



NYS Bar Intellectual Property Law Section

Advertising, Social Media, & the FTC

2019 Annual Meeting CLE Program

January 15, 2019



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Panel Participants

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Partner
- **Nur-ul Haq, Esq.**, Viacom
VP & Counsel, Tech & Kids Compliance
- **Anne Gorfinkle**, Viacom
VP, Standards and Practices for Nickelodeon
- **Rebecca Leigh Griffith, Esq.**, Unilever US
Senior Counsel

Background

FTC has long kept a hard line between advertising and editorial.

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For RELEASE: IMMEDIATE, Tuesday, November 28, 1967

Statement in Regard to Advertisements That Appear in Feature Article Format

The Commission has recently considered the publication by various print media of advertisements that use the format and have the appearance of news or feature articles. Generally the caption "ADV." or "ADVERTISEMENT" appears at the top of such advertisements, but sometimes it is omitted. The Commission is concerned that omission of the caption "ADVERTISEMENT" may cause readers to believe that the advertisement is in fact a feature or news article. The Commission also wishes to point out that in some instances the format of the advertisement may so exactly duplicate a news or feature article as to render the caption "ADVERTISEMENT" meaningless and incapable of curing the deception.

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"Advertorials"

- Advertisements designed to look like editorials.
- In the 1980s and 1990s, FTC began regulating advertorials as potentially misleading (See 1983 Policy Statement on Deception).
- "Consumers should be able to tell when a message comes to them as a paid advertisement. Only then can they evaluate the message critically."¹

¹ <https://www.ftc.gov/public-statements/1996/11/developments-consumer-protection-federal-trade-commission-achieving>

Special feature brought to you by  

CAREER GLIMPSE

Pay It Forward

Having benefited from a strong social support network when he was growing up, Fareez today chooses to excel in a meaningful profession, coming full circle as a social worker.



SHIRAZIYIN
SHIRAZIYIN—Growing up, Fareez was a bright student. He was a member of the National Honor Society and was a member of the National Student Leadership Conference. He was a member of the National Student Leadership Conference and was a member of the National Student Leadership Conference.

The appreciation and the gratitude of his clients and the resilience of his own spirit keeps him going.
Fareez is a professional social worker who has dedicated his career to helping others. He is a professional social worker who has dedicated his career to helping others.

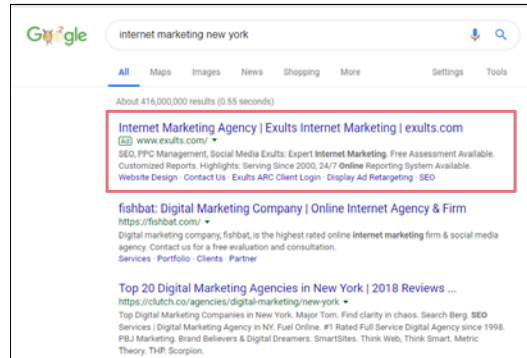
Fareez is a social worker who has dedicated his career to helping others.
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For career details: socialworker.sg

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Paid Search Results

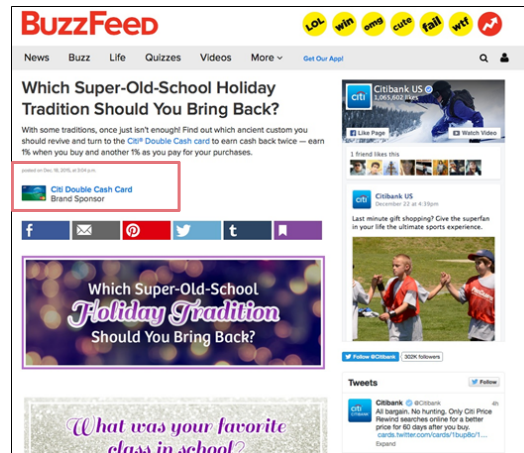
- In the early 2000s, FTC turned its eye toward paid search results.
- In 2002, FTC declined to take formal action against search engines, but recognized “the need for clear and conspicuous disclosures of paid [search] placement, and in some instances paid inclusion.”¹



¹ https://www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf

Sponsored Content & Native Ads

- Ads formatted to match the style of surrounding content.
- In its December 2015 Policy Statement on Deceptively Formatted Ads, FTC specifically addressed sponsored content & native advertising.¹
- FTC paid particular attention to misleading formatting, and misleading source identification.



