Targeting native advertising and influencer marketing, the FTC mandates "clear and conspicuous" disclosure guidelines

**BRANDS** are tapping social media celebrities—also known as influencers—to promote their products and services, and influencers can command significant compensation. Brands also use social media and other digital media formats to publish ads that seem native to the format and look more like editorial content than ads. In both cases, consumers can be deceived because the advertising nature of the message may not be apparent, thus the consumer may not be able to judge the objectivity or credibility of the speaker. In this case, the message may be deceptive advertising and actionable under state and federal false advertising and consumer protection laws. The Federal Trade Commission (FTC) has been particularly active in issuing guidance and bringing enforcement actions in these situations.

In 2009, the FTC was concerned about the use of celebrities to promote brands in social media, on talk shows, and in other contexts when it was not clear that they were paid spokespersons. It addressed these concerns by updating its Guides Concerning the Use of Endorsements and Testimonials in Advertising (E&T Guides). The E&T Guides, along with additional subsequent guidance and dozens of enforcement actions, provide a helpful roadmap for conducting legally compliant digital media advertising and promotional marketing in social media.

**FTC Advertising Law**

The E&T Guides address the application of Section 5 of the FTC Act “to the use of endorsements and testimonials in advertising.” In particular, Section 5 states that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.” Under Section 5, the four core principles for compliance are: 1) advertising must be truthful and not misleading, 2) advertising must substantiate any express or implied claims, 3) advertising cannot be unfair or deceptive, and 4) any disclosures necessary to make an ad accurate must be clear and conspicuous.

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The 2009 revised E&T Guides state that advertisers are subject to liability for false or unsubstantiated statements made through endorsements or for failure to disclose a material connection between themselves and endorsers. Although the E&T Guides do not carry the force of law or regulation, they articulate what the FTC believes is required to avoid deception under Section 5. Putting aside outright false or deceptive statements, the three most important factors to consider in evaluating social media promotions and native advertising are: 1) the existence of a material connection between the speaker and a brand, 2) when there is an endorsement or other promotional message, and 3) if there is an effective disclosure of the advertising nature of the message and of the connection between the speaker and the brand.

Based on the 2009 E&T Guides, the best practices for brands to follow for ensuring proper material connection disclosures are to 1) implement social media endorsement guidelines and policies for all internal and third-party marketing and promoting on social media.
Incentivized Endorsements

In addressing other potential deception issues, the FTC provided clarity on another popular disclosure dilemma—using sweepstakes and contests to encourage word-of-mouth promotion. In particular, the FTC has said that providing consumers sweepstakes or contest entries for posting about a brand is an endorsement that requires a disclosure so viewers and recipients are aware that the person posting had a chance to win. In an enforcement action against a brand that ran such a promotion, the FTC took the position—which has been repeated in guidance—that indicating #sweepstakes or #Contest could constitute a sufficient notice but stating #Brand was insufficient. The FTC has been less clear on “like-gating,” providing an incentive to customers to “like” the brand on social media. When a consumer sees another consumer “liking” a brand on Facebook, the action potentially suggests the consumer truly likes the brand and is endorsing it. Also, soliciting likes and shares from consumers who do not actually use and like the product is possibly deceptive because it conveys a higher popularity for the brand than is likely the case. To avoid this possible deception, brands using “like” functions should explain to consumers that the consumer should actually use and like the product to participate and should not condition receiving something of value in doing so, particularly when, as in “liking” there is no way to disclose the material connection. The FTC has stated, “Advertisers should not encourage endorsements using features that do not allow for clear and conspicuous disclosures...[but] we don’t know how much stock social networks put into ‘likes.’”

As advertisers increasingly use influencer videos on social media platforms, such as popular “unboxing” review videos, advertisers must apply FTC compliance guidance on how to avoid deception. Disclosure of a material connection in a promotional video must be displayed clearly and prominently in the video itself. Also, the guidelines suggest that stating the material connection in the description field of the video is insufficient. Disclosures for videos should appear at the beginning of the video while longer videos should have recurring, multiple disclosures to ensure the consumer is aware of the material connection. For live streams, disclosure should occur multiple times and be periodic throughout the stream. However, the FTC has stated continuous disclosure for a live stream would be the best practice. Additionally, the disclosure in the promotional video should be long enough to read, or if spoken, at an understandable cadence. In the context of a YouTube multichannel network, the disclosure on compensated reviews needs to identify the sponsor in a “sponsored by” notice made by the product manufacturer. Based on advertisers’ increasingly using promotional videos for their campaigns, ensuring the video has the appropriate disclosures will be an important facet of planning the campaign and properly educating the consumers.

Native Advertising

Native advertising is generally defined as the practice of designing ads that look and feel like the natural editorial content of a website, social media platform, magazine, or video network. Native advertising is also defined as a method in which the advertiser attempts to gain attention by providing content in the context of the user’s experience with native ad formats matching both the form and functions of the user experience in which it is placed. Another definition, which comes from the Interactive Advertising Bureau, defines native advertising as “paid ads that
are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong.” Regardless of how it is defined, native advertising is an increasingly popular method for integrating paid advertisements into editorial content to engage consumers in information about, related to, or to promote the business that originated or paid for the content. As a demonstration of the power of native advertising, a recent study indicates that about “75 percent of advertisers have gone native and the rest intend to.”

