

# The #AD Vantage Point: Navigating the FTC Endorsement Guides, Part I

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Our colleague Clint Cogburn recently wrote an article discussing the guidance provided by the NCAA's Interim NIL Policy, released in May 2022.

But the NCAA and individual states are not the only players establishing important guidelines in the NIL arena. As part of its promotion and regulation of truth in advertising through the Federal Trade Commission (FTC) Act, the FTC has created Endorsement Guides for companies who enter into deals with athletes to promote their business or

products.

The FTC's Endorsement Guides apply when an advertiser, or someone working for an advertiser, gives an individual something of value to mention a product. In the NIL context, this means the Endorsement Guides apply to the endorsement deals between brands and athletes. Do you pay an athlete to promote your business or your business' product? The Guides apply. Do you provide free products or services to an athlete in exchange for promotion? The Guides apply.

Therefore, to effectively manage your business' relationship with athletes who endorse your products or business, it's important to understand what exactly you should expect them to do when they feature your product or mention your business on the Internet. This article is the first in a series that will explain the requirements of the Endorsement Guides and their implications for businesses who enter into agreements with athletes as endorsers to ensure compliance with the Guides.

## Understanding the Endorsement Guides

The Endorsement Guides emphasize that endorsements should reflect the honest opinion of the endorser, involve only products with which the endorser has experience, and make clear to the consumer the material connection between the endorser and the company. A material connection is one that might materially affect the weight or credibility of the endorsement. Put a different way, a material connection is a connection that is not reasonably expected by the consumer.

If you are in the business of advertising, you might think consumers would always expect a connection between you, the advertiser, and an endorser such as a college athlete. But such an assumption could easily lead you astray from the requirements of the Endorsement Guides and get you in trouble with the FTC, as the FTC evaluates advertisements and endorsements from the perspective of the "reasonable consumer," not super sports fans or individuals with industry savvy.

The Endorsement Guides require disclosures in certain circumstances, including if an individual such as an athlete is paid to endorse a product or promote a business. Disclosures must be clear and conspicuous, which means they should be:

**i. Close to the claims to which they relate.**

This generally means disclosures should be located on or within each photo, video, or social media post, or in the actual language of a web posting in which an athlete is endorsing a brand or brand's product. A disclosure of a brand relationship on the home page of an athlete's website or the profile page of an athlete is not sufficient to inform the consumer of the relationship. Disclosures must also be visible without consumers needing to click "more" in post descriptions to locate them. While it's generally sufficient to use "#ad" as a disclosure, this hashtag should not be buried among other hashtags or located where a consumer is unlikely to see it, such as at the bottom of a post. If you are interested in whether the hashtags you use are sufficient under the Guides, Ward and Smith's NIL Practice Group has the experience to assist.

**ii. In a font that is easy to read and a shade that stands out against the background.**

Disclosures should be in a font that is easy to read (**think: nothing funky**) and, if used within a photo or video, should be in a shade/color that stands out against the background. The consumer should never have to search for the disclosure or wonder what it means. In that same vein, the language of the disclosure should also be the language used by the athlete to endorse the product. For example, if the athlete discusses a product in English, then the disclosure should also be in English, but if the athlete discusses a product in Spanish, then the disclosure should also be in Spanish. If athletes use multiple languages in a video discussing a product, then so should the disclosure.

**iii. In video advertisements, present for enough time to be noticed, read, and understood.**

This one is trickier. The time it takes me to notice, read, and understand something in an Instagram story or reel is going to be different than the time it takes my grandma to do the same. (Yes, my grandmother has—and successfully uses—an Instagram.) While the FTC does not detail what it considers a sufficient duration for these disclosures, it evaluates all disclosures based on the experience of a "reasonable consumer." Since it's unlikely that a reasonable consumer could notice, read, and understand disclosures present for an incredibly short amount of time, disclosures that pop up and then quickly disappear won't be enough. Similarly, in "live" videos, a disclosure at the beginning may not be enough to clearly and conspicuously disclose a brand relationship, as consumers may tune in to the live at different times. Lengthy live videos discussing a particular product or brand should include disclosures throughout.

**iv. In audio disclosures, read at a cadence that is easy for consumers to follow and in words that consumers will understand.**

Speaking this fast does not promote clarity. Deliver audio disclosures in a manner that promotes understanding in order to ensure they are clear and conspicuous. Additionally, in videos that include audio disclosures, there should also be written disclosures to account for the fact that a number of consumers watch videos without sound. Again, these disclosures should be close to the claims to which they relate.

What exactly do these disclosure requirements mean for your business' endorsement deals? Part two of this series will detail important considerations for businesses interested in endorsement deals and discuss business liability for failures by endorsers to disclose as required by the FTC.

For more information on disclosure requirements, you can read the FTC Endorsement Guides [here](#).

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