

The Latest Influencer Advertising Tips from the FTC - When, How & Where to Make Effective Disclosures

September 18, 2017 – The TMCA

by Fara Sunderji and Sandra Edelman



As we [blogged](#) about earlier this month, the FTC seems to have spent much of its summer checking out influencer advertising and focusing its attention on those who fail to make the necessary disclosures of material connections to the products and services they endorse. This resulted in the [first-ever complaint against an individual influencer](#) and a round of follow-up warning letters to various influencers. The third piece of the FTC efforts is the 2017 update to the Endorsement Guide FAQs. While the FTC's [Endorsement Guides](#), written back in 2009

continue to serve as well-reasoned regulatory guidance for brands and influencers alike, the FAQs provide helpful insights from the FTC staff into real-world, specific examples dealing with influencers and beyond. We encourage you read the [FAQs in full](#), but we thought we would give our readers a quick cheat sheet on the new update:

WHEN – When are disclosures necessary?

Charitable Donations as a Material Benefit for Product Reviews - If your company makes a donation to charity anytime someone reviews your product, there should likely be a disclosure of that benefit, as it would be viewed as an incentivized content motivated by the reviewer's desire to see more money donated to charity.

Free Merchandise With No Requirement to Post Reviews – If a company provides a product for free to a blogger without any requirement that a review will be posted, the free merchandise needs to be disclosed. Whether or not the blogger feels obligated to say something positive about the product, the reader will want to know that the product was received for free.

Related People

- Fara Sunderji

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

Liking and Linking – Social media users like to “like” products and content or share links with their social network. Nothing wrong with that, except if the liking and linking is being done as part of a sponsored campaign or the user is being compensated by a product discount or being entered into a sweepstake for a significant prize, disclosure of that material benefit is in order.

But Facebook “Likes” Don’t Allow for Disclosures – The FTC seems to recognize this limitation, but advises that advertisers “shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures.” Whether the agency would take enforcement action in this circumstance will depend on the overall impression of the endorsement and whether the “likes” would play a material role in the decision to buy a product or service. The FTC further warns that the buying of fake “likes” from non-existent people or non-users of a product would be viewed as deceptive and subject to enforcement action.

It’s Just a Part-Time Gig – If you work for a brand and are paid for a specific number of posts, do you need to make disclosures when you are off the clock? The answer is maybe – if you are responding to questions about posts you made with proper disclosures, probably not. If you are feeling generous and really like the brand and decide to make a few extra posts about how much you love the products, you should probably make a disclosure on those posts too.

I’m just Posting a Photo or a Photo with a Tag – If you have a relationship with the advertiser, a photo (or a brand tag on a photo) is likely going to be viewed as an endorsement, so you should probably drop a #ad or #sponsored (not #spon) into the first few lines of the post.

I’ll Review Yours if You Review Mine – According to the staff “there doesn’t have to be a monetary payment” for a material connection to exist. If you are part of a club of authors who agree to review each other’s work, that’s something a reader would want to know when they read your review. Friendships, family relationships or even strangers who make deals can all represent material connections.

Can a Company Solicit Endorsements? – It’s OK to ask your customers their opinions about your products and feature their comments in advertising (with permission). If the customers have no reason to expect compensation or other benefit before they provide their comments, no disclosure of material connections is required. However, if a company gives customers a reason to expect a benefit, including just the fact that their comment may be featured in an ad, that should be disclosed in an ad, such as “Customers were told in advance they might be featured in an ad.”

HOW – How are disclosures supposed to be made?

Brand Ambassadors – Congratulations, your brand just launched a brand ambassador program. First rule of brand ambassador programs is that #ambassador is confusing and unclear. Make sure you instruct all your ambassadors to use something like “[BRAND]-ambassador” or the good old #ad is just fine too.

Disclosure of Client/Consultant/Advisor Connections – It's probably NOT enough to use the hashtags #client, #advisor or #consultant to indicate that a blogger works for the company whose products or services are being endorsed. The FTC says it would be better to spell out "I'm a paid consultant to ABC" or "I work with XYZ". However, the agency also said a shorter message like "ABC-Consultant" or "XYZ-Advisor" might work.

Disclosing an Employment Connection – If a company allows their employees to use social media to communicate about the company's products, the employment relationship needs to be disclosed clearly. The FTC comments that consumers "may be confused by #employee" and that "#XYZ-Employee" will more likely be understood. Nevertheless, a company name by itself might not be enough of a disclosure if consumers won't reasonably understand the relationship between the company name and the product being endorsed. In those cases, the FTC says it would be clearer to use the words "my company" or "my employer" in the body of the message.

Write Detailed Personalized Thank You Notes – While it is always polite to thank someone for free stuff, that's not a disclosure of a material connection unless you are specific. The staff guidance indicates that "thank you [brand]" is not enough, but "thank you [brand] for the free shoes" would likely be sufficient.

Full Disclosure – How much do influencers need to say about compensation received from a brand? In true FTC-style, one size does not fit all. The staff suggests that using #paid is enough regardless of the amount (unless the amount is so small that no disclosure is necessary), but you'll need a different type of disclosure if you are a brand employee or owner of the company. When you received a payment and a free product – the staff suggests that you don't just disclose the free product because that could suggest you did not get anything more, so mention the payment too.

WHERE – Where should we put these disclosure to make them clear and conspicuous?

Social Media Platforms That Have Built-in Disclosure Features – The FTC Staff isn't willing to go so far as to put all its trust in the social media platform of the day and neither should your brand. While a given platform's feature MAY be sufficient to comply with the FTC Act, your brand should consider whether the disclosure feature allows for clear and conspicuous disclosures that fit the situation at hand. For example, the staff guidance suggests that a disclosure placed above a photo may not grab a user's attention. In the end, advertisers and influencers are responsible for proper disclosure, so it is better to evaluate whether you need to make your own disclosures rather than simply relying on a platform.

Snapchat, Instagram Stories and other Short Videos – The FTC knows we all love watching those short videos on social media, so the staff wants to make sure that you know just how to make a clear and conspicuous disclosure when your influencers post their stories – they suggest superimposing the words over the images. Make sure your chosen words are easy to read (think font size, color and placement) and on-screen long enough to be read. No one turns up the volume to listen to Instagram stories, so don't

think about exclusively relying on an audio disclosure here.

Definitely a lot to think about! But given the FTC's focus on the issue, the enforcement action already initiated and the volume of inquiry letters sent to advertisers and influencers, marketers have been put on notice that failure to comply with disclosure requirements in endorsements and influencer ad campaigns can bring unwanted regulatory scrutiny.