

VENABLE

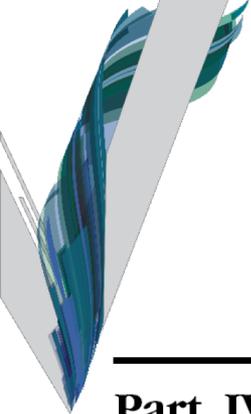
Hot Topics in Influencers: U.S. Developments and Best Practices

Melissa Landau Steinman, Partner

Venable LLP

mlsteinman@venable.com

April 1, 2019



What is the Big Deal? The Guides Concerning the Use of Endorsements and Testimonials in Advertising

Part IV

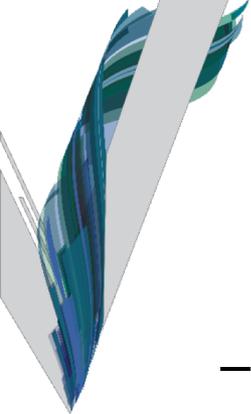
Federal Trade Commission

16 CFR 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; Final Rule

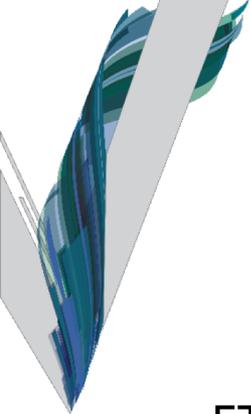
§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.



Endorsements and Testimonials: Basic Rules

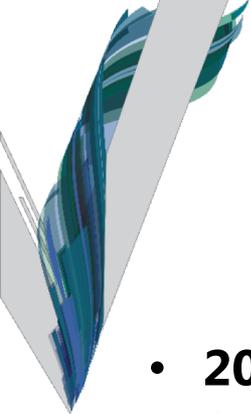
- Endorsements must reflect honest opinion, beliefs or experience of endorser; should be from bona fide user.
- Endorsements must not contain any false or misleading statement or implication.
- Advertised portion must reflect spirit of complete testimonial.
- ***Testimonials cannot be used to make claims that advertisers cannot make directly.***
- Any testimonial conveying that the results achieved by the consumer are typical require substantiation or a disclosure of typical results.
- Experts must possess qualifications represented and use their expertise in providing endorsement/evaluation.
- **Material connections that might affect credibility must be disclosed, e.g. payment or other compensation; employment, business or family connections.**



Expansive Jurisdiction

FTC and state AGs have jurisdiction over anyone who participates in the “creation or dissemination of advertising” or anyone who “directly or indirectly” participates in presenting a commercial message:

- Advertisers
- Ad agencies
- Affiliate marketers
- Publishers/Media companies
- Endorsers



FTC Enforcement Activity: A Timeline

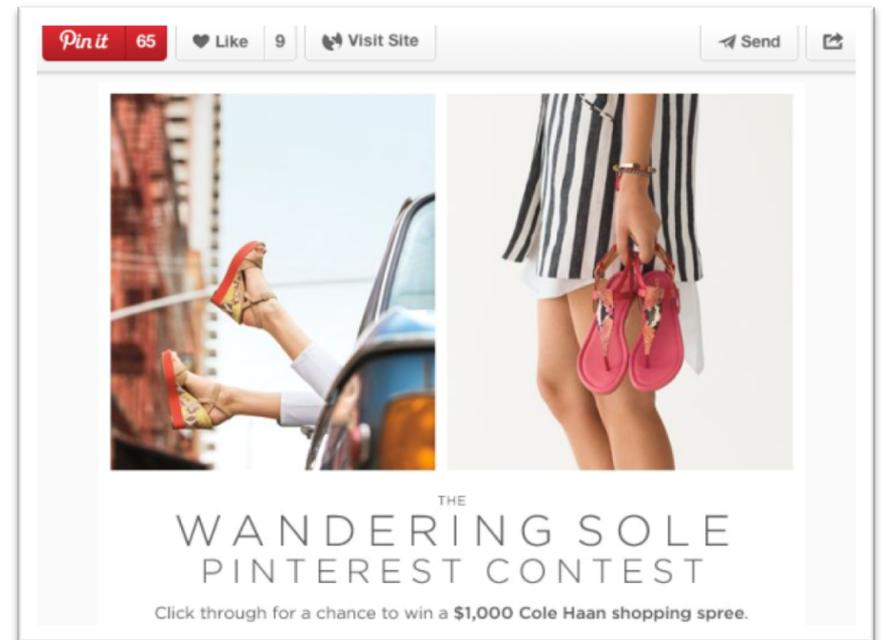
- **2009:** FTC Revised Endorsements and Testimonials Rule to add examples of how rule would be enforced with respect to influencers.
- **2010:** Issued **FAQs** further explaining how to comply/make disclosures and began enforcement:
 - Issued several **closing letters** (no action re inquiry): ***Ann Taylor Loft, Lord & Taylor, Hyundai, HP, Nordstrom Rack***
 - ***Investigations/settlements with*** companies and agencies failing to properly disclose material connection: ***Reverb; ADT; Deutsch; Spokeo; Machinima/Microsoft/Starcom; Legacy Learning.***
- **2017:** Updated **FAQs**.
- **2018:** Sent “**educational letters**” to 45 brands and 45 influencers and brought first case directly targeting influencers (***CSGO Lotto***);
- **2019:** Brought actions targeting practice of “astroturfing” and “sock puppets”: use of third parties to create fake reviews; similar case from NY Attorney General (***Devumi, Cure Encapsulations et. al.***).

