



# **Advertising and Promotional Communications in a Mobile World**

*Spotlight on Social Media Marketing and  
Recent Guidance from the BBB National Advertising Division*

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**Tuesday, September 26 | 4:00-5:00 PM**



# **Limitations of Mobile Advertising on Social Media Platforms**

- 1. FDA Draft Guidance on Social Media Advertising**
- 2. Intellectual Property Concerns**
- 3. Read and Understand Each Platform's Terms of Service**
- 4. Manage Risk Associated with Social Media Contests**

# 1. FDA Draft Guidance on Social Media Advertising

- In June 2014, the FDA released two forms of guidance on industry on internet/social media advertising:
  - Guidance on “Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices” on Platforms with Character Space Limitations
  - Guidance on “Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices” on the Internet or Social Media Platforms
- FDA considers social media advertisement to fall under its statutory and regulatory authority to regulate “promotional labeling”

# 1. FDA Draft Guidance on Social Media Advertising

## A. Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices on Platforms with Character Space Limitations

- If making a product benefit claim in a space-limited communication:
  - Benefit information should:
    - be accurate and non-misleading
    - Reveal “material facts” about use of the product
    - Be accompanied by risk information **within the same communication**
  - The advertisement should provide a mechanism **within the same communication** to allow direct access to a more complete discussion of the risks associated with the product
  - Risk disclosures should include “at a minimum, the most serious risks associated with the product”
  - Benefit and risk information should be displayed in **comparable prominence**

# 1. FDA Draft Guidance on Social Media Advertising

## A. Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices on Platforms with Character Space Limitations

- Character limits may not allow for accurate and balanced presentation of both benefits and risks. If there is not enough space to present both, reconsider use of a character-limited platform.
- Be mindful that FDA regulations still apply to social media, including those on:
  - Use of company's established name
  - Display of dosage form(s)
- Use of a hyperlink to a sufficiently detailed landing page can help to assuage FDA concerns

# 1. FDA Draft Guidance on Social Media Advertising

## B. Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices on the Internet or Social Media Platforms

- You are responsible for correcting misinformation in communications that are owned, controlled, created, or influenced, or affirmatively adopted or endorsed, by, or on behalf of your company
- This is **no** affirmative duty to correct third-party misinformation, even if the third-party communication appears on your own forum
- If the company chooses to make corrections to third-party misinformation, this draft FDA guidance applies

# 1. FDA Draft Guidance on Social Media Advertising

## B. Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices on the Internet or Social Media Platforms

- If voluntarily making a correction to third-party misinformation, your company should:
  - Provide “appropriate corrective information” which is truthful and non-misleading; or
  - Provide a link to a reputable source from which the public can obtain correct information, such as the firm’s contact information
- Appropriate corrective information should:
  - Be responsive to the misinformation and limited in scope
  - Be **non-promotional** in nature, tone, presentation
  - Be compliant with FDA-required labeling rules (evidentiary support, etc.)
  - Disclose that the information is being provided by the firm

## 2. Intellectual Property Concerns

### A. Don't Use Copyrighted Images, Videos, or Music

- Copyright protects a literary, musical, or artistic work from unauthorized commercial use or copying.
- Permission is **required** for use of:
  - a movie still;
  - photograph or use of a character or story; or
  - words or music to a song.
- Permission is **not** required to use:
  - a work published more than 100 years ago;
  - the general idea embodied in a work; or
  - the underlying facts in a written work



## **2. Intellectual Property Concerns**

### **A. Don't Use Copyrighted Images, Videos, or Music**

- Copyright Law Protects the Creative Expression of the Work, Not the Idea
- Your Work Can Have the Same Idea as Another's, But Not the Same Creative Expression

# PROBATION DEPARTMENT OF LAW ENFORCEMENT

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## Example: Facebook Promotion Guidelines

- Promotions May Be Administered on Brand Page Timelines
  - Not just apps
  - Not personal timelines
  - Via page is faster, easier, and shows in Timelines
- So You Can:
  - Collect entries by having users post on the Page or comment/like a Page post (like Page?)
  - Collect entries by having users message the Page
- Important to Determine Whether the Promotion Is Administered or Advertised on Facebook

