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Complying with the Federal Trade Commission's Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms as Marketing and Advertising Spaces

Aimee Khuong*

I. INTRODUCTION

Social-media platforms have become huge marketing and advertising spaces for both well established and start-up companies. In the 1990s, the Internet became a means for companies to communicate with customers and to promote their products and services. Throughout the past decade, the Internet has become a powerful platform that has changed the way companies do business and communicate with their customers. The growth of digital marketing through the Internet resulted in new forms of marketing and advertising space. Nowadays, any business can reach a large market with a very small investment, and anybody that can read and write has the ability to have access to and presence on the World Wide Web.¹ By blogging and maintaining social-media accounts, social-media users express and publish their ideas and opinions. At the same time, companies leverage these types of communication to advertise their products.

As the variety and audience of online advertising through social-media platforms continues to increase, new legal issues are arising, and the necessity to set a legal framework to regulate online advertising has emerged. Historically, legal rules regulating advertising have not been generally limited to any particular medium through which an advertisement is

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1. *Internet Growth Statistics*, INTERNET WORLD STATS (Mar. 7, 2016), <http://www.internetworldstats.com/emarketing.htm>.

communicated and have been applicable to the online context as well.² The public's interpretation of these rules is not always clear, which raises issues of interpretation when applied to online communications. The application of these rules, which were written at a time when such technologies were not yet created, has caused confusion amongst advertisers. With the growing number of companies using social-media and consumer-generated content for marketing and advertising purposes, the Federal Trade Commission's ("FTC") updates to the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides") are not specific enough to address the up-and-coming social-media platforms that are becoming widely used by consumers.

This Article will discuss the balance between companies that use social-media platforms for marketing and advertising purposes and the FTC's attempt to address these usages to help protect consumers through its Endorsement Guides. First, this Article will take an in-depth look at the relationship between regulation and online advertising, including the history behind the creation of the FTC and its regulations surrounding the truth-in-advertising principle. This Article will then examine how the FTC has responded to the rapid growth and change in the world of social-media and social-media marketing, and the updates made by the FTC in order to address the creative ways companies are using new digital and social channels for marketing. Finally, this Article will discuss the types of safe harbor provisions that the FTC can put in place as a response to new technologies surrounding social-media platforms, and best practices that companies can turn to when using social-media platforms as marketing and advertising spaces.

II. THE FTC ENDORSEMENT GUIDES AND ITS AMBIGUITIES

Due to the age of new media, there are currently limitless channels available for companies to reach consumers. Whether it is through social networks such as Facebook, Twitter, Instagram, Pinterest, or Snapchat, companies are being creative in integrating their social-media and consumer-generated content into their marketing and advertising strategies.³ Although these various platforms are providing alternative ways for companies to interact and connect with consumers, they are also blurring the lines between traditional advertising and entertainment. The FTC has attempted to create

2. *Dot Com Disclosures*, FED. TRADE COMM'N, 1 (May 2000), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>.

3. Sarah Perez, *Snapchat is Now the #3 Social App Among Millennials*, TECHCRUNCH (Aug. 11, 2014), <http://techcrunch.com/2014/08/11/snapchat-is-now-the-3-social-app-among-millennials/>.

standardized requirements for companies to follow when using social-media platforms for marketing and advertising purposes. The standardized requirements, as covered in the Endorsement Guides, reflect the basic truth-in-advertising principle that endorsements made on social-media platforms must be honest and not misleading. While these guidelines attempt to take into account the ever-expanding domain of online advertising and social-media, they remain ambiguous as new digital and social channels are being developed, and an increasingly large number of companies are reaching out to consumers on different social networks. With limited resources and manpower, the FTC has indicated that the sufficiency of truth-in-advertising through meeting disclosure requirements will be determined on a case-by-case basis.⁴ This has caused more confusion amongst advertisers as to what would constitute a sufficient disclosure on different social-media platforms.

III. THE CREATION OF THE FTC AS A RESPONSE TO THE REGULATION OF COMMERCIAL ADVERTISING PRACTICES

The FTC was created in September 1914 by the Federal Trade Commission Act (“FTC Act”) with the mission to protect consumers and promote competition.⁵ The FTC is an independent federal agency dedicated to protecting consumer interests while encouraging innovation and competition in the dynamic economy.⁶ The agency focuses on protecting consumers by stopping unfair, deceptive, or fraudulent practices in the marketplace and conducting investigations on issues such as data security and deceptive advertising.⁷

Under the FTC Act, the FTC has investigative, enforcement, and litigating authority.⁸ The agency’s investigative authority gives it the authority to prosecute any inquiry in the United States necessary to its duties. The FTC may gather and compile information and investigate the conduct, practices, or management of businesses that affect commerce.⁹ Under the FTC’s enforcement authority, following an investigation, the agency may initiate an enforcement action if it has reason to believe that the law is being or has been violated.¹⁰ The agency has the statutory authority to declare that

4. Lauren B. Cross, “Results Not Typical”: *The Impact of the Federal Trade Commission's New Guidelines for Endorsements and Testimonials*, 32 WITTIER L. REV. 121, 121–22 (2010).

