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Social Media Advertising

2016 is shaping up as a year of increased enforcement by the Federal Trade Commission and the Food and Drug Administration against misleading advertising on social media. The agencies already have issued numerous warning letters over companies' marketing practices. Recently updated FTC guidance on advertising is a signal that more enforcement is in the offing. The Consumer Financial Protection Bureau, meanwhile, appears ready to follow suit. Advertisers will have to be mindful of relevant federal rules to withstand any increased scrutiny by watchful regulators.

Federal Agencies Train Spotlight on Social Media Ads

Federal regulators are poised to ramp up their policing of marketing on social media in 2016, causing more headaches for advertisers.

The Federal Trade Commission and the Food and Drug Administration are already active in the space, and the Consumer Financial Protection Bureau is showing signs of following suit.

In recent years, the FTC and FDA have written or drafted guidelines and issued dozens of warning letters about marketing activities. Now, advertising attorneys—who tell Bloomberg BNA that the FTC's updated guidance on social media endorsements is a sure sign of heightened enforcement to come—expect both agencies to step up efforts, joined by the CFPB.

Increased enforcement usually follows new guidance, according to Andrew Lustigman, a partner at Olshan Frome Wolosky LLP in New York. “The FTC telegraphs that it will bring increased enforcement in a given area after first announcing guidance, potentially bringing one or more enforcement actions to demonstrate that the agency is serious,” he told Bloomberg BNA.

An FDA spokesperson told Bloomberg BNA that the agency couldn't speculate on future actions, except to say that it may send a warning letter to a company or impose an injunction if a product promotion results in a violation of a statute or regulation. An FTC spokesperson declined to comment on that agency's specific enforcement agenda. The CFPB did not respond to requests for comment.

Advertisers using social media must, under FTC rules, disclose any facts necessary to ensure their

claims are accurate, honest and not misleading, including disclosing the existence of any material connection between an endorser and the product or its seller.

To avoid warning letters and possible enforcement actions, companies should review their social media advertising campaigns and remove content inconsistent with FTC rules, and advertisers should make reasonable efforts to monitor all endorsers who post on their behalf.

“I would expect stepped up enforcement against non-compliant sponsored social media posts to be around the corner.”

ANDREW LUSTIGMAN, OLSHAN FROME WOLOSKY LLP

Social media marketers must be prepared for heightened federal scrutiny, said Bloomberg BNA's Social Media Law & Policy Report Board Member Marc Roth, a partner at Manatt Phelps & Phillips LLP in New York. “The FTC is on the beat, and it is actively looking at every industry,” he said.






Fresh Guidance Heralds Enforcement Activity. The FTC updated its “Frequently Asked Questions” on social media endorsements last May, underscoring the need for advertisers to disclose all material connections between advertiser and endorser on social media plat-






forms such as Twitter, Facebook, Pinterest and YouTube (20 ECLR 830, 6/10/15).





So far, the FTC and FDA have been the most active agencies watching social media marketing. The FTC has charged numerous companies over the past few years with deceptive social media practices. The FDA has issued 24 warning letters in the past three years, challenging promotional claims for FDA-regulated products on Facebook and other social media sites.





Although the CFPB has not yet taken action directly related to social media marketing, Anthony DiResta, a partner at Holland & Knight in Washington D.C., told Bloomberg BNA that he expects that agency—which looks into all forms of deceptive advertising by financial services companies—to begin scrutinizing social media as well.





FTC Timeline

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May 29, 2015    

FTC updates its FAQs to address the challenges of making disclosures on specific social media platforms, including Twitter, Facebook, Pinterest and YouTube.
- 
June 23, 2010    

FTC publishes an informal, frequently asked questions page on the guides, addressing general questions involving bloggers and social media.
- 
Oct. 5, 2009   

FTC revises the guides to ensure they apply to new media formats, such as blogs and social media.
- 
Jan. 18, 1980   

FTC adds to the guides three new sections on general considerations, consumer endorsements and disclosures of material connections.
- 
May 21, 1975   

FTC issues the “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” with regard to ads found on TV, in print, radio and word-of-mouth marketing.

A BNA Graphic/ftcc16g1

FTC Officials Speak Out. Following the FTC’s new guidance, top agency officials publicly highlighted the commission’s interest in social media marketing practices.

On Dec. 22, the FTC issued an enforcement policy statement and accompanying guidance on native advertising and in what scenarios disclosures may be necessary to avoid deception (21 ECLR, 1/6/16). The term “native advertising” refers to advertising that mimics the medium in which it is distributed. Examples cited by the FTC include advertising that appears to be news on social media platforms, or advertising that is embedded in social media content such as in a YouTube video.

On Nov. 16, the FTC announced in its fiscal year 2015 financial report that it will continue in 2016 to bring enforcement actions against deceptive advertisements in social media. The agency said it would prioritize investigating the use of false online reviews, undisclosed material connections with reviewers, and prohibitions on negative reviews.

