

Client Alert

March 2016

FTC Dresses Down Lord & Taylor

Yesterday, the Federal Trade Commission laid down a clear marker for retailers in announcing a [settlement](#) with Lord & Taylor. This is the agency's first native advertising case since issuing its [Enforcement Policy Statement on Deceptively Formatted Advertising](#) and [Native Advertising Business Guidance](#) in December 2015.

Yesterday's case centers on Lord & Taylor's plan last year to promote its "Design Lab" collection – a private label clothing line aimed at the millennial set – through native advertising editorials and influential Instagrammers. The retailer gifted one particular dress to 50 fashion influencers and paid the influencers between \$1,000 and \$4,000 to post one photo of themselves wearing the dress during a specified weekend in March 2015. According to the FTC's [complaint](#), Lord & Taylor's contracts required the influencers to use the @lordandtaylor user designation and #DesignLab campaign hashtag in their posts, but did not require the influencers to disclose that they had been paid by Lord & Taylor. The FTC alleges that while Lord & Taylor exercised editorial oversight over the posts, it did not add any disclosures that the posts were part of a Lord & Taylor-sponsored advertising campaign.

Lord & Taylor's Design Lab plan also included placing a native article and Instagram post with fashion magazine Nylon.com. The FTC's complaint alleges that while Lord & Taylor paid for the article and Instagram post and reviewed and pre-approved the content, the retailer did not disclose this commercial arrangement in either submission.

The FTC's complaint includes three counts of deception:

- (1) Although Lord & Taylor represented that the 50 Instagram influencers' images and captions reflected the independent statements of impartial fashion influencers, the postings were part of an advertising campaign to promote Design Lab sales;
- (2) While representing that the influencers' posts reflected the opinions of individuals with expertise in fashion trends, Lord & Taylor failed to disclose that the influencers were the company's paid endorsers; and
- (3) While Lord & Taylor represented that Nylon magazine posts were independent statements and opinions regarding the Design Lab launch, the posts were actually paid commercial advertising.

If approved, the proposed consent order will run for 20 years and:

- (1) Prohibits Lord & Taylor from misrepresenting any of its endorsers as independent, ordinary consumers, and requires Lord & Taylor to clearly and conspicuously disclose material connections between the company and its endorsers;
- (2) Prohibits Lord & Taylor from misrepresenting that paid commercial advertising is a statement or opinion from an independent or objective publisher;

(3) Requires Lord & Taylor to establish an endorser compliance and monitoring program that includes:

- providing endorsers with a statement of responsibility to disclose material connections and receiving signed acknowledgements of agreement from them to comply;
- monitoring influencer endorsements and keeping sufficient records to show results;
- terminating recalcitrant endorsers; and

(4) Requires Lord & Taylor to keep records for five years following any endorsement campaign.

Why this settlement matters for our retail and consumer products clients:

- **Advertisers are not immune under the FTC's analysis.** Although this case involved seasoned fashion influencers and an established talent agency and online fashion magazine, the FTC held Lord & Taylor, not those entities, liable for its endorsers' failure to disclose material ties.
- **Make sure your agency contracts require endorsers to disclose their material connections to you.** The FTC's complaint emphasizes that Lord & Taylor exercised significant contractual oversight over influencers' posts, requiring precise language and reviewing and approving each post, but failed to mandate disclosures. But even where intermediaries are involved and your connection to endorsers is indirect, you may be held liable. The fix here was simple – the hashtag #advertising – and could have saved Lord & Taylor significant trouble.
- **While getting creative, don't ignore the basics.** Under the FTC's native advertising guidance, ads that are not identifiable as advertising are deceptive if they mislead consumers into believing they are independent, impartial or do not come from the sponsoring advertiser. A native ad that is likely to confuse consumers must be marked as an ad. According to the FTC, "Advertisement," "Paid Advertisement" or "Sponsored Advertising Content" are terms likely to be understood by consumers to mean that a native ad is commercial advertising.

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