

What Will Your Social Media Influencer Letter from the FTC Look Like?

July 21, 2017

We have blogged about the FTC's barrage of letters when they were originally released [in April](#) and again [last week](#). Back in May, in response to a Freedom of Information Act request by the National Law Journal, the FTC released the entire set of letters set out in April. A close review of the letters is instructive about the FTC's priorities, the types of ancillary issues it is concerned about, and what your letter might look like if you are a company or a social media influencer who comes to the FTC's attention.

Altogether, the FTC sent 99 letters dated between March 20 and April 1. All of them concerned one social media channel, Instagram. Of the letters, 45 went to the companies whose products were endorsed on Instagram, and the other 54 went to the endorsers. The endorser letters matched the company letters; there were more endorser letters because some of the letters to companies referenced more than one endorser.

By way of recipient characteristics, the 45 companies that received the letters spanned the size spectrum from prominent, large companies such as Adidas, Chanel, Johnson & Johnson, Hasbro, and the Popeyes restaurant chain down to much smaller and less known companies. Industry sectors included fashion, sportswear, food, dietary supplements, fitness products, cosmetics, and toys.

Endorsers that received letters generally were celebrities. While not all of their names were familiar to this generation-X writer, the Instagram posts attached to the FTC's letters generally received at least several thousand and often hundreds of thousands of likes, indicative that the endorser had at least a significant social media following. As has been reported elsewhere, the prominent endorsers included Jennifer Lopez, Allen Iverson, Lindsay Lohan, Heidi Klum. At least one, Vanessa Hudgens, was notified about endorsements for two different companies. Letters to almost all of the endorsers were addressed in care of their agents or attorneys, again indicating their status as public personae. This focus on high-profile endorsers is consistent with the FTC's past statements that it does not intend to go after every small hobbyist blogger who happens to recommend a product now and then.

The letters were based on 2-page form letters (one for companies and another for endorsers) with certain additional boilerplate paragraphs inserted where appropriate and with a few lines of individually customized text describing the specific Instagram post, which was also attached to the letter as the third page. Starting with the company form letter, the letters identified the FTC and described the purpose of the letter as "educating marketers about their responsibilities under truth-in-advertising laws and standards." After identifying the problematic Instagram post, the letters described the FTC's "material connection" standard under the Endorsement Guides and provided guidance on the required "clear and conspicuous" disclosures of material connections. All letters advised that the disclosure be within the first three lines of an Instagram post so that the viewer would see it without having to click "more," and cautioned against burying the disclosure among

multiple tags and links. The Endorsement Guides and a FAQ about them were included with each letter.

Of interest was the extra content added to some of the company letters. While most of the letters prefaced the information about required disclosures with, "If your company has a business relationship with [endorser], ten out of the 45 letters went farther and asserted, "It appears that [endorser] has a business relationship with your company." It was not always evident how the FTC reached this conclusion, but one apparent tip-off was the offer of a discount code in some Instagram posts. Seven of the 45 letters pointed to the presence of a statement such as "Thanks @[company]!" in the post and stated that for the endorser merely to thank the company is "probably inadequate to inform customers of a material connection because it does not sufficiently explain the nature of the endorser's relationship to your company; consumers could understand it simply to mean that the person is a satisfied customer." In several letters, the FTC also rejected the use of the "#sp" hashtag to identify sponsored content, claiming that consumers do not understand this hashtag, and disapproved of ambiguous hashtags containing words like "partner" or "ambassador."

Most interestingly from this author's perspective as a claim substantiation buff, in 10 of the 45 letters, the FTC included a paragraph hinting that it suspected the content of the Instagram post to be deceptive, separate from the failure to disclose the endorser's material connection to the company. This paragraph noted that the FTC's review of the post was limited to endorser disclosures and did not attempt to determine whether the post might be deceptive in other respects, but reminded the company that it is responsible for substantiating all claims. This language appeared in cases where the Instagram post made a performance claim, generally about weight loss, health or nutrition benefits. This raises an important point for companies: Inadequately disclosed endorsements that bring your advertising to the attention of the FTC may alert the agency to problems with your product claim substantiation that it might otherwise not have noticed.

The 54 letters to endorsers adhered more closely to the basic form letter. Like the company letters, they usually said, "If there is a material connection between you and [company]" but on some occasions asserted "It appears that you have a business relationship with [company]." They echoed the advice sent to the relevant company about the inadequacy of ambiguous hashtag disclosures and "thanks." Unlike the company letters, the endorser letters never commented on the possible lack of substantiation for claims made by the endorsers.

So the takeaways from the FTC's spring Instagram endorser broadside are:

- The FTC views this campaign as an educational initiative rather than an enforcement measure – at least for now.
- The FTC looks at companies of any size in a variety of industries, but so far is focusing on endorsements by high-profile influencers.
- Several commonly used short cuts for disclosing a material endorser connection in social media are not favored by the FTC.
- Inadequate endorser disclosure can cue the FTC to other problems with advertising, including claim substantiation issues.