Although many companies have adopted native advertising to successfully promote their own brand, and media companies enjoy the revenue stream created by this new form of advertising, disclosure compliance is required just as with social media influencer campaigns. Notably, the FTC guidelines mandate disclosure in promotional content that appears to be an advertisement in order to avoid deceiving the customer. Nevertheless, native advertising compliance with FTC disclosure can be particularly difficult because “native blurs the line between editorial content and advertising, and, when most effective, engages readers in the same way as the surrounding editorial content for a site.” Therefore, a thorough understanding of the FTC’s guidance on native advertising is the best way for advertisers to ensure compliance.

The FTC “will find a native ad’s format deceptive if it materially misleads consumers about its commercial nature, including through an express or implied misrepresentation that it comes from a party other than the sponsoring advertiser.” When a business uses native advertising, it is responsible for ensuring the native ads are clearly identifiable as advertising before the consumer arrives at the main advertising page. Also, regardless of how many consumers arrive at the advertising content, the native ads must not mislead the consumer about its commercial nature. As a business evaluates whether native ads are recognizable as advertising to consumers, the advertisers should analyze the native ad’s “overall appearance; the similarity of its written, spoken, or visual style or subject matter to nonadvertising content on the publisher site on which it appears; and the degree to which it is distinguishable from other content on the publisher site.” The more similar the native ad appears to the content on the publisher’s site, the more likely disclosure will be required to prevent potential consumer deception.

To make effective disclosures for native ads, the FTC recommends following the .Com Guide. Similar to the other disclosure guidance, the disclosures should be 1) in clear and unambiguous language, 2) as close as possible to the native ads to which they relate, 3) in a font and color that’s easy to read, 4) in a shade that stands out against the background, 5) on the screen long enough to be noticed, read, and understood with respect to video ads, and 6) read—for audio disclosures—in a cadence and vocabulary easy for consumers to follow. Because advertisers have flexibility in identifying native ads as ads with different interfaces and available platforms, effective (i.e., compliant) disclosure can be accomplished creatively. Nevertheless, advertisers should ensure their native ad disclosures follow the FTC’s guidelines concerning proximity and placement, prominence, and clarity of meaning in its native advertising guide and carefully analyze the FTC’s examples of effective and ineffective native ad disclosures.

**Best Practices Case Study**

One of the best ways to demonstrate what an effective system of FTC compliance, monitoring, and enforcement looks like is to view it in practice in a real-world business environment. Social media influencer agencies have popped up over the past two to three years amid the incredible growth of social media advertising dollars pouring into the market. Social media advertising budgets have doubled worldwide over the past two years, going from $16 billion in the United States in 2014 to $32 billion in 2016. Social
media spending in the U.S. alone is expected to reach $17.34 billion in 2019. Today, many brands and studios—and the media agencies they engage to manage their social media advertising budgets—look to these social media influencer agencies to creatively develop content and cast as well as manage and execute social media influencer campaigns. When a social media agency is engaged to execute a social media influencer campaign, it is typical for the agency to be contractually obligated to comply with all applicable federal laws, rules, and regulations. These obligations should specifically call out the FTC E&T Guides in addition to other federal and state advertising laws.

In executing a branded social media campaign, social influencer agencies are tasked with a challenge to ensure all posts published by the influencers in their network are FTC-compliant. One of the most effective ways for the social influencer agency to satisfy its contractual obligations to clients is to educate the social influencers and their representatives about the E&T Guides. Social influencers communicate almost entirely in a visual language in social media. A one- or two-page list of contractual obligations in an influencer’s deal memo for the branded content campaign will likely be read once and not necessarily be understood.

As was learned from the FTC’s closing letter to Machinima, presenting influencers with a branded content campaign deal memo containing a separate section dedicated to FTC endorsement disclosure obligations is the best practice. In 2013, Machinima, Inc., a multichannel network on YouTube, conducted an advertising campaign at the request of Starcom MediaVest Group—an advertising agency representing Microsoft—in which it paid several of its network influencers to produce and upload Xbox One game play videos that were subsequently posted to YouTube to generate interest and sales activity of the newly released Xbox One and associated games. As the FTC letter indicates, the influencers were directed by Machinima to speak favorably about Xbox One and the game titles. Despite the fact that Machinima did not require the influencers to disclose in their videos that they were being compensated to produce and upload the videos, the FTC decided not to take enforcement action against Microsoft or Starcom because the incidents appeared to be isolated since Microsoft already had in place a “robust compliance program,” and both companies had “adopted additional safeguards regarding sponsored endorsements,” acting quickly to have Machinima insert disclosures into the campaign videos once they learned of the breach.

