Adequate Disclosures in 140 Characters or Less-Analysis of How Endorsers Should Approach Advertising on a Platform with Character Limitations

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ADEQUATE DISCLOSURES IN 140 CHARACTERS OR LESS—
ANALYSIS OF HOW ENDORSERS SHOULD APPROACH
ADVERTISING ON A PLATFORM WITH CHARACTER
LIMITATIONS

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ABSTRACT

Social media websites such as Twitter and Facebook have transformed the way businesses and individuals market their products and services. These websites have given advertisers and promoters the ability to advertise directly to consumers who would most likely be interested in their products or services. In theory, this should benefit both the consumer and the owner of the product or provider of the service. The product owner or service provider can more efficiently use its marketing resources, and consumers will be exposed to advertisements of products and services catered to their interests. This increased ability to target specific consumers, however, brings an increased risk of consumer deception. After recognizing this increased risk, several federal agencies empowered to protect the consumer from deceptive trade practices have published guidance on how to proceed to communicate an advertisement on social media sites to avoid the risk of deception. This seemingly premature application of consumer law to these websites has created many problems and concerns. Many of these sites have character space limitations, “CLP’s”, which would restrict the ability of businesses to effectively communicate an advertisement while also providing the necessary disclosure requirements. While it is clear that these agencies are not excluding these mediums from disclosure requirements, which is where the clarity ends. This Article is focused on highlighting the major issues that arise for advertisers, consumers and promoters that are using social media sites. It also addresses common themes in each of the agencies’ guides concerning the use

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of social media websites and makes an effort to interpret a very unclear area of law.

INTRODUCTION

“If there is one thing more dishonest than dodgy marketing, it is the pretense that marketing raises no ethical concerns. The truth is that marketing raises enormous ethical questions every day—at least it does if you are doing it right.”

—Rory Sutherland, Vice-Chairman, Ogilvy Group UK.¹

Rather than communicate this message through Twitter, Rory made this statement in an article posted on a marketing blog site. Which makes sense, because if Rory attempted to convey this message through Twitter it would look like this:

“If there is one thing more dishonest than dodgy marketing, it is the pretense that marketing raises no ethical concerns. The truth is that”

Like many social media sites, Twitter has character limitation requirements imposed on messages conveyed through its website. In order for Rory to effectively communicate his message he would have to create two separate tweets, shorten the length of his message, or provide a hyperlink that directs his followers to his full quotation on a separate website. So while Rory might be annoyed, he has different options to choose from as to how he would like to convey his message.

Suppose that rather than posting a favorite quote on Twitter, Rory wanted to express how satisfied he is with his new blood pressure medication called “HEARTLY.” So with little premeditation, Rory promptly pulls out his mobile phone and publishes the following tweet:

“Luv my new BP med. Feeling like a million bucks. #blessed #HEARTLY”

While this is a clear endorsement of the drug HEARTLY, Rory is not under contract to promote HEARTLY, and his Twitter followers would not be misled if they assumed that this was Rory’s truthful opinion and experience with the drug.

¹ Rory Sutherland, We Can’t Run Away from the Ethical Debates in Marketing, MARKETING SOCIETY: THE LIBRARY (July 9, 2012), https://www.marketersociety.com/the-library/we-cant-run-away-ethical-debates-marketing.
Let’s change the facts again. Let’s assume that Rory is not a person but actually an advertiser of the drug HEARTLY. Now if Rory makes the same statement about the drug HEARTLY, Rory’s statement is transformed from an opinion into an advertisement subject to FDA regulations. These regulations would require an advertisement of a blood pressure medication such as HEARTLY to contain certain disclosures about the risks of using HEARTLY. The FDA has made it clear that advertisements conveyed through platforms such as Twitter are not exempt from these disclosures. Accordingly, any message without these disclosures would subject Rory and other parties involved with the drug HEARTLY to liability.

Once more we change the facts and assume Rory is a male celebrity who uses HEARTLY and sincerely enjoys the benefits that he has experienced using HEARTLY. Rory also has an endorsement deal with HEARTLY and makes a commission based on the amount of HEARTLY sold each month. Rory wants to publish the following message on his Twitter:

"Luv HEARTLY- BEST BP drug ever"

This poses a problem for Rory as well as the marketing team of HEARTLY. This tweet would be considered an endorsement of a product by an individual with a material connection between himself and the drug. While this tweet is Rory’s honest and truthful opinion about HEARTLY, the fact that Rory is benefiting from the sale of the drug must be disclosed to prevent consumer deception. Despite there being no evidence of Rory’s intent to mislead his followers, the federal agencies created to protect consumers are not concerned with the subjective intent of the endorser. Their focus is on how the consumer perceives the message. This poses the question of how much disclosure is necessary to prevent liability. Would it be sufficient to just disclose the material connection that the celebrity has in the message with an #Ad or similar abbreviation? Or is the celebrity also required to comply with the disclosure requirements provided by the FDA regarding the prescription drug HEARTLY in 140 characters or less?

The answer is unclear. In an effort to comply with disclosure requirements while marketing on these Character Limited Platforms ("CLP’s"), many

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businesses and individuals have asked for guidance from consumer protection agencies on how they should approach advertising on CLP’s like Twitter. In response to their pleadings, these agencies have published and edited previous guidance documents that attempt to address how advertisers should approach marketing on CLP’s. While each agency was created with a different purpose, many of their responsibilities with regard to consumer protection overlap. The published guides have similar messages and themes. For example, they each make it clear that CLP’s are not exempt from disclosure requirements. Many times a simple #AD or hyperlink is not sufficient disclosure, and if the required disclosure in the message does not fit the CLP’s space requirements, the advertisement should not be published on that platform.

