

COMPLYING WITH THE FTC ACT: THE DO'S AND DON'TS OF SOCIAL MEDIA ADVERTISING CAMPAIGNS

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In this day and age, social media has become a cornerstone of everyday life. Therefore, it is no surprise that numerous companies have capitalized on this fact by incorporating social media into their advertising campaigns, including influencer marketing.

In 2016, Public Citizen, an advocacy group, expressed concerns to the FTC that Instagram had become the “Wild West of disguised advertising.” Public Citizen’s concerns were rooted in the fact that we live in an era where celebrities and average citizens share every detail of their lives on social media. As such, when a popular Instagram user endorses a product, it is unclear whether they were paid to do so or if they genuinely use and like the product. Public Citizen argued that when posts are made without proper disclosures, brands are deceiving consumers, to reap monetary profits.

Public Citizen petitioned the FTC to make clear that it will enforce the core principles of fair advertising law. In April 2017, the FTC validated Public Citizen’s concerns about deceptive advertising when it sent 90 letters to influencers and brands regarding FTC standards. By heeding the following rules and guidelines, you can ensure that your advertising campaigns are in compliance:

- If a “material connection” exists between an endorser and the marketer of a product, the connection must be disclosed. A connection is material if it might affect the weight or credibility that consumers give the endorsement, such as a monetary payment or free product provided to the endorser.
- The disclosure must be clear and conspicuous. For example, Instagram posts generally show the first three lines of a caption, followed by the option to click “more” to read the rest of the post. The material connection must be disclosed in the portion that is visible prior to clicking the “more” button.
- A disclosure should not be contained in a long series of hashtags or links, which the reader may skip over.
- Simply posting a picture of a product on social media could convey the idea that the poster likes and approves of the product. Thus, even if a poster does not expressly make a positive statement, the post may still require disclosure.
- Even if a famous celebrity has millions of followers and many people know that she/he regularly charges advertisers to mention their products, it is still recommended that the celebrity disclose the connection if she/he is paid to post.
- If a company provides a \$50 gift card to give away to a follower, and also gives the poster a \$50 gift card to keep, the poster cannot only say that the company gave him/her a gift card to give away.

- A single disclosure on a profile or homepage that says “many products discussed on this page are provided free by manufacturers” is not sufficient. Some may view reviews, posts and videos without seeing the disclosure on the home page.
- Even on platforms like Twitter, where messages are limited to 140 characters, disclosures are still required. The FTC notes that starting a tweet with “#ad” would likely be effective.
- Endorsements must represent the accurate experience and opinion of the endorser. A company cannot pay an endorser to promote a product if the endorser has not tried the product, or encourage the endorser to say things about the product that does not reflect the honest opinion of the endorser.
- If an endorser earns a commission by providing a link to an online retailer, the FTC recommends that the review containing the disclosure be viewable at the same time as the link. The FTC notes that the statement “I get commissions for purchases made through links in this post” would be an adequate disclosure, whereas the mere words “buy now” or “affiliate link” by themselves would not be adequate disclosure.
- Delegating a promotional program to an outside entity does not relieve a company of its responsibility under the FTC Act. The company is ultimately responsible for what others do on its behalf. The company should ensure that the PR firm has an appropriate program in place to train and monitor members.

In light of these guidelines, advertisers should instruct bloggers and social media influencers of their responsibility for disclosing their connections. In addition, advertisers should periodically search for what their promoters are saying, and follow up if any questionable practices are found. A company can limit the likelihood of a law enforcement action based on the activity of a rogue blogger by having a reasonable training and monitoring program in place.

Although the FTC does not generally monitor bloggers, the FTC will evaluate concerns about possible violations that come to its attention on a case-by-case basis. If law enforcement becomes necessary, the FTC will usually focus on the advertisers, ad agencies and public relations firms rather than the individual endorser, though the FTC noted that some action against individual endorsers may be appropriate in some circumstances as well.

For more information, companies should consult an attorney or the FTC Endorsement Guides.

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