
#ThinkAgain: How regulator guidance can impact social media marketing

Received: 13th February, 2014



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Abstract Social media have changed the ways in which brands engage with their audiences as well as employees, partners and advocates. But these new communication channels bring their own challenges for companies, such as the need to be transparent and ethical with communications, as well as to provide proper disclosure and comply with governmental regulator guidelines. This paper outlines the state of guidance from key governing bodies in the USA (namely, the Federal Trade Commission, the Securities and Exchange Commission and the Food and Drug Administration). It also discusses the ethical issues involved with new disclosure considerations surrounding native advertising and content marketing practices, as well as with word-of-mouth marketing; the key considerations regarding compliance with guidelines across new platforms, tools and devices; and practical guidance on how to communicate properly via new channels.

KEYWORDS: social media compliance, social media disclosure, social media ethics, social media regulation, WOMMA Ethics Committee

INTRODUCTION

The digital media revolution has changed the ways in which people communicate with one another and how companies/brands communicate with people. As such, it has become increasingly difficult to

interpret rules written for traditional forms of media (print, radio and television) in the context of online social network sites, mobile apps and new devices, such as tablets. It has also brought about new challenges with regards to

ethics, disclosure and transparency in communications.

As the Co-Chairs of the Word of Mouth Marketing Association's (WOMMA) Ethics Committee, we spend a lot of time focusing on the state of ethics in the various marketing disciplines and the significant concerns related to embedding transparency and disclosure in all communications from companies, their employees and partners, and anyone who has a material connection to the organisation. In short, we see the committee's role at WOMMA as advocating to companies regarding how integral ethics must be to their communications and marketing strategies, as well as providing pragmatic advice about how to make this happen. In short, marketing and communications professionals must prioritise acting in the service of their audiences as highly as they prioritise acting in the service of the company for which they work, in order to achieve the level of ethics essential for the industry to realise the potential that these new communication channels allow for organisations to connect with prospective customers, employees and other audiences.

Such thinking on the topic was shared at the most recent WOMMA summit. With a range of marketing and communications professionals in the room, there was valuable discussion about the essential importance of training ourselves and those with whom we work to 'err on the side of transparency' in our communications. In short, the industry must think about not just what regulatory bodies like the Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), the Food and Drug Administration (FDA) and others in the USA — and comparable groups around the world — might set as regulatory and legal boundaries, but instead what a strong sense of ethics within the organisation

would guide marketers to do, beyond and aside from compliance.

ETHICS, WORD-OF-MOUTH MARKETING, AND A RISING FOCUS ON NATIVE ADVERTISING

Marketers have to think in larger terms, not just about what is legally required but also what best serves the audience the brand is seeking to reach. It is up to marketing professionals to answer the challenge of defining an ethical standard for transparency in word-of-mouth marketing and so-called 'content marketing' that goes beyond questions of legality, and to recognise that taking every care to protect audiences is, in the long run, the best way to protect the reputation of our own organisations.

Simply put, it is essential to consider the ethical imperatives for the industry. The premise, in many ways, is straightforward: by having empathy for those audiences we seek to reach through our communications and by putting ourselves in their shoes, it is possible to think about creating communications that serve both the company and the audience in an ethical manner.

In the wake of the New York Attorney General targeting companies that create fake reviews, this past year,¹ some of the worst practices within the marketing industry have received significant spotlight. Of course, most professionals in marketing and corporate communications do not practise 'astroturfing' — the faking of grassroots energy around their organisations and its initiatives; however, many violations of ethical boundaries come not from this blatant act of deception, but much fuzzier lines.

If communications are misleading or obscuring information that might change the way in which the audience would consider a message, it is essential to be transparent. In this regard it is also vital to

train employees, partners and advocates to be able to put themselves in their audience's shoes to make sure not only that we avoid working with partners who would intentionally obscure information that should ethically be disclosed but, even more importantly, that we are educating and keeping top-of-mind the considerations that help keep people from inadvertently communicating in an unethical manner.

