Foster Garvey

Disclosing Endorsements on Social Media: General Considerations for FTC Compliance by Brands and Influencers

Legal Alert
April 9, 2019

By Torie Levine

Contact

Joshua A. Bloomgarden

Hillary H. Hughes

Social media platforms provide a powerful, and efficient means for brands to partner with celebrity "influencers" and reach millions with something as simple as a photograph and a few lines of text. However, as demonstrated by the recent actions initiated by the leading consumer protection agency in the United States, the Federal Trade Commission (FTC) stressing to influencers and marketers the importance of clear and conspicuous disclosure of brand relationships when promoting products on social media, these strategies are rife with pitfalls for brands and influencers, alike.[1] So, how do individuals and brands comply? There are no hard and fast rules, but the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising*[2] (the "Guides"), provide a general roadmap within which to operate.

When to Disclose Endorsements

The Guides apply to endorsements that are made on behalf of a sponsoring advertiser. The FTC defines an endorsement as "any advertising message (not just verbal statements) that consumers are likely to believe reflects the opinions, beliefs, findings or expertise of a party other than the sponsoring advertiser."[3] For example, a blogger who receives payment to review a product in their blog post is considered an endorser. Even simply tagging a brand by an influencer in a social media post constitutes an endorsement.

When a connection exists between the influencer and an advertiser that might materially affect the weight or credibility of an endorsement, the connection must be fully disclosed. If an influencer simply mentions a product that he or she paid for out-of-pocket as an ordinary consumer, then there is unlikely to be

an FTC issue. However, if an advertiser pays an influencer or gives him or her them something of value to mention a product, then he or she must disclose that information. Material connections do not include just compensation; they also cover employee or family relationships as well as the provision of free products or some other perk where the advertiser expects the influencer to promote its products in return.

How to Disclose Endorsements on Social Media

To disclose that an influencer was given something in exchange for an endorsement, the FTC stresses effective communication. According to the Guides, disclosures must be "clear and conspicuous." This means that the influencer should use plain and unambiguous language and make the disclosure easily noticeable.

To make the disclosure plain and unambiguous, the wording does not need to be special and contain any “legalese;” a simple "Thanks [BRAND] for the free product" or "Thanks [BRAND] for the gift of [PRODUCT]" will be satisfactory. Influencers may also use #Sponsored, #Ad, #[BRAND]ambassador, or #[BRAND]partner. However, it is insufficient to use only #ambassador, #sp, #partner, or "Thanks [BRAND]" to indicate that the post is sponsored. The FTC sent Jennifer Lopez a warning for posting a photo on Instagram with the caption, "#TBT to my Birthday weekend in Vegas!! Thanks again @vodkabeluga #vodkabeluga."[4] Just thanking a brand is inadequate, because it is unclear why the influencer is thanking the brand. The influencer could be thanking the brand, because he or she received something in exchange for the endorsement or purely because he or she enjoyed the product.

Using Instagram as an example, to make the disclosure easily noticeable, influencers should place the disclosure before the first three lines of the caption (before the "more" button). The disclosure should be in an easy-to-read font and in a shade that stands out against the background. It is insufficient if the influencer places the disclosure in a string of hashtags, uses multiple tags or uses a hyperlink to link to a full disclosure. For Instagram Stories, influencers can superimpose a disclosure over the images but should also consider how much time they give their followers to look at the image, how much competing text there is to read, how large the disclosure is, and how well it contrasts against the image. If the Instagram Story is a video, audio-only disclosure will not suffice since some users watch videos without sound.

Many social media platforms have built-in features that allow influencers to disclose paid endorsements. Instagram offers branded content tools that demonstrate when a commercial relationship exists between an influencer and a brand. When an influencer tags the brand in a post, Instagram users will see "Paid Partnership with [BRAND]" in the header. While Instagram's feature appears to provide clear disclosure, using such a built-in feature may not be enough to comply if the tool does not clearly and conspicuously disclose the connection.[5] The FTC will still evaluate the disclosure by looking to its placement, font and wording. "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."[6]

Liability for Influencer's Actions

The FTC holds brands responsible for ensuring that influencers comply with the disclosure requirements.[7] In May 2016, the FTC filed a complaint against retailer Lord & Taylor for failing to disclose that certain fashion influencers' Instagram posts were paid promotions.[8] Lord & Taylor eventually settled but is prohibited from failing to disclose paid endorsements for its products.[9]

Advertisers are not the only ones who may be liable. The 90 educational letters the FTC sent influencers and brands in April 2017 was noteworthy in that it was the first time the FTC warned individuals individually. Even more significantly, 21 of those influencers later received a warning letter that listed specific posts that were not in compliance with the Guides and required the influencers to list the specific steps those influencers intended to take to clearly disclose any material connections. Finally, in September 2017, the FTC announced its first law enforcement action against individual social media influencers for failing to disclose they jointly owned the company they were endorsing.[10]

Strategic Considerations for Brand/Influencer Deals

To help minimize risk of liability, brands are encouraged to have a reasonable program in place to provide guidance and training to influencers.[11] The contract between the brand and influencer should require that the influencer disclose any connections between them and provide guidelines on what the influencer can and cannot say (while still reflecting the influencer's own opinions, as required by law). Brands should also monitor those influencers who are being paid to promote their products to make sure they are complying, and if not, contact the influencer to correct it.

For their part, influencers should be ever-mindful of the need to make disclosures before posting content on social media. Under some circumstances, influencers can negotiate putting the onus of determining what constitutes an appropriate disclosure on brands, and require that brands shoulder the risk of inadequately disclosing the relationship – but as the “content publisher,” it remains incumbent on the influencer to implement such disclosures.

More and more, FTC compliance responsibilities (and the allocation of risk for same) will be contested point in contract negotiations relating to social media activations.

Torie Levine, a law student at Brooklyn Law School, was a former legal extern working in GSB's New York office. This blog post was also contributed by GSB attorneys Hillary Hughes, Joshua Bloomgarden located in the New York office, and Erika Johnson, who is a legal extern currently working in GSB's New York office.

---

[1] "FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship" available at: https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose

[2] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

[3] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

[4] "Jennifer Lopez, Sean Combs, Luke Bryan Sent Guidance Letters From FTC For Instagram Product Posts" available at: https://www.billboard.com/articles/business/7792042/jennifer-lopez-sean-combs-luke-bryan-guidance-letters-ftc

[5] "The FTC's Endorsement Guides: What People Are Asking," available at: https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[6] "The FTC's Endorsement Guides: What People Are Asking," available at: https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[7] " Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 'Fashion Influencers'" available at: https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through

[8] In the Matter of Lord & Taylor, LLC, FTC Docket No. 152-3181

[9] " FTC Approves Final Lord & Taylor Order Prohibiting Deceptive Advertising Techniques" available at: https://www.ftc.gov/news-events/press-releases/2016/05/ftc-approves-final-lord-taylor-order-prohibiting-deceptive

[10] "CSGO Lotto Owners Settle FTC's First-Ever Complaint against Individual Social Media Influencers" available at: https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

[11] "The FTC's Endorsement Guides: What People Are Asking," available at: https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.