I. THE RISE OF SOCIAL MEDIA AND ITS EFFECT ON MARKETING

A. Definition of Social Media

There have been many definitions of social media and what it entails. So for the purpose of this Article, it will be defined broadly as provided by the FFIEC:


6 See Fed. Trade Comm’n, supra note 4; FDA Guides, supra note 5 at 5.
Social media is considered to be a form of interactive online communication in which users can generate and share content through text, images, audio, and/or video. Social media can take many forms, including, but not limited to, microblogging sites (e.g. Facebook, Google Plus, MySpace, and Twitter); Forums, blogs, customer review websites and bulletin boards (e.g. Yelp); photo and video sites (e.g., Flickr and YouTube); sites that enable professional networking (e.g., LinkedIn); virtual worlds (e.g., Second Life); and social games (e.g., FarmVille and CityVille).  

The FFIEC states that, “social media can be distinguished from other online media in that communication tends to be more interactive.” It is this interaction between businesses and consumers that generates concerns in the world of advertising. When used properly, social media can be an extremely efficient and effective communication method that provides benefits for both consumers and producers alike. However, the informality of a message communicated through this medium creates an inherent risk of deception. 

For example, a drug manufacturer was recently issued a formal warning letter by the FDA for a deceptive ad posted by social media maven Kim Kardashian. With more than forty-eight million followers, Kardashian is one of the most followed people on Instagram and is often paid by companies to endorse products. The Instagram post at issue was a picture of Kardashian holding a bottle of the morning sickness medication, Diclegis, while making one of her signature selfie faces. The caption attached to the filtered photo was a glowing review about the positive effects of the drug, and a claim that

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8. Id.
“there was no increased risk to the baby” when taking the morning sickness medication. In its formal warning letter to the drug’s manufacturer, Duchesnay USA, the FDA stated the endorsement was deceptive because it failed to communicate any risk information. This is especially problematic on a public policy level because it “suggest[s] that Diclegis is safer than has been demonstrated.” In response to the FDA’s warning, Kardashian deleted the original post and replaced it with the following caption:

#CorrectiveAd I guess you saw the attention my last #morningsickness post received. The FDA has told Duchesnay, Inc., that my last post about Diclegis (doxylamine succinate and pyridoxine HCl) was incomplete because it did not include any risk information or important limitations of use for Diclegis. A link to this information accompanied the post, but this didn’t meet FDA requirements. So, I’m re-posting and sharing this important information about Diclegis…."

The post went on to list important safety information such as allergy concerns, common side effects, and a link to a website created by Duchesnay USA with more information about the drug. The new caption was in compliance with the FDA’s standards, but far exceeded the typical length of an Instagram post, which for some is nothing more than a few expressive emojis. The risk of deception through social media advertising can be even greater when using a social media platform that has a character limitation requirement.

B. Character Limited Platforms (CLP’s)

As demonstrated in the introductory examples, CLP’s are creating problems in the world of advertising. While many of the examples in the guides and in this Article involve Twitter, CLP’s are not limited to Twitter. CLP’s are found on any website that allows users to communicate a message but limits that communication in some way or another. This limitation may be on how many words a user is allowed to write or how many photos that they

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14 See Burton, supra note 10.
17 Id.
are allowed to post. The limitation could be one word or ten thousand words. Accordingly, any platform that does not allow you to fully communicate your message is considered a CLP for the purposes of this Article. So while many of the examples are based on Twitter, the guidance of the agencies can be applicable to any CLP that limits one’s ability to fully communicate their message.

II. BRIEF OVERVIEW ON FEDERAL AGENCIES CREATED TO PROTECT THE CONSUMER

A. Agencies in General

Administrative agencies are created by Congress or the President to carry out governmental programs. Administrative agencies are created by Congress or the President to carry out governmental programs. While there are many different sources that regulate and govern the activities of administrative agencies, understanding the concept of an enabling statute will be sufficient for the purpose of this Article. An enabling statute specifically empowers an agency to take certain actions and generally an agency may not act beyond its permissive scope. These enabling statutes typically require the agency to assist the government in the regulation of a specific industry by gathering data, granting licenses, creating policy, as well as enforcing and adjudicating disputes. When confusion is voiced over how a regulation should be applied in a specific circumstance, the agencies will typically publish guidance (“guides”) on how an entity should proceed. While these guides are not legally binding, they are representations of an agency’s current belief on how one should proceed in complying with its regulations.

B. Guidance from the FDA and FTC

1. The FDA

The Federal Food, Drug and Cosmetic Act created the U.S. Food and Drug Administration (“FDA”) in an effort to manage the inherent risks associated with drugs and other medical devices. The FDA has been given very broad regulatory authority over products associated with food and drugs. This broad regulatory authority inherently gives the FDA the power to protect consumers from deceptive marketing.

The FDA is currently in the process of publishing guides specifically addressing how an advertiser should proceed when utilizing a CLP. On June 18, 2014, the FDA posted a draft guidance titled “Internet/Social Media Platforms with Character Space Limitations: Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices.” The FDA is currently waiting for additional comments in order to publish an effective guidance article, and therefore the current draft contains nonbinding recommendations. However, regardless of the binding power of the draft, the FDA’s specific focus on CLP’s is beneficial to this analysis of advertising on CLP’s in general. While the FDA does not make its guides with the intention of providing guidance to industries outside of their authority, its analysis, tips and considerations help us fill in holes left by the FTC’s broad guidance.

2. The FTC

The Federal Trade Commission “FTC” was created on September 26, 1914, after President Woodrow Wilson signed the Federal Trade Commission Act

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26 Id.
27 See FDA Guides, supra note 5.
28 Id.
30 U.S. FOOD & DRUG ASS’N, supra note 29, at 1. Page one of the FDA Guides specifically states that the guides were intended for manufacturers packers and distributors of prescription human and animal drugs and medical devices for human use.
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(“FTCA”) into law. The stated mission of the FTC is to protect consumers and promote competition in the marketplace. The FTCA is the primary enabling statute of the FTC, and empowers the FTC with the authority to protect consumers from unfair or deceptive acts affecting commerce. It fulfills its stated purpose through regulation, enforcement, and establishing requirements that prevent deception. Since the creation of the FTC, the agency has developed policies and regulations aimed at protecting the consumer and educating entities on their rights and responsibilities in the marketplace.

While the FDA guidance is directed at the Food and Drug industry, the FTC’s focus is much broader and extends to the majority of transactions in the marketplace. The FTC has revised its guides on how an advertiser should advertise on a CLP. The first half of this Article will focus on guidance from the FTC and FDA on how to portray a non-deceptive message on a CLP. The first guide that we will examine, “DOT COM Disclosures,” makes an effort to describe details that businesses should consider while developing advertisements for online media. While the FDA guides give a more detailed analysis of how a

34 See Statutes Enforced or Administered by the Commission, Fed. Trade Comm’n (last visited Mar. 15, 2015), http://www.ftc.gov/enforcement/statutes. This is a very general summary of the authority given to the FTC by the FTCA enabling act. The FTC has published a more specific summary of its powers granted by the FTCA on their website.
36 See Competition Advisory Opinions, supra note 35; supra note 32.
marketer should proceed to advertise on a CLP, the FTC guides also address some of the issues that arise with space-constrained screens.

The second half of this Article addresses the type of disclosure required by third party endorsements on a CLP. As we will see, an endorser can be an employee of the company making the product or a celebrity who has contracted to promote the product. It could prove to be problematic when an employee or celebrity endorser conveys a message on a CLP without disclosing the contractual relationship they have with the product’s company. The advertiser could be held liable regardless of whether it had any control over the message. While to this date there has been no guidance published specifically addressing the issue of how much disclosure is required from an endorser on a CLP, the FTC has revised previous guides regarding endorsements and has added illustrative examples that include advertising on social media. While the publication of these revisions acted as a declaration that advertisements conveyed on CLP’s such as Twitter are not exempt from disclosure requirements, the revisions did very little to address the issue of when an endorser could be held liable. The second part of this Article will also provide examples and analysis on what is considered an endorsement, when liability is created, who is liable and when disclosure is required.

III. FTC AND FDA GUIDANCE ON USING A CLP

A. Messages Requiring Disclosures

When deciding what amount of disclosure would be sufficient for any given message conveyed, an advertiser must first evaluate the language of the message and decipher whether there is a hidden claim or representation being communicated; this can be difficult. Sometimes an advertiser or endorser’s loyalty and admiration of the product can lead to an innocent representation that is actually deceptive in the eyes of a consumer. For example, the FDA provides an illustration in its guides of a seemingly innocent tweet that is

39 Id.
41 See id. §§ 255.0-255.5.
42 See id. §§ 255.0-255.2, 255.5.
actually a claim in disguise.\textsuperscript{44} This example involves a fictional drug called “No Focus” that was created for the purpose of battling mild to moderate memory loss.\textsuperscript{45} The firm promoting the product tweets, “No Focus for mild to moderate memory loss.”\textsuperscript{46} At first glance, the tweet seems to be an innocent representation of the drug and its purpose. However, as we will later see, the FDA would categorize this message as providing “benefit information” and states that such a message should be followed by sufficient risk information to avoid consumer deception.\textsuperscript{47} While similar statements might require less disclosure outside of the realm of prescription drug and FDA authority,\textsuperscript{48} this example illustrates the significance of examining each message thoroughly in order to find hidden claims or representations that require disclosure to prevent liability.

B. Messages Not Requiring Disclosures

It bears repeating that the sole purpose of providing a disclosure is to avoid deceiving the consumer. The FTC makes it clear that in order to decide whether some form of disclosure is required, the advertiser should view the message through the eyes of a reasonable consumer.\textsuperscript{49} Not all messages pose the inherent risk of consumer deception, and accordingly may require little disclosure, or in some cases, none at all.\textsuperscript{50} The FDA notes that mere “reminder” promotions are exempt from many of the labeling and advertising disclosure requirements.\textsuperscript{51} This would suggest that little to no disclosure would be required if a message can be categorized as a reminder promotion. The FDA describes a “reminder promotion” as a message that calls attention to the name of the product but does not make any representations or suggestions about the

\textsuperscript{44} See U.S. FOOD & DRUG ADMIN., supra note 29. At this point of the Article I am using the FDA’s example to illustrate the importance of language used on a CLP. The FDA is using this example in its guides to illustrate how little space is left for disclosing required risk information after using 40 out of the 140 character maximum for the benefit claim “No focus for mild to moderate memory loss”.

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} As discussed throughout the Article, there are more express disclosure requirements required by the FDA for products under its regulation due to the risks associated; i.e. if representation about firm’s prescription drug MUST include certain risk information. See 21 C.F.R. § 202.1(r) (2015), “brief statement of intended uses” and relevant risk information in restricted-device advertising. See id. § 202.1(r) (2015).

\textsuperscript{49} Dot Com Disclosures, supra note 38.

\textsuperscript{50} The FTC notes that under some circumstances, when utilizing a space-constrained advertisement, it might be acceptable to make the disclosures on a page to which the ad linked. Id. at ii, 10.

\textsuperscript{51} The FDA is not saying that Disclosure is never required for a “reminder promotion” just that they are exempt from many of the labeling and advertising disclosure requirements. FDA Guides, supra note 5.
product.\textsuperscript{52} Returning to the FDA’s example regarding “No Focus”, disclosure may not be necessary if it simply stated: “Ask your doctor about No Focus.”\textsuperscript{53} According to this interpretation of the FDA’s guidance, this tweet would be an example of a reminder promotion; the firm makes no representations or misleading claims about the drug. These types of messages do not carry a risk of deception; they fail to make a representation about their product, and are only an effective marketing tool after the benefits and risks associated with the drug are common knowledge and understood by the consumer.\textsuperscript{54}

C. Adequate Disclosures

Once an advertiser decides that the message it would like to portray requires some form of disclosure to avoid misconception, it should ensure that the disclosure is adequate.\textsuperscript{55} The guides provide similar instruction on how an entity should proceed in ensuring that its disclosure is sufficient to prevent consumer deception.\textsuperscript{56} While the guides focus on different aspects of an adequate disclosure,\textsuperscript{57} the general themes and analysis required are very similar. In deciding whether a disclosure is sufficient, an entity should always ask itself: (i) how much disclosure is needed with my product or service, (ii) does the benefit information balance with the risk information on my advertisement,\textsuperscript{58} and (iii) is the disclosure being communicated effectively to the consumer?

