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## FTC Puts Social Media Influencers on Notice for Possible Violations of the Truth-in-Advertising Laws

Does that actress with the glowing skin really use the luxury moisturizer she keeps raving about on Instagram? What about that NBA player you're following? Did he actually pay for the pricey new sneakers he's showing off in his latest post? If you have to ask, they could be among the 90-plus social media influencers and marketers who received letters from the Federal Trade Commission ("FTC") last month, warning about the legal implications of promoting consumer products via Instagram. While the FTC regularly contacts companies about objectionable advertising practices, the latest letter campaign marks the first time the consumer protection agency has directly contacted influencers in an attempt to educate them about the lawful use of social media to endorse third-party products and services. Influencers who received warning letters reportedly included Heidi Klum, Victoria Beckham and Kourtney Kardashian.

Celebrities, athletes and other influencers who sign endorsement deals, as well as the companies and brands they endorse, are subject to truth-in-advertising laws that are enforced by the FTC.

These laws require that endorsements be honest and not misleading, reflect the honest opinion of the endorser, and not be used to make a claim that the product's marketer couldn't legally make. Failure to comply with such laws can result in consent orders, fines, lawsuits and, perhaps worse, reputational damage and other adverse publicity.

To encourage voluntary compliance with truth-in-advertising laws, the FTC developed Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 CFR Part 255) ("Guides"). In particular, the Guides instruct that any "material connection" between an endorser and the company marketing the product or service being endorsed should be clearly and conspicuously disclosed unless the connection is already clear from the context of the communication containing the endorsement. A "material connection" could consist of a business or family relationship, payment in cash or in kind (including direct or indirect equity in the company marketing the product or service), or the provision of free products to the endorser. Since the existence of a material connection might affect the weight or credibility that consumers give the endorsement, consumers should know that such a connection exists.

Social media endorsements present unique problems, especially since they frequently are spontaneous and come directly from the influencer without legal or editorial vetting, and generally not in a context that makes clear that a material connection exists. Notably, the Guides were last updated in 2009 and provide limited guidance on social media endorsements. So how does the endorser or the company make an adequate disclosure on these newer platforms? For further instruction, the FTC has directed influencers to its informal staff publication [FTC's Endorsement Guides: What People Are Asking](#), which tackles issues raised by the latest advertising and marketing trends.

The FTC does not mandate specific wording for disclosures through social media, but has indicated that a post preceded by "paid ad:" or "ad:" or followed by the hashtag "#ad," "#sponsored" or "#promotion" would likely be effective. On the other hand, the hashtags "#sp" and "#spon" are likely inadequate. In letters to influencers, the FTC advised that the disclosure should appear in the first three lines of an Instagram post so that readers can see

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the disclosure without having to click “more” on longer posts. The FTC also cautioned that readers may simply skip over multiple tags, hashtags or links.

The FTC’s latest round of warning letters serves as a powerful reminder that influencers and companies alike need to stay current on the FTC’s guidance. While the FTC has provided some instruction, engaging qualified legal counsel when negotiating endorsement agreements can help avoid negative legal, financial and reputational consequences. If you would like help ensuring appropriate compliance, please contact the attorneys listed below for assistance.

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