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**ADVERTISING & MARKETING**

Consumer-facing companies regularly use social media to interact with consumers, provide customer support, run promotions, and otherwise build consumer goodwill. Such activity has increasingly been scrutinized by the Federal Trade Commission, the authors write. They summarize the primary legal framework applicable to social media advertising; review recent enforcement actions and areas of current and future regulatory attention; and provide practical suggestions to companies engaging in social media advertising and responding to enforcement actions.

**Federal Trade Commission and National Advertising Division Social Media Enforcement: Likes, Like-Gated Offers, and Other Traps for the Unwary**

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**Overview**

**A**s consumer-facing companies become increasingly active in social media, regulatory agencies are subjecting online activity and advertising to increased scrutiny with respect to potential unfair or deceptive acts or practices. This article summarizes the primary legal framework applicable to social media advertising, reviews recent enforcement actions and areas of current and future regulatory attention, and provides practical suggestions to companies engaging in social media advertising and responding to enforcement actions.

Section 5 of the Federal Trade Commission Act (FTC Act) prohibits “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”<sup>1</sup> An act or practice is deceptive under the FTC Act if it contains a representation or omission that would be material to consumers and that would mislead consumers acting reasonably under the circumstances.<sup>2</sup> An act or practice is unfair under the FTC Act if it is likely to cause substantial con-

<sup>1</sup> 15 U.S.C. § 45 (2012).

<sup>2</sup> Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to John D. Dingell, Representative, U.S. House of Representatives (Oct. 14., 1983), *reprinted in* Cliffdale Assocs. Inc., 103 F.T.C. 110, 174 (1984), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

sumer injury, whether physical or economic, that is not reasonably avoidable by consumers themselves and is not outweighed by benefits to consumers or competition.<sup>3</sup>

Under its authority to investigate and prevent deceptive trade practices, the Federal Trade Commission (FTC) enforces the FTC Act and promulgates rules, regulations and guidance thereunder. In addition, the National Advertising Division of the Better Business Bureau (NAD) provides a self-regulatory process for resolving disputes regarding national advertising. Although participation in the NAD review process and compliance with NAD decisions is voluntary, failure to do so may lead the NAD to refer a case to the FTC.

The FTC has repeatedly emphasized that general principles of advertising law, as well as FTC guidance on advertising, apply equally to traditional media, as well as online media, social media, and the mobile marketplace.<sup>4</sup> In other words, “[d]eception is unlawful, no matter what the medium.”<sup>5</sup> Social media is therefore subject to the panoply of rules and regulations enforced by the FTC; in fact, even 140-character tweets on Twitter or pins on Pinterest may constitute testimonials<sup>6</sup> and hashtags alone are capable of being characterized as advertising claims.<sup>7</sup>

To date, the FTC’s social media enforcement agenda has focused heavily on endorsements and testimonials. In 2009, the FTC released revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Endorsement and Testimonial Guides).<sup>8</sup> The Endorsement and Testimonial Guides are administrative interpretations of laws enforced by the FTC and cover the use of consumer, expert, celebrity, and other endorsements used in advertising. Among other changes, the 2009 revisions add examples relevant to social media.

In June 2012, the FTC released an FAQ document that provided additional examples and explanations for bloggers, advertisers, and marketing businesses.<sup>9</sup> In March 2013, the FTC released a new guidance document: “Dot Com Disclosures: How to make effective disclosures in digital advertising”<sup>10</sup> (the “Dot Com Disclosure Guidance”).

<sup>3</sup> Letter from Michael Pertschuk, Chairman, Fed. Trade Comm’n, et al., to Wendell H. Ford & John C. Danforth, Senators, U.S. Senate (Dec. 17, 1980), reprinted in *Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>; see also 15 U.S.C. § 45(n).

<sup>4</sup> FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), available at <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>.

<sup>5</sup> *Id.*

<sup>6</sup> *Liquid HCG Diet LLC*, Case No. 246, Council of Better Bus. Bureaus (2010).

<sup>7</sup> *Bridgestone Golf Inc.*, Case No. 5357, Council of Better Bus. Bureaus (2011).

<sup>8</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255), available at <http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.

<sup>9</sup> FED. TRADE COMM’N, THE FTC’S REVISED ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (June 2010), available at <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>.

<sup>10</sup> FED. TRADE COMM’N, *supra* note 5.

The revised Endorsement and Testimonial Guides, Dot Com Disclosure Guidance, and other guidance documents collectively signal the FTC’s heightened focus on applying traditional advertising law principles to new technologies, including social media.

### **Targets of Enforcement: Companies and Advertising Agencies**

The FTC has primarily focused its social media enforcement efforts on marketing through company websites, social media outreach, and relationships with bloggers and similar entities.

In addition to targeting the companies to whom advertising pertains, the FTC may also hold advertising agencies liable for false or misleading claims, if the agency knew (or had reason to know) the claims were false or unsubstantiated, or if the advertising agency played a major role in developing the advertisement.<sup>11</sup> Similarly, the FTC has indicated that third parties such as advertising agencies may be held liable for making deceptive claims:

Sellers are responsible for claims they make about their products and services. Third parties—such as advertising agencies, website designers, and catalog marketers—may also be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising, or know about the deceptive claims.<sup>12</sup>

It, therefore, may be advisable for advertising agencies to independently examine the adequacy of substantiation in certain situations. Reliance on an advertiser’s assurance that claims are substantiated may, in certain circumstances, be insufficient to allow an advertising agency to avoid liability for false or misleading claims if the agency knew or should have known that the claims were deceptive, or if the agency was involved in preparation of the challenged ad.<sup>13</sup>

### **Social Media: Likes and Other Recognition Methods**

Some FTC enforcement actions relate to social media matters only tangentially, such as where the activity in question was conducted in social media, but the dispositive legal analysis (such as claim substantiation)

<sup>11</sup> See FED. TRADE COMM’N, OM RELEASE 89-1, OPERATING MANUAL 2, available at <http://www.ftc.gov/foia/ch01overview.pdf>. Liability for agencies for advertising misrepresentations may arise from the “means and instrumentalities” theory. “Means and instrumentalities” is a specific type of liability where an entity may be deemed responsible for, among other things, statements made to consumers through an intermediary. See *Shell Oil Co.*, 128 F.T.C. 749, 766 (1999) (Swindle, C., dissenting), available at <http://www.ftc.gov/os/1999/09/shellstatementofswindle.htm>.

<sup>12</sup> See FED. TRADE COMM’N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD 2 (2000), available at <http://business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road>.

<sup>13</sup> FTC guidance documents state, for example, “Advertising agencies or website designers are responsible for reviewing the information used to substantiate ad claims. They may not simply rely on an advertiser’s assurance that the claims are substantiated. In determining whether an ad agency should be held liable, the FTC looks at the extent of the agency’s participation in the preparation of the challenged ad and whether the agency knew or should have known that the ad included false or deceptive claims.” FED. TRADE COMM’N, *supra* note 13, at 2.

would have been the same if the advertising were in print or other traditional media. In other enforcement actions, however, the use of social media has directly affected the FTC's legal analysis. Many of these issues relate broadly to the concept of "recognition" in social media, which includes the numerous means of interacting with others online.

Consumer-facing companies regularly engage in social media to interact with consumers, provide customer support, run promotions, and otherwise build consumer goodwill. The types of interactions in social media vary, based on the particular platform, but the most common categories include content posting (such as posts or updates on Facebook or LinkedIn, tweets on Twitter, or pins on Pinterest), expressions of interest (such as Facebook likes or LinkedIn favorites), subscriptions (such as friending on Facebook or following on Twitter, LinkedIn, or Pinterest), re-publishing (such as sharing on Facebook, repinning on Pinterest, or retweeting on Twitter), and commentary on third-party content (such as commenting on Facebook or @mentions on Twitter).

In addition, certain types of promotions are interaction-gated, such that a consumer must take some action to take advantage of an offer. For example, a company may offer a coupon to each customer who posts a comment on its Pinterest boards or who "likes" a Facebook page.

### Enforcement Trends

The FTC and NAD social media inquiries and investigations in recent years have focused heavily on the "deceptive" prong of the "unfair and deceptive acts and practices" standard. In particular, the FTC and NAD have paid particular attention to companies (including employees and agents) that fail to disclose information that would be material to, and mislead, consumers. In addition, given the importance of personal interaction and relationships in social media, the FTC and NAD have been particularly attuned to disclosures made in connection with endorsement and testimonial relationships.

