

ADVERTISING AND PROMOTIONS IN SOCIAL MEDIA



Social media has revolutionized the way that companies advertise and market their goods and services. Using social media, companies can: advertise and launch promotions in new ways that did not exist until a few years ago; create and execute advertising campaigns and marketing promotions quickly and easily; and, increase consumer engagement in product marketing and advertising.

However, social media also presents new legal challenges. Because social media tends to be a casual medium that permits companies to launch campaigns quickly, many advertisers and marketers mistakenly assume that the laws governing the ads and promotions that they run in other mediums do not apply to social media. The same laws apply to ads and promotions in social media, even though it is not always easy to figure out how to comply with them.



ADVERTISING CLAIMS AND DISCLOSURES

Two basic principles of advertising law apply to all types of advertising in any media: advertisers must have a reasonable basis to substantiate the claims they make in their ads; and, if an advertiser needs to disclose information to prevent an ad from being misleading, these disclosures must appear in a clear and conspicuous manner.

To comply with substantiation and disclosure obligations when advertising in social media, companies should: evaluate their ads in social media the same way that they evaluate ads placed on television, websites or other mediums; ensure that they can support all claims made in the ads; and, disclose all relevant information in a way that consumers can see and understand.

ADVERTISING CLAIMS AND DISCLOSURES

SUBSTANTIATION OF CLAIMS

Advertisers must have a reasonable basis to support all objective claims in their ads. This requirement applies not only to express claims (that is, what an ad actually says) but also to implied claims that a reasonable consumer may infer from an ad, even if the advertiser did not intend to convey those claims. Therefore, an ad can be accurate but misleading if it conveys a claim that the advertiser cannot support.

If an ad is challenged, it will be analyzed from the standpoint of a typical consumer.

Accordingly, when reviewing its ads, a company should: step into the shoes of customers who may not know anything about the product other than what is in the ad; and, consider how these customers are likely to interpret the ad. If the company cannot support every reasonable interpretation, it may need to make changes to the ad.

What is adequate substantiation generally depends on the following six factors, often referred to as the Pfizer factors: the type of product; the type of claim; the consumer benefit from a truthful claim; the ease of developing substantiation for the claim; the consequences of a false claim; and, the amount of substantiation that experts in the field believe is reasonable.

The last factor is usually the most important and determines whether or not substantiation is adequate. However, it is not always clear what is considered reasonable. One side's experts will likely disagree with the other side's experts. Therefore, many advertising disputes focus primarily on the last factor.

Selecting the appropriate substantiation process depends on the type of claim. For example, if a company wants to advertise that its airline has the most flights to London or that its store has the most locations in New York City, substantiation may only involve counting. However, if the claim is that a vacuum picks up more dirt or that a detergent gets clothes whiter, the company may need to perform one or more tests to support the claim. Usually, the first step is to determine whether there is an applicable industry standard test. If there is one, the company should generally use that test.

If there is no industry standard test, the company may need to develop its own test. The test should: mirror real-world conditions as much as possible, be repeatable, and provide results that are statistically significant.

ADVERTISING CLAIMS AND DISCLOSURES

CLEAR AND CONSPICUOUS DISCLOSURES

If it is necessary to disclose information to prevent an ad from being misleading, that information must be disclosed in a "clear and conspicuous" manner. When evaluating disclosures, the Federal Trade Commission (the "FTC") and other regulators often disapprove of the practice of including disclosures in footnotes or other places that are remote from the claim the disclosures are intended to modify. The law does not mandate a font size, color or specific placement. While it may be difficult to make disclosures in social media, advertisers are not exempt from complying with the disclosure requirement when advertising in social media.

ENDORSEMENTS AND TESTIMONIALS

One of the most common ways to advertise and market products and services in social media is to use celebrity or consumer endorsements and testimonials. Like other types of advertising, endorsements and testimonials must be truthful and not misleading. In 2009, the FTC released a new version of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides), which provide guidelines to assist advertisers in meeting their legal obligations when using endorsements and testimonials in advertising. The FTC uses "endorsements" and "testimonials" interchangeably, often referring to them as endorsements.

