

FTC's Updated FAQ for Endorsements and Testimonials: Implications for Social Media Promotions and Sponsored Content

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Since its introduction to online communication, social media has exploded in popularity through its dynamic networking capabilities and its interactive exchange of ideas. In January of 2015 the Pew Research Center reported that 74% of online adults use a social networking site of some kind, with 52% of them using two or more of these sites.¹ The success and expansion of social networks has also provided a free exchange of opinions and assessments of goods and services. According to Nielsen, nearly four in five active Internet users visit social networks and blogs, and 70% of social media users hear others' experiences at least once a month.² Consumers are increasingly relying on the authenticity and credibility that comes with user generated consumer reviews and assessments via social media to evaluate the quality of products.

Advertisers have taken note of this trend. Studies show that brands are intent on figuring out on how to be involved—at least 91% of marketers want to know the most effective social tactics and the best ways to engage their audience with social media.³ Marketers are also paying close attention to social media influencers who can reach consumers via their blogs and social networks. In addition, leveraging user-generated content by incorporating it into marketing campaigns often draws audiences to the authenticity of the content and offers the credibility of personal relationships. As a result, celebrity endorsements now compete with the trusted opinions of bloggers, online reviewers, or even friends and family. But whether it involves a trusted reviewer, a popular celebrity, or an enthusiastic fan, marketing campaigns involving social media and other user-generated content carry the risk of being deceptive, misleading or unfair advertising in violation of state and federal law, and self-regulatory standards, if not conducted properly.

Advertisers have also recently been developing various forms of “native advertising,” which is content implicitly or explicitly promotional of the brand, that has characteristics of editorial content and is less obviously an ad. Native advertising has become commonplace in social and other online media, and it is sometimes unclear who the speaker is and what connection the speaker has with a brands that has paid-for or otherwise provided consideration for the message. This too, can fall into the category deceptive or misleading advertising.

The Federal Trade Commission (“FTC” or “Commission”) is increasingly scrutinizing social media promotional marketing and native advertising through enforcement actions, updated guidelines, and other guidance and educational materials. Since 2004, the FTC has been articulating its understanding of how its authority over deceptive and unfair business practices applies to the use of social media by brands, and in the last year has extended this approach to native advertising as well. This article provides a summary of FTC's guidance and enforcement actions relating to social media, user generated content and native advertising, including its most recent direction on endorsements and testimonials.

¹ Maeve Duggan, Nicole B. Ellison, Cliff Lampe, Amanda Lenhard and Mary Madden, Pew Research Center, January 2015, “Social Media Update 2014” at <http://www.pewinternet.org/2015/01/09/social-media-update-2014/>.

² The Nielsen Company, *State of the Media: The Social Media Report*, at 20 (2012).

³ Michael A. Stelzner, Social Media Examiner, “2015 Social Media Marketing Industry Report,” May 2015, available at <http://www.socialmediaexaminer.com/SocialMediaMarketingIndustryReport2015.pdf>.

The FTC and Online Marketing

Section 5 of Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce,”⁴ empowers the FTC to regulate advertisements regardless of form or medium, including promotions involving third party endorsements and testimonials.

To provide guidance on how Section 5 governs the use of certain media, the FTC has over the years provided guidelines and FAQs. Although these guidelines and FAQs are not formal rules and regulations, they are key to understanding the FTC’s application of its “unfair or deceptive acts or practices” standard to social media promotions and sponsored content, which is critical in avoiding being the target of an FTC enforcement action.

Most relevant to a brand’s involvement with social media influencers (bloggers, celebrities and everyday users of social media) is the FTC’s guidance on the use of endorsements and testimonials. The FTC treats as an endorsement or testimonial any advertising message that “consumers are likely to believe that reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”⁵ The FTC applies a very low standard to what is an advertising message—essentially anything that promotes a brand or a product.⁶ However, the advertiser is not deemed responsible for every third party messages that may be complimentary to it, but will be held responsible for messages where there is a material connection between the brand and the endorser. In such case, the brand will be responsible for:

1. the truthfulness of the message;
2. disclosure to readers of the nature of the material connection between the brand and the speaker; and
3. taking reasonable efforts to monitor the messages conveyed by the influencers with which it has a material connection with and taking corrective action where influencer(s) make deceptive or misleading statements about the brand, its products, or services and/or fail(s) to disclose a material connection to the brand.

Given that when engaging and encouraging online influencers, unlike placing a traditional paid advertising buy of brand-created content, the brand may not generally control the content or publication of the promotional messages, these obligations create challenges for brands. The FTC has, however, provided brands with a roadmap of how to engage social media influencers, and engage in native advertising, in ways that it believes meet the brands responsibilities.

