consumer Reports at 8.

[35] ANA at 5, Dudukovich at 4.

[36] Consumer Reports at 8.

[37] ANA at 5.

[38] Complaint at 12–15, 17–18, *FTC* v. *Teami, LLC,* No. 8:20–cv–00518 (M.D. Fla. Mar. 5, 2020).

[39] BBB National Programs at 5, Consumer Reports at 8.

[40] ANA at 5–6.

commenter, asserting the example is premised on unfair, insulting, and prejudicial assumptions about older adults and their abilities to understand ads, asked that the example be withdrawn.[41] The example does not assume older adults necessarily have diminished capacities, but it is reasonable to assume that population includes such individuals. The Commission's Deception Policy Statement recognizes that when ''representations . . . are targeted to a specific audience . . . the Commission determines the effect of the practice on a reasonable member of that group.'' [42]

Proposed Example 11 is intended to show how the definition of ''clear and conspicuous'' could apply to an advertisement microtargeted to a very discrete population. It imagines an advertisement for a cholesterol-lowering product that requires a disclosure because it contains testimonials about results that greatly exceed those generally experienced by the product's users. Based on online data collection, the ad is microtargeted to Spanish-speaking individuals who have high cholesterol levels and are unable to understand English. While the ad is in Spanish, the disclosure is only in English. One commenter expressed the view that the example was offensive and premised on inaccurate assumptions that a Spanish-speaking audience might be likely to have high cholesterol.[43] The example is not based upon such an assumption but is instead an illustration of when a disclosure is needed and how that disclosure must be in a language the target audience will understand. The example referenced Spanish speakers because Spanish is the second-most spoken language in the United States. The Commission is revising the example to make it more generically about speakers of a ''particular language . . . who are unable to understand English.'' The Commission is also adding a statement that the disclosure must be in the same language as the ad.

Proposed Example 12 addresses fake negative reviews of a competitor's product. Three commenters supported the example,[44] with one asking the Commission to state that commissioning a fake positive review is an unfair trade practice.[45] As discussed above, the Commission is adding a statement that fake positive reviews used to promote a product are endorsements. The Commission is also adding a cross-reference to an example in § 255.2 involving a manufacturer deceptively procuring a fake positive consumer review for its own product and having it published on a third-party review website.

Proposed Example 13 says it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use the indicators to misrepresent such influence for a commercial purpose. One commenter indicated support for the example.[46] Another commenter asserted the purchase or creation of fake followers is inherently a misrepresentation and should be prohibited per se.[47] Although the use of fake followers may be inherently ''misleading'' as that term is colloquially used, the Commission's jurisdiction is limited to commercial speech and does not reach the use of fake followers for vanity or other non-commercial purposes. A third commenter was concerned the example suggested that the Commission would hold ad agencies liable when they recommend an influencer who, unbeknownst to the agencies, happens to be using fake indicators of social media influence.[48] Nothing in the Guides addresses holding ad agencies liable for merely recommending such an influencer.

B. Section 255.1 General Considerations

1. Quotation of Endorsers

As revised, proposed § 255.1(b) stated that an advertisement need not present an endorser's message in the exact words of the endorser unless the ad presents the endorsement as a quotation. One commenter said the reference to a ''quotation'' is confusing.[49] The Commission is modifying the example to say an ad must use an endorser's exact words only when the ad represents that it is presenting the endorser's exact words, such as by using quotation marks.

2. Liability of Advertisers

Section 255.1.(d) addresses the potential liability of advertisers. Among other things, the proposed revised subsection stated advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements when there is a connection between the advertiser and the endorser.[50] Two commenters said they supported the proposed revised subsection.[51] Another commenter stated the reference to ''when there is a connection between the advertiser and the endorser'' is unnecessary because there has to be a sponsoring advertiser for there to be an endorsement.[52] The Commission is deleting that language because, as defined, an endorsement has to be an advertising, marketing, or promotional message. It is not correct, however, that a connection is needed for an advertiser to be liable for an endorsement. If, for example, an advertiser retweets a positive statement by an unrelated third party or republishes in an advertisement a positive review by an unrelated third party, that statement or review becomes an endorsement for which an advertiser is liable, despite the lack of any such connection.

One commenter asserted it is unreasonable to hold an advertiser liable for what endorsers say unless the endorsers had a contractual relationship to the advertiser and the advertiser either: (1) failed to properly instruct endorsers and take action when it became aware of failures to comply or (2) instructed the endorsers to make a false claim.[53] Another commenter said expecting advertisers to monitor their endorsers is unreasonable and unnecessary.[54] The Commission disagrees with both commenters and expects advertisers to be responsible for and monitor the actions of their endorsers. A different commenter asked the Commission to continue to allow flexibility in monitoring such as FTC staff business guidance currently provides,[55] and yet another commenter asked for more detailed guidance on effective oversight mechanisms.[56] Such detailed guidance is beyond the scope of these Guides but may be addressed in staff business guidance. The Commission is also changing a statement in the subsection that an advertiser may be liable ''for an endorser's deceptive statement'' even

[41] *Id.* at 6.

[42] *See FTC Policy Statement on Deception, appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174, 179 (1983).

[43] ANA at 6.

[44] Consumer Reports at 8, NAIMA at 2, Tripadvisor at 3–4.

[45] Tripadvisor at 4.

[46] NAIMA at 2.

[47] Consumer Reports at 5–6, 8.

[48] AAAA at 8.

[49] ANA at 6–7.

[50] One commenter implied that § 255.1(d) may limit the liability faced by multi-level marketing companies (MLMs) and their participants for deceptive claims made by the participants. *See* BBB National Programs at 6–7. The Commission does not agree. Even when a person is talking about their own experience using a product or service, they could face liability for deceptive claims under section 5 based on being the advertiser, providing the means and instrumentalities to deceive, or other theories. And a principal is liable for its agents' violations.

[51] AOA at 2, Consumer Reports at 8.

[52] ANA at 7.

[53] RILA at 4–5.

[54] N/MA at 4.

[55] ESA at 3.

[56] BBB National Programs at 6–7.

when the endorser is not liable. The Commission is clarifying that the advertiser's liability may extend to ''deceptive endorsements'' and not just the narrower issue of whether an endorser's statement is true. For example, the advertiser could be held liable for disseminating a television ad including an endorser making a truthful statement that reflects atypical results of using the product.

3. Liability of Endorsers

Proposed new § 255.1.(e) addresses the liability of endorsers. Three commenters were supportive of this paragraph,[57] with one of them suggesting that it address the liability of reviewers who represent falsely that they personally used a product or experienced a service.[58] The Commission is adopting that suggestion.

4. Liability of Intermediaries

Proposed new § 255.1.(f) addresses the liability of intermediaries generally and listed several types of intermediaries. Four commenters supported the proposed paragraph as written,[59] and another commenter suggested specifically identifying review brokers as potentially liable.[60] A different commenter stated that the undefined term ''intermediaries'' could sweep in entities for which there is no agency relationship, privity, or participation in the misconduct.[61] To address this concern, the Commission is changing the language of the provision to refer to the specific entities that it intends to address (*i.e.,* advertising agencies, public relations firms, review brokers, reputation management companies, and ''other similar intermediaries''). The Commission is also revising the paragraph to state that such entities may also be liable for their roles in ''creating'' ads containing endorsements that they know or should know are deceptive. Another comment said that the Commission should not seek to hold liable ''an entity [that] merely provides production services but is not involved in developing content for an advertisement and does not have direct knowledge about the accuracy of statements in an endorsement or testimonial.'' [62] The Commission does not believe that entities that merely provide such production services are ''other similar intermediaries'' as described in the revised language.

5. Misuse of Images of Endorsers

Proposed new § 255.1.(g) says that the use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents an attribute of the endorser that would be material to consumers in the context of the endorsement, *e.g.,* an endorser's complexion in the context of an ad for an acne treatment. Three commenters supported this new paragraph.[63]

6. Examples

Example 1 of § 255.1 addresses whether an endorsement is still valid after a product has been reformulated. The Commission is making minor modifications to clarify the first subpart of the example. A proposed new second subpart addressed an endorsement in a social media post. It said that even if an endorser would no longer use or recommend a reformulated product, there is no obligation for the endorser to modify or delete a historic post as long as the date of the post is clear and conspicuous to viewers. One commenter supported the example [64] and another said that it is not clear from the example whether the advertiser, as opposed to the endorser, needs to change or delete historical posts.[65] The Commission is modifying the example to clarify that the advertiser is not under any more obligation to do so than the endorser. The proposed new subpart also addressed sharing or reposting of the original post after the product's reformulation. The Commission is clarifying the example and adding that, under such circumstances, the advertiser would need to confirm that the endorser holds the views expressed in the original post about the reformulated product.