FTC Expectations: What Do I Have to Disclose?

1. Any “Material Connection” between an advertiser and influencer

- Payment
- Free product or services (L&T)
- ***Sweepstakes entries***
- Other things of value
- Travel
- Other business, family or other close relationship to seller
- Employee relationship

2. That would not be expected



FTC Enforcement Activity: *In the Matter of Lord & Taylor, LLC (2016)*

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of)
)
LORD & TAYLOR, LLC,)
a limited liability company.)
)

DOCKET NO. C-4576

COMPLAINT

COUNT I Misrepresentations About the Design Lab Instagram Postings

11. Through the means described in Paragraphs 4 through 7, Respondent represented, directly or indirectly, expressly or by implication, that the 50 Instagram images and captions reflected the independent statements of impartial fashion influencers.
12. In fact, the 50 Instagram images and captions did not reflect the independent statements of impartial fashion influencers. Respondent's influencers specifically created the postings as part of an advertising campaign to promote sales of Respondent's Design Lab collection. Therefore, the representation set forth in Paragraph 11 is false or misleading.

COUNT II Failure to Disclose Influencers' Material Connection to Lord & Taylor

13. Through the means described in Paragraphs 4 through 7, Respondent represented, directly or indirectly, expressly or by implication, that the 50 Instagram images and captions posted on March 27 and 28, 2015 about the Paisley Asymmetrical Dress reflected the opinions of individuals with expertise in new trends in fashion. In numerous instances, Respondent failed to disclose or disclose adequately that these individuals were paid endorsers for Respondent. These facts would be material to consumers in their decision to purchase the Paisley Asymmetrical Dress. The failure to disclose these facts, in light of the representation made, was and is, a deceptive practice.

Lord & Taylor Dress Buzz Campaign



N nylonmag
4 weeks ago [Follow](#)

Our editor-in-chief @heymichellelee transitioned her everyday outfit into the perfect springtime ensemble with this patterned dress by @lordandtaylor's new #DesignLab collection 🌈

valeria_santizo, arianatorforever100, mirian_gurdian2004 and 4,027 others like this.

sarita10612 @emitre17

la_vie_boheme85 @kndnyc Did they raid your closet?

ilkecandey who makes the jacket?

conte_eleni_ @annamaria.banakou

leanweezy @relol

lagirlygirl @hawainoj on fleek

hawamoj @lagirlygirl for outside land

Leave a comment...

#NYLON shop

FROM OUR FASHION CLOSET TO YOURS

SHOP NOW >>

[f](#)
[t](#)
[p](#)

this season's must-have line
lord & taylor's design lab

by: nylon — march 31 2015

#NYLON.shop

FROM OUR FASHION CLOSET TO YOURS

SHOP NOW >>

more nylon

prev **rihanna** finally speaks out about dating **leonardo dicaprio**

next **stop** what you're doing and watch the new 'mad max' trailer

from our friends




Bobbi Kristina Brown 9 Must-Know Tips For

view gallery

photo via @kwayyidgng instagram

[f](#)
[t](#)
[p](#)

Every season, there's one collection that you see everywhere—and yet, instead of getting sick of it, you lust after it until one day, you finally cave in and get it for yourself. This time around, we're taking out the guess work and introducing you to spring's must-have line: **Lord & Taylor's Design Lab**. You've probably already seen the new contemporary line's asymmetric bandana dress everywhere—from Instagram to your favorite blogs to the streets. But **Design Lab** is filled with many more amazing statement pieces, like festival-ready lazer cut tanks and fringed kimonos.