FTC Addresses Social Media

The introduction of the internet and correspondingly online advertising lead the FTC to address compliance challenges for online advertising, and in 2000 the FTC published its *Dot Com Disclosures*, which emphasized that traditional FTC rules regarding television, radio, and telephone advertising extend to advertisements via digital media.⁷ In 2009 the FTC released its first guidance to address promotions

⁴ 15 U.S.C. § 45.

⁵ 16 C.F.R. § 255.0(b).

⁶ See, e.g., *.com Disclosures*, *supra*, at 4; 16 C.F.R. § 255.0(c).

⁷ In 2013, the FTC updated its *Dot Com Disclosures* to provide new guidance for mobile and other online advertisers on how to avoid deception with clear and conspicuous disclosures. Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, March 2013, available at

via blogs and social media by updating its existing guidance on endorsements and testimonials.⁸ The primary focus was bloggers and celebrities' use of social media. As technology and innovation sped forward, the FTC has issued even more guidance at a faster pace than it had in the past. In 2012 the FTC released a FAQ document that provided additional examples and explanations for its 2009 guidelines.⁹ This time the FTC's attention was directed even more to social media, and it provided guidance on how companies should provide disclosures for endorsements and testimonials through various social media platforms.¹⁰ In June of 2015, the FTC provided further updated FAQs, entitled "What People Are Asking" to address uncertainty among advertisers about the ever-expanding role of endorsements and testimonials in social media advertising.¹¹ In each of these documents, the FTC has offered real world examples of when a social media message is an advertisement and what the advertiser should be doing to meet its obligations that:

1. material connections be disclosed;
2. endorsements be truthful and not deceptive; and
3. that influencers are adequately supervised by advertisers that engage them.

These obligations, as the FTC sees them, are as follows: the touchstone is whether a connection between the endorser and the seller of the advertised product might affect the weight or credibility of the endorsement.¹² Thus, when the endorser is provided something of value (even if minimal) in exchange for an endorsement, a material connection is created that requires public disclosure. For instance, a well-recognized athlete merely using an athletic product provided by the manufacturer, or a well-known celebrity who is paid to promote a product but who is not generally understood by consumers as a spokesperson for that product are both instances in which disclosure would be required. Less obvious examples include offering gifts, incentives, samples or commissions, to commentators, reviewers, bloggers, web sites, multi-channel networks (e.g. YouTube channels) and other online content publishers.

FTC regulations of endorsements and testimonials, as applied to online promotional messages about a brand by third parties, come down to four basic concepts: truth in advertising, material connections, disclosure, and monitoring. Each concept will be discussed below, with particular emphasis on how the new FAQs has affected these concepts.

<http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

⁸ GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING, 16 C.F.R. § 255.

⁹ For a concise summary of these guidelines, see John Nadolenco and Zachariah J. DeMeola, *4 Tips to Avoid FTC Scrutiny on Social Media*, MARKETING NEWS EXCLUSIVES, January 15, 2014.

¹⁰ A good summary of the FTC's evolving regulations up to and including the FTC's 2009 guidance, see Alan Friel, *Navigating FTC's Guidance on Social Media Marketing*, AdWeek, Nov. 30, 2009 and Fernando A. Bohorquez Jr., *Part II – All Native Advertising is Not Equal: Why that Matters Under the First Amendment and Why it Should Matter to the FTC*, iMedia Connections, Sept. 8, 2014, available at <http://blogs.imediaconnection.com/blog/2014/09/08/all-native-advertising-partii/>.

¹¹ Federal Trade Commission, *The FTC's Endorsement Guides: What People Are Asking*, May 2015, available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

¹² 16 C.F.R. § 255.5.

1. Disclosure of Material Connections

If there is a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, the FTC mandates that the message is a misleading ad unless the connection is made clear to consumers.

Type of Connection

Giving anything of value to someone prior to their providing an endorsement, even if posting comments on social media or reviews on a blog, could create a material connection in the eyes of the Commission. In its new FAQs, the FTC focuses on whether knowing about a gift or incentive would affect the weight or credibility the audience gives to the endorsement.¹³ Substantial payments to celebrities or gifts of free products in exchange for endorsements are obviously material connections. The FTC has made it clear that referral fees and commissions on sales generated by links and affiliate marketing commissions also establish material connections that merit disclosure. Further, accordingly to the FTC, even offering relatively modest gifts or incentives, such as coupons, entries into a contest, discounts, or the opportunity to appear in a television commercial has the potential to constitute a material connection.¹⁴

Context is crucial to this determination. For example, when a blogger receives a free product from a manufacturer under the condition that the blogger write a review, a connection is created that may require disclosure. There is no material connection when a consumer randomly generates positive content for product they purchase or when a company gifts a free product or something of value to a consumer *after* they randomly generate positive content, on a one-time basis. However, continually giving free products to consumers or repeatedly rewarding positive reviews, may create an expectation of future benefits from positive reviews, and thereby create a material connection.¹⁵

In addition, the updated FAQs note that pure product placement, or “merely showing products or brands in third-party entertainment or news content – as distinguished from sponsored content or disguised commercials,” does not require a disclosure that the placement was paid for by the advertiser.¹⁶ But it does not take much to convert a paid placement into a paid endorsement, and where the line is drawn in native advertising and social media posts is not yet entirely clear. For instance, the FTC opines that if a talk show host endorses or expresses an opinion as to the product, even only to describe “wow, this is awesome,” then the FTC would likely consider the situation to be more than a product placement. The safest course is erring on the side of disclosure.

