

FTC'S New "Disclosures 101" Publication And Video Is A Shout Out To Influencers

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On November 5, 2019, the United States Federal Trade Commission ("FTC") issued a guide entitled "Disclosures 101 for Social Media Influencers"^[1] and a video "Do you endorse things on social media?" to alert influencers to the laws governing endorsement or recommendation of products or services and provide social media influencers with "tips on when and how to make good disclosures."^[2] The FTC's written guide states that "[a]s an influencer, it's **your responsibility** to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads."^[3] The guide explains to influencers that disclosures must be made when an influencer has a "material connection," that is "any financial, employment, personal, a family relationship with a brand" and that receiving "free or discounted products or other perks" requires a disclosure.^[4] In addition, the FTC notes that "tags, likes, pins, and similar ways of showing you like a brand or product are endorsements."^[5] The FTC guide also instructs influencers that "[i]f posting from abroad, U.S. law applies if it's reasonably foreseeable that the post will affect U.S. consumers. Foreign laws might also apply."^[6] The FTC notes that disclosures must be in simple and clear language that is placed "so it's **hard to miss**" and should be placed with the endorsement itself. Disclosures that "appear only on an ABOUT ME or profile page, at the end of posts or videos, or anywhere that requires a

person to click MORE” will not be sufficient.^[7] The FTC gave the following guidance with regard to endorsement posts in photographs, video and live streaming:

- (i) “If your endorsement is in a *picture* on a platform like SnapChat and Instagram Stories, superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it”;
- (ii) “If making an endorsement in a *video*, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video. Some views may watch without sound and others may not notice superimposed words”; and
- (iii) “If making an endorsement in a *live stream*, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.”^[8]

The FTC guide states that simple explanations such as “Thanks to Acme brand for the fine product” suffice if placed “in a way that is hard to miss.”^[9] Terms such as “advertisement,” “ad” or “sponsored” or “AcmePartner” or “Acme Ambassador” provide proper notice, with or without a hashtag.^[10] Shortened versions of the foregoing (sp”, “spon” or “collab”) or “ambassador” or “thanks” do not provide proper disclosure because the FTC considers these vague and confusing.^[11] The FTC guide also underscores the fact that any endorsement, review, or evaluations needs to be truthful and based upon actual experience.

Best Practices Takeaways:

- **The FTC IS Taking Action:** In 2017, the FTC issued written letters to influencers and brands giving notice that the FTC Endorsement Guides apply to influencers^[12] and social media. In 2018, the FTC took action against influencers^[13] The issuance of this Guide is another effort by the FTC to eliminate any possible argument that it was unclear that the Endorsement Guides and FTC laws do not apply to influencers and to ensure that influencers understand that it’s their responsibility to make proper disclosures where the influencer has a “material connection” to the brand.
- **Clear and Conspicuous Disclosures Are Required:** Any U.S. endorser of a product is required to clearly and conspicuously disclose any material connection with anyone affiliated with the product or service;
- **“Material” Is A Low Threshold:** The FTC stated that: “any financial, employment, personal, a family relationship with a brand” is “material” if knowing about the consideration given or connection to the endorser affects “the weight or credibility” that readers or viewers give to the endorsement; and
- **Brands Should Use Influencer Agreements and Must Require Compliance:** Any brand utilizing an influencer in a U.S. advertising campaign should have a proper agreement in place and should include contractual provisions requiring compliance with the FTC Endorsement Guides. If there is failure to perform, the agreement should provide for termination of the influencer.

[1] https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

[2] https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers?utm_source=slider.

[3] https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf, at 2

[4] Id.

[5] Id. at 3.

[6] Id.

[7] Id. at 4.

[8] Id.

[9] Id. at 5.

[10] Id.

[11] Id.

[12] [“A Deeper Dive Into the FTC Crack-Down on Social Media Influencers: What You Should Know Before You Post,”](#) , [“Brands Beware!!!! FTC Scrutinizing Influencer Posts for Compliance with Endorsement Guides”](#).

[13] See, e.g., “FTC Swats Public Relations Firm and Publisher for Misleading Olympic-Themed Mosquito Repellant Product Endorsements and Native Advertisements” .

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