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**ADVERTISING & MARKETING**

The author addresses the Federal Trade Commission's recent updates to the frequently asked questions it provides regarding the commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising.

**FTC Updates Its Endorsement FAQs to Address Like-Gating, Pinning, Tweeting And Other Social Media Activities**

BY ALLISON FITZPATRICK

**Introduction**

The Federal Trade Commission (FTC) recently updated its answers to a series of frequently asked questions (the New FAQs) about its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides). Although the New FAQs ad-

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dress a wide array of endorsement-related issues on social media, the fundamental requirement of the Guides remains the same: endorsers must disclose their material connection (e.g., payments or free products) regardless of the media.

**The FTC Endorsement Guides and Original FAQs**

In 2009, the FTC updated the Guides to ensure that they applied to new media formats, such as blogs and social media.<sup>1</sup> At the time, the revised Guides represented the most sweeping changes in almost thirty years to endorsement and testimonial advertising.

In 2010, the FTC published its first answers to frequently asked questions about the Guides (the Original FAQs).<sup>2</sup> While the Original FAQs addressed general questions involving bloggers and social media, the Original FAQs did not place a special emphasis on endorsements on specific social media platforms or the technological challenges with disclosing endorsements on social media platforms. In contrast, the New FAQs address the challenges of making disclosures on specific social media platforms, such as Twitter, Facebook, Pinterest and YouTube. The New FAQs also expand

<sup>1</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>2</sup> FTC, *The FTC's Endorsement Guides: What People Are Asking* (June 2010), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

upon guidance provided by the FTC in its recent enforcement actions for violations of the Guides.

## The FTC's Actions Against Social Media Campaigns

Since 2014, the FTC has increased the number of actions it has brought against social media campaigns that allegedly violated the Guides.

For example, in March 2014, the FTC announced its action against home security company ADT LLC alleging that ADT's paid endorsers misrepresented themselves as independent reviewers while promoting ADT on talk shows, websites and blog posts.<sup>3</sup> Notably, as part of the FTC settlement, ADT agreed to institute reasonable monitoring programs to ensure that its endorsers were making appropriate disclosures when promoting ADT on talk shows, blogs and social media.<sup>4</sup>

Later in 2014, the FTC announced an investigation into Cole Haan Pinterest's contest which encouraged entrants to pin images of Cole Haan products with the hashtag #WanderingSole. The FTC determined that entrant's pins featuring Cole Haan images were endorsements of Cole Haan products even though the entrants did not make any statements about the products. The FTC also found that entry into the contest to win a \$1,000 shopping spree was a material connection that needed to be disclosed and that the hashtag #WanderingSole did not adequately disclose the material connection. Fortunately for Cole Haan, because the FTC had not provided guidance on the issue in the past, the FTC did not pursue formal action against the company (although the next company that runs a similar promotion to Cole Haan without adequate disclosures will not be so lucky).<sup>5</sup>

The FTC recently approved two final orders settling charges that Sony Computer Entertainment America LLC and its advertising agency, Deutsch LA, Inc., falsely advertised certain capabilities of Sony's PlayStation Vita.<sup>6</sup> While the action started as a false advertising action, the FTC ultimately alleged that Deutsch LA misled consumers by urging its employees to promote the PlayStation Vita on Twitter without instructing employees to disclose their relationship with their client.<sup>7</sup>

## What the New FAQs Say

The FTC's recent uptick in enforcement illustrates its concern over endorsements on social media. While the

<sup>3</sup> Press Release, FTC, Home Sec. Co. ADT Settles FTC Charges that Endorsements Deceived Consumers (Mar. 6, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/03/home-security-company-adt-settles-ftc-charges-endorsements>.

<sup>4</sup> *In re ADT LLC*, No. 122-3121 (F.T.C. June 18, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140624adtdo.pdf>.

<sup>5</sup> Letter from Mary K. Engle, Associate Director, FTC Division of Advertising Practices, to Christie Grymes Thompson, Kelley Drye & Warren LLP (Mar. 20, 2014), available at [https://www.ftc.gov/system/files/documents/closing\\_letters/cole-haan-inc./140320colehaanclosingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf).

<sup>6</sup> Press Release, FTC, FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console (Mar. 31, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer>.

<sup>7</sup> *Id.*

New FAQs formalize the guidance established in the above-referenced FTC actions, they also provide long-awaited guidance on appropriate disclosures on specific social media platforms, including with respect to incentivizing "likes", pinning photos, and tweeting.

## Social Media Likes, Pins and Posts

According to the FTC, pinning a photo or sharing a link as part of a paid campaign likely requires a disclosure of the material connection. The New FAQs re-emphasize the guidance from the Cole Haan action that words are not necessary for an endorsement, as even pinning a photo of a product can convey an endorsement.

Similarly, clicking on the like button (i.e., "like-gating") may also require a disclosure. Because the Facebook's like button does not allow for such disclosure, according to the FTC, companies should not use the like button for incentivized campaigns. That being said, the FTC is unsure how much stock consumers actually put into likes when deciding to patronize a business. Consequently, a company's failure to disclose that a like was incentivized may not violate the Guides.

In contrast, a company buying fake likes is very different from a company offering incentives for likes from actual consumers. If a company buys fake likes from non-existent people, or people who have no experience using the product or service, the likes are clearly deceptive, and both the company and the seller of the fake likes could be subject to FTC action.

## Clear and Conspicuous Disclosures

The New FAQs reaffirm that a clear and conspicuous disclosure is one that has clear and unambiguous language and is clearly noticeable to the audience. The FTC recommends that disclosures be close to the claim to which they relate, in an easily readable font, and in a shade that stands out against the background. Disclosures in videos should appear on screen long enough to be noticed, read, and understood. Disclosures in audio should be read at a speed that consumers can easily follow and in words they will understand.

