

Social Media Marketing

September 13, 2017

10:30 – 11:30 AM

Speakers



Katie Bond, Special Counsel, Kelley Drye & Warren LLP



Megan Olsen, Special Counsel, Wiley Rein LLP



Jason Sapsin, Counsel, Faegre Baker Daniels LLP, Moderator

What is Social Media?

- Social Media is Everywhere
 - Facebook, Twitter, YouTube, Instagram, Reddit, blogs, online consumer review sites, the list goes on
 - It may be easier to define what social media is not

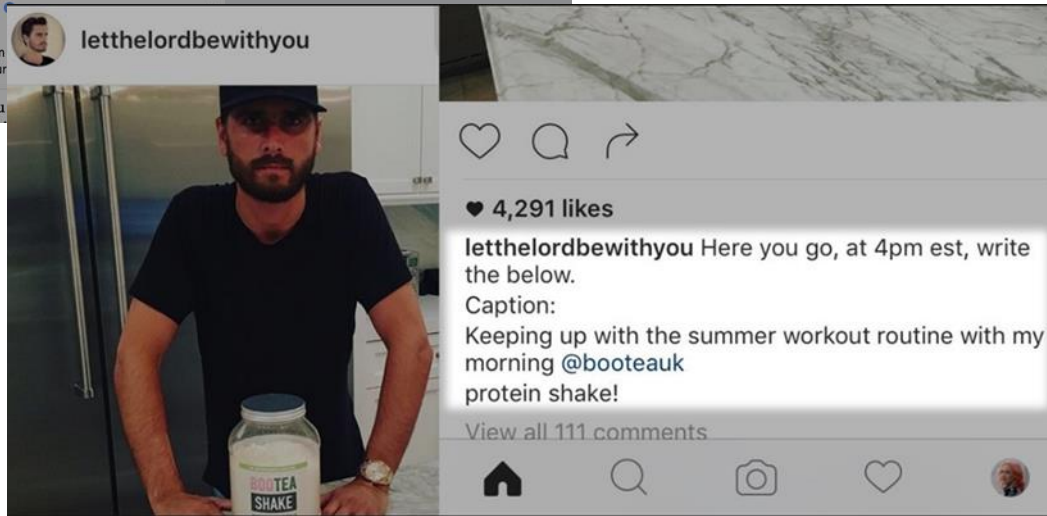
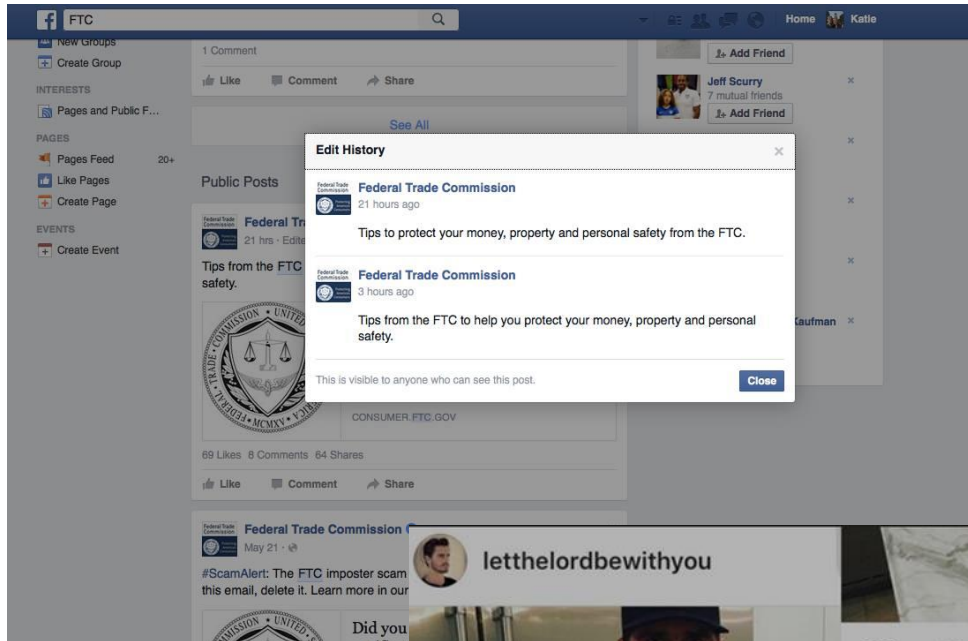


