



# RETAIL INDUSTRY LEADERS ASSOCIATION

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September 26, 2022

*Via regulations.gov (FTC-2022-0047)*

ATTN: Michael Ostheimer, Attorney

Division of Advertising Practices  
Bureau of Consumer Protection  
Federal Trade Commission, Room CC-10603  
600 Pennsylvania Ave. NW  
Washington, D.C. 20580

**Re: Guides Concerning the Use of Endorsement and Testimonials in Advertising; 87 Fed. Reg. 44288, Docket ID: FTC-2022-0047**

Dear Mr. Ostheimer:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the Federal Trade Commission's (FTC's or Commission's) proposed rule updating its Guides Concerning the Use of Endorsement and Testimonials in Advertising, or "Endorsement Guides," (hereinafter "Proposed Rule").

By way of background, RILA's members include the largest and most innovative retailers. The retail industry employs over 42 million Americans and accounts for \$1.5 trillion in annual sales. The vast majority of RILA's members sell products through both traditional brick-and-mortar stores and their e-commerce platforms. RILA and its member companies strongly support the mission and goals of the FTC to protect consumers and competition by preventing anticompetitive, deceptive and unfair business practices, including deceptive, misleading or false advertising and marketing of products.

RILA appreciates the Commission revisiting its Endorsement Guides in light of the evolution of advertising over the past decade, including the use of social media to reach consumers, as well as the dramatic increase in online shopping/e-commerce. RILA submits the following comments to FTC to highlight areas of the Proposed Rule that will benefit from more clarity. RILA also wishes to bring the Commission's attention to some areas where some of its proposed changes may result in unintended consequences that could work at cross purposes with providing consumers with balanced and unbiased product information. Lastly, RILA's comments highlight where

implementation of some proposed changes may result in undue burdens and significant costs for retailers.

**In its final rule updating its Endorsement Guides, the FTC should:**

- Permit advertisers (including retailers) to count star ratings from incentivized reviews in average ratings appearing in a product listing;
- Clarify that an advertiser may *only* be liable for an endorser's statements where a contractual relationship exists, and the advertiser either 1) requested the endorser make the misleading statement/claim and/or; 2) where an advertiser failed to establish and maintain an appropriate compliance program (including providing information and training where appropriate);
- Consider platform time limitations for providing audio and visual disclaimers;
- Provide additional clarity/examples of "clear and conspicuous" disclosures including compliant in-platform disclosures;
- Permit advertisers to have discretion to refrain from displaying product reviews submitted that do not comment on the product and only comment on customer service experiences; and
- Provide greater clarity and additional examples in its final rule on the type and nature of employee relationships that warrant disclosure.

Each of these areas are discussed in more detail below.

### **1.) Excluding incentivized reviews from average star ratings**

In its Proposed Rule, the Commission states its concern that disclosure of an incentivized review could be deceptive if an included star rating materially increases the average star rating.<sup>1</sup> The exclusion of incentivized reviews from average star ratings raises a number of concerns for RILA and its members. RILA encourages the Commission to permit sellers to count ratings from incentivized reviews in average ratings.

Incentivized reviews that are properly disclosed are very helpful to consumers to both learn about and locate products they are shopping for online. The FTC has not provided evidence to support a determination that star ratings from incentivized ratings skew higher than un-incentivized ratings. In fact, it is retailers' experience that incentivized reviews result in a range of

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<sup>1</sup> See Sec 255.5(f), Example 6(2).

star ratings and includes both reviews that are not complimentary of the product and lower starred ratings.

One RILA member shared a comparison of the average star ratings across its entire site for specific product categories as compared to the average rating contributed by "seeded" (a/k/a incentivized) reviews in a five-star rating system. This comparison (fig. 1) shows the margin of difference between the star rating averages for each product category was insignificant and immaterial.

**Figure 1. Comparison from one National Retail Chain Site Average Star Ratings vs. Seeded Review Star Ratings**

Category	Total Site	Seeded Reviews
<b>Total</b>	<b>4.4</b>	<b>4.56</b>
Apparel & Accessories	4.14	4.55
Essentials & Beauty	4.37	4.43
Food & Beverage	4.53	4.26
Hardlines	4.35	4.54
Home	4.27	4.59

The inclusion of star ratings from incentivized reviews does not deceive customers and not including them may hinder customers from discovering more products and options for comparison shopping, particularly in the case of new products that do not have a large number of reviews. Providing incentivizes increases the overall pool of reviews for a customer to peruse. Additionally, on many e-commerce websites, star ratings are used in algorithms to bring up a new product in a customer's online search, which allows for the discovery of new products and more product options.

