

Understanding the Risks Associated with Social Media Marketing

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Healthy food and beverage (“F&B”) companies frequently use social media to advertise. When used appropriately, social media campaigns can be incredibly effective tools to help emerging F&B companies reach target consumers, create buzz, and generate sales. Due to the informality of social media, forgetting that a brand’s social media posts are subject to the same advertising rules as more traditional forms of advertisements, like television commercials or printed ads, is easy.

But it is just a post!...

All advertisements, including social media posts, must be truthful and may not mislead consumers. The Federal Trade Commission (FTC) and Food and Drug Administration work together to investigate and, when appropriate, act against companies that break these rules. Claims that F&B products will improve health or reduce the risk of disease often piques the agencies’ interests. Emerging F&B companies should ensure their advertisements accurately characterize the nature of a product, its ingredients, and its intended effect. Any claim that a product has a specific health benefit, should be supported by scientific studies.

For example, Teami LLC, a wellness company, once claimed: “For centuries, tea has been used in alternative medicine to treat everything from cancer to constipation. The human body needs to have all the necessary vitamins and minerals [in order to](#) protect itself from infection and illness. The ingredients in Teami Profit have been shown to: ... Fight against cancerous cells.” The FTC cited this language and over a dozen other claims in its suit against Teami for false health claims that their teas would help consumers lose weight, fight cancer, treat colds, and prevent flu. Teami lacked reliable scientific evidence to back up its assertions and was ultimately required to pay [nearly a](#) million dollars in fines and reimbursements consumers who purchased its teas.[1]

Influencers Should Always Disclose Relationships with a Brand

Food influencers are extremely popular on social media and can help emerging F&B companies attract and retain customers. Influencers engaged to market products must comply with the FTC's transparency and material disclosure rules. If an influencer fails to adhere to these requirements, the company whose products were improperly marketed may be fined or penalized as a result.

Influencer must also disclose any "material connection" to the brand to avoid deceptive advertising. Certain material connections are not surprising: the influencer must tell their audience if they have a personal, family, employment, or financial relationship with the company whose products they are discussing. But some material connections are less obvious than others. Influencers must disclose the receipt of free or discounted products, publicity, or other benefits from the company. In the Teami lawsuit, the FTC claimed that the social media influencers Teami engaged failed to adequately disclose their connections to Teami.

A disclosure must be obvious and easy for the target consumers to see and understand. A statement like: "Thank you to BRAND X for this delicious drink" is inadequate because it is ambiguous. The statement could mean that the influencer is grateful to the brand for manufacturing a good beverage, or it could mean that the influencer received the beverages for free. A better approach would be: "BRAND X sent me a free case of this delicious drink." This type of statement clearly conveys that the influencer received products for free.

The disclosure should also be "conspicuous." This means that for video streaming platforms, the disclosures should appear on the screen long enough to be read and spoken at a cadence that is easy to understand. If the disclosure is used in a post caption, it should appear before the ellipses or "more" button. Brands should also consider using platform tools in addition to disclosure statements to identify sponsored content, such as Instagram's "Paid Partnership with" tag and TikTok's "Branded Content" toggle.

Beware: Each post is an independent advertisement. This means the required disclosures should appear on every post made by an influencer on behalf of the F&B company. According to the FTC, even relatively modest engagements such as tags, likes, pins, and similar methods of showing support for a brand or product may be considered endorsements subject to disclosure rules.

Don't Post Creative Content without Permission

Companies advertising on social media should also understand some basic principles of copyright law to avoid infringement. The creator of any creative content (photograph, image, video, blog post, etc.) typically owns the right to their creative work once it is fixed in a tangible medium (think "posted"). If a company intends to use another's work as part of its marketing strategy, it should always get the creator's explicit permission. For example, a food and beverage company should never repost a third-party image or video of a person eating, drinking, or reviewing its products unless it first receives permission from the content creator to utilize the work. Giving the original content creator credit for the content creation is not enough and is a common misconception. While it is tempting to [repost](#) content developed by other social media users, a company should always use its own content unless it first receives explicit permission to use another's creative work.

Conclusion

Social media marketing is a proven and powerful tool for emerging F&B companies to develop brand recognition and attract and retain customers. While social media marketing can be incredibly

valuable, it brings legal risks. Companies can avoid costly missteps if they understand these risks and exercise caution.

[1] <https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3174-teami-llc>

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