Apart from giving something of value to an endorser, certain relationships create material connections that must also be disclosed. An endorser who is a relative or employee of the marketer must disclose that fact along with the endorsement.¹⁷

The FTC has actively enforced the disclosure requirement in recent months, emphasizing the importance of disclosing material connections between companies and their endorsers. On February 27, 2015, the FTC for the first time charged a company with misrepresenting online reviews by failing to

¹³ *The FTC's Endorsement Guides: What People Are Asking*, at 4.

¹⁴ *The FTC's Endorsement Guides: What People Are Asking*, at 5-6.

¹⁵ *The FTC's Endorsement Guides: What People Are Asking*, at 5.

¹⁶ *The FTC's Endorsement Guides: What People Are Asking*, at 8.

¹⁷ *The FTC's Endorsement Guides: What People Are Asking*, at 1.

disclose that it gave cash discounts to customers to post the reviews.¹⁸ AmeriFreight, an automobile shipment broker, provided consumers with a \$50 discount if consumers agreed to review the company's services online, and increased the cost its services by \$50 if consumers did not agree to write a review. In addition, AmeriFreight also notified consumers that they would be automatically entered into a \$100 per month "Best Monthly Review Award" for the most creative subject title and "informative content," and contacted consumers after their cars had been shipped to remind them of their obligation to complete a review to qualify for the award. Because AmeriFreight failed to disclose that the company provided incentives to their consumer in exchange for the reviews it published, and the consumer reviews failed to include such disclosure within the reviews, the FTC determined that AmeriFreight deceptively represented that its favorable reviews were based on the unbiased reviews of customers.¹⁹

More recently, on September 2, 2015, the FTC concluded an enforcement action against the gaming and media streaming website Machinima, Inc. for failing to disclose that it had paid the company to motivate "influencers" that post YouTube videos on the channels Machinima aggregates and operates demonstrating and in effect promoting Microsoft's Xbox One system and several related games.²⁰ Machinima operates a multi-channel network as a hub for user-generated videos created in real-time video game environments and otherwise. In its marketing campaign, it first paid a small group of influencers who were given pre-release versions of the Xbox One console and video games up to \$30,000 to produce and upload videos about the platform and related games, which subsequently generated as many as 730,000 views. Next, Machinima offered a larger group of influencers \$1 for every 1,000 video views, up to a total of \$25,000. Machinima did not require any of the influencers to disclose they were being paid for producing the content or that Machinima had been paid by Microsoft to have content about its platform and games produced and distributed. Consequently, the FTC took action that eventually resulted in a consent agreement, including twenty years of FTC supervision over Machinima practices and policies.²¹ This case has implications for what is becoming known as native advertising.

Forms of Disclosure

Endorsers with whom the company has a connection must disclose that connection clearly and conspicuously. The FTC's new FAQs highlight three factors to consider for prominently placing understandable disclosures in written endorsements.²² First, disclosure should be close to the endorsement—it is not sufficient to provide a link to a disclosure on another page, such as an "about us" or "general disclosures" page.²³ In addition, an "affiliate link" or "buy now" button alone insufficient.²⁴ For employees, a disclosure should do more than list an employer or have a company's logo somewhere on a biography or Facebook page. Disclosures should always be close to the endorsement.²⁵ Disclosures should also be viewable on any device or platform, including mobile web pages and short form media, such as Twitter. Second, disclosures should be in an easily readable font. Third, disclosures should stand

¹⁸ FTC, *FTC Stops Automobile Shipment Broker from Misrepresenting Online Reviews*, February 27, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-stops-automobile-shipment-broker-misrepresenting-online>.

¹⁹ Complaint, In the Matter of AmeriFreight, Inc., No. 142 3249, Federal Trade Commission (2015), available at <https://www.ftc.gov/system/files/documents/cases/150227amerifreightpcmpt.pdf>.

²⁰ FTC, *Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted by Paid 'Influencers'*, Sept. 2, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>.

²¹ Complaint, In the Matter of Machinima, Inc., No. 1423090, Federal Trade Commission (2015), available at <https://www.ftc.gov/system/files/documents/cases/150902machinima-cmpt.pdf>.

²² *The FTC's Endorsement Guides: What People Are Asking*, at 12.

²³ *The FTC's Endorsement Guides: What People Are Asking*, at 18.

²⁴ *The FTC's Endorsement Guides: What People Are Asking*, at 18.