5. *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history>.

6. *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do>.

7. *Id.*

8. *Id.*

9. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

10. *Id.*

a business has engaged in unfair or deceptive acts or practices in or affecting commerce unlawful.¹¹ Also, the FTC has independent authority to litigate actions that may be pursued in federal court against violators of the laws enforced by the agency.¹²

IV. THE ADOPTION OF THE FTC'S ENDORSEMENT GUIDES IN ORDER TO PROTECT CONSUMERS

Although the FTC was established with the intent to regulate commercial advertising practices throughout the United States, advertising regulation did not begin until the late nineteenth and early twentieth century, when the patent medicine industry began making numerous outrageous claims about its products.¹³ Prior to this, the regulation of commercial advertising practices was settled through the court system. The FTC began adopting and enforcing regulations, which led advertisers to impose self-regulation.¹⁴ From that point on, the primary focus of regulation in commercial advertising has been on misleading and unsubstantiated claims to protect consumers and strengthen the credibility of advertising.¹⁵

In 1975, after sixty years since the FTC was established, the agency was granted the authority to adopt industry-wide trade regulations and began publishing rules and guidelines, and regulating deceptive advertising through case-by-case challenges to particular ads. Specifically, the Endorsement Guides, which were created in the 1980s, addressed the relationships between advertisers and endorsers.¹⁶ The Endorsement Guides include sections defining terms and addressing expert endorsements, endorsements by organizations, and examples illustrating each guideline.¹⁷ Any endorsement must reflect the honest opinion of the endorser and cannot be used to make a claim that the product's marketer could not legally make.

For purposes of the Endorsement Guides, an endorsement means any advertising message that consumers are likely to believe reflects the opinion, belief, or findings of the endorser. Endorsements are an important tool for advertisers and can be persuasive to consumers.¹⁸ For that reason,

11. *Id.*

12. *Id.*

13. Cross, *supra* note 4, at 122–23.

14. *Id.* at 123.

15. *Id.*

16. *Advertisement Endorsements*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> (last visited Nov. 19, 2016).

17. Jason Goldstein, *How New FTC Guidelines on Endorsement and Testimonials Will Affect Traditional and New Media*, 28 CARDOZO ARTS & ENT. L.J. 609, 612–13 (2011).

18. *Advertisement Endorsements*, *supra* note 16.

endorsements must be truthful and not misleading.¹⁹ The Endorsement Guides were designed to help advertisers ensure that they meet the applicable standards whether the advertisement is on TV, print, radio, blogs, or through word-of-mouth marketing.²⁰ Although there are no civil penalties associated with violating the Endorsement Guides, the FTC may investigate whether an advertiser's practices are unfair and deceptive under the FTC Act if the advertiser does not appear to follow the guidelines.²¹ For example, the Endorsement Guides advise advertisers to accompany testimonials with information describing what consumers can generally expect from use of the product or service.²² Moreover, if there is a connection between the advertiser and endorser that would affect how consumers evaluate the endorsement, it should be disclosed.²³ As social-media became a marketing tool for companies to reach out to consumers who were increasingly spending more time online, the FTC felt the need to update its Endorsement Guides.

In 2009, the FTC updated the Endorsement Guides to address endorsements in social-media, including product reviews, blogs, and tweets.²⁴ The revised guidelines addressed social networking and other Internet media for the first time, and applied the FTC's traditional disclosure and substantiation requirements to new media and new forms of endorsement.²⁵ The revisions provided general principles that the agency would follow when evaluating endorsements and testimonials, as well as examples illustrating the application of those principles.²⁶ The examples illustrated the long-standing principle that material connections between advertisers and endorsers must be disclosed to consumers.²⁷ A "material connection" is one that might "materially affect the weight and credibility of the endorsement."²⁸ A material connection exists where a connection between the endorser and the seller of the advertised product has the potential to materially affect the weight or credibility of the endorsement.²⁹ The FTC's

19. *Id.*

20. *Id.*

21. *Id.*

22. *Advertisement Endorsements*, *supra* note 16.

23. *Id.*

24. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM'N (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

25. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 *BUFF. L. REV.* 721, 744 (2010).

26. Cross, *supra* note 4, at 127.

27. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, *supra* note 24.

28. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009).

