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INSIGHT: Retailers Should Check Their Social Media Practices Before the FTC Makes Its Next Move



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As customers learn to jump, swipe, and pay their way past traditional advertisements, retailers are becoming more reliant on more subtle forms of endorsement. Indeed, *Business Insider* and *Mediakix* report that the number of sponsored Instagram posts nearly doubled in 2017 and that Instagram influencer marketing could reach \$2 billion by next year. By 2022, influencer marketing could become a \$5 to \$10 billion industry.

Over the last three years, the Federal Trade Commission (FTC) has repeatedly identified sponsored social media endorsements as a high-priority issue. It has issued and updated detailed guidance for how to disclose sponsored content. And, if that were not a clear enough signal, last year the FTC sent letters to 91 brands and influencers (people paid to endorse products on their social media profiles and elsewhere), educating them on their need to disclose sponsored content.

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Although the FTC has not taken any public action in this area in a year or so, retailers should not assume the Commission has moved on to other issues. Rather, businesses should make sure that their sponsored social media practices comply with the FTC's guidance—or risk becoming its next target.

A History of the FTC's Interest in Sponsored Endorsements For years, the FTC has considered it deceptive for an advertiser to solicit a review or endorsement that might lead consumers to believe the review is unbiased. The *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (Endorsement Guides), which have been in effect since 1980, provide: "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."

This policy rests on the general principle that consumers rely on other users' reviews when deciding where to spend their money. When the reviewer has an ulterior motive for posting the review, the review may have the potential to deceive unless the endorser discloses that motive. The Endorsement Guides were updated in 2009 to include examples of how this rule might apply to consumer-generated media, such as blogs and online message boards. Soon thereafter, the Commission published *What People are Asking*, an informal staff publication focused on answering advertisers' frequently asked questions (henceforth, "FAQs").

The FTC updated these FAQs again in May 2015 and September 2017 to address specifically how the Endorsement Guides apply to sponsored social media content. The FAQs explain that an endorsement should always disclose a "material connection" between the endorser and the advertiser, even where space is limited,

when “knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation.” At a minimum, sponsored posts on Twitter, Instagram, Facebook, and Pinterest should be accompanied by #ad or #sponsored (which the FTC points out require only three and 10 characters, respectively).

Material Connection

The FAQs make clear that a company can have a material connection with *anyone* with an incentive to post about it, including: employees who discuss the company’s product on their personal social media pages; bloggers who receive free products (or money) to do reviews on their websites; reviewers who make money each time a visitor clicks an affiliate link on their website; and customers who post about a specific product to enter an advertiser’s contest. The disclosure requirement applies even when the reviewer agrees to do a review without agreeing the review will be positive, or when an endorser’s post does not expressly say anything positive.

Clear and Conspicuous

To satisfy the Endorsement Guides, the disclosure must be clear and conspicuous. This means consumers must be able to see and understand the disclosure easily—it cannot be necessary to search for it. Bloggers cannot satisfy this requirement by posting a single disclosure on their homepage stating that many of the products they review are given to them for free by advertisers. For video endorsements, the FTC advises the disclosure should both be included as text overlay and vocalized in the video itself, not just in the video’s text description. Additionally, when it is likely viewers may not watch the video from start to finish, disclosures should be made throughout the video to ensure they are viewed.

FTC Answers Frequently Asked Questions

The FTC’s September 2017 updates to *What People Are Asking* responds to many specific practices used by influencers. For example, the FTC advises:

- It is “not necessarily” sufficient for influencers to rely on disclosure tools, such as the “Sponsored,” “Paid promotion” and “Paid partnership” labels on Facebook and Instagram, respectively, or YouTube’s feature that can superimpose the disclosed “Includes paid promotion” into the lower corner during the first 10 seconds of a video. The FTC observed that visitors might not view disclosures included above or in the bottom corner of posted content. “The big-picture point is that the ultimate responsibility for clearly disclosing a material connection rests with the influencer and the brand—not the platform.”

- Tagging a brand counts as an endorsement, even where the post does not describe or praise a product.

- Simply thanking a brand “is probably inadequate”—instead, the disclosure should set forth what the brand provided (for example, money, a free product, travel expenses, etc.).

- If an influencer travels abroad for a U.S. brand, the Endorsement Guides still apply.

- Where a platform truncates the body of a caption—such that only the first few lines of a post will be visible until a viewer clicks “more” to see the rest—required disclosures should be included above the “more” link.

