

LEGAL AND PRIVACY

FTC gets serious about misleading influencer marketing

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The Federal Trade Commission, charged with enforcing the legal prohibition against false and misleading advertising, has once again focused on social media influencer endorsements.

On Nov. 4, the FTC issued a guidance pamphlet entitled *Disclosures 101 for Social Media Influencers*.

The FTC clearly is very focused on this issue, and the release of this pamphlet may well signal increased enforcement efforts in the future.

Although the pamphlet is aimed at influencers themselves, companies who use influencers to promote their products should take note.

The FTC takes the position that both the sponsoring company and the influencer are responsible for ensuring that influencer advertising complies with its directives.

In fact, in the past, the FTC has brought enforcement actions against and fined companies more than the influencers themselves.

So, what are the key points of the FTC pamphlet?

Broad definition of relationships have to be disclosed

The FTC's main concern is that influencers appear to be independent reviewers, when in fact they are being compensated for their endorsements.

Any "material connection" with the brand must be disclosed. That means more than pay-for-endorsement arrangements. It includes any "personal, family or employment relationship." It also includes any financial relationship, including the brand giving free or discounted services or products, or other perks, such as free trips or hotel accommodations.

Is the influencer getting anything at all from the company? Then there has to be disclosure.

Broad definition of endorsements

Any way of indicating approval is included. This includes tags, likes, pins and similar ways of showing approval of a brand. An influencer clicking "like" may well come within the FTC regulations.

Foreign posters should take heed. Social media posts from outside the United States may be included. The FTC has stated that its regulations apply if it is "reasonably foreseeable" that the post will affect U.S. consumers.

In the age of the worldwide Web and internationally recognized influencers, it is not hard to see how many influencers have at least some U.S. following. If they do, then the FTC considers them and their posts subject to its regulations.

Companies would do well to remember that, even posts in languages other than English can have significant U.S. followings, as there are often large groups of expatriates and other non-English speakers in the U.S.

Disclosures have to be prominent

The FTC does not want disclosures buried they have to be sufficiently prominent so that viewers will see them when they see the endorsement. This means:

- They have to be placed with or next to the endorsement message itself. They cannot be on a separate "About Me" or profile page, at the end of posts or videos, or anywhere that requires the viewer to click MORE.
- The disclosure cannot be mixed in a jumble of hashtags or links.
- If in a video, the disclosure should be in the video itself not just the upload page and has to be both visual and audio, since some viewers only view without sound and some only listen without viewing.
- In livestream, the disclosure has to be repeated periodically.

Disclosures have to be clear but can be short

The FTC emphasizes that the disclosure should be clear and can be short. "Thanks to Brand X for the free product" is a good disclosure. So are terms such as "advertisement," "ad" or "sponsored."

On platforms with limited space such as Twitter, terms including "BrandXPartner" and "BrandXAmbassador" are also acceptable.

Hashtags such as #ad or #sponsored may also work if, as discussed, they are not buried among other hashtags.

Avoid using vague or confusing terms and abbreviations. And the disclosure has to be in the same language as the endorsement.

Content has to be honest

The content of the endorsement must, of course, also be true and not misleading.

The FTC makes three points on this subject. The first two are basic:

- Influencers cannot comment on products or services that they have not tried.
- If the influencer thinks the product is terrible, he or she cannot give an endorsement.

Although these two points may seem obvious, the fact that the FTC is emphasizing them means it perceives problems. And given that influencers just love to spout off about everything after all, is that not what social media is for you should assume that the truth will come out.

If the influencer tweeted that she loves your new dress, and really thinks it is uglier than a potato sack, you should assume that her real opinion is going to appear one day somewhere, and the contradiction will come to the FTC's notice.

The third point is subtler:

- If the influencer makes objective claims about the product, then, as for company advertisements, there has to be backup proofs.

This extends established rules for company advertisements to influencers. Such claims might include medical claims ("drinking this tea cures male pattern baldness"), statistical claims ("80% of women think Brand X handbags are the best") and environmental claims ("made of 100% organic materials").

This last point also underlines the FTC's overall view that influencer advertising is simply a variation on traditional endorsement advertising.

Endorsement advertising long pre-dates social media, and the FTC has for decades insisted that endorsements follow its rules.

AS A NEW method of communication, social media enjoyed a Wild West flavor that often meant that the usual rules did not apply. The FTC has now made clear that is no longer the case.

Companies that use influencers to promote their products must take heed.

If done in compliance with its rules, the FTC views influencer promotion as perfectly legitimate.

If not, then the FTC views it as false and misleading advertising.

Since compliance is easy and straightforward for those who know what to do, attention to this issue is well worth the effort.

[Please click here to read the Federal Trade Commission's "Disclosures 101 for social media influencers."](#)

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