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#Ad Disclosures: Federal Trade Commission Best Practices for Brands and Social Media Influencers

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§255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. [See §255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.
Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See §255.1(b) regarding the "good reason to believe" requirement.] (d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see §255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of §255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may not be required to meet the standards of §255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the
study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See §255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

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§255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation. 105

The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, “Notice: These testimonials do not prove our product works. You should not expect to have similar results,” the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the
An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that homeoweners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., “the average homeowner saves $35 per month,” “the typical family saves $50 per month during cold months and $20 per month in warm months,” or “most families save 10% on their utility bills.”

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that homeoweners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., “the average homeowner saves $35 per month,” “the typical family saves $50 per month during cold months and $20 per month in warm months,” or “most families save 10% on their utility bills.”

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser’s cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised cake and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser’s cake mix.

Example 6: An advertisement purports to portray a “hidden camera” situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser’s recently introduced breakfast cereal. Even though the words “hidden camera” are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertisement does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [See §255.5.]

§255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorser was based upon a comparison, such comparison must have been included in the expert’s evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors’ products.
Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [See §255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an “engineer” implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the “American Institute of Science.” From its name, consumers would infer that the “American Institute of Science” is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice—convenience of packaging—is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial “home cleaning service” states in a television advertisement that she runs a cleaning service and implies that the company’s cleaning ability is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed service was “chosen,” “selected,” or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.
benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

**Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the “findings” of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in this advertisement.

**Example 2:** A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with §255.1; but regardless of whether the star’s compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

**Example 3:** During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity disclosing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player toute the results of her surgery—mentioning the clinic by name—on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company’s clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

**Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

**Example 5:** An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his “spontaneous” opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein “steak.” This notification would materially affect the weight or credibility of the patron’s endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the “hidden camera” only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

**Example 6:** An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer’s staff reviews the profiles of individuals interested in working as “extras” in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer’s infomercial, they will receive a small payment. Viewers would not expect that these “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

**Example 7:** A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the...
Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.
FTC Materials
CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers

Owners must disclose material connections in future posts; FTC staff also sends 21 warning letters to prominent social media influencers

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Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, two social media influencers who are widely followed in the online gaming community, have settled Federal Trade Commission charges that they deceptively endorsed the online gambling service CSGO Lotto, while failing to disclose they jointly owned the company.

They also allegedly paid other well-known influencers thousands of dollars to promote the site on YouTube, Twitch, Twitter, and Facebook, without requiring them to disclose the payments in their social media posts.

The Commission order settling the charges requires Martin and Cassell to clearly and

The Do’s and Don’ts for Social Media Influencers

FTC RECOMMENDATIONS

Clearly DISCLOSE when you have a financial or family relationship with a

PRACTICES TO AVOID

DON’T ASSUME followers know about all your brand relationships
conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.

“Consumers need to know when social media influencers are being paid or have any other material connection to the brands endorsed in their posts,” said FTC Acting Chairman Maureen Ohlhausen. “This action, the FTC’s first against individual influencers, should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions.”

Also today, the FTC announced that staff has both sent warning letters to 21 social media influencers it contacted earlier this year regarding their Instagram posts, and updated staff guidance for social media influencers and endorsers.

According to the FTC, beginning in late 2015, Martin, Cassell, and their company, CSGOLotto, Inc., operated and advertised the csglotto.com website. The CSGO Lotto name was based on Counter-Strike: Global Offensive, also known as “CS: GO,” an online multi-player, first-person shooter game. The game uses collectible virtual items called “skins” that can be used to cover weapons in distinctive patterns. Skins can be bought, sold, and traded for real money. CSGO Lotto enabled consumers to gamble, using skins as virtual currency.

Martin is the company’s president and Cassell is its vice president. As alleged in the complaint, each posted YouTube videos of themselves gambling on their website and encouraging others to use the service. Martin’s videos had titles such as, “HOW TO WIN $13,000 IN 5 MINUTES (CS-GO Betting)” and “$24,000 COIN FLIP (HUGE CSGO BETTING!) + Giveaway.”

Cassell posted videos with titles such as “INSANE KNIFE BETS! (CS:GO Betting),” and “ALL OR NOTHING! (CS:GO Betting).” In all, Cassell’s videos promoting the CSGO Lotto website were viewed more than 5.7 million times. Martin and Cassell allegedly also promoted the site on Twitter without adequately disclosing their connection to CSGO Lotto.

According to the FTC’s complaint, Martin, Cassell, and their company also had an “influencer program” and paid other gaming influencers between $2,500 and $55,000 to promote the CSGO Lotto website to their social media circles, while prohibiting them from saying anything negative about the site.
The Commission’s complaint alleges that Martin, Cassell, and their company misrepresented that videos of themselves and other influencers gambling on the CSGO Lotto website and their social media posts about the website reflected the independent opinions of impartial users of the service. The complaint charges that, in truth, Martin and Cassell are owners and officers of the company operating the CSGO Lotto website and the other influencers were paid to promote the website and were prohibited from impugning its reputation.

Finally, the complaint alleges that a number of Martin’s, Cassell’s, and the gaming influencers’ CSGO Lotto videos and social media posts deceptively failed to adequately disclose that Martin and Cassell are owners and officers of the company operating the gambling service, or that the influencers received compensation to promote it.

The proposed order settling the FTC’s charges prohibits Martin, Cassell, and CSGOLotto, Inc. from misrepresenting that any endorser is an independent user or ordinary consumer of a product or service. The order also requires clear and conspicuous disclosures of any unexpected material connections with endorsers.

New Instagram Influencer Warning Letters

Following up on the more than 90 educational letters FTC staff sent to social media influencers and brands in April of this year, the staff has sent warning letters to 21 of the influencers previously contacted. The earlier educational letters informed the influencers that if they are endorsing a brand and have a “material connection” to the marketer, this must be clearly and conspicuously disclosed, unless the connection is already clear from the context of the endorsement.

The warning letters cite specific social media posts of concern to staff and provide details on why they may not be in compliance with the FTC Act as explained in the Commission’s Endorsement Guides. For example, some of the letters point out that tagging a brand in an Instagram picture is an endorsement of the brand and requires an appropriate disclosure.

The letters ask that the recipients advise FTC staff as to whether they have material connections to the brands in the identified posts, and if so, what actions they will be taking to ensure that all of their social media posts endorsing brands and businesses with which they have material connections clearly and conspicuously disclose their relationships. The FTC is not disclosing the names of the 21 influencers who received the warning letters.

Updated Guidance to Influencers and Marketers

The Commission today also issued an updated version of The FTC’s Endorsement Guides: What People are Asking, a staff guidance document that answers frequently asked questions. Previously revised in 2015, the newly updated version includes more than 20 additional questions and answers addressing specific questions social media influencers and marketers may have about whether and how to disclose material connections in their posts.

The new information covers a range of topics, including tags in pictures, Instagram disclosures, Snapchat disclosures, obligations of foreign influencers, disclosure of free travel, whether a disclosure must be at the beginning of a post, and the adequacy of various disclosures like “#ambassador.”

The Commission vote to issue the administrative complaint and to accept the consent agreement was 2-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly.
The agreement will be subject to public comment for 30 days, beginning today and continuing through October 10, 2017, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit comments electronically by following the instructions in the “Invitation to Comment” part of the “Supplementary Information” section.

NOTE: The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $40,654.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-4357). Like the FTC on Facebook, follow us on Twitter, read our blogs and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Approves Final Consent Order against Owners of CSGO Lotto Website
FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship
FTC to Hold Twitter Chat on Social Media Influencer Disclosures

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Suppose you meet someone who tells you about a great new product. She tells you it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product – or has been paid by the company to tout the product. Would you want to know that when you’re evaluating the endorser’s glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission's (FTC) Endorsement Guides.

The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.

In addition, the Guides say, if there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. For example, if an ad features an endorser who’s a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you’re planning a vacation. You do some research and find a glowing review on someone’s blog that a particular resort is the most luxurious place he has ever stayed. If you knew the hotel had paid the blogger hundreds of dollars to say great things about it or that the blogger had stayed there for several days for free, it could affect how much weight you’d give the blogger’s endorsement. The blogger should, therefore, let his readers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who says she lost 20 pounds in two
months using the advertised product. If the advertiser doesn’t have proof that the endorser’s experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), then an ad featuring that endorser must make clear to the audience what the generally expected results are.

Here are answers to some of our most frequently asked questions from advertisers, ad agencies, bloggers, and others.

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About the Endorsement Guides

*Do the Endorsement Guides apply to social media?*

Yes. Truth in advertising is important in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media).

*Isn’t it common knowledge that bloggers are paid to tout products or that if you click a link on a blogger’s site to buy a product, the blogger will get a commission?*

No. Some bloggers who mention products in their posts have no connection to the marketers of those products – they don’t receive anything for their reviews or get a commission. They simply recommend those products to their readers because they believe in them.

Moreover, the financial arrangements between some bloggers and advertisers may be apparent to industry insiders, but not to everyone else who reads a particular blog. Under the law, an act or practice is deceptive if
it misleads “a significant minority” of consumers. Even if some readers are aware of these deals, many readers aren’t. That’s why disclosure is important.

**Are you monitoring bloggers?**

Generally not, but if concerns about possible violations of the FTC Act come to our attention, we evaluate them case by case. If law enforcement becomes necessary, our focus usually will be on advertisers or their ad agencies and public relations firms. Action against an individual endorser, however, might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.

**Does the FTC hold bloggers to a higher standard than reviewers for traditional media outlets?**

No. The FTC Act applies across the board. The issue is – and always has been – whether the audience understands the reviewer’s relationship to the company whose products are being recommended. If the audience understands the relationship, a disclosure isn’t needed.

If you’re employed by a newspaper or TV station to give reviews – whether online or offline – your audience probably understands that your job is to provide your personal opinion on behalf of the newspaper or television station. In that situation, it’s clear that you did not buy the product yourself – whether it’s a book or a car or a movie ticket. On a personal blog, a social networking page, or in similar media, the reader might not realize that the reviewer has a relationship with the company whose products are being recommended. Disclosure of that relationship helps readers decide how much weight to give the review.

**What is the legal basis for the Guides?**

The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising.

The Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities. The Guides themselves don’t have the force of law. However, practices inconsistent with the Guides may result in law enforcement actions alleging violations of the FTC Act. Law enforcement actions can result in orders requiring the defendants in the case to give up money they received from their violations and to abide by various requirements in the future. Despite inaccurate news reports, there are no “fines” for violations of the FTC Act.

**When Does the FTC Act Apply to Endorsements?**

*I’m a blogger. I heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?*

No. If you mention a product you paid for yourself, there isn’t an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to its customers.

The FTC is only concerned about endorsements that are made on behalf of a sponsoring advertiser. For example, an endorsement would be covered by the FTC Act if an advertiser – or someone working for an advertiser – pays you or gives you something of value to mention a product. If you receive free products or other perks with the expectation that you’ll promote or discuss the advertiser’s products in your blog, you’re
covered. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are covered.

**What if all I get from a company is a $1-off coupon, an entry in a sweepstakes or a contest, or a product that is only worth a few dollars? Does that still have to be disclosed?**

The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed. For example, being entered into a sweepstakes or a contest for a chance to win a thousand dollars in exchange for an endorsement could very well affect how people view that endorsement. Determining whether a small gift would affect the weight or credibility of an endorsement could be difficult. It’s always safer to disclose that information.

Also, even if getting one free item that’s not very valuable doesn’t affect your credibility, continually getting free stuff from an advertiser or multiple advertisers could suggest you expect future benefits from positive reviews. If a blogger or other endorser has a relationship with a marketer or a network that sends freebies in the hope of positive reviews, it’s best to let readers know about the free stuff.

Even an incentive with no financial value might affect the credibility of an endorsement and would need to be disclosed. The Guides give the example of a restaurant patron being offered the opportunity to appear in television advertising before giving his opinion about a product. Because the chance to appear in a TV ad could sway what someone says, that incentive should be disclosed.

**My company makes a donation to charity anytime someone reviews our product. Do we need to make a disclosure?**

Some people might be inclined to leave a positive review in an effort to earn more money for charity. The overarching principle remains: If readers of the reviews would evaluate them differently knowing that they were motivated in part by charitable donations, there should be a disclosure. Therefore, it might be better to err on the side of caution and disclose that donations are made to charity in exchange for reviews.

**What if I upload a video to YouTube that shows me reviewing several products? Should I disclose that I got them from an advertiser?**

Yes. The guidance for videos is the same as for websites or blogs.

**What if I return the product after I review it? Should I still make a disclosure?**

That might depend on the product and how long you are allowed to use it. For example, if you get free use of a car for a month, we recommend a disclosure even though you have to return it. But even for less valuable products, it’s best to be open and transparent with your readers.

**I have a website that reviews local restaurants. It’s clear when a restaurant pays for an ad on my website, but do I have to disclose which restaurants give me free meals?**

If you get free meals, you should let your readers know so they can factor that in when they read your reviews.