- Disclosures are still required on platforms like Snapchat that do not provide a way to include a text

caption and can be superimposed onto the post itself; audio disclosures may not be sufficient given that some users watch videos without the audio.

FTC Warns Influencers

In addition to updating its guidance for disclosing sponsored content, in 2017 the FTC for the first time reached out directly to educate social media influencers themselves. In April 2017, the Commission sent more than 90 educational letters to celebrities such as Jennifer Lopez, Chiara Ferragni (of the Blonde Salad blog) and Victoria Beckham, and to brands such as Chanel and Adidas, to educate them on the need to follow the Endorsement Guides. These letters were informed by a 95-page petition from Public Citizen listing examples of undisclosed sponsored social media content.

In September 2017, the FTC sent a follow-up warning letter to 21 of the same recipients, citing specific social media posts that appeared to endorse a brand but failed to disclose clearly and conspicuously a material connection between the brand and the influencer. This latest round of letters asked the recipients to inform the FTC whether the posts were in fact sponsored, and if so, to outline the steps they would take moving forward to comply with the Endorsement Guides. After the letters, the FTC held a question-and-answer session on Twitter to educate influencers and brands about their obligations to disclose sponsored posts.

Further, the FTC brought what it described as “FTC’s First-Ever Complaint Against Individual Social Media Influencers.” Notably, the targeted influencers were not typical paid influencers—instead, they owned the on-line gambling website at the center of the campaign and had failed to disclose their relationship to the company in their social media posts touting the company’s services. The complaint highlights the potential for actions against owners and employees of companies that use social media individually to promote their business, and should also put influencers on notice that their content must be FTC-compliant.

Since the campaign of September 2017—the updated FAQs, follow-up letters, question-and-answer session on Twitter, and the enforcement action—the FTC has not made any other public statements or taken any other public actions in this area.

FTC Enforcement: Beyond the Warning Letters

Over the last decade, the FTC has brought about a dozen enforcement actions concerning the use of sponsored content on social media and blogs.

With the exception of the September 2017 action mentioned above, the FTC’s actions have generally targeted large brands—including retailers and advertising agencies—who allegedly incentivized positive reviews for their products or the products of their clients. For example, Ann Taylor, Lord & Taylor, and Hyundai have each been investigated for providing gifts to bloggers or other influencers, who in turn failed to make necessary disclosures.

Advertising agency Deutsch LA and public relations agency Reverb Communications, Inc. each settled actions with the FTC involving allegations that their employees used personal social media accounts to endorse video games being promoted by the agencies. Similarly, in 2015, the FTC announced a settlement with Machinima, Inc. (which touts itself as “the most notorious purveyor and cultivator of fandom and gamer culture”) for paying “influencers” up to \$30,000 each to post YouTube videos endorsing Microsoft’s Xbox One sys-

tem and several games, without requiring disclosure of the compensation.

Notably, the vast majority of these actions were settled *before* the FTC began issuing guidance specific to social media in May 2015. Although the FTC's frequent statements and warning letters concerning social media endorsements might have suggested that an onslaught of new enforcement actions was on the horizon, no such wave has yet arrived.

How Advertisers Can Protect Themselves Nevertheless, retailers should not assume that the FTC has dropped this issue. At least some of the recipients of the FTC's letters have been regularly monitored by the FTC since receiving those letters. The Commission will likely consider bringing actions against companies and influencers—whether or not they have received educational letters—if they ignore the FTC's numerous warnings and fail to bring their practices into compliance.

To help mitigate the risk of being the FTC's next target, companies that use social media influencers should have a reasonable training program and auditing process in place to make sure that those in their network—including influencers, employees, and anyone with a material connection—comply with the FTC's guidance when promoting the company or its products. These programs and processes should include the following elements:

- **Make Sure Your Contract Protects You.** Written contracts should require influencers to comply with the FTC Endorsement Guides and should maintain the right to immediately terminate the arrangement in the event of noncompliance. Contracts can also mandate specific disclosures that should appear in sponsored content, such as #ad, #sponsored, or #[BRAND]Partner or where such disclosures should be posted. Retailers should also consider adding an indemnity clause in their influencer agreements, stating that the endorser is liable for any false advertising damages tied to the absence of an endorsement.