In the revised Endorsement Guides, the FTC clarified that the terms endorsement and testimonial: refer to more than just a celebrity or consumer talking about a product on television; and, apply to comments made in social media. The Endorsement Guides include various provisions that pertain to messages in social media, such as blogs, word-of-mouth marketing and other promotions in which companies encourage consumers to speak on their behalf.

In recent years, the FTC has conducted several investigations involving endorsements in social media. In some cases, the FTC entered into settlements with the advertisers that ran the campaigns where the advertisers agreed to pay money and make significant changes to their advertising practices. In other cases, the FTC decided not to pursue enforcement actions and closed the investigations. The resulting settlements and closing letters provide valuable guidance for advertising in social media.

ADVERTISING CLAIMS AND DISCLOSURES

IDENTIFYING ENDORSEMENTS

According to the FTC, a statement made by a consumer in social media will be treated as an endorsement if, viewed objectively, it appears that the relationship between the advertiser and the speaker is of a type that the speaker's statement can be understood to be sponsored by the advertiser. The FTC encourages advertisers to ask whether speakers are acting independently or on the advertiser's behalf in their statements about a product or service. If the speaker is acting independently, the statement will not be an endorsement subject to the Endorsement Guides. If the speaker is acting on behalf of the advertiser, the statement will be an endorsement subject to the Endorsement Guides.

The FTC has stated that the relevant facts in this determination vary and cannot be fully set out, but include: whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of products or services; and, the value of the items or services received.

ENDORSEMENTS AND TESTIMONIALS

Advertisers must ensure that claims in their ads are truthful. They may be held liable for any false or misleading claims. Advertisers may also be held liable if they include a false or misleading claim made by a consumer in their ads. While this is not a new concern, the Endorsement Guides go a step further and provide that an advertiser may be liable for claims made by consumers even if the advertiser does not use those claims itself.

The Endorsement Guides state that even though an advertiser may not have control over a specific statement made in new forms of consumer-generated media, the statement may still be treated as an endorsement under the Endorsement Guides (with no automatic disqualification for the advertiser's lack of control over the statement).

In the Endorsement Guides, the FTC provides an example of an advertiser that asks a blogger to try a new lotion. Even though the advertiser does not make any claims about the lotion's ability to cure skin conditions, the blogger writes that the lotion cures eczema. The FTC states that the advertiser is liable for the misleading or unsubstantiated representations made through the blogger's endorsement. This is a troubling proposition for many advertisers because most campaigns in social media inherently involve giving up some level of control over their messages.

ADVERTISING CLAIMS AND DISCLOSURES

DISCLOSURE OF MATERIAL CONNECTIONS

The Endorsement Guides state that if there is a material connection between an advertiser and an endorser, the endorser must disclose that connection. While this may not seem controversial, the interpretation of a material connection may be broader than expected. For example, even though giving a blogger a free low-value sample may not trigger the disclosure requirement, giving the blogger a few of those samples can trigger the requirement. Even intangible benefits such as a chance to win a prize could require disclosures.

The FTC states that although the endorser has primary responsibility for disclosing the connection, advertisers should implement procedures to: ensure that endorsers make the disclosures; make certain that employee postings that mention company products on social media include disclosure of the employment relationship; monitor to ensure that endorsers and employees make the appropriate disclosures; ensure that the disclosure is clear and conspicuous; avoid encouraging endorsements that use features – such as “likes,” “pins,” or “shares” – that don not allow for clear and conspicuous disclosures if the absence of that disclosure would be misleading; and, take appropriate steps if an endorser does not make the disclosure.

CONTESTS AND SWEEPSTAKES

Companies frequently market their products and services through contests, sweepstakes or other types of promotions. Social media has changed the way companies run these promotions. Because of the large number of people who use social media daily, many companies are now able to reach a wider audience at a much lower cost. Additionally, because of the interactive nature of social media, companies may keep people engaged for longer periods of time.