29. *Id.*

revisions to the Endorsement Guides were seen as a response to the growing number of companies who were paying people to promote a product by praising it or using it as part of a seemingly noncommercial interaction in ordinary settings.³⁰ Through these updates, the FTC clarified that if a company asks someone to endorse its product on social-media sites, the said endorsement would be subject to the Endorsement Guides.³¹ Since the implementation of the updated Endorsement Guides, bloggers reviewing products have been required to disclose any material connection they have with the advertisers, including whether they have been given any free products or compensation.³² In addition, advertisers and endorsers must provide a clear and conspicuous disclosure.³³ This means that the disclosure must be presented in unambiguous language and consumers should be able to easily notice the disclosure.³⁴ When advertising testimonials to consumers purport to specify certain results, the disclosure must state what typical results consumers can generally expect from the use of the product or service.³⁵ Before the 2009 revisions, advertisers were permitted to describe unusual results as long as they included the disclaimer, “results not typical.”³⁶ The FTC revised the Endorsement Guides to keep them up-to-date with current marketing techniques, and to point out that advertisers using these new techniques are subject to the same truthful advertising laws to which that other forms of advertising is subject to.

Some consumer interest groups have argued that the 2009 revisions do not address all the marketing strategies being used by companies. They also argue that consumers often have no way of knowing whether bloggers have been received some sort of compensation for their endorsements.³⁷ As a response to the growing trend in social-media marketing, the FTC updated its Endorsement Guides concerning the use of endorsement and testimonials. However, this update has created regulatory issues. The FTC has attempted to govern all forms of advertising within social-media and without the proper foundation to create effective rules and regulations. The FTC relies on feedback and complaints from consumers on deceptive advertising, and without a concrete understanding of each social-media platform, it is difficult to create applicable regulations. The subjective nature of advertising on various social-media platforms has created confusion amongst advertisers and endorsers.

30. Tushnet, *supra* note 25, at 745.

31. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, *supra* note 24.

32. Cross, *supra* note 4, at 126.

33. 16 C.F.R. § 255.5 (2009).

34. *See id.*

35. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (2009).

36. *Id.* at n.105.

37. Cross, *supra* note 4, at 141.

V. HOW THE FTC IS REACTING TO NEW TYPES OF MARKETING AND ADVERTISING ON SOCIAL-MEDIA PLATFORMS

With the large number of users who are on social-media platforms, companies are recognizing the potential of reaching a wider audience through blog posts, Instagram photos, and tweets. Since the creation of Facebook in 2004, the social networking site has grown into a worldwide network of over 1,000 million subscribers, and mobile technology has made possible a much greater reach of the Internet.³⁸ By using social-media platforms, a company increases its brand recognition.³⁹ The company's social-media networks become new channels for the company's voice and content, making it easier for consumers to access a company's products and services and allows the company to be more recognizable by a larger audience.⁴⁰ This allows the company to connect with its audience and influence consumers into being loyal to the company brand. Furthermore, a company can increase inbound traffic, as every social-media platform becomes another path leading back to the company's website and opens up more opportunities for new consumers to be aware of the company's services and products.⁴¹ The company's interaction with its consumers on social media platforms publicly demonstrates a company's customer service and enriches consumer relationships, increasing the quality of the consumer experience.⁴² Lastly, social-media platforms give a company an opportunity to gain insight into consumers' interests and allows the company to monitor what consumers are saying about it online.⁴³

VI. INCREASING NUMBER OF COMPANIES ARE TURNING TO SOCIAL-MEDIA PLATFORMS AS MARKETING AND ADVERTISING SPACES

It is not uncommon to find sponsored content and endorsements of brands posted by celebrities, popular fashion bloggers, or style-influencers when you sign into your social-media account. A limited amount of the sponsored content and endorsements of products consistently follow FTC

38. *Internet Growth Statistics*, *supra* note 1.

39. Jayson DeMers, *The Top 10 Benefits of Social Media Marketing*, FORBES (Aug. 11, 2014, 12:24 PM), <http://onforb.es/1vyccu4>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

regulations or guidelines.⁴⁴ The FTC's regulations and guidelines apply to all endorsements and advertising, including those on social-media.⁴⁵ Thus, celebrities, bloggers, and influencers must disclose relationships and connections when they receive free products or other perks, or are compensated for advertisements or endorsements made to their fans and followers through their social-media platforms.⁴⁶ The FTC mandates that fans and followers must be given the opportunity to decide for themselves how much influence an opinion is worth and to know whether an endorsement of a product was influenced by a blogger or influencer receiving the product for free.⁴⁷ As the FTC has noted, "truth-in-advertising is important in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social-media)."⁴⁸

