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Avoid The FTC's Naughty List This Holiday Season: Recent Warning Letters Serve As Good Reminder On Conducting Influencer Campaigns With Adequate Disclosures

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With the holiday shopping season well under way, many companies have ramped up their influencer marketing campaigns. Want to avoid the Federal Trade Commission's naughty list? Recent warning letters sent by the FTC to two trade associations - the American Beverage Association and The Canadian Sugar Institute - and 12 of their online paid influencers serve as a good reminder of the importance of making proper disclosure of material connections if an advertiser utilizes paid influencers to promote its products on social media.

The letters reviewed posts made by the influencers on TikTok and Instagram and, at the outset, gave a reminder that influencers must "clearly and conspicuously" disclose any "material connection" between the influencer and the brand, unless that connection is otherwise clear from the context of the post. A "material connection" is a connection - such as a payment, free product or a family/business relationship - that might affect the weight or credibility that consumers give the endorsement. According to the FTC, "clear and conspicuous" means that a disclosure must be difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers. With that backdrop, highlights of what caught the FTC's attention include:

- Some of the posts did not incorporate any disclosures or any other indication that the influencer had a material connection to the trade association.
- While some posts included a disclosure in the text description, they did not do so in the video itself. Because viewers can easily watch a video without reading disclosures in a post's text description, the FTC contends that there should be clear and conspicuous disclosures in the video itself by, for example, superimposing much larger text over the videos. If an endorsement is made audibly, the disclosures should be audible. If an endorsement is made both visually and audibly, then the disclosures should likewise be made both visually and audibly.
- Disclosures made further down in text descriptions were insufficiently conspicuous because longer posts on TikTok and Instagram are truncated, such that viewers would not see them unless they clicked on the text. In addition, the FTC noted that disclosure in a TikTok or Instagram Reels post's text description is not clear and conspicuous, since the text description is in small print, at the bottom of the screen, and sometimes poorly contrasting so it does not stand out.

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- Some influencers relied upon the “paid partnership” disclosure tool offered by the platforms. However, the FTC reiterated its prior concerns about the conspicuousness of such built-in tools alone, as it believes it is too easy for viewers to miss seeing those disclosures in the posts. While the FTC does not recommend against the use of such tools, they should be in addition to, and not as a substitute for, the other disclosures that the FTC wants to see.
- Even if viewers read the “paid partnership,” “#sponsored” and “#ad” disclosures, the FTC thought they may still be inadequate in the context of the posts, because the influencers neglected to identify the sponsors. Viewers should understand who is sponsoring the posts, not just that the post is sponsored, so they may properly evaluate the weight and credibility to give the endorsement.

The warning letters urged the trade associations and the influencers to review their posts and policies to ensure compliance with the FTC’s disclosure requirements. Recipients were given 15 business days to respond with the specific actions taken, or to be taken, to address the FTC’s concerns, with a not so subtle reminder that receipt of the letter put the recipients on notice that engaging in the described conduct could subject them to civil penalties of up to \$50,120 per violation.

The warning letters are a good reminder that the FTC continues to monitor influencer marketing and takes enforcement of its disclosure requirements seriously. Brands using influencer marketing this holiday season (and, of course, any other time!) should be vigilant about the review and monitoring of their disclosure compliance, using the insight provided by the FTC in the warning letters. This will ensure they stay on the FTC’s “nice” list and don’t end up with a warning letter in their stockings.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at tarenth@moritthock.com.

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