### Undisclosed Gifts to Individuals

The FTC has recently conducted a series of investigations with respect to social media activity, including but not limited to promotions conducted by Ann Taylor Stores,<sup>14</sup> Hyundai Motors America,<sup>15</sup> HP Inkology,<sup>16</sup> and Nordstrom Rack.<sup>17</sup> Each of these promotions in-

involved the offering of gifts, gift cards, or other benefits to bloggers to encourage posting of reviews or other content about the company—but in each case the company was investigated based upon the alleged failure to adequately require that the gift recipient disclose its receipt of the gift. Notably, Ann Taylor actually posted a sign at an event where bloggers received gifts, informing bloggers that they should disclose the gifts if they blogged about the event, but it was not clear to the FTC how many bloggers actually saw the sign, and not all bloggers made such disclosures. Bloggers in the HP matter received one gift card to keep and one to give away to readers, but disclosure of the HP relationship in connection with the giveaway, without specific disclosure of the retained gift, was not deemed sufficient.

In each case, the FTC decided against enforcement and issued a public closing letter emphasizing the importance of disclosing material connections between an advertiser and an endorser when such a relationship is not otherwise apparent from the context of the communication. In the case of gift giving, companies must not only require that gift recipients disclose the gift but also actively monitor compliance with such requirement. As noted, the FTC declined to recommend enforcement action in each case due to certain mitigating factors. In Ann Taylor, the FTC indicated that the promotion was limited to a single event, only a small number of bloggers participated (and some of whom did disclose the gifts in connection with their posts), and Ann Taylor's prompt implementation of a social media policy addressing gifts. In Hyundai, the FTC noted that the actions were taken not by Hyundai but by employees of Hyundai's media firm, in contravention of Hyundai's established social media policy.

### Undisclosed Relationships

*User Review Forums.* The first enforcement action by the FTC following the issuance of the revised Endorsement and Testimonial Guidelines involved Reverb Communications, a company that provides public relations, marketing, and sales services to video game developers, including mobile gaming companies.<sup>18</sup> Between November 2008 and May 2009, Reverb posted reviews about its clients' games on the iTunes store review boards using account names that allegedly provided readers the impression the reviews were written by disinterested consumers. Reverb did not disclose that it was hired to promote the games and that it often received a percentage of the sales. The FTC alleged that these facts would have been relevant to consumers who read the reviews to make a purchasing decision. Reverb settled the matter, agreeing to remove any previously posted reviews that allegedly misrepresented the authors as independent users and that did not disclose a connection between Reverb and the developer. The settlement also bars Reverb from making similar endorsements of any product or service in the future without disclosing relevant connections.

*Search Engine Advertising.* Based upon its experience with infomercials and advertorials, the FTC has extensive capability to assess whether consumers are

<sup>14</sup> Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm'n, to Kenneth A. Plevan, Esq., Counsel for AnnTaylor Stores Corp. (Apr. 20, 2010), available at <http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf>.

<sup>15</sup> Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm'n, to Christopher Smith, Esq., Counsel for Hyundai Motor America (Nov. 16, 2011), available at <http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf>.

<sup>16</sup> Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm'n, to John Graubert, Esq., Counsel for Hewlett-Packard Co., & Amanda Reeves, Esq., Counsel for Porter Novelli, Inc. (Sep. 27, 2012), available at <http://www.ftc.gov/os/closings/staff/120927hpinkologycltr.pdf>.

<sup>17</sup> Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm'n, to Aaron Hendelman & Lydia Parnes, Counsel for Nordstrom, Inc. (Feb. 27, 2013), available

at <http://ftc.gov/os/closings/staff/130222nordstromrackletter.pdf>.

