



Ask Us Anything: Venable Attorneys Answer Your Questions About All Things Advertising and Marketing



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Agenda

- Email Marketing
- Social Media Marketing and Customer Reviews
- Competitor Challenges
- Your Questions



Email Marketing

Email Marketing

CAN-SPAM Act



- The CAN-SPAM Act is the federal law that regulates commercial email messages.
- CAN-SPAM's main provisions for commercial electronic messages:
 - No false or misleading header information.
 - No deceptive subject lines – must indicate commercial nature of message.
 - Provide opt-out method – honor in 10 business days.
 - Include sender's valid physical postal address.
- Advertisers may be liable for actions of affiliates and third-party email vendors.

Email Marketing

California Anti-Spam Act



- Applies to person or entity from advertising in a commercial email sent from California or sent to a California email address.
- Enforced by private parties: A violation of Section 17529 can be penalized with actual damages, or statutory damages of up to \$1,000 per email, up to \$1 million.
 - Due Care Defense
- Risk to companies depends on their roles in email marketing.

Email Marketing

California Anti-Spam Act



- Prohibits sending email advertisement containing a third party's domain name without the permission of the third party.
- Prohibits sending email advertisement containing falsified, misrepresented, or forged header information.
- Prohibits sending email advertisement with a misleading subject line.
- **NOTE:** Other states have similar anti-spam laws that are enforced by private plaintiffs.

Email Marketing: Your Questions

- *Aren't state laws governing email marketing preempted?*
- *Don't state laws only prohibit "falsity"? Why should I worry about state email marketing laws?*
- *Is email marketing the "new TCPA"?*

Social Media Marketing and Customer Reviews

Social Media and Influencer Marketing

- Online marketers must disclose
 - Any “Material Connection”:
 - Payment
 - Free product
 - Sweepstakes entry
 - Other things of value
 - Business or family relationship to seller
 - Employee relationship
 - That would not be expected

Part IV

Federal Trade Commission

16 CFR 255

**Guides Concerning the Use of
Endorsements and Testimonials in
Advertising Federal Acquisition
Regulation; Final Rule**

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.

Social Influencers

- If the existence of a financial interest will not be clear to the audience, a celebrity paid to endorse a product or service **MUST** disclose his/her interest.
- Disclosure must be made in the same format (orally, written, etc.) as the triggering claim.
- Disclosures must be made ***every time*** a celebrity appears in a broadcast or print advertisement for a product.
- FTC's Disclosures 101 for Social Media Influencers:
https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf

Note: simply disclosing endorser's relationship with company in the "About" page on the endorser's website is not likely to be sufficient.

Social Influencers

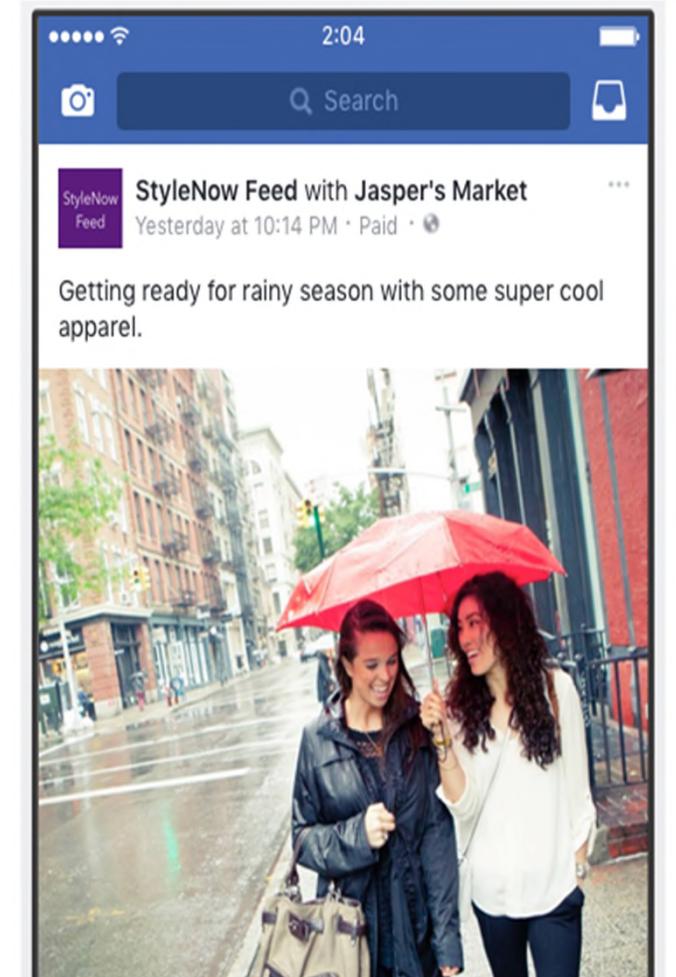
- Influencers, bloggers, or “word of mouth” (or other social media) marketers (including celebrities) who receive money or in-kind payments, including product samples, must disclose.
- Includes any “material connection” that would not be expected by the consumer:
 - Payment
 - Free product
 - Other things of value, e.g., loyalty points
 - Other business, employment or family relationship
- **Marketer and influencer** liability
- The company must:
 - (1) have influencer policy/procedures
 - (2) monitor compliance
 - (3) enforce as necessary – and make sure its *agencies* are following rules, too.
 - Important when employees are blogging on their own time, too – need to make policies clear, as well as fact that employees should disclose their affiliation when talking about their employer.