1. FTC Guidance on an Adequate Disclosure

While the FDA is focused on ensuring that certain legally required disclosures are communicated effectively to the consumer, the FTC is more


\textsuperscript{53} FDA Guidance for Industry, supra note 44.

\textsuperscript{54} See Reminder Ad, supra note 52.

\textsuperscript{55} U.S. FOOD & DRUG ADMIN., supra note 29.

\textsuperscript{56} Id.

\textsuperscript{57} See U.S. DEP’T OF HEALTH AND HUMAN SERVICES, FOOD AND DRUG ADMIN., BRIEF SUMMARY AND ADEQUATE DIRECTIONS FOR USE: DISCLOSING RISK INFORMATION IN CONSUMER-DIRECTED PRINT ADVERTISEMENTS AND PROMOTIONAL LABELING FOR PRESCRIPTION DRUGS (2015); see also Dot Com Disclosures, supra note 38 (The FDA is able to focus more on how an advertiser should balance disclosures on a character-limited platform because many of the products that the FDA regulates require certain disclosures by law. The FTC, on the other hand, does not assume a disclosure is needed and is more concerned with how the message deceives the consumer).

\textsuperscript{58} FDA Guides, supra note 5, at 4 (The FDA goes into detail on this balancing test while reviewing an advertisement on a CLP).
concerned with the overall risk of deception in the advertisement.\textsuperscript{59} Disclosures are required to ensure an advertisement is truthful, not misleading,\textsuperscript{60} substantiated, and fair.\textsuperscript{61} The FTC requires that the disclosures satisfy the “Clear and Conspicuous” requirement.\textsuperscript{62} It acknowledges that there is no bright line rule for determining whether a disclosure is clear and conspicuous, but provides a number of factors that an advertiser should focus on to avoid a violation.\textsuperscript{63} While many of the factors may have some effect on how an advertiser should proceed to advertise on social media CLP’s, this Article is concentrated on the actual message being portrayed on a CLP such as Twitter. For the purpose of the first half of this Article, assume that a company is analyzing how it should articulate the language of an advertisement on Twitter to avoid deception. Also assume that whatever message the entity conveys will be easily read on the device being used to view it, and any disclosures within the message are placed near the ad in a non-conspicuous way.

2. Necessary Disclosures

A popular belief in the world of CLP advertising is that a simple hyperlink or #AD at the end of an advertisement will effectively prevent an advertisement from being deemed deceptive.\textsuperscript{64} The guides are clear that standing alone, these abbreviated disclosures are insufficient in many situations.\textsuperscript{65} Often an advertisement must include necessary disclosures within

\textsuperscript{59} Id. at 3-5; \textit{Fed. Trade Comm'n, The FTC's Endorsement Guides: What People Are Asking} (2013).

\textsuperscript{60} \textit{Fed. Trade Comm'n, FTC Policy Statement on Deception} (Oct. 14, 1983) (The FTC’s deception policy describes an ad as deceptive if it contains a statement or omits information that is likely to mislead consumers acting reasonable under the circumstances and is “material” or important to a consumer’s decision to buy or use the product.).

\textsuperscript{61} See Dot Com Disclosures, supra note 38, at 5-6.

\textsuperscript{62} Id. at 6.

\textsuperscript{63} Dot Com Disclosures, supra note 38 at 7 (i. “[t]he placement of the disclosure in the advertisement and its proximity to the claim it is qualifying”; ii. “[t]he prominence of the disclosure”; iii. “[w]hether the disclosure is unavoidable”; iv. “[t]he extent to which items in other parts of the advertisement might distract attention”; v. “[w]hether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure”; vi. “[w]hether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration”; and vii. “[w]hether the language of the disclosure is understandable to the intended audience”).


\textsuperscript{65} See Dot Com Disclosures, supra note 38, at 10.
the message to avoid consumer deception. An advertiser must decide if the disclosure would materially affect a consumer’s decision to purchase a product or service. If so, this disclosure needs to be placed in the advertisement itself rather than within a hyperlink. If an advertiser is unable to fit the disclosure and the intended message on the CLP, the entity should not use that platform. Accordingly, identifying necessary disclosures is one of the most important preliminary determinations that an advertiser must make when deciding whether or not to advertise on a CLP.

An advertiser that creates products as opposed to providing services might need a disclosure for several reasons. These reasons include warranties communicated in the message, statements of a product’s condition, and risks associated with the product. The simplest illustration of a “necessary disclosure” is prescription drugs. The FDA guides note that, at a minimum, the firm’s message should include the most serious risks associated with the drug or medical device. The FDA describes a serious risk as one that would include all risks known to be fatal or life threatening, even if they are also represented on the box of the product. It further states that even if a drug does not have a boxed warning, fatal risks, or contradictions, the most significant warnings or precautions about the product should still be communicated in the message. This suggests that even products with low inherent risks are required to provide some type of disclosure in the message itself, outside of the hyperlink.

Unlike advertisements for products such as pharmaceutical drugs, advertisements for services are less likely to pose risks for physical injury to...
consumers. Accordingly, advertisers of services should focus on the risk of the potential for deception in the statement. For example, many services have hidden fees material to a consumer’s decision to purchase the services. If any fees would be deemed a necessary disclosure, it must be included in the message to avoid liability.

