

WEBINAR

Advertising and Social Media:
Understanding the Legal Implications
and the Do's and Don'ts of Native Advertising
and Social Media

SheppardMullin

FRENCH AMERICAN
CHAMBER OF COMMERCE

Tuesday, November 19, 2019





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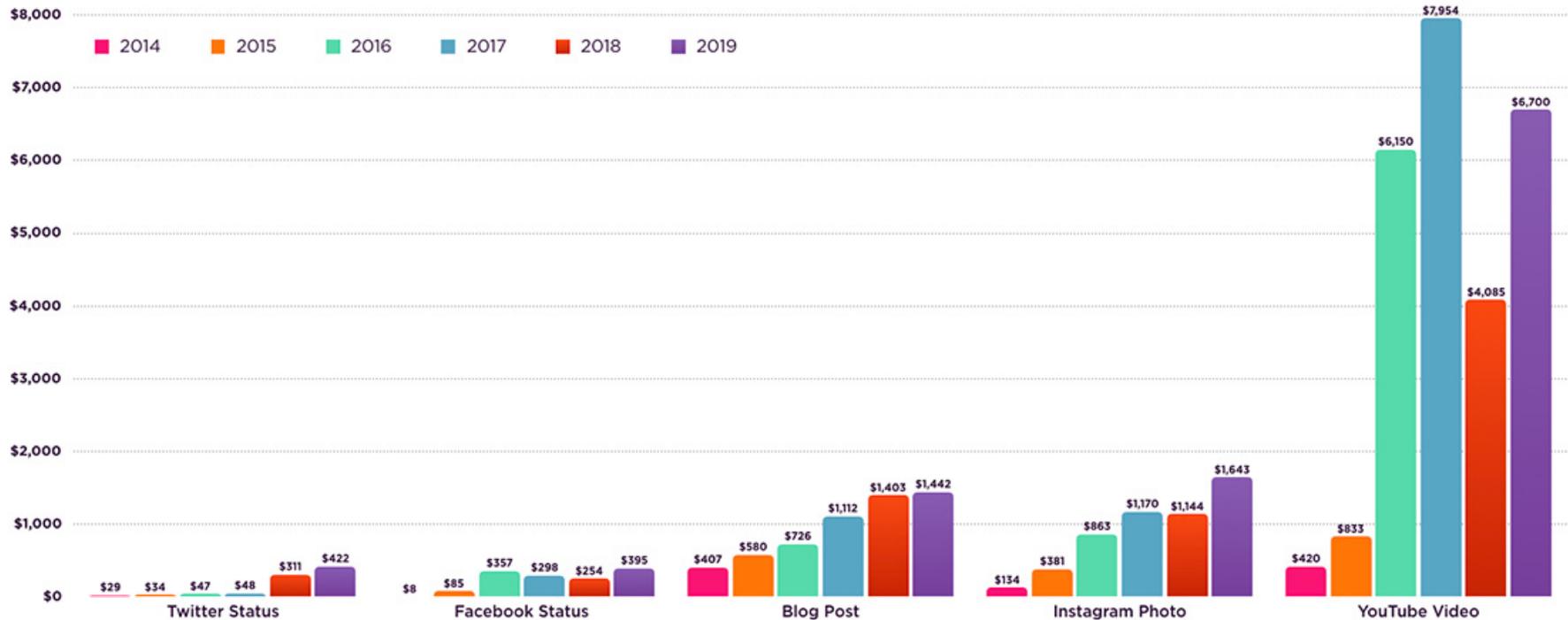


Influencers Are Key Advertising Focus

Influencer Marketing Costs



2014-2019 Average Cost Paid Per Post Per Platform (USD)



Unaudited platform data.

The Endorsement Guides: Basic Rules

- In 2009, the FTC came out with updated Revised Endorsement Guides (“Endorsement Guides”) that not only apply to “any advertising message...that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser” but also the expanding domain of online advertising and social media.

Basic Rules:

- Endorsements must reflect the truthful experience of the endorser.
- You can’t make claims that require proof you don’t have.
- Clearly and prominently disclose any material connection between the endorser and the advertiser.
- Any financial or familial relationship with a brand must be disclosed.
- Social Media is no exception.



What Are The Important New Considerations?

- How do the Revised Endorsement Guidelines work in the world of social media, influencers, and native advertisements?
- What types of disclosures can be made with social media posts, especially?
- What do advertisers and agencies need to know and do in light of the Revised Guidelines, especially in the context of Twitter, Facebook, and Instagram?
- What has the FTC done recently in terms of enforcement and what does that mean for the future?
- What are the best practices in light of the Revised Endorsement Guidelines and related FTC guidance?

Celebrity Giveaways

Your Client's Director of Marketing calls and asks: "Can we give celebrities our latest top selling designs and use their photo in our marketing materials and on our website?"

FTC Guidelines: In September 2017, the FTC in a Q&A stated: "You should tell the participants in your network that if they endorse products they have received through your program, they should make it clear they got them for free. Advise your clients -- the advertisers -- that if they provide free samples directly to your members, they should remind them of the importance of disclosing the relationship when they talk about those products."

What Makes A “Material” Girl?

The Client’s Director of Marketing states: “Madonna loves our products and we have nothing in writing but she always Tweets and Snapchats about how wonderful our designs are!!! All it is are a few designs here and there to her stylist. . . . What is the big deal? What about ‘#sp’? That works, doesn’t it?”

No. While “#sp” has been used by influencers, the FTC has said “#sp” is not “likely [to] inform consumers that the message was sponsored by an advertiser.” “#Sponsored” works. #ad or #AD works. What about “#ambassador”? Not sufficient. “#ACME BRAND Ambassador” works. What about “#Thanks ACME BRAND”? Not sufficient. “#Thanks ACME BRAND for gift of the beautiful bag.”



What Is “Material”?

Your client asks you the following: “We run a retail website and we want to include customer reviews of the designs we sell. We encourage honest reviews to help our customers. We plan to give out free products to our favorite customers for them to review. We tell them to be honest, no matter whether it is positive or negative. Do we still need reviewers to disclose when they received free products?”

FTC Says: “Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if [the company] didn’t intend for that to happen. And even assuming your reviewers are unbiased, your customers have the right to know which reviewers were given products for free. It’s also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews.”

FTC September 20, 2017 Q&A Session on Influencers

- In a September 20, 2017 Twitter Q&A, the FTC stated in response to the following question:
- “What if I upload a video to YouTube that shows me reviewing several products? Should I disclose that I got them from an advertiser?”
- “Yes. The guidance for videos is the same as for websites or blogs.”
- Disclosure: “ACME BRAND gave me this product to try....”
- Disclosure Needs to be Verbal and Written: “For video reviews like YouTube & other, the disclosure must be in the video itself, both verbal and written.”



FTC September 20, 2017 Q&A Session on Influencers

During the Twitter Q&A session, the FTC further explained what it means to be “clear and conspicuous” and provided these takeaways:

- Put disclosures in the first three lines of the post;
- Use hashtags like “#ad” or “#paid” at the beginning of the post and do not bury them amongst other links and hashtags. Hashtags like “ambassador” are not sufficient;
- Superimpose a disclosure over your Snapchat or Instagram stories and keep in mind that followers have to have time to read the disclosure; and
- In a series of disappearing posts, you may only need a disclosure on the first post if the disclosure stands out and viewers have time to process the disclosure before the next post appears.



FTC Takeaways Regarding Influencers

- If an influencer's followers know that the influencer is a paid spokesperson for a brand, the influencers need not include a disclosure every time the influencer posts about the product. But, if a "significant portion of [the influencer's] followers" are unaware of the relationship, the influencer needs to disclose it each time;
- If an influencer is hosting a giveaway funded by a third party, he or she needs to state that it is sponsored by a third party;
- An influencer need not list everything he or she receives from a company to review a product if he or she discloses that he or she was paid or received an "all-expense paid" trip;
- If an influencer works for a brand and post about its product, the influencer must disclose his or her connection to the brand, even if he or she was not paid to post about that product; and
- Brands need to monitor and follow up with any influencers with which it does business to make sure that he or she has complied with disclosure obligations under the Guidelines; and



Takeaway: Do Not Rely Upon Built-In Disclosures

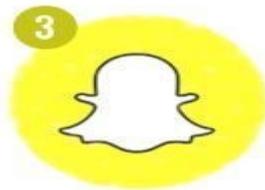
Top 5 Performing Social Channels for
INFLUENCER MARKETING