**I’m opening a new restaurant. To get feedback on the food and service, I’m inviting my family and friends to eat for free. If they talk about their experience on social media, is that something that should be disclosed?**
You’ve raised two issues here. First, it may be relevant to readers that people endorsing your restaurant on social media are related to you. Therefore, they should disclose that personal relationship. Second, if you are giving free meals to anyone and seeking their endorsement, then their reviews in social media would be viewed as advertising subject to FTC jurisdiction. But even if you don’t specifically ask for their endorsement, there may be an expectation that attendees will spread the word about the restaurant. Therefore, if someone who eats for free at your invitation posts about your restaurant, readers of the post would probably want to know that the meal was on the house.

I have a YouTube channel that focuses on hunting, camping, and the outdoors. Sometimes I’ll do a product review. Knife manufacturers know how much I love knives, so they send me knives as free gifts, hoping that I will review them. I’m under no obligation to talk about any knife and getting the knives as gifts really doesn’t affect my judgment. Do I need to disclose when I’m talking about a knife I got for free?

Even if you don’t think it affects your evaluation of the product, what matters is whether knowing that you got the knife for free might affect how your audience views what you say about the knife. It doesn’t matter that you aren’t required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free, so we advise disclosing that fact.

Several months ago a manufacturer sent me a free product and asked me to write about it in my blog. I tried the product, liked it, and wrote a favorable review. When I posted the review, I disclosed that I got the product for free from the manufacturer. I still use the product. Do I have to disclose that I got the product for free every time I mention it in my blog?

It might depend on what you say about it, but each new endorsement made without a disclosure could be deceptive because readers might not see the original blog post where you said you got the product free from the manufacturer.

A trade association hired me to be its “ambassador” and promote its upcoming conference in social media, primarily on Facebook, Twitter, and in my blog. The association is only hiring me for five hours a week. I disclose my relationship with the association in my blogs and in the tweets and posts I make about the event during the hours I’m working. But sometimes I get questions about the conference in my off time. If I respond via Twitter when I’m not officially working, do I need to make a disclosure? Can that be solved by placing a badge for the conference in my Twitter profile?

You have a financial connection to the company that hired you and that relationship exists whether or not you are being paid for a particular tweet. If you are endorsing the conference in your tweets, your audience has a right to know about your relationship. That said, some of your tweets responding to questions about the event might not be endorsements, because they aren’t communicating your opinions about the conference (for example, if someone just asks you for a link to the conference agenda).

Also, if you respond to someone’s questions about the event via email or text, that person probably already knows your affiliation or they wouldn’t be asking you. You probably wouldn’t need a disclosure in that context. But when you respond via social media, all your followers see your posts and some of them might not have seen your earlier disclosures.

With respect to posting the conference’s badge on your Twitter profile page, a disclosure on a profile page isn’t sufficient because many people in your audience probably won’t see it. Also, depending upon what it says, the
badge may not adequately inform consumers of your connection to the trade association. If it’s simply a logo or hashtag for the event, it won’t tell consumers of your relationship to the association.

I’m a blogger and a company wants me to attend the launch of its new product. They will fly me to the launch and put me up in a hotel for a couple of nights. They aren’t paying me or giving me anything else. If I write a blog sharing my thoughts about the product, should I disclose anything?

Yes. Knowing that you received free travel and accommodations could affect how much weight your readers give to your thoughts about the product, so you should disclose that you have a financial relationship with the company.

I share in my social media posts about products I use. Do I actually have to say something positive about a product for my posts to be endorsements covered by the FTC Act?

Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it’s an endorsement.

You don’t necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it’s an endorsement subject to the FTC Act.

Of course, if you don’t have any relationship with the advertiser, then your posts simply are not subject to the FTC Act, no matter what you show or say about the product. The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.

If I post a picture of myself to Instagram and tag the brand of dress I’m wearing, but don’t say anything about the brand in my description of the picture, is that an endorsement? And, even if it is an endorsement, wouldn’t my followers understand that I only tag the brands of my sponsors?

Tagging a brand you are wearing is an endorsement of the brand and, just like any other endorsement, could require a disclosure if you have a relationship with that brand. Some influencers only tag the brands of their sponsors, some tag brands with which they don’t have relationships, and some do a bit of both. Followers might not know why you are tagging a dress and some might think you’re doing it just because you like the dress and want them to know.

Say a car company pays a blogger to write that he wants to buy a certain new sports car and he includes a link to the company’s site. But the blogger doesn’t say he’s going to actually buy the car – or even that he’s driven it. Is that still an endorsement subject to the FTC’s Endorsement Guides?

Yes, an endorsement can be aspirational. It’s an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (e.g., “I want this car”). If the blogger was paid, it should be disclosed.

I’m a book author and I belong to a group where we agree to post reviews in social media for each other. I’ll review someone else’s book on a book review site or a bookstore site if he or she reviews my book. No money changes hands. Do I need to make a disclosure?

It sounds like you have a connection that might materially affect the weight or credibility of your endorsements (that is, your reviews), since bad reviews of each others’ books could jeopardize the arrangement. There doesn’t have to be a monetary payment. The connection could be friendship, family relationships, or strangers who make a deal.
My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?

It’s a good idea. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. Many businesses are so diversified that readers might not realize that the products you’re talking about are sold by your company.

A famous athlete has thousands of followers on Twitter and is well-known as a spokesperson for a particular product. Does he have to disclose that he’s being paid every time he tweets about the product?

It depends on whether his followers understand that he’s being paid to endorse that product. If they know he’s a paid endorser, no disclosure is needed. But if a significant portion of his followers don’t know that, the relationship should be disclosed. Determining whether followers are aware of a relationship could be tricky in many cases, so we recommend disclosure.

A famous celebrity has millions of followers on Twitter. Many people know that she regularly charges advertisers to mention their products in her tweets. Does she have to disclose when she’s being paid to tweet about products?

It depends on whether her followers understand that her tweets about products are paid endorsements. If a significant portion of her followers don’t know that, disclosures are needed. Again, determining that could be tricky, so we recommend disclosure.

I’m a video blogger who lives in London. I create sponsored beauty videos on YouTube. The products that I promote are also sold in the U.S. Am I under any obligation to tell my viewers that I have been paid to endorse products, considering that I’m not living in the U.S.?

To the extent it is reasonably foreseeable that your YouTube videos will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required. Also, the U.K. and many other countries have similar laws and policies, so you’ll want to check those, too.

Product Placements

What does the FTC have to say about product placements on television shows?

Federal Communications Commission law (FCC, not FTC) requires TV stations to include disclosures of product placement in TV shows.

The FTC has expressed the opinion that under the FTC Act, product placement (that is, merely showing products or brands in third-party entertainment content – as distinguished from sponsored content or disguised commercials) doesn’t require a disclosure that the advertiser paid for the placement.

What if the host of a television talk show expresses her opinions about a product – let’s say a videogame – and she was paid for the promotion? The segment is entertainment, it’s humorous, and it’s not like the host is an expert. Is that different from a product placement and does the payment have to be disclosed?
If the host endorses the product – even if she is just playing the game and saying something like “wow, this is awesome” – it’s more than a product placement. If the payment for the endorsement isn’t expected by the audience and it would affect the weight the audience gives the endorsement, it should be disclosed. It doesn’t matter that the host isn’t an expert or the segment is humorous as long as the endorsement has credibility that would be affected by knowing about the payment. However, if what the host says is obviously an advertisement – think of an old-time television show where the host goes to a different set, holds up a cup of coffee, says “Wake up with ABC Coffee. It’s how I start my day!” and takes a sip – a disclosure probably isn’t necessary.

**Endorsements by Individuals on Social Networking Sites**

Many social networking sites allow you to share your interests with friends and followers by clicking a button or sharing a link to show that you’re a fan of a particular business, product, website or service. **Is that an "endorsement" that needs a disclosure?**

Many people enjoy sharing their fondness for a particular product or service with their social networks. If you write about how much you like something you bought on your own and you’re not being rewarded, you don’t have to worry. However, if you’re doing it as part of a sponsored campaign or you’re being compensated – for example, getting a discount on a future purchase or being entered into a sweepstakes for a significant prize – then a disclosure is appropriate.

I am an avid social media user who often gets rewards for participating in online campaigns on behalf of brands. **Is it OK for me to click a “like” button, pin a picture, or share a link to show that I’m a fan of a particular business, product, website or service as part of a paid campaign?**

Using these features to endorse a company’s products or services as part of a sponsored brand campaign probably requires a disclosure.

We realize that some platforms – like Facebook’s “like” buttons – don’t allow you to make a disclosure. Advertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures. Whether the Commission may take action would depend on the overall impression, including whether consumers take “likes” to be material in their decision to patronize a business or buy a product.

However, an advertiser buying fake “likes” is very different from an advertiser offering incentives for “likes” from actual consumers. If “likes” are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake “likes” could face enforcement action.

I posted a review of a service on a website. Now the marketer has taken my review and changed it in a way that I think is misleading. **Am I liable for that? What can I do?**

No, you aren’t liable for the changes the marketer made to your review. You could, and probably should, complain to the marketer and ask them to stop using your altered review. You also could file complaints with the FTC, your local consumer protection organization, and the Better Business Bureau.
How Should I Disclose That I Was Given Something for My Endorsement?

Is there special wording I have to use to make the disclosure?

No. The point is to give readers the essential information. A simple disclosure like “Company X gave me this product to try . . . .” will usually be effective.

Do I have to hire a lawyer to help me write a disclosure?

No. What matters is effective communication. A disclosure like “Company X gave me [name of product], and I think it’s great” gives your readers the information they need. Or, at the start of a short video, you might say, “The products I’m going to use in this video were given to me by their manufacturers.” That gives the necessary heads-up to your viewers.

Do I need to list the details of everything I get from a company for reviewing a product?

No. What matters is whether the information would have an effect on the weight readers would give your review. So whether you got $100 or $1,000 you could simply say you were “paid.” (That wouldn’t be good enough, however, if you’re an employee or co-owner.) And if it is something so small that it would not affect the weight readers would give your review, you may not need to disclose anything.

When should I say more than that I got a product for free?

It depends on whether you got something else from the company. Saying that you got a product for free suggests that you didn’t get anything else.

For example, if an app developer gave you their 99-cent app for free for you to review it, that information might not have much effect on the weight that readers give to your review. But if the app developer also gave you $100, knowledge of that payment would have a much greater effect on the credibility of your review. So a disclosure that simply said you got the app for free wouldn’t be good enough, but as discussed above, you don’t have to disclose exactly how much you were paid.

Similarly, if a company gave you a $50 gift card to give away to one of your readers and a second $50 gift card to keep for yourself, it wouldn’t be good enough only to say that the company gave you a gift card to give away.

I’m doing a review of a videogame that hasn’t been released yet. The manufacturer is paying me to try the game and review it. I was planning on disclosing that the manufacturer gave me a “sneak peek” of the game. Isn’t that enough to put people on notice of my relationship to the manufacturer?

No, it’s not. Getting early access doesn’t mean that you got paid. Getting a “sneak peek” of the game doesn’t even mean that you get to keep the game. If you get early access, you can say that, but if you get to keep the game or are paid, you should say so.

Would a single disclosure on my home page that “many of the products I discuss on this site are provided to me free by their manufacturers” be enough?

A single disclosure on your home page doesn’t really do it because people visiting your site might read individual reviews or watch individual videos without seeing the disclosure on your home page.
If I upload a video to YouTube and that video requires a disclosure, can I just put the disclosure in the description that I upload together with the video?

No, because consumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance of being clear and prominent if it’s included in the video itself. That’s not to say that you couldn’t have disclosures in both the video and the description.

What about a disclosure in the description of an Instagram post?

When people view Instagram streams on most smartphones, descriptions more than four lines long are truncated, with only the first three lines displayed. To see the rest, you have to click “more.” If an Instagram post makes an endorsement through the picture or the first three lines of the description, any required disclosure should be presented without having to click “more.”

Would a button that says DISCLOSURE, LEGAL, or something like that which links to a full disclosure be sufficient?

No. A hyperlink like that isn’t likely to be sufficient. It does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures. The disclosures we are talking about are brief and there is no space-related reason to use a hyperlink to provide access to them.

The social media platform I use has a built-in feature that allows me to disclose paid endorsements. Is it sufficient for me to rely on that tool?

Not necessarily. Just because a platform offers a feature like that is no guarantee it’s an effective way for influencers to disclose their material connection to a brand. It still depends on an evaluation of whether the tool clearly and conspicuously discloses the relevant connection. One factor the FTC will look to is placement. The disclosure should catch users’ attention and be placed where they aren’t likely to miss it. A key consideration is how users view the screen when using a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook. Second, the disclosure should use a simple-to-read font with a contrasting background that makes it stand out. Third, the disclosure should be a worded in a way that’s understandable to the ordinary reader. Ambiguous phrases are likely to be confusing. For example, simply flagging that a post contains paid content might not be sufficient if the post mentions multiple brands and not all of the mentions were paid. 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.

How can I make a disclosure on Snapchat or in Instagram Stories?

You can superimpose a disclosure on Snapchat or Instagram Stories just as you can superimpose any other words over the images on those platforms. The disclosure should be easy to notice and read in the time that your followers have to look at the image. In determining whether your disclosure passes muster, factors you should consider include how much time you give your 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. (You might want to have a solid background behind the disclosure.) Keep in mind that if your post includes video and you include an audio disclosure, many users of those platforms watch videos without sound. So they won’t hear an audio-only disclosure. Obviously, other general disclosure guidance would also apply.
What about a platform like Twitter? How can I make a disclosure when my message is limited to 140 characters?

