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#Ad: The FTC Wants To Hear From You As It Revisits The Endorsement Guides

March 3, 2020

On Feb. 21, 2020, the Federal Trade Commission (FTC) published a request for public comment on its [Endorsement Guides](#) in the [Federal Register](#). This marks the first time since 2007 that the FTC has sought formal input on the Guides, although it has held a multitude of workshops and issued a variety of additional resources to assist the industry since last formally updating the Guides in 2009.

As influencer marketing has grown to become part of the marketing mix for virtually every brand, bad behavior continues to persist, and the FTC appears determined to find out whether this is due to (i) a lack of understanding of the Guides on the part of brands, influencers, and consumers, or (ii) a lack of deterrence (i.e., soft enforcement), or both.

Of particular note is a separate [statement](#) issued by Commissioner Rohit Chopra (which is not part of the Federal Register Notice), in which he pulls no punches in voicing his frustration with the current state of affairs, using phrases like “launder[ing] advertising,” “illegal payola,” “polluting the digital economy,” and “stop fraud from festering.” He proposes several avenues for righting the ship, including imposing requirements on social media platforms, offering standard contractual provisions for the industry to include in influencer contracts, and codifying certain elements of the Guides into formal rules so that violators can be liable for civil penalties and damages.

All stakeholders who could be impacted by changes to the Guides, as well as by enhanced enforcement and penalties, should pay close attention not only to what Commissioner Chopra has stated, but also to the 22 specific questions that the FTC included in its request for input. Many of these questions get straight to the heart of whether and how the

current Guides are missing the mark and ask for evidence, data, and studies to help the FTC better understand complex issues such as the base level of sophistication of today's consumers (including children), how influencer marketing tactics possibly skew product reviews (both individual and averages), whether affiliate marketing should be expressly addressed in the Guides, and whether industry self-regulatory efforts have been effective.

The tenor of Commissioner Chopra's statement, coupled with his [dissent](#) in the recent [Sunday Riley](#) case (in which he was joined by Commissioner Rebecca Kelly Slaughter), indicate that we may have reached a tipping point here; the days of "everybody else is doing it" and "no harm, no foul" may be coming to a close, as the FTC seems intent on taking steps to not only protect consumers, but also to level the playing field in the marketplace by making it more difficult for bad actors to gain an unfair competitive advantage by using deceptive influencer marketing tactics. Everyone in the industry should consider making their voices heard through the public comment process, as this could reshape this entire industry for the foreseeable future; comments are due by April 21, 2020.

For more information, please contact the Barnes & Thornburg attorney with whom you work, or Jim Dudukovich at 404-264-4054 or jim.dudukovich@btlaw.com, or any member of the Advertising and Marketing Practice Group.

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