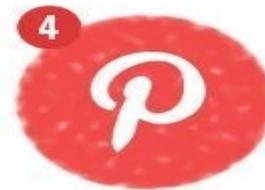
Instagram



Youtube



Snapchat



Pinterest

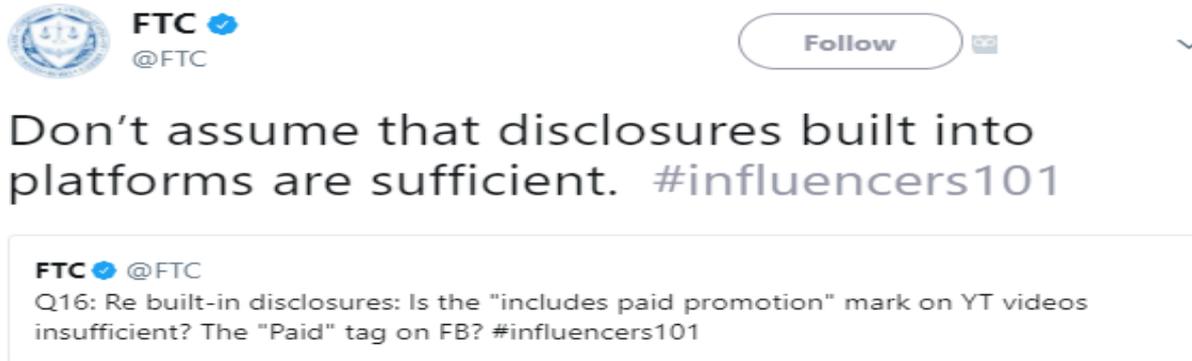


Twitter

- Do not rely on built-in disclosure tools (e.g., “Paid” tag on Facebook or “Includes paid promotion” mark on YouTube or “Paid partnership with” tag on Instagram) for disclosures.
- FTC has stated: “It depends on whether the tool clearly and conspicuously discloses the connection.”



Takeaway: Do Not Rely Upon Built-In Disclosures



- FTC has stated: “FTC staff doesn’t think that the built-in Youtube and FB tools suffice” and “The same applies to built-in Instagram tool.”
- Regarding Snapchat and Instagram, FTC stated: “When all photos will be seen, disclosure on first one could be good enough if it stands out & viewers have time to notice it.”
- With regard to Pinterest, the FTC has advised: “A superimposed disclosure or one in the description could work. It needs to be clear and conspicuous.”

Key Examples of FTC Enforcement

- FTC v. Deutsch LA
- In re Sunday Riley Modern Skincare
- In re Warner Bros. Home Entertainment
- FTC v. Lord & Taylor
- FTC Letters to Influencers
- In re CSGOLotto
- In re Creaxion Corp.
- Truth in Advertising, Inc. Complaints
- FTC v. Devumi, LLC

FTC v. Deutsch LA

FTC v. Sony and Deutsch LA

- FTC alleged Sony misled consumers about the PlayStation Vita gaming console;
- Sony claimed the features were “game changing” when the claims made regarding the console’s capabilities were not true;
- FTC alleged Deutsch LA knew or should have known advertisements were misleading about the console’s capabilities; and
- FTC alleged Deutsch LA mislead consumers by having its employees promote PS Vita in Social Media without disclosing they were employees of Deutsch.



FTC v. Deutsch LA

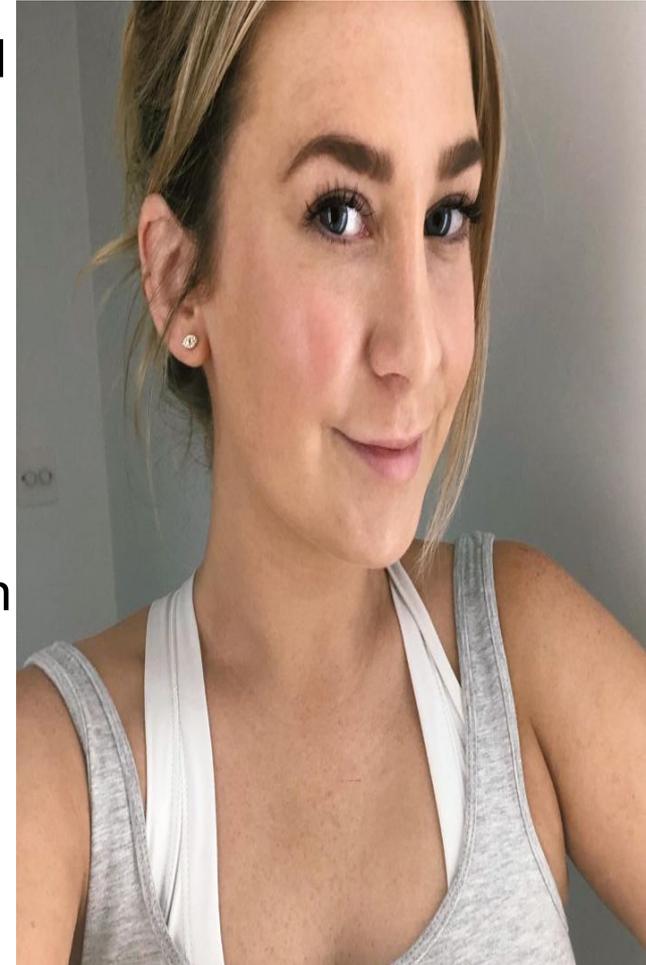
FTC v. Sony and Deutsch LA

- FTC Order barred Sony from making misleading claims re handheld consoles in the future and Sony gave consumers who purchased prior to June 1, 2012 \$25 in cash or credit or \$50 voucher for merchandise;
- Deutsch LA was barred from making similar misrepresentations, bars misrepresentations that an endorser of any game console or video game product is an independent user; and
- Deutsch LA required to disclose material connection between endorser of game console product and Deutsch LA or any company involved in the manufacturing or marketing of the product.



