

Updates Regarding the FTC Guidelines for Promoting Products on Social Media

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In July of 2015, I wrote about the *New FTC Guidelines for Promoting Products on Social Media*. I discussed the FTC's rationale, concerns and stance on using social media to advertise and promote products. At the time, when the FTC issued the guidelines, it did not yet enforce or even assert them.

Less than two years later, the FTC has begun to take action. The FTC has pursued claims against companies regarding their use of "native advertisements" (the FTC's language for purported "organic" advertisements online through social media and blogs) and their alleged deception of consumers by failing to adequately disclose that they paid social media influencers to promote their products.¹ Most recently, the FTC has issued warning letters to celebrities, athletes, social media influencers and advertisers, regarding endorsements.

The FTC has issued these warnings in what may be the start of actions against both companies *and* the people they hire to endorse and advertise their goods and services. The FTC has gone on record that while they are not monitoring bloggers per se, if concerns are raised about possible violations of the FTC Act, they will evaluate those concerns on a case by case basis. The FTC has also stated that if "law enforcement becomes necessary," their focus will typically be on the companies doing the advertising and their respective ad agencies and public relations firms. However, they reserved the right to take action against individual endorsers.²

The FTC's rationale for its guidelines in native advertisements is that consumers must know of the relationship between the person making the statement and the company whose product they are endorsing. Typically, consumers tend to give more credibility to unbiased opinions and less credibility to sponsored opinions. The FTC wants to provide consumers with information about the relationships between advertisers and endorsers, so that consumers can come to their own decision on the credibility of the statement. Thus, if a company had a hand in a social media post about their product, that relationship must be disclosed clearly. If the company paid the endorser to make the post, provided the goods or services for free or at a discount, provided a loan on the goods (depending on what the loan entailed), then that relationship must be disclosed *clearly* and *conspicuously*.

On social media, the use of the hashtags #ad or #sponsored to denote a relationship between an endorser and advertiser has been increasing in popularity and has become the preferred method to denote a relationship. However, in posts where numerous hashtags are made or where a long review is made, these hashtags can often times get lost. For example, on Instagram, after the first three lines of a post, the additional terms and hashtags are not shown unless one clicks on "more" and therefore, sometimes it is skipped by consumers. The FTC, in their recent letters to social media influencers has taken issue with this new protocol. They reiterated that the language must be "clear" and "conspicuous" so that it stands out and that consumers notice the disclosure easily. Thus, instead of having the hashtag #ad or #sponsored at the conclusion of the post, it should be readily visible in the post. For example, on Instagram, it should be in the first three lines of the post.

If social media influencers or endorsers do not take the aforementioned steps, the companies that are paying them for the advertisements may very well be subject of the FTC's ire, and possibly have an enforcement action instituted against them. Even if a company hires an advertising firm or a PR agency to undertake these native advertisements and seek endorsements from social media influencers, that does not insulate them from liability and they may still be held liable for violating the FTC Act.

Accordingly, it is important for companies to manage the statements made by endorsers about their products. Companies must implement a specific plan on how they manage advertisements made by social media influencers/endorsers. They should 1) explain to the endorser what they can and cannot say about the products or services (i.e., they cannot make any false claims); 2) instruct the endorser of their responsibilities for disclosing their relationship with the company; 3) periodically review what the endorsers are saying; and 4) follow-up if there is something questionable or awry.



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¹ Two of the most prominent companies subject to action by the FTC were Warner Bros. and Lord & Taylor. Both of them settled their claims with the FTC.

² *The FTC's Endorsement Guides: What People Are Asking*, May 2015