Proskauer

On Notice: Disclosing Unexpected Material Connections in Advertising

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In this final installment of our "On Notice" series about the FTC's Notice of Penalty Offenses Concerning Endorsements, we discuss when and how to properly disclose the existence of a material connection between an advertiser and an endorsing party.

Per the FTC's Notice of Penalty Offenses, "[i]t is an unfair or deceptive trade practice to fail to disclose a connection between an endorser and the seller of an advertised product or service, if such a connection might materially affect the weight or credibility of the endorsement and if the connection would not be reasonably expected by consumers." In support, the FTC cited *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984), a case where "[n]one of the testimonials used in the respondents' advertisements and promotional materials indicate that at the time of their writing, the testimonialists personally knew the manufacturers or various marketers…or were connected with them in any way." The FTC's Endorsement Guides contain the same guidance. *See* 16 C.F.R. § 255.5.

The FTC does not require that every connection be disclosed – only connections that are material to a consumer's perception of the endorsement, and that consumers would not reasonably expect. A "material connection" can include payment, free product, or a family or employee relationship with the advertiser. As for whether a consumer would reasonably expect such a connection, the Endorsement Guides provide an example where an ad for an anti-snoring product features an endorsement from a physician. The FTC notes that while consumers would expect the physician to be reasonably compensated for his appearance in the ad, consumers would be unlikely to expect that the physician receives a percentage of gross product sales or that he owns part of the company – and knowing this would materially affect the weight and credibility of the endorsement. Accordingly, the FTC advises that the latter two connections should be disclosed.

Where consumers would not reasonably expect a particular material connection, the FTC's Endorsement Guides instruct that the person making the advertisement must "clearly and conspicuously disclose" (i) either the payment or promise of compensation prior to and in exchange for the endorsement, or (ii) the fact that the endorser knew or had reason to know or believe that they would receive some benefit if they favored the advertised product. The Endorsement Guides provide an example where a college student who has earned a reputation as a video game expert receives a free gaming system from the manufacturer, in exchange for reviewing the product on his personal website or blog. Noting that because his review is disseminated via "a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious," the FTC recommends that the blogger should clearly and conspicuously disclose that he received the gaming system free of charge.

Overall, the primary question is whether knowing about the compensation or other benefit would affect the weight or credibility the audience would ascribe to the recommendation. These requirements apply equally across different platforms and types of media, whether the endorsement appears in a television commercial, YouTube video, or Instagram post.

So what does it mean for a disclosure to be "clear and conspicuous?" While there is no special wording that must be used, the disclosure must effectively communicate that the endorsement was provided in exchange for some benefit. For example, if an endorser is sent free product in exchange for providing a video review, it would be appropriate to say something like "Company X gave me this product to try," or "Company X gave me [name of product] and I think it's great." For video reviews, the FTC requires an audio disclosure as well as a written disclosure in the description or caption for the video. For sponsored social media posts, hashtags such as #sponsored, #ad, or #[Brand]_Ambassador can be used, but vague or ambiguous hashtags like "#sp," "#spon," "#thanks," or the word "#ambassador" standing alone are not sufficient. As with any disclosure, the hashtags must be unambiguous and easy to find. A hashtag that is buried in a string of other hashtags, or that is not visible unless the viewer clicks to see "more" would not be considered an adequate disclosure.

Factors the FTC considers in determining whether a particular disclosure is clear and conspicuous include:

- The placement of the disclosure in the advertisement and its proximity to the claim it is qualifying;
- The prominence of the disclosure;
- Whether the disclosure is placed so prominently that a consumer will invariably see it;
- The extent to which items in other parts of the advertisement might distract attention from the disclosure;
- Whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure;
- Whether disclosures in audio messages are presented in an adequate volume and cadence;
- Whether visual disclosures appear for a sufficient duration; and
- Whether the language of the disclosure is understandable to the intended audience.

The FTC has been particularly active in monitoring this space in recent years as partnerships between advertisers and social media "influencers" have become increasingly common. The FTC has issued warning letters to and brought enforcement actions against both advertisers and influencers for their alleged failures to comply with FTC regulations concerning undisclosed material .

In one recent example, the FTC brought an enforcement action against Teami, LLC, the maker of various diet and detox tea products, and issued warning letters to several of Teami's influencers. We referenced this action in a previous "On Notice" post. In addition to allegations of unsubstantiated testimonials, the FTC's complaint cited a failure to disclose that Teami paid well-known Instagram influencers to promote its products. Though Teami implemented a social media policy in May 2018 that specifically instructed its paid influencers to make clear and conspicuous disclosures, the FTC found that subsequent sponsored Instagram posts clearly flouted these directives. This case underscores that simply instructing influencers to comply with disclosure requirements is not enough; an advertiser should actively monitor its influencers' advertisements, and take proactive steps to take down any advertisements that do not comply.

Following FTC guidance, NAD and ERSP, too, have made failure to disclose material connections a priority. For example, in one case, ERSP was concerned social media influencer advertising for athletic apparel did not contain sufficiently clear or conspicuous disclosures. *Alo, LLC (Alo Yoga)*, ERSP Case #429 (2019). In particular, ERSP identified certain posts where the disclosure was not visible until viewers hit the "more" button, where the disclosure was couched between several hashtags, and where the disclosure was made in a different language from the original post. Although Alo provided its influencers with "Ambassador Program Guidelines," which instructed influencers to comply with the FTC's disclosure requirements, ERSP found this to be insufficient because the company did not follow up with social media influencers engaging in questionable practices.

Additionally, NAD recently rolled out its Fast-Track "SWIFT" process, expediting the process for singe-issue disputes that do not require complex evidence or argument. NAD's SWIFT process can only be used for three types of cases – one of which is cases involving the prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews. We will monitor if and how the NAD uses the SWIFT program to consider issues of influencer advertising.

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