

5 KEY TAKEAWAYS

Advertising, Social Media, and FTC Enforcement

Barry M. Benjamin, partner in the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to moderate a panel discussion at the 2019 New York State Bar Association's Annual Meeting, for the Intellectual Property Section. The panel, titled "Advertising, Social Media, and the FTC", discussed current social media legal issues and risks, the regulatory enforcement environment, and compliance obligations under the [FTC's Endorsement Guides](#).

Takeaways from the panel include:

1

The FTC has long required consumers be made aware of the distinction between editorial content and advertising content, [going back at least as far as 1967](#). That year, the FTC responded to the practice of including advertisements in print magazines and newspapers that appeared to look just like regular news articles. The FTC advised that it is deceptive advertising to include within a newspaper or magazine advertisements that "cause readers to believe that the advertisement is in fact a feature or news article." The FTC's stance towards ensuring a hard dividing line between the look and appearance of advertising and editorial content has been applied to many areas over the years, including advertorials, direct mail ads disguised as book reviews, infomercials that look like regular television programming, emails with deceptive headers, and even distinguishing between organic and paid internet search results. The FTC has also recently directly addressed a new version, [Native Advertising](#).

Advertiser obligations under the FTC's Endorsement Guides include disclosing any "material connections" between the influencers who post on social media and the advertiser. A material connection can include direct payment, an employment relationship, giving free goods or services, or even incentivizing a social media post through entry into a sweepstakes or contest. The FTC views all posts induced by any material connection to be a commercial advertisement, rather than organically posted, personal content. The FTC has actively enforced violations of its Endorsement Guides, including actions against [a gaming company](#) and [a mosquito repellent company and its public relations firm](#), as well as [sending letters to influencers](#).

2

In addition, advertisers must be wary not just of the FTC, but also of consumer advocacy groups. They too may also bring unwanted public attention to alleged [lack of compliance with the disclosure obligations](#) under the Endorsement Guides. Other federal agencies, such as the Securities and Exchange Commission, have also brought [enforcement proceedings](#) when their jurisdiction is implicated by influencers and social media engagement.

3

When dealing with children's advertising, it is also very important to include specific disclosures indicating when content is advertising, and not part of native programming. Advertisers targeting children must also take care to comply with various [Federal laws and regulations](#), as well as the [guidelines for advertising to children](#) issued by the Children's Advertising Review Unit of the Council of Better Business Bureaus, an advertising industry self-regulatory body.

4

5

In sum, the Endorsement Guides require advertisers to disclose when a material connection prompted a social media post, via things like including hashtags such as [#advertisement](#) or [#sponsored](#). Advertiser obligations also include educating influencers, employees, and agents about disclosure obligations, requiring compliance by influencers, whether by formal contract, terms and conditions, or otherwise, and monitoring the influencers the advertiser works with. The [FTC publishes guidance for business](#) that answers a host of questions that may arise when confronting social media disclosure issues.

Social media platforms are wonderful new media outlets that advertisers can use to reach people, get their message out, and generate brand awareness. While these social media platforms may be new, the thrust of FTC and other regulatory enforcement is old, and traditional. People must be able to distinguish between organic, editorial content and posts that were prompted by a commercially oriented purpose. Compliance with the FTC Endorsement Guides is a small price to pay to benefit from the wonderful world of social media.

For more information, please contact Barry Benjamin: bbenjamin@kilpatricktownsend.com.