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Wednesday, August 26, 2015

Endorsements on social media run afoul of FTC

By Ashley Cullins

In her excitement to connect with fans on social media, a famous professional athlete posted about her life-changing vision surgery at a specific medical clinic. "The surgery was life-altering and helped me win," she writes, but what she doesn't disclose is that she is a paid spokeswoman for the clinic. Potentially millions of consumers could see this post, many of whom won't realize it's an endorsement, making it a direct violation of Section 5 of the Federal Trade Commission Act, which generally prohibits deceptive advertising.



Daily Journal photo

VLP Law Group LLP partner Char Pagar said it's not always clear who is getting paid to post on social media and who isn't. In response, the FTC has updated its endorsement guidelines for the first time in five years.

Instances such as this fictional scenario offered on the FTC website are not a rarity - more than half of celebrity endorsements of brands or products on social media are not in compliance with Federal Trade Commission regulations, according to Greenberg Glusker LLP partner Jesse Saivar.

"It's an interesting problem because it's one of those where attorneys have to tell their clients - brands or celebrities - that these are real concerns they should have, but if you look around a majority of celebrities are not necessarily abiding by these rules," Saivar said, adding that he thinks such infringements have been largely overlooked by the FTC in favor of focusing on data collection and privacy.

In a sign of potential increased scrutiny, however, the FTC in May updated its endorsement guidelines for the first time in more than five years to answer questions about how truth in advertising looks on social media.

Char Pagar, partner at VLP Law Group LLP and former attorney at the FTC, said fines and regulations could be levied on an advertiser or an endorser. "For an initial violation, the FTC would be able to seek in court, or negotiate with the advertiser, an order that would govern the advertiser's future behavior," Pagar said of the ways in which an advertiser could be punished. "If the advertiser violated that order in the future, then the FTC would be able to seek civil penalties of up to \$16,500 per day per violation."

Who is ultimately responsible for paying those fines would likely involve taking a hard look at the endorsement contract, most of which, attorneys said, now include specific provisions for the number and frequency of social media posts, as well as who has final approval rights.

Saivar said the FTC guidelines for endorsements require that the celebrity actually use the product or service, that their opinions in the endorsement be honest and that there must be disclosure when it's not otherwise obvious that there's a relationship between the endorser and the brand.

"That's where social media really makes this more complicated," Saivar said. "If there's a celebrity in a TV commercial talking about Ford, it's clearly obvious. On the other hand, if a celebrity mentions on his Facebook page that he loves his Ford truck, it's not so obvious."

Questions and Comments

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Pagar said keeping up with advancements in technology is a consistent challenge for regulators.

"Whenever there's new technology or new media that's adopted, regulators have to figure out how to make the old rules apply and how to make it clear to the public that the old rules apply," she said.

Pagar said the FTC's view is that consumers give more weight to the opinions of people they know and respect, especially celebrities, and on social media it's not always clear who is getting paid to post and who isn't.

Advertisers want celebrities to post endorsements on sites like Facebook, Twitter and Instagram so that the endorsements seem more organic, a philosophy Saivar said directly contradicts that of the federal government. "The very reason the endorsements on social media are so sought after is the very thing the FTC is trying to prevent," he said.

Brands alone can run afoul of FTC regulations, even without the aid of celebrity endorsers.

In 2014 the FTC launched an investigation into a social media contest sponsored by lifestyle brand Cole Haan Inc., which encouraged the general public to post about the company's products. Those who posted were entered into a contest where they could win a shopping spree, though they were not required to indicate their post was related to the contest.

The FTC didn't take enforcement action, but made the issues with the practice very clear in a letter to the company's attorneys stating such activity "requires the disclosure of a material connection between a marketer and an endorser when their relationship is not otherwise apparent from the context of the communication that contains the endorsement." It further stated that the Cole Haan contest "constitutes a material connection that would not reasonably be expected by viewers of the endorsement."

Ellie Altshuler, attorney at Nixon Peabody LLP, said the letter sent ripples through the industry.

"Before [the Cole Haan investigation] it was a less formal process and now it's more heavily negotiated and structured," she said, adding that advertisers will now even ghost write social media posts for celebrities to ensure they're compliant with FTC regulations.

While the FTC doesn't mandate specific wording in the disclosures, it does require it to be "clear and conspicuous," which Altshuler said is forcing people to be more creative to avoid writing things like "sponsored" or "paid ad" in a post.

Saivar said he saw an endorsement deal between a brand and a well-known blogger dissolve when the parties learned of the FTC disclosure requirements.

"It especially doesn't go smoothly when both parties were unaware of that," he said. "It's a classic problem where it's so rampant that most people have no idea that there's anything wrong with it."

Altshuler said that while she hasn't seen any deals fall through, she has seen tension between parties about the issue.

"Depending on who you represent there's a blame shift that happens," Altshuler said. "If you represent the brand, you try to make the argument that the celebrity is responsible for being compliant. If you represent the celebrity, you try to make the brand responsible for letting the celebrity know what the rules are."

Pagar said some of her clients are including specific provisions to expressly require disclosures in each post and to notify the celebrity that the advertiser will be reviewing his or her posts from time to time to ensure they are in compliance with the regulations.

Altshuler said at the end of the day social media specifics are just another deal point.

"This forces people to learn what the FTC is and what their guidelines are," she said. "It forces [celebrities] to slow down - they really, really have to make sure they're compliant and it's on point with what they discuss with the brand."

Saivar said being compliant isn't difficult, but it's still a tough sell for some clients. "It's not that hard to start a Facebook post with 'Ad.' or put '#sponsored' in a tweet, but that kind of defeats the whole purpose of it," he said. "I can't force them to comply, but I've got to make sure my client understands the risk at least."

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