From TikTok to Clubhouse: Expect the FTC To Stay One Step Ahead

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Consumers have been deprived of consistent in-person connections for almost two years now. In the wake of this, brands have redoubled their efforts to resonate with their audiences. Now more than ever, consumers reeling from political instability, acts of racial injustice and ongoing uncertainty about the future are revisiting their core values and priorities — resulting in consumer perception shifts that may long outlast the immediate crisis of the pandemic.

In response, brands have accelerated their efforts to partner with influencers who are deeply connected to their audiences and who genuinely care about diversity, inclusion and giving back. These influencers have, in turn, become more specialized in their fields and their ability to create interactive, successful content, and are increasingly becoming known as "content creators."

In a world where influencer and "content creator" brand partnerships show no signs of slowing down, the Federal Trade Commission (FTC) is poised to issue updates to its Endorsement Guides in 2022 (following a public comment period that closed on June 22, 2020). These updates may well provide substantial new guidance with respect to recent developments in technology and how consumers perceive new media. In particular, platforms such as TikTok enjoyed an incredibly high profile year, and have been quickly followed by social networking platforms such as Clubhouse.

As of now, marketers should remember that even "viral" and "organic" content on platforms such as TikTok is still subject to the FTC's core requirement — that influencers must clearly and conspicuously disclose their material connections with the marketer. Videos on TikTok include a standard text field in the bottom left corner of the video, where many influencers will add a disclosure. However, users on TikTok can easily export TikTok videos to platforms such as Facebook, Twitter and Instagram, and the standard text in the bottom left corner is often cut off when shared, and certain regulatory and self-regulatory bodies are starting to take action against such situations.

Last year, the National Advertising Division (NAD) of the Better Business Bureau opened an inquiry into a consumer goods brand with respect to this issue. The brand had contracted influencers to post videos featuring a "dance challenge" in which influencers break out into a dance while the voiceover sings about how it's time to "clean up your life." The brand's products appeared in the background and all of the TikTok videos clearly and conspicuously included the appropriate hashtag disclosing the material connection between the influencer and the brand in accordance with the Endorsement Guides. However, when those videos were shared to Instagram, they did not include the applicable hashtag. The NAD did not pursue the inquiry further after the consumer goods brand demonstrated that it had taken action to ensure that disclosures would be made properly in the future.

What We Can Expect In the Future

- As norms around sponsorship disclosures continue to shift, expect the FTC to stay one step ahead.
- In particular, until further guidance is issued by the FTC, marketers running influencer campaigns on TikTok and similar platforms should consider requiring the influencer to include additional disclosures, such as "ad" or "paid," superimposed over the video or image content in a centralized location, to ensure that the disclosures will follow if shared to another platform.