²⁵ *The FTC's Endorsement Guides: What People Are Asking*, at 7.

out against the background. If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don't meet the "clear and conspicuous" standard.²⁶

In its updated FAQs, the FTC also addresses disclosures for video and audio endorsements. Disclosures for video should appear on the screen long enough to be noticed, read, and understood. The FTC warns that it is more likely that a disclosure at the end of the video will be missed, especially if someone doesn't watch the whole video, so placing the disclosure at the beginning of the review is recommended, but including multiple disclosures during the video is even better. Even so, no one should promote a link to a review that bypasses or skips over the disclosure.²⁷ Audio disclosures should be read at a cadence that is easy for consumers to follow and in words consumers will understand, and like video disclosures it should not be bypassed.²⁸ The FTC emphasizes that a disclosure that is made in *both* audio and video is more likely to be noticed by consumers.²⁹

As to what should be said in a disclosure, the FTC's new FAQs indicate that disclosures may be made in simple language, but must also convey essential information. Generally speaking, a disclosure should indicate what has been provided in exchange for an endorsement, such as payment or a free product, or mention the nature of the connection or dynamic of connection, such as employment with the manufacturer. For instance, statements like "I work for," "I got a free product," "I get paid on leads I generate," "I get commissions for purchases made through links in this post," or "I am an employee of" are likely effective. If more than one incentive was provided, the endorser should mention them all, i.e. "I got a free product and get paid on leads I generate."³⁰ On the other hand, an endorsement in short form media, such as Twitter, needs a disclosure in the same message. So, one Tweet requires disclosure in the same Tweet, which the FTC advises can be accomplished through short, general but unambiguous disclosures, such as "#Ad" or "Sponsored" labels. Notably, the hashtag in these examples is not required, but is recommended only as a way to be consistent with the venue custom (and possibly to help the FTC gauge compliance trends through hashtag searching). Ultimately, context is crucial—a disclosure should be made in a way that is consistent with the format and functionality of the social media platform.

Contests and sweepstakes entries, where consumers post about a brand as a method of entry, require disclosure too, since the consumer is motivated by a chance to win and other consumers should be aware of that motivation to evaluate the objectivity of the post. The FTC advises posting of the terms "contest" or "sweepstakes" as hashtags as an eligibility requirement to enter through a Tweet, post or pin.³¹ The FTC has warned that merely including an abbreviation like "sweeps" is not sufficient because many people would likely not understand what it means.³² In fact, the FAQ's guidance on contests or sweepstakes speaks directly to a recent FTC investigation of a promotional contest by shoe manufacturer Cole Haan. To promote Cole Haan shoes, the company asked consumers on social media site Pinterest to "pin" images of the company's shoes with the caption "#WanderingSole." The images would then appear on the consumers' personal "boards," where their followers could see what they had pinned. In exchange for the publicity, Cole Haan entered the participants into a sweepstakes to win a \$1,000 shopping spree. In a letter to Cole Haan, the FTC contended that the consumers' actions constituted endorsements of the

²⁶ *The FTC's Endorsement Guides: What People Are Asking*, at 12.

²⁷ *The FTC's Endorsement Guides: What People Are Asking*, at 13.

²⁸ *The FTC's Endorsement Guides: What People Are Asking*, at 12.

²⁹ *The FTC's Endorsement Guides: What People Are Asking*, at 12.

³⁰ *The FTC's Endorsement Guides: What People Are Asking*, at 10.

³¹ *The FTC's Endorsement Guides: What People Are Asking*, at 11.

³² *The FTC's Endorsement Guides: What People Are Asking*, at 14.

Cole Haan shoes, and that the #WanderingSole hashtag did not adequately communicate the sweepstakes incentive—a material connection between the contestants and the company in connection with a promotional post.³³ The FTC ultimately declined to pursue enforcement in the case because it had not previously given notice that entry into a contest was a material connection, or that a pin on Pinterest that merely mentioned or featured a brand could constitute an endorsement. Moreover, the FTC explained, the contest ran for a relatively limited period of time and received a relatively low response rate and, afterward, Cole Haan adopted a satisfactory social media policy that satisfied the FTC’s guidelines. Still, the Cole Haan case provides valuable prospective guidance for online advertisers considering campaigns that incorporate sweepstakes, contests and/or user-generated content.

