

#Trending: The FTC has stepped up regulatory investigations on social media. Is your company in compliance?

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Facebook, Instagram, YouTube, and other social media platforms have become the format of choice for many companies that want to advertise their products and services. At the same time, the U.S. Federal Trade Commission (FTC) has increased its enforcement of consumer protection laws and regulations.

In this hoganlovells.com interview, senior associate James Denvil explains the FTC's updated guidelines for online advertising and provides tips to ensure your social media promotions comply with regulations.

What's driving the FTC's increased scrutiny of social media advertising?

Denvil: As more and more companies use social media to advertise and distribute information, many are engaging endorsers — celebrities, in particular — to promote their products. The FTC is concerned that these endorsements may not provide consumers with material information that would help consumers make reasonably informed decisions about whether to purchase a product or engage with a service. For example, absent sufficient disclosures, some consumers might think that a social media endorsement is independent praise for a product, as opposed to a paid statement.

The FTC has longstanding guidelines for endorsements on television and radio. But with the growth of social media, in 2017, the FTC updated their guidance to address social media endorsements.

What is the FTC's definition of a deceptive practice?

Denvil: The FTC considers a message, representation, omission, or practice to be deceptive if it's likely to mislead reasonable consumers.

So if you leave something out, that is deceptive. If you say something false, that is deceptive. If endorsers praise a product without disclosing that they were paid to make the statement, that could be deceptive.

How does the FTC define endorsements?

Denvil: An endorsement is a message that consumers are likely to believe reflects an individual's opinions, findings, or experiences. For example, stating online that "I think this product is great!" would be an endorsement.

According to the FTC, such an endorsement could be deceptive if there's a material misrepresentation or omission. "Material" means it's likely to influence a reasonable consumer's decision to purchase the product. An endorser's relationship with a brand, particularly a paid relationship, likely will be viewed as a material issue.

What is the role of the states regarding consumer protection?

Denvil: Every state has adopted general consumer protection laws, which generally align with the federal FTC Act. Those laws provide state enforcement authorities with the power to take action against companies that have engaged in unfair or deceptive trade practices.

So if a company has engaged in a deceptive practice, does that mean it could be penalized at both the state and the federal levels?

Denvil: It could, yes. In the privacy and cybersecurity space, you sometimes see the FTC join with a state attorney general in enforcement actions. But state authorities and the FTC sometimes act independently. For example, state authorities might pursue an action if they believe that an important issue is not being addressed at the federal level.

How can companies comply with consumer protection laws when using social media endorsers?

Denvil: In recent years, the FTC has taken actions against endorsers and the brands that engage endorsers in association with social media endorsements. Those enforcement actions provide some insight into reasonable compliance steps, and the FTC has issued guidance for social media endorsements.

The FTC expects companies and endorsers that are engaging in social media to provide honest and accurate disclosures regarding material issues.

If there's a material connection between an endorser and an advertiser, you need to clearly and conspicuously disclose that. A material connection is a connection that consumers need to understand in order to make an informed decision. So if someone wouldn't reasonably understand that a celebrity was a hired endorser, you need a clear disclosure that alerts them to that fact.

Is the endorser or the company ultimately responsible for the disclosure?

Denvil: The FTC has taken the position that both parties are responsible. Endorsers are responsible for providing appropriate disclosures. And companies are responsible for taking reasonable steps to confirm that endorsers are providing such disclosures. The FTC has made clear that they expect brands to provide guidance to endorsers on what disclosures they need to provide and to monitor what their endorsers are doing. If an endorser fails to include appropriate disclosures, companies are expected to take action, perhaps even going so far as terminating the relationship with the endorser.

The FTC has also clarified the types of disclosures that are not acceptable. What are some examples?

Denvil: Disclosures can't be buried. If your disclosure is on the "click to see more" link, where you have to click on something to open up more text to view the disclosure, that could be viewed as deceptive because you don't expect people to actually read all the way in.

The disclosure must be readily noticeable by a reasonable consumer. If it's in a video, you may need to put the disclosure in the beginning — not at the end, because people may stop watching before you get to the end. The FTC expects the disclosure to be clear and readily available upfront.

Of course, there may be space or character limitations for disclosures. On Instagram or Twitter, for example, it would be pretty hard to write, "I work for such-and-such a brand and this should be treated as an endorsement." Instead, the FTC has said including things like #ad, #sponsored, and #endorsed can provide sufficient notice to alert reasonable consumers to the fact that it's an endorsement.

Some social media platforms are developing their own disclosure mechanisms or provide tools that people can use to disclose that something is sponsored. But the FTC has expressed in recent Twitter chats that companies have an independent obligation to make sure that the tools provide clear, conspicuous disclosures. Some platform-based mechanisms may not meet that standard.

The FTC also expects brands to establish compliance programs to train and monitor their endorsers. How do those work?

Denvil: In terms of training, companies should let their endorsers know what they can and cannot say about a product, and require endorsers to disclose their connections to the brand. In terms of monitoring, the FTC expects companies to periodically search for and review the endorsers and follow up if the endorsers have said something that isn't true or failed to make the right disclosures. If a company is relying on a third-party PR firm or ad agency for their social media advertising, they should make sure that firm or agency has a good compliance program in place and that they maintain oversight over it.

What approaches are other countries taking to enforce consumer protection on social media?

Denvil: Given the global nature of the internet, consumer protection authorities are focusing on content that reaches their jurisdictions, regardless of the source. The FTC, for example, takes the position that whenever it's reasonably foreseeable that social media posts will affect U.S. consumers, the FTC has authority to take action. So if a celebrity in Europe or Asia tweets something or posts an Instagram or Facebook message that endorses a product and that person has a big U.S. following, it's going to be subject to the U.S. endorsement regulations.

Around the world, more and more consumer protection authorities are starting to focus on social media. The Consumer Protection Enforcement Network, or CPEN, which is comprised of consumer protection authorities from around the globe, has been looking at social media endorsements and tend to — with caveats, of course — take the same approach as the FTC: What you say has to be true, don't leave anything out that people would want to know in order to make an informed decision, and disclose material connections.

Is there anything else companies should consider before engaging an endorser?

Denvil: Aside from monitoring and instructing your endorsers on what they should be doing with their social media posts that endorse your brands, companies should consider seeking protections to mitigate the risks of endorsers failing to comply with endorsement guidelines. For example, companies may want to include indemnification provisions in their agreements with their endorsers. So if an endorser fails to abide by endorsement guidelines, the endorser will be responsible for costs associated with those violations.

Companies should also consider making sure that their agreements with endorsers contain breach-of-contract provisions that allow the company to terminate the agreement if an endorser fails to follow required endorsement guidelines.

About James Denvil

James Denvil has a passion for helping companies navigate the complex challenges associated with deploying and managing today's information technologies and systems. He understands that one of the most important elements of client service is listening, and once he understands a client's needs, he leverages his analytical training to identify potential issues, dissect alternative approaches, and deliver practical solutions.

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