

The Laws of Influence

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“Influencers” make money (or get free stuff) by leveraging their popularity on social media networks to endorse third-party products. Influencers can be celebrities, athletes, experts, social media stars, or even pets, like the incomparable “Menswear Dog” on Instagram.¹

Influencers command an increasing role in many companies’ marketing strategies—a function of the explosive growth of social media and the ineffectiveness of traditional advertising in the face of ad-blocking, ad-skipping, and other technologies. As a result, influencers are also attracting increasing attention from regulators.

While the use of social media influencers may be a relatively new advertising technique, the relevant legal principles are actually well-developed and quite clear. An advertiser may lawfully compensate an influencer to endorse its product on social media. But the influencer cannot make any false, misleading, or unsubstantiated claims about the product. And the influencer must disclose the “material connection” to the advertiser, i.e., that it received compensation or free stuff in exchange for the endorsement. In social media, this disclosure commonly takes the form of hashtags like “#ad.” If an influencer does not play by these rules, the advertiser can be held legally responsible.

FTC Guidance

Simple legal principles, of course, may not always be greeted with simple fact patterns. Luckily, the Federal Trade Commission (FTC) provides real-world compliance examples in several helpful guides. The FTC’s “Endorsement Guides”² and corresponding “What People Are Asking” document³ detail the legal requirements for online

and offline endorsements and describe examples of when “material connection” disclosures are required.

Where a disclosure is required, the FTC’s “.com Disclosures” guide⁴ drills down on the characteristics of effective disclosures, again with real-world examples, including sample social media posts and hashtags. Depending on the overall context of the post, hashtags like “#ad” or “#sponsored” may do the trick, but “#spon” or “#thanks[brand]” may not. In fact, hashtag disclosures may be unnecessary if the content of the post itself makes the material connection clear, e.g., “Found my new favorite [product]! Thanks for the free sample @Brand!” (And disclosure practice gets really interesting in newer technologies, like live streaming video apps—can you anticipate what an influencer will say and when they will say it in a live stream, and do you even have the ability to add disclosures before, during and/or after the stream?)

In addition, FTC announced several settlements in the past two years that illustrate its enforcement priorities and provide further guidance for advertisers.

In 2014, FTC entered into a 20-year consent order with home security company ADT, LLC⁵ based on allegations that ADT’s paid influencers misrepresented their online and offline endorsements as independent product reviews. For example, FTC alleged that a prominent blogger known as “The Safety Mom” appeared on NBC’s *The Today Show* to tout ADT’s products, but failed to disclose that she is a paid ADT spokeswoman. The settlement requires ADT to disclose any material connections with endorsers in the future in compliance with FTC’s Endorsement Guides, to inform its endorsers of their duty to do the same, and to monitor the endorsers for compliance.

In early 2016, FTC entered into

a 20-year consent order with online entertainment network Machinima, Inc.,⁶ alleging that Machinima paid “gamer” influencers to post YouTube videos endorsing video game systems without proper disclosures of the material connection. Similar to the ADT settlement, Machinima must not misrepresent in any influencer campaign that the endorser is an independent user of the product, and it must ensure that all of its influencers are aware of their responsibility to make required disclosures and monitor its influencers’ representations and disclosures. The settlement also prohibits Machinima from compensating influencers who make misrepresentations or fail to make the required disclosures.

Also in early 2016, FTC entered into a 20-year consent order with retailer Lord & Taylor⁷ (“L&T”) based on allegations that L&T paid 50 online fashion influencers to post Instagram photographs of themselves wearing a dress from L&T’s Design Lab collection, and that the influencers failed to properly disclose that L&T had given each influencer the dress, and in some cases, thousands of dollars, in exchange for their endorsements. L&T contractually required the influencers to include “#DesignLab” and “@lordandtaylor” in their posts, and it reviewed and approved the influencers’ posts with respect to the required wording (but not with respect to the FTC’s endorsement or native ad requirements). FTC did not believe the attempted disclosures included in the influencers’ social media posts (i.e., “#DesignLab” and “@lordandtaylor”) were sufficient to identify the material connection to L&T. The settlement contained terms similar to ADT and Machinima, and included a detailed education, monitoring and compliance program require-

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ment. Among other things, L&T must implement a system to educate its endorsers on their responsibility and to monitor and review endorsers' representations. Each endorser must sign a statement acknowledging their responsibility to disclose any material connection to L&T, and L&T must terminate any endorser that fails to do so. The endorser may receive "one notice of a failure to disclose and an opportunity to cure the disclosure" if L&T reasonably determines the failure was inadvertent. L&T must also maintain reports sufficient to show its compliance with these monitoring requirements.