Proposed new Example 2 involves an ad featuring a well-known DJ who implicitly communicates owning and regularly using an advertised coffee maker, but who only used it during a demonstration by the product's manufacturer. One commenter said that the example described was not clearly an ad.[66] The Commission is modifying the example to clarify that the DJ is speaking during a radio advertisement played during commercial breaks. Another commenter asked the Commission to consider clarifying that the DJ could have used the coffeemaker every weekday at the studio and that the endorsement could have made the context of such use clear and understandable.[67] The commenter is correct in that the DJ might have used the coffee maker regularly without owning it. The Commission is simplifying the example, focusing on the implied claim of regular use, and deleting the reference to ownership.

Example 5 addresses the potential liability of an influencer for making an unsubstantiated health claim, as well as the advertiser's potential liability for the influencer's endorsement. The Commission disagrees with a commenter who asserted the proposed revised example is too complicated and should not address potential liability.[68]

Proposed new Example 6 addresses two alternative scenarios in which the pictures accompanying endorsements featured on a marketer's website are not of the actual endorsers and misrepresent material attributes of the endorsers. Two commenters supported the example.[69] The Commission is clarifying in the first alternative that the pictures accompanying acne treatment testimonials were ''stock photos . . . purchased'' by the advertiser. The second alternative involves a testimonialist who says they lost 50 pounds using a weight-loss product. The subpart explains the testimonial on the marketer's website was accompanied by an ''after'' picture of a person who appears to weigh 100 pounds but the testimonial was from someone who weighed 250 pounds after the weight loss. One commenter sought to correct a statement about the endorser appearing to have lost ''one-third of their original body weight,'' thinking the Commission had made a mathematical error.[70] The example was correct as written, but the Commission is adding a parenthetical to the example explaining its calculation.

C. Section 255.2 Consumer Endorsements

1. Substantiation for Performance Claims

Section 255.2(a) says an advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support claims

[57] *Id.* at 7, Generation Patient at 2, Tripadvisor at 4.

[58] Tripadvisor at 4.

[59] BBB National Programs at 7, Generation Patient at 2, NAIMA 3.

[60] CDI at 2.

[61] CCIA at 2–3.

[62] N/MA at 4.

[63] BBB National Programs at 8, Consumer Reports at 9, NAIMA at 3.

[64] BBB National Programs at 8–9.

[65] Dudukovich at 5.

[66] *Id.* at 6.

[67] ANA at 7.

[68] ANA at 8.

[69] BBB National Programs at 9, Consumer Reports at 9. One of those commenters also supported proposed new Example 7 about a misleading picture of a child in an ad for a learn-to-read program. Consumer Reports at 9.

[70] Consumer Reports at 9.

made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly. The Commission proposed clarifying this principle applies to both express and implied claims. One commenter said this clarification is helpful.[71]

2. Typicality Claims

Currently, § 255.2(b) says that, if an advertiser does not have substantiation that an endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and that the advertiser must possess and rely on adequate substantiation for the representation in such disclosure. One commenter supported this principle.[72] The Commission proposed adding a sentence that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect. One commenter supported that position.[73] The Commission is also adding a sentence to the paragraph explaining that, to be effective, a disclosure must alter the net impression of an advertisement so it is not misleading.

3. Consumer Reviews

The Commission proposed adding a new § 255.2(d) addressing advertisers procuring, suppressing, boosting, organizing, or editing consumer reviews of their products or services in a way that distorts or otherwise misrepresents what consumers think of their products. One commenter asked whether this guidance covered upvoting, publishing, or selectively publishing reviews.[74] The Commission is clarifying the new subsection by adding publishing, upvoting, downvoting, and reporting.

Four commenters supported the new paragraph.[75] A different commenter said the Commission was using the Guides in lieu of proper rulemaking in seeking to regulate the entire industry's use of customer reviews.[76] In the context of four subsequent examples illustrating the new principle, the same commenter stated the Commission was unnecessarily wading into an analysis of how moderation of user-generated reviews may negate immunity otherwise granted pursuant to section 230 of the Communications Decency Act (the ''CDA''), 47 U.S.C. 230, and the Commission's guidance may lead to inconsistencies with ''ongoing'' legal principles.[77] The commenter did not identify any actual or purported inconsistencies between the Commission's guidance and the CDA or other laws, and the Commission sees none. The Commission reiterates that the Guides are not regulations; as stated in § 255.0(a), the Guides are simply ''administrative interpretations of . . . section 5 of the FTC Act'' in order to ''provide the basis for voluntary compliance.'' The Commission need not engage in rulemaking to offer such guidance.

4. Examples

Example 2 of § 255.2 involves an ad for a heat pump featuring three testimonials about monetary savings that will likely be interpreted as conveying such savings are representative of what buyers can generally expect. The Commission proposed expanding the example to illustrate how disclosures of generally expected results could themselves be misleading if they apply only in limited circumstances not described in the advertisement. Two commenters supported the inclusion of the additional guidance.[78]

Example 4 addresses when an ad for a weight-loss product[79] requires and does not require a disclosure of generally expected results and what such a disclosure should say. The Commission proposed revising the example and expanding it from three to six subparts.

Paragraph (ii) of Example 4 said that if a woman says, ''I lost 50 pounds in 6 months with WeightAway,'' a disclosure such as ''Average weight loss is 1–2 pounds per week'' is inadequate and likely deceptive. Although no commenters addressed this subpart, the Commission is modifying this statement to better explain why such a disclosure is inadequate and likely deceptive.

Paragraph (iii) of Example 4 said a disclosure such as ''most women who use WeightAway lose between 10 and 50 pounds'' is inadequate because the range specified is so broad it does not sufficiently communicate what users can generally expect. One commenter asked the Commission to state the disclosure would be acceptable if the top of the range (*e.g.,* 50 pounds) had an appreciable number of incidences.[80] The Commission believes that, even if some appreciable number of consumers lost 50 pounds, the range would still not adequately communicate what users can generally expect. A marketer could instead disclose the generally expected result and also state what percentage of customers lose 50 pounds or more.

Paragraph (iv) of Example 4 illustrates how a disclosure of mean weight loss could be deceptive when the mean is substantially affected by outliers. One commenter said the new guidance was helpful.[81] Another commenter said it supports ''the allowance of 'mean computation' ''; [82] the Commission interprets that comment to refer to the fact that disclosures could use mean weight loss in a non-deceptive way.

Paragraph (v) of Example 4 says that, if a manufacturer procures a fake review that is published on a third-party review website, the review is a deceptive endorsement because it was not written by a bona fide user of the product. The subpart cross-references § 255.1(c). Two commenters supported the inclusion of this paragraph.[83] The Commission is adding that the review would also be deceptive because it does not reflect the honest opinions, findings, beliefs, or experience of the endorser, with a cross-reference to § 255.1(a).

Paragraph (vi) of Example 4 said the disclosure ''The typical weight loss of WeightAway users who stick with the program for 6 months is 35 pounds'' is inadequate if only one-fifth of those who start the weight-loss program stick with it for six months. One commenter supported the guidance[84] while another asserted the disclosure was, in fact, adequate.[85] The Commission continues to believe, as explained in the example, the disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program.

One commenter suggested the Guides specifically state that selectively posting bona fide positive testimonials to third-party review sites would constitute a deceptive practice.[86] The Commission is adding a paragraph (vii) to Example 4, saying that if a manufacturer forwards

[71] BBB National Programs at 10.

[72] Generation Patient at 3.

[73] BBB National Programs at 10–11.

[74] Dudukovich at 6. Upvoting or downvoting a review is casting a vote in support of or in disapproval of it by clicking on an arrow or other icon, usually affecting the review's rank or position on a website or platform.

[75] BBB National Programs at 11, CCIA at 3–4, Consumer Reports at 9, Tripadvisor at 3.

[76] ANA at 8.

[77] *Id.* at 9–10.

[78] BBB National Programs at 11–12, NAIMA at 5.

[79] The Commission is changing the name of the product from WeightAway to QRS Weight-Loss in the Guides.

[80] ANA at 9.

[81] BBB National Programs at 14–15.

[82] NAIMA at 5.

[83] Consumer Reports at 9, NAIMA at 5.

[84] BBB National Programs at 15.

[85] ANA at 9.

[86] Consumer Reports at 9.

only favorable reviews for its product to a third-party review website or omits unfavorable reviews, it is engaging in a misleading practice.