VII. INVESTIGATIONS CONDUCTED BY THE FTC

The FTC has conducted investigations to determine whether companies using social-media for their collaborations with social-media influencers to endorse and advertise products are "proper uses." In March 2014, the FTC notified Cole Haan, a popular shoe brand, that it had conducted an investigation of a contest, held on Pinterest, for an alleged violation of Section 5 of the FTC Act.⁴⁹ Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."⁵⁰ The shoe company urged its Pinterest followers to post five shoe images on the company's Wandering Sole Pinterest Board, as well as five photos of the contestants' "favorite places to wander."⁵¹ Contestants were instructed to use "#WanderingSole" in each pin description.⁵² The contestant with the most creative entry won a \$1,000 shopping spree. The FTC considered these pins to be endorsements of Cole Haan's products because consumers who saw the pins would not reasonably expect that the pins were incentivized by the

44. Jennifer Schultz, *Social Media Endorsements and Disclosure*, 35.8 THE LICENSING JOURNAL 18, 18 (2015).

45. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, *supra* note 24.

46. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009).

47. *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, 3 (May 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

48. Schultz, *supra* note 44.

49. *Closing Letter to Christie Grymes Thompson, Counsel for Cole Haan, Inc.*, FED. TRADE COMM'N (Mar. 20, 2014), https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

50. Federal Trade Commission Act, 15 U.S.C. § 45 (2016).

51. *Closing Letter to Christie Grymes Thompson, Counsel for Cole Haan, Inc.*, *supra* note 49.

52. *Id.*

chance to win a \$1,000 shopping spree.⁵³ However, upon review of the contest, the FTC decided that no further action was needed at the time because it had neither publicly addressed whether entry into a contest was a form of material connection, nor explicitly addressed whether a pin on Pinterest might constitute an endorsement.⁵⁴ Other factors that the FTC considered included the small number of contestants that entered Cole Haan's contest, and the company's adoption of a social-media policy that adequately addressed the FTC's concerns with monitoring social-media influencers' compliance with the obligation to disclose material connections when endorsing its products.⁵⁵

In April 2015, Lord & Taylor, a luxury department store, debuted one of its most successful advertising initiatives by recruiting fifty popular style bloggers and giving them each a paisley printed dress from its 2015 Design Lab line.⁵⁶ The bloggers were paid to post a photo of themselves wearing the dress on their Instagram accounts using the hashtag "#DesignLab."⁵⁷ The campaign raised awareness of the brand's new "fashion-forward" collection and, the Instagram posts picked up more than 1,000 likes from fashion fans.⁵⁸ The dress that was found on the bloggers' Instagram accounts were sold out almost immediately.⁵⁹ However, none of the bloggers disclosed that they were paid by Lord & Taylor to post the photos.⁶⁰ According to the FTC, the bloggers were required to disclose to their followers that there was a material relationship between them and Lord & Taylor because they were paid for their Instagram posts.⁶¹ In an attempt to meet the FTC guidelines, some of the Instagram posts were edited to include disclosures, such as adding the hashtag "#ad" to the posts.⁶²

The FTC has not been strictly enforcing its guidelines on companies who are using social-media to promote their products. As a result, many companies are choosing not to disclose campaigns and partnerships they have with social-media influencers. The lack of enforcement by the FTC in bringing legal cases against companies who are violating the FTC's guidelines with these contests, and campaigns in placing proper disclosures

53. *Id.*

54. *Id.*

55. *Id.*

56. Liza Darwin, *Why Those FTC Blogger Requirements Aren't Working*, REFINERY 29 (Apr. 7, 2015), <http://www.refinery29.com/2015/04/85144/ftc-blogger-requirements>.

57. *Id.*

58. Martin Beck, *Did Lord & Taylor's Instagram Influencer Campaign Cross the Line?*, MARKETING LAND (Apr. 3, 2015, 12:09 PM), <http://marketingland.com/did-lord-taylors-instagram-influencer-campaign-cross-the-line-123961>.

59. Darwin, *supra* note 56.

60. *Id.*

61. *Id.*

62. Beck, *supra* note 58.

for advertisements done on social-media platforms, is a major issue because more companies believe they can get away with not including proper disclosures.⁶³ Although the FTC has detailed in its guidelines the proper ways to disclose advertisements via social-media, penalties for any violations of the guidelines remain unclear because they have not been published. Aside from investigations that have been conducted by the FTC, there have been no legal cases brought against companies who have violated the guidelines.⁶⁴ Although it is within the FTC's authority to penalize advertisers and bloggers,⁶⁵ it is choosing not to. The primary reasons behind this could be that it is difficult to search the Internet for violators, and if violators were found, it would be too costly to take them to court.⁶⁶ The possibility of punishment if companies violate the Endorsement Guides is not slowing down the use of these social-media platforms for marketing and advertising purposes. Companies are continuing to use social-media platforms, such as marketing campaigns, to advertise their products.⁶⁷