Click through the gallery to see how your favorite bloggers style their **Design Lab** pieces.

Where/How Do I Need to Disclose? (Or a Lesson in How Not to Do It) In re Warner Bros. (2016)



The screenshot shows a YouTube video player interface. At the top left, the channel name "I AM WILDCAT" is visible. The video title is "Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay". The channel name "I AM WILDCAT" is repeated below the title, along with a "Subscribe" button and a subscriber count of "3,127,000". The video has "379,565" views, "11,511" likes, and "131" comments. The video description includes the text: "Published on Oct 3, 2014", "Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!", "Click here for more info on Shadow of Mordor! <http://bit.ly/1vivrEL>", and "Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>". A red arrow points to the "SHOW MORE" link at the bottom of the description area.

Warner Bros. Home Entertainment, Inc.

Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay

I AM WILDCAT  [Subscribe](#) 3,091,534 378,647

[Add to](#) [Share](#) [More](#) [Like](#) 11,496 [Comment](#) 131

Published on Oct 3, 2014
Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!
Click here for more info on Shadow of Mordor! <http://bit.ly/1vivrEL>
Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>
This game is Rated M for Mature.

This video is sponsored by Warner Brothers.

[DK Shop: http://www.wildcat-shop.eu](http://www.wildcat-shop.eu)
[EU Shop: http://wildcat-shop-eu.spreadshirt.net/](http://wildcat-shop-eu.spreadshirt.net/)

Follow Me on Twitch: http://www.twitch.tv/I_AMWILDCAT
Subscribe to my let's play channel: <http://bit.ly/WILDCATLetsPlays>
Apply for a Partnership: <http://apply.fullscreen.net/?ref=w1ld...>

For Business Inquiries Contact: IAMWILDCATBusiness@yahoo.com

Use the code "WILDCAT" to get 8% off all products from my controller sponsor:
<http://www.customcontrollerzz.com/7CI...>

Outro Song: The Wreckage – Breaking Through <http://www.youtube.com/watch?v=LekDT7...>

Please don't use the word "Warner Bros" in your comments, you don't need that here :D

This video is sponsored by Warner Bros.

No one reads this far into the description...what are you doing snooping around...

Category	Gaming
License	Standard YouTube License

[SHOW LESS](#)

Warner Bros. Home Entertainment, Inc.

Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay

I AM WILDCAT 3,091,534

378,647

Published on Oct 3, 2014

Thanks for watching! LIKE the video if you enjoyed and always leave comments, i read them all! :D Thanks for your support!

Click here for more info on Shadow of Mordor! <http://bit.ly/1vivvEL>

Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>

This game is Rated M for Mature.

Follow me on twitter: http://bit.ly/IAM_WILDCAT

Subscribe to my let's play channel: <http://bit.ly/WILDCATLetsPlays>

Apply for a Partnership: <http://apply.fullscreen.net/?ref=w1ld...>

For Business Inquiries Contact: IAMWILDCATBusiness@yahoo.com

Use the code "WILDCAT" to get 8% off all products from my controller sponsor: <http://www.customcontrollerzz.com/7CI...>

Outro Song: The Wreckage – Breaking Through <http://www.youtube.com/watch?v=LekDT7...>

Please flag hateful comments or spam...we don't need that here :D

This video is sponsored by Warner Bros.

No one reads this far into the description...what are you doing snooping around...

Category Gaming

SHOW LESS

**No one reads this far into the description.
What are you doing snooping around.**



[Home](#) » [News & Events](#) » [Press Releases](#) » [FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship](#)

FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

Commission aims to improve disclosures in social media endorsements

SHARE THIS PAGE



FOR RELEASE

April 19, 2017

TAGS: [Bureau of Consumer Protection](#) | [Consumer Protection](#) | [Advertising and Marketing](#) |

[Online Advertising and Marketing](#)

After reviewing numerous Instagram posts by celebrities, athletes, and other influencers, Federal Trade Commission staff recently sent out more than 90 letters reminding influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media.