Social Commerce 101

- Facebook: Nearly 1.5 billion active users
- Instagram: Approximately 400 million active users
- Twitter: Over 300 million active users
- LinkedIn: Nearly 100 million active users



Social Media Gone Wrong



Even Social Media Experts Get it Wrong!



Scott Bartosiewicz was a social media strategist for New Media Strategies.

Thinking he was signed into his own account, he accidentally tweeted the following from the corporate Twitter account for Chrysler: "I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to f*cking drive."

Bartosiewicz was fired and Chrysler didn't renew its contract with New Media Strategies.



Scott Bartosiewicz College Car Guide

But what about the legal implications . . . ?

FDA on Social Media



FDA on User Generated Content (UGC)

- Communications Decency Act of 1996
 - “[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”

FDA recommends that a firm be transparent in disclosing its involvement on a site by clearly identifying the UGC and communications of its employees or third parties acting on behalf of the firm. This could be achieved by inclusion of the firm's identifier (e.g., name or logo) as part of the communication. However, a firm generally is not responsible for UGC that is truly independent of the firm (i.e., is not produced by, or on behalf of, or prompted by the firm in any particular).⁵ FDA will not ordinarily view UGC on firm-owned or firm-controlled venues such as blogs, message boards, and chat rooms as promotional content on behalf of the firm as long as the user has no affiliation with the firm and the firm had no influence on the UGC.

Guidance for Industry Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics, Draft Guidance, Jan. 2014

When Might a Company be Responsible for Information in Social Media?

- If the sites are owned, controlled, created, influenced, or operated by, or on behalf of, the firm
- If the content is generated by an employee or agent who is acting on behalf of the firm to promote the firm's product
- On third-party sites if the firm has any control or influence over the information on the third-party site
- Where a firm exerts control over the UGC

FDA Does Not “Like” Unauthorized Claims



© Facebook

Amarc Enterprises 12/11/12



Department of Health and Human Services

Public Health Service
Food and Drug Administration
Los Angeles District
19701 Fairchild
Irvine, California 92612-2508
Telephone (949) 608-2900
Fax (949) 608-4415

WARNING LETTER

VIA UNITED PARCEL SERVICE
SIGNATURE REQUIRED

December 11, 2012

WL 11-13
AMARC Enterprises, Inc.
Attn: Albert Sanchez, CEO
1339 Broadway
El Cajon, CA 92021

Dear Mr. Sanchez:

This letter concerns your firm's marketing of the products, Poly-MVA and Poly-MVA for Pets. The U.S. Food and Drug Administration (FDA) reviewed your websites, www.polymva.com and www.polymva.net, as well as literature included in the information packet which accompanied the sale and shipment of your product, "Poly MVA" on November 15 and has determined that "Poly MVA" is promoted for conditions that cause the product to be a drug under section 201(g)(1)(B) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 321(g)(1)(B)]. The claims in the literature and on your websites establish that this product is a drug because it is intended for use in the cure, mitigation, treatment, or prevention of disease. The marketing of your product with these claims violates the Act.

In addition, we reviewed your websites at www.polymva4pets.com and www.polymvaforpets.com where you promote and sell your "Poly-MVA for Pets" veterinary product. We have determined that Poly-MVA for Pets is intended for use in the cure, mitigation, treatment, or prevention of disease in animals, or to affect the structure or function of the body of animals, which makes it a drug under section 201(g)(1) of the Act. [21 U.S.C. § 321(g)(1)]. Further, as discussed below, this product is an unapproved new animal drug as defined by the Act and your marketing of it therefore violates the law.