Proposed new Example 8 addresses an online retailer that suppresses negative reviews on its website, stating that the resulting product pages would be misleading. The example also addresses fact patterns in which the retailer blocks reviews containing profanity or complaining about the owner's policy positions. Based upon the Consumer Review Fairness Act (the ''CRFA''), 15 U.S.C. 45b, the example says sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the seller reasonably believes are fake, so long as a seller's criteria for not displaying such reviews are applied uniformly to all reviews submitted. The Commission also said sellers are not required to display reviews that are unrelated to their products or services, but customer service is related to the seller's products and services. One commenter suggested the Commission expand the exceptions listed to include other information that should not be published, such as sensitive personal information.[87] The CRFA also includes exceptions for reviews that ''contain[] the personal information or likeness of another person, or [are] libelous,'' [88] content ''that is clearly false or misleading,'' [89] or ''trade secrets or privileged or confidential commercial or financial information,'' [90] and the Commission is adding that language to the example. Another commenter said product reviews that are just about customer service should not be displayed when they are about the customer service of a different seller.[91] The Commission agrees and is modifying the example so it refers to ''a particular seller's customer service.'' One commenter took the view that all product reviews including those just about customer services should be displayed to allow consumers reading the reviews to decide for themselves how to interpret them,[92] while another one said product reviews about services should not need to be published when there are other mechanisms for customer service feedback.[93] The Commission responds that the purpose of publishing such reviews about customer service is to protect and inform potential purchasers of the products, rather than simply to provide a means for feedback. One commenter agreed with the example, saying that sellers should be able to elect not to display reviews that contain objectionable content, as long as the content moderation is done without improper consideration as to whether the review is negative, neutral, or positive.[94] The commenter also asked that the right of third-party review platforms to block similar content be noted.[95] The Commission agrees that third-party review platforms should be able to similarly block such content, but it does not see the need to address the rights of third-party review platforms in the Guides at this time.

In proposed new Example 10, a manufacturer uses unfair threats of legal action or physical threats to coerce consumers into deleting negative reviews of its products which the consumers had posted on third-party review websites. One commenter supports the example and would expand it beyond violence or litigation to other less drastic coercive measures.[96] The Commission is expanding the example to add threats to disclose embarrassing information. The Commission also notes the listed threats are intended as illustrative and not exhaustive. Another commenter expressed concerns that simply sending a letter attempting to correct false statements could be considered threatening.[97] The Commission would not consider simply notifying a reviewer of inaccuracies to be threatening. The Commission is also modifying the example to describe the circumstances in which threatened legal action would be considered unfair or deceptive. A third commenter suggested the Commission is improperly trying to expand the CRFA through a Guide-refreshing process when it should ask Congress to do so and said the Commission has not placed into the record any evidence that advertisers are frequently threatening reviewers.[98] The Commission is not attempting to expand the CRFA. It is interpreting section 5 of the FTC Act. Any enforcement actions based upon conduct inconsistent with the Guides would have to establish that the conduct violated section 5. The Commission need not establish that an action is prevalent in order to give guidance that it believes the action is unfair. The example is based upon Commission cases against Roca Labs and World Patent Marketing.[99] Finally, the Commission is clarifying how the use of such threats can be deceptive or unfair.

Although it was not addressed by the commenters, the Commission is adding an alternative scenario to Example 10 based upon the facts of a recent Commission case.[100] The new scenario involves a business abusing a third-party review platform's mechanism for reporting suspected fake reviews. A manufacturer routinely flags negative reviews of its products as fake without a reasonable basis for believing they are fake, which results in many truthful reviews being removed from the website. Such conduct is an unfair or deceptive practice.

Proposed new Example 11 addresses a marketer engaging in review gating, which involves asking past purchasers to provide feedback on a product and then inviting only those who give positive feedback to post online reviews on one or more websites. The example notes that the practice ''may be unfair or deceptive if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice.'' Two commenters said that the example was helpful,[101] another suggested expanding it to address upvoting, downvoting, and selective publication,[102] and a third said that the Commission is unlawfully prohibiting advertisers from exercising their commercial speech rights by encouraging a happy customer to write a review.[103] The Commission added publishing, upvoting, downvoting, and reporting to the general principle expressed in § 255.2(d) and does not believe it needs to add them to this example. The Commission is not saying or suggesting that businesses cannot ask happy customers for reviews. As the example expressly states, the marketer could have simply invited all recent purchasers to post reviews, even if it had expressed its hope that the reviews would be positive. The example also states clearly that deception or unfairness occurs not in the selective

[87] Dudukovich at 6.

[88] See 15 U.S.C. 45b(b)(2)(C)(i).

[89] See 15 U.S.C. 45b(b)(2)(C)(iii).

[90] See 15 U.S.C. 45b(b)(3)(A).

[91] Bazaarvoice at 1–2.

[92] Trustpilot at 3–4.

[93] RILA at 5–6.

[94] Tripadvisor at 4.

[95] *Id.*

[96] Consumer Reports at 9.

[97] NAIMA at 5–6.

[98] ANA at 10.

[99] Complaint at 25, *FTC* v. *Roca Labs, Inc.,* No. 8:15–cv–02231 (M.D. Fla. Sept. 24, 2015); Complaint at 8–10, 12, *World Patent Mktg., Inc.,* No. 1:17–cv–20848 (S.D. Fla. Mar. 6, 2017).

[100] Complaint at 26, 32, *FTC* v. *DK* Automation *LLC,* No. 1:22–cv–23760 (S.D. Fla. Nov. 16, 2022).

[101] BBB National Programs at 15–16, Consumer Reports at 9.

[102] Dudukovich at 6.

[103] ANA at 10.

asking of customers for reviews but only when the posted reviews are substantially more positive as a result.

D. Section 255.3 Expert Endorsements

1. An Exercise of Expertise

The proposed revision of § 255.3(b) said that an expert 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.'' In the context of Example 6 of § 255.3, two commenters suggested more clearly addressing an expert's purported expertise—that is, the level of expertise that an endorser is represented as possessing.[104] The Commission is modifying § 255.3(b) to make clear that the endorser must have exercised the expertise that they are ''represented'' as possessing.[105]

2. Examples

Example 2 of § 255.3 describes an endorser of a hearing aid who is simply referred to as a ''doctor'' during an ad. The example says the ad likely implies the endorser is a medical doctor with substantial experience in the area of hearing. As revised, the proposed example would have said 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 make clear the nature and limits of the endorser's expertise. Two comments supported the proposed revised example,[106] two comments asked the Commission to clarify it is acceptable to describe an audiologist with a doctorate as ''Doctor of Audiology,'' ''Au.D., Audiologist'' or ''Ph.D., Audiologist,'' [107] and one comment asked why a doctor who clearly and conspicuously discloses the nature and limits of their expertise might not be able to endorse a product.[108] On reflection, the Commission recognizes that, in the absence of a white coat, a stethoscope, or other indicia of an endorser being a physician, consumers are likely to believe an endorser identified as a doctor has expertise in the area of hearing but might not expect the doctor to be a medical doctor. The Commission is revising the example such that either a medical doctor with substantial experience in audiology or a non-medical doctor with a Ph.D. or Au.D. in audiology could endorse the hearing aid as a ''doctor'' without any disclosure. Finally, the example will say a doctor without substantial experience in the area of hearing might be able to endorse the product if the ad clearly and conspicuously discloses the nature and limits of the endorser's expertise. Given the revision to the example, it is no longer necessary to address how a person with a doctorate in audiology should be identified. The example continues to say the doctor without substantial experience in the area of hearing might be able to endorse the product as a doctor if the advertisement clearly and conspicuously discloses the nature and limits of the endorser's expertise.

Example 3 refers to testing an automobile part's ''efficacy,'' which the Commission is changing to testing the part's ''performance.''

E. Section 255.4 Endorsements by Organizations

Section 255.4 addresses endorsements by organizations. The Commission proposed adding two new examples to this section.

Proposed new Example 2 describes a trampoline manufacturer that sets up and operates what appears to be an independent trampoline review website that reviews the manufacturer's trampolines, as well as those of competing manufacturers. The example says the claim of independence is false. Three commenters supported the example.[109] One commenter asked why the example is in the ''organizations'' section of the Guides, rather than the material connections section.[110] The Commission is rewording the example so the operator of the website appears to be an independent trampoline institute.

Proposed new Example 3 involves a review website operator that accepts money from manufacturers in exchange for higher rankings of their products. The example says a manufacturer who pays for a higher ranking on the website may be held liable for deception. Two commenters supported the example.[111] One of them suggested the Commission clarify that both the manufacturer who pays for a higher ranking and the site operator can be liable for misleading consumers and the Commission say that using a ranking methodology that results in higher rankings for products or services with a relationship to the rating site is misleading.[112] The Commission is making both of those changes. One commenter said it was unclear how the example related to the Guides.[113] The example belongs in the Guides because the review website is endorsing the products it is reviewing.

F. Section 255.5 Disclosure of Material Connections

1. Whether Connections Are Material

Section 255.5 addresses the need to disclose unexpected material connections between the endorser and seller of an advertised product. To be material, a connection must affect the weight or credibility the audience gives to the endorsement. The revised section gives examples of possible material connections. One commenter agreed with the general principle, as well as the specific examples described,[114] while another supported the broad scope of possible material connections addressed in the section.[115] Another commenter asked the Commission to add more examples of benefits to an endorser that are or could be material.[116] The examples of possible material connections listed in § 255.5 are meant to be illustrative rather than exhaustive, and the Commission does not believe it is necessary to expand the list.