Some companies focus exclusively on these benefits and erroneously assume that because promotions in social media tend to be more casual than promotions in other media, they do not require the same legal attention or create the same concerns as other types of promotions. However, not only do the same laws apply, running a promotion in social media presents a unique set of issues.

When planning to run a promotion in social media, companies must consider:

- Legal requirements. Despite their more casual appearance, contests, sweepstakes and other promotions run through social media are subject to the same laws that apply to promotions in other platforms.
- Third-party platform requirements. If a promotion is run on a third-party platform, the platform may have additional requirements that apply. The most popular platforms used for these promotions, such as Facebook and Twitter, have internal requirements.
- Consumer involvement. Consumer involvement often presents the most challenging aspect of using social media for promotions, especially when promotions involve user-generated content or consumer involvement in selecting winners. While permitting more consumer input promotes increased engagement, too much consumer engagement can create problems for the company running the promotion.

CONTESTS AND SWEEPSTAKES

LEGAL REQUIREMENTS

When running a contest, sweepstakes or other type of promotion, state contest and sweepstakes laws primarily govern the structure and operation of the promotion. However, other laws may also apply, depending on the type of promotion involved.

CONTEST AND SWEEPSTAKES LAWS

Marketers often use the words contests and sweepstakes interchangeably. However, these terms refer to different types of promotions that can be subject to different legal requirements. In general: a contest is a promotion in which prizes are awarded based on skill; and, a sweepstakes is a promotion in which prizes are awarded based on chance. Companies should not assume that because a promotion does not include a random drawing, it is skill-based. A promotion can be chance-based even without a drawing. Different states have different thresholds for what is considered skill, so it may be difficult to figure out which type of promotion is involved.

There is no single sweepstakes law or contest law. Instead, these types of promotions are subject to a patchwork of laws across all 50 states, as well as several federal laws. Fortunately, there are more similarities than differences. The most important principle under these laws is that a company cannot require people to make a purchase or payment in a promotion in which winners are selected based on chance. There are two common ways to deal with this prohibition: eliminate any payment requirement; and, do not involve chance.

Usually, it is permissible to include a method of entry that involves a purchase, if a free method of entry is also provided. Companies should consider what works best in the situation, but typical options are to allow people to enter for free either: online or by sending a request through the mail.

To ensure compliance: both entry methods must be treated equally (for example, a contest cannot place a limit on the number of free entries but allow people to get unlimited entries by making purchases); and, the free option must be carefully disclosed. Many companies have faced legal action for burying that fact in the fine print.

CONTESTS AND SWEEPSTAKES

PLATFORM REQUIREMENTS

In addition to complying with state and federal laws, if a company runs a promotion on a third-party platform, it needs to determine whether that platform has its own requirements. Many popular social media platforms have rules and guidelines that apply to promotions. If a promotion violates platform guidelines, the company may be prohibited from using the platform. Companies should note that compliance with platform guidelines does not mean that the promotion complies with legal requirements.

FACEBOOK PROMOTIONS GUIDELINES

The Facebook promotions guidelines restrict how companies can use Facebook's features in their promotions. Previously, Facebook required companies to administer all promotions through apps and did not allow an entry to result from liking a page, checking in to a place or connecting to an app. However, Facebook revised its promotion guidelines. Now, promotions may also be administered on Facebook page timelines, and companies can: collect entries by having users post on the page, or comment or like a page post; collect entries by having users message the page; and, use likes as a voting mechanism.

Personal Timelines and friend connections must not be used to administer promotions, however. For example, the guidelines state that “share on your Timeline to enter,” “share on your friend’s Timeline to get additional entries,” and “tag your friends in this post to enter” are not permitted).

INSTAGRAM PROMOTIONS GUIDELINES

Instagram has similar guidelines. They stat that “You must not inaccurately tag content or encourage users to inaccurately tag content (ex: don’t encourage people to tag themselves in photos if they aren’t in the photo.” Like on Facebook, the following disclosures should also be included in the rules: the complete release of Instagram by each entrant or participant; and, an acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Instagram.