Providing disclosure examples in a visual, imagery-based, detailed description of what a proper endorsement disclosure looks like to followers on each social media platform is the best way to communicate important contractual and legal obligations to influencers who work in an imagery-based publishing and distribution world. If the client’s branded content campaign requires influencers to post on the influencer’s Instagram account, for example, the agency should include images of what a branded social post looks like on Instagram in the E&T Guides obligations section of the influencer deal memo.

Another method for social influencer agencies to ensure that branded content campaigns for their clients are FTC-compliant is to include image-based examples and step-by-step instructions in the influencer deal memo on how to use platform-specific branded content tools. YouTube has recently added a new tool to provide notice to viewers about sponsored content to help influencers achieve compliance with the necessary disclosures about their relationships with advertisers. The new feature adds visible text on a video for the first few seconds watched by a viewer with a label stating “Includes paid promo-
tion.” Similarly, Facebook implemented a branded content tool in the spring of 2016 and requires any post that includes paid content to be published using the tool. The Facebook Branded Content Tool adds hyper-linked text at the top of the post “Brand with Influencer.” Clicking on the “Brand” link takes the user to the brand’s official Facebook page.

One of the practical challenges facing influencers, agencies, and brands is establishing a baseline of acceptable and mutually agreed compliant disclosures for each campaign. Many social media influencer campaigns involve negotiating a campaign statement of work among three separate legal departments (the media agency representing the brand, the brand, and the agency). Personal experience has demonstrated that many influencers will not agree to use the standard FTC acceptable #Ad, #sponsored, or #Paid in their paid posts because they view them as “spammy” or “too commercial.”

From a legal compliance and policy point of view, these accepted disclosures are intended to inform followers that the post is commercial or paid. Marketing departments for brands often align with influencers in their desire to make influencer marketing seem organic and not overtly commercial. In many cases, the brand, the media agency, and the influencer agency agree to provide social influencers a choice of mutually agreed disclosures that include standard direct disclosures (#Ad, #Sponsored, or #Paid) and more organic copy in the body of the text of each post, for example “I’m working with Brand....,” “I’ve teamed up with Brand....,” or “I’ve partnered with Brand.....” Many influencers and brands prefer the organic nature of these types of disclosures over the more commercial #Ad because it lends more authenticity to the influencer’s messaging as it is presented more in the influencer’s voice. The FTC has not commented specifically on which, if any, of these types of more organic disclosures would be FTC-compliant in disclosing the material connection between the advertiser and the influencer. The options for disclosures should be enumerated specifically in the influencer’s deal memo as well as in the statement of work between the brand and the social media influencer agency.

Social influencer agencies need to ensure that the influencers they engage to execute branded content campaigns in social media do so in compliance not only with E&T Guides but also with social platform terms of service and requirements for usage of their tools. Although the branded-content tools being implemented by social platforms are helpful to influencers in disclosing their relationships with advertisers, it is not clear whether the tools create posts that are compliant with FTC endorsement disclosure requirements or with other applicable laws. Until practitioners know more about how the FTC views the posts published through the social platform branded content tools, the best practice is to include a requirement that the influencer use the tools in accordance with each social platform’s terms of service and the specific text approved in the deal memo for compliant disclosures (e.g., #Ad, #Paid, #Sponsored).

Influencer agencies and businesses executing branded content campaigns in social media using influencers should be concerned with establishing an effective system of compliance, monitoring, and enforcement that focuses on the influencer’s actions. To date, the FTC has not pursued action against influencers merely for failure to comply with the individual disclosure obligations, without further misconduct. However, social media agencies, influencers, and talent managers should be aware that there has been an increase in formal complaints from consumer protection organizations to the FTC regarding flagrant deceptive marketing practices of many high profile influencers in social media. In 2016, there were formal complaints to the FTC from Truth in Advertising and the Center for Digital Democracy. Both formal complaints alleged rampant failure of high-profile social influencers and celebrities—e.g., the Kardashians—of publishing paid branded content posts without disclosing the nature of their relationship with the advertisers. These consumer protection organizations also point out that the majority of the violations are taking place on platforms like Instagram where the consumers may be more vulnerable because they are often younger—according to Pew Research more than 80 percent of consumers under 30 use Instagram as opposed to 43 percent age 30 and above. With the increase in formal complaints to the FTC related to violations from influencers, it is possible that the FTC may begin to investigate and take action against influencers directly.

The FTC has issued guidelines and answered FAQs concerning social media promotions and native advertising; however, concerning some of the best practices a business can follow to ensure FTC compliance, each advertiser and business should adjust its own disclosure and compliance program practices based on particular campaigns. As technology continues to evolve and the FTC promulgates further guidelines and clarifications, heightened vigilance on avoiding deception in advertisements should be the mission of every brand and agency.

1 16 C.F.R. §255.
2 16 C.F.R. §255(a).
4 16 C.F.R. §255(a).
11 Id.
12 Native Advertising, supra note 17.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Com Disclosures, supra note 5.
19 Id.
20 Id.
21 Id.
22 Native Advertising, supra note 17.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.