On social media platforms, the New FAQs emphasize that a disclosure should be in a place where the majority of the intended audience will notice it. For example, placing a hashtag in a Twitter profile is insufficient because many people will not see it in conjunction with tweets that contain endorsements.

## Twitter Disclosures

The New FAQs emphasize that a disclosure should disclose the nature of the relationship between the endorser and the company whose products are being endorsed. The FTC does not mandate the specific wording of such disclosures but the same general principle—i.e., that people should receive the information that they need to evaluate sponsored statements—applies across the board, regardless of the medium and any limitations of that medium. On platforms with limited character restraints, such as Twitter, the words (or hashtags) "Sponsored," "Promotion," "PaidAd," or starting a tweet with the word "Ad" would likely be effective disclosures.

## YouTube and Online Video Disclosures

With respect to YouTube and other online videos, the disclosure should appear in the video itself (not in the

video description) and should appear toward the beginning of the video—not at the end of the video. For longer, more continuous endorsements such as live streams, viewers should be able to see a disclosure at whatever point they tune in to the broadcast. As such, the FTC recommends multiple periodic disclosures throughout the stream, or, as a best practice, clear and continuous disclosure throughout the entire stream.

### Social Media Contests

Posting a tweet or pinning a photo as part of a contest may constitute a material connection that is required to be disclosed. Harkening back to the Cole Haan action, the New FAQs explain that when entrants are encouraged to endorse a company in connection with a contest on a social media, entrants' hashtags should clearly convey that their posts were made as part of a contest. According to the FTC, a hashtag with the company's name would not be sufficient to notify the audience that the posts were incentivized. While adding the word "contest" or "sweepstakes" to the hashtag would likely be sufficient, an ambiguous word such as "sweeps" would not likely be sufficient because many people would not know what that means.

### Celebrity Endorsements

The New FAQs address the issue of whether celebrities who have millions of followers on Twitter must disclose when they are paid to tweet about a company's products. If a significant amount of the celebrity's followers do not know that the celebrity's tweets about the company's products are paid endorsements, a disclosure would be necessary. Due to the difficulty of making this determination, the FTC recommends that the celebrity make the disclosure.

### Employee Endorsements

According to the FTC, if an employee uses social media to talk about his or her employer's products, the employee should properly disclose the employee/employer relationship in the post. The updated guidance also states that before using social media to talk about the employer's products, an employee should check with the employer to ensure compliance with its employer's policies.

The New FAQs emphasize that employers should establish a formal program reminding employees of policies regarding how to properly disclose an employee/employer relationship. If an employer learns that an employee has posted a review on the company's website without an adequate disclosure, the employer should remind the employee of the company policy and ask him or her to either remove the review or adequately disclose their relationship to the company.

Employees of an advertising agency or public relations firm also have a material connection to their clients that should be disclosed in all social media posts. Accordingly, if an agency or PR firm asks its employees to endorse clients on social media, the agency and PR firm must advise their employees to disclose their relationship with their client when making such posts.

### Responsibilities for What Others Say on Social Media

Following up on ADT, the New FAQs explain that companies are expected to make reasonable efforts to

monitor endorsers who post on their behalf on social media. For example, when using a network of influencers to promote products, companies are responsible for developing and maintaining programs to train and monitor that network. The New FAQs suggest that companies should (i) explain to network members what is permissible and what is not permissible to say about a product; (ii) instruct network members regarding responsibilities for disclosing their relationship to the company; (iii) periodically check to see what members of the network are saying on social media; and (iv) follow up with network members if questionable practices are discovered.

That being said, the FTC understands that it is unrealistic for companies to be fully aware of what their network is doing all the time. Thus, as long as the company makes a reasonable effort to train and monitor its network, it is unlikely that questionable practices by a single influencer would lead to formal action. Still, companies should remember that they are responsible for what others say online on their behalf. According to the FTC, if a company's social media program is run by an outside public relations firm, the company is ultimately responsible for what the firm and others post on its behalf. As such, the company should make sure that its public relations firm has an appropriate program in place to train and monitor members of its social media network and should ask for regular reports confirming that the program is operating properly.

### Practical Tips for Complying with the New FAQs

- Ensure that all endorsers clearly and conspicuously disclose their material connections on social media—while there is no magic language, the goal is to effectively communicate the relationship between the endorser and the company whose products are endorsed.
- Clicking the like button, pinning a photo or sharing a link as part of a paid campaign will likely require a disclosure.
- Disclosures are required regardless of space constraints of the medium (e.g., Twitter) and can be made via hashtags such as #paid or #sponsored.
- Disclosures in YouTube and other online videos should be made in the video itself, toward the beginning of the video and not at the end of the video.
- Unless the audience knows a celebrity is a spokesperson for a company, the celebrity should disclose his or her relationship to the company.
- If entrants are asked to pin or tweet a company's photo in connection with a contest or sweepstakes, a disclosure is required and can be made via hashtags such as #contest or #sweepstakes (but not #sweeps).
- Remind employees that if they post on behalf of the company or its clients that they must disclose their relationship to the company or the client.
- Institute reasonable monitoring programs to ensure endorsers are making adequate disclosures and, if you delegate your social media campaign to

outside firms, ensure the outside firm institutes reasonable monitoring programs for endorsers.

- When in doubt, make a disclosure.

### **Conclusion**

Fresh off the heels of recent enforcement actions, the New FAQs emphasize the responsibilities of companies

and their endorsers on social media. Most importantly, the new FAQs put the industry on notice about the FTC's position on how to make clear and conspicuous disclosures on social media, which will likely precede more FTC enforcement against social media campaigns that violate the Guides.