<sup>18</sup> Reverb Commc'ns, 150 F.T.C. No. 092 3199 (Nov. 22, 2010), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

able to identify consumer-directed advertising in certain types of potentially ambiguous scenarios. In June 2013, for example, the FTC sent letters to search engine companies<sup>19</sup> to update guidance it had provided in 2002 on this point.<sup>20</sup> Both the 2002 and 2013 letters underscored that failing to distinguish clearly and prominently between search results and advertising could be a deceptive practice. The 2013 FTC letter expanded on the earlier guidance, recognizing the rapid evolution of business models that incorporate search features, including social media, mobile apps, voice search, and specialized search results, and counseling companies to remain mindful of the disclosure requirements across platforms. Consistent with the Dot Com Disclosure Guidance, the FTC emphasized the need to tailor clear and conspicuous disclosures to the nature of the relevant platform and to ensure that disclosures are effective across platforms and devices.

### *Celebrity Tweets: Undisclosed Payments*

The FTC has recently expressed concern regarding celebrity tweets or other posts where consumers may not expect a relationship between the celebrity and an identified company, product, or service. The Dot Com Disclosure Guidance addresses this issue in the context of short-form disclosures in space-constrained contexts, such as Twitter. The FTC suggests that tweets beginning with “Ad:” or “Sponsored:” may be necessary to inform consumers that a celebrity tweet is an advertisement.<sup>21</sup> FTC officials have recently acknowledged that there are open FTC investigations regarding companies that have not ensured that adequate disclosures have been made by their celebrity partners,<sup>22</sup> although the FTC has not yet issued any public closing letters or commenced enforcement. Given the FTC’s consistent guidance on this topic and the widespread use of celebrity tweets without disclosures, additional attention and perhaps even enforcement action by the FTC may be anticipated.

### *Testimonials: Absence of Material Disclosures*

Weight-loss and other health-related companies have frequently used testimonials in advertising. In contrast to the 1980 version of the Endorsements and Testimonial Guides, the revised Endorsement and Testimonial Guides explicitly require an advertiser to either ensure that advertised experiences are typical, or if not typical, indicate what typical results would be. A “results not typical” disclaimer is not, according to the revised Endorsement and Testimonial Guides, appropriate unless typical results are also disseminated. More generally, advertisers have an obligation to ensure that statements

made by an endorser or through a testimonial are adequately substantiated, applying the same legal standard as if the advertiser made the statement itself.

A recent NAD investigation applied these revised standards to Pinterest testimonials. Weight-loss company Nutrisystem posted weight-loss success stories to a board on Pinterest, with a picture of a Nutrisystem customer and a description such as “Christine B. lost 46 lbs. on Nutrisystem.” Following the NAD inquiry, Nutrisystem voluntarily revised the relevant pins to include additional disclosures such as “On Nutrisystem, you can expect to lose at least 1-2 lbs per week.”

### **Enforcement Case-Study: Coastal Contacts Like-Gated Offer**

NAD’s first decision addressing a Facebook promotional campaign involved a challenge brought by 1-800-Contacts, Inc. against a variety of claims disseminated by Coastal Contacts Inc.<sup>23</sup> Among other challenges, 1-800-Contacts challenged Coastal Contact’s reference to the number of people on Facebook who have liked the Coastal Contact Facebook page and the allegedly deceptive manner by which Coastal obtained such consumer endorsements.

Coastal Contact’s Facebook page provided, “Like This Page! So you too can get your free pair of glasses!” This “like-gated offer,” however, was contingent upon certain terms and conditions that were not available to consumers until after they liked the page, including shipping and handling costs and limitations on styles and lens types eligible for the “free” offer. 1-800-Contacts alleged that the “free” eyeglasses claim, without the inclusion of qualifying terms and conditions, was false and misleading, which fraudulently induced consumers to like the Coastal Facebook page. 1-800-Contacts further alleged that these likes obtained through false pretenses resulted in a misleading perception that Coastal enjoyed broader support than it would actually have in the absence of its misleading “free” promotion. Further, Coastal leveraged its likes through press releases to the investor community without disclosing the role played by the “free” offers in generating the likes. 1-800-Contacts argued that Coastal should be required to remove the likes obtained through the “free” glasses offer, or if Coastal were unable to determine whether the likes were obtained as a result of this offer, Coastal should be required to remove all of its likes.

NAD determined that the message conveyed by a Facebook like is one of general social endorsement. In elaborating this concept, NAD acknowledged that the display of Facebook likes on a company’s fan page may mean many things to consumers, including that a consumer generally likes the company or its products or services, that the individual intended to enter a like-gated offer or promotion, or that the individual wanted to share some piece of content on the company’s page with its Facebook friends.

