

Can Advertisers Edit Influencer Content?

September 9, 2016

When advertisers engage influencers to promote their products, they understandably want to ensure that the message conveyed is consistent with the advertiser's goals. At the same time, **the Federal Trade Commission (FTC) requires that product endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.”**¹ So, what elements of a sponsored social media post may an advertiser exercise control over, and what elements must be kept strictly in the influencer's authentic voice? Following is a brief summary of the FTC's guidance on this topic.

Endorsements must be honest, so potential consumers are not misled

The key standard articulated by the FTC is that an endorsement must not mislead the potential consumer, meaning that (1) an endorser cannot talk about their experience with a product if they haven't in fact tried it, (2) if an endorser was paid to try a product and thought it was terrible, the endorser cannot say it is terrific, and (3) the endorser must disclose any connection he or she has with an advertiser of the product.² For these purposes, the FTC treats endorsements and testimonials identically,³ and the FTC will take enforcement action against endorsements deemed to mislead or deceive potential consumers.⁴ Although endorsements “need not be phrased in the exact words of the endorser” (unless the ad gives the impression the words are the endorser's own), “the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product.”⁵

The FTC derives its enforcement authority from Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”⁶ A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, if it would likely affect the consumer's conduct or decisions with regard to a product or service. In determining whether an advertisement, including its format, misleads consumers, the FTC considers the overall “net impression” the advertisement conveys to the consumer.⁷ The FTC has issued Endorsement Guides which set forth principles by which

¹ US Federal Trade Commission 16 CFR Part 255.1(a).

² US Federal Trade Commission, *The FTC's Endorsement Guides: What People Are Asking*.

³ US Federal Trade Commission 16 CFR Part 255.0(c).

⁴ See, e.g., US Federal Trade Commission Press Release, March 15, 2016: *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”*.

⁵ US Federal Trade Commission 16 CFR Part 255.1(b).

⁶ Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices.

⁷ US Federal Trade Commission, *Enforcement Policy Statement on Deceptively Formatted Advertisements*.

advertisers must abide so that consumers get a clear and accurate picture of a product or service. Fundamentally, the FTC Guides reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading.

Advertisers should review sponsored content for accuracy

The FTC has made clear that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, and for failing to disclose material connections between themselves and their endorsers.⁸ For this reason, influencers posting sponsored content must clearly and conspicuously disclose that they were compensated, and posts should be monitored for disclosure compliance. Additionally, because advertisers can be held liable for the accuracy of statements made about a product in paid endorsements,⁹ advertisers are encouraged to review and correct the factual content of sponsored posts (e.g., statements about the product's objective characteristics or efficacy). However, an advertiser should not rewrite statements regarding the influencer's subjective opinions regarding a product.

In sum, an advertiser may modify the language of sponsored social media content to ensure the product is accurately described, but must ensure the honest opinions, findings, beliefs, or experience of the influencer are not altered, and the consumer is informed that the influencer has a relationship with the advertiser. In the *Lord & Taylor* case, for example, the FTC did not object to the contractual provision that required its influencers to use designated hashtags, or that allowed Lord & Taylor to pre-approve posts, but mandated that Lord & Taylor "monitor and review the representations and disclosures of endorsers, made as part of an Influencer Campaign," to ensure compliance with the FTC's mandate that material connections between the endorser and Lord & Taylor be clearly and conspicuously disclosed, and that the influencer not misrepresent, "in any manner, his or her independence and impartiality."¹⁰

Please contact us with any questions, or if you would like additional information.

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⁸ US Federal Trade Commission 16 CFR Part 255.5.

⁹ US Federal Trade Commission, *The FTC's Endorsement Guides: What People Are Asking* (noting that "[i]t's unrealistic to expect [advertisers] to be aware of every single statement made by a member of [the advertiser's] network. But it's up to [advertisers] to make a reasonable effort to know what participants in [its] network are saying").

¹⁰ See *Lord & Taylor* Press Release (noting that "Lord & Taylor is prohibited from misrepresenting that paid ads are from an independent source, and is required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements").