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May 24, 2022

FTC Scrutinizing Ed Tech Providers and Endorsements

On May 19, 2022, at the Federal Trade Commission's (FTC) first open meeting since the confirmation of Commissioner Alvaro Bedoya, the FTC unanimously approved two documents that signal its intention to strengthen its enforcement activity with respect to children's privacy and potentially deceptive endorsements: (1) a [policy statement](#) on the application of the Children's Online Privacy Protection Act (COPPA) to ed tech providers, and (2) [proposed amendments to the FTC Endorsement Guides](#) to address changes to endorsement guidelines, such as influencer advertising and consumer reviews, since the last update in 2009. In addition, the proposed amendments to the *Endorsement Guides* address a host of issues concerning advertising to general audiences.

COPPA Ed Tech Policy Statement

The COPPA policy statement does not announce any new provisions but rather reiterates four existing requirements noted below. Nevertheless, the adoption of the policy statement is significant because it signals the FTC's intent to scrutinize ed tech providers with respect to COPPA's substantive provisions in addition to the notice and choice provisions that have historically been emphasized in the FTC's COPPA enforcement actions.

- **Collection Limits.** Under COPPA, covered entities, including ed tech providers, cannot condition access to an online activity on the collection of more information than is reasonably necessary for children to participate in the activity. As an example, the policy statement notes that an ed tech provider should not require students to provide their email addresses if the provider does not need to email students.
- **Use Limits.** Ed tech providers that rely on schools to obtain COPPA consent for their collection of personal information may only use such data for the benefit of the school and no other commercial purpose, such as marketing and advertising.
- **Retention Limits.** Under COPPA, covered entities, including ed tech providers, cannot retain children's personal information longer than is reasonably necessary to fulfill the purpose for which such data was collected. As an example, the policy statement notes that ed tech providers may not retain personal information for speculative future uses.
- **Data Security Procedures.** COPPA-covered entities, including ed tech providers, must have procedures to maintain the confidentiality, security, and integrity of children's personal information.

Proposed Updates to *Endorsement Guides*

While the FTC's proposed modifications to its *Endorsement Guides* are unrelated to the COPPA ed tech policy statement, they reflect the FTC's desire to protect children, in addition to general audiences. Significant proposed modifications to the *Endorsement Guides* and their accompanying commentary include:

- **Intermediary and Platform Liability.** According to the proposed modifications, intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known was deceptive. In addition, while expressing support for social media platforms' built-in tools to disclose material connections between endorsers and companies they endorse, the FTC expressed concern that some existing tools do not produce effective disclosures and that platforms could expose themselves to liability "depending on the representations they make about these tools."

- **Fake Reviews and Manipulated Reviews.** According to the proposed modifications, fake reviews can be covered by the *Endorsement Guides*. In addition, the proposed modifications articulate what the FTC calls a "fundamental principle" that in procuring, suppressing, boosting, organizing, or editing consumer reviews, advertisers should not distort or misrepresent what consumers think of their products, such as by suppressing negative reviews.
- **Tagging a Brand and Virtual Influencers.** The proposed modifications clarify that tagging a brand can count as an endorsement and that virtual influencers are subject to the *Endorsement Guides*.

In addition, the FTC proposed a new provision stating that endorsements in advertisements directed to children may be of "special concern" and that "[p]ractices which would not ordinarily be questioned in advertisements addressed to adults might be questioned" if they appear in advertisements directed to children. However, the FTC stated that it lacked adequate evidence to develop specific guidance or best practices on the issue. To address that gap, the FTC announced that on October 19, 2022, it will host a [public event](#) called "Protecting Kids from Stealth Advertising in Digital Media." The FTC is soliciting public comments and research on issues relating to marketing directed to children. The FTC is likely to use the information from the workshop and associated submissions to provide further guidance on the subject. In the meantime, Chair Lina Khan warned at the open meeting that businesses and individuals should not assume that compliance with the *Endorsement Guides* is a safe harbor when making endorsements directed to children.

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