¹ https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptivenforcement.pdf

FTC Historical Action

Over the years, the FTC has challenged in this area:

- “advertorials” that appeared as news stories or feature articles,
- direct-mail ads disguised as book reviews,
- infomercials presented as regular television or radio programming,
- in-person sales practices that misled consumers as to their true nature and purpose,
- mortgage relief ads designed to look like solicitations from a government agency,
- emails with deceptive headers that appeared to originate from a consumer’s bank or mortgage company
- paid endorsements offered as the independent opinions of impartial consumers or experts.

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FTC Endorsement Guides

FTC Endorsement Guides

- “Advertising” includes social media
- Disclose Material connections between advertiser and influencers
- Expanded liability for advertisers and endorsers
- Advertiser obligated to monitor

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FTC Endorsement Guides

MATERIAL CONNECTIONS

Disclose any MATERIAL CONNECTION with influencer

- **“material connection”** =
 - Incentives e.g. free swag, prizes, special access, privileges
 - Relationship with advertiser - employment
- Disclosure must Clear and Conspicuous; easily understood; unambiguous

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FTC Endorsement Guides

It's Real Money

May 9, 2018:



- **Dwayne "The Rock" Johnson** is charging Universal Pictures \$1 million to promote his upcoming film "Red Notice" on his own social media pages, according to Variety.
- The million-dollar "social-media fee" is part of his \$22 million salary for the film, which is second only to Daniel Craig's \$25 million salary for the upcoming "James Bond" film, according to Variety's round-up of high-profile film salaries.
- Johnson currently stands at 105.6 million followers on Instagram, 57.7 million on Facebook, and 12.9 million on Twitter.

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FTC Endorsement Guides

FTC v. CSGO Lotto: Sept. 2017



- Settlement with 2 influencers
- Who also owned the company
- Posted promoting “Counter-Strike: Global Offensive” video game
- Never disclosed they actually owned the company that produced the video game
- Also paid other influencers \$2,500-\$55,000 to promote game, but contractually prohibited influencers from saying anything negative about it
- Same Day: FTC announced having sent 21 influencers warning letters for failing to disclose material connections.

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Influencer & Endorser Policy Guidance

DO

- Place disclosures up front (before users can click on, watch or read the sponsored content) in the main communication. See: [Platform Specific Placement Guidance chart page 2](#).
- Craft your disclosure for the intended audience.
- Use a larger font or repeat disclosures on lengthy posts or if the content includes repeated claims.

DON'T

- Require additional action, such as scrolling, to see the disclosure.
- Place the disclosure on a busy screen or moving background where it may be difficult to see.
- Rely on the placement of a disclosure in a hyperlink, page description or profile to provide your notice.

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Platform-Specific Disclosure Placement Guidance

Platform	Placement
Twitter	- Disclosure must appear in first 90 characters of copy, prior to any links or other #s, and must be visible to viewers without any additional action across all devices.
Facebook & Instagram	- Paid Partnership or Sponsored Tag mechanism must be supplemented with a # or plain language disclosure. - Disclosure must appear in first 90 characters, prior to any links or other #s, and must be visible to viewers without any additional action across.
SnapChat	- Disclosure must appear on screen in each snap. Disclaimer placement on screen and choice of font size/ style/ color should ensure that the disclaimer is easy to notice and read. - Exceptions: - Disclosure may be given verbally if the endorsement is also only provided verbally (no images, visual references to the product/ brand/ campaign/ Unilever on screen). - No disclosure necessary for Influencer takeovers of a Brand's SnapChat account.
Pinterest	- Disclosure must appear in the main communication, prior to clicking.
Blogs	- Disclosure must be provided at the beginning of the post, prior to any mention of Unilever, brand, product or campaign. - Any social media communication notifying followers of a new blog post must also include a # or plain language disclaimer acknowledging the relationship to Unilever or the brand.
YouTube & Other Videos	- Must appear in the video description AND either: on-screen (placement, font style/size and length of time on screen should ensure that the disclaimer is easy to notice and read), OR, verbally as part of the script introduction; - Must appear prior to any reference to the brand/ product/ campaign/ Unilever; - If the video is long and the brand/ product/ campaign reference does not happen until later in the video the notice of the connection should be repeated, either on screen or verbally in the script.
Streaming	- Disclosure must appear several times on-screen to ensure that viewers see the disclosure no matter when they begin streaming. - Placement, font style/size and length of time on screen should ensure that the disclaimer is easy to notice and read.