As proposed, the revised section would also acknowledge some connections may be immaterial because they are too insignificant to affect the weight or credibility the audience gives to endorsements. Two commenters asked for examples of connections that are immaterial. Whether a connection is too insignificant to be material is such a fact-specific question that it is difficult to devise a useful example of a necessarily immaterial connection.

2. Whether Connections Are Unexpected

The most recent version of the Guides describes the type of connection that must be disclosed as one that ''is not reasonably expected by the audience.'' The Commission proposed restating this as ''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.'' The Commission is now rewording the statement in the Guides to say a ''material connection needs to be disclosed when a significant minority of the audience for an endorsement does

[104] *Id.* at 11, BBB National Programs at 16–17.

[105] In Example 6 of § 255.3, the Commission is changing a reference to ''the purported degree of expertise'' to the ''represented degree of expertise.''

[106] BBB National Programs at 17, NAIMA at 6.

[107] Academy at 2–3, HIA at 1–2.

[108] ANA at 11.

[109] BBB National Programs at 18, Consumer Reports at 10, NAIMA at 6.

[110] ANA at 12.

[111] BBB National Programs at 19, Consumer Reports at 10.

[112] BBB NATIONAL PROGRAMS at 19–20.

[113] ANA at 12.

[114] Generation Patient at 3.

[115] Tripadvisor at 3.

[116] TINA.org at 8–9.

not understand or expect the connection.''

One commenter asserted this guidance was ambiguous and asked that the Commission give concrete examples or delete the new language.[117] Two other commenters similarly asked for examples.[118] It may be that certain, well-known influencers have become so closely identified with a particular brand that almost everyone knows of their connection. It may also be that followers of some well-known influencers have all come to expect that the influencers endorse products only when paid. The Commission is reluctant to identify real-world influencers who might fit these descriptions. Whether any particular connection is or is not expected by an audience is a factual question that might require empirical testing, and that testing might only be relevant to a particular endorser or to a narrow set of circumstances.[119]

Another commenter stated consumers are more likely to understand and expect that influencers have received some sort of incentive when the influencers are reviewing or showcasing certain types of products.[120] The commenter gave the example of video game influencers and asserted many video game players are aware influencers have access to games before those titles are made available to the public. The Commission recognizes this assertion may be true, but an audience knowing generally about such early access is not the same as knowing what a given influencer may have received—whether it's merely early access or a large monetary payment—in connection with a given game.

Two commenters were opposed to the proposed reworded principle.[121] One said all connections should always be disclosed and the Commission was weakening the Guides.[122] The Commission disagrees. As discussed above, the Guides already say the only connections that must be disclosed are ones not reasonably expected by the audience. If the audience *does* reasonably expect a connection, then it is not deceived by the lack of disclosure. Consistent with section 5 of the FTC Act, the Commission thus cannot require that every connection be disclosed. This position is also consistent with existing Example 2 of § 255.5, which says that, if a film star endorses a particular food product in a television commercial, a disclosure is unnecessary because it is ordinarily expected that celebrities are paid for such appearances.

The other commenter who opposed the revised guidance asked how one determines that a connection is understood by all but an insignificant portion of the audience.[123] As discussed above, the Commission has reworded its guidance in terms of a significant minority of the audience not understanding or expecting the connection. Again, the question of whether any particular connection is or is not expected by an audience is highly fact-specific and in some cases its resolution might require empirical testing. The Guides do contain multiple examples with scenarios in which the Commission is comfortable saying at least a significant minority of the audience does not or is unlikely to understand or expect the connection.

One commenter asked the Commission to require marketers to substantiate that a material connection need not be disclosed because it is understood or expected by the audience.[124] In a section 5 case, the Commission has the burden of proving a connection is material and is not able to shift the burden of proof to the marketer.

3. Details of Connections

The Commission proposed stating a disclosure of a material connection does not require the complete details of the connection but must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

One commenter said disclosures of material connections should not require the dollar amount of any payment[125] and another supported not having to disclose the details of a connection.[126] Another commenter said influencers should disclose how much they are being paid because the ''large scope and range of differing pay might impact what products influencers are pushing to their audience.'' [127] The Commission is not convinced consumers are generally misled by not knowing how much influencers are paid.

A different commenter asked if the new statement in the Guides meant a disclosure like ''#Ad'' is now insufficient.[128] That is not the Commission's intention. The Commission is adding a new example, drawn from staff business guidance, to illustrate when a disclosure does not adequately communicate the nature of the material connection. In new Example 13, an app developer gives a consumer a 99-cent game app for free in order to review it. A disclosure that the consumer was given the app for free suggests the consumer did not receive anything else for the review, which would be deceptive if the app developer also gave the consumer $50 for the review.

4. Examples[129]

Example 3 of § 255.5 involves a professional tennis player who has a contractual relationship with a laser vision correction clinic. The contract provides for payment to the athlete for speaking publicly about their vision correction surgery at the clinic. One commenter suggested noting that, if the surgery had been performed for free, and if consumers would not have expected that to have been the case, the free surgery is a material connection that would require disclosure.[130] The receipt of free surgery is already addressed in what the Commission proposed as subpart 2 of the example.

As proposed, new paragraph (ii) of Example 3 began by stating the player ''also'' touts the results of the surgery ''in a social media post.'' It said the relationship should be disclosed even if the relationship involves no payments but only the tennis player getting the laser correction surgery for free or at ''a reduced cost.'' One commenter raised three concerns with this subpart of the example. It said the use of ''also'' rather than ''instead'' might indicate the FTC intends that the hypothetical facts only in the aggregate produce the stated outcome.[131] The Commission will change ''also'' to ''instead.'' [132] The commenter also asked the Commission to articulate more clearly why the use of the tennis player's endorsement on the

[117] CDI at 2.

[118] Bazaarvoice at 2, Dudukovich at 7.

[119] Although the Commission is not quantifying a ''significant'' minority of an audience, it notes that in the context of net claim takeaway from an ad, it has stated that ''net takeaway of 10%—or even lower—supported finding that the ads communicated the claims at issue.'' *See Telebrands Corp.,* 140 F.T.C. 278, 325 & n.47 (2005), *aff'd,* 457 F.3d 354 (4th Cir. 2006).

[120] ESA at 2.

[121] Consumer Reports at 10, Generation Patient at 3.

[122] Consumer Reports at 10.

[123] Generation Patient at 3.

[124] TINA.org at 9.

[125] InfluenceLogic at 1.

[126] N/MA at 2.

[127] Generation Patient at 3.

[128] Dudukovich at 8.

[129] The Commission is deleting an unnecessary sentence introducing the examples to § 255.5.

[130] BBB NATIONAL PROGRAMS at 20.

[131] ANA at 14.

[132] The same commenter made a similar comment about the introduction to subpart 2 of Example 4 of § 255.5 (ANA at 15) and the Commission is making the same change to the subpart. In addition, the Commission is clarifying that the reference to ''more likely to expect'' in that subpart means more likely to expect than in a television commercial.

clinic's social media page would not reasonably be expected by the audience.[133] The example is intended to address a post by the tennis player and not by the clinic, so the Commission is changing ''in a social media post'' to ''in the player's social media post.'' An endorsement disseminated from the clinic's social media account is addressed in the example's third subpart. Finally, the commenter asked whether receipt of discounted products or services is always material or whether there is a threshold level of discount that makes it material.[134] A discount is not necessarily material, but there is not a clear line between a material discount and a non-material one. The Commission is changing the example so it refers to receiving the surgery at ''a significantly reduced cost.''

As proposed, new paragraph (iii) of Example 3 varies the example so that the clinic disseminates the tennis player's endorsement from its own social media account. One commenter asserted that, if the tennis player's post already has a disclosure, the clinic should not have to add a disclosure.[135] Another commenter stated the Commission failed to articulate why the audience would not reasonably expect the tennis player's endorsement on the clinic's social media page was compensated.[136] The commenter continued that, in many instances, an advertiser's use of a celebrity endorser on its own social media should not need a disclosure because one would expect that the celebrity was paid to provide the endorsement.[137] The commenter suggested (a) the example clarify that the clinic is reposting or sharing the tennis player's social media endorsement from the prior paragraph to the clinic's social media, (b) the advertiser needs to disclose the relationship because the tennis player did not clearly and conspicuously disclose it in the first place, and (c) given the nature of the endorsement (*i.e.,* a personally created statement from the tennis player versus a television commercial with an endorsement), and in the context of the clinic's social media, the viewing audience would likely not reasonably expect the tennis player is being compensated.[138] The Commission is adopting most of these commenters' suggestions and clarifying that the clinic's post is a repost. As modified, the example makes clear the original post either did not have a clear and conspicuous disclosure or had a disclosure that is not clear and conspicuous in the repost.

