
Running a Sweepstakes or Contest on Social Media?

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If entry for the chance to win a prize requires participants to post content featuring your company's products or services, the participants should be instructed to disclose that their posts are pursuant to a contest. Specifically, the Federal Trade Commission recently indicated that when a company runs a sweepstakes, contest or other prize promotion on a social media platform, and the method of entering the contest involves posting content about the sponsoring company's products or services (such as by "pinning" photos of the company's products on Pinterest), the company is expected to tell the participants to make clear that their posts are being made as part of a contest.

Background

It has long been recognized that endorsements and testimonials regarding a company's products or services—whether the endorsements are made by consumers, experts or celebrities—can have a powerful influence on consumer purchasing decisions and, if done improperly, can mislead consumers. Under the FTC's authority to regulate commercial advertising under Section 5 of the FTC Act (which prohibits "unfair or deceptive acts or practices in or affecting commerce," including advertising of products and services that misleads or is likely to mislead consumers), the FTC maintains a set of Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Guides"). The Guides are published, in part, to assist advertisers using endorsements and testimonials from doing so in a manner that violates the FTC Act. The Guides were first issued in the 1970s, and have been updated a few times over the years, including most recently in 2009.

As noted in a previous advisory (available [here](#)), when the Guides were originally issued, most endorsements and testimonials were disseminated by advertisers through traditional media such as radio and television commercials, billboards and print ads, and not by the endorsers themselves. In the age of the Internet, companies now have the ability also to have their products and services mentioned, favorably reviewed, or otherwise praised on the company's behalf directly by consumers and other third parties—

through blogs, social media and other new media platforms. The FTC's update of the Guides in 2009 confirmed that the old rules continue to apply to endorsements and testimonials made directly through these new media platforms.¹

Disclosure of "Material Connections"

The Guides set forth a number of requirements for advertising using endorsements or testimonials to avoid being deceptive, but one of the most important principles concerns the disclosure of "material connections" between the company and the endorser—that is, connections that would not reasonably be expected by the viewers of the ad. Specifically, the Guides provide:

"When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."²

For endorsements made on new media platforms directly by individuals, the Guides suggest that receiving a payment, a free product or some other financial benefit from the company, in exchange for posting a product review or other endorsement, is a "material connection" subject to the disclosure requirement. The individual endorser is the party expected to clearly and conspicuously disclose that connection. However, the company behind the endorsed product or service is expected to (i) advise the endorser up front that this connection should be disclosed, and (ii) have procedures in place to try to monitor postings by such individuals to confirm the connections are being disclosed.

In a recent "closing letter" sent by the FTC to Cole Haan, Inc., the FTC clarified that prize promotions run on social media involving postings by individuals about the company's products or services as part of entering such promotions are likewise subject to these "material connection" rules.³

Cole Haan's "Wandering Sole" Contest

Cole Haan ran a contest on Pinterest in 2013 that promised a \$1000 shopping spree to the winner. In order to enter the contest, each contestant was required to create a Pinterest board titled "Wandering Sole," and to "pin" five photos of the contestant's favorite Cole Haan shoes from Cole Haan's Wandering Sole Pinterest board, as well as five images of the contestant's "favorite places to wander." The contestants were also required to use the hashtag "#WanderingSole" in each pin.

On March 20, 2014, the FTC sent a letter to Cole Haan indicating that the pins required to enter the contest on Pinterest for a chance to win the \$1000 prize were the equivalent of endorsements subject to the disclosure requirements under the Guides. In pertinent part, the FTC stated as follows:

"We believe that participants' pins featuring Cole Haan products were endorsements of the Cole Haan products, and the fact that the pins were incentivized by the opportunity to win a \$1000 shopping spree would not reasonably be expected by consumers who saw the pins. Moreover, we were concerned that Cole Haan did not instruct contestants to label their pins and Pinterest boards to make it clear that they had pinned Cole Haan products as part of a contest. We do not believe that the '#WanderingSole' hashtag adequately communicated the financial incentive – a material connection – between contestants and Cole Haan.

¹ See <http://www.pillsburylaw.com/publications/ftc-updates-guidance-on-endorsements-and-testimonials-in-advertising>.

² 16 C.F.R. § 255.5.

³ See http://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

“Section 5 of the FTC Act 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. Under the circumstances set out above, entry into a contest to receive a significant prize in exchange for endorsing a product through social media constitutes a material connection that would not reasonably be expected by viewers of the endorsement.”⁴

The Take-Away

Although the FTC did not pursue an enforcement action against Cole Haan, it often uses letters like this to send a message to industry. The FTC’s message is that asking consumers to post, pin or otherwise publish content on a social media platform regarding the company’s products or services in order to enter a sweepstakes, contest or other prize promotion, without requiring that the post be clearly labeled as being part of the contest, is problematic under Section 5 of the FTC Act.

Unfortunately, the FTC did not explain in the letter to Cole Haan exactly how such disclosures should read. This can be a tricky task, especially given the space-constrained limitations presented by most social media platforms. Indeed, the FTC has been grappling with this issue for a number of years now, including in its “.Com Disclosures” guide, which the FTC updated in March 2013.⁵ A primary message from the .Com Disclosures guide was that “disclosures must be communicated effectively so that consumers are likely to notice and understand them in connection with the representations that the disclosures modify,” notwithstanding the space-constrained limitations of many mobile devices and social media platforms.

Applying that guidance to disclosures for contests on social media, it may be that requiring participants simply to use a hashtag that names the sweepstakes or contest with each post—such as “#AcmeWidgetContest2014”—will be sufficient to satisfy the FTC’s expected disclosure. If the particular platform can accommodate a longer disclosure indicating that the post is being made as part of entering a particular contest, that would probably be preferred. As with many new developments, certain best practices will likely evolve over time, which we will continue to monitor.

In the meantime, the FTC has clearly communicated that a consumer endorsement that might be stimulated by the chance to win a prize is not different from a consumer endorsement that might be stimulated by a payment of cash or free goods. The material connection must be disclosed in both cases. It is less clear how the material connection of a chance to win a prize must be disclosed. What is clear is that Cole Haan’s attempt at making this disclosure—which made no reference to a contest or to the Cole Haan brand—failed the FTC’s standards of transparency for disclosing the material connection.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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⁴ Id.

⁵ See <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

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