The FTC isn’t mandating the specific wording of disclosures. However, the same general principle – that people get the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium. The words “Sponsored” and “Promotion” use only 9 characters. “Paid ad” only uses 7 characters. Starting a tweet with “Ad:” or “#ad” – which takes only 3 characters – would likely be effective.

You just talked about putting “#ad” at the beginning of a social media post. What about “#ad” at or near the end of a post?

We’re not necessarily saying that “#ad” has to be at the beginning of a post. The FTC does not dictate where you have to place the “#ad.” What the FTC will look at is whether it is easily noticed and understood. So, although we aren’t saying it has to be at the beginning, it’s less likely to be effective in the middle or at the end. Indeed, if #ad is mixed in with links or other hashtags at the end, some readers may just skip over all of that stuff.

What if we combine our company name, “Cool Stylle” with “ad” as in “#coolstyllead”?

There is a good chance that consumers won’t notice and understand the significance of the word “ad” at the end of a hashtag, especially one made up of several words combined like “#coolstyllead.” Disclosures need to be easily noticed and understood.

Is it good enough if an endorser says “thank you” to the sponsoring company?

No. A “thank you” to a company or a brand doesn’t necessarily communicate that the endorser got something for free or that they were given something in exchange for an endorsement. The person posting in social media could just be thanking a company or brand for providing a great product or service. But “Thanks XYZ for the free product” or “Thanks XYZ for the gift of ABC product” would be good enough – if that’s all you got from XYZ. If that’s too long, there’s “Sponsored” or “Ad.”

What about saying, “XYZ Company asked me to try their product”?

Depending on the context of the endorsement, it might be clear that the endorser got the product for free and kept it after trying it. If that isn’t clear, then that disclosure wouldn’t be good enough. Also, that disclosure might not be sufficient if, in addition to receiving a free product, the endorser was paid.

I provide marketing consulting and advice to my clients. I’m also a blogger and I sometimes promote my client’s products. Are “#client” “#advisor” and “#consultant” all acceptable disclosures?

Probably not. Such one-word hashtags are ambiguous and likely confusing. In blogs, there isn’t an issue with a limited number of characters available. So it would be much clearer if you say something like, “I’m a paid consultant to the marketers of XYZ” or “I work with XYZ brand” (where XYZ is a brand name).

Of course, it’s possible that that some shorter message might be effective. For example, something like “XYZ_Consultant” or “XYZ_Advisor” might work. But even if a disclosure like that is clearer, no disclosure is effective if consumers don’t see it and read it.

Would “#ambassador” or “#[BRAND]_Ambassador” work in a tweet?
The use of “#ambassador” is ambiguous and confusing. Many consumers are unlikely to know what it means. By contrast, “#XYZ_Ambassador” will likely be more understandable (where XYZ is a brand name). However, even if the language is understandable, a disclosure also must be prominent so it will be noticed and read.

I’m a blogger, and XYZ Resort Company is flying me to one of its destinations and putting me up for a few nights. If I write an article sharing my thoughts about the resort destination, how should I disclose the free travel?

Your disclosure could be just, “XYZ Resort paid for my trip” or “Thanks to XYZ Resort for the free trip.” It would also be accurate to describe your blog as “sponsored by XYZ Resort.”

The Guides say that disclosures have to be clear and conspicuous. What does that mean?

To make a disclosure “clear and conspicuous,” advertisers should use plain and unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily. They should not have to look for it. In general, disclosures should be:

- close to the claims to which they relate;
- in a font that is easy to read;
- in a shade that stands out against the background;
- for video ads, on the screen long enough to be noticed, read, and understood;
- for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.

A disclosure that is made in both audio and video is more likely to be noticed by consumers. Disclosures should not be hidden or buried in footnotes, in blocks of text people are not likely to read, or in hyperlinks. If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don’t meet the “clear and conspicuous” standard. With respect to online disclosures, FTC staff has issued a guidance document, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” which is available on ftc.gov.

Where in my blog should I disclose that my review is sponsored by a marketer? I’ve seen some say it at the top and others at the bottom. Does it matter?

Yes, it matters. A disclosure should be placed where it easily catches consumers’ attention and is difficult to miss. Consumers may miss a disclosure at the bottom of a blog or the bottom of a page. A disclosure at the very top of the page, outside of the blog, might also be overlooked by consumers. A disclosure is more likely to be seen if it’s very close to, or part of, the endorsement to which it relates.

I’ve been paid to endorse a product in social media. My posts, videos, and tweets will be in Spanish. In what language should I disclose that I’ve been paid for the promotion?

The connection between an endorser and a marketer should be disclosed in whatever language or languages the endorsement is made, so your disclosures should be in Spanish.

I guess I need to make a disclosure that I’ve gotten paid for a video review that I’m uploading to YouTube. When in the review should I make the disclosure? Is it ok if it’s at the end?
It's more likely that a disclosure at the end of the video will be missed, especially if someone doesn't watch the whole thing. Having it at the beginning of the review would be better. Having multiple disclosures during the video would be even better. Of course, no one should promote a link to your review that bypasses the beginning of the video and skips over the disclosure. If YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous.

_I'm getting paid to do a videogame playthrough and give commentary while I'm playing. The playthrough – which will last several hours – will be live streamed. Would a disclosure at the beginning of the stream be ok?_

Since viewers can tune in any time, they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream people are likely to see them no matter when they tune in. To be cautious, you could have a continuous, clear and conspicuous disclosure throughout the entire stream.

**Other Things for Endorsers to Know**

_Besides disclosing my relationship with the company whose product I'm endorsing, what are the essential things I need to know about endorsements?_

The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

- You can’t talk about your experience with a product if you haven’t tried it.
- If you were paid to try a product and you thought it was terrible, you can’t say it’s terrific.

You can’t make claims about a product that would require proof the advertiser doesn’t have. The Guides give the example of a blogger commissioned by an advertiser to review a new body lotion. Although the advertiser does not make any claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, she writes that the lotion cures eczema. The blogger is subject to liability for making claims without having a reasonable basis for those claims.

**Social Media Contests**

_My company runs contests and sweepstakes in social media. To enter, participants have to send a Tweet or make a pin with the hashtag, #XYZ_Rocks. (“XYZ” is the name of my product.) Isn’t that enough to notify readers that the posts were incentivized?_

No, it is likely that many readers would not understand such a hashtag to mean that those posts were made as part of a contest or that the people doing the posting had received something of value (in this case, a chance to win the contest prize). Making the word “contest” or “sweepstakes” part of the hashtag should be enough. However, the word “sweeps” probably isn’t, because it is likely that many people would not understand what that means.

**Online Review Programs**
My company runs a retail website that includes customer reviews of the products we sell. We believe honest reviews help our customers and we give out free products to a select group of our customers for them to review. We tell them to be honest, whether it’s positive or negative. What we care about is how helpful the reviews are. Do we still need to disclose which reviews were of free products?

Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if you didn’t intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It’s also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than reviewers who bought the products. If that’s the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer’s games. We’re going to have these reviewers announce at the beginning of each video (before the action starts) that it’s “sponsored by XYZ” and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think that XYZ is a neutral third party and won’t realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, “Sponsored by [name of the game company],” that would be good enough.

Soliciting Endorsements

My company wants to contact customers and interview them about their experiences with our service. If we like what they say about our service, can we ask them to allow us to quote them in our ads? Can we pay them for letting us use their endorsements?

Yes, you can ask your customers about their experiences with your product and feature their comments in your ads. If they have no reason to expect compensation or any other benefit before they give their comments, there’s no need to disclose your payments to them.

However, if you’ve given these customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them that you want their honest opinion. In fact, even if you tell your customers that you aren’t going to pay them but that they might be featured in your advertising, that opportunity might be seen as having a value, so the fact that they knew this when they gave the review should be disclosed (e.g., “Customers were told in advance they might be featured in an ad.”).

I’m starting a new Internet business. I don’t have any money for advertising, so I need publicity. Can I tell people that if they say good things about my business on Yelp or Etsy, I’ll give them a discount on items they buy through my website?
It’s not a good idea. Endorsements must reflect the honest opinions or experiences of the endorser, and your plan could cause people to make up positive reviews even if they’ve never done business with you. However, it’s okay to invite people to post reviews of your business after they’ve actually used your products or services. If you’re offering them something of value in return for these reviews, tell them in advance that they should disclose what they received from you. You should also inform potential reviewers that the discount will be conditioned upon their making the disclosure. That way, other consumers can decide how much stock to put in those reviews.

A company is giving me a free product to review on one particular website or social media platform. They say that if I voluntarily review it on another site or on a different social media platform, I don’t need to make any disclosures. Is that true?

No. If you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product.

Does it matter how I got the free product to review?

No, it doesn’t. Whether they give you a code, ship it directly to you, or give you money to buy it yourself, it’s all the same for the purpose of having to disclose that you got the product for free. The key question is always the same: If consumers knew the company gave it to you for free (or at a substantial discount), might that information affect how much weight they give your review?

My company wants to get positive reviews. We are thinking about distributing product discounts through various services that encourage reviews. Some services require individuals who want discount codes to provide information allowing sellers to read their other reviews before deciding which reviewers to provide with discount codes. Other services send out offers of a limited number of discount codes and then follow up by email to see whether the recipients have reviewed their products. Still others send offers of discount codes to those who previously posted reviews in exchange for discounted products. All of these services say that reviews are not required. Does it matter which service I choose? I would prefer that recipients of my discount codes not have to disclose that they received discounts.

Whichever service you choose, the recipients of your discount codes need to disclose that they received a discount from you to encourage their reviews. Even though the services might say that a review is not “required,” it’s at least implied that a review is expected.

What Are an Advertiser's Responsibilities for What Others Say in Social Media?

Our company uses a network of bloggers and other social media influencers to promote our products. We understand we’re responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products might need a more robust program than one that simply offers discounts for social media posts. It’s important to note that an advertiser’s liability can extend to the actions of its network participants.

https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-p...
products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser’s responsibility for substantiating objective product claims, explain to members of your network what they can (and can’t) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

It’s unrealistic to expect you to be aware of every single statement made by a member of your network. But it’s up to you to make a reasonable effort to know what participants in your network are saying. That said, it’s unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

*Our company’s social media program is run by our public relations firm. We tell them to make sure that what they and anyone they pay on our behalf do complies with the FTC’s Guides. Is that good enough?*

Your company is ultimately responsible for what others do on your behalf. You should make sure your public relations firm has an appropriate program in place to train and monitor members of its social media network. Ask for regular reports confirming that the program is operating properly and monitor the network periodically. Delegating part of your promotional program to an outside entity doesn’t relieve you of responsibility under the FTC Act.

**What About Intermediaries?**

*I have a small network marketing business. Advertisers pay me to distribute their products to members of my network who then try the product for free. How do the principles in the Guides affect me?*

You should tell the participants in your network that if they endorse products they have received through your program, they should make it clear they got them for free. Advise your clients – the advertisers – that if they provide free samples directly to your members, they should remind them of the importance of disclosing the relationship when they talk about those products. Put a program in place to check periodically whether your members are making those disclosures, and to deal with anyone who isn’t complying.

*My company recruits “influencers” for marketers who want them to endorse their products. We pay and direct the influencers. What are our responsibilities?*

Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

**What About Affiliate or Network Marketing?**
I’m an affiliate marketer with links to an online retailer on my website. When people read what I’ve written about a particular product and then click on those links and buy something from the retailer, I earn a commission from the retailer. What do I have to disclose? Where should the disclosure be?

If you disclose your relationship to the retailer clearly and conspicuously on your site, readers can decide how much weight to give your endorsement.

In some instances – like when the affiliate link is embedded in your product review – a single disclosure may be adequate. When the review has a clear and conspicuous disclosure of your relationship and the reader can see both the review containing that disclosure and the link at the same time, readers have the information they need. You could say something like, “I get commissions for purchases made through links in this post.” But if the product review containing the disclosure and the link are separated, readers may not make the connection.

As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. The closer it is to your recommendation, the better. Putting disclosures in obscure places – for example, buried on an ABOUT US or GENERAL INFO page, behind a poorly labeled hyperlink or in a “terms of service” agreement – isn’t good enough. Neither is placing it below your review or below the link to the online retailer so readers would have to keep scrolling after they finish reading. Consumers should be able to notice the disclosure easily. They shouldn’t have to hunt for it.

Is “affiliate link” by itself an adequate disclosure? What about a “buy now” button?

Consumers might not understand that “affiliate link” means that the person placing the link is getting paid for purchases through the link. Similarly, a “buy now” button would not be adequate.

What if I’m including links to product marketers or to retailers as a convenience to my readers, but I’m not getting paid for them?

Then there isn’t anything to disclose.

Does this guidance about affiliate links apply to links in my product reviews on someone else’s website, to my user comments, and to my tweets?

Yes, the same guidance applies anytime you endorse a product and get paid through affiliate links.

It’s clear that what’s on my website is a paid advertisement, not my own endorsement or review of the product. Do I still have to disclose that I get a commission if people click through my website to buy the product?