Most recently, in July 2016, FTC again addressed "gamer" influencers in a settlement with Warner Bros. Home Entertainment, Inc.⁸ relating to allegations that Warner Bros. paid "gamer" influencers to endorse the video game *Middle Earth: Shadow of Mordor* on YouTube and social media. Of particular note, some influencers included disclosures in the description box below their videos posted on YouTube, but the disclosures were "below the fold," i.e., viewers needed to click the "Show More" link for the disclosures to appear. FTC alleged such "below the fold" disclosures are not sufficiently conspicuous. The proposed 20-year consent order closely tracks the Lord and Taylor consent order terms, and includes a duty to monitor any entity (e.g., agency) hired by Warner Bros. to conduct an influencer campaign on its behalf for compliance with FTC endorsement requirements, and to immediately cease payment to any such entity if Warner Bros reasonably concludes that the entity is not in compliance.

NAD Guidance

The National Advertising Division of the Council of Better Business Bureaus (NAD) also recently issued an "influencer" decision. In *Goop, Inc.*,⁹ NAD held that online lifestyle publication Goop was responsible for claims regarding third-party dietary supplements sold on the Goop website and endorsed by Goop founder and celeb-

rity Gwyneth Paltrow. The products were featured as recipe ingredients in "GP's Morning Smoothie," which Ms. Paltrow allegedly drank every morning. The recipe and purchasing page for the products included efficacy claims regarding the dietary supplements (e.g., "sooth overworked muscles," "combat mental foggiess"). NAD held that Goop's inclusion of such claims and Ms. Paltrow's endorsement on its website rendered Goop responsible for verifying that the products actually provide the claimed benefits. (NAD did not review the claims on the merits, however, because Goop agreed to voluntarily discontinue the claims.) This case is notable in that the influencer (and her company) were the enforcement targets, rather than the manufacturer/source of the products like the FTC examples above.

More Regulatory Action on the Horizon?

Additional influencer enforcement actions may be on the way. At the recent NAD annual conference in New York, both FTC and NAD representatives specifically identified influencer campaigns as a priority moving forward.

Further, consumer advocacy groups have been pushing for enforcement action addressing influencers. For example, a September 2016 joint letter¹⁰ sent to FTC by four consumer advocacy groups alleged that over 100 prominent influencers systemically failed to disclose material connections to advertisers in paid endorsements on Instagram. The complaint named a wide variety of alleged offenders, including celebrities and athletes like the Kardashians, Lindsey Lohan, Dwight Howard, Rihanna, David Beckham, and Michael Phelps, and global brands like Puma, Ralph Lauren, Adidas, Chanel, L-Oreal, and Nike. Although FTC is not required to take action in response to the letter, it undoubtedly reviewed the letter with interest given its recent enforcement focus on influencer campaigns. It certainly would not be surprising to see further FTC and NAD action in this area.

Best Practices

Several best practices emerge from these guides and cases, and in particular

the recent FTC consent orders, which could be viewed as roadmaps for what FTC would like to see from all advertisers. First, and most obviously, follow the rules: tell the truth, don't mislead, confirm any claims are substantiated, and disclose any material connections between the influencer and advertiser. Second, advertisers should consider a written agreement with influencers specifically addressing, and requiring compliance with, the FTC guides and other applicable laws. Third, advertisers should consider implementing a system of monitoring and documenting influencers' compliance. Fourth, if advertisers hire agencies to run their influencer campaigns, they should consider including provisions in the agency agreement addressing the issues above and making clear the agencies' responsibilities with respect to obtaining contracts from, and monitoring, influencers.

Conclusion

Influencer campaigns are trending with advertisers and regulators. More enforcement actions and resulting guidance are sure to arrive. In the meantime, the significant legal guidance already available should allow for well-designed influencer campaigns to be both legally compliant and effective.

Endnotes

1. See <https://www.instagram.com/mensweardog>.
2. Available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.
3. Available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.
4. Available at <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.
5. *In the Matter of ADT LLC*, case documents available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3121/ad-llc-matter>.
6. *In the Matter of Machinima, Inc.*, case documents available at

<https://www.ftc.gov/enforcement/cases-proceedings/142-3090/machinima-inc-matter>.

7. *In the Matter of Lord & Taylor, LLC*, case documents available at [https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-](https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter)

[llc-matter](https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter).

8. *In the Matter of Warner Bros. Home Entertainment, Inc.*, case documents available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>.

9. *Goop, Inc. (Moon Juice Action Dust and Brain Dust Dietary Supplements)* Case No. 5977 (July 26, 2016)

10. Available at <http://www.citizen.org/documents/Letter-to-FTC-Instagram-Endorsements.pdf>.