2. Truthful Advertising

To begin with, truthful advertising is the overarching principle behind FTC guidelines. At its most basic level, endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser. In practice, this means that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.³⁴

False or Unsubstantiated Statements

Demonstrably false statements would clearly violate FTC regulations. Endorsements purported to be from “actual consumers” must, in fact, be from actual consumers. Moreover, selectively editing an endorsement in a way that would alter the opinion or statement would be a violation of FTC standards, even if nothing of value was provided to the endorser, because the advertisement does not fairly reflect the opinion of the endorser. A classic example specifically cited by the FTC is a movie critic’s negative review excerpted and taken out of context for a positive advertisement of the movie.³⁵

Apart from these examples, there are more subtle nuances of FTC guidance that are capable of catching a company in an unintentional violation. For example, while inviting people to post reviews of a business after they have actually used the business’ products or services is permissible, in its new FAQs the FTC is clear that it is “not a good idea” to give consumers a discount or other incentive in exchange for posting positive reviews, because it incentivizes false posts.³⁶ Of particular note in the updated FAQs is attention paid to social media sharing functions that allow users to “like” a product, pin a picture or share a link to communicate a preference for a product or brand. According to the FTC, “Like-gating,” or incentivizing customers to “like” or “share” brand on social media, could be an endorsement triggering disclosure obligations.³⁷ Although the FTC has not prohibited the use of these functions as part of incentivized promotion, it leaves open the possibility that it will find it deceptive for an advertisers to provide something of value to encourage promotional messages in a manner that does not allow for clear and conspicuous disclosures of the receipt of that benefit. Further, soliciting likes and shares from consumers who do not actually use and like the product is also possibly deceptive. Thus, brands should explain to consumers in the call to action that they should actually use and like the product to participate and be wary of giving an incentive for consumers to engage in messaging where disclosure of the incentive cannot be explained as part of that message.

³³ Closing Letter, Cole Haan, No. 142 3041, Federal Trade Commission (2014), available at http://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

³⁴ 16 C.F.R. § 255.1.

³⁵ 16 C.F.R. § 255.0, at Example 1.

³⁶ *The FTC’s Endorsement Guides: What People Are Asking*, at 16, 9.

³⁷ *The FTC’s Endorsement Guides: What People Are Asking*, at 9.

The general principle of truthful advertising also extends to the FTCs requirement for substantiated claims. Endorsers must, just as advertisers, have prior appropriate substantiation for claims made. In addition, atypical results, even if true, cannot be touted unless the typical results are clearly and conspicuously disclosed. Until 2009, the FTC permitted disclaimers of “results not typical” or “individual results may vary” to indicate that a noted consumer result, though true, was not typical. This no longer is sufficient.³⁸ Advertisers now have two choices: have substantial evidence to back up any claim that specific results shown in an advertisement are typical, or clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad. For example, even if an endorser had exceptional results from using a product, *i.e.*, “I lost 50 pounds in 6 months with WeightAway,” and a consumer cannot generally expect to get those results, the ad should disclose what consumers can generally expect, *i.e.*, “most women who use WeightAway for six months lose at least 15 pounds.”³⁹ And these standards are applied to endorsements made by influencers in social media, so brands need to educate their influencers and require their compliance to these new standards.

It is also deceptive advertising when a brand’s employees, or its agents’ employees pose as mere consumers. One of the more direct violations of these general principles occurred in March 2010, when the FTC alleged that Legacy Learning Systems Inc. deceptively advertised the “Learn and Master Guitar” program through online affiliate marketers who falsely posed as ordinary consumers and posted positive reviews of the product online without clearly disclosing that they were paid substantial commissions for every sale they generated.⁴⁰ In June 2011, Smith and Legacy Learning paid \$250,000 and agreed to maintain a system to review and monitor their affiliate marketers’ representations and disclosures.⁴¹ The advertising firm Deutsch LA faced liability over its less obvious word of mouth marketing campaign for the Sony Playstation Vita handheld gaming console.⁴² As part of its marketing campaign, the firm asked consumers to tweet about the console and include a “#GameChanger” hashtag within the tweet. A Deutsch LA account executive then allegedly sent a firmwide email encouraging Deutsch LA employees to participate by tweeting positive comments about the Vita from their personal accounts and including the “#GameChanger” hashtag. Deutsch LA employees complied with tweets such as “One thing can be said about PlayStation Vita...it’s a #gamechanger.” The FTC filed a complaint against Deutsch LA, contending that the firm misled consumers to believe that the tweets originated with actual users of the console, not with employees of the firm marketing the console. Because the tweets did not disclose this material connection, the FTC contended, they violated the FTC Act. The Deutsch LA case emphasizes a point the FTC reiterates in its guidance and FAQs, that no matter the medium—even in “space constrained” tweets—endorsers must disclose any material connections to the endorsed company to avoid deception.

3. Monitoring and Corrective Action

Scope of Regulations

As an initial matter, FTC guidelines make clear that advertisers are subject to liability for deceptive, false or unsubstantiated statements made through endorsements, including for failing to

³⁸ *The FTC’s Endorsement Guides: What People Are Asking*, at 21.

³⁹ *The FTC’s Endorsement Guides: What People Are Asking*, at 21.

⁴⁰ Complaint, In the Matter of Legacy Learning Systems, Inc., No. 102 3055, Federal Trade Commission (2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/06/110610legacylearningcmpt.pdf>.