If it’s clear that what’s on your site is a paid advertisement, you don’t have to make additional disclosures. Just remember that what's clear to you may not be clear to everyone visiting your site, and the FTC evaluates ads from the perspective of reasonable consumers.

Expert Endorsers Making Claims Outside of Traditional Advertisements

One of our company’s paid spokespersons is an expert who appears on news and talk shows promoting our product, sometimes along with other products she recommends based on her expertise. Your Guides give an example of a celebrity spokesperson appearing on a talk show and

recommend that the celebrity disclose her connection to the company she is promoting. Does that principle also apply to expert endorsers?

Yes, it does. Your spokesperson should disclose her connection when promoting your products outside of traditional advertising media (in other words, on programming that consumers won’t recognize as paid advertising). The same guidance also would apply to comments by the expert in her blog or on her website.

Employee Endorsements

I work for a terrific company. Can I mention our products to people in my social networks? How about on a review site? My friends won’t be misled since it’s clear in my online profiles where I work.

If your company allows employees to use social media to talk about its products, you should make sure that your relationship is disclosed to people who read your online postings about your company or its products. Put yourself in the reader’s shoes. Isn’t the employment relationship something you would want to know before relying on someone else’s endorsement? Listing your employer on your profile page isn’t enough. After all, people who just read what you post on a review site won’t get that information.

People reading your posting on a review site probably won’t know who you are. You definitely should disclose your employment relationship when making an endorsement.

On her own initiative and without us asking, one of our employees used her personal social network simply to “like” or “share” one of our company’s posts. Does she need to disclose that she works for our company?

Whether there should be any disclosure depends upon whether the “like” or “share” could be viewed as an advertisement for your company. If the post is an ad, then employees endorsing the post should disclose their relationship to the company. With a share, that’s fairly easy to do, “Check out my company’s great new product ….” Regarding “likes,” see what we said above about “likes.”

Our company’s policy says that employees shouldn’t post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they are hired. But we have several thousand people working here and we can’t monitor what they all do on their own computers and other devices when they aren’t at work. Are we liable if an employee posts a review of one of our products, either on our company website or on a social media site and doesn’t disclose that relationship?

It wouldn’t be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products. Also, if you learn that an employee has posted a review on the company’s website or a social media site without adequately disclosing his or her relationship to the company, you should remind them of your company policy and ask them to remove that review or adequately disclose that they’re an employee.

What about employees of an ad agency or public relations firm? Can my agency ask our employees to spread the buzz about our clients’ products?
First, an ad agency (or any company for that matter) shouldn’t ask employees to say anything that isn’t true. No one should endorse a product they haven’t used or say things they don’t believe about a product, and an employer certainly shouldn’t encourage employees to engage in such conduct.

Moreover, employees of an ad agency or public relations firm have a connection to the advertiser, which should be disclosed in all social media posts. Agencies asking their employees to spread the word must instruct those employees about their responsibilities to disclose their relationship to the product they are endorsing, e.g., “My employer is paid to promote [name of product],” or simply “Advertisement,” or when space is an issue, “Ad” or “#ad.”

*My company XYX wants to tell our employees what to disclose in social media. Is “#employee” good enough?*

Consumers may be confused by “#employee.” Consumers would be more likely to understand “#XYZ_Employee.” Then again, if consumers don’t associate your company’s name with the product or brand being endorsed, that disclosure might not work. It would be much clearer to use the words “my company” or “employer’s” in the body of the message. It’s a lot easier to understand and harder to miss.

**Using Testimonials That Don’t Reflect the Typical Consumer Experience**

*We want to run ads featuring endorsements from consumers who achieved the best results with our company’s product. Can we do that?*

Testimonials claiming specific results usually will be interpreted to mean that the endorser’s experience reflects what others can also expect. Statements like “Results not typical” or “Individual results may vary” won’t change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or
2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

*How would this principle about testimonialists who achieved exceptional results apply in a real ad?*

The Guides include several examples with practical advice on this topic. One example is about an ad in which a woman says, “I lost 50 pounds in 6 months with WeightAway.” If consumers can’t generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, “Most women who use WeightAway for six months lose at least 15 pounds.”

*Our company website includes testimonials from some of our more successful customers who used our product during the past few years and mentions the results they got. Can’t figure out now what the “generally expected results” were back then. What should we do? Do we have to remove those testimonials?*

There are two issues here. First, according to the Guides, if your website says or implies that the endorser currently uses the product in question, you can use that endorsement only as long as you have good reason to believe the endorser does still use the product. If you’re using endorsements that are a few years old, it’s your
obligation to make sure the claims still are accurate. If your product has changed, it’s best to get new
endorsements.

Second, if your product is the same as it was when the endorsements were given and the claims are still
accurate, you probably can use the old endorsements if the disclosures are consistent with what the generally
expected results are now.

Where can I find out more?

The Guides offer more than 35 examples involving various endorsement scenarios. Questions? Send them to
endorsements@ftc.gov. We may address them in future FAQs.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to
provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on
consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261.
Watch a video, How to File a Complaint, at consumer.ftc.gov/media to learn more. The FTC enters consumer
complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by
hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small
businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the
conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses
can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-
734-3247) or go to www.sba.gov/ombudsman.

September 2017
A company selling a popular series of guitar-lesson DVDs will pay $250,000 to settle Federal Trade Commission charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers.

The FTC complaint against Nashville, Tennessee-based Legacy Learning Systems Inc. and its owner, Lester Gabriel Smith, is part of FTC efforts to make sure that advertising to American consumers is truthful and not deceptive, whether the advertisements appear in traditional or newer forms of media.

The Learn and Master Guitar program promoted by Legacy Learning and Smith is sold as a way to learn the guitar at home using DVDs and written materials. According to the FTC’s complaint, Legacy Learning advertised using an online affiliate program, through which it recruited “Review Ad” affiliates to promote its courses through endorsements in articles, blog posts, and other online editorial material, with the endorsements appearing close to hyperlinks to Legacy’s website. Affiliates received in exchange for substantial commissions on the sale of each product resulting from referrals. According to the FTC, such endorsements generated more than $5 million in sales of Legacy’s courses.

The FTC charged that Legacy Learning and Smith disseminated deceptive advertisements by representing that online endorsements written by affiliates reflected the views of ordinary consumers or “independent” reviewers, without clearly disclosing that the affiliates were paid for every sale they generated.

The FTC’s revised guidelines on endorsements and testimonials, issued in 2009, explain in general terms when the agency may find endorsements or testimonials unfair or deceptive. Under the guidelines, a positive review by a person connected to the seller – or someone who receives cash or in-kind payment to review a product or service – should disclose the material connection between the reviewer and the seller of the product or service.
“Whether they advertise directly or through affiliates, companies have an obligation to ensure that the advertising for their products is not deceptive,” said David Vladeck, Director of the FTC’s Bureau of Consumer Protection. “Advertisers using affiliate marketers to promote their products would be wise to put in place a reasonable monitoring program to verify that those affiliates follow the principles of truth in advertising.”

Under the proposed administrative settlement, Legacy Learning and Smith will pay $250,000. In addition, they have to monitor and submit monthly reports about their top 50 revenue-generating affiliate marketers, and make sure that they are disclosing that they earn commissions for sales and are not misrepresenting themselves as independent users or ordinary consumers. Legacy Learning and Smith also must monitor a random sampling of another 50 of their affiliate marketers, and submit monthly reports to the FTC about the same criteria.

The Commission vote to approve the administrative complaint and proposed consent agreement was 5-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through April 15, 2011, after which the Commission will decide whether to make it final. Interested parties can submit written comments electronically or in paper form by following the instructions in the Invitation To Comment part of the “Supplementary Information” section. Comments in electronic form should be submitted using the following Web link: https://ftcpublic.commentworks.com/ftc/legacylearningsystems and following the instructions on the web-based form. Comments in paper form should be mailed or delivered to: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The FTC is requesting that any comment filed in paper form near the end of the public comment period be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

NOTE: The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The complaint is not a finding or ruling that the respondent has actually violated the law. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an Administrative Law Judge. A consent order is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

The Federal Trade Commission works for consumers to prevent fraudulent, deceptive, and unfair business practices and to provide information to help spot, stop, and avoid them. To file a complaint in English or Spanish, visit the FTC’s online Complaint Assistant or call 1-877-FTC-HELP (1-877-382-4357). The FTC enters complaints into Consumer Sentinel, a secure, online database available to more than 1,800 civil and criminal law enforcement agencies in the U.S. and abroad. The FTC’s Web site provides free information on a variety of consumer topics.

(FTC File No. 1023055)
(Legacy NR)

Contact Information

MEDIA CONTACT:
FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

Commission aims to improve disclosures in social media endorsements

FOR RELEASE
April 19, 2017

TAGS: Bureau of Consumer Protection | Office of Technology Research and Investigation (OTech) | Consumer Protection | Advertising and Marketing | Online Advertising and Marketing

After reviewing numerous Instagram posts by celebrities, athletes, and other influencers, Federal Trade Commission staff recently sent out more than 90 letters reminding influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media.

The letters were informed by petitions filed by Public Citizen and affiliated organizations regarding influencer advertising on Instagram, and Instagram posts reviewed by FTC staff. They mark the first time that FTC staff has reached out directly to educate social media influencers themselves.

The FTC’s Endorsement Guides provide that if there is a “material connection” between an endorser and an advertiser – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication. A material connection could be a business or family relationship, monetary payment, or the gift of a free product. Importantly, the Endorsement Guides apply to both marketers and endorsers.

In addition to providing background information on when and how marketers and influencers should disclose a material connection in an advertisement, the letters each addressed one point specific to Instagram posts -- consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click “more,” which many may not do. The staff’s letters informed recipients that when making endorsements on Instagram, they should disclose any material connection above the “more” button.
The letters also noted that when multiple tags, hashtags, or links are used, readers may just skip over them, especially when they appear at the end of a long post – meaning that a disclosure placed in such a string is not likely to be conspicuous.

Some of the letters addressed particular disclosures that are not sufficiently clear, pointing out that many consumers will not understand a disclosure like “#sp,” “Thanks [Brand],” or “#partner” in an Instagram post to mean that the post is sponsored.

The staff’s letters were sent in response to a sample of Instagram posts making endorsements or referencing brands. In sending the letters, the staff did not predetermine in every instance whether the brand mention was in fact sponsored, as opposed to an organic mention.

In addition to the Endorsement Guides, the FTC has previously addressed the need for endorsers to adequately disclose connections to brands through law enforcement actions and the staff’s business education efforts. The staff also issued FTC's Endorsement Guides: What People are Asking, an informal business guidance document that answers frequently asked questions. The staff’s letters to endorsers and brands enclosed copies of both guidance documents. The FTC is not publicly releasing the letters or the names of the recipients at this time.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-4357). Like the FTC on Facebook, follow us on Twitter, read our blogs and subscribe to press releases for the latest FTC news and resources.

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FTC Stops Automobile Shipment Broker from Misrepresenting Online Reviews

Company Failed to Disclose It Gave Discounts and Awards to Customer Reviewers

FOR RELEASE
February 27, 2015

TAGS:  Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing |
Endorsements | Online Advertising and Marketing

AmeriFreight, an automobile shipment broker based in Peachtree City, Georgia, has agreed to a settlement with the Federal Trade Commission that will halt the company’s allegedly deceptive practice of touting online customer reviews, while failing to disclose that the reviewers were compensated with discounts and incentives.

The FTC’s complaint marks the first time the agency has charged a company with misrepresenting online reviews by failing to disclose that it gave cash discounts to customers to post the reviews.

“Companies must make it clear when they have paid their customers to write online reviews,” said Jessica Rich, Director of the FTC’s Bureau of Consumer Protection. “If they fail to do that – as AmeriFreight did – then they’re deceiving consumers, plain and simple.”

AmeriFreight is an automobile shipment broker that arranges the shipment of consumers’ cars through third-party freight carriers. Its website touted that the company had “more highly ranked ratings and reviews than any other company in the automotive transportation business.” As part of its advertising, it encouraged consumers to “Google us ‘bbb top rated car shipping.’ You don’t have to believe us, our consumers say it all.”

According to the FTC's complaint, AmeriFreight and its owner, Marius Lehmann, violated Section 5 of the FTC Act by failing to disclose that they compensated consumers for their online reviews. Specifically, according to the complaint, the respondents:

-
The proposed order settling the FTC’s charges prohibits the respondents from misrepresenting that their products or services are highly rated or top-ranked based on unbiased consumer reviews, or that customer reviews are unbiased. It also requires the respondents to clearly and prominently disclose any material connection, if one exists, between them and their endorsers.

The respondents also must maintain records of their advertisements and other relevant documents, and must deliver copies of the order to company principals, officers, directors, managers, employees and others. Finally, they must notify the FTC about any changes in corporate structure or affiliation with new businesses that could affect their compliance with the order, which will expire in 20 years.

Information for Consumers

The FTC has information for consumers about how to detect and avoid advertisements that may be deceptive or misleading, including specific information on endorsements and testimonials.

The Commission vote to accept the proposed consent order for public comment was 5-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly. Interested parties can submit comments electronically by following the instructions in the “Invitation to Comment” part of the “Supplementary Information” section. The agreement will be subject to public comment for 30 days, beginning today and continuing through March 31, 2015, after which the Commission will decide whether to make the proposed consent order final.