How to Disclose

- Disclosure of material connection (i.e., financial, employment, family).
- In a way that is hard to miss (not buried in a string of hashtags, at the beginning and not end of disclosure, not just in written description but in middle of or early in post).
 - A hyperlink or button that says “Disclosure, Legal” that links to full disclosure is **not** sufficient.
- Treat sponsored tags, including tags in pictures and videos, like any other; repeated if necessary.
- On image-only posts, superimpose disclosure.

The Do's and Don'ts for Social Media Influencers	
FTC RECOMMENDATIONS	PRACTICES TO AVOID
 <p>Clearly DISCLOSE when you have a financial or family relationship with a brand</p>	 <p>DON'T ASSUME followers know about all your brand relationships</p>
 <p>Ensure your sponsorship disclosure is HARD TO MISS</p>	 <p>Don't assume disclosures BUILT INTO social media platforms are sufficient</p>
 <p>Treat sponsored tags, including tags in pictures, LIKE ANY OTHER endorsement</p>	 <p>Don't use AMBIGUOUS DISCLOSURES like "Thanks," #collab, #sp, #spon, or #ambassador</p>
 <p>On image-only platforms like Snapchat, SUPERIMPOSE DISCLOSURES over the images</p>	 <p>Don't rely on disclosures that people will see only if they CLICK "MORE"</p>

Source: Federal Trade Commission



How to Disclose: Current Best Practices

Naughty List	Nice List
[Brand], [brand]ad	Ad, advertising, paid advertising, [Brand]Ad
Sp, spon	Sponsored
Ambassador, Employee	[Brand]Ambassador, [Brand]Employee [Brand]_Ambassador, [Brand]_Employee
Partner	[Brand]Partner [Brand]_Partner
Thanks, Thank You, Thanks[Brand]	Thanks [Brand] for gifting me/Thanks[Brand] for the free [detail the stuff given]
Buried in string of hashtags and/or after “[more]”, at end of tweet or post	Right at beginning of tweet or post or in first two lines, alone or at beginning of a few hashtags
Platform disclosure alone	

Customer Reviews

- FTC is cracking down on disclosures with respect to reviews.
- The FTC contends that it is misleading not to disclose consumers were paid or given free product to try in exchange for their review.
 - Must disclose all “material connections” in connection with reviews and testimonials
 - FTC says:
 - Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if you didn’t intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It’s also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than would reviewers who bought the products. If that’s the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers, you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

Managing Negative Reviews: Consumer Review Fairness Act

- Consumer Review Fairness Act, 15 U.S.C. § 45b
 - Protects consumers' ability to share their honest opinions about a business's products, services, or conduct, in any forum, including social media
 - Cannot prohibit honest reviews via contracts or threaten legal action over consumers
 - Cannot impose a penalty or fee against someone who gives a review
 - Cannot require people to give up all of their intellectual property rights in the content of their reviews.
 - Types of reviews that are protected: online reviews, social media posts, uploaded photos, videos, etc.
 - Watch out for online provisions, terms that prohibit or punish negative reviews.
 - Doesn't apply to employment contracts/independent contractors; libelous or harassing, obscene conduct, legally compelled conduct, clearly false or misleading statements, or reviews that are simply unrelated.