VIII. UPDATES TO THE FTC'S ENDORSEMENT GUIDES: "WHAT PEOPLE ARE ASKING" PAGE

As a response to the investigations conducted by the FTC into the disclosure practices of companies on various social-media platforms, the FTC made updates to its "What People Are Asking" page, a source that companies can turn to for informal guidance relating to the Endorsement Guides in May 2015. The page takes the format of a typical FAQ and answers page, including information about disclosing material connections between advertisers and endorsers.⁶⁸ The FTC revised the FAQ section to address forms of promotion on various social-media platforms that had gained popularity since the last updates that were made to the Endorsement Guides back in 2009. The FAQ revisions addressed current advertising and marketing trends, such as the use of Twitter endorsements, Facebook's "like" button, video endorsements, and employee endorsements.⁶⁹ Although

63. Martin Beck, *FTC Puts Social Media Marketers on Notice with Updated Disclosure Guidelines*, MARKETING LAND (June 12, 2015, 1:56 PM), <https://marketingland.com/ftc-puts-social-media-marketers-on-notice-with-updated-disclosure-guidelines-132017>.

64. *Id.*

65. *Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 9.

66. Beck, *supra* note 63.

67. Sonny Ganguly, *Why Social Media Advertising Is Set to Explode in the Next 3 Years*, MARKETING LAND (Mar. 17, 2015, 12:28 PM), <http://marketingland.com/social-media-advertising-set-to-explode-next-3-years-121691>.

68. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 47.

69. Beck, *supra* note 63.

the revisions provide clarification on the FTC's expectations when companies turn to social-media platforms,⁷⁰ the FTC stresses that the underlying legal principles surrounding endorsements remain the same.⁷¹ Endorsements must be truthful and not misleading.⁷² If there is a material connection between an endorser and an advertiser of the product that would affect how people evaluate the endorsement, it must be disclosed clearly and conspicuously.⁷³ If the advertiser does not have proof that an endorser's experience with the product represents what consumers will experience by using the product, the advertiser must disclose the generally expected result in those circumstances.⁷⁴

The updates made to the FTC's "What People Are Asking" page were intended to help advertisers navigate their specific obligations under the Endorsement Guides and offer advertisers expanded guidance on relevant topics.⁷⁵ The FAQs include an entire section that focuses on disclosures.⁷⁶ Even though the FTC does not mandate specific language for disclosing a paid endorsement, or an endorsement where the endorser was given a product for free, the FTC suggests that companies use a simple disclosure, such as "Company X gave me this product to try. . ." ⁷⁷ In contrast, the FTC points out that a disclosure such as "Company X gave me a sneak peek of its new product" is insufficient to disclose a paid relationship.⁷⁸

The FTC suggests using terms such as "Ad," "Sponsored," "Promotion," or "Paid Ad" on Twitter and other social-media platforms to disclose a sponsorship on social-media.⁷⁹ Moreover, companies who hold contests and sweepstakes on social-media must clearly disclose that the post is being made as part of a contest or sweepstakes.⁸⁰ The FTC clarifies that using a general hashtag is insufficient, but including "contest" or "sweepstakes" as part of the hashtag should be sufficient.

In regard to employee endorsements, an employee who endorses his or her employer's products on social-media must disclose the relationship with the employer.⁸¹ The FTC does not consider listing an employee's employer

70. *Id.*

71. Lesley Fair, *Answering Your Questions About Endorsements*, FED. TRADE COMM'N (May 29, 2015, 10:25 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/05/answering-your-questions-about-endorsements>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 47.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 47.

on a profile page as sufficient notice, and places emphasis on the company's responsibility to ensure proper disclosure is made any time an employee posts positive reviews online.⁸² The disclosure that an employee is reviewing a product or service should be included in the review itself.

On social-media platforms such as Facebook and Instagram, which allow users to "like" a company or social-media post, the FTC considers buying fake "likes" to be deceptive.⁸³ For videos that include endorsements or testimonials, disclosures should not be placed in the description of a video and instead should be clearly and prominently featured in the video itself.⁸⁴ Although the FTC has provided helpful insight on endorsements and related disclosures through its Endorsement Guides and informal guidance on its "What People Are Asking" page, these resources are not entirely comprehensive.

IX. HOW THE FTC CAN ADDRESS CONTINUALLY CHANGING TECHNOLOGIES SURROUNDING SOCIAL-MEDIA PLATFORMS AND WHAT COMPANIES CAN DO TO ENSURE COMPLIANCE WITH THE GUIDELINES

Although the FTC has updated its "What People Are Asking" page to informally address questions concerning the use of endorsements and testimonials in social-media advertising, there has been no formal updates to its Endorsement Guides. Typically, regulations are slow to catch up with technology.⁸⁵ Social-media is less formal and moves rather quickly. As a result, companies tend to overlook which regulations apply.⁸⁶ As of today, the FTC has conducted several investigations, but has chosen not to bring any legal action.⁸⁷ As new issues arise, companies who find themselves in situations like Cole Haan and Lord & Taylor may not be so lucky, and the FTC may choose to fine or recommend other enforcement action for neglecting to disclose material connections or including insufficient disclosures on social-media marketing.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Federal Trade Commission Continues to Explore Consumer Privacy Protection Measures*, KELLEY DRYE & WARREN LLP (Feb. 3, 2010), http://www.kelleydrye.com/publications/client_advisories/0528.