Helpful Resources: The FTC has issued the following guides regarding social media activities on behalf of brands by influencers and endorsers. Please review and familiarize yourself with (and follow) these guides. The FTC's Endorsement Guides: https://www.ftc.gov/system/files/documents/plain-language/ftc-2020-endorsement-guides-faq_0.pdf. Guides concerning the Use of Endorsements & Testimonials in Advertising: <https://www.ftc.gov/ftb/2016/05/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/20160505-revisedendorsementguides.pdf>

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Carly Patterson shared Inside Gymnastics's post.
June 5, 2016 ·
I was definitely surprised to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.

FTC Complaint against PR firm Creaxon Corporation and specialty sports magazine publisher Inside Publications

Thank you so much FIT Organic for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buff for mosquitoes so this is a game changer! --- with Carly Patterson Caldwell.

Endorsements did not disclose Carly Patterson or Jake Dalton's paid promotional relationship with HealthPro

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Short form disclosure options: #Paid, #Sponsor, #Ad, #FITOrganicPartner, #FITOrganic Ambassador

Plain language disclosure options: "I've partnered with FIT Organic to . . ." "So excited to work with FIT Organic on . . ." "Proud to be a part of the most recent FIT Organic campaign . . ."

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Inside Publications posted and reposted statements on social media about FIT Organic Mosquito Repellent, primarily through its *Inside Gymnastics* accounts.

Inside Publications did not disclose the spokespersons' paid promotional relationships with HealthPro or that its own statements were paid commercial advertising.

Short form disclosures: #paid, #sponsor, #ad

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Inside *Gymnastics* magazine published articles referring to FIT Organic Mosquito Repellent. The articles did not disclose they were paid commercial advertising.

Disclosure options if the advertiser created the content:
“Paid Advertisement,”
“Advertisement”

Disclosure options if the advertiser funded but did not create the content: “Sponsored by FIT Organic,” “Brought to you by FIT Organic,”
“Made possible by FIT Organic”



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Works great 12/5/2018 Was this review helpful?
★★★★★
by BeeWhispererDori
With all the rain we have had in Southeast NC this year the mosquitoes have been terrible. After returning from Brazil my brother Mark told me about this amazing spray he used there to combat the mosquitoes. I ordered mine right away. After only one application I was sold. The little buggers wouldn't even land. All natural, smells great, not greasy. It works!!

Worked for me in Brazil 9/29/2018 Was this review helpful?
★★★★★
by Mark
I used this product on a recent hike in a Brazilian rainforest and didn't get a single mosquito bite. A fellow hiker had been bitten by several mosquitoes. Apparently, the spray he was using did not work. I learned from my FIT Organic repellent and he loved it. He finished the hike without any more bites. This product smells great and is light on your skin. I highly recommend it.

Works and smells great! 9/28/2018 Was this review helpful?
★★★★★
by Laura
Great product and doesn't make you cough or feel like you're putting on chemicals when you spray it on like DEET. Not only does it work, it smells so fresh and natural. I'm very satisfied.

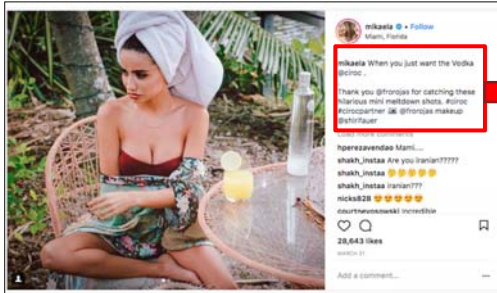
Creaxion conducted an online consumer review program that reimbursed individuals, including Creaxion employees, for purchasing FIT Organic Mosquito Repellent and posting online reviews.

Reviews did not disclose that the reviewers were reimbursed for buying the product or the reviewers' relationships to the PR and marketing company hired to promote the product.

