

Advertising on the Cutting Edge

What you need to know about the FTC, native advertising and social media

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The Federal Trade Commission (FTC) recently has taken steps through enforcement actions to shine a bright light on the differences between advertising and endorsement, on the one hand, and unsolicited and impartial consumer response, on the other, in across various forms of social media, including Facebook, YouTube, Instagram, Twitter and others. These decisions impact all forms of online retailers and advertisers, from online gaming to fashion retail. There is no question that the increased frequency of these cases signals that the FTC is scrutinizing social media advertising and becoming more vigilant in enforcing the simple rule that advertisements and marketing that promote goods or services must be clearly identified as advertising.¹ To avoid these potential legal issues, it is important to understand how recent FTC enforcement actions impact online and native advertising, influencers and social media.

Endorsement Guidelines in the Age of Social Media

The FTC's guide on the use of endorsements in advertising entitled "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (Endorsement Guides), first published in 1980, defines an endorsement as "any advertising message ... that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser." The FTC updated the Endorsement Guides in 2009 and issued "The FTC's Endorsement Guides: What People Are Asking" in June 2010 to address the most frequently asked questions (FAQs).²

In June 2015, the FTC revised the FAQs to expand on original topics and address new social media issues not previously covered: "The key principle is that consumers have a right to know when a supposedly objective opinion is actually a marketing pitch."³ The revised guidelines make clear that social media

is no exception – the basic rules still apply, even to bloggers and influencers:

- Endorsements must reflect the truthful experience of the endorser. Social media participants cannot make claims that require proof that does not exist;
- The endorser must clearly disclose and endorse any material connection between the endorser and the advertiser;
- Each company advertising should have a company policy regarding employee use of social media and a robust compliance program, including specific training and guidance relating to the FTC's Enforcement Guides; and
- Advertisers should make training available to employees, vendors and personnel at respective advertising agencies and implement a response-and-remediation program to take immediate action when given notice of improper or insufficient disclosure.⁴

Helpful Do's and Don'ts for Online Advertisers and Retailers

Don't Tweet and Not Disclose

In 2012, the advertising agency Deutsch LA promoted the PlayStation Vita (PS Vita) gaming console by creating a Twitter campaign that asked users to tweet positive statements about the handheld gaming device with the hashtag #GameChanger. The FTC alleged that Deutsch LA misled consumers by encouraging its own employees to promote PS Vita on Twitter without disclosing they were Deutsch employees and that PS Vita was a client.⁵ This was the first action of its kind involving Twitter and misleading behavior. Notwithstanding this fact, the FTC made it clear that the guidelines were applicable to Twitter.⁶

Don't Go Native Without Disclosing That It's Advertising

In 2016, in the first case involving native advertising, the FTC alleged that Lord & Taylor deceived consumers by promoting the launch of its Design Lab Collection and featuring a paisley dress through paid native advertising, including a sponsored article in the online fashion publication *Nylon* and a *Nylon* Instagram post, without disclosing that these were paid promotions.⁷ While the influencers were free to style the paisley dress as they wanted, Lord & Taylor required each influencer to use the Instagram



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user designation @lordandtaylor and the hashtag #DesignLab in the caption of their photo posting. While Lord & Taylor also preapproved each proposed post, it failed to require the influencers to disclose that Lord & Taylor paid them to post the photo, and no influencers made any such disclosures.⁸

The FTC settlement prohibits Lord & Taylor from “misrepresenting, in any manner . . . that an endorser of such [Lord & Taylor] product or service is an independent user or ordinary consumer of the product or service.” Lord & Taylor is also required to “clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists, between such [Lord & Taylor] endorser ad.” Lord & Taylor is required to establish a monitoring and review program for its endorsement campaigns, including, inter alia, provisions requiring the termination of any endorser who has misrepresented his or her impartiality or failed to make a clear and conspicuous disclosure.

The FTC noted: “The watchword is transparency. An advertisement or promotional message shouldn’t suggest or imply to consumers that it’s anything other than an ad.”⁹ Social media influencers must clearly and conspicuously disclose any material relationship between the brand and him/herself. The disclosure should use a contrasting font and type that is easy to read and stands out. The test to determine if disclosure is required regarding an individual social media post is whether knowing about the gift or incentive given by the brand to the social media influencer affects “the weight or credibility” readers or viewers give to the recommendation.

Influencers – Don’t Post the Video Unless You Disclose Who Paid for It

An entertainment network that worked for Microsoft’s ad agency, Starcom, paid a large group of “influencer” bloggers to promote Microsoft’s Xbox One by producing and uploading YouTube videos of themselves playing Xbox One games. No disclosure of the network’s compensation was required and many of the videos lacked disclosure. The 2016 order settling the FTC’s charges prohibits the network from misrepresenting in any influencer campaign that the endorser is an independent user of the promoted product. Among other things, the order also requires disclosure of any material connection between the endorser and the advertiser, and it prohibits compensating any influencer who has not made the required disclosures.

Consumers have a right to know when a supposedly objective article or social media post is actually a paid promotion.

In addition, the order requires follow-up within 90 days of the campaign launch to ensure the disclosures are still being made. The FTC issued a closing letter but did not take action against Microsoft and Starcom because of the “robust” compliance program, guidance, and training for employees, vendors, and Starcom personnel. The FTC also noted that Microsoft and Starcom had taken swift action to require proper disclosures once put on notice.¹⁰

You Cannot Use a “Ring of Power” to Hide Sponsorship of Video Content

In 2014, Warner Bros. Home Entertainment launched an online advertising campaign designed to generate buzz within the gaming community for the new release of *Middle Earth: Shadow of Mordor*, a fantasy game based on *The Hobbit* and the *Lord of the Rings* trilogy. During the campaign, Warner Bros., through its advertising agency, hired online influencers to develop sponsored gameplay videos and post them on YouTube and promote the videos on Twitter, Facebook and other social media. According to the FTC complaint, Warner Bros. paid each influencer between hundreds to tens of thousands of dollars and gave them a free advance-release game.¹¹ The FTC alleged that Warner Bros. failed to require the paid influencers to disclose that the videos were sponsored content and clearly and conspicuously disclose Warner Bros.’s sponsorship. The FTC order prohibits Warner Bros. from misrepresenting that any such gameplay videos are independent opinions or the result of impartial video game consumers and requires clear and conspicuous disclosure of any material connection between Warner Bros. and any influencer or endorser.¹²

The FTC has stepped up enforcement of social media advertising and this is likely to continue. Advertisers and retailers must be mindful that if any content is sponsored or any influencer or spokesperson is paid to promote a product or service online, a clear and conspicuous disclosure is required. It is possible that FTC enforcement may soon include focus upon endorsers and influencers and require clear and conspicuous disclosures by them regarding the endorsement of products or services for compensation.

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