

FTC UPDATES ENDORSEMENT GUIDANCE

In 2009, the Federal Trade Commission ("FTC") introduced a revised version of its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides"), with a primary goal of demonstrating how the Guides applied to new marketing channels and techniques like blogs and social media. Basic truth-in advertising principles are at the core of the Guides, which require that endorsements must be honest and not misleading. In addition, the Guides require disclosure of a material connection between an endorser and the advertiser that consumers would not expect and which could affect how consumers evaluate the endorsement. As trends and topics continue to evolve, on May 29, 2015, the FTC issued updated answers to its frequently asked questions ("New FAQs") about compliance with the Guides, providing much needed guidance on endorsement-related issues such as incentivizing "likes" on social media, making disclosures on Twitter, celebrity endorsements, social media promotions, online review programs and employee endorsements. A few highlights are discussed below.

Social Media Promotions

The FTC reiterated its prior guidance that entry into a sweepstakes or contest for a chance to win a prize in exchange for an endorsement could affect how people would view that endorsement such that a disclosure would be required. A disclosure that merely included the name of the product in the hashtag would not be sufficient because the hashtag does not convey that the posts were incentivized by an entrant's receipt of something of value (*i.e.*, a chance to win a prize). Making the word "contest" or "sweepstakes" part of the hashtag would likely be sufficient but, notably, the FTC clarified that the word "sweeps" would not be sufficient because people may not understand what that term means.

Twitter Disclosures

The FTC does not mandate specific wording of disclosures. Regardless of the advertising medium and its limitations, however, the general principle that people get the information they need to evaluate sponsored statements will still apply. Consequently, while the FTC recognizes Twitter's 140 character-limitation, a disclosure is still required. The FTC suggests that the words "Sponsored", "Promotion" or "Paid Ad" use few characters and are likely effective, as is *starting a tweet* with "Ad" or "#ad". Note that abbreviating "Sponsored" to "#Spon" is viewed as inadequate.

Celebrity Endorsements

Whether or not celebrities must disclose that they are being paid every time they tweet about a product depends upon whether or not their followers understand that the tweets are paid endorsements. Under the New FAQs, if a "significant portion" of the celebrity's followers does not know that the tweets are paid endorsements, a disclosure of the relationship is required. Since determining whether followers are aware of a relationship "could be tricky", the FTC recommends a disclosure.

Social Media Likes, Pins and Shares

Per the New FAQs, clicking a "like" button, pinning a picture or sharing a link as part of a paid campaign "probably" requires a disclosure of the material connection between the endorser and the company. For example, if someone clicked "like" to show that they were a fan of a particular business or product and, in exchange, they received a discount on a



STRENGTH IN PARTNERSHIP

ALERT

future purchase or received entry into a sweepstakes for a prize, then a disclosure would be appropriate.

According to the FTC, because certain platform functions (such as the Facebook "like" button) do not allow for disclosures, advertisers should not encourage endorsements using features that do not allow for clear and conspicuous disclosures. That said, the FTC acknowledged that it does not know how much stock social network users actually put into "likes" when deciding to patronize a business, so the failure to disclose that people were incentivized to give a "like" might not be a problem. In contrast, if an advertiser buys fake "likes" from non-existent people or people who have no experience using their product or service, those "likes" are clearly deceptive and both the advertiser and seller of the fake "likes" could face enforcement action.

YouTube and Online Videos

Disclosures for a YouTube video (such as, for a video product review) should not be made in the video description because consumers might watch the video without seeing the description page or, if they do, they might not read the disclosure. According to the FTC, the most effective way to make the disclosure is in the video itself (or both in the video and the description), preferably at the beginning of the video or, better yet, multiple times during the video. Live streams are of particular concern since viewers can tune in at any time and could easily miss a disclosure at the beginning of a stream or at any other single point in the stream. The FTC recommends multiple, periodic disclosures throughout the stream or, as best practice, a continuous, clear and conspicuous disclosure throughout the stream. The FTC also cautioned against promoting links to videos that bypass the beginning of the video and skips over the disclosure, as well as ads that obscure a disclosure.

Online Reviews

A retail website that includes customer reviews of products and encourages reviewers to be honest, whether the review is positive or negative, must still disclose which reviews, if any, were made by consumers who received free products for review. Knowing that reviewers got free product to review would probably affect the weight that customers would give to those reviews, even if the retailer did not intend for that to happen. In addition, the reviews could be impacted by a reviewer's concern that the retailer might stop sending them free product if they wrote a negative review.

Soliciting Endorsements

A company may ask its customers about their experience with the company's service or products and feature those comments in their ads, whether or not the company pays the customer for its endorsement, providing that the customer had no reason to expect compensation or any other benefit before they gave their comments. If, however, the company gave the customer a reason to expect a benefit from providing their thoughts about the company's product, the company should disclose that fact in its ads. According to the FTC, even telling a customer that they will not be paid but that they might be featured in the company's advertising might be an opportunity that is seen as having a value, such that the fact that they knew this when they gave the review should be disclosed in the ad (for example, by stating "Customers were told in advance they might be featured in an ad").



