

CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | April 4, 2016

Why FTC's Action Against Lord & Taylor Was More Than Slap on Wrist

From the Experts

Allison Fitzpatrick and Paavana L. Kumar

In an evolving digital world, advertisers are constantly looking for new ways to engage consumer interest, and to maintain that interest. Over the past few years, we have seen an explosion of "online celebrities"—stars on Vine, Instagram and YouTube—who have harnessed huge consumer followings in the fields of fashion, makeup, music and technology. They are subsequently hired by brands looking to monetize that consumer base.

Enter the regulators: namely, the Federal Trade Commission (FTC), which for years has been paying close attention to influencer, blogger and representative activities (including paid review practices). Last year the commission issued guidance updating the principles in its Endorsement Guides.

But the online landscape is moving fast. To maximize online exposure, brands are adopting comprehensive and multifaceted strategies to run campaigns across all types of media, pushing out content not only via influencer networks on social channels but also through online publishers. These publishers have integrated so-called native advertisements into the general look, feel and aesthetic of their publications to pique the interest of consumers.

Unluckily for some, the interest of regulators has also been piqued. The



very benefit of native advertising—that it blends into surrounding editorial content to attract consumers—also poses the potential to mislead consumers if the source of the advertising message is not made clear at the point of contact. Concerns regarding deceptive influencer content and native advertising came to a head in March with the FTC's action against Lord & Taylor. The FTC claimed that the retailer paid for native advertisements and online influencer posts without disclosing that these were paid promotions for

the company's 2015 Design Lab clothing collection. While Lord & Taylor ultimately settled the action, the retailer did not escape unscathed.

The Background

According to the FTC's complaint, Lord & Taylor paid *Nylon*, an online fashion magazine, to place an article in its publication and simultaneously post on Instagram about Lord & Taylor's new clothing collection. Both the article and the paid post included a photograph of one of the retailer's new Design Lab

paisley dresses. The retailer also incentivized various online fashion personalities to post photos of themselves wearing the dress on social media over a “product bomb” weekend. The incentive was that the women wearing the dress received it for free and were also paid between \$1000 and \$4000. The social media campaign was extremely successful, reaching 11.4 million individual users and resulting in 328,000 brand engagements with Lord & Taylor’s Instagram handle (such as likes, comments and reposts).

The catch? While Lord & Taylor reviewed, edited and approved all the paid content, it did not require *Nylon* (or any influencers) to include a disclosure that the content was paid for by Lord & Taylor. Nor did Lord & Taylor add any such disclosures as part of the editing and review process. Ultimately, neither the article nor any of the posts included any disclosure of the material connection to Lord & Taylor.

Notably, this action comes only a few months after the FTC issued an enforcement policy and business guidelines on native advertising (Native Guides), which expressly affirmed its position that traditional consumer protection principles under the FTC Act – and the need for transparency and disclosure – apply to native advertising. While many of the FTC’s more recent examples in its guidance addressed some of the grey areas in native advertising, this was not one of them. This was paid content that not only promoted advertiser products but also appeared similar to the surrounding editorial content, and a disclosure was necessary to distinguish the editorial content from the paid advertising content.

The FTC also claimed that the retailer’s failure to instruct influencers to disclose that they were compensated by Lord & Taylor violated the FTC’s Endorsement Guides, an area of

extensive FTC scrutiny over the last two years.

Did the Settlement Order Have Teeth?

While the FTC’s settlement order imposed significant injunctive obligations on Lord & Taylor, the retailer was not required to pay any monetary penalties. On its face, the proposed consent order may not seem like a true punishment. Advertisers and their partners might be excused for seeing this outcome as a “slap on the wrist,” a mere warning along with stern advice.

However, such a characterization does not take into consideration the FTC’s statutory authority, and it downplays the significance of injunctive provisions required by the settlement. Remember that, while the FTC can require advertisers to pay redress or disgorge profits in the event of real harm to consumers (especially if the challenged act or practice was dishonest or fraudulent to consumers), under Section 5 of the FTC Act, the commission generally does not have the power to seek other monetary damages as part of a consent order. That said, these injunctive provisions not only have long lives, they may be actively monitored by the FTC. As such, the commission can impose significant civil penalties for violations of its orders. The magnitude of potential penalties stemming from failure to comply with an FTC order – which have been upwards of \$10,000 per day in other FTC matters -- should not be underestimated.