The exclusion of star ratings from incentivized reviews would also disproportionately impact those e-commerce platforms that are smaller and have fewer customers or are newer and not as well-established as long-time e-commerce sites. It is not uncommon for a product that is listed on large long-established online marketplaces to have thousands of customer reviews. In contrast, many traditional brick-and-mortar retailers are playing catchup when it comes to building up reviews on their e-commerce sites. These retailers rely on incentivized reviews to increase overall product reviews on their sites. Even with incentivized reviews, the pool of total reviews is likely to be more modest (hundreds and not thousands). Including star ratings from incentivized reviews will facilitate competition and a more level playing field in the e-commerce space.

To increase the overall pool of reviews for customers, many retailers' e-commerce sites pull syndicated reviews either directly from an individual brand or product manufacturer's website or from third-party product review platforms (e.g., Influenster.com). From a consumer information perspective, this practice allows one customer to share their experience with a product with multiple customers across a wider number of ecommerce platforms (via a syndicated review) where that item is sold (rather than just going to one platform and having their review reside just in one place). For many retailers, syndicated reviews makeup a significant percentage of reviews appearing within a product listing. Retailers do not have direct control over the content of these syndicated posts, and it is unclear how they could decouple the star ratings from them.

In general, there is no proverbial switch that can be flipped to remove the incentivized subset of existing ratings from overall star ratings from calculations. Retailers would likely need to develop or procure technology to eliminate these ratings from their rating counts and reviews. The Commission should consider the cost and resources required to make these changes and whether the unsubstantiated harm to consumers from including incentivized star ratings warrants these investments.

## **2.) Liability for endorsers/social media influencers claim**

The Commission proposes an advertiser may be liable for an endorser's deceptive statement even when the endorser is not liable. The Proposed Rules states that 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. RILA is concerned that the vicarious liability and oversight described in the Proposed Rule is overly burdensome.

The relationship between an advertiser and a social media influencer is like an independent contractor arrangement. Retailers provide guidance to social media influencers they contract with on statements they make in their posts to prevent them from making misleading statements. However, retailers do not ultimately have control over influencers' social media accounts. Retailers can request that an influencer remove a post from the influencer's account that may violate their guidelines. If an influencer chooses to disregard the request, a retailer cannot block or remove a post from individual social media accounts they do not operate/own. It is unreasonable to hold retailers liable for an endorser's statements if the retailer did not request that they make those statements. Additionally, influencers often comment on products and brands even when they have no contractual relationship with a brand owner and/or retailers that sells those products. In these scenarios, retailers would have no control or means to bind an influencer to an agreement. The FTC should acknowledge this type of scenario in its final rule.

RILA encourages the FTC to clarify in its final rule that an advertiser (including retailer-advertisers) could be held liable for an endorser's false/misleading statements where a contractual relationship exists between advertiser and endorser and if: 1) the advertiser failed to establish and maintain an appropriate compliance program advising contracted endorsers

(including social media influencers) of their obligation to comply with legal truth in advertising and marketing requirements and FTC's guidance on this issue (this includes providing endorsers with information and training where appropriate and taking appropriate action when the advertiser becomes aware that an endorser has failed to comply) and/or 2) if the advertiser requested that the endorser make false or misleading statements/claims. In all other instances the endorser would be liable (not the advertiser).

### **3.) Definition and format of a "clear and conspicuous" disclosure of the material relationship between advertiser and reviewer**

In its Proposed Rule, the Commission proposes to define "clear and conspicuous" disclosure as a disclosure that "is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers." While not mandating that a disclosure be both visual and audible under all circumstances, the proposed revision would say that when the triggering claim is visual the disclosure should be at least visual; that when the triggering claim is audible, the disclosure should be at least audible; that when the triggering claim is both visual and audible, the disclosure should be both; and that a *simultaneous audible and visual disclosure is more likely to be clear and conspicuous* (emphasis added).