Example 5 involves a restaurant whose patrons are informed they will be interviewed by the advertiser as part of a television promotion of its new ''meat-alternative'' burger. The example said the advertisement should clearly and conspicuously inform viewers the patrons on screen knew in advance they might appear in a television advertisement ''if they gave the burger a good review.'' One commenter said the Commission should remove the language regarding appearance in a television advertisement ''if they gave the burger a good review.'' [139] The Commission agrees. The disclosure need not mention giving the burger a good review; it is implicit someone would know they would appear on television only if they gave the product a good review.

A new paragraph (ii) of Example 6 addresses incentivized reviews and says any review that fails to clearly and conspicuously disclose incentives provided to that reviewer is likely deceptive. Three commenters supported this guidance.[140] The example continues, noting that, 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 if that inclusion materially increases that average star rating. One commenter did not disagree with the Commission's position but noted that, in its experience, including incentivized ratings generally does not materially affect a product's average star rating; it did acknowledge possible exceptions (for example, if the product has few reviews other than incentivized ones).[141] A second commenter said the Commission should not prohibit including incentivized reviews in the average star ratings and argued the Commission did not have evidence of a difference between aggregate star ratings containing and not containing incentivized reviews.[142] The Commission is not saying incentivized reviews materially inflate average star ratings; just that, if they do, then they could be deceptive. A third commenter suggested allowing the website operator to make a blanket disclosure regarding incentivized reviews.[143] A fourth commenter said prohibiting the inclusion of incentivized reviews (when incentives are provided fairly and are clearly and conspicuously disclosed) in aggregate star ratings could hurt competition and, as a practical matter, it may be infeasible for many advertisers to discern and calculate the average star rating without incentivized reviews.[144] The Commission is adding a statement to the example, stating that, if such a material increase occurs, the marketer likely would need to provide a clear and conspicuous disclosure to people who see the average star rating.

As rewritten, Example 7 discusses a woodworking influencer who received an expensive, full-size lathe from its manufacturer in the hope the influencer would post about it. The influencer posts videos containing favorable comments about the lathe. The example said, if a significant proportion of viewers are likely unaware the influencer received the lathe free of charge, the woodworker should clearly and conspicuously disclose receiving it for free. One commenter supported the guidance.[145] A different commenter said ad agencies are contracted to monitor compliance for a contracted period of time and should not be expected to conduct ''indefinite monitoring for decades.'' [146] A third commenter said the Commission missed an opportunity in the example to provide guidance on how long the woodworker might need to continue to make a disclosure.[147] The Commission recognizes a connection probably becomes less material over time but is not prepared to set a time frame that divides material from immaterial, a distinction that likely varies depending upon the scenario. The Commission agrees an ad agency should not have to monitor an influencer for decades based upon a single gift. A fourth commenter objected to the rewritten example, saying it had been weakened by adding language that a disclosure was necessary only if a significant proportion of viewers are likely unaware that the influencer received the lathe free of charge.[148] The Commission disagrees it is weakening the example. The additional language is a clarification consistent with the law and the Commission is changing a ''significant proportion'' to a

[133] ANA at 13.

[134] *Id.* at 14.

[135] Dudukovich at 8.

[136] ANA at 13–14.

[137] *Id.* at 13.

[138] *Id.* at 14.

[139] ANA at 15.

[140] Bazaarvoice at 2, BBB NATIONAL PROGRAMS at 20–21, Tripadvisor at 5.

[141] Bazaarvoice at 2.

[142] RILA at 2–4.

[143] Dudukovich at 8–9.

[144] ANA at 15.

[145] BBB NATIONAL PROGRAMS at 22.

[146] AAAA at 11.

[147] ANA at 16. That third commenter also asked the Commission ''what constitutes a 'significant' portion of an audience,'' ANA at 15–16, an issue addressed above. *See supra* n. 119.

[148] Consumer Reports at 10.

''significant minority,'' which is the language in the Commission's Deception Statement.[149]

New Example 8 addresses endorsements by employees. It says the employer described in the example can limit its own liability for such endorsements by engaging in appropriate training of employees and, if the employer has directed such endorsements or otherwise has reason to know about them, by monitoring them and taking other steps to ensure compliance. One commenter asked whether the guidance regarding employees applies to all employers, including large retailers who don't manufacture the products they sell, and said it would be unreasonable to expect an employer to review posts by thousands or millions of employees.[150] The Commission notes the connection between a retailer and its employees may be relevant to readers of the employees' reviews even when the reviews are of products the retailer sells but did not manufacture. As explained in the example, an employer would not have to monitor the reviews or other endorsements of employees unless the employer solicits the endorsements or otherwise has reason to know about them. Another commenter asked the Commission to rewrite the last sentence of the example to demonstrate the disclosure requirement does not change depending on the platform.[151] The Commission is adopting the commenter's proposed language.

New Example 10 says the use of an environmental seal of approval from a non-profit, third-party association that charges manufacturers a reasonable fee for the evaluation of their products does not necessitate a disclosure regarding the fee. One commenter asked about the relevance of the third party being a ''non-profit.'' [152] The fact the certifying entity is a non-profit might make it less likely the decision to award the seal of certification was impacted by payment. Three other commenters appeared to support the example,[153] and one of them suggested additional examples involving third-party seals or awards.[154] The Commission is adding new Example 14 illustrating a scenario in which a testing company has a relationship with the company that commissions an analysis, such that a disclosure of the relationship is necessary.

In new Example 11, the Commission discusses a blogger who writes product reviews and receives ''a small portion of the sale'' through paid affiliate links. The example says the reviews should clearly and conspicuously disclose the compensation. Two commenters supported the example [155] and a third commenter said the Commission should not state that the blogger receives a ''small'' portion of the sale unless it clarifies whether it is trying to communicate something about the nature or quantity of the compensation for purposes of finding ''materiality.'' [156] The Commission is striking the word ''small'' from the example. One of the commenters supporting the example asked the Commission to distinguish paid affiliate links from a display ad for a product appearing on the same page as an article reviewing the product.[157] Although the Commission does not consider a display ad appearing on the same page as a review to be inherently deceptive, it does not consider the issue sufficiently related to the example to add it to the Guides.

New Example 12 involves a podcast host beginning a podcast by reading what is obviously a commercial. The example states the host need not make a disclosure because, even without a statement identifying the advertiser as a sponsor, listeners would likely still expect the podcaster was compensated. Five commenters supported the example.[158] The example continues by stating the ad might communicate the host is expressing their own views, in which case the host would need to hold the views expressed.

Example 12 also states that, if the host mentions the product in a social media post, the fact no disclosure was required in the podcast is not relevant to whether one is needed in the post. One commenter said whether a material connection disclosure is required is a fact-specific analysis; the Commission agrees.[159]

G. Section 255.6 Endorsements Directed to Children

New § 255.6 says endorsements in advertisements directed to children may be of special concern because of the character of the audience; practices that would not ordinarily be questioned in ads directed to adults might be questioned when directed to children. Three comments supported this new section,[160] with one of them suggesting the section be supplemented with specific examples.[161] One commenter said the section was inadequate,[162] while another urged the Commission to issue guidance that addresses in greater detail which techniques and practices are impermissible,[163] and yet another asked the Commission to ban targeted and influencer advertising to children and teens.[164] A different commenter was concerned that ''any new standards for children may impose duplicative material disclosure requirements for ads'' and suggested the Commission defer to the Better Business Bureau's Children's Advertising Review Unit (''CARU'').[165] Finally, a commenter said the new section does not add any incremental benefit within the context of the Guides and, when appropriate, the Commission can provide additional guidance to marketers through other avenues, such as a report and other business guidance.[166]

The Commission continues to believe new § 255.6 is helpful in establishing a general principle and does not impose duplicative requirements on marketers. The types of specific guidance that appear to be desired involve the wording, appearance, and placement of disclosures of material connection in various contexts. As discussed above, the Commission does not believe that specifics of disclosures of material connections should be addressed in the Guides themselves. Research on children's cognitive development suggests disclosures will not work for younger children. Commission staff recently held an event to learn more about advertising to children in digital media, including endorsements directed to children, and is exploring next steps.

List of Subjects in 16 CFR Part 255

Advertising, Consumer protection, Trade practices.

■ For reasons stated in the preamble, the Federal Trade Commission revises 16 CFR part 255 of the Code of Federal Regulations to read as follows:

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

Sec.

[149] *FTC Statement on Deception,* 103 F.T.C. 174, 177 n.20 (1984) (appended to *Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)).

[150] RILA at 6–7.

[151] ANA at 16.

[152] *Id.* at 16.

[153] BBB NATIONAL PROGRAMS at 22, Consumer Reports at 10, NAIMA at 6.

[154] BBB NATIONAL PROGRAMS at 22.

[155] Consumer Reports at 10, NAIMA at 6.

[156] ANA at 16.

[157] N/MA at 3.

[158] BBB NATIONAL PROGRAMS at 23, Consumer Reports at 10, InfluenceLogic at 2, NAIMA at 6, N/MA at 2.

[159] ANA 17.

[160] BBB NATIONAL PROGRAMS at 24, CCIA at 4–5, Generation Patient at 3.

[161] BBB NATIONAL PROGRAMS at 24.

[162] TINA.org at 9–10.

[163] Fairplay at 1.

[164] Common Sense at 1, 10.

[165] AAAA at 12–13.

[166] ANA at 16–17.

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41–58.

§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of section 5 of the FTC Act, 15 U.S.C. 45, to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The examples in each section apply the principles of that section to particular factual scenarios but do not address every possible issue that the facts or principles might implicate. Nor do the Guides purport to cover every possible use of endorsements in advertising.[1] 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 for a product 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. Verbal statements, tags in social media posts, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual, and the name or seal of an organization can be endorsements. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be 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 endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term ''product'' includes any product, service, 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 training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

(f) For purposes of this part, ''clear and conspicuous'' means that a disclosure is difficult to miss (*i.e.,* easily noticeable) and easily understandable by ordinary consumers. If a communication's representation necessitating a disclosure is made through visual means, the disclosure should be made in at least the communication's visual portion; if the representation is made through audible means, the disclosure should be made in at least the communication's audible portion; and if the representation is made through both visual and audible means, the disclosure should be made in the communication's visual and audible portions. A disclosure presented simultaneously in both the visual and audible portions of a communication is more likely to be clear and conspicuous. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood. An audible disclosure should be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it. In any communication using an interactive electronic medium, such as social media or the internet, the disclosure should be unavoidable. The disclosure should not be contradicted or mitigated by, or inconsistent with, anything else in the communication. When an endorsement targets a specific audience, such as older adults, ''ordinary consumers'' includes members of that group.

(g) Examples:

(1) *Example 1.* A film critic's review of a movie is excerpted in an advertisement placed by the film's producer. The critic's review is not an endorsement, but when the excerpt from the review is used in the producer's advertisement, the excerpt becomes an endorsement. Readers would view it as a statement of the critic's own opinions and not those of the producer. If the excerpt alters or quotes from the text of the review in a way that does not fairly reflect its substance, the advertisement would be deceptive because it distorts the endorser's opinion. (*See* § 255.1(b))

(2) *Example 2.* A television commercial depicts two unidentified shoppers in a supermarket buying a laundry detergent. One comments to the other how clean the advertised brand makes the shopper's clothes. The other shopper then replies, ''I will try it because I have not been fully satisfied with my own brand.'' This obviously fictional dramatization would not be an endorsement.

(3) *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 does not purport to speak from personal experience, nor on the basis of their own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

(4) *Example 4.* A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. 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 primarily as a racing driver and not merely as a product spokesperson. Accordingly, many consumers would likely believe the driver would not speak for an automotive product without actually believing in the product and having personal knowledge sufficient to form the beliefs expressed. The likely attribution of these beliefs to the driver makes this message an endorsement under the Guides.

(5) *Example 5.* (i) 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.

(ii) The golfer is also hired to post the video to their social media account. The paid post is an endorsement if viewers

[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.

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.

(6) *Example 6.* (i) 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 reading from a script, the statement would be an endorsement, because consumers are likely to believe it reflects the actor's personal views.

(ii) Assume that, rather than speaking about their experience with or opinion of the machine, the actor says that the machine was designed by exercise physiologists at a leading university, that it isolates each of five major muscle groups, and that it is meant to be used for fifteen minutes a day. After demonstrating various exercises using the machine, the actor finally says how much the machine costs and how to order it. As the actor does not say or do anything during the infomercial that would lead viewers to believe that the actor is expressing their own views about the machine, there is no endorsement.

(7) *Example 7.* (i) 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 with their own money. 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 their 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 an independent review website. But, if the consumer submits the review to the review section of the manufacturer's website and the manufacturer chooses to highlight the review on the homepage of its website, then the review as featured is an endorsement even though there is no connection between the consumer and the manufacturer.

(ii) 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.

(iii) Assume now that the consumer joins a marketing program under which participants agree to periodically receive free products from various manufacturers and write reviews of them. 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.

(iv) Assume that the consumer is the owner of a ''dog influencer'' (a dog with a social media account and a large number of followers). If the manufacturer sends the consumer coupons for a year's worth of dog food and asks the consumer to feature the brand in their dog's social media feed, any resulting posts that feature the brand would be considered endorsements even though the owner could have chosen not to endorse the product.

(8) *Example 8.* A college student, who has earned a reputation as an excellent video game player, live streams their game play. The developer of a new video game pays the student to play and live stream its 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 because the apparent enjoyment is implicitly a recommendation.

(9) *Example 9.* (i) 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. The disclosure is not clear and conspicuous because people seeing their paid posts could easily miss the disclosure.

(ii) Assume now that the influencer discloses their connection to the manufacturer but that, in order to see the disclosures, consumers have to click on a link in the posts labeled simply ''more.'' If the endorsement is visible without having to click on the link labeled ''more,'' but the disclosure is not visible without doing so, then the disclosure is not unavoidable and thus is not clear and conspicuous.

(iii) Assume now that the influencer relies solely 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.

(10) *Example 10.* A television advertisement promotes a smartphone app that purportedly halts cognitive decline. The ad presents multiple endorsements by older senior citizens who are represented as actual consumers who used the app. The advertisement discloses via both audio and visual means that the persons featured are actors. Because the advertisement is targeted at older consumers, whether the disclosure is clear and conspicuous will be evaluated from the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities.

(11) *Example 11.* (i) A social media advertisement promoting a cholesterol-lowering product features a testimonialist who says by how much their serum cholesterol went down. The claimed reduction greatly exceeds what is typically experienced by users of the product and a disclosure of typical results is required. The marketer has been able to identify from online data collection individuals with high cholesterol levels who speak a particular foreign language and are unable to understand English. It microtargets a foreign-language version of the ad to them, disclosing users' typical results only in English. The adequacy of the disclosure will be evaluated from the perspective of the microtargeted individuals, and the disclosure must be in the same language as the ad.

(ii) Assume now that the ad has a disclosure that is clear and conspicuous when viewed on a computer browser but that it is not clear and conspicuous when the ad is rendered on a smartphone. Because some consumers will view the ad on their smartphones, the disclosure is inadequate.

(12) *Example 12.* An exterminator purchases fake negative reviews of competing exterminators. A paid or otherwise incentivized negative statement about a competitor's service is not an endorsement, as that term is used in the Guides. Nevertheless, such statements, *e.g.,* a paid negative review of a competing product, can be deceptive in violation of section 5. (*See* § 255.2.(e)(4)(v) regarding the purchase of a fake positive review for a product.) Fake positive reviews that are used to promote a product are ''endorsements.''

(13) *Example 13.* A motivational speaker buys fake social media followers to impress potential clients. The use by endorsers of fake indicators of social media influence, such as fake social media followers, is not itself an endorsement issue. The Commission notes, however, that it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use them to misrepresent such influence to potential clients, purchasers, investors, partners, or employees or to anyone else for a commercial purpose. It is also a deceptive practice to sell or distribute such indicators to such users.

§ 255.1 General considerations.

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

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

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

(d) Advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements or for failing to disclose unexpected material connections between themselves and their endorsers. (*See* § 255.5.) An advertiser may be liable for a deceptive endorsement 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. While not a safe harbor, good faith and effective guidance, monitoring, and remedial action should reduce the incidence of deceptive claims and reduce an advertiser's odds of facing a Commission enforcement action.

(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, including when an endorser falsely represents that they personally used a product. Also, an endorser who is not an expert may be liable for misleading or unsubstantiated representations regarding a product's performance or effectiveness, such as when the representations are inconsistent with the endorser's personal experience or 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* § 255.3.) Endorsers may also be liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when an endorser creates and disseminates endorsements without such disclosures.

(f) Advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries may be liable for their roles in creating or disseminating endorsements containing representations that they know or should know are deceptive. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures.

(g) The use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

(h) Examples:

(1) *Example 1.* (i) A building contractor states in an advertisement disseminated by a paint manufacturer, ''I use XYZ exterior house paint because of its remarkable quick drying properties and durability.'' This endorsement must comply with the pertinent requirements of § 255.3. Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to use the paint as reformulated and to subscribe to the views presented previously.

(ii) 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 for the contractor or the manufacturer to modify or delete a historic post containing the endorsement 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 holds the views expressed in the original post with respect to the reformulated product and the advertiser would need to confirm that with the contractor.

(2) *Example 2.* In a radio advertisement played during commercial breaks, 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 regularly use the coffee maker. If, instead, they used it only during a demonstration by its manufacturer, the ad would be deceptive.

(3) *Example 3.* (i) 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 posts that the company's newest acne treatment product is ''clinically proven'' to work. Before giving the endorsement, the dermatologist received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. Given their medical expertise, the dermatologist should have recognized

the study's flaws and is subject to liability for their false statements made in the advertisement. The 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 unexpected material connections.)

