

## Using Hashtag #Disclosures in Social Media Advertising

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The Federal Trade Commission (“FTC”) has been cracking down on brands for paying Instagram users to endorse their products or to share brand content without disclosing the relationship. Indeed, the recent settlements the FTC has entered into with Lord & Taylor, LLC. (“Lord & Taylor”) and Warner Bros Home Entertainment Inc., make clear that the FTC is paying close attention to endorsements of all kinds – whether by celebrities, sponsors, or paid “influencers.”

While paying an influencer up to \$4,000 for an endorsing post without properly disclosing the relationship (which was the situation in the Lord & Taylor case) is a clear violation of FTC rules, the line becomes increasingly blurred when the compensation for a praiseful Instagram post is not a payment, but rather free merchandise, an early look at a new video game, or even the expectation of some kind of payment in the future. Add into the mix non-celebrity advertisers that lack clearly defined sponsorship relationships with brands and conspicuous disclosure becomes nonexistent.

Non-celebrity driven brand messaging in social media has been on the rise and will likely continue to increase. This type of advertising brings authenticity at a fraction of a celebrity advertiser’s price tag. Often, brands simply give away free merchandise with little or no strings attached. While influencers may feel pressured to give a flattering review, they may not be obligated to do so. Regardless, consumers have a right to know whether the newest elevated blogger du jour is a true fan who selected and paid for the product she is reviewing or whether she was provided the product at no charge in exchange for writing a review. Thus, it is not surprising that FTC has been vocal about its intent to pay close attention to how these material connections between brands and influencers are disclosed to the public. And it’s not just the FTC that is growing concerned. Consumer advocacy groups, like Public Citizen, have been bringing awareness to the seemingly unfair advertising practices on social media and requesting that the FTC scrutinize influencer content more closely – especially on Instagram. In their letter submitted on September 7, 2016, Public Citizen called for an FTC enforcement action against not just the paid influencers on Instagram, but also the brands that engaged these non-disclosed influencers. While it is unclear what action, if any, the FTC has or will be taking, inevitably, this heightened scrutiny may very well result in some unexpected penalties to brands themselves.

In the meantime, it is a good practice for brands to disclose their relationships with influencers on

social media—even if that relationship is not clearly defined. This is especially important when brands rely on these endorsements by re-posting influencer content. For the avoidance of doubt, consumers need to be informed whenever there is a “material connection” between brands and influencers. A common way to make this disclosure in social media posts is by using hashtags. A hashtag (words or phrases preceded by a pound (#) sign) has become an integral part of social media communications, providing not only the relevant details advertisers want users to see, but also crossing over into the not so glamorous side of legal disclosures. Originally created to simplify searches within social media networks by providing a convenient way to label posts and categorize content, hashtags serve the needs of social marketing in a most unique way. Words or short phrases following a hashtag symbol not only can be powerful marketing tools, but also valuable FTC compliance allies.

The hashtag disclosures that are required must be presented “clearly and conspicuously.” Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. While the FTC admits that there is no one way to make a disclosure effective, it has been acceptable for advertisers to use hashtags like #ad or #sponsored. Of course, the more specific and clear the hashtag is the more likely that it will be FTC compliant. For example, #spon has been criticized for not providing enough disclosure because most consumers would not instantly associate it with “sponsored” content, while #sp may be misleading, as some use it in social media to denote ‘sexual partner.’

Here are some simple rules that can be followed by brands and their influencers to avoid FTC policy violations:

- Disclose any material connection between influencer and brand regardless of its type (e.g., payment, future payment, early access rights, free merchandise);
- Disclose any material connection each and every time an endorsement is made;
- Use clear hashtags like #ad, #sponsored, #sponsoredpost, #workingwith;
- Avoid confusing hashtags like #sp or #spon;
- Merely thanking a brand or influencer is not enough without a hashtag disclosure of the relationship;
- Do not bury the hashtags at the bottom of a post. Place them at the beginning (and, in the case of a video make sure the disclosure appears early in the video and is prominently seen and/or heard).

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