

COLUMNS

FTC issues new social media and endorsement guidance

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The Federal Trade Commission's Endorsement Guides were revised in 2009 to provide advertisers with guidance on how to apply traditional legal principles regarding testimonials and endorsements to new marketing channels and techniques.

More recently, in 2013, the FTC issued its revised .Com Disclosure Guide. Recognizing the continuing growth and evolution of social media and consumer generated content as well as the space constrained nature of some platforms, on May 29, 2015, the FTC issued "The FTC's Endorsement Guides: What People Are Asking," which provides an update to the Guides' Q&As.

The FTC has consistently stated that traditional truth-in-advertising principles apply to social media and other forms of user-generated content.

This requires advertisers that have a material connection with a person who speaks about its product or service (i.e., an endorser) to take affirmative steps to ensure that the posting is truthful and is not misleading.

In order to do so, the FTC has made clear that the endorser must typically disclose the material connection between the endorser and the advertiser, and the endorser cannot make a claim that is either untruthful or one for which the advertiser lacks adequate substantiation.

These principles may seem logical, but the challenge advertisers and endorsers have faced is how to provide the disclosures in a manner that fits with the platform, and how the principles apply to actions frequently taken by consumers, such as entering a sweepstakes.

While the FTC reiterates that no special language is required in providing the disclosures, an advertiser and endorser should keep in mind the 4P's prominence (size), presentation (understandable), placement (will it be seen), and proximity (is it close to the triggering claim) to the claim.

These standards apply to social media platforms and small screen devices. The FTC's revisions cover a number of topics. A few highlights and examples are discussed below.

Receipt of value

Endorsers and advertisers must remember that the FTC still applies a different standard to bloggers than it does with traditional media as it relates to sample products.

While traditional newspapers and magazine reviewers of products do not need to disclose if they received the sample for free, particularly if there is an ongoing relationship, the FTC continues to hold that those writing on a

example for free, particularly if there is an ongoing relationship, and the FTC continues to hold that those writing on a personal blog or in social media posts need to make the disclosure, such as "Company X gave me this product to try ..."

The FTC has also reiterated its position that affiliate marketers must clearly and conspicuously disclose their relationship to an online retailer on its site and not rely simply on an "affiliate link" or "buy now" button.

Platform does not matter

The disclosure obligations apply regardless of the platform. This means if an endorser must disclose his or her connection to the advertiser, it must be made irrespective of space limitations.

For example, for Twitter (which has a 140-character limitation), the FTC states the user should start the tweet with "ad" or #ad or include "Sponsored", "Promotion" or "Paid Ad".

Similarly, in uploading a video review on YouTube, the FTC advises that the disclosure must be clearly and conspicuously made by placing the disclosure in the beginning of the online review, and repeating throughout a longer video, so that it is not missed by a viewer.

Sweepstakes and promotions

The FTC's position regarding material connection has been expanded recently to require a disclosure if a person receives a sweepstakes entry in exchange for a post, as well as incentives with potentially no financial value.

The FAQs provide that if a user is "rewarded" with an entry for a post, the advertiser should ensure that such post include the (hashtag) disclosure #contest or #sweepstakes.

The FTC does not recommend using abbreviations, such as "#sweeps", because of concerns that a consumer would not understand the disclosure.

Advertiser's responsibility

The FTC continues to reiterate that advertisers have an affirmative obligation to train and monitor what persons with whom they have a material connection say regarding the advertisers' products and services.

The FTC recognizes that advertisers cannot possibly know every post, but stress that there should be a program in place in which the advertiser: (a) instructs members of the network on their responsibilities for disclosing their connections to the advertiser; (b) periodically searches for what those people are saying; and (c) follows up if it finds questionable practices.

In instituting such compliance and monitoring programs, advertisers should be sure to document the steps it has taken with regard to such a program.

Takeaway

As advertisers continue to use social media channels as a marketing vehicle, they must take affirmative steps to ensure that advertising is not only truthful, but discloses a material relationship when someone speaks about their product.

An advertiser's obligation in this regard is ongoing and requires a robust and documented training and monitoring program.

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