NOTE: The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

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PRESS RELEASE REFERENCE:
FTC Approves Final Order Barring AmeriFreight from Deceptively Touting Online Consumer Reviews and Failing to Disclose Incentives It Provided to Reviewers

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FTC Stops False Advertising, Phony Reviews by Online Trampoline Sellers

Commission alleges duo developed supposedly independent review websites, posted deceptive endorsements

FOR RELEASE

May 31, 2017

TAGS: Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Endorsements | Online Advertising and Marketing

Two brothers have agreed to settle Federal Trade Commission charges that in marketing and selling their trampolines, they deceived consumers by directing them to review websites that claimed to be independent but were not, and by failing to disclose that one of the brothers posted online product endorsements without disclosing his financial interest in the sale of the products.

Under an administrative consent order announced today, Son “Sonny” Le and Bao “Bobby” Le are barred from engaging in such deceptive behavior in the future and must clearly and conspicuously disclose any material connections between a reviewer or endorser and the product being reviewed.

According to the FTC’s complaint, working together and using several fictitious business names, the Les marketed and sold Infinity and Olympus Pro brand trampolines on several websites. These sales websites prominently featured logos from supposedly independent review entities, including “Trampoline Safety of America,” the “Bureau of Trampoline Review,” and “Top Trampoline Review.”

Consumers who clicked on the logos were directed to the websites of those reviewing organizations, which claimed to provide objective information, including unbiased “expert reviews” of specific brands and models, as well as ratings based on safety, performance, and other qualities. Each review site recommended the Les’ Infinity and Olympus Pro trampolines.
In reality, the review sites were not what they appeared nor were they unbiased, as all were owned and run by
the Les. The FTC alleges that the logos were fake, as were claims on the sites stating, for example, that
Trampoline Safety of America (one of the purported reviewing entities) “is a third-party organization involved in
studying the technical aspects of all the major trampoline sites in America” comprised of structural engineers,
trampoline gymnastic coaches, and professionals whose goal was to educate the public about “the safeties of
trampolines.”

The FTC also charged in its complaint that Bobby Le posted online reviews that appeared to be from ordinary
trampoline owners – praising the “strong frames” and other attributes of the Les’ products, while disparaging
other brands – without disclosing his connection to the products he was promoting.

The proposed order settling the FTC’s charges prohibits the Les from making any of the misrepresentations
alleged in the complaint and requires them to disclose clearly, conspicuously, and in close proximity to an
endorsement any unexpected connection between an endorser and the company or anyone associated with it.
Finally, the order requires that if the Les review a product that they sell or that competes with one they sell,
that they clearly and conspicuously disclose this fact, as well.

The Commission vote to issue the administrative complaint and to accept the consent agreement was 2-0. The
FTC will publish a description of the consent agreement package in the Federal Register shortly. The
agreement will be subject to public comment for 30 days, beginning today and continuing through June 30,
2017, after which the Commission will decide whether to make the proposed consent order final.

Interested parties can submit comments electronically by following the instructions in the “Invitation To
Comment” part of the “Supplementary Information” section.

NOTE: The Commission issues an administrative complaint when it has “reason to believe” that the law has
been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When
the Commission issues a consent order on a final basis, it carries the force of law with respect to future
actions. Each violation of such an order may result in a civil penalty of up to $40,654.

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learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-
4357). Like the FTC on Facebook, follow us on Twitter, read our blogs and subscribe to press releases for the
latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Approves Final Consent Order Stopping False Advertising, Phony Reviews by Online Trampoline Sellers

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Home Security Company ADT Settles FTC Charges that Endorsements Deceived Consumers

Company’s Paid Spokespersons Failed to Disclose Their Connection to ADT

FOR RELEASE

March 6, 2014


As part of its ongoing crackdown on misleading endorsements in advertising, the Federal Trade Commission has charged the home security company ADT LLC with misrepresenting that paid endorsements from safety and technology experts were independent reviews. Under an agreed-upon settlement, ADT is prohibited from misrepresenting paid endorsements as independent reviews in the future.

Boca Raton, Florida-based ADT manufactures and markets the ADT Pulse home security and monitoring system and various other security products and services. The FTC’s administrative complaint alleges that ADT paid spokespeople to demonstrate and review the ADT Pulse on NBC’s Today Show, as well as other television and radio news programs and talk shows across the country, and in blogs and other online material. ADT, the FTC alleges, misrepresented that the reviews were independent, and failed to disclose that the experts were being paid by ADT to promote the Pulse system.

“It’s hard for consumers to make good buying decisions when they think they’re getting independent expert advice as part of an impartial news segment and have no way of knowing they are actually watching a sales pitch,” said Jessica Rich, Director of the Federal Trade Commission’s Bureau of Consumer Protection. “When a paid endorser appears in a news or talk show segment with the host of that program, the relationship with the advertiser must be clearly disclosed.”
ADT paid three spokespersons, including a child safety expert, a home security expert, and a technology expert, more than $300,000 to promote the ADT Pulse, with one spokesperson receiving more than $200,000. Two of those spokespersons also received a free ADT Pulse security system, valued at approximately $4,000, and free monthly monitoring service, according to the complaint. In exchange, the spokespersons appeared on more than 40 different television and radio programs nationwide and posted blogs and other material online.

ADT set up media interviews for the endorsers through its public relations firms and booking agents – often providing reporters and news anchors with suggested interview questions, and background video, also known as b-roll, according to the complaint. The paid ADT endorsers were introduced by program hosts as experts in child safety, home security, or technology, usually with no mention of any connection to ADT. The endorsers sometimes demonstrated child safety, home security, or technology products other than the ADT Pulse, adding to the impression that they were providing an impartial, expert review of the products.

The proposed order:

- prohibits ADT from misrepresenting that any discussion or demonstration of a security or monitoring product or service is an independent review provided by an impartial expert;
- requires ADT to clearly and prominently disclose, in connection with the advertising of a home security or monitoring product or service, a material connection, if one exists, between an endorser and the company; and
- requires the company to promptly remove reviews and endorsements that have been misrepresented as independently provided by an impartial expert or that fail to disclose a material connection between ADT and an endorser.

The Commission vote to issue the administrative complaint and to accept the agreement containing the proposed consent order for public comment was 4-0. The FTC will publish a description of the complaint and consent agreement in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through April 7, 2014, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit written comments electronically or in paper form by following the instructions in the “Invitation To Comment” part of the “Supplementary Information” section. Comments in electronic form should be submitted using the following Web link: https://ftcpublic.commentworks.com/ftc/adtconsent and following the instructions on the web-based form. Comments in paper form should be mailed or delivered to: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The FTC is requesting that any comment filed in paper form near the end of the public comment period be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

NOTE: When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

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variety of consumer topics. Like the FTC on Facebook, follow us on Twitter, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Approves Final Consent Settling Charges that Home Security Company ADT’s Endorsements Deceived Consumers

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Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”

Promotions Were Part of the Company’s March 2015 Design Lab Collection Launch

FOR RELEASE
March 15, 2016

TAGS:  Retail | Merchandise & Clothing | Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Online Advertising and Marketing

National retailer Lord & Taylor has agreed to settle Federal Trade Commission charges that it deceived consumers by paying for native advertisements, including a seemingly objective article in the online publication Nylon and a Nylon Instagram post, without disclosing that the posts actually were paid promotions for the company’s 2015 Design Lab clothing collection.

The Commission’s complaint also charges that as part of the Design Lab rollout, Lord & Taylor paid 50 online fashion “influencers” to post Instagram pictures of themselves wearing the same paisley dress from the new collection, but failed to disclose they had given each influencer the dress, as well as thousands of dollars, in exchange for their endorsement.

In settling the charges, Lord & Taylor is prohibited from misrepresenting that paid ads are from an independent source, and is required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements.
“Lord & Taylor needs to be straight with consumers in its online marketing campaigns,” said Jessica Rich, Director of the FTC’s Bureau of Consumer Protection. “Consumers have the right to know when they're looking at paid advertising.”

Design Lab Paisley Asymmetrical Dress that was the subject of the Nylon social media campaign

According to the FTC, over a weekend in late March 2015, Lord & Taylor launched a comprehensive social media campaign to promote its new Design Lab collection, a private-label clothing line targeted to women between 18 and 35 years old. The marketing plan included branded blog posts, photos, video uploads, native advertising editorials in online fashion magazines, and online endorsements by a team of specially selected “fashion influencers.”

The complaint alleges that Lord & Taylor placed a Lord & Taylor-edited paid article in *Nylon*, a pop culture and fashion publication. Nylon also posted a photo of the retailer’s Design Lab Paisley Asymmetrical Dress on Nylon’s Instagram site, along with a caption that Lord & Taylor had reviewed and approved. The Instagram post and article gave no indication to consumers that they were paid advertising placed by Lord & Taylor.

Over the same weekend in March 2015, Lord & Taylor gave 50 select fashion influencers a free Paisley Asymmetrical Dress and paid them between $1,000 and $4,000 each to post a photo of themselves wearing it on Instagram or another social media site. While the influencers could style the dress any way they chose, Lord & Taylor contractually obligated them to use the “@lordandtaylor” Instagram user designation and the hashtag “#DesignLab” in the caption of the photo they posted. The company also pre-approved each proposed post.
In addition, the FTC’s complaint charges that Lord & Taylor did not require the influencers to disclose that the company had compensated them to post the photo, and none of the posts included such a disclosure. In total, the influencers’ posts reached 11.4 million individual Instagram users over just two days, led to 328,000 brand engagements with Lord & Taylor’s own Instagram handle, and the dress quickly sold out.

The proposed consent order settling the FTC’s complaint prohibits Lord & Taylor from misrepresenting that paid commercial advertising is from an independent or objective source. It also prohibits the company from misrepresenting that any endorser is an independent or ordinary consumer, and requires the company to disclose any unexpected material connection between itself and any influencer or endorser. Finally, it establishes a monitoring and review program for the company’s endorsement campaigns.

The FTC recently issued an enforcement policy statement that businesses can use to ensure they make required disclosures in native advertisements.

The Commission vote to issue the administrative complaint and to accept the proposed consent agreement was 4-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly.

The agreement will be subject to public comment for 30 days, beginning today and continuing through April 14, 2016, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit comments electronically by following the instructions in the “Invitation To Comment” part of the “Supplementary Information” section.

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PRESS RELEASE REFERENCE:
FTC Approves Final Lord & Taylor Order Prohibiting Deceptive Advertising Techniques

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Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an O
Public Relations Firm to Settle FTC Charges that It Advertised Clients' Gaming Apps Through Misleading Online Endorsements

FOR RELEASE
August 26, 2010

TAGS: Consumer Protection

A public relations agency hired by video game developers will settle Federal Trade Commission charges that it engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the developers.

"Companies, including public relations firms involved in online marketing, need to abide by long-held principles of truth in advertising," said Mary Engle, Director of the FTC’s Division of Advertising Practices. "Advertisers should not pass themselves off as ordinary consumers touting a product, and endorsers should make it clear when they have financial connections to sellers."

Under the proposed settlement order, Reverb Communications, Inc. and its sole owner, Tracie Snitker, are required to remove any previously posted endorsements that misrepresent the authors as independent users or ordinary consumers, and that fail to disclose a connection between Reverb and Snitker and the seller of a product or service. The agreement also bars Reverb and Snitker from misrepresenting that the user or endorser is an independent, ordinary consumer, and from making endorsement or user claims about a product or service unless they disclose any relevant connections that they have with the seller of the product or service.

Reverb is a company that provides public relations, marketing, and sales services to developers of video game applications, including mobile gaming apps. Between November 2008 and May 2009, Reverb and Snitker posted reviews about their clients’ games at the iTunes store using account names that gave readers the impression the reviews were written by disinterested consumers, according to the FTC complaint. Reverb and
Snitker did not disclose that they were hired to promote the games and that they often received a percentage of the sales. These facts would have been relevant to consumers who were evaluating the endorsement and deciding whether to buy the gaming applications, the FTC complaint alleged.

In its revised endorsements and testimonials guides issued last year, the FTC specified that while decisions will be reached on a case-by-case basis, the online post by a person connected to the seller, or someone who receives cash or in-kind payment to review a product or service, should disclose the material connection the reviewer shares with the seller of the product or service. This applies to employees of both the seller and the seller’s advertising agency.

The FTC vote to approve the administrative complaint and proposed consent agreement was 5-0. The FTC will publish an announcement regarding the agreement in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through September 27, 2010, after which the FTC will decide whether to make it final. To file a public comment, please click on the following hyperlink: https://ftcpublic.commentworks.com/ftc/reverb. Copies of the complaint, the proposed consent agreement, and an analysis of the agreement to aid in public comment are available from both the FTC’s website at http://www.ftc.gov and the FTC’s Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

NOTE: The Commission issues an administrative complaint when it has reason to believe that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The complaint is not a finding or ruling that the respondents have actually violated the law. The consent agreement is for settlement purposes only and does not constitute admission by the respondents of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

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(FTC File No. 0923199)
(Reverb)

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Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos

Influencers Were Paid Thousands of Dollars to Promote ‘Shadow of Mordor’

FOR RELEASE
July 11, 2016

TAGS: Bureau of Consumer Protection | Western Region | Consumer Protection | Advertising and Marketing | Endorsements | Online Advertising and Marketing

Warner Bros. Home Entertainment, Inc. has settled Federal Trade Commission charges that it deceived consumers during a marketing campaign for the video game Middle Earth: Shadow of Mordor, by failing to adequately disclose that it paid online “influencers,” including the wildly popular “PewDiePie,” thousands of dollars to post positive gameplay videos on YouTube and social media. Over the course of the campaign, the sponsored videos were viewed more than 5.5 million times.