On Oct. 6, FTC Bureau of Consumer Protection Director Jessica Rich told a Word of Mouth Marketing Association gathering that the FTC will continue in 2016 to focus on social media endorsements, as consumers are increasingly becoming enlisted in social media campaigns to tout products. “In general, when there are material connections (like payment) between a marketer and an endorser, they must be disclosed clearly and prominently,” Rich said.

“It’s pretty clear that the FTC now accepts social media marketing as an integral part of its agenda,” said DiResta.

Peter Brody, a partner at Ropes & Gray LLP in Washington D.C., echoed DiResta’s sentiment. “The FTC has really been warning the industry for a while,” he told Bloomberg BNA.

DiResta and Brody are advisory board members of Bloomberg BNA’s Social Media Law & Policy Report.

FDA Enforcement Also Signals Increase. Advertisers in regulated industries should also check their marketing efforts against guidance from the FDA, said Benjamin M. Zegarelli, a partner at Epstein Becker Green P.C. in New York.

“The presence of social media guidance means that the FDA is watching promotional communications closely,” Zegarelli told Bloomberg BNA Dec. 2. “The FDA’s monitoring is certain to continue as promotional communications over social media become more prevalent, leading to a likely increase in enforcement letters addressing company communications on social media,” he said.

On Aug. 7, 2015, the FDA sent a warning letter to drugmaker Duchesnay Inc. over Kim Kardashian’s social media post that endorsed the morning sickness drug Diclegis. The paid endorsement was false or misleading, the FDA asserted, because it failed to communicate risk information associated with the drug’s use. The FDA asked the drug company to stop what the agency called misbranding of the drug and to submit a plan of action to disseminate corrective advertising. Following the warning, Kardashian posted corrective statements on Instagram, Facebook and Twitter with the hashtag #CorrectiveAd.

The FDA's warning letter sent a signal that the agency will be vigorously enforcing social media marketing practices, and that brands should be actively monitoring their endorsers' social media posts, Lustigman said.

Zegarelli said the FDA will continue to watch social media closely in the new year.

“We have no reason to believe the FDA will slow down issuing warning letters generally around violative promotional claims made in the context of social media.”

NIKKI REEVES, KING & SPALDING

“The FDA will not hesitate to bring enforcement actions against companies that use social media platforms in ways that are inconsistent with the FDA's traditional limitations on product promotion,” he said.

In Congress, Rep. Billy Long (R-Mo.) introduced legislation May 22 that would require the FDA to issue up-to-date regulations on the dissemination of information about medical product information on social media. The bill, H.R. 2479, is pending in the House Energy and Commerce Committee.

Advertisers Should Watch CFPB Too. Advertisers should also study the social media guidance released by the Federal Financial Institutions Examination Council (FFIEC), DiResta said. The FFIEC is an interagency body empowered to prescribe uniform principles and standards for the Consumer Financial Protection Bureau.

The CFPB's recent crackdown on marketing services agreements is a sign that the agency will soon turn its attention to violations of the FFIEC's social media guidance, Debbie Hoffman, chief legal officer of Digital Risk in Maitland, Fla., told Bloomberg BNA.

“That enforcement will naturally lead to a ripple effect of enforcement over social media,” Hoffman said.

The CFPB has jurisdiction over banks, credit unions and other financial service providers. However, it would be a good idea even for companies outside the CFPB's jurisdiction to study the agency's actions, DiResta said. Its guidance serves as a broad “communications policy” that ensures all communications made on behalf of a company are accurate, transparent and compliant with all consumer protection regulations, he said.

“I would not be surprised in 2016 if the government—both the FTC and the CFPB—looks for more rigorous policies concerning their advertising compliance during investigations and supervisory examinations,” he said.

Steps Marketers Can Take Now. Enforcement activity related to social media marketing has come in the form of warning letters from either the FDA alone or, in some instances, jointly from the FDA and FTC.

According to Kristi Wolff, special counsel at Kelley Drye & Warren LLP in Washington D.C., the FTC commonly engages in private investigations of a company's advertising, including advertising on social media platforms. It will file enforcement actions in cases of decep-

FTC Enforcement Over Disclosure of Material Connections

- App maker who failed to disclose his connection with the company in promoting his research must stop representing that the app is backed by science and must make the required disclosures in the future (*In re Carrot Neurotechnology, Inc.*, FTC, No. 142 3132, consent order accepted 9/17/15) (20 ECLR 1318, 9/23/15).

- Online entertainment network must refrain from posting YouTube videos by paid “influencers” endorsing an Xbox game console (*In re Machinima Inc.*, FTC, No. 142 3090, consent order accepted 9/2/15) (20 ECLR 1267, 9/16/15).

- Video game company and its advertising agency must disclose the material connection between any endorser of its PlayStation game console (*In re Sony Computer Entertainment America LLC*, FTC, No. C-4514, final order issued 3/24/15, *In re Deutsch LA, Inc.*, FTC, No. C-4515, final order issued 3/24/15) (20 ECLR 521, 4/8/15).

tive commercial practices. Settlements in enforcement actions provide good guidance for the entire industry.