D. Utilizing the Hyperlink

A hyperlink is a valuable tool for an entity utilizing a CLP. A hyperlink is a link included in the message that allows an interested consumer to be directed to a separate page that might include the product website or a page of disclosures. A hyperlink can be in the form of a specific message or a short sequence of letters that are generally known to be a hyperlink. While there is no exact test to determine the extent of disclosure necessary to prevent a message from being deemed deceiving, the guides suggest to provide at least some type of disclosure in the message itself and the remaining material information in a separate page accessed through a hyperlink. Regardless of form, the hyperlink must be easily recognizable by the consumer or it will fail to prevent the deception intended by its placement. However, while a hyperlink can be a valuable tool in providing non-necessary disclosures, it also bears the risk of a company placing too much reliance on a hyperlink to satisfy its disclosure requirements.

75 Supra note 70 at 10.
76 Id. at A-4, A-15.
77 Dot Com Disclosures, supra note 38, at 10 (stating that “hyperlinks can provide a useful means to access disclosures that are not integral to the triggering claim”).
79 DOT COM DISCLOSURES, supra note 38, at 7 (stating “there is no set formula for clear and conspicuous disclosures” and that “it depends on the nature and form of the advertisement.” In evaluating “the clear and conspicuous requirement,” the FTC provides a list of factors to consider including “the placement of the disclosure in the advertisement” and “whether the language of the disclosure is understandable to the intended audience”).
80 Id. at 10 (stating “disclosures that are an integral or inseparable part of a claim should not be communicated through a hyperlink” but rather “should be placed . . . immediately next to the claim”); Id. at 8, 10; FDA Guides, supra note 27, at 10.
81 Dot Com Disclosures, supra note 38, at 11.
82 See id. at 10–11 (stating information that should not be disclosed via hyperlink includes cost information, health and safety disclosures or other hidden fees that a consumer would not expect to incur).
E. The Final Determination

While the FDA and FTC guides have helped clarify questions on strategy, there is still much confusion on how much disclosure is required by an advertiser utilizing a CLP.\footnote{See id. at 6–7.} However, one message is clear. If an advertiser cannot articulate a message on a CLP that is both effective and fulfills the disclosure requirements, it should not use that platform.\footnote{FDA Guides, supra note 27, at 5; see Dot Com Disclosures, supra note 38, at 6–7 (stating “if disclosure is necessary to prevent an advertisement from being deceptive, unfair or otherwise … and it is not possible to make the disclosure clearly and conspicuously” then either the claim should be modified or the “ad should not be disseminated.” Moreover, “if a particular platform does not provide an opportunity to make clear and conspicuous disclosures . . . it should not be used to disseminate advertisements that require such disclosures”).} If an advertiser does use a CLP to advertise, it should ensure that it has a detailed risk-management system in place to guarantee it is communicating a non-misleading message with adequate disclosure.\footnote{Fed. Deposit Ins. Corp., FIL-56-2013, Social Media: Consumer Compliance Risk Management Guidance, FDIC (Dec. 11, 2013), available at https://www.fdic.gov/news/news/financial/2013/fil13056.pdf.}

F. Effective Risk Management Systems

While many industries are not required to have a risk management system (“RMS”) in place, it is strongly recommended by the guides.\footnote{Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 4,848, 4,850 (Jan. 23, 2013), available at http://www.occ.treas.gov/news-issuances/federal-register/78fr4848.pdf.} The guides suggest that the amount of detail required in the RMS should be proportionate to the amount of marketing that the advertiser would like to use on a CLP.\footnote{Id.} Advertisements for products or services associated with a higher risk of physical or financial harm should include more detailed monitoring systems than advertisements for products with low risks of harm to the consumer.\footnote{Id.} Advertisers that choose to market frequently on a CLP should have more detailed monitoring systems than advertisers that use other marketing methods.\footnote{Id.} Thus, there is no perfect test to determine how much detail or resources that an advertiser should direct towards its risk management program.

A critical problem with inadequate monitoring systems can arise from the use of a CLP by a third party associated with the entity.\footnote{Advertising Guides, supra note 2 at 53,124.} Should endorsements
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of a product or service on a CLP be analyzed the same way as if the entity had communicated the message itself? In other words, should an endorsement by a third party subject to a contractual relationship with an entity be subject to the disclosure requirements above?

IV. DISCLOSURES AND THIRD PARTY ENDORSEMENTS

A. Additional Disclosure Requirements for Third Parties

While the guides can be useful in directing an advertiser in marketing its own product using a CLP, they lack guidance about how disclosures should be handled by a third party that is being compensated to endorse a product or service via CLP. It would seem contrary to public policy to allow an advertiser to circumvent the disclosure requirements discussed in the first half of this Article by paying a celebrity or other third party to endorse its product. In fact, it would seem that there is an even greater risk of deception when a third party is promoting a product without revealing that they are benefiting from their message. As discussed above, the increased risk of deception to consumers requires a greater need for additional disclosure.

B. FTC Guides on Endorsements

In response to the inherent deception that is created with endorsements of products and services on new media, the FTC revised its guides to include several examples of how they apply to new forms of consumer-generated media. These revisions were created to provide a basis for advertisers and endorsers to comply with the FTC’s provisions and did not purport to cover every possible use of an endorsement in an advertisement. These new additions were immediately met with criticism; many commenters argued that it was premature to apply these guides to new media without further discussion about the scope of liability this would create for advertisers. Other commenters argued that the effect of these revisions would deter advertisers


92 Id. at 53,127.

93 Id. at 53,138.

94 Id. at 53,125.
Nonetheless, the revisions were added. While the revisions helped entities understand that third party endorsers can create liability for the entity or third party through a CLP advertisement, there are still many questions regarding the amount of disclosure needed by an endorser and when the endorsers themselves are shielded from liability.

1. What Is an Endorsement and Who Is an Endorser?

The FTC defines an endorsement as any advertising message or statement that consumers are likely to believe reflects the opinions, beliefs, or experiences of a party other than the sponsoring advertiser. The guides also state that it is irrelevant if the message contained in the endorsement is identical to the views of the advertiser. Therefore, the focus is on the consumer’s perception of the endorsement, rather than the endorser’s intentions. Commenters argue that focusing on consumer perception in the realm of endorsements creates inherent uncertainty. However, the FTC dispels that argument by reiterating that the focus on the consumer’s takeaway is consistent with the approach the Commission uses to determine whether a practice is deceptive.