Under a proposed FTC order announced today, Warner Bros. is barred from failing to make such disclosures in the future and cannot misrepresent that sponsored content, including gameplay videos, are the objective, independent opinions of video game enthusiasts or influencers.

“Consumers have the right to know if reviewers are providing their own opinions or paid sales pitches,” said Jessica Rich, Director of the FTC’s Bureau of Consumer Protection. “Companies like Warner Brothers need to be straight with consumers in their online ad campaigns.”

The FTC’s complaint stems from a late-2014 Warner Bros. online marketing campaign designed to generate buzz within the gaming community for the new release of Middle Earth: Shadow of Mordor, a fantasy role-
playing game loosely based on The Hobbit and the Lord of the Rings trilogy. It was released in September 2014 for the PlayStation 3 and in November 2014 for the Xbox 360.

According to the complaint, during the campaign, Warner Bros., through its advertising agency Plaid Social Labs, LLC, hired online influencers to develop sponsored gameplay videos and post them on YouTube. Warner Bros. also told the influencers to promote the videos on Twitter and Facebook, generating millions of views. PewDiePie’s sponsored video alone was viewed more than 3.7 million times.

Warner Bros. paid each influencer from hundreds to tens of thousands of dollars, gave them a free advance-release version of the game, and told them how to promote it, according to the complaint. The FTC contends that Warner Bros. required the influencers to promote the game in a positive way and not to disclose any bugs or glitches they found.

While the videos were sponsored content – essentially ads for Shadow of Mordor – the FTC alleges that Warner Bros. failed to require the paid influencers to adequately disclose this fact. The FTC also alleges that Warner Bros. did not instruct the influencers to include sponsorship disclosures clearly and conspicuously in the video itself where consumers were likely to see or hear them.

Instead, according to the complaint, Warner Bros. instructed influencers to place the disclosures in the description box appearing below the video. Because Warner Bros. also required other information to be placed in that box, the vast majority of sponsorship disclosures appeared "below the fold," visible only if consumers clicked on the "Show More" button in the description box. In addition, when influencers posted YouTube videos on Facebook or Twitter, the posting did not include the "Show More" button, making it even less likely that consumers would see the sponsorship disclosures.

The complaint also alleges that in some cases, the influencers disclosed only that they had received early access to Shadow of Mordor, but failed to disclose that Warner Bros. also had paid them to promote the game.

The FTC also alleges that the Warner Bros.’ contracts with influencers subjected their videos to pre-approval, and that on at least one occasion Warner Bros. reviewed and approved an influencer video that lacked adequate sponsorship disclosure.

The Commission’s complaint charges that Warner Bros., through its marketing campaign, misled consumers by suggesting that the gameplay videos of Shadow of Mordor reflected the independent or objective views of the influencers. The complaint also alleges that Warner Bros. failed to adequately disclose that the gamers were compensated for their positive reviews.

The proposed order settling the FTC’s charges prohibits Warner Bros. from misrepresenting that any gameplay videos disseminated as part of a marketing campaign are independent opinions or the experiences of impartial video game enthusiasts. Further, it requires the company to clearly and conspicuously disclose any material connection between Warner Bros. and any influencer or endorser promoting its products.

Finally, the order specifies the minimum steps that Warner Bros., or any entity it hires to conduct an influencer campaign, must take to ensure that future campaigns comply with the terms of the order. These steps include educating influencers regarding sponsorship disclosures, monitoring sponsored influencer videos for compliance, and, under certain circumstances, terminating or withholding payment from influencers or ad agencies for non-compliance.

The Commission vote to issue the administrative complaint and to accept the proposed consent agreement was 3-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly.
The agreement will be subject to public comment for 30 days, beginning today and continuing through August 10, 2016, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit comments electronically by following the instructions in the “Invitation to Comment” part of the “Supplementary Information” section of the Federal Register notice.

**NOTE:** The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-4357). Like the FTC on Facebook, follow us on Twitter, read our blogs and subscribe to press releases for the latest FTC news and resources.

**PRESS RELEASE REFERENCE:**
FTC Approves Final Order Requiring Warner Bros. to Disclose Payments to Online Influencers

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A California-based online entertainment network has agreed to settle Federal Trade Commission charges that it engaged in deceptive advertising by paying “influencers” to post YouTube videos endorsing Microsoft’s Xbox One system and several games. The influencers paid by Machinima, Inc., failed to adequately disclose that they were being paid for their seemingly objective opinions, the FTC charged.

Under the proposed settlement, Machinima is prohibited from similar deceptive conduct in the future, and the company is required to ensure its influencers clearly disclose when they have been compensated in exchange for their endorsements.

“When people see a product touted online, they have a right to know whether they’re looking at an authentic opinion or a paid marketing pitch,” said Jessica Rich, Director of the Bureau of Consumer Protection. “That’s true whether the endorsement appears in a video or any other media.”

According to the FTC’s complaint, Machinima and its influencers were part of an Xbox One marketing campaign managed by Microsoft’s advertising agency, Starcom MediaVest Group. Machinima guaranteed Starcom that the influencer videos would be viewed at least 19 million times.

In the first phase of the marketing campaign, a small group of influencers were given access to pre-release versions of the Xbox One console and video games in order to produce and upload two endorsement videos each. According to the FTC, Machinima paid two of these endorsers $15,000 and $30,000 for producing YouTube videos that garnered 250,000 and 730,000 views, respectively. In a separate phase of the marketing...
program, Machinima promised to pay a larger group of influencers $1 for every 1,000 video views, up to a total of $25,000. Machinima did not require any of the influencers to disclose they were being paid for their endorsement.

The order settling the FTC’s charges prohibits Machinima from misrepresenting in any influencer campaign that the endorser is an independent user of the product or service being promoted. Among other things, it also requires the company to prominently disclose any material connection between the endorser and the advertiser, and prohibits Machinima from compensating any influencer who has not made the required disclosures. In addition, it requires the company to follow up within 90 days of the start of a campaign to ensure the disclosures are still being made.

FTC staff also has sent a letter to Microsoft and Starcom closing its investigation into the two companies in this case. According to the letter, while Microsoft and Starcom both were responsible for the influencers’ failure to disclose their material connection to the companies, Commission staff considered the fact that these appeared to be isolated incidents that occurred in spite of, and not in the absence of, policies and procedures designed to prevent such lapses. The companies also quickly required Machinima to remedy the situation after they learned that Machinima was paying influencers without making the necessary disclosures.

The Commission vote to issue the complaint and accept the proposed consent order for public comment was 5-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through Oct. 2, 2015, after which the Commission will decide whether to make the proposed consent order final. Comments can be submitted electronically.

The FTC appreciates the assistance of the New York State Attorney General’s Office in bringing this case. The Commission recently issued updated questions and answers providing guidance regarding online endorsements and testimonials.

NOTE: The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

The Federal Trade Commission works for consumers to prevent fraudulent, deceptive, and unfair business practices and to provide information to help spot, stop, and avoid them. To file a complaint in English or Spanish, visit the FTC’s online Complaint Assistant or call 1-877-FTC-HELP (1-877-382-4357). The FTC enters complaints into Consumer Sentinel, a secure, online database available to more than 2,000 civil and criminal law enforcement agencies in the U.S. and abroad. The FTC’s website provides free information on a variety of consumer topics. Like the FTC on Facebook, follow us on Twitter, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers

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Venable Materials
The FTC’s Influence Reaches Influencers: FTC Settles First Ever Complaint Against Social Media Influencers

BY RANDY SHAHEEN AND AMY MUDGE ON SEPTEMBER 7, 2017

Big day at the FTC for influencer announcements! The FTC announced its first ever settlement with social media influencers. At the same time they followed up with a second round of warning letters to a large group of influencers. Finally the FTC updated its FAQs on endorsements with some guidance, including its current views about what phrases are and are not clear in disclosing a material connection.

Let’s debrief:

Unlike the unfortunate settling social media influencers, the FTC in its consent order against the online gaming community influencers, Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, is loud and clear about its stance regarding marketing and promoting on social media – clearly disclose any business ties or financial incentives. In other words, a social media influencer must disclose all material connections, if any, to the product or service he or she endorses.

According to the FTC’s complaint against TmarTn and Syndicate, beginning in 2015, the social media influencers operated and advertised the csglotto.com website. The CSGO Lotto name is based on the first-person shooter video game Counter-Strike: Global Initiative. The game allows players to collect virtual items that can be bought, sold, and traded for real money. CSGO Lotto capitalized on this feature by enabling consumers to gamble the virtual items as currency. The charges in the complaint alleged that the social media influencers promoted YouTube videos about their company without revealing their co-ownership role in the company. Additionally, the complaint alleged the TmarTn and Syndicate paid other influencers thousands of dollars to promote CSGO Lotto on YouTube, Twitch, Twitter, and Facebook without requiring them to include any sponsorship disclosures and prohibiting them from making disparaging remarks about the gambling website. While so much of the focus in this case and in general is on material connection disclosure, there are other important elements of the Testimonial and Endorsement Guides. For instance, the influencer’s statements must reflect the truthful experience of the reviewer and, if the claim is performance based, that the result must reflect the typical experience a user can expect. In this action, the FTC was also troubled that the influencers were allegedly required to post only positive comments about the gaming service, without regard to what they really thought. (As an aside, for those who digest each word from the FTC like we do, you might recognize Syndicate as one of the influencers noted in the Machinima complaint as posting about his game experiences without
adequately disclosing that he was paid. Makes one wonder if this case came about because the watchful eyes of the FTC’s Enforcement Division were keeping a close eye on his posts?)

As the first of its kind, today’s consent order prohibits TmarTn, Syndicate, and CSGO Lotto from making any misrepresentation that any endorser is an independent user or ordinary consumer of a product or service. The consent order also requires them to clearly and conspicuously disclose any unexpected material connections with endorsers. It is important to point out that the FTC, in this case, charged two specific social media influencers and their company but has yet to charge an independent social media influencer for failing to disclose a material connection to a separate company. However, for the FTC to take this next step, we predict, is a matter of when – not if.

To that point, we previously blogged about the FTC’s sweep of influencers and the 90 “educational letters” it sent. Today, the FTC followed up with 21 “warning letters” (a sample letter can be found here) telling the influencers to disclose their business interests when sharing paid posts about brands or advertisers. The warning letters cite specific social media posts and provide details on why they may not comply with the FTC’s Endorsement Guides. These letters ask the influencers to follow up with the FTC directly.

To cap off a busy day, the FTC’s Endorsements Guides FAQs were updated and the FTC created a useful infographic that includes the “do’s” and “don’ts” for social medial influencers. The updated version of the Guides includes additional information that covers things like Instagram tags and how to meet FTC standards for disclosure on Snapchat or Instagram Stories. A few new tidbits in the FAQs on acceptable disclosure language: (1) #ambassador is not ok but #[BRAND]Ambasssador probably is, assuming the brand name is one people would recognize and (2) #consultant is not ok but #[BRAND] Consultant might be. While the FTC Staff seems to like the brand name in the disclosure, and we know they like #ad, they don’t seem to like #[brand]ad using all lowercase letters, as readers’ might not parse out that the disclosure is explaining the post is an ad for a brand.

If you haven’t been influenced by the FTC enough today, you can watch FTC Acting Chairman Ohlhausen’s message (with all appropriate material disclosures) to influencers here.
The FTC's Influence Reaches Influencers: FTC Settles First Ever Complaint Against Soci...
INTRODUCTION

Native advertising is content delivered to consumers in-stream or as a more organic part of the user experience. It is made with some collaboration or influence, as well as payment or another form of consideration, from a marketer. Well-known early types of native advertising include magazine “advertorials” and infomercials. The Internet and mobile technology provide new opportunities for advertisers to move from the sidelines with banner ads into the “main stage” discussion. These opportunities also bring compliance challenges for advertisers and their counsel.

This article first briefly discusses factors that distinguish editorial content from advertising. Focusing on the latter, the article then reviews recent Federal Trade Commission (FTC) guidance on native advertising, including when content needs to be disclosed as advertising and how to make appropriate disclosures. Throughout, the article integrates discussion of best practices for disclosing sponsorship in certain specific formats.

WHEN SPONSORED CONTENT IS ADVERTISING

Whether speech is advertising or not affects the degree of First Amendment protection, and thus the degree of regulation, of that speech. The Supreme Court’s landmark opinions on commercial speech provide the framework for determining whether speech is advertising. See, e.g., Lorillard Tobacco Co. v. Reilly (2001) 533 US 525, 553. Commercial speech is “expression related solely to the economic interests of the speaker and its audience.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y. (1980) 447 US 557, 561. In Lorillard, the Court restated its Central Hudson test, which is a “framework for ana-
lyzing regulations of commercial speech” (533 US at 554 (quoting Central Hudson, 447 US at 566):

[A]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In-stream content is generally regarded as “native advertising” if the advertiser is creating a demand for its product or service through the native advertising piece, which would support the conclusion that the speech is commercial. It is also relevant whether the advertiser had a role, or not, in creating the content.

