

# Your Newest Instagram Follower, the FTC: Agency Reminds Endorsers and Marketers to #Disclose with Over 90 Warning Letters

April 28, 2017

The Federal Trade Commission (FTC) reminded celebrities, social media influencers, and marketers that failing to disclose material connections to the products they endorse is #notokay. On April 19, 2017, [the FTC sent over 90 letters](#) to such personalities and businesses stating that they must clearly and conspicuously disclose commercial relationships when promoting or endorsing products.

The letters the FTC sent out on April 19 outlined when and how marketers and influencers should disclose “material connections” in an endorsement. A material connection can be a business or family relationship, monetary payment, or the gift of a free product. In other words, “a connection that might affect the weight or credibility that consumers give the endorsement.” The letters explained that if the connection is not clear from the context of the endorsement, a clear and conspicuous disclosure is required. To be considered clear and conspicuous, the FTC explained “consumers should be able to notice the disclosure easily, and not have to look for it.”

Specifically, the letters highlighted Instagram posts in which influencers endorse products. Because of how Instagram works, a consumer may only see a few lines of a post when scrolling through the app on her mobile device. To see the rest of a message, where an endorser may have disclosed his connection with the marketer of the product highlighted in the post, the consumer would have to click “more.” The FTC explained that the disclosure must be displayed above the “more” button, so that consumers do not have to click through to see it.

In the letters addressed to marketers, the FTC added the extra onus that “marketers should advise endorsers of their disclosure responsibilities and should monitor their endorsements to ensure that appropriate disclosures are made.”

## #Latergram: The FTC’s Prior Policy and Guidance on Endorsements and Native Ads

So, have these letters come out of the blue? The short answer is no. The FTC has increasingly expanded its endorsement and advertising guidance for companies and individuals to apply to new forms of media. The guidance is to help companies avoid violating Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” (15 U.S.C. § 45(a)). Additionally, demonstrating its enforcement readiness, the FTC has taken several actions in the last few years against marketers and endorsers (even publishers) for failing to adequately disclose commercial

content or relationships.<sup>1</sup> Likewise state<sup>2</sup> and non-U.S. consumer protection enforcers<sup>3</sup> have brought their own actions.

The long answer starts in 2015 when the FTC issued two sets of new guidance for businesses and for individuals relating to the potential for deception in endorsements and native advertising, particularly with respect to digital media.

The FTC's Endorsement Guides are longstanding, having been last updated in 2009, but the FTC issued a set of [FAQs](#) related to the application of the Endorsement Guides in the context of bloggers, Instagram, and YouTube celebrities — in other words, social media. The basic tenet of the Guides is that endorsements must be honest and not misleading. One way to potentially avoid misleading consumers is by disclosing the material connection that endorsers have with the company whose products they are recommending on the grounds that knowing the connection would affect how consumers would evaluate the endorsement.

New for 2015, but also based on existing principles, were the [FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements and accompanying guide](#) regarding “native advertising” for businesses. Like the Endorsement Guides, the FTC has long provided guidance relating to advertisements but the 2015 policy explicitly extended its application to native advertising, a new form of media. Native advertising is content that blurs the line between advertising and objective content such as news, feature articles, product reviews, entertainment (such as video games), and other online material. The same doctrines that apply to endorsements extend to native advertisements; that is, such promotional material must not be deceptive or misleading. As with endorsements, one way to potentially avoid misleading consumers about the commercial nature of the content is to disclose its source (if it is not obvious). For example, if a feature article describes the benefits and features of a product but the article does so in a way that appears to be objective reporting, it could be misleading if there is no disclosure that the article was sponsored by the manufacturer of the product.

In the context of digital social media, the line between endorsements and native advertisements can be muddy. Imagine a scenario where a content aggregation site publishes articles on various subjects. One of those subjects is an article, written in the same tone and style of the other articles on the site, profiling a celebrity's enthusiasm for a particular brand of juicer. If the manufacturer of the juicer has paid either the celebrity to endorse the juicer or the content aggregation site to write the article profiling

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<sup>1</sup> For example, the FTC [settled charges](#) with the department store chain Lord & Taylor in March 2016 that it deceived consumers by paying for native advertisements in the online publication, Nylon, or on Nylon's Instagram account, without disclosing the posts were paid promotions for Lord & Taylor. Additionally, the complaint stated that Lord & Taylor paid 50 online fashion influencers to post pictures on Instagram of themselves wearing certain Lord & Taylor apparel without disclosing its payments to endorse the products.

<sup>2</sup> For example, New York's Attorney General, along with the FTC, [settled charges](#) under New York's consumer protection statute with Machinima, Inc., a video entertainment company that produces and distributes content relating to video games and gaming culture, that the company paid video gaming influencers to post YouTube videos endorsing Microsoft's Xbox One gaming console and several games without disclosing the compensation Machinima paid for the posts.

<sup>3</sup> The U.K.'s advertising regulator, the Advertising Standards Authority (ASA), [cited BuzzFeed and Dylan](#), a clothing dye manufacturer, for an October 2015 native advertisement, entitled “14 Laundry Fails We've All Experienced,” that mimicked BuzzFeed's style and tone. According to the ASA, Dylan and BuzzFeed had not made the piece “obviously identifiable” as commercial in nature, a violation of the U.K.'s Committee on Advertising Practices Code.

the celebrity's love of the juicer and none of these material connections is disclosed, all three parties could potentially run afoul of the law. Under the FTC's rules, the lack of disclosure could be deceptive because knowing the connections between the parties would be material to a reasonable consumer's evaluation of the claims or benefits of the products described in the article.

### #NoFilter: The Bottom Line for Companies Who Market Using Social Media and Native Ads

Social media, the use of influencers as endorsers, and native advertising can be powerful marketing tools. As a result, using these techniques requires companies to keep in mind a few points:

- *Disclosures should be clear.* The FTC does not require endorsers or marketers using native advertising to use any specific language to indicate the commercial relationship or nature of the content. In the context of endorsements, it has, however, said that certain vague terms, like “Thank you [marketer],” “#partner,” and “#sp” are not sufficient because they do not explain the relationship. Likewise, with respect to native advertisements, the FTC has said that terms like “Promoted” or “Promoted Stories” and, depending on the context, “Presented by [x],” “Brought to you by [x],” “Promoted by [x],” or “Sponsored by [x]” may be too ambiguous to disclose the fact that the marketer prepared or influenced the content. In either case, the disclosure must clearly indicate the relationship between the endorsement or the native content and the marketer.
- *Disclosures should be obvious.* The FTC guidance states that disclosures must be easy to identify. If a consumer has to do something, like click on “more” as in Instagram, or dig through a bunch of other terms with hashtags to get to the disclosure, the FTC will not view the disclosure as sufficient. Disclosures should be located as close as possible to the endorsement or advertising message. The guidance is the same for video endorsements or native advertisements.
- *Marketers have a responsibility to ensure endorsers disclose the connection.* Think you're not responsible for what the celebrity or endorser discloses about your relationship with them? Think again. The FTC has said marketers must inform endorsers of their responsibilities and monitor their compliance. If the FTC finds a violation of the FTC Act, the endorser and the marketer could both be held liable.

In short, a social and digital media review can help keep the FTC from knocking. Don't get #CaughtOffGuard.

## Contacts



**Meghan Rissmiller**

Partner, Washington, D.C.

Tel +1 202 637 4658

[meghan.rissmiller@hoganlovells.com](mailto:meghan.rissmiller@hoganlovells.com)