(ii) Assume that the expert had asked the pharmaceutical company for the evidence supporting its claims and there were no 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 that 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.

(4) *Example 4.* A well-known celebrity appears in an infomercial for a hot air roaster that purportedly cooks a chicken perfectly in twenty 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 a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just twenty minutes, this is the product you need. A significant percentage of consumers are likely to believe the statement represents the celebrity's own view and experience even though the celebrity is reading from a script. Because the celebrity knows that their statement is untrue, the endorser is subject to liability. The advertiser is also liable for misrepresentations made through the endorsement.

(5) *Example 5.* A skin care products advertiser hires an influencer to promote its products on the influencer's social media account. The advertiser requests that the influencer try a new body lotion and post a video review of it. The advertiser does not provide the influencer with any materials stating that the lotion cures skin conditions and the influencer does not ask the advertiser if it does. However, believing that the lotion cleared up their eczema, the influencer says in their review, ''This lotion cures eczema. All of my followers suffering from eczema should use it.'' The influencer, who did not limit their statements to their personal experience using the product and did not have a reasonable basis for their claim that the lotion cures eczema, is subject to liability for the misleading or unsubstantiated representation in the endorsement. If the advertiser lacked adequate substantiation for the implied claims that the lotion cures eczema, it would be liable regardless of the liability of the endorser. The influencer and the advertiser may also be liable if the influencer fails to disclose clearly and conspicuously being paid for the endorsement. (*See* § 255.5.) 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* paragraph (d) of this section and § 255.5.)

(6) *Example 6.* (i) 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 stock photos the advertiser purchased of individuals with near perfect skin. The images misrepresent the improvements to the endorsers' complexions.

(ii) The same website also sells QRS Weight-Loss shakes and features a truthful 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 QRS Weight-Loss shakes caused the endorser to lose one-third of their original body weight (going from 150 pounds to 100 pounds), the image misrepresents the product's effectiveness. Even if it is accompanied by a picture of the actual endorser, the testimonial could still communicate a deceptive typicality claim.

(7) *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 and their 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 will be interpreted as representing that the product is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support express and implied claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.,* without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation. The disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect. To be effective, such disclosure must alter the net impression of the advertisement so that it is not misleading.

(c) Advertisements presenting endorsements by what are represented, expressly or by implication, to be ''actual consumers'' should utilize

actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

(d) In procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements under the Guides.

(e) Examples:

(1) *Example 1.* (i) 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.

(ii) 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.

(2) *Example 2.* (i) An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, fewer than 20% of purchasers will save $100 or more. A disclosure such as, ''Results not typical'' or ''These testimonials are based on the experiences of a few people and you are not likely to have similar results'' is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect.

(A) In another context, the Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either ''Results not typical'' or the stronger ''These testimonials are based on the experiences of a few people and you are not likely to have similar results.'' Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

(B) The advertiser should clearly and conspicuously disclose the generally expected savings and have adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.,* ''the average homeowner saves $35 per month,'' ''the typical family saves $50 per month during cold months and $20 per month in warm months,'' or ''most families save 10% on their utility bills.''

(ii) Disclosures like those in this *Example 2,* specifically paragraph (e)(2)(i)(B) of this section, could still be misleading, however, if they only apply to limited circumstances that are not described in the advertisement. For example, if the advertisement does not limit its claims by geography, it would be misleading if the disclosure of expected results in a nationally disseminated advertisement was based on the experiences of customers in a southern climate and the experiences of those customers was much better than could be expected by heat pump users in a northern climate.

(3) *Example 3.* An advertisement for a cholesterol-lowering product features individuals who claim that their serum cholesterol went down by 120 points and 130 points, respectively; the ad does not mention the endorsers having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have competent and reliable scientific evidence that the product can produce the specific results claimed by the endorsers (*i.e.,* a 130-point drop in serum cholesterol without any lifestyle changes).

(4) *Example 4.* (i) An advertisement for a weight-loss product features an endorsement by a formerly obese person who says, ''Every day, I drank 2 QRS Weight-Loss shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.'' The advertisement accurately describes the endorser's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed QRS Weight-Loss shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which they achieved the claimed results, the ad is not likely to convey that consumers who weigh substantially less or use QRS Weight-Loss 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 QRS Weight-Loss 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 substantiation, however, for any performance claims conveyed by the endorsement (*e.g.,* that QRS Weight-Loss is an effective weight-loss product and that the endorser's weight loss was not caused solely by their dietary restrictions and exercise regimen).

(ii) If, in the alternative, the advertisement simply features ''before'' and ''after'' pictures of a woman who says, ''I lost 50 pounds in 6 months with QRS Weight-Loss,'' the ad is likely to convey that the endorser's experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad would be deceptive. Instead, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* ''women who use QRS Weight-Loss for six months typically lose 15 pounds''). A disclosure such as ''Average weight loss is 1–2 pounds per week'' is inadequate because it does not effectively communicate the expected weight loss over six months. Furthermore, that disclosure likely implies that weight loss continues at that rate over six months, which would not be true if, for

example, the average weekly weight loss over six months is .57 pounds.

(iii) If the ad features the same pictures but the testimonialist simply says, ''I lost 50 pounds with QRS Weight-Loss,'' and QRS Weight-Loss users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* ''women who use QRS Weight-Loss lose 15 pounds on average''). A disclosure such as ''most women who use QRS Weight-Loss 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.

(iv) Assume that a QRS Weight-Loss 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 median weight loss instead could help avoid deception, *e.g.,* ''most users lose 8 pounds'' or ''the typical user loses 8 pounds.''

(v) Assume that QRS Weight-Loss's manufacturer procured a fake consumer review, reading ''I lost 50 pounds with QRS Weight-Loss,'' and had it published on a third-party review website. This endorsement is deceptive because it was not written by a bona fide user of the product (*see* § 255.1(c)) and because it does not reflect the honest opinions, findings, beliefs, or experience of the endorser (*see* § 255.1(a)). Moreover, the manufacturer would need competent and reliable scientific evidence that QRS Weight-Loss is capable of causing 50-pound weight loss.

(vi) Assume that QRS Weight-Loss is a diet and exercise program and a person appearing in a QRS Weight-Loss ad says, ''I lost 50 pounds in 6 months with QRS Weight-Loss.'' Very few QRS Weight-Loss users lose 50 pounds in 6 months and the ad truthfully discloses, ''The typical weight loss of QRS Weight-Loss users who stick with the program for 6 months is 35 pounds.'' In fact, only one-fifth of those who start the QRS Weight-Loss 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 QRS Weight-Loss program can generally expect.

(vii) Assume that QRS Weight-Loss's manufacturer forwards reviews for its product to a third-party review website. If it forwards only favorable reviews or omits unfavorable reviews, it is engaging in a misleading practice.

(5) *Example 5.* An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are 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.

(6) *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.

(7) *Example 7.* (i) 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.

(ii) 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.)

(8) *Example 8.* (i) 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 representing that it is providing an accurate reflection of the views of the purchasers who submitted product reviews to the website. If the retailer chose to suppress or otherwise not publish any reviews with fewer than four stars or reviews that contain negative sentiments, the product pages would be misleading as to purchasers' actual opinions of the products.

(ii) If the retailer chose not to post reviews containing profanity, that would not be unfair or deceptive even if reviews containing profanity tend to be negative reviews. However, it would be misleading if the retailer blocked negative reviews containing profanity, but posted positive reviews containing profanity. It would be acceptable for the retailer to have a policy against posting reviews unrelated to the product at issue or related services, for example reviews complaining about the owner's policy positions. But it would be misleading if the retailer chose to filter reviews based on other factors that are only a pretext for filtering them based on negativity. Sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; the personal information or likeness of another person; 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 reviews that are unrelated to their products or services. A particular seller's customer service, delivery, returns, and exchanges are related to its products and services.

(iii) Assume now that each product page starts with a glowing five-star review that is labeled as ''the most helpful review.'' Labeling the review as the most helpful suggests it was voted most helpful by consumers visiting the website. If the initial review on each such page was selected by the retailer and was not selected as the most helpful review by other consumers, labeling it as the most helpful would be deceptive.

(9) *Example 9.* A manufacturer offers to pay genuine purchasers $20 each to write positive reviews of its products on third-party review websites. Such reviews are deceptive even if the payment is disclosed because their positive nature is required by, rather than being merely influenced by, the payment. If, however, the manufacturer

did not require the reviews to be positive and the reviewers understood that there were no negative consequences from writing negative reviews, a clear and conspicuous disclosure of the material connection would be appropriate. (*See* Example 6).

