

insights

TYPES NOT MAPPED YET October 26, 2017 | TTR not mapped yet | Mark Sableman

FTC: Even implied messages need explicit disclosures

On the Internet, it's not just what you say, but also what you imply. Social media comments, video and image posts, and even tags and "likes," can carry implied messages, which may create legal liability.

FAQs recently issued by the Federal Trade Commission, relating to the agency's advertising endorsement rule, flesh out the basic principle that any significant connection between an endorser and a marketer should be disclosed – no matter what the means of expression or medium used.

The FTC adapted its long-standing endorsement rule to social media in 2009. But several issues continue to puzzle many people. First, what kinds of posts are viewed as endorsements? Second, what circumstances short of direct payments require disclosures? Finally, how can the circumstances of endorsements be disclosed in the limited space of social media? The agency created the new FAQs to answer those questions.

Let's look initially at some of the kinds of social media posts that may fall into the FTC's "endorsement" category:

- A fair and favorable review in a blog.
- A video uploaded to YouTube, showing the user using the product.
- A photo of the product posted to Pinterest.
- A tweet of a short review/description of the product.
- A tag of the product in a photo on the user's Facebook page.
- The user mentions, truthfully, a desire to own the product.

None of these posts states, "I endorse the product." But in all of them, the FTC discerns the implied message, "I endorse this product." And thus all these posts are subject to the FTC endorsement rule, and will require disclosures of some kind if the author received anything of value from the seller.

The FTC has good reason for looking beyond the literal words of the postings. Messages, even strong ones, can be stated by implication. A great example comes from an old libel case, involving the first mate's memorable inscription in the ship's log, "Captain sober today." More recently, as the U.S. Supreme Court grappled with the status of statements of opinion in libel law, it [concluded](#) that statements that look like opinion on their face may often imply defamatory facts.

As the FTC notes, "Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it's an endorsement. You don't necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or believes about the product, and you have a relationship with the company marketing the product, it's an endorsement subject to the FTC Act."

This takes us to the next issue – what kinds of "relationships with the company marketing the product" need to be disclosed? Here too, the FTC takes a broad view.

Direct payments for product reviews clearly qualify. But a post may be covered as well if the seller or marketer gives the reviewer free products, free meals, travel and accommodations, free coupons, a loaner product, the

chance for a prize, or even the chance to appear on TV or in a company promotion. Similarly, if the reviewer endorses products made by his employer, or by a company where one of his relatives works, that's covered too.

In all these cases, the FTC believes, reasonable consumers would want to know about the connections. In the agency's view, anytime a reviewer is given something of value, that connection "might materially affect the weight or credibility of your endorsements." Thus, disclosures are required.

And that takes us to the disclosure requirement. How do you make legal disclosures on social media?

The FTC's answer is that it can readily be done, often in simple and terse language. Its most important requirement is that the disclosure must be plainly visible to the ordinary viewer.

Often, particularly in blogs, a disclosure can read, "Company X gave me this product to try." Where payments have been received, the specific amounts of payments usually need not be disclosed, but only the fact of payment.

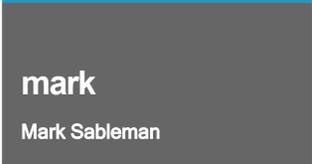
To those who claimed that Twitter's 140-character limit doesn't make disclosures feasible, the FTC has an answer: "The words 'Sponsored' and 'Promotion' use only 9 characters. 'Paid ad' only uses 7 characters. Starting a tweet with 'Ad' or '#ad' - which takes only 3 characters - would likely be effective."

Of course, the conspicuousness of disclosures is always an issue. In its same explanation of the ease of using "#ad," the FTC also cautions that that disclosure must not be hidden at the end of the tweet, amid other links or hashtags. The agency warns that home page and hyperlinked disclosures often aren't sufficient, and even gives the specific guidance that in Instagram posts, the disclosure must be in the first three lines of the disclosure, so it is visible even if the user doesn't click "more."

And if you do want "more" on the FTC's guidelines, the FAQs are [available here](#).

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