



By Matthew Kaplan, Partner and Ryan Evans, Associate, Tucker Ellis

Two new documentaries streaming concurrently on Hulu and Netflix tell the story of a heavily marketed concert event in the Bahamas called the Fyre Festival. The festival, scheduled for two weekends in the spring of 2017, promised privately chartered flights to the Bahamas for weekend-long luxury music festivals with lavish accommodations, meals catered by world-famous chefs, art and education installations, and adventures on yachts, jet skis and the like—in other words, a Millennial music-lover's dream. Nearly every Millennial knew about the event through a highly effective social media marketing campaign that leveraged a "who's who" of social media influencers, models and celebrities. But the event was canceled the first day due to the lack of housing, running water, food, sanitation, security and performers. Rapper and co-organizer Ja Rule denied any fraud but acknowledged that the zealous social

media marketing campaign may have amounted to "false advertising." His co-organizer, who pled guilty to wire fraud, is serving six years in federal prison. While the Fyre Festival may be an extreme example, those in the nutrition industry must tread carefully when using influencers and endorsers and engaging the public on social media.

Influencer-based social media marketing is subject to the same laws as advertising on other marketing channels. Everything that an advertisement expressly says or reasonably implies must be truthful and not misleading. An advertisement that misleads a "significant minority" of consumers is considered to be unlawful by the Federal Trade Commission (FTC), and the FTC, state, and private regulators (class action lawyers) may pursue claims against companies making false, deceptive or unsubstantiated statements, whether on social media or elsewhere or made

directly by the company or endorser on its behalf.

Social media influencers/endorsers and the companies that use them should avoid two common pitfalls:

1. Product claims made by an endorser must clearly and conspicuously disclose any material connection the endorser has with the seller of the advertised product or service (i.e., whether the endorser is paid for their endorsement). This is undoubtedly one of the areas that drew such a strong governmental response to the Fyre Festival, as the festival paid dozens of people, including supermodels Kendall Jenner and Bella Hadid, to promote the event on Instagram, but only one disclosed the connection.

2. Claims made by endorsers must, like any advertising claim, be supported by evidence; in the language of the law, there must be prior substantiation for the claim. The Fyre Festival marketed

the event's location as an island formerly owned by Pablo Escobar. In truth, Pablo Escobar never owned the island. The Fyre Festival presumably promoted this idea because it made the event seem more interesting, but they had no evidence to substantiate this claim—it just sounded cool.

Like the organizers of the Fyre Festival, those within the health, wellness, and supplement industry view social media influencers as an effective tool for targeting desired populations. Unfortunately, some in our industry who have used similarly unlawful advertising have been forced to disgorge millions of dollars in revenue. The Fyre Festival story and previous FTC enforcement actions provide insight as to how companies should effectively and lawfully leverage social media influencers as part of their overall marketing campaigns.

Actively Manage Influencer Relationships

To limit the risk of potential liability, advertisers should use contracts to specify permissible conduct by social media influencers and other endorsers and implement a training and monitoring program. An advertiser that has a compliance program in place is less likely to make a mistake and suffer an FTC enforcement action because the error may be attributable to a "rogue blogger." The scope of a compliance program depends on the amount of advertising conducted and its potential to cause consumers harm from a planned advertising campaign; however, as with any vendor, companies should periodically review an endorser's work product to ensure they are providing the promised services—including compliance with advertising laws and other expectations of the advertiser. After all, it is not a compliance program if you are not monitoring compliance.

Establish Expectations and Standards in Endorsement Contracts

A company/product brand and reputation is one of the most valuable assets to a business. Choosing social media partners carefully is essential to protecting the brand. Having contracts with each of your influencers/endorsers is critical to aligning your goals with your partners and avoiding claims for improper advertising. These contracts should be thought of as tools to educate your partners about your expectations and

how they can meet their obligations.

While the full scope of terms that could be included in contracts with social media partners is beyond the scope of this article, two important things ought to be considered in connection with every such contract:

1. Clearly set forth the endorser's obligation to comply with the law. This may be nothing more than a general commitment to comply with the law, or it may be the place to educate the influencer as to the specific permissible claims allowed by the advertiser or the need to disclose their relationship with you in their postings.