Short form disclosure options:
#FitOrganicEmployee, #loveyourjob **AND** #Got4Free, #FreeProduct, #Free

Plain language disclosure options:
“I'd buy this spray even if I didn't work for FIT Organic and got to try the product for free,” “So proud to work on a brand that . . . and lets me try the product for free,” “My company makes this great product . . .”

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In regard to the placement of #cirocpartner, the FTC has said that placing a disclosure so far down in the caption of an Instagram post — in this case, on the sixth line — is easy to miss and unlikely to cut it. The disclosure does not even appear without clicking “more.”

“Family business!!!” – sufficient disclosure?



TINA.org letter to the FTC asking them to investigate Diageo’s use of influencers to market Ciroc Vodka on Instagram.

How often do third party complaints result in regulatory activity at the FTC?

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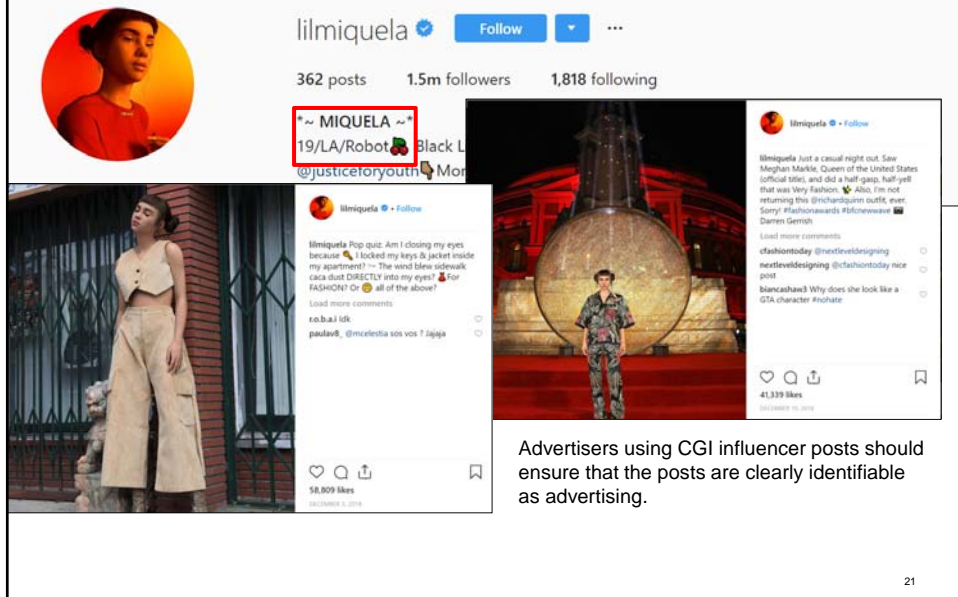
DJ Khaled and Floyd Mayweather Jr. settled with SEC – alleged violation of the anti-touting provision of the federal securities laws.

Failed to tell their social media followers that they received money for promoting investments in Initial Coin offerings (“ICOs”).

Examples:

- DJ Khaled received a \$50,000 payment referring to Centra’s ICO as a “Game changer” on various social media accounts.
- Mayweather received a \$300,000 payment tweeting that Centra’s ICO “starts in a few hours. Get yours before they sell out, I got mine . . .”
- Mayweather allegedly failed to disclose his relationship with two other ICOs that paid him \$200,000 for posts such as, “You can call me Floyd Crypto Mayweather from now on.”

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Blurring of Ads and Content in the Kids' Space

- *Kids can't differentiate between programs and commercials...*
- Birth of KIDVID
- FCC requires separations between programs and ads
- FTC requires clear and conspicuous disclosures in advertising
- Enforced by Children's Advertising Review Unit (CARU), self-regulatory industry watchdog

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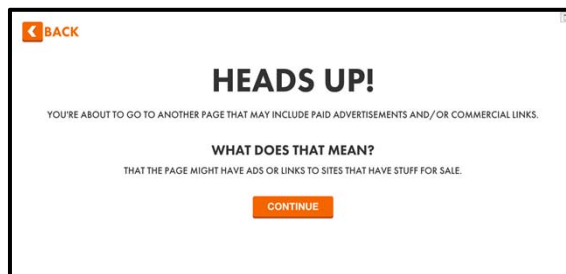
FTC Disclosures in Sponsored Content, Advertising, Social Influencers