86. Emily Field, *FTC's Social Media Promotion Guide Has Marketers Confused*, LAW360 (July 31, 2015), <http://www.law360.com/articles/685415/ftc-s-social-media-promotion-guide-has-marketers-confused>.

87. Beck, *supra* note 63.

X. SAFE HARBORS THAT THE FTC CAN PUT IN PLACE AS A RESPONSE TO NEW TECHNOLOGIES SURROUNDING SOCIAL-MEDIA PLATFORMS

Given the scope of the ever-expanding domain of online advertising and social-media, the question still remains as to exactly how the informal guidelines will be enforced. To date, there are over one billion registered accounts on Facebook and over 400 million monthly active accounts on Instagram.⁸⁸ As noted by Richard Cleland, an associate director for the FTC's advertising division, there are not enough resources for the agency to look at 500,000 blogs or even a thousand blogs.⁸⁹ Currently, the agency can only look into individual cases that are reported.⁹⁰ In return, the agency heavily relies on consumers to report any sponsored content or advertising campaigns that are not compliant with the FTC's guidelines. Although the FTC has attempted to publicize specific guidance about social-media issues, there is still a lack of awareness and education among the marketing community.⁹¹

The Endorsement Guides apply equally to all types of media and forms of endorsement, but this can be problematic as there are variations amongst social-media platforms. For example, Snapchat, a video messaging mobile application that allows users to capture videos and pictures, is becoming widely used for advertising purposes.⁹² Advertisers are taking advantage of the mobile application's popularity – data shows that more than 60% of individuals living in the United States age thirteen to thirty-four are Snapchatters, and there are seven billion video views that occur every day on Snapchat.⁹³ What sets Snapchat apart from other social-media networks is its ability to have photos and videos immediately disappear after it is viewed by a user's followers, or after twenty-four hours if photos and videos are posted on a user's "story." With social networks like Snapchat being created, the FTC cannot keep up with its disclosure requirements to new media and forms of endorsement. Although the Endorsement Guides and informal guidelines from the "What People Are Asking" page are a reminder

88. *Leading Social Networks Worldwide as of January 2016, Ranked by Number of Active Users (In Millions)*, STATISTA, <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>.

89. Caroline McCarthy, *Yes, New FTC Guidelines Extend to Facebook Fan Pages*, CNET (Oct. 5, 2009, 10:56 PM), <http://www.cnet.com/news/yes-new-ftc-guidelines-extend-to-facebook-fan-pages/>.

90. *Id.*

91. Beck, *supra* note 63.

92. Sarah Vizard, *Three Reasons Why Snapchat Is Moving into Ad Tech*, MARKETING WEEK (Jan. 6, 2016), <https://www.marketingweek.com/2016/01/06/three-reasons-why-snapchat-is-moving-into-ad-tech/>.

93. SNAPCHAT, <https://www.snapchat.com/ads> (last visited Nov. 19, 2016).

to advertisers that the FTC remains vigilant in policing advertising claims, the agency does not have the manpower or a clear understanding of what potential problems may arise from new forms of social-media marketing.⁹⁴

Many advertisers have been waiting for the FTC's guidance on social-media issues that were not on the agency's radar five years ago.⁹⁵ However, because the FTC has not updated its Endorsement Guides since 2009, the marketing community has not made much effort to keep up with any guidance surrounding social-media.⁹⁶ Although the FTC views the updates made to the "What People Are Asking" page as notice to companies who are turning to social-media platforms as marketing and advertising spaces, more can be done to publicize these updated guidelines.⁹⁷ By adequately educating the marketing community about the proper disclosures, more self-regulation can be achieved amongst advertisers, companies, and social-media influencers. In addition, FTC can indicate specific guidance on proper disclosures on all social-media platforms instead of including multiple suggestions and recommendations. This, in turn, would clarify the FTC's expectations for each scenario discussed in its guidelines. For instance, the FTC can require "ad" to be displayed in text for all sponsored content found on Snapchat for the entire duration of the photo or video that is published on an influencer's account. By setting clear criteria that must be met, companies will have a better understanding of what a proper disclosure entails. Lastly, because the guidance provided by the FTC is seen as informal, the FTC can send a clear message to advertisers that it is cracking down on those who are not compliant by incorporating and adopting the specific guidance into its Endorsement Guides.

