

# **Advertising, Social Media and the FTC**

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## **ADVERTISING, SOCIAL MEDIA, & THE FTC**

New York State Bar Association  
Annual Meeting 2019

Intellectual Property Law Section

January 15, 2019

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With the expansion of social media and the introduction of new digital platforms, brands are looking to connect with consumers in fast, real-time, personalized ways. Brands have gravitated towards and embraced the opportunity to participate in influencer marketing through these different social media. With influencer marketing, brands can connect with consumers by engaging a specific individual to post and share information about a product or service. These posters, who are known as “influencers,” generally have a large or specific audience that brands want to target. This multimillion dollar business has boomed in recent years with new platforms and opportunities to connect with consumers.

Influencer marketing can take place in a variety of situations; for example, an influencer may post: (1) a YouTube video, reviewing make-up products; (2) on Facebook, touting a new restaurant; (3) a fashion blog entry, noting new clothing brands; (4) a video on Snapchat, which includes a discount code for purchasing workout equipment; or (5) on Instagram, highlighting a unique travel destination. The common thread with each of these different types of marketing avenues is the ability to connect on a personalized level with the consumer and provide targeted advertising for a specific product or service.

However, these mediums and opportunities for using influencer marketing have opened the doors for emerging legal issues and considerations. Specifically, brands must be aware of, and analyze the implications of, advertising laws, and incorporate disclosures into the posts to alert consumers of the relationship between the influencer and the advertiser.

#### **A. Legal Framework**

Influencer marketing is guided by general advertising laws. Specifically, 15 U.S. Code § 45 provides that “unfair or deceptive acts or practices in or affecting commerce . . . are . . .

declared unlawful.”<sup>i</sup> This regulation has broad and wide implications and applies to the use of influencer marketing and sponsored advertising. Brands have the responsibility to ensure that influencers who have a material connection to the brand, either in terms of compensation, employment, free goods or services or other consideration, explicitly disclose the connection. A disclosure ensures that consumers are not misguided, or deceived, by the reasons or motivations behind a post, comment or endorsement.

The FTC has also provided its guidance in the Guides Concerning Use of Endorsements and Testimonials in Advertising (the “Guidelines”).<sup>ii</sup> The Guidelines, as explained by the FTC, “reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.”<sup>iii</sup> The Guidelines are intended to assist advertisers, consumers, and influencers in understanding the basic principles, best practices and required disclosures for an influencer who is posting about a product or service for which he or she has received compensation.

The Guidelines explain that disclosures must be included in any type of post, no matter the medium or platform, where there is a relationship with the advertiser. If there is the implication that the influencer is sponsoring, or endorsing a product or service, and there is a material connection with the advertiser, there must be a disclosure within the post.<sup>iv</sup>

The question then becomes what constitutes an adequate disclosure? It is understood that the disclosure will vary depending on the medium on which it is posted, but the underlying requirement is that the disclosure must “provide the essential information”<sup>v</sup> and must be “worded in a way that’s understandable to the ordinary reader.”<sup>vi</sup> The best disclosure fully explains the relationship between the influencer and advertiser, and is clear, prominent, and conspicuous. For

example, if an influencer is given a free product, the optimal disclosure would state “Company X gave me this product to try . . . .”<sup>vii</sup> The disclosure can be included directly in the text of a post or explicitly stated within a video.

The FTC has also provided recommendations for what it means to “make a disclosure clear and conspicuous.” This includes making the disclosures “close to the claims to which they relate; in a font that is easy to read; in a shade that stands out against the background; for video ads, on the screen long enough to be noticed, read, and understood; and for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.”<sup>viii</sup> These general rules can be applied for every type of post and on every social media platform.