In re Sunday Riley Modern Skincare

- Sunday Riley launched her skincare firm Sunday Riley Modern Skincare, LLC (“SRMS”) in 2009 and its skincare products, including Good Genes, Power Couple, U.F.O., C.E.O., Luna and Tidal, have enjoyed tremendous success, having been featured, promoted, and sold online through Sephora and its website, [www. Sephora.com](http://www.Sephora.com);
- On October 21, 2019, the Federal Trade Commission (“FTC”) announced a consent order in an action for violation of Section 5 of the FTC Act against Ms. Riley and SRMS for posting false reviews of its Sunday Riley products and falsely representing that the false reviews reflected the opinions of ordinary customers of the products.



In re Sunday Riley Modern Skincare

- The FTC complaint alleged that from 2015 until 2017 SRMS managers, including Riley, posted reviews on the Sephora website, using false accounts created to conceal their identities and directed SRMS employees to do the same: “I would like everyone to create 3 accounts on Sephora.com, registered as a different identities.”
- Riley also focused on certain products and giving specific instructions: “Leave a review – make sure to NOT compare the product to other products, to not use foul language, and to be very enthusiastic without looking like a plant. Always leave 5 stars.”



In re Sunday Riley Modern Skincare

- Truth-in-advertising principles apply on social media platforms, and if there is a material connection between an advertiser and an endorser (whether she or he is a tweeter or blogger or endorser on another online site), it has to be clearly disclosed.
- Commissioners Slaughter and Chopra dissented on the absence of a monetary penalty: “Going forward, the FTC should seek monetary consequences for fake review fraud, even if the exact level of ill-gotten gains is difficult to measure.” Commissioners Slaughter and Chopra noted that fake online reviews are a global problem and that the United Kingdom, Canada and Australia all have recognized fake reviews as a threat to honest competition online.



The Takeaway

FTC Guides: Social Media Best Practices for Employees and Vendors

- Make sure you have a company policy regarding employee and vendor use of Social Media. If you do not and they make a mistake, it will be held against you;
- Instituting a robust compliance program, including specific training and guidance relating to the FTC's Enforcement Guides, may mitigate FTC actions and penalties if isolated instances;
- Make training available to employees, vendors and personnel at any respective advertising agencies;
- Have response and remediation program in place in case of violation of policy and take immediate action when given notice of improper or lack of proper disclosure; and
- Disclosure: **#employee** not sufficient: “**#ACME_Employee** or **#My Company**” is sufficient.

In re Warner Bros. Home Entertainment

- In 2014, Warner Bros. Home Entertainment launched an online advertising campaign designed to hype the new release of “Middle Earth: Shadow of Mordor,” a fantasy game based on “The Hobbit” and the “Lord of the Rings” trilogy.
- Warner Bros., through its ad agency, hired and paid online influencers and gave them an advance game to develop sponsored gameplay videos and post them on YouTube and promote the videos on Twitter, Facebook, and other social media.



In re Warner Bros. Home Entertainment



- On July 11, 2016, the FTC issued a consent order and the complaint alleged that WB failed to require the influencers to disclose that the videos were sponsored content and clearly and conspicuously disclose WB's sponsorship.
- The FTC order prohibits Warner Bros. from misrepresenting that any such gameplay videos are independent opinions or the result of impartial video game consumers and requires clear and conspicuous disclosure of any material connection between WB and any influencer or endorser.

What About Native Advertising?

What if your client gets a reporter to prepare an article about the new collaboration? They suggest that it could also have influencers wear such products and take selfies? We would only give them one design which sells for \$500 at retail. That cannot be a problem, can it?

