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# Don't Take The (Click)bait: Avoiding Pitfalls in Social Media Advertising

By Rachel Raphael and Elizabeth Bresnahan

Guest authors Rachel Raphael, partner at Morgan, Lewis & Bockius, LLP, and Elizabeth Bresnahan, an associate at the firm, advise beauty companies on how to avoid the common mistakes firms make in social media marketing and suggest proactive steps to reduce litigation risk.

We live in an era where social media permeates almost all aspects of daily life, giving us a front row seat to everything from breaking news to the latest dance trends. Social media is also increasingly used by brands—and sought after by consumers—as a powerful advertising tool.

At the close of 2024, Izea Worldwide, Inc. and Traacker, two influencer marketing companies, published results from separate consumer behavior surveys focused on social media and influencer marketing.

The results are not surprising: U.S. consumers routinely turn to social media influencers for their product research and therefore, brand investment in social media is growing at a rapid rate. Shopping over social media is “surging unlike ever before,” with a staggering 77% of survey participants indicating a preference for content created by social media influencers over content created by marketing professionals. This trend is particularly apparent when it comes to fashion and beauty. When consumers were asked which product type they are most likely to purchase over social media, beauty/personal care and health/wellness ranked in the top 5.

This phenomenon, which some attribute to consumer demand for authentic product reviews over neatly packaged advertisements, creates the potential for increased consumer engagement, and therefore, increased compliance and litigation risk.

With the ability to broadcast your brand and reach wider audiences through influencer marketing, there can be a lot to #love about social media. But companies and their brands must remain mindful of the common pitfalls. Online advertising and marketing is not exempt from traditional truth-in-advertising laws.

As regulation and enforcement in this area continues to evolve, brands and companies of all shapes and sizes can expect increased scrutiny over endorsements made by influencers across social media platforms. These risks are uniquely acute for personal care and cosmetics companies. Not only do consumers of these products look heavily to social media for guidance and product recommendations, but influencers are quick to make unqualified environmental



and health benefit claims like “natural,” “organic,” and “clean.” These terms, which are not universally defined and leave room for interpretation among consumers, are particularly fertile ground for litigation.

## Regulatory Landscape: The Federal Trade Commission (FTC)

Over the years, marketing methods have expanded beyond more traditional print and television advertising to social media and other online platforms. Although the format has evolved, the fundamental principle is the same. Under the law, claims in advertisements and other marketing materials must be truthful and not misleading. This is the case whether those claims are made by the company on its own website or by the various others (e.g., brand “ambassadors,” celebrities, and influencers) on social media.

## The FTC Act and Claims Substantiation

Section 5 of the FTC Act broadly prohibits “unfair or deceptive acts or practices in or affecting commerce.” Many states have also enacted their own unfair trade practices and consumer protection laws, often referred to as “baby” FTC Acts. Advertising (including online endorsements and reviews) can be deceptive if it has the capability to mislead a reasonable consumer. Specifically, product related claims that are made without support, or “substantiation,” may be misleading.

Generally speaking, companies must have a reasonable basis for the claims made in product advertising. A narrow exception exists for puffery—vague, subjective, non-qualified language for which no reasonable consumer expects support.

The level of support required by the FTC depends on the nature of the claim. Objective claims that are factual and measurable need objective evidence—i.e., factual

and, where necessary, technical and/or scientific support. Determining the most appropriate method of substantiation requires careful consideration of the scope of the claim at issue, the nature of the underlying product and industry, and consumer expectations. And when it comes to objective advertising, if a company cannot make a claim, neither can a social media personality.

### The Guides Concerning the Use of Endorsements and Testimonials

The increasing popularity of social media advertising has not been lost on the FTC. Last year, the agency released updated guidelines for online reviews and social media endorsements. Previously revised in 2009, the Guides Concerning the Use of Endorsements and Testimonials (“Endorsement Guides”) are designed to ensure that whenever a social media influencer or other content creator has a “material connection” with a brand (i.e., a financial, personal, family, or employment relationship) and endorses one of its products on social media, that endorsement is honest and any connection between the brand and the endorser is fully disclosed. In other words, if an influencer is paid by the company, gets a discount, or receives free product, he or she must make that clear in the social media post. These required disclosures are important because if a consumer knows that an influencer is being paid for his or her endorsement or has some other relationship with the brand, it might affect the weight the consumer gives to that advertisement.

At the end of the day, whether social media content qualifies as an “endorsement” depends on the overall impression that the post would make on a reasonable consumer. Endorsements are not necessarily limited to words; they can include, for example, pictures and images. On social media platforms, endorsements often come in the form of videos, pictures, “pins,” “likes,” “shares,” and “tags.” The required disclosures must appear in clear and simple language where consumers can see and understand them (e.g., on the picture, in the video, or in the livestream, with the endorsement message itself). The disclosure must also match the medium in which the underlying representation was made. If a representation is made both visually (in text) and audibly (in a video), the disclosure needs to be both visual and audible as well.