CONTESTS AND SWEEPSTAKES

TWITTER PROMOTIONS GUIDELINES

Twitter also has guidelines governing promotions. For example, Twitter asks companies to discourage users from creating multiple accounts and from posting the same tweet repeatedly. Therefore, a promotion that awards a prize to the person who tweets the same message the most times would violate the Twitter guidelines. Companies should note that Twitter has shut down at least one promotion that encouraged repeated posts. If under a promotion people have to include a hashtag in tweets, hashtag topics need to be relevant to the tweet. Encouraging users to add a hashtag to unrelated tweets might cause the participant to violate Twitter's user rules.

OTHER PLATFORMS

Other platforms may adopt promotions guidelines as their popularity increases. Companies should check the applicable rules and guidelines before running a promotion on a particular platform. Not every platform has welcomed contests and sweepstakes. For example, Google recently imposed guidelines for its Google+ platform. Google+'s Pages Contest and Promotion Policies prohibits users from running contests, sweepstakes and other promotions directly on their Google+ Page, but permits users to run a promotion on another site and include a link to it on their Google+ Page.

USER-GENERATED CONTENT

Many contests in social media invite consumers to submit content for judging, such as photos or videos. While a company can usually ensure its own content complies with applicable laws, it is harder to ensure that user-generated content is lawful. Companies themselves can face legal actions for what consumers do in the context of a company's marketing campaign, even if the company did not authorize the consumer's acts. In recent years, companies have been sued over content that consumers posted on their websites when that content allegedly: violated a third party's copyrights, included false claims, and included defamatory statements.

To avoid or reduce the risk of liability for user-generated content, companies should clearly disclose what consumers can and cannot submit. When planning a promotion, a company should take time before launching the promotion to think about problems it is likely to encounter and proactively guard against them. For example, if accepting submissions from entrants, a company should disclose that people have to submit original content that does not violate any third party's copyrights.

Despite using best efforts to avoid problematic content, people may still post submissions that violate third-party rights. Fortunately, there are laws that can protect companies in these situations, including:

- The Digital Millennium Copyright Act. The Digital Millennium Copyright Act (the "DMCA") provides safe harbor protection from potential liability arising from publishing content that infringes a third party's copyrights if that content was posted by another person. However, the DMCA safe harbor does not provide blanket immunity. Companies need to take several steps to take advantage of the safe harbor, and they may lose their protection if they have knowledge of infringement or are aware of facts from which infringement should be apparent.
- The Communications Decency Act of 1996. Section 230 of the Communications Decency Act of 1996 (the "CDA") may also provide protection if consumers post content that includes defamatory statements or false claims (47 U.S.C. § 230). Courts have been generous in applying these protections to specific situations, but the protections are limited.

USER-GENERATED CONTENT

AVOIDING LIABILITY FOR USER-GENERATED CONTENT

The DMCA and CDA provide limited protections against liability for problematic content posted by rogue consumers. However, if the company invites these problems, pointing the finger at those consumers is insufficient to avoid liability. When planning a promotion that involves user-generated content, companies should: carefully consider what consumers are being asked to submit; warn consumers against submitting various types of problematic content; and set up a process to comply with the safe harbor requirements under applicable laws.

Most importantly, while it may be able to escape liability for problematic content posted by consumers, a company will not be able to escape liability for any user-generated content that the company uses itself.

PLANNING PROMOTIONS IN SOCIAL MEDIA

Most social media promotions that have had problems in recent years have not done so because companies failed to comply with laws or platform requirements, but because the companies failed to appreciate the risks that are inherent in social media. When planning a promotion in social media, companies should: ensure they comply with contest or sweepstakes laws, as applicable; ensure they comply with any rules implemented by the platform on which the promotion will run; think through the potential legal and other issues and take steps to guard against them; consider the risks and benefits of turning over some control to consumers; and, have contracts with any third parties that may be assisting the company with any aspects of the promotion.