NAD addressed the “free” glasses promotion and applied longstanding rules that the use of the word “free” must be reserved for genuinely free offers, subject to clear and conspicuous upfront disclosure of additional terms and conditions applicable to the offer. NAD con-

<sup>19</sup> Letter from Mary K. Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm’n, to General Purpose Search Engines (June 24, 2013), available at <http://www.ftc.gov/os/2013/06/130625searchenginegeneralletter.pdf>.

<sup>20</sup> Letter from Heather Hippley, Acting Assoc. Dir., Fed. Trade Comm’n, to Search Engines (June 27, 2002), available at <http://www.ftc.gov/os/closings/staff/commercialalertattach.shtm>.

<sup>21</sup> FED. TRADE COMM’N, *supra* note 5, at 16, A-18.

<sup>22</sup> Nick Bilton, *Disruptions: Celebrities’ Product Plugs on Social Media Draw Scrutiny*, N.Y. TIMES, June 9, 2013, <http://bits.blogs.nytimes.com/2013/06/09/disruptions-celebrities-product-plugs-on-social-media-draw-scrutiny/?ref=business>.

<sup>23</sup> Coastal Contacts Inc., Case No. 5387, Council of Better Bus. Bureaus (2011).

cluded that Coastal failed to clearly and adequately disclose material information relating to Coastal's "free" promotion. NAD recommended that Coastal make additional upfront disclosures to provide advanced notice to consumers regarding the conditions applicable to the promotion.

After addressing the need for additional disclosures regarding Coastal's "free" offer, NAD determined that Coastal did in fact have the social endorsement that the likes conveyed, as customers who liked the Coastal page to participate in the like-gated promotion actually received the benefit of the promotion. NAD did not recommend that Coastal remove some or all of its likes.

As the first NAD investigation focusing on a Facebook promotion, the Coastal matter highlights a few significant lessons. First, the investigation shows that regulators are becoming increasingly willing to focus on platform-specific and technology-specific compliance requirements for promotions and advertising conducted through social media platforms. Second, like-gated offers and similar gated promotions through social media must clearly and conspicuously disclose all material terms at the outset of the offer—i.e., before the like—not after the consumer enters the promotion. Third, Facebook likes and similar social media expressions of interest are a "general social endorsement," the consequences of which are largely context dependent.

### **Guidance for Social Media Compliance**

Companies should regularly work with legal counsel to ensure that social media activities do not result in unnecessary legal exposure. The following tips and guidance are a starting point for such compliance.

*Treat social media advertising with as much consideration as traditional advertising.* It is worth restating that the FTC has emphasized that "[d]eception is unlawful, no matter what the medium."<sup>24</sup> Although social media platforms, tools, and technologies add an additional layer of complexity to advertising compliance, the FTC holds companies to the same legal standards online and off. The real-time and personal nature of social media occasionally leads companies (or their employees or agents) to take liberties with the standard compliance procedures and policies followed in connection with traditional media. In fact, a number of social media enforcement actions have occurred in recent years for this reason. Companies must work flexibly and creatively to advertise and conduct promotions through social media while complying with traditional advertising requirements. The Dot Com Guidance provides a helpful starting point on managing the technical aspects of compliance online and through mobile devices, including making space-constrained disclosures, addressing proximity issues around disclosures, and the use of links.

*Implement and enforce a comprehensive social media policy.* Companies should implement comprehensive social media policies that govern a company's activities through social media (which should be distinguished from social media policies implemented from a human resources perspective to address employees'

<sup>24</sup> FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), available at <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>.

personal use of social media). Among other things, social media policies should clearly address gift giving through social media, including requiring the gift recipient to adequately disclose the gift. Companies should also actively monitor compliance with the social media policy in all respects, including by gift recipients, spokespeople, and third party media vendors and agents.

*Work closely with spokespeople and other partners to ensure compliance.* The FTC's recent attention to the issue of paid celebrity activity on social media without adequate disclosure should serve as a red flag for companies regarding future regulatory action. When entering into a spokesperson relationship with a celebrity who will be expected to use social media to promote the company or its products or services, the company should clearly outline its expectations regarding disclosures and actively monitor compliance with such expectations.