Importantly, not all disclosures are sufficient even when they appear in a prominent location. It again depends on how reasonable consumers are likely to interpret them. Clear phrases like “thanks BRAND for the free product” and “Advertisement” or “BRAND Partner” tend to make clear that there is a material relationship between the company and an influencer. But generic phrases like “thank you” and “#partner” alone are likely not enough without a link to the company or clear indication of the company/influencer relationship. And although social media platforms have recently taken steps to enable the branding of certain content as “sponsored” or “advertised,” companies and influencers should not rely solely on these mechanisms.

### FTC Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

In August 2024, the FTC published its Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (“Final Rule”), which went into effect on October 21, 2024. The Final Rule prohibits as unfair and deceptive the following practices: (1) writing, creating, selling, purchasing or disseminating fake or false consumer reviews, consumer testimonials, and celebrity testimonials; (2) buying positive or negative reviews; (3) using insider reviews and consumer testimonials; (4) advertising brand-sponsored review sites as “independent”; (5) engaging in review suppression practices; and (6) buying or misrepresenting social media indicators (e.g., likes). Unlike the Endorsement Guides, which only offer guidance, the Final Rule gives the FTC the ability to impose civil penalties and consumer redress for noncompliance.

### Best Practices and Other Key Considerations

As social media advertising draws greater attention, the risk of litigation increases. Plaintiffs’ lawyers have taken to mining popular platforms for potential plaintiffs in false advertising class actions arising out of product representations. Beauty and wellness brands are not immune, particularly as the plaintiffs’ bar focuses on the morass of unqualified, environmental and health-based claims. The best defense is in truthful and honest advertising and sufficient support for all claims—whether they are made by the company or someone else on its behalf. To that end, there are a number of proactive steps a company can take in the new year to reduce its litigation risk, and better position itself if one day sued over the advertising of its products.

- **Educate Employees.** All employees involved in the marketing, advertising, and labeling of a company’s products, including those dealing with influencers or social media content, should be familiar with both the Endorsement Guides and the Final Rule, and well-versed in support needed for the company’s advertising claims.
- **Ensure Communication Between R&D, Legal, and Marketing.** Internal communication is critical among the team developing the products, the team marketing the products, and the team evaluating the risks posed by the products. And all three teams have a role to play in determining whether or not a company has the support needed for its claims. The R&D team knows the ins and outs of the products and what they are capable of. The marketing teams knows what advertising claims best resonate with consumers and give the brand a competitive edge. And together with outside counsel, the legal team can provide important guidance on rules around substantiation, the best support for a company’s claims, and the need for experts or scientific/technical review.

- **Maintain Claims Substantiation Records.** A company needs policies and procedures that ensure proper documentation of all claims-related substantiation (i.e., supporting data, survey results, studies), maintenance of these records, and accessibility in the event of a challenge.
- **Provide Clear Guidance and Guardrails For Influencers and Other Content Creators.** Anyone posting about a brand online needs to make sure that the statements they make are truthful and substantiated, and that any relationship with the company is adequately disclosed. A company relying on influencers and social media endorsements must also take steps to ensure that those who are promoting product use are actual, bona fide users.
- **Insist on Robust Influencer Agreements.** Influencers and other content creators must be made aware of their rights, as well as their obligations to the company whose product(s) they are promoting. A company should put in place comprehensive influencer agreements, and these agreements should outline key considerations, including for example, the specific services being provided, any content approval rights, the terms of the parties' relationship, the allocation of risk, ownership of the social media content, and the applicable disclosure obligations.
- **Monitor Social Media Representations and Disclosures.** A company must be in the know about what influencers and other social media personalities are saying about the company and its products, so it can flag social media claims that cannot be substantiated or reflect atypical results. And a company should take action to address misleading and other violative content, even if that means terminating relationships with certain influencers.
- **Stay Apprised of What Consumers Are Saying About The Company and Its Products.** Social media can serve as a breeding ground for dissatisfied consumers and a goldmine for plaintiffs' attorneys scouring comments for individuals with shared experiences or product-related complaints. A company needs to know what is being said about it online—good and bad—in order to identify trends and be able to respond quickly if litigation is threatened or filed.
- **Exercise Caution with Social Media Reviews and Testimonials.** With the Final Rule, online reviews and testimonials are likely to face increased scrutiny—if not from the FTC then from state regulators and the plaintiffs' bar. Companies need to tread carefully, and take an even-handed approach when collecting, vetting, and disseminating consumer reviews.
- **Engage Counsel Early.** Bringing in competent advertising counsel often and early on to review advertising claims and supporting documentation, audit influencer relationships, and assess consumer complaints, can make the difference when it comes to mitigating litigation exposure. With the right legal help, a company can defeat false advertising claims early on, or even avoid, them altogether.



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