⁴¹ Agreement Containing Consent Order, In the Matter of Legacy Learning Systems, Inc., No. 102 3055, Federal Trade Commission (2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/03/110315llsagree.pdf>.

⁴² Agreement Containing Consent Order, In the Matter of Deutsch LA, Inc., No. 112 3252, Federal Trade Commission (2014), available at <http://www.ftc.gov/system/files/documents/cases/141125deutschagree.pdf>.

disclose material connections between themselves and their endorsers.⁴³ As the updated FAQs explain, a company may be responsible for deceptive acts or practices by their employees and incentivized influencers. A company is also responsible for the practices of organizations or individuals it relies on to recruit or direct endorsers, as well as the statements made by the endorsers themselves.⁴⁴ This includes employees, agents, contractors, public relations firms, marketing network operators, publishers, and others. The FTC takes the position that advertisers are strictly liable, even for the acts and omissions of their agents and incentivized influencers. However, the Commission also makes clear that to foster a culture of compliance it will exercise its prosecutorial discretion not to go after brands and ad agencies that have good compliance, education, monitoring and enforcement programs and the FTC has suspended enforcement actions in many cases where it has determined this was the case and the offense were the result of a few bad apples acting in contradiction to appropriate policy.

Monitoring and Compliance

Given that a company is ultimately responsible for what others do on its behalf, advertisers need to have reasonable programs in place to train and monitor employees, agents and contractors and other influencers for compliance.⁴⁵ Clear policies governing the use of social media are the first step in ensuring effective training and monitoring, including strict disclosure requirements. Companies should undertake reasonable efforts to monitor those who are subject to the disclosure policy (such as bloggers or other promoters) to ensure compliance. The FTC acknowledges it would be unrealistic to expect a company to be aware of every single statement made by every member of influencer networks, so companies should also focus on efforts directed towards policy compliance and training.⁴⁶ These policies should be clearly communicated to any member of a company's influencer network, including employees, agencies, publishers and individual influencers. Records of disclosure policy and of communications, including contractual commitments, requiring compliance should be maintained.

More specifically, the FTC suggests that the scope of a monitoring and disclosure program should depend on the risk that deceptive practices could cause consumer harm. Consequently, an influencer network marketing health products may require more supervision than a network promoting a new fashion line.⁴⁷ In any case, the FTC offers four elements that every program should include:

- First, an advertiser should explain to members of its network what they can (and cannot) say about the products. For example, a company can provide a list of substantiated health claims members of its advertising network can make for its products;
- Second, companies should clearly instruct members of their networks on their responsibilities for disclosing their connections to that company;
- Third, companies should periodically search for what their influencers are saying; and
- Fourth, companies need to follow up if they find questionable practices, and make efforts to improve their programs for the future.

The importance of good policies and sound monitoring and compliance practices has been evident in a variety of instances where the FTC chose not to pursue enforcement action, notwithstanding

⁴³ 16 C.F.R. § 255.1(d).

⁴⁴ *The FTC's Endorsement Guides: What People Are Asking*, at 16-17.

⁴⁵ *The FTC's Endorsement Guides: What People Are Asking*, at 16.

⁴⁶ *The FTC's Endorsement Guides: What People Are Asking*, at 16.

⁴⁷ *The FTC's Endorsement Guides: What People Are Asking*, at 16.

certain failures to disclose material connections. For instance, in 2010 Ann Taylor Loft invited bloggers to preview its summer collection, offering a “special gift,” and promising that those posting coverage from the event would be entered into a “mystery card drawing,” where they could win between \$50 and \$500. Even though the FTC was concerned that bloggers failed to disclose that they received gifts for posting content about the event, Ann Taylor posted a sign at the preview that bloggers should disclose gifts, maintained a written policy stating LOFT would not issue gifts without first telling bloggers to disclose them, and several bloggers actually disclosed the gifts they received. Based on these factors, the FTC determined not to recommend enforcement action.⁴⁸ In similar fashion, and based on similar factors, the FTC in 2013 decided against recommending enforcement action against Nordstrom Rack after social media influencers who attended a “Tweet Up” event failed to disclose that Nordstrom provided them gifts, including a \$50 gift card, for attending the event.⁴⁹

More recently, in the Machinima matter, while the FTC determined that Microsoft was responsible for the Machinima influencers’ failure to disclose their material connection to Microsoft, the FTC opted not to recommend enforcement action against Microsoft because the offenses appeared to be isolated incidents that occurred in spite of, and not in the absence of, policies and procedures designed to prevent such lapses. Of particular importance to the FTC, Microsoft also quickly required Machinima to remedy the situation after they learned that Machinima was not requiring or otherwise making the necessary disclosures.⁵⁰ Given the FTCs consistent appreciation for sound social media monitoring policies and efforts for corrective action when policies are not followed, companies are well-advised to keep informed of updates in the area and develop a policy to remain within the FTC’s constraints.