(10) *Example 10.* (i) In an attempt to coerce them to delete their reviews, a manufacturer threatens consumers who post negative reviews of its products to third-party review websites, with physical threats, with the disclosure of embarrassing information, with baseless lawsuits (such as actions for defamation that challenge truthful speech or matters of opinion), or with lawsuits it actually does not intend to file. Such threats amount to an unfair or deceptive practice because other consumers would likely be deprived of information relevant to their decision to purchase or use the products, or be misled as to purchasers' actual opinions of the product.[2]

(ii) Assume now that one of the third-party review websites has a reporting mechanism that allows businesses to flag suspected fake reviews. The manufacturer routinely flags negative reviews of its products as fake without a reasonable basis for believing that they actually are fake, resulting in truthful reviews being removed from the website. This misuse of the reporting option is an unfair or deceptive practice.

(11) *Example 11.* A marketer contacts recent online, mail-order, and in-store purchasers of its products and asks them to provide feedback to the marketer. The marketer then invites purchasers who give very positive feedback to post online reviews of the products on third-party websites. Less pleased and unhappy purchasers are simply thanked for their feedback. Such a practice may be an 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. If, in the alternative, the marketer had simply invited all recent purchasers to provide feedback on third-party websites, the solicitation would not have been unfair or deceptive, even if it had expressed its 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 taste or price), the endorsement must be supported by an actual exercise of the expertise that the expert is represented as possessing in evaluating product features or characteristics which are relevant to an ordinary consumer's use of or experience with 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 represented 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 that, with respect to those features on which the endorser is represented to be an expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. (*See* § 255.1(e) regarding the liability of endorsers.)

(c) Examples:

(1) *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.

(2) *Example 2.* An endorser of a hearing aid is simply referred to as a doctor during the course of an advertisement. The ad likely implies that the endorser has expertise in the area of hearing, as would be the case if the endorser is a medical doctor with substantial experience in audiology or a non-medical doctor with a Ph.D. or Au.D. in audiology. A doctor without substantial experience in the area of hearing might be able to endorse the product if the advertisement clearly and conspicuously discloses the nature and limits of the endorser's expertise.

(3) *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 performance by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (*e.g.,* if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

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

(5) *Example 5.* A person who is identified as the president of a commercial ''home cleaning service'' states in a television advertisement for a particular brand of cleanser that the service uses that brand instead of its leading competitors because of its 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 (or superior, if such is the net impression conveyed by

[2] The Consumer Review Fairness Act makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. 15 U.S.C. 45b.

the advertisement) to 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.

(6) *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 represented 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 representation. (*See* § 255.1(d) and (e))

§ 255.4 Endorsements by organizations.

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

(b) Examples:

(1) *Example 1.* A mattress manufacturer advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

(2) *Example 2.* A trampoline manufacturer sets up and operates what appears to be a trampoline review website operated by an independent trampoline institute. 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.)

(3) *Example 3.* (i) A third-party company 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 or independence, such paid-for rankings are deceptive and the website operator is liable for the deception. A headphone manufacturer who pays for a higher ranking on the website may also be held liable for the deception. A disclosure that the website operator receives payments from headphone manufacturers would be inadequate because the payments actually determine the headphones' relative rankings. If, however, the review website does not take payments for higher rankings, but receives payments from some of the headphone manufacturers, such as for affiliate link referrals, it should clearly and conspicuously disclose that it receives such payments. (*See* § 255.5(k)(11))

(ii) Assume that the headphone review website operator uses a ranking methodology that results in higher rankings for products whose sellers have a relationship to the operator because of those relationships. The use of such a methodology is also misleading.

§ 255.5 Disclosure of material connections.

(a) 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 (including products 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 promotions. Some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. A material connection needs to be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection. 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.

(b) Examples:

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

(2) *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.

(3) *Example 3.* (i) 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 ever 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 doctors, 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 having a contractual relationship with the clinic that includes payment for speaking publicly about the surgery. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure during the interview that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. A disclosure during the show's closing credits would not be clear and conspicuous. Furthermore, if consumers are likely to take away from the interview that the athlete's experience is typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

(ii) Assume that the tennis player instead touts the results of the surgery—mentioning the clinic by name—in the player's social media post. Consumers might not realize that the athlete is a paid endorser, and because that information might affect the weight consumers give to the tennis player's endorsement, the relationship with the clinic should be disclosed—regardless of whether the clinic paid the athlete for that particular post. It should be disclosed even if the relationship involves no payments but only the tennis player getting the laser correction surgery for free or at a significantly reduced cost.

(iii)(A) Assume that the clinic reposts the tennis player's social media post to its own social media account and that the player's original post either—

(*1*) Did not have a clear and conspicuous disclosure, or

(*2*) Had such a disclosure that does not appear clearly and conspicuously in the repost.

(B) Given the nature of the endorsement (*i.e.,* a personally created statement from the tennis player's social media account), the viewing audience of the clinic's social media account would likely reasonably not expect the tennis player to be compensated. The clinic should clearly and conspicuously disclose its relationship to the athlete in its repost.

(iv) Assume that during the appearance on the television talk show, the tennis player is wearing clothes bearing the insignia of an 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.

(4) *Example 4.* (i) A television ad for an anti-snoring product features a physician who says, ''I have seen dozens of products come 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.

(ii) Assume that the physician is instead paid to post about the product on social media. In that context, consumers might not expect that the physician was compensated and might be more likely than in a television ad 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.

(5) *Example 5.* (i) In a television advertisement, an actual patron of a restaurant, who is neither known to the public nor 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 because that information may materially affect the weight or credibility of the endorsement.

(ii) 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 here, even if patrons were also told, after the interview, that they would be paid for allowing the use of their opinions in advertising.

(6) *Example 6.* (i) An infomercial producer wants to include consumer endorsements in an infomercial for an automotive additive product not yet on the market. The producer's staff selects several people who 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 to endorse the product in the infomercial. Viewers would not expect that these ''consumer endorsers'' are actors who used the product in the hope of appearing in the commercial and receiving compensation. Because the advertisement fails to disclose these facts, it is deceptive.

(ii) Assume that the additive's marketer wants to have more consumer reviews appear on its retail website, which sells a variety of its automotive products. The marketer recruits ordinary consumers to get a free product (*e.g.,* a set of jumper cables or a portable air compressor for car tires) and a $30 payment in exchange for posting a consumer review of the free product on the marketer's website. The marketer makes clear and the reviewers understand that they are free to write negative reviews and that there are no negative consequences of doing so. Any resulting review that fails to clearly and conspicuously disclose the incentives provided to that reviewer is likely deceptive. When the resulting reviews must be positive or reviewers believe they might face negative consequences from posting negative reviews, a disclosure would be insufficient. (*See* §§ 255.2(d) and (e)(9).) 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. If such a material increase occurs, the marketer likely would need to provide a clear and conspicuous disclosure to people who see the average star rating.

(7) *Example 7.* A woodworking influencer posts on-demand videos of

various projects. A tool 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 products and comments favorably about it in videos. If a significant minority 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).)

(8) *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 on 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 their relationship to the manufacturer. To limit its own liability for such posts, the employer should engage 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 employees posting their own reviews of the product on retail websites or review platforms.

(9) *Example 9.* A college student signs up to be part of a program in which points are awarded each time a participant posts on social media about a particular advertiser's products. Participants can then exchange their points for prizes, such as concert tickets or electronics. These incentives would 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.

(10) *Example 10.* Great Paper Company sells photocopy 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.

(11) *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 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.

(12) *Example 12.* (i) 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).)

(ii) 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.

(13) *Example 13.* An app developer gives a consumer a game app to review. The consumer clearly and conspicuously discloses in the review that they were given the app, which normally costs 99 cents, for free. That disclosure suggests that the consumer did not receive anything else for the review. If the app developer also gave the consumer $50 for the review, the mere disclosure that the app was free would be inadequate.

(14) *Example 14.* Speed Ways, an internet Service Provider, advertises that it has the ''Fastest ISP Service'' as determined by the ''Data Speed Testing Company.'' If Speed Ways commissioned and paid for the analysis of its and competing services, it should clearly and conspicuously disclose its relationship to the testing company because the relationship would likely be material to consumers in evaluating the claim. If the ''Data Speed Testing Company'' is not a bona fide independent testing organization with expertise in judging ISP speeds or it did not conduct valid tests that supported the endorsement message, the endorsement would also be deceptive. (*See* § 255.3(c)(3))

§ 255.6 Endorsements directed to children.

Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.

By direction of the Commission.

April J. Tabor,

Secretary.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–989]

Schedules of Controlled Substances: Temporary Placement of Etizolam, Flualprazolam, Clonazolam, Flubromazolam, and Diclazepam in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Temporary amendment; temporary scheduling order.

SUMMARY: The Administrator of the Drug Enforcement Administration is issuing this temporary order to schedule five synthetic benzodiazepine substances: etizolam, flualprazolam, clonazolam, flubromazolam, and diclazepam, in schedule I of the Controlled Substances Act. This action is based on a finding by the Administrator that the placement of these five substances in schedule I is necessary to avoid imminent hazard to the public safety. As a result of this order, the regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances will be imposed on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical