

“#SP” OR “THANKS [BRAND]” IS NOT ENOUGH: FTC GUIDES FOR SOCIAL MEDIA INFLUENCERS ON ENDORSEMENTS AND TESTIMONIALS

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With global advertising expenditures on the rise, social media supports an increasing share of all advertising and endorsements and is subject to regulation by the Federal Trade Commission (“FTC”). The FTC established the “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” to regulate advertising to ensure that promotional content is honest and not misleading, and that material connections between the advertiser and the endorser are disclosed. These guides are particularly important in social media posts so that a reader knows whether the celebrity poster simply enjoyed a good restaurant dinner, or if they were paid to endorse the restaurant. While social media sites are beginning to provide some tools for disclosure, some consumers may not notice those tools or be aware of their purpose. What are the current FTC guides and how can social media influencers and advertisers comply?

I. INTRODUCTION

With global advertising expenditure projected to reach \$623 billion in 2019, a 4.7% increase,¹ social media supports an increasing share of all advertising and endorsements. In fact, a global study by advertisement agency Zenith revealed, advertisers were expected to allot 40.2% of their budgets for online advertising in 2018, an increase from 37.6% in 2017.² Across various major social media platforms, there is an increasing percentage of advertising expenditures.³ As

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1. Jonathan Barnard, *Advertising Expenditure Forecasts March 2019*, ZENITH (Mar. 2019), <https://www.zenithmedia.com/wp-content/uploads/2019/03/Adspend-forecasts-March-2019-executive-summary.pdf>.

2. *Id.*

3. Looking at the growth comparisons from the second to the third quarter of 2017 across all major social media platforms, Snapchat ad expenditure

part of the Federal Code of Regulations for Commercial Practices, the FTC established the “Guides Concerning the Use of Endorsements and Testimonials in Advertising” in order to regulate paid promotional content.⁴ A MediaKix study that assessed the monthly average number of sponsored posts and average number of FTC compliant posts of fifty top celebrity influencer accounts found that of those fifty, 30 contained sponsored content, and of those that contained sponsored content, as few as 7% may be in compliance with these FTC guidelines and regulations.⁵ As the FTC learned of influencer advertising activity on Instagram, the posts were reviewed by FTC staff and the FTC sent over 90 letters to remind influencer celebrities and marketers that clear disclosure of relationships to brands is necessary when endorsing products on social media.⁶

The FTC is also pursuing enforcement, as the first ever FTC case against individual social media influencers was settled in September of 2017.⁷ While some social media sites are responding with tools for disclosure, such as a “paid partnership” feature added by Instagram in 2017,⁸ as much as 60% of social media post readers are not observing currently utilized sponsor disclosures.⁹ As advertising

increased by 73%, Instagram by 55%, Facebook by 27%, and Twitter, Pinterest, and LinkedIn also experienced increases in ad expenditures of 26%, 26%, and 17%, respectively. See Aaron Goldman, *Social Media Is Dead ... Long Live Social Advertising The Final Nail in the Coffin May Have Been Snapchat's Redesign*, ADWEEK (Dec. 9, 2017) <https://www.adweek.com/digital/aaron-goldman-4c-insights-guest-post-social-media-is-dead-long-live-social-advertising/>. Social media influencer marketing reached \$1 billion on Instagram alone. *93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines*, MEDIKIX (May 31, 2017), <http://mediakix.com/2017/05/celebrity-social-media-endorsements-violate-ftc-instagram/#gs.wenBPSo>.

4. 16 C.F.R. §§ 255.0–255.5 (2009).

5. MEDIKIX, *supra* note 3. (“[T]he remaining 93% [of endorsed social media posts] did not include #ad, #sponsored, and/or the appropriate verbiage.”).

6. Press Release, Fed. Trade Comm’n, The FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017) <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

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

8. Kerry Flynn, *Instagram Adds ‘Paid Partnership’ Feature, the Formal Alternative to #ad or #spon*, MASHABLE (June 14, 2017), <https://mashable.com/2017/06/14/instagram-paid-partnership-ad-spon/#oKDMC2q.kqn>.

9. Will Heilpern, *How ‘Deceptive’ Sponsored News Articles Could Be Tricking Readers – Even With a Disclosure Message*, BUS. INSIDER (Mar. 17, 2016, 11:05 AM), <https://www.businessinsider.com/how-deceptive-sponsored-news-articles-could-be-undermining-trusted-news-brands-even-with-a-disclosure-message-2016-3> (citing a study led by Dr. Bart Wojdyski, Director of Digital Media, Attention, and Cognition Lab at the University of Georgia and Nathaniel J. Evans, Assistant Professor, Advertising, University of Georgia, that “found

continues to increase on social media, the question remains, how can the current FTC guides concerning the use of endorsements and testimonials in advertising be enforced on social media?

II. THE FTC GUIDES

As mandated by the Federal Trade Commission Act, “unfair or deceptive trade practices are illegal.”¹⁰ As such, the “Guides Concerning the Use of Endorsements and Testimonials in Advertising” defines endorsement¹¹ and explains disclosure requirements related to (a) Consumer Endorsements (advertisers employing endorsements by consumers, or ads with endorsements relating to the experience of consumers), (b) Expert Endorsements (indirect or directly implied experts in endorsement ads must include “exercise of that expertise” and an “evaluation or testing of the product that is at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement”), (c) Endorsements by Organizations (such that “an organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgement of the organization”), and (d) the Disclosure of Material Connections (explaining that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.* the connection is not reasonably expected by the audience), such connection must be fully disclosed”).¹²

Each Section provides examples with guidance to assist with disclosures in various contexts, as the FTC explains, “[t]he Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities.”¹³

that 60% of readers did not notice the sponsor disclosure label placed at the top of sponsored articles.”)

10. 15 U.S.C. § 45(a)(1) (2017).

11. 16 C.F.R. §§ 255.0–255.5 (2019) Guides Concerning the Use of Endorsements and Testimonials in Advertising. (“(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.”).

12. *Id.* §§ 255.0–255.5.

13. *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMMISSION (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

In a breakdown of the FTC's own interpretation of the Guides, several key points can be extracted:¹⁴

1. Endorsements must be truthful and provide conspicuous disclosure: "The Guides, at their core, 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."¹⁵

2. Endorsements must clearly disclose material connections: "In addition, the Guides say, if there's a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed."¹⁶

3. Endorsements cannot feature endorsements that may be misleading due to unconventional results: "Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results."¹⁷ As an example, the guides describe a blogger paid to review a body lotion for an advertiser where the blogger reports the lotion cured her eczema. In this example, the blogger's comment exposes her to liability as she does not have a reasonable basis to report that the lotion can cure disease.¹⁸

4. Even if less than the majority of consumers are misled, the endorsement may be considered deceptive: "Under the law, an act or practice is deceptive if it misleads "a significant minority" of consumers."¹⁹ For example, even if some of the consumers of an endorsed product are aware of a brand association with a particular celebrity, not all may be aware of it, and therefore that association would require disclosure.

5. Violations of the FTC Guides for Endorsements are illegal and enforceable: "The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising."²⁰ Violators of these Guides may lose earnings associated with advertising that failed to meet requirements.²¹

6. Some supplemental acknowledgement of specific social media examples have now been referenced as of 2017, providing some

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* ("Law enforcement actions can result in orders requiring the defendants in the case to give up money they received from their violations and to abide by various requirements in the future.")

context to the Guides originally issued in 2009.²² In an example using Facebook, the FTC verifies that the “like” button does not provide a source of sufficient disclosure in and of itself.²³ In another example related to Instagram, the context of the way the site is set up is referenced. On Instagram posts, if the content extends beyond three lines, the viewer has to click “more” to see the remainder of the written content underneath the image, and the FTC warns against failing to include disclosure without requiring viewers to click that “more” button.²⁴

III. CHALLENGES IN IMPLEMENTING AND ENFORCING FTC REGULATIONS

A. *Advertisers or Endorsers Violate the Regulations*

As of February 2018, the FTC and the State of Maine Attorney General’s Office settled with Marketing Architects (MAI), a Minneapolis-based advertising agency, for \$2 million in a case related to the false advertising of a weight loss product Puranol.²⁵ In one example of a Puranol ad, as referenced by the FTC, an actor claimed to have “already lost 30 pounds” even though these were false reports.²⁶ Further, the ads were not all able to clearly be interpreted as ads, as in one radio spot example, the ad was disguised as a “health news” report and another was structured to sound as though it were a “public service announcement on an obesity epidemic.”²⁷ Mary Engle, head of the FTC’s Ad Practicers Division, concluded that MAI did not clearly and conspicuously disclose that these radio spots were ads, and that deceptive and fake testimonials were utilized.²⁸

In September 2017, YouTubers and social media influencers Trevor Martin and Thomas Cassell settled with the FTC after the FTC had charged that they failed to disclose that they jointly owned

22. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0–255.5 (2009).

23. *The FTC’s Endorsement Guides*, *supra* note 13 (“We realize that some platforms – like Facebook’s “like” buttons – don’t allow you to make a disclosure. Advertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures.”).

24. *Id.* (“If an Instagram post makes an endorsement through the picture or beginning lines of the description, any required disclosure should be presented without having to click ‘more.’”).

25. Lesley Fair, *Ad Agency to Pay \$2 Million for Role in Deceptive Weight Loss and “Free” Offers*, FED. TRADE COMMISSION: BUS. BLOG (Feb. 7, 2018, 10:50 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2018/02/ad-agency-pay-2-million-role-deceptive-weight-loss-free>.

26. Patrick Coffee, *FTC False Advertising Judgment Marks Largest Fine Ever Paid by an Ad Agency*, ADWEEK (Feb. 7, 2018), <https://www.adweek.com/agencies/ftc-false-advertising-order-marks-largest-ever-fine-paid-by-an-ad-agency/>.

27. Fair, *supra* note 25.

28. Coffee, *supra* note 26 (“The ads were widely disseminated on the radio, but the testimonials—and the alleged customers behind them—were all fake.”).

an online gambling company (CSGO Lotto), while concurrently endorsing that same service online.²⁹ Yet, according to the FTC, Cassell and Martin, and CSGOLotto Inc., all falsely attested that their videos and social media posts sponsoring CSGO Lotto reflected impartial stand-alone opinions, even though these posts were paid for.³⁰ According to the associated FTC investigation, Cassell and Martin also paid other YouTube gamers sums ranging from \$2,500 to \$55,000 to share their experiences with the CSGO Lotto site—while contractually required to avoid mention of any comment that might damage the image of the site.³¹ Although, as a result of the settlement Martin and Cassell were required to disclose clearly and conspicuously on any future posts,³² this case highlights some of the techniques advertisers may take in attempt to bypass regulation. Following the settlement, the FTC issued a graphic, attached here as the Appendix, called “The Do’s and Don’ts for Social Media Influencers” with some quick tips of practices to avoid to stay in compliance.³³

In 2013, ad agency Machinima paid YouTubers up to \$30,000 to say only positive things about the Xbox One, and, by September of 2015, the FTC issued an order addressing this deceptive advertising activity on behalf of YouTube creators.³⁴ This was the first case where the FTC issued a deceptive advertising order related to creators on YouTube³⁵ and preceded the 90 letters issued to social media influencers, such as YouTubers, in April of 2017.³⁶

B. Celebrities and/or Social Media Platforms May Also Have Other Objectives

As reported in May 2018, celebrity Kylie Jenner’s Instagram posts may be worth as much as \$1 million per post. Moreover, in the preceding 30 days, Kylie’s 156 social media posts resulted in over 180

29. *FTC Settles Social Media Influence Complaint*, *supra* note 7.

30. Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMMISSION: BUS. BLOG (Sept. 7, 2017, 11:11 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.

31. *Id.*

32. *Id.*

33. *FTC Settles Social Media Influence Complaint*, *supra* note 7.

34. Brian Crecente, *FTC Finds YouTube Network Used Deceptive Practices in Xbox One Advertising*, POLYGON (Sept. 2, 2015, 2:33 PM), <https://www.polygon.com/2015/9/2/9248527/ftc-machinima-deceptive>.

35. *Id.*

36. FTC, *supra* note 6.

million engagements online.³⁷ Other members of the celebrity Kardashian-Jenner family³⁸ can earn as much as \$500,000 per post.³⁹

Celebrity Kourtney Kardashian makes disclosures for some ads, such as ads for detox teas and the Manuka Doctor skincare endorsement.⁴⁰ However, some of her posts are less clear whether it is an ad or not. For example, Kourtney Kardashian posted a picture wearing a tequila brand hat and tagged it (attaching a link) to the tequila company, and did not include a written disclosure,⁴¹ which made it ambiguous whether the post was an ad.

As with many of the examples provided, the Kardashian-Jenner family exerts influence in spite of failing to disclose ads correctly.⁴² For example, the Jenner-Kardashians use impermissibly vague language on posts, such as #sp (i.e. sponsored), or KJ4EL (Kendall Jenner for Estée Lauder).⁴³

C. Social Media Platforms May Have Their Own Challenges with Avoiding False Advertising

In 2017, reports explained that Facebook was claiming to reach a number of viewers that exceeded actual population data with the

37. Katilyn Frey, *Kylie Jenner is Most Valuable Instagram Celeb with Posts Worth \$1 Million: Report*, PEOPLE (May 3, 2018, 1:44 PM), <https://people.com/style/kylie-jenner-highest-paid-kardashian-jenner-social-media-instagram/>.

38. As used herein, the Kardashian-Jenner family includes sisters Kim, Kourtney, and Khloe Kardashian, and half-sisters Kendall and Kylie Jenner.

39. Elle Hunt, *Social Media Stars Face Crackdown Over Money From Brands - Instagram 'Influencers' Told To Clarify Paid-For Ads While Health Claims Are Taken Down After Advertising Breaches*, GUARDIAN (Sept. 15, 2017, 7:26 PM), <https://www.theguardian.com/technology/2017/sep/16/social-media-stars-face-crackdown-over-money-from-brands>.

40. Natalie Robehmed, *Inside the Business of Kardashian-Jenner Instagram Endorsements*, FORBES (Nov. 16, 2016, 8:55 AM) <https://www.forbes.com/sites/natalierobehmed/2016/11/16/inside-the-business-of-celebrity-instagram-endorsements/#3a65fd2d5724>.

41. Kourtney Kardashian (@kourtneykardashian), *On Vacation*, INSTAGRAM (July 9, 2016), <https://www.instagram.com/p/BHpCOEWgBva/?taken-by=kourtneykardash&hl=en>.

42. Katie Kilkenny, *The Kardashians Still Aren't Disclosing Paid Ads on Instagram*, PAC. STANDARD (Sept. 26, 2017), <https://psmag.com/news/the-kardashians-keep-flaunting-ad-disclosure-regulations>. (“Truth in Advertising (TINA.org) released a report that included a “sampling” of over 200 improper ad disclosures on the Facebook, Snapchat, and Instagram accounts of Kim, Kourtney, and Khloe Kardashian, and half-sisters Kendall and Kylie Jenner.”).

43. MEDIAKIX, *supra* note 3 (“Hashtags including #sp, #partner, and/or verbiage including ‘Thanks [Brand]’ are not considered by the FTC as adequate disclosure.”) (emphasis omitted).