To determine what constitutes an endorsement and who can be classified as an endorser, the FTC makes the analysis through the eyes of a reasonable consumer. The FTC states that not every person who espouses a beneficial message about a product or service will be considered an endorser. A statement made by an announcer “who is not familiar to consumers” may not be an endorsement, unless that announcer is a spokesperson for the advertising

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95 Id.
96 See id. at 53,128 (Stating many commenters criticized the FTC for the lack of guidance of when an endorser would be liable. They argued it would require “celebrities to educate themselves” on the product, industry and competition and expose them to liability for claims beyond their expertise or control. They also argued that the risk of liability would deter them from endorsing products and create a chilling effect. The FTC claims the new examples featuring celebrities do not create new liability for celebrities but instead serves to warn them and their advisors about the potential liability associated with their endorsement activities).
97 Id. at 53,124.
98 Id.
99 Id. at 53,124-25.
100 Id. at 53,125.
101 Id.
102 Id. at 53,125-26.
company and is speaking on its behalf.\textsuperscript{103} However, a “well-recognized” professional golfer driving a particular brand of golf balls off a tee during a television commercial would be considered an endorser.\textsuperscript{104} Other examples illustrating endorsements suggest that once an individual achieves a level of recognition, their statements become more susceptible to being characterized as an endorsement by the FTC.\textsuperscript{105} However, the FTC has not deemed every use of social media to discuss a product as an endorsement.

This Article focuses on two types of individuals that would qualify as endorsers in my interpretation of the guides. The first type of endorser would be an individual who is highly recognized by the public and has sufficient influence on consumers (“celebrity endorsers”). Celebrity endorsers include actors, singers, public figures, politicians, and professional athletes. The second type of endorser would be any individual who is not well known by the public, but has a beneficiary relationship with the success of the product or services (“beneficiary endorsers”). Beneficiary endorsers include high-ranked employees in a company, or a single individual, who benefit from the product sales.

\textit{a. Disclosing a Material Connection}

The FTC requires disclosure of “Material Connections” between an advertiser and endorser inside each advertisement to prevent consumer deception.\textsuperscript{106} This suggests that not every connection between the advertiser and endorser needs a required disclosure. In order for disclosure to be required, the connection must be material. It defines a material connection as one that exists between the endorser and the seller of the advertised product that might materially affect the credibility of the endorsement.\textsuperscript{107} Technically, a low-ranked employee of a business would fit this definition, and the FTC has included an example of employees that create liability via online posts.\textsuperscript{108} This Article will focus on endorsers who directly benefit from the commission of sales of a product rather than employees who are working for an hourly wage.

\begin{footnotesize}
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\begin{enumerate}
\item \textsuperscript{103} Id. at 53,138.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. (e.g., “an announcer who is not familiar to consumers”, “a well-known professional automobile racing driver”, “a prominent and well-recognized professional golfer”, “well-known entertainer”, “well-known female comedian”, “well-known celebrity”, “well-known professional tennis player” “who is neither known to the public”).
\item \textsuperscript{106} 16 C.F.R. § 255.5.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id. at example 8.
\end{enumerate}
\end{footnotesize}
b. Additional Disclosure Requirements for Third-Party Endorsements

Section 255.1 of the FTC’s revised guide on endorsements provides advertisers and endorsers with general considerations for promoting products.\footnote{109} Below are two that have generated a lot of criticism, but are useful in our analysis of the disclosure requirements on a CLP:

(a) “Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”\footnote{110}

(d) “Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.”\footnote{111}

First, the guide makes it clear that an advertisement conveyed by an endorser is not exempt from the disclosure requirements discussed above.\footnote{112} Consideration (a) states that an endorsement cannot state an express or implied representation that would be deceptive if made directly by the advertiser.\footnote{113} Consideration (d) uses the false and unsubstantiated language that we discussed in the first half of this Article.\footnote{114} Accordingly, if an endorser decides to make a statement about a product on a CLP, he or she must also ensure that the message is not deceptive or misleading.\footnote{115} But as discussed earlier, an endorsement that is not representative of what consumers can generally expect to achieve with the product or service is a deceptive endorsement. In many cases, an opinion or a testimony of a product would fit this definition.

For example, assume a celebrity that has contracted to promote a brand of acne medication labeled “ACNE-GONE” tweeted out the following message:

“Acne-gone cleared my acne in 2 days #bumpsbegone #AD”

\footnote{109} 16 C.F.R. § 255.1
\footnote{110} Advertising Guides, supra note 2, at § 255.1 (2011).
\footnote{111} Id.
\footnote{112} 16 C.F.R. § 255.1.
\footnote{113} Id.
\footnote{114} Id.
\footnote{115} Id.
While this is a clear representation of an endorser’s experience with a product, which is protected under consideration (a), it may still be considered deceptive if that was not the performance consumers would generally expect to achieve with the product. Accordingly, this statement requires additional disclosure from the advertiser to avoid deception.

Advertisers and endorsers can both be subject to liability for misleading advertisements. Thus, advertisers should have some type of regulatory system in place to avoid liability stemming from third-party statements on a CLP. Companies have expressed concern about being subject to liability for an endorser’s message, which they did not write. They argue that they should only be liable if they had control over the advertisement. The Commission’s response is that regardless of control, the company initiated the process that led to the endorsement and should not be shielded from liability for misleading statements made by endorsers.

Returning to the example of “Acne-gone,” assume the celebrity was found to have communicated a deceptive message via Twitter. Under consideration (a), the celebrity would have a strong defense against being found liable based on the argument that his or her statement was a truthful reflection of his or her experience with the product. However, while the third-party endorser may avoid liability from the statement, it does not mean that the advertiser of the product will also avoid liability. The focus is on the injury sustained by the...
consumer. The Shaggy Defense, “[i]t wasn’t me,” is not going to protect the advertiser in this situation.