The letters were informed by petitions filed by Public Citizen and affiliated organizations regarding influencer advertising on Instagram, and Instagram posts reviewed by FTC staff. They mark the first time that FTC staff has reached out directly to educate social media influencers themselves.

The FTC's [Endorsement Guides](#) provide that if there is a "material connection" between an endorser and an advertiser – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication. A material connection could be a business or family relationship, monetary payment, or the gift of a free product. Importantly, the Endorsement Guides apply to both marketers and endorsers.



EVENTS
CALENDAR

For Consumers

[Blog: Is that post #sponsored?](#)

For Businesses

[Blog: Influencers, are your #materialconnection #disclosures #clearandconspicuous?](#)

[Endorsements](#)

[FTC's Endorsement Guides: What People Are Asking](#)

Media Resources

Our [Media Resources](#) library provides one-stop collections of materials on numerous issues in which the FTC has been actively engaged. These pages are



ABOUT THE FTC

NEWS & EVENTS

ENFORCEMENT

POLICY

TIPS & ADVICE

I WOULD LIKE TO...

Home » News & Events » Press Releases » FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

Commission aims to improve disclosures in social media endorsements



CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers

Owners must disclose material connections in future posts; FTC staff also sends 21 warning letters to prominent social media influencers



SHARE THIS PAGE



In English

En Español

FOR RELEASE

September 7, 2017

TAGS: Bureau of Consumer Protection | Consumer Protection | Advertising and Marketing | Endorsements | Online Advertising and Marketing

Related Cases

CSGO Lotto, Trevor Martin, and Thomas Cassell

advertiser – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication. A material connection could be a business or family relationship, monetary payment, or the gift of a free product. Importantly, the Endorsement Guides apply to both marketers and endorsers.

Our media resources library provides one-stop collections of materials on numerous issues in which the FTC has been actively engaged. These pages are



TmarTn
@TmarTn

Follow

Made \$13k in about 5 minutes on CSGO betting. Absolutely insane. Reactions here : youtu.be/_V-dS74WJTtw

RETWEETS 109
LIKES 915



9:56 PM - 6 Mar 2016

45 109 915



Thomas
@ProSyndicate

Follow

Bruh.. i've won like \$8,000 worth of CS:GO Skins today on [@CSGOLotto](#) I cannot even believe it!