- Persistent visual ad-marking
- Bookend with sponsorship messaging
- Unboxing disclosures - CARU EvanTube Case
- Social influencers with kid followers

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Persistent Visual Ad-Marking

Internal Bumper



Nick.com



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Persistent Visual Ad-Marking



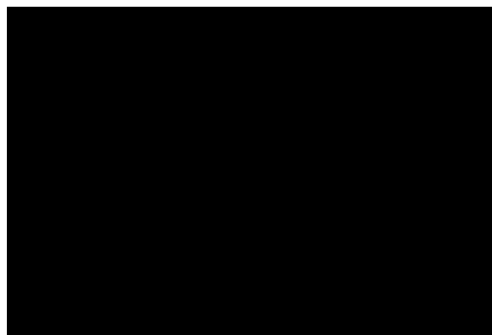
Nick Jr. YouTube
(Ad-Marked throughout)



Nick YouTube
(Ad-Marked throughout)

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Bookend Sponsorship Messages



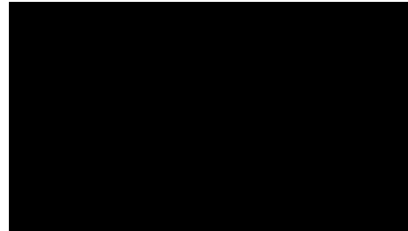
Influencer: *Jojo Siwa*
Pikmi Pops Sponsorship

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YouTube Videos — Unboxing



EvanTubeHD
Disney LEGO without
Sponsorship Disclosure



EvanTubeHD
Mattel Sponsorship Disclosure

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YouTube Social Influencers



Influencers: *Eh Bee Family*
Influencers: *Eh Bee Family*
Chrysler Sponsorship Disclosure



Influencers: *Ariel "Baby" Martin & Daniel Skye*
Journeys and Converse
Sponsorship Disclosure

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FTC is on the Case

Influencers receiving FTC Warning letters in 2017

1. Naomi Campbell
2. Lindsay Lohan
3. Vanessa Hudgens
4. Snooki (Nicole Polizzi)
5. Sofia Vergara
6. Amber Rose
7. Scott Disick



(***Doris Day and Chuck Norris did not receive letters)

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Advertiser Obligations per the FTC

Advertiser obligations:

- Educate influencers about disclosure req's
- Educate employees/agents
- Require disclosure by influencers
 - “If you choose to review or share this product please be sure to disclose that it was provided to you by the company.”
- Monitor disclosures
 - Remind and cut off if no compliance

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Advertiser Obligations per the FTC

FTC says “Everybody knows....” is not true.

FTC says DON'T assume platform disclosure tool is sufficient (e.g. Instagram).

FTC DOES NOT LIKE ambiguous disclosures:

#thanks; #collab; #sp; #spon; #ambassador

FTC says Don't rely on disclosures only seen if user clicks “more...”

Claim Substantiation concerns still relevant.

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Advertiser Obligations per the FTC

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

FTC RECOMMENDATIONS	PRACTICES TO AVOID		
 <p>Clearly DISCLOSE when you have a financial or family relationship with a brand</p>	 <p>DON'T ASSUME followers know about all your brand relationships</p>	 <p>Treat sponsored tags, including tags in pictures, LIKE ANY OTHER endorsement</p>	 <p>Don't use AMBIGUOUS DISCLOSURES like “Thanks,” #collab, #sp, #spon, or #ambassador</p>
 <p>Ensure your sponsorship disclosure is HARD TO MISS</p>	 <p>Don't assume disclosures BUILT INTO social media platforms are sufficient</p>	 <p>On image-only platforms like Snapchat, SUPERIMPOSE DISCLOSURES over the images</p>	 <p>Don't rely on disclosures that people will see only if they CLICK “MORE”</p>

Source: Federal Trade Commission

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Thank You!

Thank you for your time!
Any questions, or
comments. . .



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ANCHORAGE
ATLANTA
AUGUSTA
CHARLOTTE
DALLAS
DENVER
HOUSTON
LOS ANGELES
NEW YORK
RALEIGH
SAN DIEGO
SAN FRANCISCO
SEATTLE
SHANGHAI
SILICON VALLEY
STOCKHOLM
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