The
**BLOG
POWER
LIST**

*Follow
NET-A-PORTER
on Twitter
and tell us who
your favorite
blogger is*

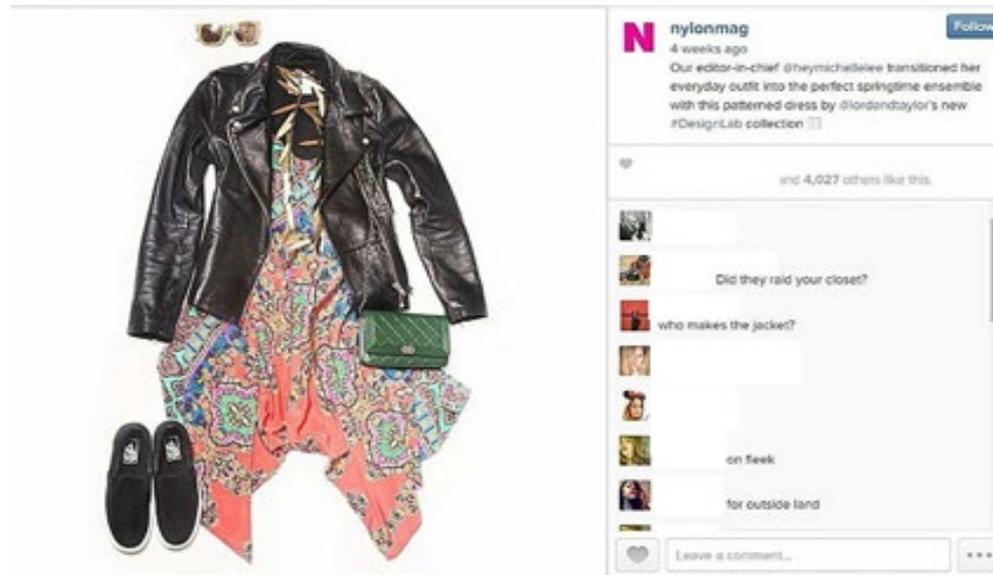
They've got the world at their feet. When they're not sitting front row, they're signing book deals and starring in ad campaigns. We asked a panel of industry experts to select their top ten favorite blogs

MEET THE PANEL

MICKEY BOARDMAN Founder, Paper Magazine	DEREK BLASBERG Editor-at-Large, Harper's Bazaar US	GRACE LAM Senior Fashion Style Editor, Vogue China	COLIN MCDOWELL Fashion Commentator	JONNY JOHANSSON Creative Director, Acne	ANNA LAUB Creative Director, Prism	PETER PILOTTO & CHRISTOPHER DE VOS Designers, Peter Pilotto	RICHARD NICOLL Creative Director, Richard Nicoll	RICH TONG Fashion Director, Tumblr	MATTIAS SWENSON Founder, Bloglovin'

FTC v. Lord & Taylor: The Facts

New York retailer Lord & Taylor promoted the launch of the Design Lab Collection and a featured Design Lab paisley dress design through native advertising, including a Lord & Taylor-sponsored article in the online publication, *Nylon*, and a *Nylon* Instagram post that was approved by Lord & Taylor. Lord & Taylor paid fifty online fashion “influencers” to post Instagram pictures of themselves wearing the same Design Lab paisley dress.



FTC v. Lord & Taylor: Required Disclosure Missing

While the influencers were free to style the paisley dress as they wanted, Lord & Taylor required each influencer to use the Instagram user designation “@lordandtaylor” and the hashtag “#DesignLab” in the caption of their photo posting. While Lord & Taylor also pre-approved each proposed post, it failed to require the influencers to disclose that Lord & Taylor paid them to post the photo and no influencers made any such disclosures.



FTC v. Lord & Taylor: Immediate Results

The Instagram portion of the social media campaign was very successful and reached 11.4 million individual users in just more than two days, resulting in 328,000 brand engagements with Lord & Taylor's Instagram handle, and the sell-out of the featured paisley dress.



FTC v. Lord & Taylor: No Disclosure of Native Advertising



Lord & Taylor failed to disclose that the *Nylon* article and Instagram post were contracted and paid-for promotions. Lord & Taylor also approved the Instagram *Nylon* post but did not require any disclosure. Lord & Taylor also neglected to disclose that it had given each of the fifty influencers the dress, as well as a payment between \$1,000 and \$4,000, in exchange for his or her endorsement and the posting of a photo of themselves wearing the dress on Instagram or another social media site.

FTC v. Lord & Taylor: The Consent Judgment

- On March 15, 2016, the FTC settled charges brought against Lord & Taylor arising from its March 2015 social media campaign regarding the launch of its Design Lab Collection.
- The FTC settlement order prohibits Lord & Taylor from: “misrepresenting, in any manner, expressly or by implication, that an endorser of such [Lord & Taylor] product or service is an independent user or ordinary consumer of the product or service” in connection with the advertising labeling, promoting, offering for sale, sale, or distribution of any product or service.
- Lord & Taylor also is required to “clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists, between such [Lord & Taylor] endorser ad.”
- Lord & Taylor also is required to establish a monitoring and review program for its endorsement campaigns, which includes provisions, inter alia, for terminating any endorser with a material connection to Lord & Taylor who has misrepresented, in any manner, his or her independence or impartiality or failed to disclose, clearly and conspicuously, in close proximity to the representation, a material connection between the endorser and Lord & Taylor.