It is unclear if the Commission has considered any social media platform constraints with respect to the length of posts (*e.g.*, character and time limits). RILA's members are concerned that requiring both audio and video disclosures could result in "fast-talk" half disclaimers. In finalizing the rule, the FTC should address how it has accounted for these platform limitations.

Additionally, the Proposed Rule lacks clarity and examples of social media disclosures that are "clear and conspicuous." For example, the FTC has not referenced whether and how hashtags can meet the "clear and conspicuous" requirement. RILA encourages the FTC to engage directly with social media platforms to devise compliant in-platform disclosure criteria. At a minimum, the Commission should provide more examples, including appropriate use of hashtags in disclosures, in its final rule.

### **4.) Inclusion of customer reviews focused solely on customer service issues**

The Proposed Rule states that customer reviews that include discussions on returns, shipping, or exchanges should be allowed on the site since it is related to the seller's products and services. RILA disagrees that customer reviews that are solely about customer service issues, such as returns, shipping or exchanges, should be included in product reviews.<sup>2</sup>

Consumers seek out product reviews to learn more about a product's quality or attributes (*e.g.*, color, fit, size). If a customer experiences shipping delays, or is dissatisfied with a retailer's refund

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<sup>2</sup> See Sec. 255.2(b), Example 8(ii).

process, that is not reflective of the product itself. The FTC should not require sellers to include reviews that solely discuss service experience and do not include comment on the product.

RILA is not suggesting that a retailer should not include reviews that include commentary on the product along with discussions of returns, shipping or other service issue. Rather if a review/rating is solely submitted to comment on customer service – whether positive or negative – those reviews do not belong alongside other product reviews. Moreover, consumers have other channels available for providing feedback on customer service directly to retailers (e.g., via phone, email, online contact forms and social media), as well as well-established forums for bringing consumer attention to business practices (e.g., Better Business Bureau), and via posts tagging businesses on widely viewed social media platforms.

In its final rule, the Commission should not require that advertisers display reviews submitted on products that only comment on customer service experiences (including, but not limited to, returns, shipping, refund processes, etc.) provided that the advertiser makes other mechanisms available for a consumer to communicate customer service feedback (e.g., phone, e-mail, and/or contact form).

#### **5.) Employee endorsements**

With respect to the FTC's treatment of disclosure of an employee relationship, the FTC should clarify and provide examples of where an employee's connection to a product would be immaterial and therefore disclosure of their employment is not required. In the example given in the Proposed Rule,<sup>3</sup> the employee works for a manufacturer of a leading home robot is promoting the product in online forums/message boards without disclosing that they are employed by the manufacturer. The FTC states that the employer should engage in appropriate training of its employees to "limit its own liability for such posts." The FTC later states that "the disclosure requirements in this example would apply equally to consumer reviews of the product posted on retail websites or review platforms."<sup>4</sup> Absent more clarity, this example and application to large national retailers is overly burdensome.

It is unclear from the example if the FTC would treat all employees equally. Is the individual in the example directly involved in the manufacture of that product where they have special and/or expert knowledge of the product? In such a case, it is reasonable that the material relationship exists that should be disclosed. However, this example does not translate well to retailers. Retailers rarely manufacture the products they sell and most sell a vast assortment of thousands of different products. Large national retail chain collectively employ millions of workers who are also their customers. The vast majority of those employees would have no greater knowledge or vested interest in a particular product than any other consumer. While a retailer may provide guidance on disclosing their relationship, it should not be liable for policing their customer reviews for posts that may have been submitted by any one of their thousands or millions of

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<sup>3</sup> See Sec. 255.5(h), Example 8.

<sup>4</sup> Id.

employees – who in many cases may be using ambiguous screennames or not be readily identifiable.

RILA encourages the Commission to provide greater clarity and additional examples in its final rule on the type and nature of employee relationships that warrant disclosure.

### Closing

RILA appreciates the opportunity to provide these comments on the FTC's Proposed Rule updating its Endorsement Guides. We would welcome an opportunity to discuss our feedback with the Commission.

If you have any questions or need any additional information, please contact me at [susan.kirsch@rila.org](mailto:susan.kirsch@rila.org) / (202) 866-7477.

Sincerely,



Susan Kirsch  
Vice President, Regulatory Affairs