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ANTHONY DiRESTA, HOLLAND & KNIGHT

For example, the FTC obtained in September a settlement order barring a video game advertiser from posting YouTube videos by paid influencers endorsing the Xbox One system without disclosing the material connection (20 ECLR 1267, 9/16/15).

In the Xbox One case, the settlement order directed the advertiser to clearly and prominently disclose all material connections between an endorser and the advertiser in future influencer campaigns. It also ordered the advertiser to establish, implement and maintain a system to monitor its endorsers' disclosures and to conduct a review of any endorsement prior to compensating the influencer. The advertiser must continue to monitor the endorsements after they have been posted and conduct a second review within a 90-day timeframe.

Wolff said that, over the last 18 months, there has been an increase in industry-wide or issue-specific warning letters from the agency. Last year, the FTC—in an initiative called “Operation Full Disclosure”—sent warning letters to more than 60 companies that allegedly failed to make adequate disclosures in their televi-

sion and print advertising (19 ECLR 1256, 10/1/14). Companies can expect an increase in investigations over social media advertising practices as well, she said.

Wolff said these government efforts are likely to continue.

Nikki Reeves, a partner at King & Spalding in Washington D.C., told Bloomberg BNA that she expects the FDA to continue issuing warning letters in the new year. "We have no reason to believe the FDA will slow down issuing warning letters generally around violative promotional claims made in the context of social media," she said.

"The FTC is on the beat, and it is actively looking at every industry."

MARC ROTH, MANATT PHELPS & PHILLIPS LLP

Companies with robust advertising review processes review all content before posting to social media, Wolff said. "Companies that aren't reviewing social media content as part of their regular advertising review processes should start doing so and work on removing content that is not consistent with current guidance," she added.

Advertisers should start to make more disclosures and better distinguish between sponsored and unsponsored content, Wolff said.

Both companies and advertisers should also monitor their endorsers to ensure the required disclosures are being made. According to FTC guidance, the activity of a rogue blogger would not likely be the basis of an enforcement action if a company has a reasonable training and monitoring program in place.

Updates to FTC Guidance. Section 5 of the FTC Act, 5 U.S.C. § 45, prohibits unfair or deceptive acts or practices in or affecting commerce.

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BENJAMIN M. ZEGARELLI, EPSTEIN BECKER GREEN P.C.

The FTC's 2009 Guides Concerning the Use of Endorsements and Testimonials in Advertising address the application of this provision to the use of endorsements in advertising. The guides provide, among other things, that endorsements must reflect the honest opinions of the endorser and that any material connection to an advertiser must be disclosed when such a relationship is not apparent from the context of endorsement.

The FTC returned to the topic of endorsements in May 2015, this time with an emphasis on endorsements made on social media platforms. The agency said that a

disclosure should be in a place where the majority of the intended audience will notice it. Individuals who are part of a paid campaign to promote a product likely need to disclose that fact when pinning a photo, sharing a link, or even clicking a "like" button. Because Facebook's "like" button doesn't offer space for a clear and conspicuous disclosure of a connection between the advertiser and the endorser, the use of paid endorsers to "like" a product could be misleading, the agency said in its updated guidance.

Lustigman said that, as a result of the FTC's guidance update, he expects the agency to rev up enforcement against endorsements made without the proper disclosures. "I would expect stepped up enforcement against non-compliant sponsored social media posts to be around the corner," he said.

Guidance From FDA, FFIEC. Congress in 2012 directed the FDA to issue guidance on product promotions via social media, passing the Food and Drug Administration Safety and Innovation Act. Section 1121 called on the FDA to issue guidance on social media advertising.

The FDA released draft guidance on social media in 2014 (19 ECLR 819, 6/25/14). It recommended that, on character- and space-limited media, the content of the risk information should—at a minimum—include the most serious risks associated with the product. Manufacturers should also include in their communications a direct hyperlink to a webpage devoted exclusively to the communication of risk information.

The FDA is planning to issue new draft guidance on the use of hyperlinks to third-party websites in social media product promotion, according to its 2015 guidance agenda.

The FFIEC's guidance, issued in 2013, recommends that financial institutions take steps to ensure that their social media advertising complies with all existing laws, including Section 5 of the FTC Act (18 ECLR 1085, 6/5/13). Companies should ensure the information they communicate on social media is accurate, consistent and not misleading, according to the FFIEC.

The guidance also provides that, because employee communications via social media may be viewed by the public as reflecting the employer's official policies, companies should establish internal rules to ensure employees make all legally required disclosures.

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The FTC's endorsement guides are available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

The FFIEC's social media guidance is available at https://www.ffiec.gov/press/PDF/2013_Dec%20Final%20SMG%20attached%20to%2011Dec13%20press%20release.pdf.

The FDA's draft social media guidance on benefit and risk information is available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM401087.pdf>.