CRFA Enforcement

- FTC Action Enforcing the CRFA (15 U.S.C. § 45b)
 - Complaint, *FTC v. Shore to Please Vacations LLC* (Docket No. C-4683). The company’s rental contract included non-disparagement provision under its disclaimers section. Under the provision, any vacationer who posted a review giving the property less than a “5 star or absolute best rating” owed the company at least \$25,000.
 - Owner filed lawsuits against renters who posted negative reviews, asserting in his demand letters that by breaching the non-disparagement provisions, the renters owed him \$25,000 plus attorneys’ fees.
 - Proposed settlement orders include: injunctive relief requiring that owner notify affected consumers that the challenged contracts provisions are void and that they have the right to post honest reviews online; dismissal of lawsuits against renters with prejudice; and compliance and reporting requirements.

Social Media Marketing and Customer Reviews: Your Questions

- *Can we use aggregate star reviews when some of the reviewers were compensated?*
- *What is the current status of the FTC's call for comments on endorsements and testimonials?*
- *Is the FTC targeting influencers?*



Competitor Challenges

Competitor Challenges

- *My competitor is making false advertising claims. What can we do about it?*
 - Lawsuit under the Lanham Act and state “mini FTC” statutes
 - Challenge before the National Advertising Division
 - Send demand letters
 - Government petition / outreach

Competitor Challenges

- Lanham Act lawsuit
 - Federal governing trademark infringement, trademark dilution, and false advertising
 - Provides for multiple potential types of relief
 - Injunctive relief (including preliminary relief)
 - Damages (including actual damages and statutory damages)
- Lawsuit under state “mini FTC” laws
 - Laws prohibiting unfair and deceptive acts and practices, including false advertising.
 - Relief varies by statute.
 - State laws vary as to whether businesses are permitted to file lawsuits under the private right of action

Competitor Challenges

- Filing a challenge before the National Advertising Division (NAD)
 - Voluntary self-regulatory program that examines advertising claims.
 - Issues findings as to whether claims are substantiated and recommendations for modifying or discontinuing claims.
 - Non-compliance with an NAD decision or failure to participate in the NAD process results in a referral to the relevant agency, including the Federal Trade Commission.

Competitor Challenges

- Demand letters
 - Send a demand letter alleging violations of certain laws, rules, and regulations and threatening legal action.
 - Some state mini-FTC laws require pre-suit demand before a suit can be filed.
 - **Before sending demand letter**, are you willing to back it up?
- Petition the government / outreach
 - Contact government agencies calling attention to the competitors' activities.
 - The agency to be contacted depends on the type of violation.

Other Questions

Laws Governing Automatic Renewal Programs

- *Are there any recent updates in laws governing automatic renewal programs?*
- *Have there been any recent enforcements under the Restore Online Shoppers' Confidence Act (ROSCA)?*
- *What are the FTC, state regulators, and private plaintiffs targeting in this area?*

Selling Products in an Uncertain Regulatory Framework

- *We're thinking about selling a product that has an uncertain regulatory framework, but for which there appears to be a great consumer demand. We think that even if we make no claims about the product at all, it'll still sell like crazy because the public seems to believe there is some benefit to the product, even if the only claim is the name of the product or it "contains" the ingredient the public is clamoring for.*
 - *Can knowledge of this external circumstance be the basis for an allegation by an enforcer that the offering is deceptive because we have a duty not to sell into a self-deluded market?*

Consumer / Customer Surveys

- *What are the dos and don'ts of using consumer or customer surveys?*

FTC and CFPB Enforcement

- *When does the FTC or CFPB target individuals?*
- *Does the FTC or CFPB target in-house counsel?*

Disclosures

- *What are the proper use of disclosures in advertising?*
- *When can we use a hyperlink to provide product disclaimers?*

Loyalty Programs

- *What are the risks of loyalty and rewards programs for merchants and for service providers?*

Nonprofits and Cause Marketing

- *Do restrictions on telemarketing and email marketing apply to nonprofit organization marketing messages?*
- *Can you discuss risks surrounding cause marketing?*

Other Questions? Contact Us



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