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Recent FTC settlements spotlight hidden ways to hook unwary consumer

Brands of all kinds are increasingly using "influencers" or "brand ambassadors" to promote their brand's products in blog posts and on social media platforms. But no matter whether they are style influencers with a fierce following on Tumblr and Instagram, techies who tweet about consumer electronics, mom bloggers who Facebook about child safety products or gamers who review the latest video games, the Federal Trade Commission wants to make sure consumers know when these endorsers have been compensated in some way for their favorable opinions.

While some endorsers are bloggers, posters and pinners who have no material connection to the advertiser, others are compensated. The bloggers may be directly paid to specifically recommend a product; paid a commission as an affiliate marketer for sales; given an incentive such as a gift certificate; or simply provided with the product for free. While industry insiders may know this, the average consumer may not — and that's what the FTC has its eye on.

The FTC's recent settlement of deceptive advertising claims against a national department store illustrates the importance of transparency surrounding the connection between an endorser and a brand. The agency also took the opportunity to clarify that its guidance on the use of endorsers applies to advertising in all forms of media, from television and magazines to blogs and social media.

The national retailer's marketing plan for the release of its 2015 private label clothing collection for women targeted social-media savvy consumers through branded blog posts; posting of photos and videos on social media; native advertising editorials in online fashion magazines; and online endorsements by a team of specially selected "fashion influencers."

The coordinated marketing plan, which took place over two days in the spring of 2015, was very successful, but the FTC charged the retailer claiming the campaign deceived consumers in two ways.

First, a brand-sponsored article about the clothing line in the online fashion publication Nylon and a Nylon Instagram post about one of the featured items (the "Paisley Asymmetrical Dress") — both reviewed and approved by the store before published by Nylon — failed to disclose that they were paid advertising.

Second, the company gave 50 fashion "influencers" a free Paisley Asymmetrical Dress and paid them between $1,000 to $4,000 each to post photos of themselves wearing the dress on Instagram or other social media sites. The retailer preapproved each post and required the influencers to include specific hashtags relating to the brand and the clothing line in each post.

The influencers, however, were not required to disclose that they were paid to post the photo or had a material connection with the retailer. The brand got a lot of bang for its influencer buck. The posts collectively were seen by more than 11 million Instagram users over of period of just two days, leading to 328,000 brand engagements with the retailer's Instagram handle. The dress also sold out.

The company settled the FTC charges in March 2016, paying no fines under the agreement. It did agree that it will not misrepresent paid or sponsored content as being from an independent source or ordinary consumer. The retailer also must disclose any material connections between the retailer and the endorser "in close proximity" to the claim.

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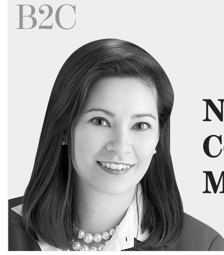

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This is hardly the first time the FTC has called out a company for failing to disclose that it paid influencers in exchange for endorsements.

Right on the heels of this settlement, the FTC announced the final settlement with Machinima Inc. The FTC charged that Machinima paid "influencers" to post YouTube videos endorsing Microsoft's Xbox One system without requiring that the influencers disclose they were being paid for their endorsements.

> *The FTC notes that while some bloggers are paid by marketers, others are not. Endorsers have the responsibility to clearly make their relationship to a product known.*

Machinima, an online entertainment network, worked with Microsoft's advertising agency, Starcom MediaVest Group, on the Xbox One marketing campaign. Machinima paid a small group of influencers to produce and upload two endorsement videos each.

Two influencers in particular were well paid for videos that drew triple-digit number of views, earning $15,000 and $30,000 for videos that received 250,000 and 730,000 views, respectively, the FTC noted. In a separate part of the marketing campaign, Machinima promised influencers $1 for every 1,000 video views, up to $25,000.

The FTC settlement prohibits Machinima from misrepresenting influencers' relationships with advertisers or paying influencers without full disclosures. Machinima also agreed to ensure that influencers continue to make the proper disclosures 90 days after the start of a marketing campaign in which they participate. The agency also held Microsoft and Starcom responsible for deceptive advertising.

Other companies that have settled similar FTC charges include home security company ADT, which failed to tell consumers that it paid "mom blogger" child safety experts to appear on news programs and talk shows to endorse its products and services.

Another company, people search engine Spokeo, directed its own employees to write and post favorable comments about the company using account names provided by the company, giving readers the false impression the comments were from actual Spokeo users.

The FTC updated its endorsement guidelines, originally published in 2009, with a Q&A guidance "The FTC Endorsement Guides: What People Are Asking?" in May 2015, designed to set the record straight on a number of frequently asked questions.

The FTC also clarified its definition of an endorser as someone paid by an advertiser, or an entity that works for an advertiser, to favorably mention a product in exchange for money or something of value, including free product samples.

The fact that an endorser sincerely likes a product and is telling the truth in his or her endorsement does not nullify the obligation to disclose the connection between the advertiser and the endorser. “If there’s a connection between you and the brand that a reader or viewer wouldn’t expect and if knowledge of that would affect how they evaluate the endorsement, you should disclose that connection,” the FTC says.

Disclosure requirements apply to all testimonials, including those posted on social media. Testimonials are not limited to written statements or online reviews; posting a video or photo of a product in social media is also an endorsement because it can convey an individual’s approval of a product.

The Q&A also highlights the popular misconception that the obligation to disclose the connection is only on the marketer. The obligation is also shouldered by the endorser. “The responsibility goes both ways,” says the FTC. Endorsers should never assume consumers believe all bloggers that mention specific products get paid by marketers to do so.

The FTC notes that while some bloggers are paid by marketers, others are not. Endorsers have the responsibility to clearly make their relationship to a product known. Although there’s no mandatory language that must be used, the FTC advises using simple, direct language in a section of the post that won’t be overlooked by the reader.

“In other words, don’t hide a disclosure behind a hyperlink. Don’t bury it in a dense block of text or a hard-to-read license or user agreement. And don’t put it in an obscure footnote or somewhere else people aren’t likely to look,” says the agency.

Advertisers also are responsible for the endorsers’ disclosures (or the failure to make them), which means that marketers must educate endorsers about what’s expected of them. “Marketers should have reasonable programs in place to train endorsers and monitor what they’re doing on the brand’s behalf,” the FTC explains.

At the very least, every training program should include instructions on what endorsers can and cannot say about the products; an explanation of endorsers’ responsibilities for disclosing their connection to advertisers; periodic checks on what endorsers are saying; and follow up on any questionable practices.

Positive reviews from influencers can be a powerful way to appeal to consumers and, as social media platforms proliferate and offer more options to reach more audiences, marketers will undoubtedly use these partnerships in new ways.

As the FTC’s settlements indicate, financially compensating endorsers or influencers is acceptable as long as parties’ connection to the product and each other is spelled out. Anything less than complete transparency may be viewed as an attempt to deceive consumers.