# Example: Facebook Promotion Guidelines

**Example 1: Tylenol Cold + Flu Severe**

THAT RED NOSE THING  
only works for Rudolph

**TYLENOL**  
COLD + FLU SEVERE  
Acetaminophen

**Example 2: Bayer Animal Health - It Only Takes One**

IT ONLY TAKES ONE

We're rolling into the dog days of summer, but before you and your pup venture to the beach, make sure your friend is properly protected. It only takes one bite from a parasite to put your dog at risk of an infectious disease. #ItOnlyTakesOne

**Facebook Post Details:**

- Page:** TYLENOL (December 21, 2015)
- Text:** The holidays are about spending time with family, not a stuffy nose. TYLENOL® Cold relieves your worst cold and flu symptoms. (Use only as directed)
- Engagement:** 3.7K likes, 348 Shares, 190 Comments
- Comments:**
  - Chann Wessell: What ever happened to Tylenol cold and sinus in the green bottle? This was the best stuff for congestion and sinus headaches. (December 23, 2015)
  - TYLENOL: Hello, Chann! You may be thinking of our TYLENOL Sinus Congestion & Pain Caplets. Check them out here: <http://www.tylenol.com/tylenol-sinus-congestion-pain>... We hope this helps. Happy Holidays!

**Facebook Post Details:**

- Page:** Bayer Animal Health (August 15)
- Text:** We're rolling into the dog days of summer, but before you and your pup venture to the beach, make sure your friend is properly protected. It only takes one bite from a parasite to put your dog at risk of an infectious disease. #ItOnlyTakesOne
- Engagement:** 212 likes, 15 Shares, 1 Comment
- Comments:**
  - Lau Perez Hermoso: (August 15 at 8:16am)

Images courtesy of:

<https://www.facebook.com/tylenol/photos/a.281543021990857.1073741828.232437940234699/794218517389969/?type=3&theater>

<https://www.facebook.com/Bayer4Animals/photos/a.168213173387680.1073741828.148942741981390/717301478478844/?type=3>

# Facebook Promotion Guidelines

- Can Still Run Promotions Via Apps
  - Creating a promotion with an app on Facebook allows a Page to create a more personalized experience
  - Promotions run through apps can collect data in a secure, structured way
  - Cannot require that someone like the page to access the app
- Can't Have People Enter by Liking, Sharing, or Posting Something on Their Personal Timeline
- Rules for a Facebook Promotion Must Still Include
  - A complete release of Facebook by each entrant or participant
  - Acknowledgment that the promotion is in no way sponsored, endorsed, or administered by, or associated with, Facebook
- Brand May Not Require a User to "like" Their Page in Order to Access Content, Such as Entry Into a Contest or Sweepstakes, Via a Facebook Application

## Example 2: Twitter

- Twitter Has "Guidelines for Contests"
- Rule #1: Don't Encourage Abuse of Twitter
  - Discourage the creation of multiple accounts
  - Discourage posting the same tweet repeatedly - a violation of the Twitter Rules
  - Twitter has shut down promotions that caused an excessive amount of activity



## Example 2: Twitter

- Require Users to Include an @Reply to You in Their Update So You Can See All the Entries
- Don't Use Twitter's Trademarks, e.g., Twitter and Tweet, Other Than to Refer to Twitter and Sending a "Tweet"
- Recommended Disclosures:
  - NO PURCHASE NECESSARY Rules: [bit.ly](http://bit.ly)

## 4. Manage Risk Associated with Social Media Contests

London Drugs | LD Contest! | Liked

Get ready for the Summer Sun.  
**ENTER FOR A CHANCE TO WIN!**

**Summer Contest #3: Enter for Your Chance to Win a \$250 London Drugs Gift Card!**

**ENTER FOR A CHANCE TO WIN!**  
**\$250 Gift Card**

London Drugs' 3rd Contest of Summer is on. Enter for a chance to win a \$250 Gift Card to London Drugs. This gift card can be used on any products at any of our physical locations. Contests are open to all residents of British Columbia, Alberta, Saskatchewan, and Manitoba. No purchase necessary. Limit one (1) entry per person. See full rules and regulations. Help us spread the word by sharing and tweeting your friends!

4 days 10:52:37 remaining

Enter your email address

**Enter Contest**

**1,741** people have entered

Send  
Recommend 551  
+1 6 Tweet 12 Plus

This promotion is in no way sponsored, endorsed or administered by, or associated with, Facebook. You understand that you are providing your information to London Drugs and its affiliates and you agree to release London Drugs and its affiliates from any and all liability.

Source: "30 Amazing Examples of Branded Facebook Contests Done Right,"  
<https://blog.wishpond.com/post/52173284787/10-amazing-examples-of-branded-facebook-contests-done>

## Social Media Contests – Key Things to Remember

- A Contest (skill or merit required to win) and a Sweepstakes (prize based upon chance, no consideration permitted to enter) are okay.
- A Lottery (purchase, payment or other consideration paid for a chance to win a prize) is illegal. The line between contest/sweepstakes and a lottery can be narrow.

# Social Media Contests – What is Consideration?

- Purchase
- Text message charge (Premium vs. Standard Text Messages)
- Effort? (Survey, trivia, quiz)
- A single store visit? Multiple store visits?
- Postage? (Vermont)
- Personal or highly sensitive information (credit card application)

## Social Media Contests – What is Consideration?

- "Free" Method of Entry Must Be Equally Available ("Equal Dignity")
- Examples
  - Mail-in, 800 number, in-store, online?
- "Free" Method of Entry Is Only Effective to Eliminate Consideration Where the Consideration Is Being Paid for Something Other Than the Chance to Win
- Disclosure of Free Method of Entry
  - Equal prominence with purchase method
  - Accessible to consumers

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# Recent National Advertising Division Decisions: Lessons Learned

## BA Sports Nutrition, LLC (BodyArmor SuperDrink)

- BA Sports Nutrition, LLC posted on its Facebook page making advertising claims about BodyArmor SuperDrink (“BodyArmor is ‘natural’”) and made comparisons to competitor Gatorade (“Gatorade is ‘artificial’”). BA Sports also shared blog post links or highlighted comments making favorable claims about its product, including images of individuals dumping out bottles of Gatorade.
- Challenged before the NAD by Stokley-Van Camp, Inc., the producer of Gatorade.
- NAD concluded that this conduct was improper and recommended that BA Sports discontinue making these claims on social media and reposting or linking to third party content denigrating Gatorade.

# Recent National Advertising Division Decisions: Lessons Learned

Lesson No. 2:      Be Mindful of Disclosures.

Social Media Advertisements Through Paid Celebrity Endorsement **Must** “Disclose Material Connections” Between the Advertiser and the Endorsing Celebrity.

Cases:      Kardashian, Kourtney, et al. (Fit Tea), Case # 6046, NAD/CARU Case Reports (January 2017); Fit Products, LLC (Fit Tea), Case #6042, NAD/CARU Case Reports (December 2016)



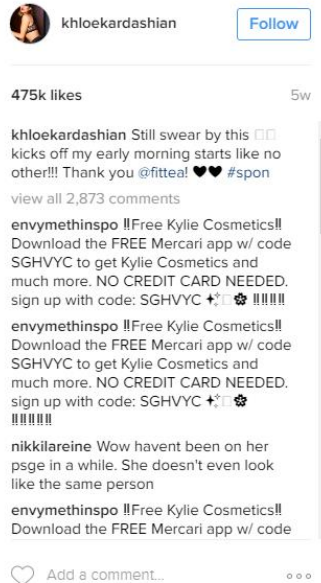
# Recent National Advertising Division Decisions: Lessons Learned

## Fit Products, LLC (Fit Tea)

- NAD brought this case against FitTea as part of its ongoing monitoring program.
- The case focused on express claims made by FitTea and endorsements and testimonials posted on social media on behalf of FitTea.
- In response to the NAD inquiry, Fit Products developed a Social Media Policy regarding endorsements. Moving forward, all paid endorsers must include “#ad or #endorsement” as well as “@FitTea” or #FitTea” on posts to disclose the connections.
- The NAD’s final decision approved of the Fit Products Social Media Policy.

# Recent National Advertising Division Decisions: Lessons Learned

## Compliant Advertisement



## Non-Compliant Advertisement



Image Source: Jordana Narin, "Can You Keep Up with the Kardashians? 3 Takeaways for Your Brand," Adlibbing (Aug. 9, 2016), <https://www.adlibbing.org/2016/08/09/keeping-kardashians-3-takeaways/>.

Image Source :<http://cdn.thejournal.ie/embeds/twitter/76fd2ba11d9d7338c53e92f3f51a9108.png>