Further, it is relevant whether the sponsor of the content receives a commercial benefit from the sponsorship. In an early native advertising case involving Qualcomm, the National Advertising Division (NAD) of the Better Business Bureau suggested a rather broad reading of what constitutes advertising. See Qualcomm, Inc. (Snapdragon Processors), NAD Case Report #5633 (9/20/13). NAD ultimately concluded that (NAD Case Report #5633 at 3)

sponsored content can convey an explicit message about a product, the benefits of using the product, or the disadvantages of a competing product. In such circumstances consumers have a compelling interest in knowing the sponsor of the content because the content conveys a commercial message that benefits the advertiser.

Part of what makes the NAD’s view of what is advertising so expansive is the nature of the sponsorship that NAD was considering.

Qualcomm sponsored a series of articles on Mashable, called What's Inside, looking at the technology behind many electronic devices. Qualcomm did not have editorial rights to the articles or even any say in “planning, creating, or posting” any of the pieces. NAD Case Report #5633 at 1. Qualcomm’s own processor, Snapdragon, was not featured in any of the What’s Inside articles. During the term of the sponsorship, the index page for the What’s Inside articles called out that they were “supported by Snapdragon,” and the articles included a yellow bar indicating that the content was sponsored. NAD Case Report #5633 at 1. Advertisements for Snapdragon also ran on Mashable, contiguous to the articles. At the end of the sponsorship, the articles remained on the website, but Mashable removed the references to the Snapdragon sponsorship.

NAD was asked to consider whether a disclosure was required after the term of the sponsorship had ended. NAD concluded that disclosure was not required. What is interesting is what NAD had to say about Qualcomm’s disclosure obligations during the term of the sponsorship.

The Supreme Court’s landmark opinions on commercial speech provide the framework for determining whether speech is advertising.

NAD concluded that it was necessary and appropriate to have disclosed this sponsorship during the term of the sponsorship (NAD Case Report #5633 at 3):

[C]onsumers can be misled when an advertiser conveys a commercial message without disclosing that it is the author of the message because sponsored content can convey an explicit or implicit message about a product, the benefits of using the product, or the disadvantages of a competing product.

But NAD went on to opine that (NAD Case Report #5633 at 3)

[i]f the content simply conveys information about an issue with which the advertiser wants to be associated, the advertiser may still have an obligation to identify itself as the sponsor because consumers generally will attach different significance to articles that are sponsored than those that are not sponsored and purely editorial. As a result, failing to disclose the sponsor of an article may deprive consumers of insight into why a particular article was published, including the motivations of the author.

This suggests that, in NAD’s view, there may be times when a sponsor has an obligation to disclose the sponsorship of an article that does not touch directly on the sponsor’s line of business.

Another factor to consider is whether the content refers to the sponsor’s products. For example, the FTC may not go as far as NAD when the content does not expressly refer to the sponsor’s product, the product category, or a competitor’s product. The FTC uses an example of an article on great vacation spots for fitness enthusiasts, presented by a running shoe company that does not promote (or mention) any of the sponsor’s products, to demonstrate when an article does not legally need to be identified as an advertisement. The FTC points to the article as an example of content that is not advertising. See FTC, Native Advertising: A Guide for Businesses (December 2015) (Business Guide), Part II, Example 2 (available at
Determining exactly where the line is between advertising and editorial content that is published on behalf of a marketer may not be an issue of primary importance. Even if content is more likely considered editorial rather than commercial speech, the trend has been for advertisers to find ways to disclose the sponsorship consistent with the guidelines available to them, which are discussed below. After all, the point of native advertising is to engage with viewers and, hopefully, have them associate engaging, smart, entertaining content with a brand.

**FTC GUIDANCE**

Native advertising may be taking on new forms with the advent of new technology, but the FTC’s position is that it is nothing really new as far as the applicable legal analysis is concerned. The FTC has been addressing advertising that does not look like advertising since 1968, when a misleadingly sponsored restaurant review appeared in a newspaper. The FTC’s current guidance on how to prevent consumer confusion is rooted in this long history.

In December 2015, the FTC issued an Enforcement Policy Statement on Deceptively Formatted Advertisements (Enforcement Statement) (available at https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted) addressing native advertising—that is, as the FTC explained, “advertising and promotional messages integrated into and presented as non-commercial content.” Enforcement Statement at 1.

The Enforcement Statement summarizes the principles underlying the FTC’s decades of work addressing various forms of deceptive advertising and is clear that those principles apply in equal force to native advertising. In other words, native advertising fits comfortably within a large category of advertising that includes infomercials, deceptive door-openers, and online search results. The Enforcement Statement references the FTC’s Policy Statement on Deception (Oct. 14, 1983) (1983 Policy Statement) (available at https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception).

In its 1983 Policy Statement, the FTC wrote that “[c]ertain elements undergird all deception cases” and set forth its view of the meaning of deception (1983 Policy Statement at 1):

First, there must be a representation, omission or practice that is likely to mislead the consumer. . . . Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. . . . Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.

The same principles undergird the FTC’s view of native advertising.

The Enforcement Statement also reminds advertisers that, as in the past, advertisements must be clearly recognized as such by consumers and that any necessary disclosure that content is “advertising” must be made at the outset rather than later. Therefore, before clicking or tapping on a link, consumers must know that they are accessing an advertisement.

Of course, in today’s marketing world, there are a myriad of ways to design and deliver advertising. When determining whether an advertisement is clearly recognizable as such, the FTC will look to the overall impression conveyed by the material, including images and the interaction of all of the advertisement’s elements. The FTC will also evaluate the net impression of the advertisement from the perspective of reasonable members of its target audience. See Enforcement Statement at 1. For obvious reasons, advertisers and their legal counsel should understand the target audience before relying on them to understand a disclosure.

Native advertising fits comfortably within a large category of advertising that includes infomercials, deceptive door-openers, and online search results.

The FTC released the Business Guide contemporaneously with the Enforcement Statement in 2015. Consistent with the Enforcement Statement, the Business Guide emphasizes the importance of context. For example, an “article” on running shoe shock absorption that appears on a financial news site is unlikely to be confused with true editorial content. See Business Guide, Pt I, Example 1. Similarly, billboard ads that appear in a video game are likely to be understood by consumers as paid content, so no additional disclosure is necessary. See Business Guide, Pt I, Example 9. The Business Guide also answers its own question about why disclosure and contextual issues are so important: “Why would it be material to consumers to know the source of the information? Because knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or
credibility consumers give the information it conveys.” Business Guide, Pt I.

The importance of the disclosure is increased the more native the placement is. In other words, if commercial content is shaded or otherwise visually separated from the noncommercial content that surrounds it, readers are more likely to appreciate that the content is commercial; therefore, the disclosure itself may not be as critical. The more the content is seamlessly woven into pure editorial content, the more important an upfront disclosure becomes. Because context is king, these are at best merely guidelines for advertisers to follow.

“Magic” Disclosure Words

While there are no clear “go” words or “stop” words, some words are better than others at notifying consumers that particular content is an advertisement.

The Enforcement Statement, for example, endorses use of the words “Advertisement” or “Paid Advertisement.” See Enforcement Statement at 13. The Business Guide proceeds to suggest more flexibility, as long as some variant of “ad” appears. The Business Guide prefers terms such as “ad,” “advertisement,” “paid advertisement,” and “sponsored advertising content.” See Business Guide, Pt III, Section C.

The FTC discourages the use of “promoted” or “promoted stories,” because these terms could confuse consumers into believing that the content is endorsed by the publisher site rather than being a commercial message from a marketer. See Business Guide, Pt III, Section C. Company logos or names alone without more information are also inadequate to signal commercial content.

When determining whether an advertisement is clearly recognizable as such, the FTC will look to the overall impression conveyed by the material, including images and the interaction of all of the advertisement’s elements.

Beyond these guidelines, marketers may find other terms that are (or are not) capable of adequately disclosing sponsorship. The FTC states that (Business Guide, Pt III, Section C)

depending on the context, consumers reasonably may interpret other terms, such as “Presented by [X],” “Brought to You by [X],” “Promoted by [X],” or “Sponsored by [X],” to mean that a sponsoring advertiser funded or “underwrote” but did not create or influence the content.

The FTC has also expressed concern with such terms if they are used to mean different things on the same website. Conducting consumer research on exactly what viewers understand terms like “sponsored by X” or “promoted by X” to mean is something the FTC always recommends.

The underlying goal is to disclose the association between the sponsor and the content. If the words used in a particular context fail to disclose the association, then an advertiser may find itself on the other end of a dispute.

Where to Place the Disclosure

As in the case of the words used to disclose sponsorship, certain places to put the disclosure are better than others. The Business Guide addresses two common placement issues: timing and physical placement. See Business Guide, Pt III, Section A. First, the Business Guide addresses whether disclosures must happen once, or twice, when a link is involved. When the content itself is advertising, the disclosure must appear twice: once with the link and then a second time with the content. This ensures that consumers know before clicking that they are going to view an advertisement and ensures that the disclosure travels with that advertisement. See Business Guide, Pt I, Example 7. Further, if there is a social media plug-in at the end of an article or video that allows viewers to share the content with their social network, any link generated should include a disclosure.

The Business Guide also addresses where, specifically, to place disclosures. See Business Guide, Pt III, Section A. The key, of course, is to make sure that the disclosure is seen. Therefore, an advertisement on a website might be placed on the main page. Depending on how a website is read, placement on the left or at the top is preferred to placement on the right or at the bottom (where the consumer is more likely to click into the advertisement before seeing the disclosure). Disclosures should be placed as close as possible to where a consumer might look (e.g., the focal point of a picture or graphic or the byline). If the content is in video format, the disclosure should appear in the video itself and not exclusively in text surrounding the video.

DIFFERENT MEDIA PRESENT DIFFERENT DISCLOSURE CHALLENGES

Technology enables advertisers to creatively integrate advertising into content in many different ways. Therefore, how an advertiser meets its disclosure ob-
ligations depends in part on the medium in which the advertiser places the native advertising. And as the available media evolves, advertisers and their counsel will need to evolve too. Guidance and experience, more than bright-line rules, will likely continue to be the bases for lawyers’ counsel.

Print

Native advertising in print media is subject to the clearest rules for disclosing the facts of the sponsorship.

In 1968, the FTC issued Advisory Opinion No. 191, which looked at “whether it was deceptive to publish an advertisement in a format of a news article without disclosing it was an advertisement.” FTC, Advisory Opinion Digests, No. 191, Advertisements which appear in news format (available at https://www.ftc.gov/sites/default/files/documents/commission_volumes/volume-73/ftcd-vol73january-june1968pages1289-end.pdf). The FTC concluded that disclosure was appropriate in the case of a restaurant review that was sponsored and uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant ... [but] in fact consists of a series of commercial messages which are paid for by the advertisers.

The FTC advised that the disclosure should “clearly and conspicuously disclose it is an advertisement.” FTC, Advisory Opinion Digests, No. 191.

More recently, NAD took on the issue of native advertising in the print medium involving an issue of Shape magazine. Shape branded fitness and health products that it advertised, including advertisements within Shape magazine itself. “NAD was concerned that promoting SHAPE-branded products in a format that makes it look like editorial content blurs the line between editorial content and advertising in a way that can confuse consumers.” American Media, Inc. (Shape Water Boosters), NAD Case Report #5665 (12/18/13), 1. In the September 2013 issue of Shape magazine, the letter from the editor announced the launch of the Shape product line and promised to discuss the products within the pages of Shape. The magazine had an article, captioned “news” and called Water Works, about the benefits of hydration and mentioned new Shape Water Boosters as a way to add flavor to ordinary water. See NAD Case Report #5665 at 2. About ten pages later (not contiguous to the article) were full-page advertisements for Shape Water Boosters. Shape argued that “because consumers are aware of the connection between the magazine and the SHAPE-branded product, it has no obligation to disclose that its promotion of Shape-branded products is advertising.” NAD Case Report #5665 at 3. However, NAD believed that consumers would attach different significance to the recommendation and might believe that the writer of the article was independent from Shape because the article was captioned “news.” See NAD Case Report #5665 at 4.

Disclosures should be placed as close as possible to where a consumer might look (e.g., the focal point of a picture or graphic or the byline).

NAD’s decision refers to the FTC’s 1968 Advisory Opinion No. 191. “NAD considered, but was not persuaded by, the advertiser’s argument that the editor’s note ... disclosed the connection between Shape Magazine and Shape Water Boosters was sufficient to alert customers that the article was an advertisement.” NAD Case Report #5665 at 4. The report concluded that “NAD precedent is clear that effective disclosures must be in close proximity to the main claim, meaning that they can be read at the same time a consumer reviews the claim.” NAD Case Report #5665 at 4. Shape ultimately agreed to remove the “news” heading from content that discussed its branded products.

In print, using words such as “advertisement” is the safest course of action and is an accepted industry practice.

