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How to Avoid a Challenge

This is the third in a series of three articles examining the advertising regulatory landscape and the key issues affecting in-house counsel. You need to share your knowledge and insight with your internal marketing and compliance teams to ensure that certain controls are implemented that will help you avoid regulatory scrutiny.

AS INSIDE COUNSEL, YOU LIKELY have a good picture of the legal and regulatory risks associated with your business's advertising and marketing practices.

Unfortunately, it is unlikely that you have the time or bandwidth to review and opine on each and every advertisement and/or social media message that your business disseminates. Accordingly, it is imperative that you share your knowledge and insight with your internal marketing and compliance teams and ensure that your external publishers, vendors, influencer networks and talent partners implement certain controls that will help you avoid regulatory scrutiny.

I. Implement Internal Controls

1. Establish internal policies. It is likely that you have already created (or inherited) internal policies regarding the review and approval of advertising content and claims. To ensure that these policies are actually relevant, however, you will need to

regularly update these documents to reflect your business's current marketing practices.

For example, if your business engages influencers, you should create policies that clearly set forth the contractual provisions that must be included in every influencer contract—such as provisions regarding compliance with the Federal Trade Commission's Endorsement and Testimonial Guidelines and specific disclosures that influencers must include (e.g., #ad).

Similarly, you should provide your social media and "content lab" teams with guidelines and parameters for engaging and placing content online. On the technology side, both the FTC and Digital Advertising Alliance have focused increased



attention on cross-device data, tracking and behavioral advertising. Accordingly, you will need to ensure that your employees know how to appropriately collect, maintain and share consumer information, and establish detailed templates for privacy policies and other consumer-facing documents.

2. Conduct training. Once you have established comprehensive policies, it is important to train employees on how to properly comply with such guidance. Educate account leads with respect to best practices and when and how they should be implemented to help them understand the practical context for legal recommendations.

For teams handling sensitive data or personal information, train employees and website developers so that they fully understand their obligations with respect to consumer notice, consent and control over their information.

3. Stay on top of recent developments. The advertising landscape is constantly evolving, and new regulatory actions can often shed light on timely issues that are relevant to your marketing practices. Stay on top of newly issued regulatory guidance and state AG opinions to ensure that your legal advice is sound and the internal policies and procedures that you have established are up-to-date.

II. Ensure Compliance Across Employee, Partner and Influencer Networks

The FTC has recently stepped up its scrutiny of advertisers, publishers and agencies, specifically with respect to endorsements and testimonials, paid reviews, and native advertising practices. In reviewing the FTC's recent actions, one thing is abundantly clear: that businesses need to ensure compliance not only internally but also across partner and influencer networks.

The FTC recently found that Lord & Taylor paid Nylon, an online fashion magazine, to place an article and an accompanying Instagram post about the retailer's new clothing collection. Although Lord & Taylor edited and approved the content, it did not require Nylon to include a disclosure that the content was paid for by Lord & Taylor.

Lord & Taylor also failed to require its online influencers to disclose their connection to the retailer. In the resulting settlement agreement, the FTC found Lord & Taylor to be responsible for ensuring compliance across influencer and publisher networks—primarily due to the

advertiser's sustained involvement and editorial role with respect to every element of the campaign.

Consistent with the Lord & Taylor settlement, the FTC's recently introduced Native Guidelines make it very clear that, where consumers may be misled about the nature or source of an advertising message, proximate and prominent disclosures need to be included, such as "advertisement."

In view of the FTC's Native Guidelines and recent history of enforcement, businesses should always seek to contractually enforce disclosure requirements across partner teams and influencer networks. A business's responsibilities, however, don't stop there. The FTC has clearly taken the position that businesses must not only address these obligations at the contracting stage, but must also monitor and regularly audit their partners to ensure continued compliance.

III. Monitor and Enforce in Real Time

In a real-time world, where publishers and influencers are disseminating new posts and placements every minute, one might assume that a business's responsibility is limited to training its employees and contractually obligating its partners to abide by certain policies and procedures. The FTC, however, requires that advertisers be more proactive about monitoring their marketing practices and those of their business partners.

Recently, the FTC brought an action against Machinima, an online entertainment network, for failing to disclose that its influencers were being paid to produce and upload videos endorsing Microsoft's Xbox One system. This case is factually similar to a recent settlement between the FTC and Deutsch LA, in which the advertising agency settled claims that it misled consumers by urging its employees to promote its client Sony's PS Vita

on Twitter without including proper disclosures.

In its settlements with Machinima and Deutsch LA, the FTC emphasized that advertisers are not only responsible for properly instructing their social media influencers (whether those influencers are employees or members of hired networks) but are also responsible for regularly monitoring influencers for compliance and for terminating influencers who do not comply. This conclusion was ratified in the Lord & Taylor consent order, which requires the retailer to abide by certain monitoring and reporting obligations for a period of 20 years.

As evidenced by these recent FTC actions, training employees and obligating partners to comply simply isn't enough — the process of enforcement must be regular and ongoing if you want to stay ahead of the regulators.

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