

## The FTC Cracks Down On March 2015 Lord & Taylor Social Media Launch: Native Advertisers Beware!

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Recent efforts by the Federal Trade Commission (“FTC”) to regulate the use of native advertisements — a popular and growing advertising tool— have resulted in the first enforcement action. On March 15, 2016, the FTC settled charges brought against New York retailer Lord & Taylor, LLC (“Lord & Taylor”), arising from Lord & Taylor’s March 2015 social media campaign targeted at 18 to 35-year old women its launch of its new Design Lab Collection, signaling the FTC’s intention to more heavily regulate the use of social media influencers to advertise fashion apparel. The FTC complaint alleged that Lord & Taylor promoted the launch of the Design Lab Collection and a featured Design Lab paisley dress design through native advertising, including a Lord & Taylor-sponsored article in the online publication *Nylon*, and a *Nylon* Instagram post that was approved by Lord & Taylor. The FTC complaint alleged that Lord & Taylor paid fifty online fashion “influencers” to post Instagram pictures of themselves wearing the same Design Lab paisley dress. A copy of the [current order](#) and [complaint](#) are attached.

The FTC complaint also alleged that Lord & Taylor failed to disclose that the *Nylon* article and Instagram post were contracted and paid-for promotions. The FTC complaint alleged that Lord and Taylor also approved the Instagram *Nylon* post but did not require a disclosure. With regard to the fifty influencers, the FTC also alleged that Lord and Taylor neglected to disclose that Lord & Taylor had given each influencer the dress, as well as a payment between \$1,000 and \$4,000, in exchange for their endorsement and the posting of a photo of themselves wearing the dress on Instagram or another social media site. While the influencers were free to style the paisley dress as they wanted, Lord & Taylor contractually obligated each influencer to use the Instagram user designation “@lordandtaylor” and the hashtag “#DesignLab” in the caption of their photo posting. While Lord & Taylor also pre-approved each proposed post, it failed to require the influencers to disclose that Lord & Taylor paid them to post the photo and no influencers made any such disclosures. The Instagram portion of the social media campaign was very successful and reached 11.4 million individual users in just more than two days, resulting in 328,000 brand engagements with Lord & Taylor’s Instagram handle, and the sell-out of the featured paisley dress.

The proposed FTC settlement order prohibits Lord & Taylor from “misrepresenting, in any manner, expressly or by implication, that an endorser of such [Lord & Taylor] product or service is an independent user or ordinary consumer of the product or service” in connection with the advertising

labeling, promoting, offering for sale, sale or distribution of any product or service. Lord & Taylor also is required to “clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists, between such [Lord & Taylor] endorser ad.” Lord & Taylor also is required to establish a monitoring and review program for its endorsement campaigns, which includes provisions, inter alia, for terminating any endorser with a material connection to Lord & Taylor who has misrepresented, in any manner, his or her independence or impartiality or failed to disclose, clearly and conspicuously, in close proximity to the representation, a material connection between the endorser and Lord & Taylor. The proposed settlement agreement is subject to a 30-day comment period and would put Lord & Taylor’s future endorsement campaigns under a monitoring and review period.

This action and the proposed consent order is the first such order following the issuance by the FTC of its Enforcement Policy Statement regarding native advertising in December 2015. The proposed settlement order also reinforces the FTC Endorsement Guides, which require disclosure as to the nature of an individual’s involvement as part of a sponsored campaign or any compensation received that might impact the credibility of a review, whether it is free or discounted purchases or being entered into a sweepstakes for a significant price. See FTC Endorsement Guides. As the FTC has explained in Native Advertising: A Guide for Business: “The watchword is transparency. An advertisement or promotional message shouldn’t suggest or imply to consumers that it’s anything other than an ad.” This case also demonstrates the FTC’s growing focus on native advertising. If there is a connection between a company and the endorser that might materially affect the credibility or weight given by the consumer to the endorsement, it should be disclosed. See FTC Endorsement Guides. Disclosures must be made in clear and unambiguous language as close to the endorsement or advertisement as possible, in a font or color that is easy to read, in a shade that stands out against the background, which disclosure is visible or audible.

It is important to remember that every company using social media campaigns featuring endorsements should have an effective compliance program, which includes:

1. Careful explanation to social media influencers and other participants as to which claims can be supported by the company;
2. Instruction to social media influencers and participants about the legal obligation of transparency and the need for proper disclosures;
3. Periodic review and searching of social media posts to ensure that social media guidelines and instructions are being followed; and
4. Follow-up and actions to be taken if adherence to social media guidelines is not maintained.

Since this is the first settlement order of its kind following the FTC’s recent statement on native advertising, there are sure to be further developments and challenges, which Sheppard Mullin will continue to report on through our Fashion, Apparel and Beauty Blog. Brands should comply with FTC guidelines in all of its advertising practices and it remains to be seen how aggressively the FTC will enforce its guidelines in the future with respect to native advertising and social media influencers and bloggers.

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