U.S. Census Bureau.⁴⁴ In one instance, the U.K. component of Facebook reported reaching 12.2 million adults aged 20-29, when the Census data for the population in that age group was only 8.76 million.⁴⁵ In another instance, Iceland's numbers for all age groups prior to age 40 also exceeding census data for those corresponding age groups.⁴⁶

IV. THE FTC IS ENFORCING THE GUIDES

In support of the FTC Guides concerning endorsements, the FTC is taking alternative actions in attempts to enforce these guidelines and regulations. In September 2017, twenty-one of the ninety influencers who received the April letter received another warning from the FTC.⁴⁷ This time, the warning-letters requested that influencers and celebrities disclose any material connections with the brands the FTC identified in the first letter.⁴⁸ Letters are not the only way the FTC is communicating with the public and with social media platforms. The FTC has taken to Twitter to call out YouTube and Instagram for not "doing enough to show users when content has been paid for."⁴⁹ Further, the FTC is beginning to respond to tools created by social media sites to assist in disclosure.⁵⁰

V. CONCLUSION

As the use of social media for advertising grows, some would argue that so must the enforcement mechanisms. But what is the FTC to do? Can the FTC possibly police every social media post? And if they do find a violation, should the FTC pursue the poster, the advertiser, or both? What damages would be appropriate? After all, by the time the FTC sees the post, it will have been liked, reposted, or retweeted. Should the influencer be required to post again admitting the violation? Or does that simply give further promotion to the advertiser?

44. Jeremy Lee, *Should Advertisers be Worried About Facebook's False Audience Figures?*, CAMPAIGN (Sept. 13, 2017), <https://www.campaignlive.co.uk/article/advertisers-worried-facebooks-false-audience-figures/1444112>.

45. *Id.*

46. *Id.*

47. Fair, *supra* note 30.

48. *Id.*

49. Cecile Borkhataria, *FTC Hits Out at YouTube and Instagram for Not Doing Enough to Show Users When Posts Are Sponsored*, DAILY MAIL (last updated Sept. 21, 2017, 3:29 PM), <http://www.dailymail.co.uk/sciencetech/article-4907394/FTC-crack-sponsored-posts-Facebook-YouTube.html>.

50. See *Does YouTube's "Includes Paid Promotion" Tag Satisfy FTC Guidelines?*, MEDIKIX (last updated Jan. 24, 2019), <https://mediakix.com/blog/youtube-includes-paid-promotion-tag-ftc/>, ("The FTC's Guidelines state that using YouTube's paid promotion tag alone is not considered sufficient.").

Coincidentally, the author was just interrupted while writing this article by her daughter, who showed her a post of a popular teenage personality showing the redesign of a bedroom. It appeared to be a paid post because there were references to the brand name of the products in the bedroom and where they were purchased. However, even though there was no “paid sponsorship” notice in compliance with the Guides, the author and her daughter, assumed it was paid, even without the notice, and do not feel misled, confused, or damaged. The conversation quickly passed, with no long-lasting impact. Imagine, on the other hand, the amount of time and money that the FTC would spend to serve and pursue notices to that influencer and the sponsor. Is it worth it? Is this really a battle that needs to be fought?

APPENDIX: IMAGE 1⁵¹

The Do's and Don'ts for Social Media Influencers	
FTC RECOMMENDATIONS	PRACTICES TO AVOID
 <p>Clearly DISCLOSE when you have a financial or family relationship with a brand</p>	 <p>DON'T ASSUME followers know about all your brand relationships</p>
 <p>Ensure your sponsorship disclosure is HARD TO MISS</p>	 <p>Don't assume disclosures BUILT INTO social media platforms are sufficient</p>
 <p>Treat sponsored tags, including tags in pictures, LIKE ANY OTHER endorsement</p>	 <p>Don't use AMBIGUOUS DISCLOSURES like "Thanks," #collab, #sp, #spon, or #ambassador</p>
 <p>On image-only platforms like Snapchat, SUPERIMPOSE DISCLOSURES over the images</p>	 <p>Don't rely on disclosures that people will see only if they CLICK "MORE"</p>

Source: Federal Trade Commission

51. *FTC Settles Social Media Influence Complaint*, *supra* note 7.