FTC Letters to Influencers

- In response to a petition from a coalition of consumer groups last year complaining about the need for disclosures by social media influencers, the FTC recently announced on April 19, 2017 that it had issued more than ninety letters reminding influencers and brands that “if there is a ‘material connection’ between an endorser and the marketer of a product – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement.”
- The FTC explained that material connections could “consist of a business or family relationship, monetary payment, or the provision of free products from the endorser.”
- A second letter was sent to 21 social media influencers who ignored the FTC specific disclosure instructions, reminding them of their obligations and additional deceptive social media posts.



FTC Letters to Influencers

- The FTC raised specific posts with influencers and marketers and made clear that when disclosures are made they need to be seen readily at the top of a post so that consumers will not skip over or miss them, meaning that a disclosure placed at the end of a string or below a “more” Instagram button is not likely to be conspicuous.



- The FTC noted that “particular disclosures that are not sufficiently clear, pointing out that “many consumers will not understand a disclosure like ‘#sp,’ ‘Thanks [brand],’ or ‘#partner’” to mean that a post is sponsored. The FTC letters included copies of the Endorsement Guides and the publication “FTC’s Endorsement Guides: What People are Asking.”

In re CSGOLotto

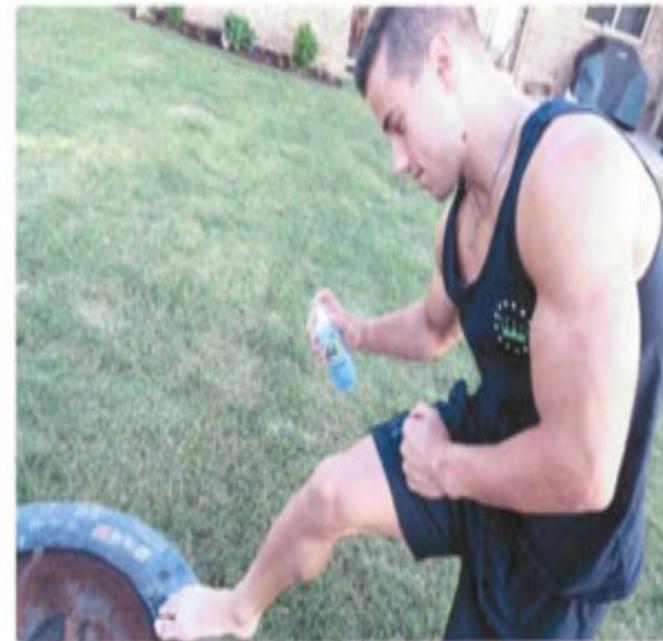
- The FTC's Bureau of Consumer Protection ("BCP"), brought an action against two online gaming influencers, Trevor Martin (a/k/a TmarTn), Thomas Cassell (a/k/a TheSyndicateProject, Tom Syndicate, and Syndicate), and their corporation CSGOLotto, Inc. ("CSGOLotto").
- The FTC alleged that Martin and Cassell (1) did not disclose their ownership in CSGOLotto, (2) were paid to endorse the online platform's gambling service, and (3) asked other gaming influencers to promote the service in exchange for payments between \$2,500 and \$55,000, without making them disclose such payments.
- In response to the complaint, neither Martin, Cassell, nor CSGOLotto admitted or denied the allegations, but instead agreed to enter into an Consent Order dated Sept. 7, 2017, which enjoined them from misrepresenting an endorser as an independent user or ordinary consumer and required them to clearly and conspicuously state if the endorsers have a material connection to the product or service.



In re Creaxion Corp.

- **FTC Swats Native Advertisers:** On February 8, 2018, the FTC issued orders against Creaxion Corp. and Inside Publications, LLC and their principals for misrepresenting paid athletes' endorsements as independent consumer opinions and commercial paid-for advertising as independent journalistic content concerning the promotion and advertising of FIT Organic mosquito repellent during the 2016 Zika virus outbreak.
- The FTC orders prohibited Creaxion and Inside from making any false representations in the future and required that they ensure all endorsers disclose all material connections going forward and monitor compliance by any endorsers.

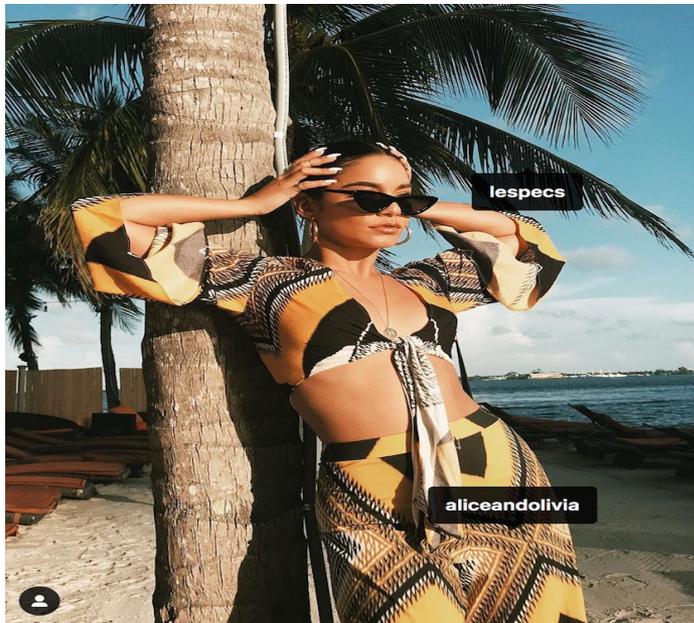
Getting Rio Ready! Not worried about Zika. Fit Organic has my back and body covered. Love the Fit mosquito repellent



Truth In Advertising March 4, 2019

Complaint to FTC

Truth In Advertising wrote to FTC complaining that 20 social media influencers, notwithstanding two FTC notice letters, still continue to mislead their fan base by refusing to disclose material connections to brands they are promoting and gave 1,400 examples promoting 500 companies. Truth In Advertising has written several complaint letters to the FTC.



 **vanessahudgens**  • Follow

vanessahudgens Migraine posing is the new thing im told lol 🤔📧 @chadwoodhair

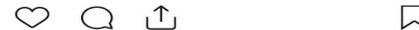
[Load more comments](#)

parisandpearl 🌟🌟❤️

natalierulon HOW @channaloraine

channaloraine @natalierulon The true Mommy

saccoguy Migraine pose! LMA 😂! That aside, W 😍 W! U look amazing!



302,425 likes

AUGUST 3, 2018

[Log in](#) to like or comment.

Truth In Advertising March 4, 2019

Complaint to FTC

Truth In Advertising noted that Rachel Parcell as the most deceptive Instagram ads in TINA.org's database.

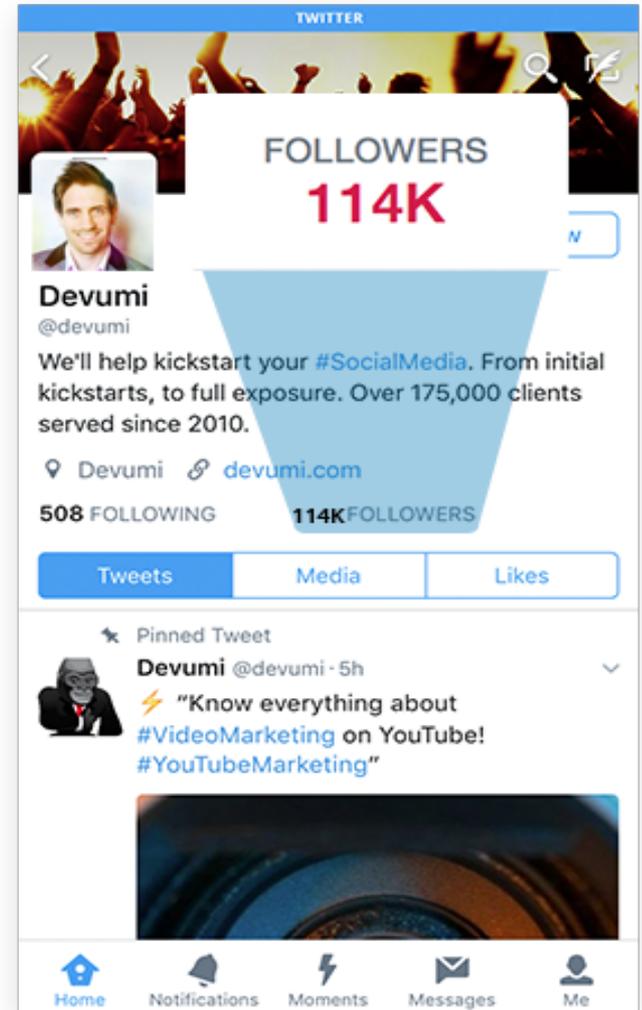
This is the fourth influencer marketing complaint TINA.org has filed with the FTC, having previously alerted the agency to deceptive social media posts by the Kardashians, Warner Bros. and YouTube personality PewDiePie, and Circoc influencers. TINA.org also sent a warning letter to the "King of Snapchat," DJ Khaled but did not assert an FTC complaint after he took steps to correct the undisclosed alcohol ads identified by TINA.org.

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FTC v. Devumi, LLC

- The FTC sued Devumi, LLC (Devumi) and its owner and CEO, German Calas, Jr., in the US District Court for the Southern District of Florida for selling fake indicators of social media influence, including fake followers, subscribers, views, and likes to users of social media platforms, including LinkedIn, Twitter, YouTube, Pinterest, Vine, and SoundCloud.
- Devumi agreed to settle the FTC's first-ever complaint challenging the sale of fake indicators of social media influence a monetary judgment against German Calas, Jr. of \$2.5 million, the amount that the FTC alleges he was paid by Devumi or its parent company.



FTC v. Devumi, LLC



- The FTC alleged defendants sold fake Twitter followers to actors, athletes, musicians, writers, and others who wanted to increase their appeal as online influencers. and to motivational speakers, law firm partners, investment professionals, and others who wanted to boost their credibility to potential clients.
- According to the FTC, Devumi filled more than 58,000 orders for fake Twitter followers.
- Devumi also allegedly had more than 4,000 sales of fake YouTube subscribers and over 32,000 sales of fake YouTube views to its clients, including musicians who wanted to increase the apparent popularity of their songs.

New Developments: FTC Signs MOU with UK's CMA

On March 25, 2019, the FTC signed a memorandum of understanding with the United Kingdom's Competition & Markets Authority ("CMA") to strengthen enforcement cooperation on consumer protection matters. The new agreement enhances cooperation, and the U.S. SAFE WEB Act provides the FTC with key powers to carry out this cooperation. The MOU streamlines investigative information and complaint data sharing, simplifies investigative assistance, and aids joint law enforcement investigations. The MOU further facilitates the FTC's cooperation with the members of the U.K. Consumer Protection Partnership, which includes U.K. enforcers and non-governmental entities that have consumer protection responsibilities, such as the ASA.



The CMA Issues “Influencer Guide”

On January 23, 2019, the CMA has released both a “Guide for Social Media Endorsements” and an “Influencer Guide” in an attempt to encourage brands to be more transparent.

The key points include:

- Disclosure of how much the influencer has been paid/given/loaned;
- Clarity in relationship to the brand, including any past relationship; and
- Transparency in whether the influencer *actually* used the product and whether they purchased it or it was gifted to them.

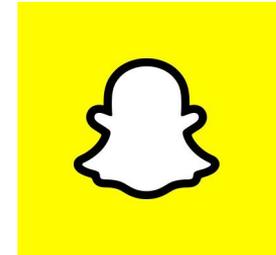
The FTC Issues “Disclosures 101 for Social Media Influencers”

- On November 5, 2019, the FTC issued a guide for influencers which states: “[a]s an influencer, it’s **your responsibility** to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads.”
- The written guide and accompanying video provide influencers with “tips on when and how to make good disclosures.”
- The guide explains to influencers that disclosures must be made when an influencer has a “material connection,” that is “any financial, employment, personal, a family relationship with a brand”

The FTC Issues “Disclosures 101 for Social Media Influencers”

Tips Given:

- “If your endorsement is in a *picture* on a platform like SnapChat and Instagram Stories, superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it”;
- “If making an endorsement in a *video*, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video. Some views may watch without sound and others may not notice superimposed words”;
- “If making an endorsement in a *live stream*, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.”



Executive Summary: What You Need to Know

- **What's the bottom line?**: “The watchword is transparency. An advertisement or promotional message shouldn't suggest or imply to consumers that it's anything other than an ad.” The FTC Guides apply to any advertising message that consumers are likely to “believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser.”
- **What do the rules require of social media influencers?**: Social media influencers **must disclose** any material relationship between the brand and him/herself.

Executive Summary: What You Need to Know

- **How can social media users fulfill the FTC disclosure requirements?** The FTC requires that the disclosure be clear and conspicuous:
 - For example, including the following on an Instagram or Twitter post is likely sufficient: “#contest, #sweepstakes, #advertisement, or #ad.
 - For the disclosure, use a font and contrasting shade of type that is easy to read and that stands out. Additionally, use hashtags that are relevant. The hashtag “#sweeps”, for example, is likely not sufficiently transparent to meet the FTC disclosure requirement for sweepstakes.
- **Which social media posts are governed by the FTC Guides?** The FTC is focused on endorsements that are made on behalf of a sponsoring advertiser in exchange for a fee or something of value (i.e., free clothing or a discount on future purchasers).
- **The Need for Disclosure:** The test to determine if an individual social media post requires a disclosure is: “Whether knowing about the gift or incentive given by the brand to the social media influencer affects ‘the weight or credibility’ readers or viewers give to the recommendation?”

Be Prepared!!!

- The cost of avoiding risk is cost of being prepared;
- Have an Employee and Vendor Policy regarding social media;
- Have agreements in place with influencers, bloggers, advertisers and celebrities;
- Monitor social media usage by employees and influencers, bloggers and celebrities to ensure that proper disclosures being made; and
- The FTC is scrutinizing social media. Be prepared and careful!!!

Merci de votre attention!



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