Advertising Law Alert

Influencer Marketing Legal Issues During COVID-19

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With consumers staying at home in front of devices during COVID-19, brands are ramping up their influencer marketing. They should be wary of legal risks.

COVID-19 has changed marketing in 2020; e-commerce has found new life. The result is that consumers are overwhelmed with a barrage of offers and information in their inboxes. Consumers are looking for trusted advice, and influencer marketing fills that void. Regulators are keeping a watchful eye out for those who lead consumers astray. Influencer marketing is ripe for enforcement activity. This post looks at some of the legal developments over the last few months that underscore the need for risk mitigation.

FTC Guides' Public Comment Period

Earlier this year, the Federal Trade Commission (FTC) opened a public comment period on its Endorsement & Testimonial Guides ("Guides"). Originally enacted in 1980, and amended in 2009 to address the digital marketplace, the FTC's Guides mandate that any material connection between a brand and an endorser needs to be disclosed clearly and conspicuously. As part of its "systematic review" of all agency guides, the FTC opened a public comment period that was set to expire in early April. Faced with the coronavirus pandemic, the FTC extended the public comment period to June 22, 2020.

The FTC's original notice expressed an interest in receiving comments on several matters. For example, the FTC asked, among other things, whether the Guides are effectively addressing problems in the marketplace? Are consumers benefitting from the Guides? Do technologic changes require new updates to the Guides? Are endorsers making clear and meaningful disclosures? Do free or discounted product offers bias consumer reviews? Are composite ratings of reviews based on incentives misleading? Should the Guides address affiliate links?

It is possible that the FTC was spurred to examine the Guides because it kept seeing rampant violations of the Guides in the marketplace with influencers confusing consumers. In 2019, the agency had a string of investigations and warning letters related to the Guides.

Casper Filing

In January 2020, Casper, an online seller of mattresses, launched its initial public offering and made news for including an "influencer disclosure" in the company's S-1 filing. (This filing identifies a company's risk factors that could cause its stock to decline.) Casper acknowledged that its use of influencer marketing created a risk for the company's reputation and stock price because influencers might fail to make legally required disclosures or fail to make them properly.

Casper's filing was significant because it recognized the difficulty in containing legal risks inherent in influencer marketing. Even with an S-1 disclosure, however, a brand should still take internal steps to mitigate and dissipate these risks.

Teami Settlement

Indeed, influencer marketing issues created legal problems for another company. On March 17, 2020, the United States District Court in Florida entered a settlement order between the FTC and Teami, LLC. Teami, a marketer of teas and skincare products, settled FTC charges that it used deceptive health claims and that its influencers failed to make proper disclosures.

The FTC had alleged that Teami made unsubstantiated health benefit claims in advertising its teas and skincare products. The company claimed that its products could assist in weight loss, fight cancer, clear clogged arteries, decrease migraines, and treat flu and colds. The complaint also listed a host of famous influencers who had failed to include proper disclosures in social media posts. These influencers included Cardi B, Katya Elise Henry, Brittany Renner, Adrienne Bailon, Princess Mae, Jordin Sparks, Alexa PenaVega, Leyla Milani-Khoshbin, Jenicka Lopez, and Darnell Nicole. (They all received warning letters from the FTC directly as well.)

Specifically, the FTC asserted that consumers would have to click on the "more" option of Instagram posts to find out that Teami paid these influencers to advertise its products. This practice persisted even after the FTC had warned the company in 2018 that its influencers were not using clear and conspicuous disclosures. In fact, the agency had provided specific guidance about Instagram and disclosure placement which Teami allegedly continued to ignore.

The settlement requires Teami to communicate disclosure obligations directly to influencers and obtain signed acknowledgments from them. The company must also monitor its influencers' posts and take steps to address improper disclosures. The settlement also bars Teami from making unsubstantiated claims about their products when advertising.

The settlement order imposes a $15.2 million judgment. That amount will be suspended upon payment of $1 million by the owners of Teami. In a press release, Andrew Smith, Director of the FTC's Bureau of Consumer Protection stated that "[c]ompanies need to back up health claims with credible science and ensure influencers prominently disclose that they're getting paid to promote a product."

Influencer Marketing Risks

While the public comment period of the FTC Guides has been extended, companies should not dismiss the real risk of influencers marketing. The financial punishment in Teami is evidence of this risk. In fact, during this pandemic, government regulators are even more concerned about deceptive advertising that influences consumers to part with their hard-earned money. Companies need to act proactively to protect themselves from rogue influencers and insist on proper disclosures.

Best Practices

In a previous blog, entitled "How to Decrease Your Influencer Marketing Legal Risk," we spelled out some best practices for using influencer marketing. Based on 2020 events, including the pandemic, we supplement those best practices here:

- If you are using influencers without an agreement, now is the time to put a formal contract in place.

- When drafting your new contracts, include a force majeure clause that would allow you to terminate your influencer marketing obligations based on a well-structured force majeure clause that refers to the pandemic.

- Include termination rights in your discretion if you feel the campaign needs to shift focus to reach consumers in a different way in these uncertain times.

- Review your existing influencer marketing contracts to ensure you have obligated the influencers to abide by the law.

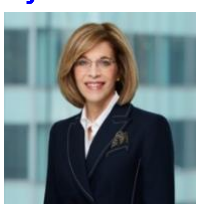
- If you have not done so already, provide your influencers with a set of guidelines that explain what kinds of disclosures they should be making and how. Also refer them to the FTC Disclosures 101

- If you are marketing any item that affects public health and wellness, pay particular attention to what product claims influencers are making and whether they have properly disclosed their material connections to your brand.

- For companies who are on budgets during these economically uncertain times, consider a "triage" approach to risk mitigation. Top on the list should be guidelines and contracts, followed by even a simple monitoring and take-down program. The gold standard for legal protection combines these elements. Read the public comments that the FTC is receiving and consider filing your own.

If you need help drafting your influencer marketing contracts or reviewing a force majeure clause to see if it allows you to terminate a relationship, contact Kyle-Beth Hilfer, Reema Pangarkar, or your CLL attorney.

Kyle-Beth Hilfer



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