Examples of claims in the form of testimonials, on your websites, www.polymva.com and www.polymva.net, on the webpage titled, "Customer Experiences" include:

Metatag Keywords

Bodyhealth.com, LLC 11/18/14



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER PROTECTION
WASHINGTON, D.C. 20580

TO: David Minkoff
webmaster@bodyhealth.com

FROM: The Food and Drug Administration and the Federal Trade Commission

RE: Unapproved Products Related to Ebola and Notice of Potential Illegal Marketing of Products to Prevent, Treat or Cure Ebola Virus



DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD 20993

WARNING LETTER

This is to advise you that in October 2014 the U.S. Food and Drug Administration (FDA) and the United States Federal Trade Commission (FTC) reviewed your website at <http://www.bodyhealth.com> from which you take orders for your product, "BodyHealth Optimum Health Survival Kit," which includes your products "Complete + Detox," "MAP amino acids," "Body Detox," "Silver Biotics," "Lugol's Solution Iodine," "Vitamin C," "Vitamin D3," and "Vitamin A." Based on FDA's review, we have determined that your website promotes your product for conditions that cause the product to be a drug under section 201(g)(1)(B) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 321(g)(1)(B)]. The therapeutic claims on your website establish that the product is a drug because it is intended for use in the cure, mitigation, treatment, or prevention of disease. As explained further below, introducing or delivering this product for introduction into interstate commerce for such uses violates the Act.

In addition, claims made on your Facebook page <https://www.facebook.com/BodyHealthOptimize>, which has a link to your website at <http://www.bodyhealth.com> where your "BodyHealth Optimum Health Survival Kit" can be purchased directly, provide further evidence that your product is intended for use as a drug:

- "Ebola Virus, Are you worried? bodyhealth.com ... Stay proactive- BodyHealth recommends these preventative measures to lower risk."

The above bullet is a link that directs you to the http://www.bodyhealth.com/ebola_virus page, which has the claims as mentioned above.

Further, claims on your Twitter page, <https://mobile.twitter.com/BodyHealthcom>, which has a link to your website at <http://www.bodyhealth.com> where your "BodyHealth Optimum Health Survival Kit" can be purchased directly, provide further evidence that your product is intended for use as a drug:

- "Here's what BodyHealth ... recommends to lower your risk and help protect against Ebola."

The claim in the above bullet provides a link that directs you to the http://www.bodyhealth.com/ebola_virus page, which has the claims as mentioned above.

The claims quoted above are supplemented by the metatag keywords used to bring consumers to your website through Internet searches. The metatag keywords include: "ebola," "ebola virus," and "ebola scare."

Space Limited Social Media Platforms

- If a platform cannot accommodate all necessary disclosures for a claim, the platform should not be used
 - Example:
 - S/F Qualifiers (e.g., “occasional constipation”)
 - S/F claim (DSHEA) disclosures



Guidance for Industry Internet/Social Media Platforms with Character Space Limitations— Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices

DRAFT GUIDANCE

This guidance document is being distributed for comment purposes only.

Comments and suggestions regarding this draft document should be submitted within 90 days of publication in the *Federal Register* of the notice announcing the availability of the draft guidance. Submit electronic comments to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD, 20852. All comments should be identified with the docket number listed in the notice of availability that publishes in the *Federal Register*.

For questions regarding this draft document, contact (CDER) Jean-Ah Kang at 301-796-1200; (CBER) Office of Communication, Outreach and Development at 800-835-4709 or 240-402-7800; (CVM) Dorothy McAdams at 240-453-6802; or (CDRH) Deborah Wolf at 301-796-5732.