XI. SAFEGUARDS FOR COMPANIES AS THEY AWAIT FURTHER GUIDANCE FROM THE FTC

There are safeguards that companies can take to ensure compliance with the FTC's current Endorsement Guides and suggestions made in its "What People Are Asking" page. First, companies should become familiar with what the FTC considers to be an endorsement.⁹⁸ Under the Endorsement Guides, an endorsement is defined as:

[A]ny advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the

94. See McCarthy, *supra* note 89.

95. Beck, *supra* note 63.

96. *Id.*

97. *Id.*

98. Schultz, *supra* note 44.

name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.⁹⁹

This is particularly important for endorsements made on social-media platforms. Depending on the type of endorsement being made, it is sometimes difficult for followers (who are also consumers) to notice that their favorite blogger has either paid for the product that is photographed on his or her social-media account, or was given the product for free in exchange for his or her post endorsing the brand. When in doubt, companies should err on the side of caution and include a disclosure.

Second, if companies are using social-media or consumer-generated content, such as blogs, in their marketing and advertising, they should adopt a self-imposed requirement to have all campaigns, contests, and content include a disclosure. The FTC has made it clear that the Endorsement Guides apply to social-media and that disclosures should be made in all forms of social-media that are being used by the company.¹⁰⁰ A simple statement should suffice and be based on the examples provided by the FTC in its “What People Are Asking” page. For example, due to the 140-character limit on Twitter, the FTC advises to begin a tweet with “Ad:” or “#ad,” which only takes up three characters.¹⁰¹ Using words such as “promotion,” “paid ad,” or “sponsored” may also be sufficient.¹⁰² By including very specific guidelines into a company’s policies and procedures when using social-media or consumer-generated content in its marketing and advertising, the FTC’s truth-in-advertising requirement will likely be met.

Putting into practice the use of appropriate disclosures when using social-media or consumer-generated content can be a complex task for companies; as the FTC has recommended different standards of disclosures depending on which social-media platform is being used. For example, video endorsements must include an oral disclosure at the beginning of the video. Whereas endorsements made on blogs must be included in the blog posts in a font that is easy to read. Although there is no “right” type of disclosure, the FTC has addressed types of disclosure that may be insufficient.¹⁰³ When using Facebook, there is enough space for a full

99. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2009).

100. *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 47.

101. *Id.*

102. *Id.*

103. *See id.*

disclosure, but lengthy status updates may appear too daunting for readers to want to click. By adding “Ad:,” “Sponsored by:,” or “Affiliate link:” at the beginning of the status update, it becomes very apparent to readers that this is a disclosure.¹⁰⁴ Another consideration is whether companies are getting their readers to click an affiliate or sponsored link before getting to the disclosure. This may appear as misleading to readers unless companies are including text indicating that the link is an affiliate one. On Twitter, the challenge is the limitation on characters, so companies should maximize their words while clearly conveying their disclosure by leading tweets with “Ad” or “Sponsored.”¹⁰⁵ When using blog posts, companies should avoid placing disclosures at the end of the post if affiliate or sponsored links in the content appears before the disclosure.¹⁰⁶ The FTC, most likely will consider this misleading to consumers.¹⁰⁷ Because blog posts allow for more space for proper disclosures, companies should be clearer in their disclosures and include a full disclosure paragraph.¹⁰⁸ On social-media platforms like Instagram and Pinterest, lengthy disclosures may take away from the appearance of these platforms. Thus, companies should take advantage of one word intros such as “Ad,” “Advertisement,” or “Sponsored.”¹⁰⁹ In the case of Snapchat, where the video disappears as soon as it is viewed, there is no particular place to include a disclosure that would guarantee that all consumers would be made aware of the partnership between the company and the user, unless the disclosure is included on all of the user’s photos or videos. Companies will have to choose between including a prominent disclosure in text that is included in all the related Snapchat stories on the user’s profile or not having sponsored content on Snapchat.

Third, companies should ensure that their disclosures are clear and conspicuous, as noted by the Endorsement Guides.¹¹⁰ To meet the FTC’s “clear and conspicuous” standard, companies “should use clear and unambiguous language and make the disclosure stand out.”¹¹¹ Disclosures should not be hidden in a disclaimer or at the bottom of the webpage.¹¹² Disclosures should be placed near the claims and opinions reflected by the endorser in a font that is easy to read and in a shade that stands out against

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* 16 C.F.R. § 255.5.

108. *See The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 47.

109. *Id.*

110. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (2009).

111. *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 47.