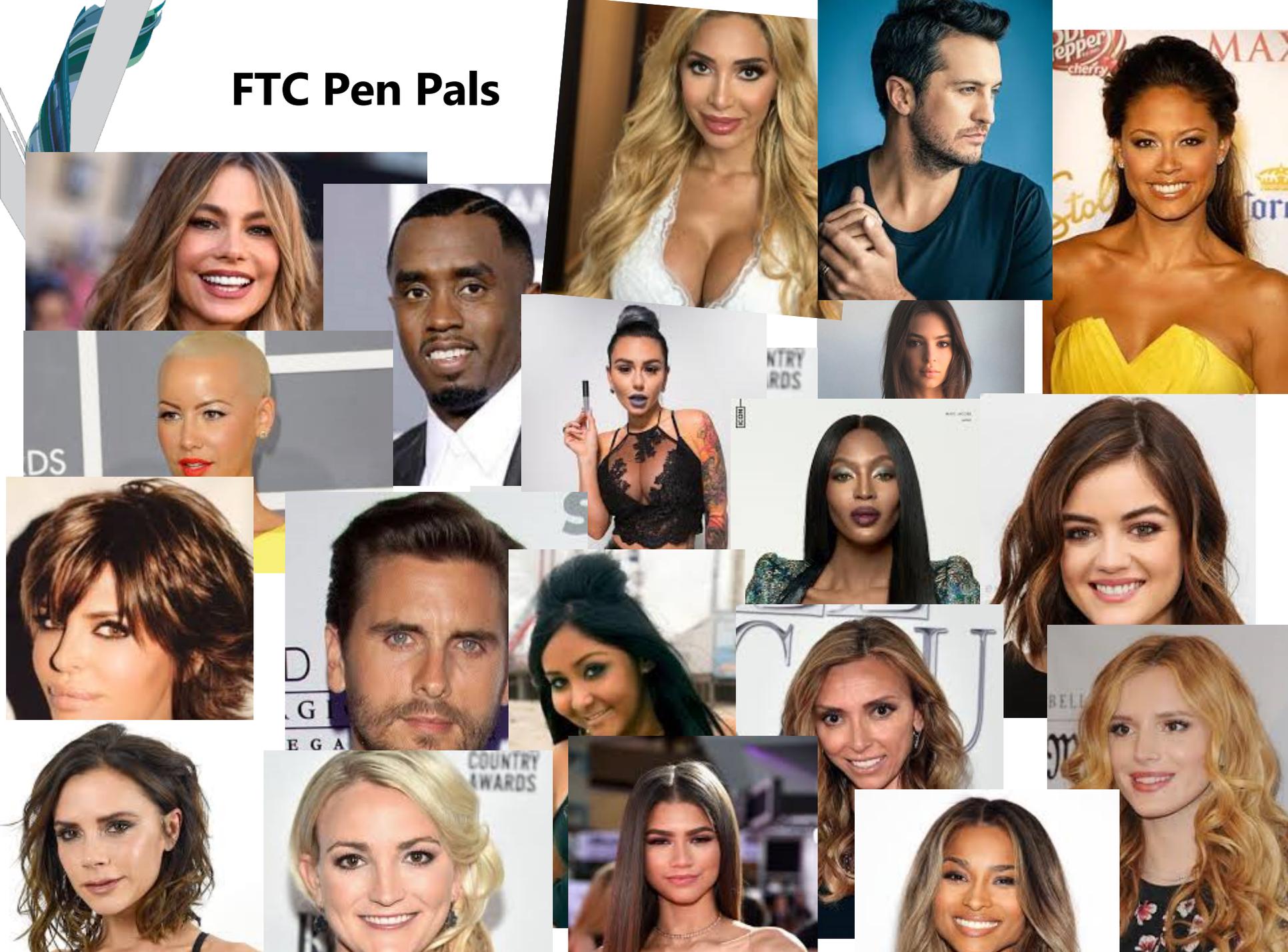
RETWEETS 75
LIKES 972



4:34 PM - 30 Mar 2016

52 75 972

FTC Pen Pals





carolinemanzo

Follow

3,949 likes

27w

carolinemanzo Keeping on my healthy kick in the kitchen tonight with @hellofresh. Since all the fresh ingredients are pre-measured for perfectly portioned meals, I don't have to think about meal planning and can just start cooking! Love that I have @hellofresh to switch it up when I just don't have the time to grocery shop and meal prep. Give it a try with my code "FreshCaroline" for \$35 off your first healthy week at hellofresh.com #fallmeals #healthy #hellofreshpics #sp

load more comments

jcaffa13 Go you! You've always been one of my favorite! You keep it real. And, I love that cutting board! Like pumpnickel swirl bread...Where did you get it?

tubbysoaps waste of money to be lazy
tubbysoaps .

Log in to like or comment.





carolinemanzo

Follow

3,949 likes

27w

carolinemanzo Keeping on my healthy kick in the kitchen tonight with @hellofresh. Since all the fresh ingredients are pre-measured for perfectly portioned meals, I don't have to think about meal planning and can just start cooking! Love that I have @hellofresh to switch it up when I just don't have the time to grocery shop and meal prep. Give it a try with my code "FreshCaroline" for \$35 off your first

hellofresh.com #fallmeals
#cs #sp

I've always been one
to keep it real. And, I love
the pumpernickel
and you get it?
I have money to be lazy

meal prep. Give it a try with my code
"FreshCaroline" for \$35 off your first
healthy week at hellofresh.com #fallmeals
#healthy #hellofreshpics #sp

Log in to like or comment.





emrata

Follow

230k likes

4d

emrata Thanks @nipandfab for these insane glycolic night fix pads. Ready for my bday week → @cvspharmacy @mrsrodial #nipandfab

view all 1,208 comments

thepennycloset_ Perfect! 🐾

kathyyoung0802 @nicrutsid my kind of body goals 😊😁💧 (look more at her ig)

haniamalhas @loulwans.7

ruby_pettis @livesinmamon

coppolaa @stellabougg sexy

danielsenm @leifeduardo

lonedreamer Bella figa

Emrata Thanks @nipandfab for these
Insane glycolic night fix pads. Ready for
My bday week @cvspharmacy
@mrsrodial #nipandfab



emrata

Follow

248,614 likes

47w

emrata Thanks @nipandfab for these pads. #ad @cvspharmacy @mrsrodial #nipandfab

load more comments

gabry_annunziataa Bruttina

jannelle.zamora @dellllaaaa

annyaaaforbes @yuhan_perera

william_naim @emrata Hey How are u ?? I follow you for a long time, I want to congratulate you for what you do and the image that you arrive to give people through the social networks. You inspire me very much, I am jewelry designer my brand is @myjewelerisw and I would love to be able to get in touch with you to send you jewels from my collection. I guess you have to be much asked .. but I try my luck .. thank you so much continues like that ..



emrata Thanks @nipandfab for these pads. #ad @cvspharmacy @mrsrodial #nipandfab



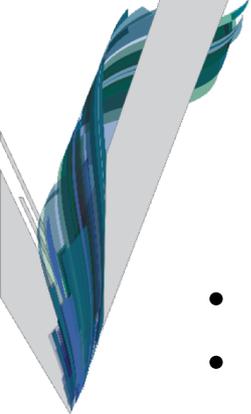
kimkardashian

439k likes

1d

kimkardashian OMG. Have you heard about this? As you guys know my #morningsickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, I felt a lot better and most importantly, it's been studied and there was no increased risk to the baby. I'm so excited and happy with my results that I'm partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more

I'm partnering with Duchesnay USA to
Raise awareness about treating morning
sickness. If you have morning sickness,
Be safe and sure to ask your doctor



How Do I Disclose?

- Clear, unavoidable and easy to read!
- Must be clear as to nature of relationship:
 - What was received (e.g. paid vs. free stuff, etc.).
 - What you are doing for brand (e.g., employee vs. paid endorser).
 - Use the “nice” words, not the “naughty words” – e.g., don’t use ambiguous terms like “thanks” or “ambassador” without more.
- Early in the post, blog, tweet:
 - Before the break (e.g., first 2 lines/“Read more” on Instagram).
 - Preferably right at the beginning.
- Not buried in a string of hashtags or terms.
- No abbreviations (e.g., #sp, #sweeps).
- Disclose directly in the video/on the picture; don’t just rely on the description or audio.
- Even tags can be endorsements.
- Natural language is ok.



Bottom Line

Naughty List	Nice List
[brand]ad	Ad, advertising, paid advertising, [Brand]Ad
Sp, spon	Sponsored
Ambassador, Employee	[Brand]Ambassador, [Brand]Employee [Brand]_Ambassador, [Brand]_Employee
Partner	[Brand]Partner [Brand]_Partner
Thanks, Thank You, Thanks[Brand]	Thanks [Brand] for gifting me/Thanks[Brand] for the free [detail the stuff given]
[Brand]	
Platform disclosure alone	

The **Do's** and **Don'ts** for Social Media Influencers

FTC RECOMMENDATIONS



Clearly **DISCLOSE** when you have a financial or family relationship with a brand



Ensure your sponsorship disclosure is **HARD TO MISS**



Treat sponsored tags, including tags in pictures, **LIKE ANY OTHER** endorsement



On image-only platforms like Snapchat, **SUPERIMPOSE DISCLOSURES** over the images

PRACTICES TO AVOID



DON'T ASSUME followers know about all your brand relationships



Don't assume disclosures **BUILT INTO** social media platforms are sufficient



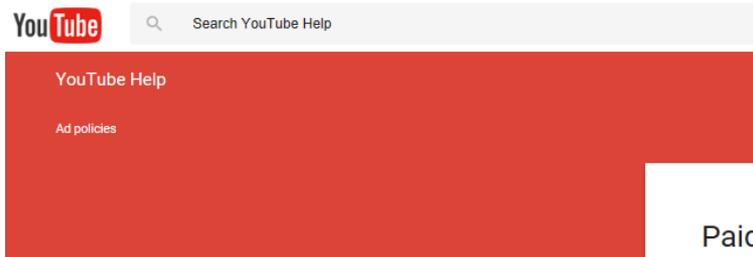
Don't use **AMBIGUOUS DISCLOSURES** like "Thanks," #collab, #sp, #spon, or #ambassador



Don't rely on disclosures that people will see only if they **CLICK "MORE"**

Source: Federal Trade Commission

What About “Paid Promotion” on YouTube?



Paid product placements and endorsements

This article was updated on October 4, 2016, for clarity purposes and to announce an additional paid promotion disclosure. There are no changes to our long-standing Paid Promotion policies.