U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
Center for Biologics Evaluation and Research (CBER)
Center for Veterinary Medicine (CVM)
Center for Devices and Radiological Health (CDRH)

June 2014
Advertising

Bottom Line

“[R]egardless of the Internet source used to communicate about medical products, the public health is best served by clear, accurate, truthful and non-misleading information about them.” – Thomas Abrams, Director, FDA’s Office of Prescription Drug Promotion



FTC on Social Media



FTC Warning Letters to Companies and Influencers

FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

Commission aims to improve disclosures in social media endorsements

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FOR RELEASE

April 19, 2017

TAGS: [Bureau of Consumer Protection](#) | [Consumer Protection](#) | [Advertising and Marketing](#) | [Online Advertising and Marketing](#)

After reviewing numerous Instagram posts by celebrities, athletes, and other influencers, Federal Trade Commission staff recently sent out more than 90 letters reminding influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media.

The letters were informed by petitions filed by Public Citizen and affiliated organizations regarding influencer advertising on Instagram, and Instagram posts reviewed by FTC staff. They mark the first time that FTC staff has reached out directly to educate social media influencers themselves.

The FTC's Endorsement Guides provide that if there is a "material connection" between an endorser and an advertiser – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication. A material connection could be a business or family relationship, monetary payment, or the gift of a free product. Importantly, the Endorsement Guides apply to both marketers and endorsers.

In addition to providing background information on when and how marketers and influencers should disclose a material connection in an advertisement, the letters each addressed one point specific to Instagram posts --

Disclosures in Social Media

- Unexpected material connections must be disclosed
- Disclosure must be clear and conspicuous

When Is Disclosure Required?

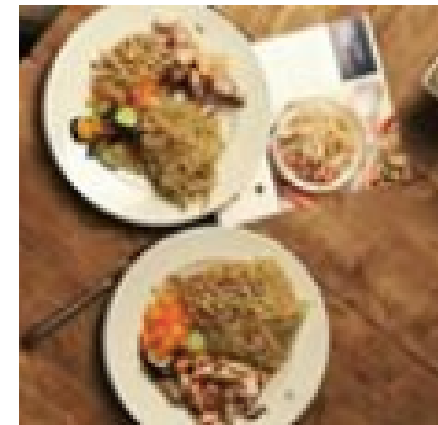




Michael Phelps  with **Blue Apron**.

September 1 at 3:50pm · 

I might not have read the instructions completely... but the meal was still amazing!! Chicken Miso Ramen 🍜
[#ad](#)



   2.6K

63 Comments 18 Shares

↻ Selena Gomez Retweeted



Vogue Magazine  @voguemagazine · Aug 3

Why @SelenaGomez's new collaboration with @Coach is deeply personal.



Selena Gomez's Coach Collaboration Contains Hidden Messages of ...

Get a first look at the complete Selena Gomez x Coach collection.

[vogue.com](https://www.vogue.com)



208



4.3K



16K



markwahlberg

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#wahlburgers

Load more comments

brittliberda Would love a whalberg in San Antonio Texas

ashleyhittle 😊❤️😊 Momma Mia!!!!

tambabyy31 Come to Arizona!!!

nwaent I cant wait

jd25200 Cinci's ready to have you😊😊😊

notyoaveragesquare @markwahlberg
broooooooooo, when are you coming to Cincy???? I'm really hoping to catch you at your grand opening!!!!!!

lilredlisa1972 Yay! Have to come down town when it opens!

meljo_ @laurenjean5

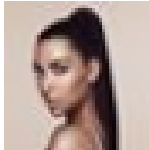
vkimmymomatz Why does mike where a



203,575 likes

AUGUST 29

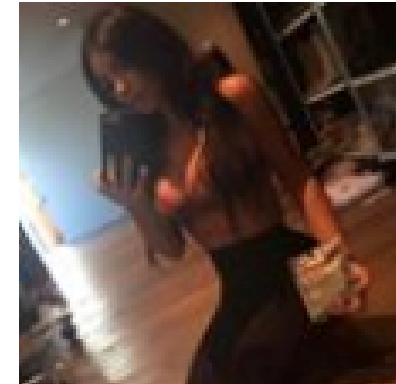
Log in to like or comment.