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2. Include any business/brand specific rules in the agreement, whether morals based (e.g., prohibited language, images) or serving competitive purposes (e.g., no direct comparisons to competitor products). An endorser's personal brand reputation is the reason they are typically engaged, so you need to ensure that they preserve both their own and your brand equity to support the success of your marketing campaign.

Disclosure of Material Connections By and With Influencers

When deciding whether a connection requires disclosure, companies and endorsers should bear in mind the law's goal to protect consumers from being misled into believing endorsers/influencers are offering opinions as if they are impartial users. Thus, the FTC takes a broad view of the types of connections that must be disclosed. An endorser

must disclose any ownership or financial interest in the brands or products they promote, as well as any compensation they receive. This includes payment in the form of free or "gifted" products received in exchange for giving a review or mentioning a product on social media. And a connection can be "material" even if it is not of a monetary nature: A close personal stake in a company or product may require disclosure.

For example, the FTC recently took action against Supple, LLC, a manufacturer and marketer of liquid glucosamine and chondroitin supplements. Dr. Monita Poudyal provided an expert medical endorsement in an infomercial hosted by Supple's CEO Peter Apatow. They failed to disclose the fact that they were married. This fact, along with other misleading claims, led to an order imposing a \$150 million fine against the company and Apatow, requiring them to notify customers of the false claims and allow cancellation of subscription purchases, requiring repayment of the FTC's costs, and banning the use of illegal forms of advertising. Another example involves action taken by the state of Maine and the FTC against the manufacturer of "memory improvement" supplement CogniPrin and the advertising agency used to produce the infomercials: Because the infomercials included a medical expert's endorsement without disclosing the fact that he received a percentage royalty of products sold, full refunds of customer purchases and fines were imposed.

As for how the material connection must be disclosed, endorsers must clearly and conspicuously make the disclosure in an area obvious to viewers. Influencers should not assume that the disclosure tool provided by a platform such as Instagram is sufficient to comply with the law. A platform's disclosure tool may place a disclosure in an area unlikely to attract the viewer's attention or after the message has been conveyed. Disclosure placed after a "click more" link or in another easy-to-miss location will not suffice. And influencers using image-only platforms such as Snapchat or Instagram may have to superimpose disclosures over images they post. On video blogs, endorsers should place a sponsorship disclosure clearly and conspicuously in the video itself.

Endorsements Should Be True

Endorsements must reflect the endorser/influencer's honest opinions, findings,

beliefs or experiences. An advertiser may use an influencer's endorsement only if it has good reason to believe that the endorser continues to hold the views presented. As a best practice, companies should periodically check in with their endorsers to ensure the endorser continues to hold that view. Companies should also instruct influencers about the types of health-related claims they are permitted to make about promoted products to insure that their statements do not cause the product to be considered a drug or medical device under the regulations enforced by the U.S Food and Drug Administration, and to ensure that any claim made by the endorser is one for which a supplement maker has supporting evidence.

All Product Claims Must Be Supported by Evidence

The law requires an advertiser to have a reasonable basis for all claims made in an advertisement, including those made by influencers. The level of evidence required varies depending on the advertisement's claims. An endorser's claim about a product's performance or sour-

ing, for example, would require sufficient evidence to prove the product does what is claimed in the advertisement. In other words, the advertisement creates a warranty of sorts. Claims about ingredients, environmental impacts or health benefits generally are the type that require competent and reliable scientific evidence to give an advertiser a reasonable basis for making the claim. Depending on the claim, scientific tests may need to be high-quality studies, including placebo-controlled studies and blinded (or double-blinded) tests.

Endorsements discussing a consumer's experience with a product's central or key attribute are considered to represent the experience consumers generally have with the product under normal conditions of use. Thus, if an endorsement is not, in fact, representative of a consumer's typical experience, then the ad must clearly and conspicuously disclose the generally expected performance in the depicted circumstances.

Social media influencers are powerful marketing channels, as the Fyre Festival revealed, but they also raise unique

challenges given the speed at which social media moves. Using contracts that clearly set forth the permissible and impermissible scope of claims your endorsers may make and implementing a compliance program to monitor their performance can protect your brand reputation and fend off law enforcement challenges. **NIE**



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