Further, the injunctive orders impose stringent obligations, which are more far-reaching than they appear at first glance. Most notably, Lord & Taylor’s consent order continues for a period of 20 years (which may be even longer if Lord & Taylor does not monitor compliance and violates the order going

forward). It also imposes comprehensive disclosure, monitoring and reporting obligations. Specifically, Lord & Taylor must provide each of its endorsers with a clear statement of his or her disclosure responsibilities and obtain from each endorser a signed statement acknowledging receipt. Lord & Taylor must establish and maintain a system to monitor and review its endorsers’ disclosures to ensure compliance with the FTC Endorsement Guides, and terminate any endorsers who fail to disclose their relationship with the retailer. The consent order also requires that Lord & Taylor maintain reports sufficient to show the results of its monitoring, which is a burdensome task when dealing with hundreds of influencers and possibly thousands of social media posts.

In addition, for five years following the dissemination of any endorsement covered by the order, Lord & Taylor must maintain and, upon reasonable notice, make available to the FTC all advertisements and promotional materials containing the endorsements and all contracts and written communications with any influencers, as well as any complaints regarding the retailer’s failure to comply with these requirements. Once again, this is a time-consuming task, given that Lord & Taylor must compile this information from hundreds of influencers over multiple social media platforms. It may be some time before Lord & Taylor undertakes another comprehensive Influencer campaign.

While the majority of the consent order focused on the influencer campaign, the order received significant media attention because it was the FTC’s first action involving native advertising. Before dismissing this action as a slap on the wrist, consider the number of articles that have scrutinized and criticized the Lord & Taylor

campaign and the unfavorable publicity the retailer received as a result of this action. Further, Lord & Taylor's failure to abide by the FTC Endorsement Guides certainly does not help its reputation going forward.

Why Was Lord & Taylor Singled Out?

Why did the FTC choose to single out Lord & Taylor, especially when other parties, such as the influencers, the influencers' agency and the publisher also appeared to be at fault? The FTC certainly has the authority to hold other parties liable for their roles in engaging in deceptive trade practices. Yet the FTC chose not to add *Nylon* magazine, any of the influencers or the agency that hired the influencers to its complaint.

As for why the FTC did not bring an action against the influencers, the FTC has stated previously that it would prefer to bring actions against the advertiser or its advertising agencies, which the FTC holds more responsible. From a practical standpoint, the FTC could face significant PR fallout if were to bring multiple actions against the consumer influencers instead of holding the advertiser who orchestrated the campaign responsible.

As for why the FTC did not bring an action against the agency, according to the FTC, advertisers are ultimately responsible for the actions of their agencies. To the extent Lord & Taylor hired an agency (or multiple agencies) to administer its influencer program, Lord & Taylor should have ensured (and potentially contractually obligated) that the agency train the influencers to make appropriate disclosures, and monitor the influencers to make sure that they were doing so.

It is difficult to know why the FTC did not bring an action against *Nylon*, the publisher of the native article. It

certainly impacts the analysis that Lord & Taylor was the single entity responsible for orchestrating the entire campaign – reviewing, editing and approving all the content, and managing the contractual relationships with multiple individuals as well as *Nylon* (and likely other publishers) to disseminate this content in a specific manner, but notably without a disclosure. Further, the widespread media buzz about Lord & Taylor's campaign at the time of dissemination – which included several articles about whether its influencers had in fact been incentivized – likely came to the attention of the FTC, which unearthed the deceptive native advertisements during the course of its wider investigation into the endorsement violations and took the opportunity to reinforce its recent guidance.

While all of the above parties appear to be somewhat at fault, Lord & Taylor was involved in each step of the campaign (including reviewing and approving the paid content), and had the most to gain from the campaign's success.

What Can We Learn?

This action should also serve as a warning sign that regulatory enforcement in this area will only intensify, and advertisers, agencies, influencers and publishers need to be aware of their ongoing obligations. They would do well to keep in mind the following takeaways:

1. Pay careful attention to how native advertisements and influencers' activities are developed and placed. Evaluate whether disclosures are required when content has been paid for, approved or otherwise incentivized by a brand, and ensure, when necessary, clear and proximate disclosures are made in accordance with the FTC's Native Guides and Endorsement Guides.

2. When engaging influencers, include language in their contracts

that requires them to disclose their relationships and comply with FTC Endorsement Guides. Also provide the influencers with guidelines and examples of appropriate disclosures. Remember that regulatory risk cannot be contracted away. Closely monitor compliance, and terminate influencers who do not comply.

3. Consider developing your own internal native advertising and influencer policies, as well as policies regarding the review and monitoring of publisher and influencer posts. This may be the best way to ensure that your internal teams as well as your partners and influencers are adhering to the key principles set forth in the Native Guides and Endorsement Guides.

Allison Fitzpatrick is a partner in the advertising, marketing and promotions practice group of Davis & Gilbert. She may be reached at afitzpatrick@dglaw.com. Paavana L. Kumar is an associate in the same group and can be contacted at pkumar@dglaw.com.