STRENGTH IN PARTNERSHIP

ALERT

Employee Endorsements

Before using social media to post about an employer's products, employees should first check with their employer to ensure compliance with the company's policies. If allowed to use social media to discuss the employer's products, the employee should ensure that their relationship to the company is clearly disclosed to the audience reading the posts. Per the New FAQs, listing the employer on the employee's profile page is not sufficient. The employment relationship must be disclosed when making the endorsement.

Ambassadors

If a person is hired by a company to be their "ambassador" and promote their products/services, there is a financial connection between them and that relationship exists whether or not the person is being paid for a particular tweet or post. The New FAQs give example of an ambassador hired by a trade association to promote its upcoming conference on social media for five hours a week. The ambassador must disclose the relationship if it is endorsing the conference on social media, regardless of whether or not those tweets/posts are made during the five hours in which the ambassador is working or during its off time. If, however, the ambassador's tweet/post does not communicate the ambassador's opinion about the conference (for example, if it merely responds to a question about the event, such as where to find a link to the agenda), then it is not an endorsement and no disclosure is required. Similarly, if the ambassador is responding to a question about the event via email or text, the person making inquiry probably already knows the ambassador's affiliation with the conference so that disclosure may not be required. If disclosure is required, the FTC advises that posting the conference badge or a disclosure on the ambassador's profile page is not sufficient because many people in the audience may not see it and, depending upon what it says, it may not adequately tell consumers of the ambassador's relationship to the association.

Social Influencers

The FTC recognizes that it is unrealistic for an advertiser to be aware of every single statement made by its bloggers and other social media influencers. That said, the FTC does expect an advertiser to make a "reasonable effort" to know what people in its network are saying. Advertisers need to have reasonable programs in place to train and monitor members of their network, the scope of which depends on the risk that deceptive practices by network participants could cause consumer harm (whether physical injury or financial loss). By way of example, the FTC compares a network devoted to the sale of health products to a network promoting a new fashion line. According to the FTC, every program should include: (1) explanation of what the endorsers can and cannot say about the products; (2) instruction to network members on their responsibilities for disclosing their material connection to the advertiser; (3) periodically searching for what your people are saying; and (4) following up if the advertiser find questionable practices. Therefore, as a best practice, advertisers should adopt a social media influencer policy to ensure it has effective processes to comply with these guidelines. Similarly, if an advertiser uses a public relations firm to run its social media program, the advertiser must ensure that its firm has an appropriate program in place to train and monitor members of its social media network, since the advertiser is ultimately responsible for what others do on its behalf. As best practice, the FTC recommends that the advertiser request regular reports from the public relations firm confirming that the program is operating properly and periodically monitor the network.



STRENGTH IN PARTNERSHIP

ALERT

Moritt Hock & Hamroff LLP is a broad based commercial law firm with more than 60 lawyers and a staff of technical advisors and paralegals. The firm's practice areas include: alternative dispute resolution; commercial foreclosure; commercial lending & finance; construction & surety; copyrights, trademarks & licensing; corporate & securities; creditors' rights & bankruptcy; cybersecurity; employment; equipment & transportation leasing and finance; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; not-for-profit; patents; real estate; tax; and trusts & estates.

This Alert was written by Terese L. Arenth.

Ms. Arenth, a partner with the firm, serves as chair of the firm's marketing, advertising & promotions group within its intellectual property department. She concentrates her practice in promotional marketing, advertising and Internet/new media, as well as commercial and corporate litigation. In addition, Ms. Arenth also has significant involvement in the firm's intellectual property and unfair competition, and cybersecurity practice areas.

Any questions concerning the matters raised in the Alert should be addressed to Ms. Arenth. She can be reached at (516) 873-2000 or by email at tarenth@morithock.com

Affiliate Marketing

An affiliate marketer's relationship to any online retailer must be clearly and conspicuously disclosed on its site so readers can decide how much weight to give the affiliate marketer's endorsement. The New FAQs clarify that merely including an "affiliate link" by itself or a "buy now" button will not be a sufficient disclosure, as consumers may not know that it means the "person placing the link is getting paid for purchases through the link". The FTC recommends putting the disclosure in proximity to the affiliate marketer's recommendation. Putting the disclosure in obscure places, such as an "About Us" or "General Info" page, behind a poorly labeled hyperlink or in a "terms of service" agreement is not sufficient. Likewise, it is insufficient to put the disclosure below the affiliate marketer's review or below the link to the online retailer such that readers would have to keep scrolling after they finish reading. Bottom line, consumers should not have to hunt for it.

Conclusion

While the New FAQs clarify the intersection between the Guides and social media, the fundamental requirements of the Guides remain the same: endorsements must be truthful and accurate; when an endorser receives something of value in exchange for its endorsement or review of a product, disclosure of that material connection is required; and, while the FTC does not mandate special wording, disclosures must be made clearly and conspicuously, regardless of the medium in which it is made. An advertiser remains ultimately responsible for what others say and do on its behalf, so it is incumbent upon the advertiser to make reasonable efforts to monitor and train anyone making statements on its behalf, including employees, public relation firms, ambassadors and social influencers.



This Alert is published solely for the interests of friends and clients of Moritt Hock & Hamroff LLP for informational purposes only and should in no way be relied upon or construed as legal advice.