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## **ONLINE ENDORSEMENTS**

*The Federal Trade Commission's latest guidance and enforcement actions against big brands are signs that the agency will continue going after allegedly deceptive endorsement practices. The authors discuss the do's and don'ts in online marketing campaigns, including when an endorsement disclosure is required and how to include one.*

### **Online Advertising**

## **Federal Trade Commission Means Business: How Agency's New Guidelines Regulate Brands' Use of Online Endorsements**



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When the Federal Trade Commission ("FTC") released new guidelines regulating how brands can use online endorsements, it was clear that the agency meant business. Buttressed by a long list of hypotheticals and detailed language, the guidelines make clear that the FTC is aware of the importance brands place on online endorsements, and the agency appears prepared to apply the FTC Act to regulate those endorsements. Indeed, the FTC has already gone after a large brand for being insufficiently transparent about its endorsements, and there are no signs that the agency plans to let up.

With influencers and advocates seemingly top of mind for most big brand marketers, so too should be the latest FTC guidelines that dictate how these brands can utilize these powerful marketing tools. This article is intended to help explain the *do's and don'ts* for those looking to be compliant in their influencer and customer advocacy marketing.

In applying the FTC guidelines, the fundamental starting point is understanding what is outright forbidden, what constitutes sponsored content and requires disclosure, and what constitutes organic advocacy and does not require disclosure.

### **The Golden Rule**

The overarching theme to the FTC guidelines is: don't do anything dishonest, such as buying "likes," reviews or endorsements from people who don't actually use your product. Even if it is disclosed, it is still considered fraudulent. Importantly, there is pass-through liability, so that a brand remains fully liable for *any actions taken on its behalf*. This can apply even if the brand is misled by a contracted non-compliant third party that claimed it was providing authentic reviews from *bona fide* product users.

### **The Guiding Principle**

Did the brand sway the objectivity of a person by giving him/her a benefit for taking a particular action? If so, it

needs to be disclosed.

Here's a simple example that illustrates what constitutes sponsored, not sponsored, and fraud.

**Not Sponsored:** Placing a sticker on a restaurant door or card stapled to your bill that states, "We'd love a review on Yelp."

**Sponsored:** That same restaurant telling patrons that if they provide a screenshot of a review they've left on Yelp, they will get a free dessert.

**Fraud:** A website that sells five-star Yelp reviews for \$10 each.

### How to Disclose:

Disclosure means *clearly* labeling it as "sponsored content." If the benefit might reasonably sway the neutrality, you need to include that fact in the disclosure. There is some flexibility given to the medium of the content, whether it is a review on Amazon indicating the product was given for free, a clear statement of sponsorship in a YouTube review, or on social posts where you will most often see them as hashtags like #sponsored or #ad or #Igotitfree. In contrast, you can't simply create a campaign called #CrowdlyLovers, and argue that inclusion of that hashtag denotes it as sponsored. It has to be *explicitly* and *clearly* disclosed.

### What Doesn't Require Disclosure:

- **Actions that aren't done for a material benefit**, even if they are encouraged by the brand. A good example might be a postcard included in a product delivery telling a buyer that good reviews from their happy customers are very appreciated, and indicates where they can leave one if they desire. No material benefit, so no disclosure required.
- **Benefits that aren't material enough to sway neutrality**. Imagine if an office supply company asked its own Facebook community for user-generated content for the best office break room holiday makeover pictures, and said it would select one to send a box of hot chocolate mix to. Because it is prompting its own community, and offering a chance at a token gesture, most reasonable people would understand that the brand's fans are motivated by the experience and participation, not the one-in-a-thousand chance at a \$10 prize. There is no threshold value as to what is considered to impact neutrality, so common sense is required. A free t-shirt is fine; a five-day vacation is likely not.
- **Surprise and Delights**. A brand can reach out to ten of its best fans and give them some free product, movie tickets, etc, without this being considered "sponsored." The key is that the items can't be given in exchange for any action, or with an expectation of future engagement. If something is given as a gesture of gratitude for someone's historic organic participation, it likely will not be deemed "sponsored." Surprise and Delights can be very effective, and they are also straightforward to discern. If it is done in clear expectation of future action, or implemented as a work-around for a clearly sponsored campaign, expect to find yourself in trouble.
- **Alongside, but not related to, contests**. If I want to run a sweepstakes, I can't make entry to the sweepstakes be contingent upon endorsement (e.g., Tweet to win) without it requiring disclosure. However, after someone enters a sweepstakes, I can prompt that person to invite his/her friends in that sweepstakes, only as long as I make very clear that doing so is not a prerequisite for eligibility to the lottery, and that endorsement or share in no way affects the odds of winning.