The guides are not clear in regards to when an endorser will be held liable. The guides state that liability will be determined on a facts and circumstances basis. This Article will describe three different scenarios in which the endorser may be subject to liability for deceptive messages. All three scenarios focus on the objective intent of the endorser.

First Scenario

"An endorser should be held liable for failing to adequately disclose the material connection that he or she has with a product communicated through a CLP."

The guides clearly suggest that not everybody who endorses a product will be considered an endorser. To be an endorser, one would have to achieve some level of notoriety, or be in a position to benefit from a consumer buying that product.

Celebrity Endorsers

For liability to attach in scenario one, first look to the endorser’s intent. While there are exceptions to every rule, celebrity endorsers have gained a high level of influence through hard work and dedication. They are often conscious of the impact their statements have on their fans, and with influence comes responsibility. A reasonable person in their position should understand that advertising a product they are contracted to promote, without adequately disclosing it, is inherently deceptive to their fans or followers. This reasonable person determination would be an objective analysis of their intent.

125 See supra note 122 at 53,125.
129 See Id. § 255.1(c) (2015).
131 Id. at 53,126.
132 Id.
Beneficiary Endorsers

The same analysis used for celebrity endorsers can be applied to beneficiary endorsers. Under the objective standard, a reasonable person would understand that endorsing a product or service that he or she directly benefits from is deceptive to a consumer when not adequately disclosed. Online forums, product and service review sites, and online marketplaces have a large influence on a product or service, and with this influence comes the increased risk of deception.\(^\text{133}\)

For example, David, the creator of the drug Acne-Gone, sold the product to a well-established business that would be able to produce and distribute it globally. He not only uses and loves his product, but also loves the 20% commission that he receives from its sales. Acne-Gone is a new product and many of the websites that sell this product have limited consumer reviews. In an effort to jump-start the product’s popularity, David skims the Internet review sites and anonymously posts the following message on each one:

“This product is amazing. I will never buy another acne cream. I honestly have only used it a couple days and my face is clearer than it has ever been. I definitely recommend purchasing this product.”

Regardless of whether David’s statement is true, the message is considered deceptive according to the guides of the FTC.\(^\text{134}\) This is a statement that does not represent the benefits that a consumer should expect with this product.\(^\text{135}\) David’s intentions and anonymous status may support the argument that he was not making an advertisement.\(^\text{136}\) However, surely this message would fit the definition of an endorsement, and his material connection with the product would qualify him as an endorser.\(^\text{137}\) As stated above, an endorsement message cannot make a representation that would be deceptive if expressly stated by the advertiser.\(^\text{138}\) Therefore, the advertiser would be liable for this deceptive


\(^{134}\) See 16 C.F.R. § 255.5 (2015).

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Advertising Guides, supra note 2.

\(^{138}\) Id. at 255.5.
statement, and David would be liable as an endorser for failing to disclose his material connection with the product. Thus, after using an objective analysis of the endorser’s intent, we find that endorsers would also be liable for failing to disclose the material connection that they have with a product or service. But what about in situations where they disclose their relationship?

**Second Scenario**

“An endorser should be held liable when the message communicated on the CLP is not a reflection of their honest opinions, findings, beliefs, or experiences.”

The guides suggest that an endorser can be found liable for making a deceptive statement about their personal experience with the product or service. An endorsement should reflect the honest opinions, findings, beliefs, or experiences of the endorser.

**Celebrity Endorsers**

Matthew is a professional basketball player, and has an endorsement deal with a shoe company, “AIR-JOHNS.” Matthew’s Twitter followers are unaware that Matthew is an endorser of AIR-JOHNS’ shoes. Matthew is told by his agent that the first set of test results for the new AIR-JOHNS 3s show that the shoes instantly increased test participants’ vertical jump by three inches. Matthew was still waiting to receive his pair of AIR-JOHN 3s, when he posted the following tweet:

*The new Air-John 3s are in. Just increased my vertical by 3 inches. #Flying#AD*

Although Matthew has merely repeated results of the test and disclosed his material connection with the product by using the hashtag #AD, the message is clearly deceptive to the consumers regardless of his intentions. He has not personally experienced the shoes’ benefits, and the shoes have not increased

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139 *Id.*
140 *Id.*
141 *Id.* at § 255.5.
142 *Id.* at § 255.1.
143 *Id.*
144 *Id.*
145 See *id.* at § 255.2.
his vertical by 3 inches. By allowing celebrity endorsers to communicate
tweets such as this one, pursuant to contract, or on their own free will,
consumer deception is possible.\footnote{Id. at § 255.0.}

In contrast, suppose Matthew had gained a lot of weight in the last few
months and decided to work on losing weight by jumping up and down one
hundred times a day with his new AIR-JOHNS 3s. As a result, he lost a
substantial amount of weight and the public is begging to know how. A
company that markets a weight loss drug, “SKINNY-MAN”, calls Matthew’s
agent and asks to use a “before and after” picture of Matthew to promote its
product. The company assures Matthew’s agent that it will not put any
messages in the advertisement claiming that Matthew used the product.
Matthew and his agent discuss and agree to allow them to use the pictures in its
advertisement. The company then posts ads throughout Facebook and other
social media sites with the following message:

\textit{BUY SKINNY-MAN clinically proven to lose weight fast}

Directly under that statement are Matthew’s before and after pictures. While Matthew is not directly quoted in the advertisement, by agreeing to
allow them to use his pictures he is implicitly endorsing their product. The
deception is clear. Consumers will assume that Matthew used “SKINNY-
MAN” to lose weight and will buy the product. This implication would violate
general consideration (a), which states that if an endorsement makes a
representation about an experience with a product, then that experience must
be truthful.\footnote{See id.} Therefore, while Matthew did not actually use the product, but
consented to the company using his photos, Matthew should be held liable for
the advertiser’s use of his photos.\footnote{Id. at 255.2.}