112. *Id.*

the background.¹¹³ Moreover, endorsements made via audio or video should be delivered in the same manner.¹¹⁴ It is also important for companies to remember that audio and video endorsements may need to include multiple disclosures depending on their lengths.¹¹⁵ Companies should keep in mind that the main purpose of including a proper disclosure on social-media platforms is to inform the followers that the content they are viewing is an endorsement.¹¹⁶

Lastly, companies should consider creating a legal social-media policy for both employees and bloggers. Adopting a legal social-media policy that addresses proper disclosure practices and training employees and influencers on this policy, is the first step to maximizing the effectiveness of strategic social-media use while minimizing the risk of engaging in misleading advertisement.¹¹⁷ By providing clear guidelines, there is less confusion as to what the company's expectations are for employees and influencers. Under the Endorsement Guides, bloggers have the primary responsibility to disclose a material connection to the advertiser.¹¹⁸ However, the FTC has emphasized that companies must also institute procedures to ensure their current employees and third-party bloggers who are endorsing their products are complying with the disclosure requirement.¹¹⁹ Best practices in meeting these requirements include: (1) tracking all individuals who post product reviews online at the company's direction; (2) ensuring that each individual understands when he or she needs to disclose the relationship with the company; (3) implementing a review process to ensure that individuals acting on the company's direction are posting accurate statements; and (4) taking steps to address statements that do not comply with the Endorsement Guides.¹²⁰ By following these best practices, a company may be more likely to be compliant if it has established and implemented proper procedures. The failure to institute such procedures will increase the risk of holding the company liable for non-compliance with the disclosure requirement by an employee or third-party blogger.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.*

117. Lisa McGrath, *Why You Need a Legal Social Media Policy*, 32.4 THE COMPUTER & INTERNET LAWYER 7, 7 (2015).

118. Scott W. Pink, *FTC's New Guidelines Could Change How Testimonials Are Used in Social Media*, DLA PIPER (Mar. 10, 2010), https://www.dlapiper.com/en/us/insights/publications/2010/03/ftcs-new-guidelines-could-change-how-testimonial_.

119. *Id.*

120. *Id.*

XII. THE CONSEQUENCES OF NOT HAVING A LEGAL SOCIAL-MEDIA POLICY IN PLACE

Companies can lower the risk of finding themselves in scenarios that Sony Computer Entertainment America LLC (Sony) and Nordstrom Rack were in when using social-media for advertising purposes. In 2014, during Sony's promotion of the launch of its new PlayStation Vita gaming console, Deutsch LA, Inc., the advertising agency hired by Sony, asked its employees to promote the ad campaign by tweeting about the console using the hashtag "#gamechanger."¹²¹ The FTC investigated the ad campaign and determined that the employees failed to disclose their connection to Sony and Deutsch LA, which violated the Endorsement Guides.¹²² The Endorsement Guides required both companies to inform social-media users that their employees were being paid to tweet endorsements, and to implement a reasonable monitoring program to ensure that their employees were disclosing such connections.¹²³ After conducting the investigation, the FTC agreed not to pursue enforcement against Sony and Deutsch LA if both companies provided a report setting forth how they will comply with the Endorsement Guides in the future and submitted to a five-year reporting requirement. In Nordstrom Rack's case, the company hosted a Tweetup, providing influencers on Twitter with \$50 gift cards in exchange for positive tweets about the store in advance of its opening.¹²⁴ According to the Endorsement Guides, Nordstrom Rack had the same requirements as noted in Sony's case. However, despite of these requirements, Nordstrom Rack chose not to have event attendees disclose their connection with the company, and stated that it was not responsible for ensuring that social-media users disclosed such connections.¹²⁵ The FTC investigated the Tweetup, and in exchange for not pursuing enforcement against Nordstrom Rack, the company agreed to amend its social-media policy to comply with the Endorsement Guides.¹²⁶ Both companies could have avoided these situations by having a legal social-media policy in place that properly addresses all the requirements in the FTC Endorsement Guides. Aside from the legal and financial liability associated with these settlements with the FTC, the companies also experienced brand damage. Companies should avoid legal liability and brand damage by adopting a legal social-media policy containing the requirements of the Endorsement Guides.

121. McGrath, *supra* note 117.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

XIII. CONCLUSION

As the rapid growth of social-media platforms as marketing and advertising spaces continues, there will be new legal issues arising in terms of what constitutes a proper disclosure to consumers. There is a need for uniform regulations to be accepted collectively by companies who choose to use social-media platforms for marketing and advertising purposes. The FTC should keep up-to-date with advertising practices on up-and-coming social-media platforms in order to provide the right amount of guidance. Setting clear, minimum standards would provide foreseeability, reliability, and development of what constitutes as sufficient disclosures at a time where new technologies surrounding social-media platforms are continuing to grow. This will allow the FTC to be flexible and actively involved enough to be aware of the evolving online advertising space that companies are entering into. In the meantime, companies should adhere to the guidelines provided by the FTC. If the FTC's guidelines do not cover a particular area, it is best practice to be stricter with disclosure requirements to ensure compliance.