Kim Kardashian West ✓ is with **Flat Tummy Co.**

June 20 at 7:00pm · 🌐

#ad hot on my summer go-to list is Flat Tummy Tea, feeling sooo good right now! (P.S. It's 20% on sale today, go get you some!)



Chris Perry and 52K others

666 Comments 445 Shares



stephencurry30



Follow

stephencurry30 Up your hydration game with the Brita Stream this school year. Tag someone who's thirsty @BritaUSA #ad

Load more comments

yahnivbenisrael_ <https://www.gofundme.com/followerofthelamb>

chrplmr @maurice_slt I feel like...

garenhaney @ayeshacurry 🤔🤔🤔🤔

macromanjr @860.nb lol

thecurlymani 🙏



1,071,358 views

4 DAYS AGO

Log in to like or comment.





Stephen Curry ✓ @StephenCurry30 · 2 Dec 2016

It's go time! Thanks @DegreeMen for moving with me. #ad



50



438



3.1K

#Sponsored OR #Promotion OR #Ad

Not good enough if buried

BrandX gave me this product to try, and I think it's great

Thanks BrandX for the free product

Not good enough if also paid

#BrandXAmbassador

#Ambassador not good enough

#BrandX_Rocks_Sweepstakes

#BrandX_Rocks or #BrandX_Sweeps not good enough

Many products I discuss on this site are provided to me for free

#Thanks[Brand]

Hyperlink stating “LEGAL” or “Disclosure”

Disclosures provided after the “more” button

Video disclosures outside of video itself

“Likes”



- FTC:
 - “Likes” can be an endorsement and do not allow for accompanying disclosures
 - “Advertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures.”
 - “Whether the FTC may take action would depend on the overall impression, including whether consumers take ‘likes’ to be material in their decision to patronize a business.”
- “Likes” can reverse CDA protection

National Advertising Division

AUTO EXPERTS DISCUSS SHELL V-POWER® NITRO+ PREMIUM GASOLINE

Nov 10, 2015

Benefits of Shell V-Power® Nitro+ Premium Gasoline

Earlier this year, Shell launched Shell V-Power® Nitro+ Premium Gasoline, a breakthrough premium fuel which provides the BEST TOTAL engine protection you can get. It provides unbeatable protection against gunk and corrosion and superior protection against wear. Automotive experts across the country have experienced the difference for themselves and are weighing in on the fuel's features and benefits. See for yourself what experts like [Jason Fenske](#) and [others](#) are saying about Shell V-Power Nitro+ Premium Gasoline.

*Shell hosted Jason Fenske at its labs in Houston, at race related events and at pre-launch events for Shell V-Power Nitro+ Premium Gasoline. Watch as Jason Fenske from Engineering Explained takes an in-depth look inside what goes into the making and fuel testing of new Shell V-Power Nitro+ Premium Gasoline.



Guidance Docs

- FTC, The FTC's Endorsement Guides: What People Are Asking
- FTC, Endorsement Guides
- FTC, .com Disclosures: How to Make Effective Disclosures in Digital Advertising
- FTC, Commission Enforcement Policy Statement on Deceptively Formatted Advertisements
- FTC, Native Advertising: A Guide for Businesses

Consumer Online Reviews

72%

OF CONSUMERS
TRUST ONLINE
REVIEWS AS MUCH
AS PERSONAL
RECOMMENDATIONS
FROM REAL PEOPLE
SEARCH ENGINE LAND

68%

OF CONSUMERS
GO TO SOCIAL
NETWORKING
SITES TO READ
PRODUCT REVIEWS
VOCUS

90%

OF CONSUMERS
SAY THAT POSITIVE
ONLINE REVIEWS
INFLUENCE THEIR
BUYING DECISIONS
DIMENSIONAL RESEARCH

[Source](#)

Fake News: Fake Online Reviews



Get Better Customer Reviews - Improve Your Online Reputation

[Ad get.signpost.com/better/reviews](https://get.signpost.com/better/reviews) ▼

Attract More Clients. Be found **Online** & In Your City. Try A Free Demo Today!