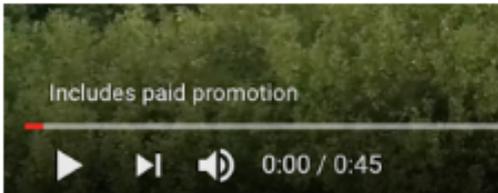
Is there a feature that can help me inform viewers about Paid Promotion in my videos?

Yes. We now offer an additional feature that enables creators to opt-in to a visible disclosure for viewers, which appears as a text overlay for the first few seconds when a viewer watches the video.

You can choose to add the paid promotion disclosure to any new or existing videos without having to upload a new video. If you add the paid promotion disclosure to an existing video, the video will keep its view count and other video metrics.

Use the paid promotion disclosure feature by following these instructions:

1. For any new or existing video that contains Paid Promotion, [follow the steps above](#) to check the "video contains paid promotion" box.
2. You'll see a second checkbox that says **Help me inform viewers of paid promotion by adding a disclosure to this video.**
3. Check this box to add a 10-second text disclosure on your video that says "Includes paid promotion."
4. Viewers will see this when they start watching the video on a computer or the latest version of the YouTube mobile app.

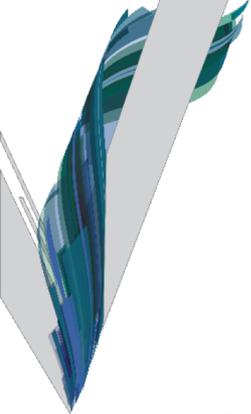


Note: Even if you use the paid promotion disclosure feature, keep in mind that different jurisdictions have various requirements for creators and brands involved in Paid Promotion that may require you to do more, so be sure to check and follow applicable laws.

FTC Compliance Requirements

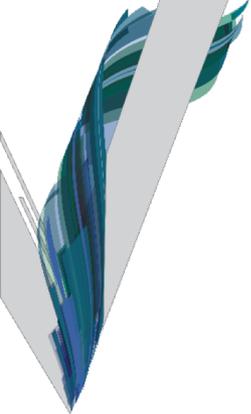


Monitoring
Policy/Training Enforcement



The Importance of Monitoring and Enforcement

- Advertisers must ensure influencers are complying with Endorsements and Testimonials Rule or risk liability.
 - FTC requires that brands must monitor influencers for compliance and require that inadequate disclosures must be fixed.
 - Brand should have Influencer Policy/Agreement that lays out expectations for compliance and clearly specifies what will happen if the influencer fails to comply with the FTC Rule (i.e., fix or suspend, terminate)
 - Brand must contact influencers who violate policy with direction on how to correct, follow through if they fail to correct or consistently fail to properly comply with Rule.
 - Document compliance, particularly corrections.
- Both employees and agencies must be trained in expectations/compliance as well.



Reviews and the Endorsements Rule

- FTC/NAD/AGs have been very active in enforcing Endorsements Rule with regard to reviews.
- Basic principle: must identify receipt of compensation, relationship, interest when writing/posting review. Recent cases:
 - **NAD: *Scott's Company*** (sweepstakes/gift card incentive not disclosed)
 - **FTC: *In re Creaxion, Inc.*** (involved Rio Olympics and use of influencers, failure to disclose material connection in reviews)
- Best Practices:
 - Require disclosures or even better, automatically tag incentivized reviews (e.g., Sweepstakes Entry, #ad).
 - Before using reviews as basis for claim/as survey, independently substantiate advertising claims with reliable, representative data.
 - Don't use reviews or social media reposts as a back door to make claims that you would not be able to make directly.
 - Carefully evaluate cross-platform compatibility before aggregating reviews, and don't forget about offline purchasers.
 - Collect product reviews in a systematic way, from a representative sample of purchasers, and post all of them – don't cherry pick.
- **Consumer Review Fairness Act of 2016:** may not suppress negative ²⁸ reviews.

What's Coming?



- March 4, 2019
TruthinAdvertising.org Letter to FTC complaining a large number of celebrity influencers who received letters 2 years ago still weren't complying with Rule.
 - FTC is following up.
 - Result?????
- Will definitely be more cases
- Greater focus on disclosure plus substantive claims/deception—easy cases are out of the way?



ALL ABOUT
ADVERTISING LAW

REGULATORY & LITIGATION DEVELOPMENTS FOR ADVERTISERS AND MARKETERS

Contact



Melissa Landau Steinman
Partner, Venable LLP
mlsteinman@Venable.com
202.344.4972