

The Attack On Social Media Influencer Campaigns

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The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising — more commonly known as the “Endorsement Guides” — have had a profound impact on how companies use influencers to promote their brands on social media. Among other things, companies are required to make sure it's clear that their influencers are working with the company. You can't pass off an opinion as independent, if there's an incentive behind it. Although the FTC has investigated various companies for failing to comply with this requirement, some groups think that the agency is not doing enough.



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In September, four consumer groups — Public Citizen, Commercial Alert, the Campaign for a Commercial Free Childhood, and the Center for Digital Democracy — sent a joint letter to the FTC, encouraging the agency to investigate and bring enforcement actions related to the use of influencers on Instagram. The letter included examples of over 100 allegedly problematic posts on that platform. Last week, the same groups sent another letter to the FTC with 50 new examples, and once again urged the commission to take action to stop this “dangerous trend.”

Although the letters highlight some legitimate issues regarding the use of influencers, they also misstate some of the requirements in the Endorsement Guides and lump good influencer campaigns with bad ones. If you're looking at the letters and trying to identify risks associated with your own campaigns, it's important to first have a clear understanding of what the Endorsement Guides actually do and do not require.

The Endorsement Guides

The Endorsement Guides have been around since 1980, long before social media and long before words like “influencers” were common in a marketer's vocabulary. In an effort to keep pace with changes in advertising, the FTC released a new version of the Endorsement Guides in 2009. One of the things the FTC did in the revised version was clarify that the term “endorsements” covers more than just a celebrity spokesperson talking about a product on TV. It also covers any social media promotion in which companies encourage celebrities or consumers to speak on their behalf.

The Endorsement Guides state that if there is a “material connection” between an advertiser and an endorser, that connection must be evident to consumers. Consumers have a right to know whether an opinion is independent or incentivized. Although this may not seem controversial, what constitutes a

material connection may be broader than many people think. A payment is obviously a material connection, but things like free products, and even intangible benefits, such as a chance to win a prize, could also fall under that category.

If the connection between an endorser and the company is not evident from the context, the company must ensure that the endorser discloses the connection in a “clear and conspicuous” manner. Compliance with this provision isn’t always easy, for a number of reasons, not the least of which is that what many marketers consider to be clear and conspicuous doesn’t always accord with the FTC’s interpretation of that term. However, the FTC has provided some guidance as to what words can be used and how disclosures must be made in order to meet that standard.

In some cases, the disclosure can be provided in a sentence. For example, the FTC has stated that a simple disclosure like “Company X gave me this product to try ...” could be effective. In some campaigns — such as those that take place on Twitter — there may not always be enough room for a full sentence. Lack of space is no excuse, though, and the FTC has suggested various options when space is limited. For example, they note that the words “sponsored” and “promotion” use only nine characters. And starting a tweet with “Ad:” or “#ad” — which takes only three characters — will likely be effective.

The failure to adequately disclose material connections has been at the center of more than 10 FTC investigations concerning the Endorsement Guides in social media since 2009. In most of the cases, people simply didn’t make any disclosures at all, either because they ignored the company’s instructions to make the disclosures or because the company failed to provide the right instructions, in the first place. In one case, though, influencers did make the disclosures, but the FTC found that they were not sufficiently clear and conspicuous.

Consumer Groups Step In

In September, Public Citizen, Commercial Alert, the Campaign for a Commercial Free Childhood, and the Center for Digital Democracy sent their first letter to the FTC. The letter discussed the importance of ensuring that influencer posts are ads, but noted that most influencers are not making the required disclosures. As a result, “consumers, especially young consumers, are being deceived on vast scale.” The groups asked the FTC to move “promptly and aggressively” in order to stop a problem that “has reached epidemic proportions.”

The groups discussed the results of an internal “investigation of the disclosure practices among movie stars, reality TV personalities, famous athletes, fitness gurus, fashion icons, and pop musicians.” According to the letter, the investigation revealed over 100 influencers who endorsed a product without making a disclosure. Although the groups didn’t seem to know for certain whether those influencers were compensated or not (in which case a disclosure wouldn’t be necessary), the groups presumed, “based on industry norms,” that the influencers were compensated.

Despite not being certain, the groups presented examples of over 100 Instagram posts that could be problematic. And they asked the FTC to “take aggressive enforcement action against companies and agencies that engage in the practice of non-disclosed ‘influencer’ endorsements.” (The groups even suggested two companies that should be at the top of the FTC’s list.) Although the groups believe that the FTC should continue to focus on the companies, they also urged the agency to take action against prominent influencers, something the FTC has not yet done.

Last week, the same groups sent another letter to the FTC urging the commission to take action to stop

this “dangerous trend.” This letter included 50 new examples of alleged violations and noted that the groups “suspect that there are thousands more not reflected in this document, especially among influencers with small followings.” Although some of the examples provided in the letter could — if the allegations are true — violate the FTC’s Endorsement Guides, others are arguably fine. The problem is that groups misstate some key provisions in the guides and exaggerate advertisers’ responsibilities.

For example, the groups suggest that all paid endorsements must be labeled as ads. That’s not correct. Although a label is often necessary, the FTC has acknowledged in various contexts that a label may not be required if something is obviously an ad. There is room to debate whether something is obvious to a reasonable consumer, but some of the posts highlighted by the groups contained prominent branding, and it’s hard to believe that consumers wouldn’t identify the posts as ads. (After all, the groups were able to identify them as ads, even without a label.)

The groups also suggest that the only appropriate labels are #advertisement or #ad. Again, that’s not correct. The FTC has stated that there is “no special wording” for the disclosures and that other labels — including “sponsored” and “promotion” — could be appropriate. Moreover, the commission has opined that a simple disclosure explaining that a person received a free product to try “will usually be effective.” Although the examples in the letter don’t use the word “advertisement,” some examples do include other language that arguably communicates a relationship between the influencer and advertiser.

What This Means

Are there problems with many influencer campaigns? Yes, absolutely. But a letter that misstates the requirements under the Endorsement Guides and lumps compliant campaigns together with ones that are not compliant isn’t helpful to anyone. As anyone who has worked extensively with influencers knows, there is a lot of gray in this area, and there often aren’t one-size-fits-all answers. Whether a disclosure is required depends a lot on the context. And if a disclosure is required, there are usually multiple ways to get the required information across.

What does this mean for companies that use influencers? If your company is included as an example in the letters, you should take a close look at your campaigns. Just because the letters allege that you’ve violated the law doesn’t necessarily mean that you have. But now that you’re in the spotlight, you should work with counsel to make that determination yourself. Do you think that the examples in the letter are compliant? If not, think about how you will respond to the FTC if they contact you, and make sure you put procedures in place to ensure future campaigns are better.

Even if your company isn’t included as an example, these letters should serve as a good reminder that influencer campaigns are subject to tricky legal requirements. If you haven’t taken a close look at how your company conducts its campaigns recently, now is the time to do so. Check your internal policies, as well as your agreements with influencers and agencies to make sure that everyone understands what is required. And make sure you take steps to monitor compliance. As these letters demonstrate, you don’t just have worry about the FTC finding problems — other groups may be watching, too.

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