\textbf{Beneficiary Endorsers}

Switching the analysis from celebrity endorsers to beneficiary endorsers,
the same result occurs. Allowing beneficiary endorsers to make false claims
about their experiences or opinions on a product, creates a greater risk of
deception.\footnote{Id. at 255.2.}
Sam works for AIR-JOHNS and sells AIR-JOHNS products on a commission basis. Sam goes on YouTube and finds videos that review the new AIR-JOHNS 3s and writes:

*The guy in the video is right. These bad boys helped me finally touch the rim. They look good too. If anyone wants to buy a pair, I’ll give you a 20% discount. Email me at Samtheman@gmail.com*

Sam has never used the shoes, but immediately receives emails from consumers to purchase AIR-JOHNS 3s. Under the FTC, Sam’s beneficiary status qualifies him as an endorser, and he therefore violated general consideration (a) by making a false representation about his experience with the product. While consumers are not buying this product based on Sam’s celebrity status, his deceptive marketing strategy has influenced consumers.

In both the scenarios discussed above, it would seem easy enough for the endorser to avoid liability by disclosing the connection between the product and the endorser by using the hashtag #AD. However, the guides do not specifically state that #AD is sufficient. In contrast, the guides suggest that the use of #AD is not sufficient, and in the context of a CLP, every letter is important. Thus, an additional disclosure is probably needed for an endorser to avoid liability while conveying a message on a CLP.

**Third Scenario**

An endorser should be held liable for failing to disclose other required disclosures that would make the message deceptive when a reasonable consumer would feel that disclosure was a “deal breaker.”

In terms of designating liability, should the endorser be liable for failing to disclose his connection with the product, any necessary disclosures, and any hyperlinks to other disclosures required by agencies such as the FTC and FDA? This is a lot of information for a platform with a character limitation of

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150 Id.

151 Id.


153 Id.


155 Advertising Guides, supra note 2.
140 words or less. As discussed above, the FTC and FDA suggest that disclosure requirements need to be in the message itself, rather than in a hyperlink, in order to avoid deception or the possibility that a consumer would categorize the non-disclosed items as “deal breakers.”

By the time these disclosures are typed out, there is little room left for the endorser to convey any message about the product itself. Requiring this amount of disclosure on a CLP prevents many endorsers from advertising on these platforms. Further, many endorsers fear the liability attached to publication of a deceptive statement.

Consumers may be ultimately injured as well. Consumers often mimic their role models, and place trust in the services or products used by endorsers. While it is the opinion of this Article that endorsers should not be held to the disclosure standards discussed in the FDA and FTC guides, there are still many situations where additional disclosures should be required in addition to disclosing a material connection.

To establish the extent of disclosure required in a situation, an objective standard should be used. To do so, consider the standard of a reasonable consumer to determine if an additional disclosure is a “deal breaker.” Would knowing that additional information materially effect a consumer’s decision to buy a product or service?

For example, Jake used to be an obese individual. However, he decided to change his lifestyle and eat three sandwiches a day from the same sandwich restaurant down the street from his apartment, “SANDWICH”. While each sandwich was healthier than what Jake had previously been eating, the sandwiches still contained a high caloric content. In addition to eating the sandwiches, he jogged for two hours a day and quickly lost a significant amount of weight. SANDWICH watched his weight loss transition and signed Jake as a promoter for SANDWICH. Jake subsequently became a popular public figure, and gained a substantial number of Twitter followers. In recognition of his achievement he decides to tweet:

Luv all my supporters. Can’t believe I lost 300 lbs eating at SANDWICH. #AD

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156 Effective Disclosures, supra note 161 at A-17.
157 Advertising Guides, supra note 2.
158 Id.
159 Id.
In this situation, Jake would not be liable for deceiving consumers under our first two scenarios. Jake disclosed the material connection between himself and the product with the hashtag #AD, and lost the weight through his personal experience of eating at SANDWICH. However, Jake may be liable for failure to disclose “deal-breakers” because the consumers are under the impression that SANDWICH is the only reason Jake lost weight. Under an objective analysis, a reasonable person would understand that jogging two hours a day also contributed to Jake’s weight loss and would understand that fact to be a necessary disclosure. Accordingly, in order to avoid the message from being designated as deceptive, Jake would have to disclose the “deal-breaker” in his advertisement to avoid personal liability. 160

CONCLUSION

The uncertainty created from these guides as they relate to the ever-expanding world of social media is apparent. I agree with commenters who argue that making the endorsement guidance applicable to new online media was premature. Advertisers and endorsers alike need to know how they should approach advertising on a CLP, and the risk of consumer deception is higher than it has ever been in this age of social media. Therefore, acting quickly and competently is critical in future regulation and guidance.

If there is insufficient regulation, there is a greater risk of consumer deception by advertisers on social media sites. However, there are many benefits to consumers and advertisers alike in the use of CLP’s to advertise products. If there is excessive regulation, there is a risk of advertisers abandoning CLP’s altogether, which would ultimately injure the consumer. While concentrating on protecting the consumer, we sometimes forget that the consumer also has an inherent duty of due diligence.

Regardless of all the confusion surrounding the disclosure requirements required on a CLP, one thing is certain: marketers will continue to find new strategies and platforms to advertise their products on platforms that have not

160 See Advertising Guides, supra note 2 at § 255.2. (This scenario is largely based off of the newly added example 4 and the FTC’s guidance—example 4 illustrates an example of a formerly obese woman claiming in an advertisement the following statement: “Every day, I drank 2 WeightAway shakes, ate only raw vegetables and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” In its guidance the FTC states that this statement would not be deceiving because she disclosed her exceptional circumstances under which she achieved her results. However, the FTC states that if she had merely posted “I lost 110 pounds in six months using WeightAway together with diet and exercise”, this description would not adequately alert consumers to the remarkable circumstances leading to her weight loss.)
been specifically addressed by the guides. Therefore, we should come up with a flexible standard that adapts with our ever-progressing online presence that continues to educate consumers to use their best judgment regarding product endorsements.