- **Educate Your Influencers.** Retailers should consider taking the additional step of educating the paid influencers promoting their brands on FTC compliance. This not only means educating the influencers on the Endorsement Guides' guidance, but also general advertising dos and don'ts (e.g. an advertisement may not be false or misleading). When preparing contracts and/or influencer guidelines, brands should be careful to avoid using language that could be interpreted as providing legal advice to the influencers, who might in turn try to blame the company if down the line they face legal or regulatory action in response to a sponsored post.

- **Monitor Their Compliance.** Retailers should make a reasonable effort to know what influencers and others with material connections with the brand are saying about their brand or products. This may be done by having an auditing process in place. The FTC recognizes that "It's unrealistic to expect you to be aware of every single statement made by a member of your network," and that "it's unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place."

- **Correct Noncompliance Immediately.** When a company learns that someone in its network has failed to disclose a material connection with the company or other required disclosures, it should address that non-

compliance immediately. The FTC will likely not look fondly upon evidence that the brand knowingly overlooked noncompliance.

- **Third Parties.** The FTC has made clear that brands working with third-party advertising or PR firms are still responsible for the content that they sponsor. Brands should thus take reasonable steps to verify that the third parties acting on their behalf have appropriate programs in place to train and monitor influencers and employees. Brands should also consider requiring third-party agencies to periodically provide reports confirming that the program is following through with such training and monitoring.

- **Employment Training.** Because many retailers have been targeted for posts made by their employees, rather than by third-party endorsers, retailers should have clear internal policies in place that require employees to disclose their connection with the company before posting about its products.

Thus far, the FTC has looked kindly on retailers that either had policies in place calling for reviewers to disclose any material relationship, or that ended the allegedly deceptive practice soon after it occurred. Developing a compliance program would therefore not only reduce the likelihood that the company would violate the *Endorsement Guides* in the first place, but would also reduce the likelihood of an FTC action in the case that a violation ever does occur.

The FTC's enforcement action against video game promoter Machinima, mentioned above, provides a helpful example. There, the FTC decided not to take action against Microsoft, the brand being promoted, or its advertising agency Starcom, because Microsoft had in place at the time of the violation a "robust" compliance program, including specific legal and marketing guidelines concerning the FTC's Endorsement Guides, which they had shared with employees, vendors and Starcom personnel. The FTC also noted that after the Machinima campaign at issue, Microsoft and Starcom each adopted additional safeguards regarding sponsored endorsements and further committed to other steps, such as requiring their employees to monitor influencer campaigns conducted by subcontractors in the future. The FTC also noted favorably the fact that Microsoft and Starcom immediately required Machinima to add disclosures to the sponsored content after being made aware that the content lacked such disclosures.

Is It Possible for a Compliance Program to Be Too Robust? There may be such a thing as exercising too much control over one's influencers—at least from an employment law perspective. On April 30, 2018 in *Dynamex Operations West, Inc.*, the California Supreme Court substantially narrowed the class of individuals who qualify as independent contractors under California wage-hour law. Under this decision, every worker is presumed to be an employee unless the employer can show that the worker:

- is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;

- performs work that is outside the usual course of the hiring entity's business; and

- is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In most cases, a brand-influencer relationship should easily satisfy the second and third requirements. The first factor, however, is more complicated, especially for businesses that have implemented thorough posting requirements and training programs for their influencers (which, again, is what the FTC Endorsement Guides recommends). The test for “freedom from control and direction” is whether the employer controls the manner and methods by which the purported independent contractor (here, the influencer) creates the final product. If so, she is a misclassified employee.

Notably, it is permissible for employers to require independent contractors to comply with state or federal laws, without transforming them into employees. (For example, many employers have anti-harassment policies and/or trainings.) Brands should therefore make clear that influencer training materials are intended to promote compliance with FTC guidelines. While training materials can—and, according to the FTC, should—

teach influencers how to disclose their material connections to the brand, brands should avoid implementing company-specific rules. So while it would be appropriate to offer examples of FTC-compliant hashtags that influencers could use to disclose a material connection (e.g. #BrandNamePartner), brands should avoid telling influencers *exactly how* to go about implementing their disclosures.

Conclusion As compared to legacy advertising—such as television, billboards, and magazines—social media influencer endorsements are still in their infancy. The advertising practices in this area are changing, and the FTC is trying hard to keep up. Retailers should review their current practices to make sure that they are in compliance with the FTC’s latest guidance, or they could risk being made an example of if and when the FTC begins taking more aggressive action.