Special Considerations for Employee Social Media Policies

In putting together an effective social medial policy and compliance program, companies should also be mindful of their obligations under labor laws. In particular, the National Labor Relations Board has issued guidelines extending protection over certain work-related conversations conducted on social media.⁵¹ Under the National Labor Relations Act company may not prohibit or unduly burden employees’ ability to discuss their workplace or employment conditions and cannot require employees to make private social media accounts and posts available for review without violating labor laws.

Generally, potentially unlawful restrictions would include restrictions regarding communicating working conditions or disparaging comments about an employer, requirements that employees obtain management approval before posting content on social media, and restricting communications with outside parties. Conversely, restrictions on information communicating the performance of company’s

⁴⁸ Closing Letter, Ann Taylor Stores Corp., No. 102 3147, Federal Trade Commission (2010), available at http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf.

⁴⁹ Closing Letter, Nordstrom Rack, No. 122-3167, Federal Trade Commission (2013), available at https://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf.

⁵⁰ FTC, *Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted by Paid ‘Influencers,’* Sept. 2, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>; see also Closing Letter, Microsoft/Starcom, No. 142-3090, Federal Trade Commission (2015), available at https://www.ftc.gov/system/files/documents/closing_letters/nid/150902machinima_letter.pdf.

⁵¹ National Labor Relations Board, *The NLRB and Social Media*, available at <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>.

products or services or privileged or proprietary information, social media posts that violate state or federal law, and communicating in the name of the company are all potentially lawful policies.⁵²

Special Considerations for Particular Content and Media

With its updated FAQs, FTC guidance has special importance to newer and evolving forms of media. In particular, companies making use of “native advertising” and multi-channel networks should take note of FTC guidance and recent enforcement actions related to disclosure requirements in a couple of ways.

First, companies should understand the scope of their social media network and who is included. The FTC will hold publishers on any channel, whether broadcast, print or digital, responsible when creating or distributing content for marketers that constitutes a deceptive act or practice, so paying close attention to FTC disclosure guidelines is even more important when accounting for the various influencers or publishers involved in making the advertisement or endorsement.

Second, the unique qualities of native advertising or multi-channel network content itself is important. Native advertising takes many forms, but essentially it is content paid for by an advertiser that appears to be editorial content, that is a website or application’s content as opposed to an inserted paid ad. An article written by an advertiser to promote a product using the same form as an article written by the editorial staff would be one example of native advertising. The major concern here is that a significant number of consumers will not be able to distinguish paid advertising from other content, which could draw FTC attention or enforcement activity. Although the FTC has not yet issued specific guidance for native advertising, its updated endorsement and testimonial FAQs touch on native advertising and suggest that curative, effective disclosure will rely on how such advertising is displayed and labeled. Thus, disclosures should be prominent in the context in which users engage the advertisement. This would likely require the use of a type of font or graphic that is different from the editorial content, in addition to using shading and borders to separate the ad from other content. Disclosures should otherwise be clear and conspicuous by stating something unambiguous like “ad,” “advertisement,” “content paid for by [Brand],” or “sponsored by [Brand],” but simply stating “promotional consideration by [Brand]” or “brought to you by [Brand]” may not be sufficient as a significant number of consumers may not understand what those disclosures denote.⁵³ Less clear disclosures could be supplemented by a further explanation such as is currently used by several online publishers such as: “This Sponsored Content was

⁵² More information on NLRB regulations of social media policies can be found at Barry J. Bendes, Alan L. Friel, and David C. Kurts, *Employers Need to Review and Revise Social Media, Blogging and Privacy Policies After NLRB General Counsel Report*, LexisNexis, June 2012, available at http://www.martindale.com/labor-employment-law/article_Edwards-Wildman-Palmer-LLP_1524040.htm.

⁵³ See Alan L. Friel and Fernando A. Bohorquez, Jr., *FTC Clarifies Native and Online Ad Obligations*, Baker Hostetler Data Privacy Monitor, June 17, 2015, available at <http://www.dataprivacymonitor.com/social-media/ftc-clarifies-native-and-online-ad-obligations/>. Friel and Bohorquez note that in her June 3, 2015 presentation to the Clean Ads I/O Conference, FTC Associate Director of Advertising Practices, Mary Engle, stated that a simple “Sponsored” label on Native Advertising such as has become common on BuzzFeed, Wired and Gawker, would be an insufficient way of explaining the material connection between the publisher and the brand if the notice was not so prominently given that 85 to 90% of readers saw the disclaimer when reading the content, even if they only read the headline. She explained the “FTC uses tests determining what consumers saw to measure how misleading an ad is.” She also announced that the FTC would go after both the brands and the publisher since in Native Advertising the “publisher is creating the content” as opposed to merely distributing it. For more on the legal risks of native advertising, see Alan L. Friel and Fernando A. Bohorquez Jr., *Navigating The Legal Risks Of Native Advertising*, Law360, March 5, 2015, available at <http://www.law360.com/articles/627657/navigating-the-legal-risks-of-native-advertising>. See also Fernando A. Bohorquez Jr., A guide to native advertising's legal issues, iMedia Connection, Dec. 2, 2013, available at <http://www.imediaconnection.com/content/35490.asp#multiview#7JGYpGljBCF7bM5o.99>

developed by our advertising department for [Brand] and our editorial staff had no involvement with its creation or selection.” It is advised that the more promotional the content, the more clear and unambiguous the disclosure be. However, based on FTC commentary and its position that post merely referencing a brand in a social media contest entry was an endorsement, erring on the side of unambiguous disclosure is recommended.

The major issue for multi-channel networks is ensuring that disclosures are effective when video content is prominently featured in an advertisement. Disclosure of material connections must be displayed clearly and prominently in the video itself. Disclosures in a description field alone are insufficient and companies should take care to ensure that disclosures on the video itself are not obscured by any other advertisement or label from the website or venue.⁵⁴ While disclosures in the beginning of a shorter video may be sufficient, longer videos should have recurring, multiple disclosures, and for live-stream videos the most effective disclosure would be continuous throughout the video. In the context of a YouTube multi-channel network, the updated FAQs explain that the disclosure on compensated reviews needs to identify the sponsor in a “sponsored by” notice made by the product manufacturer.⁵⁵

Best Practices⁵⁶

- Free products for review and any compensation or reward should be disclosed.
- Make sure that disclosures are clear and conspicuous. For short form media, such as Twitter, disclosures should be viewable on any device or platform, including mobile web pages and short form media, and be included at the front of the message. If a Tweet is followed by links to other content or multiple hashtags, it is more effective to put the disclosure up first to make it distinguishable. Videos must also contain disclosures, and a disclosure that is embedded in the video and continuous is most effective, particularly for longer videos.
- There is no magic language for disclosures, but the FTC has consistently said that unambiguous disclosures such as “ad” or “I received X from Y company” are sufficient. Make sure to require entrants to include “contest” or “sweepstakes” in posts that are an entry for a chance to win. And the FTC advises to spell out “sweepstakes,” opining that the consumers may not understand “Sweeps.”
- While the FTC fails to explain what kind of disclosure would be sufficient as part of native advertising, in the content of social media they state that “AD,” “#AD,” “Sponsored,” “Promotion” and “Paid Ad” are all “likely effective.” Accordingly a clear and conspicuous disclosure using these terms proximate to the beginning of sponsored content and other native advertising would seem to be similarly sufficient, and it is advised to supplement these short form disclosures with a more detailed explanation that the editorial staff had no involvement in the creation or selections of the content, but rather that it was developed by the advertising staff and the brand.
- In the context of a YouTube Multi Channel Network (MCN) that distributes product reviews by users, the new FAQs explain that the disclosures on compensated reviews

⁵⁴ *The FTC’s Endorsement Guides: What People Are Asking*, at 11.

⁵⁵ *The FTC’s Endorsement Guides: What People Are Asking*, at 11.

⁵⁶ For additional recommendations and analysis of the updated FAQs, see Alan L. Friel and Fernando A. Bohorquez, Jr., *FTC Clarifies Native and Online Ad Obligations*, Baker Hostetler Data Privacy Monitor, June 17, 2015, available at <http://www.dataprivacymonitor.com/social-media/ftc-clarifies-native-and-online-ad-obligations/>.

need to identify the sponsor in a “Sponsored by ____” notice be the product manufacturer, not the MCN.

- Each new review and incentive should be disclosed.
- Advertisers have an ongoing obligation to ensure disclosure. If a product changes, an endorsement must be updated to ensure the advertising is not deceptive.
- Social media policies and programs should include employee, agent, contractor and influencer compliance training and education. Companies should explain to their network members what they can and cannot say about products, such as providing a list of the health claims network members can make. Also, companies should take care to instruct network members on their responsibilities for disclosing any material corporate connection. Likewise, companies should incorporate the guidelines from their social media policies into agency contracts and should document contractor compliance with those policies.
- Social media policies need to be carefully crafted not to chill employees’ protected speech rights.
- Having a social media policy is not enough without some practice of monitoring and corrective action. Companies should conduct periodic searches on what their network members are saying and how they are saying it, and should address any questionable practices as soon as possible. If amending or revising a policy or program is necessary to address any failure in compliance, companies should do so.

Additional Resources

For further review, the following resources are helpful in understanding FTC guidance:

Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, March 2013, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

FTC Endorsement Guidelines, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255, available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

Baker Hostetler Data Privacy Monitor Blog, available at <http://www.dataprivacymonitor.com/>

iMediaConnection Social Media Blog, available at <http://blogs.imediainconnection.com/blog/author/fernandobohorquez/>

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