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FTC Sends (Another) Warning That Endorsers Must Disclose Connections to Products, Brands, or Services in Any Form of Media

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When thinking about the regulations they must comply with, most broadcasters focus primarily, if not exclusively, upon the Federal Communications Commission (FCC). But there is at least one other federal agency that deserves attention, and that is the Federal Trade Commission (FTC). This is particularly true when endorsements, contests, and other marketing activities are in play, as well as when such activities occur not only on-air, but also on digital platforms including social media. Activities involving social media "influencers" and other endorsement-related issues have for some time been subject to increasing FTC scrutiny, as we have explained before. While one might have predicted that the FTC would pay less attention to these issues in the new administration, three recent developments suggest otherwise.

Of most potential interest to broadcasters and other media companies – particularly those with an online presence – is an update to the FTC's FAQs (Endorsement FAQs) concerning compliance with the agency's Guidelines Concerning the Use of Endorsements and Testimonials in Advertising (the Endorsement Guides). The Endorsement FAQs were last revised in April 2015, and the new version serves as a helpful reminder regarding basic obligations and provides some useful clarifications. Here are five key takeaways:

1. ***All financial or family relationships should be clearly disclosed.*** The FTC's bottom line is this – if there is *any*

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connection between a person making and endorsement and the product, service, or brand they are endorsing, it needs to be disclosed. Whether the connection is an employment relationship, the actual receipt of payment by the endorser, or even less obvious forms of compensation such as a brand paying for an endorser to attend an event that they will discuss in programming or on social media, if a connection exists then it needs to be made clear. In the FTC's view, "[t]he reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement."

2. ***Broadcasters should remain concerned with the FCC's sponsorship identification rules, but the FTC is also watching.*** The Endorsement FAQs recognize that the FCC has responsibility for broadcast ad disclosures related to "product placement" issues. And, of course, the FCC's sponsorship identification rules and policies concerning payola and plugola extend to other types of sponsored programming as well. However, the FTC notes that in its view, while mere product placements do not require a disclosure, anything that goes beyond such placement should contain a disclosure. So, if an on-air host or guest endorses a product in any way – even by just saying "wow this is awesome" – then the FTC's rules would require a disclosure if the host, guest, or station was paid or otherwise received anything in return for the endorsement or has a connection to the product or brand. The only exception is for material that is "obviously an advertisement," but it is not always clear when content may meet this test. And, although the FTC does not mandate the specific wording of disclosures, the FCC has specifically approved the use of only two "magic phrases" – "paid for by" or "sponsored by" – under its own sponsorship identification rules.
3. ***You may be able to get away with "#Ad," but must avoid ambiguous disclosures.*** One of the many challenges with social media platforms is the limited space that some allow. The Endorsement FAQs suggest that "#Ad" would likely be sufficient, but caution against making even that hashtag confusing by, for example, combining it with the brand's name (i.e. "#coolstyllead" for the brand "Cool Stylle"). Also, it's not enough for an endorser to simply say "thank you" to a sponsoring company that provided a free product. On the other hand, "thanks for the free product!" would be sufficient, provided that the endorser received nothing else from the sponsor. And, while those in the marketing business may understand what is meant by a "brand ambassador" or "consultant," the FTC says that use of terms such "ambassador," "client," "advisor," or "consultant" do not communicate a relationship clearly enough. Similarly, if a person promoting a product, good, or service on their own social networks is an employee of the brand, the Endorsement FAQs indicate that using "employee" alone would be confusing to consumers. Nor is use of Facebook's "like" button sufficient to disclose a connection, and the FTC urges companies to avoid encouraging endorsements using features that do not allow for clear and conspicuous disclosures.
4. ***Disclosures need to be made where consumers will see or hear them.*** The touchstone of whether a disclosure is sufficient is whether it is "clear and conspicuous." Thus, not only does the language need to be clear, but the disclosure should "stand out" and be easily noticed by consumers. For endorsements on TV, the FTC suggests that both audio and visual disclosures are optimal, and cautions that visual disclosures need to be on the screen long enough to be noticed, read, and understood. For radio, they must be read at a cadence that is easy for consumers to follow and

understand. Although it is not necessary to start an endorsement with a disclosure, the disclosure should be difficult to miss. On a blog or other website, for example, a disclosure at the bottom or at the very top of a page, or outside of the main content, would be easily overlooked. In video formats, the FTC believes that a disclosure at the very end is more likely to be missed. And bundling disclosures with other content (such as a series of hashtags or links) is also dangerous; the FTC says this practice increases the likelihood that consumers will not understand. Within YouTube in particular, it is not sufficient to place a disclosure within the "Description" field, and on Instagram disclosures need to be visible without clicking "more."

5. ***Disclosure tools built in to platforms are not enough.*** Some social media platforms, such as YouTube and Instagram, include their own disclosure tools. On YouTube, use of the existing tool would place a disclosure in the lower corner of a video, while Instagram's tool would place one above a photo. But the FTC strongly suggests these features, as currently designed, would not comply with the Endorsement Guides:

"A key consideration [in determining whether a disclosure is clear and conspicuous] is how users view the screen when using a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook."

In addition to updating the Endorsement FAQs, the FTC has made crystal clear that it is not afraid to go after those who violate its endorsement guidelines. In its first law enforcement action against individual online influencers, the FTC settled a complaint alleging that two YouTube stars endorsed an online gambling website without disclosing that they owned the company that operated the website. In addition, the agency sent follow up warning letters to 21 online influencers citing specific examples of social media posts that the FTC believes may not comply with the Endorsement Guides. These letters follow up on more than 90 educational letters that the FTC sent in April 2017, and ask specific questions about the recipients' disclosures.

In general, then, a disclosure should be made any time a person endorsing, reviewing, or otherwise positively discussing a product or brand received any form of compensation for making the statement. On-air, compliance with the FCC's sponsorship identification rules and payola/plugola policies – ideally including use of the phrases "paid for by" or "sponsored by" – should also satisfy the FTC. But it is important to remember that the FTC could separately take action against a brand or individual endorser that does not make the disclosures required by its rules, and that disclosure requirements apply both on and off the air. If you have any questions concerning the FTC's Endorsement FAQs or related issues, please contact us.