Will New FTC Endorsement Guidelines Make A #Hashtag of Influencer Advertising?

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In a world where social media influencers can wield more power over consumers than network media buys, the Federal Trade Commission’s (FTC) Endorsement Guides felt increasingly like a relic from an earlier era. While not wholly ineffective, the FTC’s formal guidance to businesses on the use of endorsements and testimonials in advertising was still a policy with roots in the limited media environment of the 1970s, the decade when the Guides originated. There were no Instagram influencers, no sponsored posts, and no hashtags in 1980, when the Guides were finally enacted, and even cable television was in its infancy. And despite important and well-intentioned 2009 amendments crafted during the early days of social media, so much has happened in the intervening years that the Guides never seemed fully engaged with the radical implications of a marketing environment where blurring the lines between advertising and reality is more often a feature rather than a bug.

But now, and not a moment too soon, the FTC is finally ready to revisit the Guides, and any company with a digital marketing presence is well advised to pay close attention to the developments likely to occur over the next year. Specifically, this past month the FTC announced that it was formally seeking public comment on whether to make changes to the Endorsement Guides, with a notice in the Federal Register asking for submissions by April 21, 2020. While most of the suggestions
offered by the FTC as potential subjects for comment dealt with the type of broad policy issues that the FTC would hope to address in any regular review of commission policy, a number of questions were quite specific, and telling, and worth a read in their entirety. Of particular note are the inquiries focused on the notion of how to disclose material connections between an advertiser and an endorser in the context of different social platforms. Others are directed towards the authenticity of online review processes and affiliate marketing.

These questions get at the heart of the issue: as the line between content and branded communication becomes increasingly difficult to discern – or even irrelevant – how can the FTC protect consumers from deceptive advertising? When anyone can be anyone else on the internet, how can identity be authenticated, and how can authentic messages be verified? And are the Guides a proper vehicle to accomplish that goal when the technology used to communicate to consumers changes so rapidly?

Intriguingly, at the same time as the FTC opened its process for comment, Commissioner Rohit Chopra also released his own statement on the FTC’s upcoming review of the Guides, and while he is only one member of the Commission, his unmistakable enthusiasm for additional regulation is critical to note for anyone reading tea leaves on a future FTC approach to new media advertising. Beyond an expansion of the Guides to address the challenges offered by the kind of deception we described last year as “fake law,” Chopra argues for aggressive, mandatory rules on influencer advertising backed by civil penalties – in effect, Chopra hopes for a sea change in the regulatory environment for advertisers, a new model wherein the FTC becomes a much more tangible threat, with far more specific rules and expanded remedies.

While any prediction on the ultimate shape and policy of this next iteration of the Endorsement Guides is premature, now is the time for any company, agency, or influencer with a role to play in the digital advertising ecosystem to consider whether it wants to participate in the process. The FTC’s comment period is open until April 21, and while the FTC has extraordinary resources, it cannot know your business as well as you do. This is an important opportunity for companies to shape the rules that will serve as guidance for their own regulation for many years to come, and the remedies in the consent decrees of tomorrow may be driven by the comments submitted today.

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