In addition, specific guidelines apply to the different social media platforms because consumers see and read the sponsored posts in different ways. On Instagram, it is important that the disclosure is included within the first three lines of text; if there is additional text, the remaining text will be truncated and consumers will need to click “more” to read the entire post, something they may not do.<sup>ix</sup> For Instagram and Snapchat stories, the disclosure should be superimposed over the video and be “easy to notice and read in the time that [] followers have to look at the image.”<sup>x</sup> On Twitter, where the length of the post is limited by the number of characters, simple words can be included as disclosures. For example, one can use “#sponsored,” “#promotion,” “#paid ad,” or “#ad.”<sup>xi</sup> Again, the point is that the disclosure be clear and conspicuous and that “people get the information they need to evaluate sponsored statements.”<sup>xii</sup>

## B. Instructive Cases and Orders

Most of the legal guidance regarding influencer marketing has come from the FTC, either in the Guidelines or through FTC complaints and notices to influencers and advertisers. A few of the more instructive cases are below.

- ***CSGOLotto, Trevor Martin, and Thomas Cassell.***<sup>xiii</sup> In the FTC’s first enforcement action against social media influencers, the FTC filed a complaint against Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, who posted endorsements of the gambling website CSGOLotto, without disclosing that they were the owners of the site.<sup>xiv</sup> In addition, the influencers allegedly paid other well-known influencers to post about the website, without requesting that the influencers include disclosures in their posts. The action was eventually settled, requiring that Martin, Cassell, and the CSGOLotto company “clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.”<sup>xv</sup>
- ***Cole Haan.***<sup>xvi</sup> Here, the FTC took issue with Cole Haan’s “Wandering Sole” contest on Pinterest, which asked participants to create Pinterest boards with images of five Cole Haan shoes and photographs of the contestants’ “favorite places to wander.”<sup>xvii</sup> The person who posted the most creative entry would win a \$1,000 shopping spree. Cole Haan told participants to include the hashtag “#WanderingSole” with their photos, but Cole Haan did not tell or require participants to make it clear that they posted the pins in order to enter a contest. The fact that this material connection (that a pin resulted in a contest entry) was not disclosed in entrants’ posts concerned the FTC. Although the FTC ultimately did not bring an enforcement action, the FTC stated, in its closing letter, that “entry into a contest to receive a significant prize in

exchange for endorsing a product through social media constitutes a material connection that would not reasonably be expected by viewers of the endorsement.” In the FTC’s view, the #WanderingSole hashtag did not effectively communicate the material connection between Cole Haan and the contest participants.

- ***Lord & Taylor, LLC.***<sup>xviii</sup> Lord & Taylor partnered with online fashion magazine Nylon to engage Instagram influencers for a marketing campaign to promote a specific paisley dress.<sup>xix</sup> Lord & Taylor gave the dress to fifty influencers and paid them to post photos of themselves in the dress on Instagram during a particular weekend in March 2015, and Nylon ran an article and posted a photo to its own Instagram account promoting the dress. Although Lord & Taylor pre-approved the posts, Lord & Taylor did not require, among other things, that the influencers disclose that they were paid to post the photos or had received the dress for free. The FTC complaint charged Lord & Taylor with three violations: (1) that Lord & Taylor falsely represented that the Instagram posts reflected the independent statements of impartial fashion influencers; (2) that Lord & Taylor failed to disclose that the influencers were the company’s paid endorsers; and (3) that Lord & Taylor falsely represented that the Nylon article and Instagram post reflected Nylon’s independent opinion about the dress. The case settled with requirements for stricter oversight and a more robust mechanism for monitoring campaigns and necessary disclosures.<sup>xx</sup>
- ***Warner Bros. Home Entertainment Inc.***<sup>xxi</sup> Warner Bros. conducted a marketing campaign for the video game *Middle Earth: Shadow of Mordor*.<sup>xxii</sup> Warner Bros hired an influencer marketing agency to execute a YouTube campaign with top gaming influencers. A select group of YouTubers were given a pre-release version of the



video game and were each paid anywhere from a few hundred to tens of thousands of dollars to promote the game on their channels. The influencers were instructed to create and post gameplay videos that promoted the game in a positive way and not to disclose any bugs or glitches they encountered. In addition, the influencers were told to disclose the sponsorship in the description box below the video, which often resulted in the disclosure being “below the fold” and visible only if consumers clicked on a “show more” link. A year after the campaign had ended, the FTC filed a complaint against Warner Bros. The FTC took the position that the marketing campaign misled consumers by suggesting that the videos reflected the independent or objective views of the influencers and that the disclosures were inadequate. The Guidelines clearly state that the disclosure must be near the top of the description box, above the “Show More” button, and for videos, the Guidelines require that influencers also include a verbal disclosure close to the beginning of the video. Under the FTC’s order, Warner Bros. is “barred from failing to make such disclosures in the future and cannot misrepresent that sponsored content, including gameplay videos, are the objective, independent opinions of video game enthusiasts or influencers.”<sup>xxiii</sup>

- ***FTC Warning Letters.*** In April 2017, the FTC sent out more than 90 letters to remind “influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media.”<sup>xxiv</sup> The letters were the result of petitions filed by Public Citizen and affiliated organizations; this was the first time that the FTC contacted influencers directly to warn them about the way in which the influencers either improperly, or failed completely, to disclose their relationships with advertisers. In addition to

explaining the purpose for including disclosures, and the best practices for doing so, the letters specifically addressed three trends within disclosures. The FTC noted that “when multiple tags, hashtags, or links are used, readers may just skip over them,” and therefore the disclosures are not considered conspicuous. The FTC also noted that shortened, or abbreviated, disclosures are not necessarily clear. For example, “#sp,” “Thanks [Brand],” or “#partner” do not necessarily describe that the post is sponsored.<sup>xxv</sup> And, the FTC reminded influencers that consumers must be able to see the disclosure clearly without having to search for it within the post.

After the initial warning letters were sent, the FTC wrote follow-up letters to some of these influencers in September 2017.<sup>xxvi</sup> These letters cited specific posts that the FTC determined were not in compliance with the Guidelines. Instead of just being a general “warning letter,” these follow-up letters asked the influencers to inform the FTC as to whether there was a “material connection to the brands in the identified social media posts.” The FTC also requested that if the influencers do have a connection, that they specifically detail the steps that they will take to ensure that “they clearly disclose their material connections to brands and businesses.”

### **C. Practical Considerations and Best Practices**

Brands must be sensitive to the need for adequate disclosures in all sponsored advertisements. Of course, the most important rule is to ensure that the relationship between the influencer and the brand is fully, clearly, and prominently disclosed, but there are additional important considerations.

First, many social media platforms are creating new tools for directly indicating that a post is sponsored by a brand. It is important not to rely on these tools to inform consumers about the relationship for a few reasons. First, if a consumer is unaware, or not knowledgeable about a specific social media tool, the consumer may not understand that the post is sponsored. Additionally, the tool may ultimately be removed from the platform, leaving the post without any type of disclosure. If the disclosure is included directly within the text or video, then both the brand and the influencer will be confident that the disclosure will last the entire life of the post. Lastly, these tools may not provide the influencer with the opportunity to include a full disclosure or provide a way to accurately describe the relationship behind the post.

Many brands want to create custom hashtags for their marketing campaign, and will try to incorporate the words “ad” or “sponsored” to comply with the disclosure requirements. However, these hashtags may be too lengthy or confusing, making it difficult for the average consumer to understand that the hashtag is a marketing disclosure. If a brand wants to include a custom hashtag, it is recommended that the influencer also include a simple tag such as “ad” or “sponsored” so that a clear and conspicuous disclosure is included within the post.

Brands should always keep the Guidelines in mind when new social media platforms emerge. The new platforms may provide different ways for sharing content, which may not always provide the traditional text options. Accordingly, it is important for both the brands and the influencers to be creative and ensure that the post explains the relationship and that the post is sponsored.

When engaging an influencer to post about a certain product or service, a brand should take the initiative to provide the influencer with the necessary tools to properly comply with the Guidelines. This includes informing the influencer about his or her responsibility for disclosing

the relationship. If a product is shared with an influencer for free, and there is no contractual relationship to post about the item, then the brand should include a note explaining that if the influencer decides to post about the product, then he or she must explain that the item was given to the influencer for free. In the alternative, if there is a contractual relationship between the influencer and the brand, then the brand may want to include specific requirements regarding the posts. This could include, the specific language to include, the specific hashtags to use, the language not to use, or even exactly what the picture or video should look like.

It is also important for the brand owners to pre-approve posts, if feasible, and monitor the posts once they are published. A brand owner's responsibility to ensure that the posts comply with the Guidelines does not end when the instructions are provided. Instead, the brand owner must continue to confirm that the disclosures are accurately included, and if they are not, provide the influencer with instructions on how to correct the post.

In sum, the following are a few best practices to help minimize the legal risks when engaging influencers in advertising:

- Contractually require influencers to abide by the Guidelines and provide clear instructions on how and when to disclose. Consider providing the actual disclosure language to the influencer.
- Monitor influencers' posts and ensure that disclosures are present and sufficient.
- Do not use ambiguous disclosures such as #ambassador, #partner, #sp, #spon, or #thanks. The FTC has stated that disclosures should use clear and unmistakable language.
- Make sure that disclosures accompany the post in a prominent location and do not bury the disclosures in links or text below a video or image.
- Do not simply rely on a platform's own disclosure tool. The disclosure obligation rests with the brand, and the brand should make sure that its disclosures are sufficient and lasting.

- Do not assume that a relationship is obvious. While it may seem that everyone would know that a celebrity has a business relationship with a product, the best practice is to err on the side of caution and disclose.

If participants enter a contest or sweepstakes with social media posts, the FTC will likely view this as a material connection and a disclosure must accompany the post.

**THIS OUTLINE PROVIDES GENERAL GUIDELINES ONLY  
AND SHALL NOT BE CONSIDERED LEGAL ADVICE.**

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<sup>i</sup> 15 U.S.C. § 45(a)(1).

<sup>ii</sup> FED. TRADE COMM’N, THE FTC ENFORCEMENT GUIDES: WHAT PEOPLE ARE ASKING, *available at* <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

<sup>iii</sup> *Id.*

<sup>iv</sup> *Id.*

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.*

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> *Id.*

<sup>xi</sup> *Id.*

<sup>xii</sup> *Id.*

<sup>xiii</sup> *CSGO Lotto, Trevor Martin, and Thomas Cassell*, No. C-4576 (Nov. 28, 2017), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/162-3184/csgolotto-trevor-martin-thomas-cassell>.

<sup>xiv</sup> Press Release, Fed. Trade Comm’n, CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), *available at* <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

<sup>xv</sup> *Id.*

<sup>xvi</sup> *Cole Haan*, No. 142-3041 (F.T.C. Mar. 20, 2014).

<sup>xvii</sup> Fed. Trade Comm’n, Div. of Advert. Practices, Letter from Assoc. Dir. Mary K. Engle to Christie Grymes Thompson (March 30, 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>xviii</sup> *Lord & Taylor, LLC*, No. C-4576 (F.T.C. May 23, 2016), *available at* <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf>.

<sup>xix</sup> Press Release, Fed. Trade Comm’n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”, *available at*

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<https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

<sup>xx</sup> Press Release, Fed. Trade Comm’n, FTC Approves Final Lord & Taylor Order Prohibiting Deceptive Advertising Techniques, *available at* <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-approves-final-lord-taylor-order-prohibiting-deceptive>.

<sup>xxi</sup> *Warner Bros. Home Entertainment Inc.*, No. C-4595 (F.T.C. Nov. 17, 2016), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>.

<sup>xxii</sup> Press Release, Fed. Trade Comm’n, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos, *available at* <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

<sup>xxiii</sup> Press Release, Fed. Trade Comm’n, FTC Approves Final Order Requiring Warner Bros. to Disclose Payments to Online Influencers, *available at* <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-approves-final-order-requiring-warner-bros-disclose-payments>.

<sup>xxiv</sup> Press Release, Fed. Trade Comm’n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, *available at* <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

<sup>xxv</sup> *Id.*

<sup>xxvi</sup> Fed. Trade Comm’n, Div. of Advert. Practices, Letter from Assoc. Dir. Mary K. Engle (Sept. 6, 2017), *available at* [https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de/instagram\\_influencer\\_warning\\_letter\\_template\\_9-6-17.pdf](https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de/instagram_influencer_warning_letter_template_9-6-17.pdf).

<sup>xxvii</sup> Lesley Fair, FED. TRADE COMM’N, *Business Blog*, (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.