*Follow platform-specific rules.* The use of social media sites is governed by site-specific terms of use and other rules, including some specific to commercial activity through the site.<sup>25</sup> These terms typically require companies to comply with applicable legal requirements, and also impose additional platform-specific requirements. Companies should regularly review the applicable terms and rules for its advertising on social media platforms.

### **Responding to an Enforcement Action**

In the event a company becomes subject to an advertising investigation or enforcement action by the FTC or NAD, the company should first retain experienced legal counsel. In addition, companies should consider the following key issues in connection with such investigation or action<sup>26</sup>:

*Expect to dispute implied claims.* The FTC will typically allege a wide range of implied claims. Companies will benefit in many cases from disputing the existence of such implied claims. Although the FTC is not required to rely upon extrinsic data in addition to its own expertise in evaluating implied claims, the FTC may be persuaded if a company has already conducted tests that demonstrate that such alleged implied claims are not, in fact, perceived by consumers.

*Understand "fencing-in."* The FTC will frequently attempt to extend a consent decree or court order to a company's activity beyond the specific deceptive activity engaged in by the company. For example, in a Facebook matter pertaining to one company product, the FTC may propose a consent decree that extends to all social media platforms for an entire product line. As

<sup>25</sup> See, e.g., *Guidelines for Contests on Twitter*, TWITTER (2013), <https://support.twitter.com/groups/31-twitter-basics/topics/114-guidelines-best-practices/articles/68877-guidelines-for-contests-on-twitter>; *Facebook Advertising Guidelines*, FACEBOOK (July 26, 2013), <https://www.facebook.com/ad-guidelines.php>; *Facebook Pages Terms*, FACEBOOK (July 1, 2013), <https://www.facebook.com/page-guidelines.php#promotionsguidelines>; *Terms of Service*, TWITTER (June 25, 2012), <https://twitter.com/tos>; *Statement of Rights and Responsibilities*, FACEBOOK (Dec. 11, 2012), <https://www.facebook.com/legal/terms>.

<sup>26</sup> See also, Paul D. Rubin, *Ten Things to Consider When Under Investigation, or Subject to Enforcement, by the FTC for Alleged Advertising or Consumer Product Violations*, 1 BLOOMBERG CORP. L.J. 35 (2006)

this extension can have a substantial impact on the company's future operations, a company may benefit from negotiating such fencing-in provisions. The FTC will generally consider three factors in determining the extent, if any, of fencing-in: (1) the seriousness and deliberateness of the violations; (2) the ease with which the violations may be transferred to other products; and (3) whether the respondent has a history of prior violations. This is typically a significant issue when negotiating a settlement with the FTC, as it can often have a substantial impact upon the company's future operations.

*Consider the potential for individual liability.* The FTC frequently names individuals in its enforcement actions, particularly in connection with small, closely-held companies. The standard for individual liability is challenging to overcome, as fraudulent intent is not required. An individual may be liable for the unfair or deceptive acts or practices of the company if he or she had actual knowledge of the acts or practices or if he or she acted with reckless indifference or intentional avoidance of the truth. In such cases, the individual may be jointly and severally liable with the company. In matters involving multiple potentially liable individuals, each

individual may need to retain his or her own legal counsel.<sup>27</sup>

### *Conclusion*

The trend toward increasing use of social media platforms is expected to continue unabated. Although one is unable to predict future forms of social media usage, the FTC's ability to initiate investigations and pursue enforcement remains largely unfettered by technological advancements. Specifically, the FTC continues to interpret Section 5 of the FTC Act as being sufficiently flexible to apply to new or emerging technologies without the need for Congress to enact technology-specific laws.

Accordingly, companies should continually monitor FTC and NAD developments to discern enforcement trends and predict future application of existing laws to new technologies or innovative uses of existing technologies. By understanding the FTC's primary concerns, consumer-orientation, and enforcement precedent, companies may be better positioned to develop appropriate social media policies designed to ensure legal compliance.

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<sup>27</sup> See, e.g., Paul D. Rubin & Smitha G. Stansbury, *FTC Enforcement Against Individuals* (Apr. 2011), <http://tinyurl.com/lc7jvom>.



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