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Get 5-Stars. Promote It Online - Profit From 5-Star Reviews Now

[Ad www.be5stars.com/From-\\$49-Month/Start-Risk-Free](https://www.be5stars.com/From-$49-Month/Start-Risk-Free) ▼

We Get 5-Star **Reviews** & Promote Them With Social & SEO For Up To 16x Web Traffic

Get 5 Star Reviews · Money Back Guarantee · Free Consultation/Demo · 32 Yrs Proven Success

Fake News: Fake Online Reviews

A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \$350,000 In Fines

"Operation Clean Turf" Concludes Year-Long Undercover Investigation Into Reputation Management Industry, Astroturfing And False Endorsements

Schneiderman: Astroturfing Is 21st Century's False Advertising

NEW YORK -- Attorney General Eric T. Schneiderman today announced that 19 companies had agreed to cease their practice of writing fake online reviews for businesses and to pay more than \$350,000 in penalties. "Operation Clean Turf," a year-long undercover investigation into the reputation management industry, the manipulation of consumer-review websites, and the practice of astroturfing, found that companies had flooded the Internet with fake consumer reviews on websites such as Yelp, Google Local, and CitySearch. In the course of the investigation, the Attorney General's office found that many of these companies used techniques to hide their identities, such as creating fake online profiles on consumer review websites and paying freelance writers from as far away as the Philippines, Bangladesh and Eastern Europe for \$1 to \$10 per review. By producing fake reviews, these companies violated multiple state laws against false advertising and engaged in illegal and deceptive business practices.

FTC Stops Automobile Shipment Broker from Misrepresenting Online Reviews

Company Failed to Disclose It Gave Discounts and Awards to Customer Reviewers

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FOR RELEASE

February 27, 2015

TAGS: [Bureau of Consumer Protection](#) | [Consumer Protection](#) | [Advertising and Marketing](#) | [Endorsements](#) | [Online Advertising and Marketing](#)

AmeriFreight, an automobile shipment broker based in Peachtree City, Georgia, has agreed to a [settlement with the Federal Trade Commission](#) that will halt the company's allegedly deceptive practice of touting online customer reviews, while failing to disclose that the reviewers were compensated with discounts and incentives.

The FTC's complaint marks the first time the agency has charged a company with misrepresenting online reviews by failing to disclose that it gave cash discounts to customers to post the reviews.

"Companies must make it clear when they have paid their customers to write online reviews," said Jessica Rich, Director of the FTC's Bureau of Consumer Protection. "If they fail to do that – as AmeriFreight did – then they're deceiving consumers, plain and simple."

AmeriFreight is an automobile shipment broker that arranges the shipment of consumers' cars through third-party freight carriers. Its website touted that the company had "more highly ranked ratings and reviews than any other company in the automotive transportation business." As part of its advertising, it encouraged consumers to "Google us 'bbb top rated car shipping.' You don't have to believe us, our consumers say it all."

#BestPractices

- ✓ Maintain written guidelines
- ✓ Create guardrails around allowed social media practices
- ✓ Have a clear chain of review for social media posts
- ✓ Monitor social media compliance
- ✓ Anticipate how social media departments may respond to big events
- ✓ Have decision-makers and legal on-call at key times (*e.g.*, big company events or national events, like the Super Bowl)
- ✓ Have an escalation process for when things go wrong
- ✓ Be aware of other legal pitfalls (*e.g.*, IP, privacy, security, contracts, etc.)
- ✓ Reevaluate, reevaluate, reevaluate!

Questions



Thank You!

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