

Publications

Best Practices For Social Media Marketing: Navigating The FTC's Updated Guidance, Straightline

Fall 2017

There has been a proliferation of social media campaigns with the significant increase in consumers' presence online. Companies in all industries and sectors are using social media to create buzz around their products, services and events, often without first adopting policies and guidelines. Influencers and even employees who have a social media following can extend the reach of traditional advertising. However, the informality and viral spread of social media campaigns makes this type of marketing particularly vulnerable to running afoul of advertising laws and regulations.

General Rules For Advertising. The first rule for advertising is always to be truthful: Make statements about your brand that can be supported. Second, always ensure the source of the product or services that are promoted is clear in order to avoid false advertising or false association claims. The latter task becomes more confusing in the world of social media marketing, when celebrities or social media "influencers" post on their own individual social media accounts on behalf of a company.

Risks For Brands and Influencers. If you are or represent a brand owner that partners with a social media influencer or celebrity to promote a product or brand, you may have liability if the proper disclosures are not used by that influencer. For example, the brand may be liable for violating the Federal Trade Commission's ("FTC") Endorsement Guidelines or for false advertising under the Lanham Act (15 U.S.C. §§ 1051 et seq.), or may have liability under a range of other regulations and state laws. Historically, only brands were held accountable for social media endorsement violations. Recently, however, the FTC shifted its focus to include social media influencers and endorsers and settled its first-ever complaint against individual influencers. In that case, two influencers did not disclose their ownership of a company they promoted on their YouTube channel. *In the Matter of CSGOLOTTO Inc.*, Case No. 162-3184 (F.T.C. September 7, 2017).

Enforcement of FTC's Social Media Guidelines. Social media campaigns that do not comply with advertising laws or FTC regulations can result in consumer complaints, reputational damage, FTC enforcement and litigation. In 2017, several social media campaigns were reported to the FTC as violating the Endorsement Guidelines. Separately, a lack of disclosures on the social media campaign for the Fyre Music Festival was the subject of a class action lawsuit for fraud and false advertising. To underscore its guidelines, the FTC sent out a series of letters reminding influencers of their duty to disclose required information. In addition, the FTC updated the "Frequently Asked Questions" section of its Endorsement Guidelines. These actions all indicate that brands and influencers have increased risk of liability and reputational damage.

What Do Brands and Influencers Need to Know About Social Media Disclosures?

Do Disclose Financial Ties and Sponsorships: The disclosure must clearly and conspicuously convey a financial relationship. The use of #SPONSORED or #AD at the beginning and/or end of the caption of a post is sufficient. For social media formats that do not allow for text captions, disclosures should be superimposed on images so that they stand out to the viewer.

Don't Use Ambiguous Terms: Do not use ambiguous forms of disclosure such as #SPON, #PARTNER, #COLLAB, #THANKYOU, #AMBASSADOR. Even if the marketing campaign is categorized as a brand ambassadorship, this term doesn't necessarily convey to consumers that the influencer is being paid or received some type of consideration to endorse the brand. The FTC advises that #AMBASSADOR should be combined with the full name of the sponsoring brand (e.g., #[BRAND]AMBASSADOR).

Do Disclose Every Time: Disclose with every post. Even if an influencer and brand engage in a long-term marketing campaign, each post must include some sort of disclosure. New consumers may see each new post and may be unaware of the sponsorship.

Don't Clutter Disclosures: Do not hide the disclosures by using multiple tags, hashtags or links. This format confuses readers who are likely to skip over them and miss the disclosure, especially when several hashtags are used at the end of a long caption.

Do Disclose Relationships: Disclose an employer/employee or ownership relationship. If a social media influencer is employed by a company and is asked to promote a campaign, product, event or even a contest or sweeps, the employment relationship must be disclosed. A hashtag combining the name of the company and "employee" (e.g., #[COMPANY]Employee) may suffice depending on context, but the FTC suggests that it is better to spell it out and use the words "my company" or "my employer" in the body of the post.

Don't Rely on Links: Do not assume that tagging a brand or including a hyperlink to a brand's website is sufficient for disclosure. Readers who do not click the link will not see a disclosure or understand the relationship between the influencer and the brand.

Do Consider Benefits: Disclose relationships whenever there is a benefit. If an influencer receives free products, travel, hotel stays or any type of consideration, monetary or otherwise, some sort of disclosure is required.

Anything Else Brands Should Do To Protect Themselves?

Social Media Guidelines For Partnerships. When partnering with a social media influencer or celebrity on a marketing campaign online, specify the details of the obligations and responsibilities in the contract. Rather than insert a generic clause in an agreement that all parties will comply with FTC guidelines, brands should also draft social media guidelines that are appended to each influencer agreement. Specific guidelines help to avoid liability with the FTC and also provide an opportunity for quality control of your intellectual property. For example, if your brand incorporates specific colors with your logos and trade dress, you may encourage your social media partners to incorporate those colors in your campaigns and further require that all marketing efforts avoid colors used by your competitors.

Intellectual Property Considerations. Although social media marketing feels informal, the rules of intellectual property still apply. Brands should consult with intellectual property counsel to ensure that any intended use of images, logos, videos and even re-posted content, such as a "meme," will not infringe a third party's rights.

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