

# Morrison & Foerster Client Alert

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## FTC Enforcement Action Confirms That Ad Disclosure Obligations Extend to Endorsements Made in Social Media

By Julie O'Neill and Adam Fleisher

The Federal Trade Commission (“FTC”) has once again made good on its promise to enforce against deceptive advertising under Section 5 of the FTC Act, *regardless of the media in which the advertising appears*: its recently announced proposed complaint and draft settlement with the advertising firm Deutsch LA, Inc. involves endorsements posted by social media users. The action unmistakably signals to companies that advertise through social media—especially by leveraging user-generated content—that they need to comply with Section 5’s disclosure requirements.

**As discussed below, not only is it deceptive to post bogus endorsements, but a clear and conspicuous disclosure of any material connection between an endorser and the advertising company is necessary in order to avoid a charge of deception.**

### ONLINE ADVERTISING DISCLOSURE REQUIREMENTS UNDER SECTION 5 OF THE FTC ACT

Section 5 of the FTC Act bars “unfair or deceptive acts or practices.” This prohibition extends to advertising, marketing and other promotional activities, including the use of endorsements. The FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”)<sup>1</sup> represent the FTC’s interpretation of the application of Section 5 to the use of endorsements and testimonials in advertising. In other words, they explain how an advertiser using endorsements can avoid engaging in deceptive practices.

The FTC defines an “endorsement” as an advertising message that “consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”<sup>2</sup> According to the Endorsement Guides, a customer endorsement must be from an actual, bona fide user of the

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<sup>1</sup> See 16 CFR § 255.

<sup>2</sup> See *id.* at § 255.0(b).

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endorsed product or service. In addition, if there is any material connection between the endorser and the advertiser that consumers would not reasonably expect—such as payment or other exchange of consideration, or an employment relationship—then that connection must be clearly and conspicuously disclosed. Because such information is likely to affect the weight or credibility that consumers will give to an endorsement, a failure to clearly and conspicuously disclose it is deceptive.

The FTC staff has provided guidance on how to effectively make clear and conspicuous disclosures in online advertising. When the staff initially released its [Dot Com Disclosures](#) guidance in 2000, it affirmed that Section 5 applies to online advertising, just as it applies in the brick-and-mortar world. In 2013, the FTC staff released [updated Dot Com Disclosures](#), specifically addressing how to make appropriately clear and conspicuous disclosures online, including on mobile devices. The guidance reaffirmed that disclosures that are required to avoid deception or to otherwise comply with the law must be presented in a clear and conspicuous manner—no matter the media in which they appear—and asserted that, if an advertiser cannot make a required disclosure effectively in a particular medium, then it should not run the ad in that medium.

## THE DEUTSCH LA ENDORSEMENT ACTION

The proposed settlement with Deutsch LA arose out of the advertising firm's alleged activities relating to the promotion, on behalf of its client Sony, of the PlayStation Vita handheld gaming console.<sup>3</sup> The gravamen of the FTC's complaint related to allegedly deceptive advertising claims about the console's technological capabilities. The FTC also, however, included a count relating to the advertising firm's use of Twitter to promote its client's console. Specifically, the [complaint](#) alleged that Deutsch LA employees responded to a request from an assistant account executive to use their personal Twitter accounts to post positive comments about the Sony console, using the same "#gamechanger" hashtag. The complaint includes examples of the employees' tweets, such as "One thing can be said about PlayStation Vita...it's a #gamechanger."

The FTC alleged that the employees' tweets were deceptive because they falsely purported to be endorsements from actual users of the Sony gaming console. Moreover, the fact that the tweets were written by employees of Sony's ad agency would have been material to consumers in making decisions about whether to purchase the console. For this reason, the tweeters' failure to disclose their connection to Deutsch LA (and, in turn, to Sony) was allegedly deceptive.

In light of both the Endorsement Guides and the revised Dot Com Disclosures guidance, this FTC enforcement action is not surprising. The Endorsement Guides establish that the failure to disclose a material connection is deceptive, and Dot Com Disclosures affirm that the FTC's rules on necessary disclosures apply to any message, whatever the medium, and expressly including even "space constrained ads," such as tweets.

## WHAT'S NEXT?

The *Deutsch LA* proposed [consent order](#) bars the company from representing that an endorser of a product is an independent user or ordinary consumer of the product, if that is not the case, and it requires the ad agency to make clear and prominent disclosures of any material connections between an endorser and Deutsch LA and/or entities on whose behalf it promotes a product or service. The action thus reaffirms that individual endorsements that appear in social

<sup>3</sup> The FTC also reached a [proposed settlement with Sony](#).

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media must clearly and conspicuously disclose any material connection between the endorser and the advertiser of the endorsed product or service.

Although the FTC has brought cases based on deceptive endorsements before,<sup>4</sup> *Deutsch LA* appears to be the first time that it has brought an enforcement action against endorsements made on social media. Now that the FTC has followed through on its Dot Com Disclosures guidance that tweeted ads are just like any other advertisements—and thus require the same clear and conspicuous disclosures as in any other media—the obvious question is, what's next? Now that social media is multimedia (see, for example, Instagram and Pinterest, which let users post photos and videos), brands are likely to leverage users to incorporate promotions into their personal feeds. For instance, if a brand discovers that a popular Instagram user takes compelling pictures that meld with the brand's image, the brand might engage that user to produce content on behalf of the brand and to use a hashtag or some other means to promote the brand organically in the user's feed. If the brand does not require the user to disclose—clearly and conspicuously and in each picture, tweet or other post—that he or she has a material connection to the company, then both the company and the user run the risk of being subject to a charge of deception.

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<sup>4</sup> For instance, in 2010, *In re Reverb Communications* (also an advertising agency), the FTC alleged that Reverb's employees posted reviews in iTunes about the agency's clients' gaming applications, without disclosing their relationship to the agency or its clients.