Technologically Rendered Content

Content delivered online or consumed on mobile devices proves the most challenging for lawyers advising creative clients on how to make adequate disclosures consistent with the goals of a marketing campaign.

In March 2013, the FTC published .com Disclosures: How to Make Effective Disclosures in Digital Advertising (.com Disclosures) (available at https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital). Not surprisingly, the FTC noted that “new issues arise almost as fast as technology develops,” but, of course, “cyberspace is not without boundaries, and deception is unlawful no matter what the medium.” .com Disclosures at 1.

Without providing an exhaustive list of required disclosures (although providing comprehensive guidelines), the FTC advised advertisers to disclose the fact of sponsorship within the content or near it, to dis-
courage scrolling, and to discourage hyperlinks for simple disclosure such as sponsorship (unless industry adopts a symbol that is recognized by consumers). The FTC further advised advertisers that disclosures should be clear and conspicuous on all devices and platforms and counseled advertisers to “[k]eep abreast of empirical research about where consumers do and do not look on a screen.” .com Disclosures at ii. The FTC stated that, ultimately (.com Disclosures at 2),

“[t]here is no litmus test for determining whether a disclosure is clear and conspicuous, and, in some instances, there may be more than one method that seems reasonable. In such cases, the best practice would be to select the method more likely to effectively communicate the information in question.

Although .com Disclosures does not single out native advertising per se, the FTC clearly indicated that it applies broadly to advertising “online” (i.e., “via Internet and other electronic networks”) and are “device neutral.” .com Disclosures at 1 n1.

More recently, in the second part of its Business Guide, the FTC used examples to explain how to make disclosures effectively and prevent deception. Although the Business Guide provides general guidance only, it confirms the basic tenet of .com Disclosures (among other guidance from the FTC) that “no matter how consumers arrive at advertising content, it must not mislead them about its commercial nature.” Business Guide, Pt II.

NAD has also opined on disclosures in an online environment. In a matter involving Taboola, NAD rejected a contention that Taboola “needed to use the word ‘advertisement’ to inform consumers that its links are sponsored.” Taboola, Inc. (Online Advertising) NAD Case Report #5708 (5/5/14), 7. NAD concluded that “in the absence of consumer-perception evidence demonstrating that consumers do not understand the words ‘sponsored content’ or ‘promoted content’ to mean that the content is paid, NAD is reluctant to mandate specific words to use for disclosure.” NAD Case Report #5708 at 7. Key to this decision and other guidance is the importance of understanding how consumers will perceive a disclosure. The case sets out NAD’s views on how to accomplish disclosure clearly and conspicuously in the context of a content recommendation widget, including a preference for disclosure at the top of the box in a font that contrasts sufficiently with the background for viewers to notice it.

Search Results

Perhaps the original type of native advertising online consists of sponsored search results—that is, search engine results that an advertiser has paid to have delivered to a user before any other search result.

The FTC has repeatedly advised that to distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an “advertisement” and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement. In a June 24, 2013, sample letter to general purpose search engines (June 2013 Sample Letter) (available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencies-guidance-search-engine-industryon-need-distinguish/130625searchengineregeneralletter.pdf), the FTC laid out some clear ground rules for search engines to follow. Although the FTC ultimately left it up to search engines to determine what method to use, that method must be “noticeable and understandable to consumers.” June 2013 Sample Letter.

If commercial content is shaded or otherwise visually separated from the noncommercial content that surrounds it, readers are more likely to appreciate that the content is commercial.

For search engines choosing to use visual cues, the FTC advised that the luminosity of font colors and other visual cues needed to improve. The FTC advised search engines to use more prominent shading than had previously been the standard. In particular, search engines were advised to consider how a chosen font color will be viewed on various devices, in various technological settings, and in various lighting conditions. The FTC also advised search engines to use a more prominent border “that distinctly sets off advertising from natural search results.” June 2013 Sample Letter. Of course, search engines can use both prominent shading and a prominent border to identify the sponsored result.

Further, the FTC advised search engines to use text labels (in addition to or in lieu of visual cues) to separate the sponsored results from natural search results. Search engines should use language that “explicitly and unambiguously conveys if a search result is advertising.” June 2013 Sample Letter. The text used to convey that message must be “large and visible enough for consumers to notice it.” June 2013 Sample Letter. (Similarly, if audible cues are used to make the disclosure, the aural disclosure must be loud enough and at an appropriate cadence for the listener to hear and comprehend it.) In addition to using large text, the
FTC recommended that the text be located either immediately before the advertisement or at the top left corner of an advertisement box. Consumer studies have shown that the right side of the screen receives less attention, so placement there is not a best practice.

As the technological media for delivering search results evolve, the basic principle of ensuring that disclosures of sponsored results are noticeable and understandable to consumers will remain.

Social Media

The FTC has also made recommendations about social media. In social media, some sponsored content may not need to be explicitly disclosed when users will know, on the basis of their customary use of the social media, that the content is sponsored. One example is a video sourced from a vendor that a user does not follow that shows up in that user’s regular feed. Again, it is important for an advertiser and its counsel to have a good understanding of the target audience to craft effective disclosures.

When content is not obviously sponsored, however, a disclosure will need to be made. For instance, if a video is sponsored content, the publisher must ensure that if that video is posted by a user to social media, it will include a disclosure of the sponsorship. In the Business Guide, the FTC explains that “[a]dvertisers should ensure that the format of any link for posting in social media does not mislead consumers about its commercial nature.” Business Guide, Pt II, Example 15.

The FTC has repeatedly advised that to distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an “advertisement” and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement.

Lord & Taylor ran afoul of its disclosure obligations after it launched an advertising campaign consisting of Lord & Taylor–branded social media posts and the use of a team of “influencers” to post on social media. Although the influencers were paid and Lord & Taylor reviewed their social posts, Lord & Taylor did not require the influencers to disclose that Lord & Taylor had paid them and exercised control over their content. The FTC believed that disclosure was required and filed a complaint against Lord & Taylor in 2016, resulting in a settlement. See documents relating to In re Lord & Taylor LLC, available at https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter.

The Lord & Taylor case serves as an important reminder that disclosure obligations in social media extend beyond posts that the advertiser makes directly. When posts are paid for by the advertiser, disclosure of that fact should be made.

Television

The FTC has been consistent that not all product placements need to be disclosed with a large “advertising” warning label. In some cases, this is true even though there is no discussion of the product or product category attributes or benefits or other objective claims.

To distinguish sponsored search results from other responsive hits, advertisers should consider stating that the hit is an “advertisement” and use luminosity, contrasting background or borders, or text cues in a prominent font directly above or to the left of an advertisement.

For example, in a letter dated February 10, 2005, addressed to Gary Ruskin, Executive Director, Commercial Alert (February 2005 Ruskin Letter) (available at https://www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf), the FTC stated that not every sponsored product placement without a disclosure is misleading, using as an example the American Idol judges with their ubiquitous Coke cups. According to the February 2005 Ruskin Letter,

Some products appear in programming because advertisers pay for such placement, while other products appear because of the creative judgment of the program’s writers. We are not aware of any empirical data concerning whether consumers distinguish between these two uses of products in programming. . . . Assuming, however, that consumers are not aware when an advertiser has paid for a product to appear in programming, . . . it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act.

The FTC explained that “the rationale for disclosing that an advertiser paid for a product placement” is
generally absent when all that occurs is the product’s placement on-screen without any claims about the product’s attributes. February 2005 Ruskin Letter.

More recently, the Business Guide reached the same conclusion. The Business Guide includes an example involving product placement in a video game in which game characters wear a particular clothing brand or drink a beverage but do not make objective product claims. No disclosure is required. See Business Guide, Pt II, Example 10.

**Because there is no per se rule exempting product placements from disclosure requirements, advertisers need to tread just as carefully in this arena as they do in others.**

On the other hand, some types of product placements do trigger disclosure requirements. One of the first consent orders involving an infomercial was brought when BluBlockers aired a program-length advertisement in a format that allegedly looked like an investigative journalist report similar to 20/20. The FTC required that the programs disclose that they are “paid advertisements” at least twice in any spot longer than 15 minutes, so that consumers understand that they are watching an advertisement and not an objective news program. See In re JS&A Group, Inc., FTC Consent Order, Feb. 24, 1989 (available at https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-111/ftc_volume_decision_111_july_1988-june_1989pages_522-_620.pdf).

In the Business Guide, the FTC provides another example in which an “expert” on a home improvement show appears in a video and uses a particular product but does not expressly recommend it. In that example the FTC recommends disclosure of the paid inclusion, because consumers may mistake the expert’s use of the product as being based on his or her own independent evaluation. See Business Guide, Pt II, Example 13.

In some cases the risk of not disclosing will not be worth any perceived gains. Because there is no per se rule exempting product placements from disclosure requirements, advertisers need to tread just as carefully in this arena as they do in others.

**Repurposing**

The Business Guide provides several examples involving the repurposing of content. In the first example, an advertiser wants to republish an independent favorable review. Because the advertiser did not solicit the review, the review itself does not need to be labeled as an “ad,” but its placement by the advertiser in other third party media is an “ad” and should be disclosed. Business Guide, Pt II, Example 8.

Similarly, advertisers sometimes want content to appear in consumers’ social media feeds. If the link appears in a manner that is not typical for an advertisement (e.g., if it looks like a user’s friend has just posted a link to an article in a magazine), then the advertiser must be certain that the reposting conveys that the link will take the user to advertising content. The same advice holds true if the article can be found through nonpaid search engine results.

**CONCLUSION**

Native advertising is not new, although current modes of delivery may be. There is every reason to expect that media will continue to evolve, and how consumers receive advertising will evolve as well. Is virtual reality the new frontier for native advertising? What will the resulting disclosure guidelines be?

The basic rules that advertisers and their legal counsel have employed to deliver nonmisleading advertising to consumers still apply to native advertising. But the rules are also evolving and adapting to new media as we learn more about how consumers view native advertising and what they understand about disclosures. As the industry encounters the nuances and some of the particular challenges of evolving technology, it has FTC guidance on how to continue to provide advertising in native form that is not misleading. To continue to publish nonmisleading advertising, it is and will remain important for advertisers and their counsel to stay abreast of developments in content delivery technology and how native content is perceived by target audiences.

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Senate Banking Committee Holds Hearing on Virtual Currencies – Warns of Celebrity Endorsements

BY CHRISTOPHER BOONE ON FEBRUARY 8, 2018

The Senate Committee on Banking, Housing, and Urban Affairs held a hearing on Tuesday on virtual currencies and the role of the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) in overseeing the virtual currency industry. Witnesses included SEC Chairman Jay Clayton and CFTC Chairman Christopher Giancarlo.

A key takeaway of the hearing was a concern among regulators and Committee members of opportunistic fraud taking place amid the hype around virtual currencies, also commonly known as cryptocurrencies.

Among these concerns were those involving celebrity endorsements of token sales in Initial Coin Offerings (ICOs). In some cases these sales may be fraudulent. CFTC Chairman Giancarlo noted one example where his agency took action against a company that solicited customers for a virtual currency known as My Big Coin. Mr. Giancarlo stated that within the agency that coin came to be known as “My Big Con,” as the company used the funds to purchase personal luxury items rather than using the funds for their purported purposes.

However, even when the offering is not fraudulent, members of the Senate Banking Committee voiced concern over the use of celebrity endorsements, fearing that proper disclosures are not being made. Senator Menendez raised Floyd Mayweather’s promotion of a token known as “Centra” on Instagram as one potential example.

The SEC previously released a statement on these promotions by celebrities, explaining that any “celebrity or other individual who promotes a virtual token or coin that is a security must disclose the nature, scope, and amount of compensation received in exchange for the promotion.”

While readers of this blog are probably well aware of similar restrictions in the social media influencer space with regard to promoting fashion items or other physical goods, the stakes here are a bit different as SEC Chairman Jay Clayton has expressed that, in his view, many of these ICOs are securities.
offerings. Thus, a failure to disclose this information is a violation of the anti-touting provisions of the federal securities laws.

Chairman Clayton similarly indicated that companies should not change their name to reference blockchain technology if the company is not undertaking a sincere blockchain endeavor, and that doing so conveys misleading information to potential investors.

Another key focus of the hearing was to get a better sense of the exact scope of each agency’s jurisdiction over virtual currencies to identify gaps in the existing regulatory structure, and evaluate whether congressional action is needed to address ongoing concerns.

To that end, both chairmen emphasized a need for a multifaceted, multiregulatory approach to address the various consumer and market protection concerns facing the industry, especially with regard to regulating cryptocurrency trading platforms. Chairman Clayton, while not asking for any specific SEC authority, indicated that he was open to exploring whether increased federal regulation of cryptocurrency trading platforms would be needed.

Finally, both chairmen emphasized that the underlying blockchain technology holds enormous potential. Chairman Clayton’s testimony noted that these technological innovations have the potential to improve capital markets and the financial services industry, and to provide investors with opportunities to offer support and capital to novel concepts and ideas. Chairman Giancarlo similarly provided in his testimony that blockchain technology is “likely to have a broad and lasting impact on global financial markets in payments, banking, securities settlement, title recording, cyber security and trade reporting and analysis.” Chairman Giancarlo therefore emphasized that the industry merited a thoughtful regulatory response and not a dismissive one.