### What Requires Disclosure:

- **If it is done for material incentive**. The concept here is pretty straightforward. The particulars really revolve around what qualifies as "material." We can remember the guiding principle, and whether a reasonable person would regard that endorsement differently if he/she knew of the incentive.
- **If it is done directly in exchange for points or currency**. This type of campaign is one of the most common violations of current FTC guidelines in practice today. Here is what to look for in maintaining compliance:
  - Whether you're giving out \$1,000 or 25 cents in exchange for each action, it is direct compensation, and it needs to be disclosed—regardless of the amount.
  - If a user is prompted to take an action to earn a set amount of points, and those points are redeemable for a prize or entries to win a prize, those points can be considered a type of currency and always require disclosure.
  - In the office decorating contest example above, saying a participant *may* be chosen is fundamentally different from saying that each share earns ten entries to win. It comes down to the relatedness between action and prize. If you are picking a winner from among all participants, you are on safer ground. If entries are worth a set amount of entry points, and someone can earn multiple entries for different actions (thereby increasing the odds of winning), it is sponsored.

### What is Never Allowed:

- **Endorsements of a product by people who are not real customers.** Simple rule: Endorsements must be legitimate. Selling fake Amazon reviews, or manufacturing likes, tweets, or social sharing about a new product line, is forbidden. The FTC made clear that even something as superficial as “fake likes” incentivized by the brand are considered “obviously deceptive.” Again, this is not something that is allowed even when labeled “sponsored”; it is always non-compliant.

### Recent Actions the FTC Has Taken:

- The FTC filed a complaint against Machinima, Inc. (“Machinima”), an online gaming website, for deceptive advertising based on endorsements found in YouTube videos. According to the complaint, Machinima conducted “influencer campaigns” in which it would pay YouTube users up to \$30,000 to create videos promoting certain games. Machinima and the FTC settled the action and Machinima is required to inform all influencers of their duty to inform their audience about the nature of the promotion (20 ECLR 1267, 9/16/15). The settlement order also prohibits Machinima from compensating any influencer that doesn't disclose the relationship, and requires it to report back within 90 days after the start of any campaign to ensure that the required transparency is present. The FTC also found Microsoft, which operates the Xbox One platform that Machinima games are played on, to be responsible for lack of disclosure in Machinima's influencer campaign.
- The FTC also filed a complaint against the department store Lord & Taylor for not being sufficiently transparent about a campaign it ran across Instagram and certain editorial websites. The complaint claimed that Lord & Taylor paid 50 influencers to post pictures of themselves on Instagram wearing the same dress. Lord & Taylor pre-approved each post and had the influencers tag the company in the photo and use a designated hashtag. Influencers were given the dress for free and paid \$1,000-\$4,000 for being a part of the campaign. According to the complaint, the store also wrote and paid for an article on Nylon.com, without disclosing it was a sponsored endorsement. The FTC settlement requires that Lord & Taylor obtain written acknowledgement from influencers that they must disclose their material connection to Lord & Taylor and create a program to monitor the company's endorsement campaigns (21 ECLR 405, 3/23/16).

The FTC's actions against Machinima and Lord & Taylor were some of the first actions under the new regulations, but they most likely will not be the last. The FTC has shown its willingness to go after allegedly unfair and deceptive advertising in the form of influencer campaigns and online endorsements.

The FTC Guidelines provide recognition that digital word-of-mouth has become a mainstream tactic of most established brands, and that the space is quickly evolving. The development of these standards is not a bureaucratic wet blanket, but rather should ultimately help the practice flourish by maintaining public credibility in the increasing importance we place on online endorsements and recommendations. As with the first generation of any large scale marketing movement, there have been some bad actors who have misused or misrepresented this platform. And, as with any second generation, we are now getting smarter about what is really effective and ethical.

Here are some surefire ways to avoid any confusion or action by the FTC:

- Engage with the people who already love your brand and use your products;
- Find the people who are influential within that core base of customers, and encourage them to spread the word organically;
- If actions are incentivized, make sure that is clearly disclosed;
- If working with a vendor on influencer initiatives, make sure they are upfront about how they engage with influencers, operate within FTC guidelines, and give you full transparency into who your actual influencers are; and
- Never, ever ask someone who is not a *bona fide* customer to pretend to like you.

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ISSN 2159-3051

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