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Enforcement Against Lord & Taylor Proves FTC Serious About Native Advertising Guidelines

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Less than three months after the Federal Trade Commission issued new guidelines on native advertising, the agency announced an enforcement action against national retailer Lord & Taylor.

The FTC alleged on March 16, 2016 that Lord & Taylor paid for and approved an online fashion magazine publishing a "seemingly objective" article reviewing a new dress line, without disclosing that the posts were paid promotions.

Lord & Taylor agreed to a 20-year "cease and desist" order prohibiting it from misrepresenting, "expressly or by implication," that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.

The FTC also alleged that Lord & Taylor failed to mandate that online fashion "influencers" – who posted Instagram pictures of themselves wearing dresses that Lord & Taylor had given them – disclose that they were paid. The company agreed to ensure that influencers clearly disclose when they have been compensated in exchange for their endorsements.

This and other recent enforcement actions reflect the agency's intention to scrutinize native advertising, especially online, and to require strict adherence to its new Native Advertising Guides as well as its Endorsement Guides.

What did the FTC allege Lord & Taylor did wrong?

The FTC complaint against Lord & Taylor alleges that *Nylon*, an online fashion magazine, posted a photo of the retailer's dress, together with a Lord & Taylor-edited caption, and also ran an article in its online magazine, which was pre-approved and paid for by Lord & Taylor. While both pieces were approved by Lord & Taylor, neither indicated that the company had paid for the posts.

The FTC also alleges that Lord & Taylor gave free products and additional compensation to 50 paid "influencers" to post pictures online featuring a dress from Lord & Taylor's Design Lab line of clothing. The posts, which had to be pre-approved by Lord & Taylor, were contractually required to contain specific hashtags and links to the company. However, Lord & Taylor did not require the influencers to identify the post as an advertisement or otherwise note that they had been compensated in exchange for the post, and none of the posts disclosed they were part of an advertising campaign.

Lord & Taylor has agreed to a consent order which will prevent the company from misrepresenting that (1) paid commercial advertising is a statement or opinion from an independent or objective publisher or source, or (2) that a paid endorser is an independent user or ordinary consumer, and mandate (3) clear and conspicuous disclosures of material connections between endorsers and the company.

The consent order also requires Lord & Taylor to implement a program to ensure compliance. The company has agreed to (1) require paid influencers to acknowledge in writing that they must disclose their connection to the company and (2) to monitor and review influencers' posts and terminate endorsers who do not provide the required disclosures.

Other recent enforcement

In another recent case, the FTC alleged that Machinima, Inc., hired by Microsoft's advertising agency as part of

an Xbox One marketing campaign, engaged in deceptive advertising by paying influencers to post YouTube videos endorsing the Xbox One system and games without disclosing they were compensated.

The FTC order against Machinima, made final in March 2016, prohibits the company from misrepresenting that paid influencers were objective or independent and failing to disclose when influencers had a material connection with the company. That order also requires Machinima to create a compliance monitoring system for influencers.

Notably, the FTC did not take action against either Microsoft or its advertising agency, even though the agency identified both as responsible for the influencers' failure to disclose their material connection. The FTC appeared to credit the companies' compliance programs and their quick response to remedy the Machinima influencer materials after they discovered the lack of disclosures.

How can an advertisement be deceptive if its claims are accurate?

In December 2015, the FTC issued a 16-page "Enforcement Policy Statement on Deceptively Formatted Advertisements" and additional informal guidance, entitled "Native Advertising: A Guide for Business." The Policy Statement is a detailed recap of the types of deceptive practices in the native advertising setting that can trigger FTC investigations and enforcement actions.

The FTC's view is that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or unrelated to the sponsoring advertiser.

The FTC looks to the overall "net impression" of advertisements, including their format. According to the FTC, the formatting of an advertisement can render it deceptive even if its claims are accurate and not misleading. The Policy Statement advises, "[r]egardless of an ad's format or medium of dissemination, … [d]eception occurs when an advertisement misleads reasonable consumers as to its true nature or source."

Almost every company today promotes its products or services online. And the FTC has acknowledged that the "recent proliferation of natively formatted advertising in digital media has raised questions about whether these advertising formats deceive consumers by blurring the distinction between advertising and non-commercial content."

The FTC reasons that recognizing an article, social media post, or other promotional messages as an advertisement is likely to affect whether a consumer will choose to interact with the content and will affect the credibility that the consumer assigns to it.

The FTC Policy Statement highlights three formats that the agency believes may mislead consumers as to their commercial nature:

1. advertisements appearing in a news format or that otherwise misrepresent their source or nature,
2. misleading door openers (advertisements or sales practices where the first contact with the consumer is deceptive as to the nature of the interaction even if the truth is later made clear, such as emails with falsified sender information or salespeople who do not identify themselves as such), and
3. endorsements that do not disclose the sponsoring advertiser.

In May 2015, the FTC also published a 23-page FAQ to its Endorsement Guides, which highlights the requirement to disclose material connections between an endorser and marketer and makes clear that the FTC's guidance applies to the internet, blogs and social media as well as to traditional advertising like television and magazines.

How to avoid becoming a target of FTC enforcement

To avoid becoming a target for similar FTC enforcement, company marketers should note the obligations imposed on Lord & Taylor, and (1) enter signed agreements with endorsers who receive free products or other

compensation requiring them to disclose that they are compensated, (2) train employees to review sponsored content and endorsements, (3) monitor endorsers to ensure they are disclosing material connections, and (4) terminate endorsers that do not disclose material connections.

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