These are issues on which industry organisations like WOMMA have been focused for years. WOMMA has helped define what the 'gold standard' of disclosure should be and advocates that marketers take seriously the reputational damage they do to themselves when they do not take the necessary steps to ensure that they and all their employees/partners are taking great care in being transparent.

While issues still regularly arise in which marketers are failing to provide proper disclosure, there is within marketing an increasing concern regarding ethical issues surrounding content creation and the rise of what has commonly been labelled 'native advertising', a term encompassing everything from sponsored tweets and Facebook posts; to content amplification services that provide paid links to a company's content, placed adjacent to editorial content on publishers' sites; to the rise in sponsored editorial content featuring on a range of traditional publishers' sites.

A few main principles of native advertising are as follows:

- It is crucial for marketers to respect the audiences of the publishers they seek to reach and strive for a high level in transparency that said content is paid, lest the trust that brings audiences to those publishers in the first place be broken.
- Because publishers are, in many cases, relying on revenues from native

advertising to bring needed revenues in to their enterprise, advertisers cannot rely on publishers to handle the ethical due diligence and must themselves be sure that they are considering what is in the best interests of the audiences they seek to reach with their content.

- With organisations like the FTC holding workshops about native advertising, the marketing industry cannot simply rely on regulatory bodies to determine best ethical practice, but must pursue, independent of that, a higher industry standard to which it should hold itself.

When the FTC discussed the challenges of native advertising, the big issue was finding ways to mark the difference between traditional editorial and advertiser-presented content, so that readers can know whether or not the content is being featured because of a paid relationship. The FTC has previously provided disclosure guidelines on how those who endorse a company or its products or services should be transparent when there is a material relationship between that person and the company. But even if the FTC eventually does decide to take action, it will work to establish the minimum of what constitutes proper transparency.

WOMMA'S GUIDE TO BEST PRACTICES

There is much that we can learn from existing ethical considerations and apply to new terrain like native advertising. For instance, WOMMA's Ethics Committee recently collaborated with its Legal Affairs Committee to release the short 'Guide to best practices for transparency and disclosure in digital, social, & mobile marketing'.² The two-page guide sets out the chief considerations all professionals in marketing and communications — and their partners — should keep in mind

when striving to act ethically in their disclosure practices.

In particular, the guide focuses on four key charges:

- be transparent in communications;
- make the necessary disclosures;
- be truthful and have substantiation; and
- disclose all material terms.

The guide also outlines the responsibilities companies and brands have to ensuring that these four imperatives are prioritised.

REGULATORY GUIDANCE CONCERNING SOCIAL MEDIA

While thinking about how these ethical frameworks connect with compliance with existing regulatory guidelines on these issues, consider some of the current governmental guidance issued regarding disclosure and transparency in the USA.

Many regulatory bodies have released guidance specifically addressing these issues in the context of social media over the last two years, including those that oversee financial services and institutions, including the Federal Financial Institutions Examination Council and the Financial Industry Regulation Authority. The present paper will focus on the FTC's '.Com Disclosures' report released in early 2013,³ the SEC's 2013 response to Netflix CEO Reed Hastings⁴ and the draft guidance recently published by the FDA.⁵

FTC: '.Com Disclosures — How to Make Effective Disclosures in Digital Advertising'

In an attempt to bring clarity to guidelines and reassurance to legal and compliance teams, the FTC released a report to address issues presented for disclosures in social, mobile and other digital channels. The '.Com Disclosures' report provides updated guidance — the previous report

was issued in 2000 — and adds further clarification to the FTC's 'Guide to Endorsements and Testimonials' from 2009.⁶

Like the original, the updated report emphasises that consumer protection laws apply equally to marketers across all media, whether delivered on a desktop computer, a mobile device or more traditional media such as television, radio or print. Technological restrictions on space, the design of certain social media tools or the size of a given advertisement in a small screen or window do not exempt advertisers from making required disclosures and notices on the abovementioned platforms.

The FTC guidance offers much clearer guidance for the inclusion of disclosures in digital marketing channels, in particular with respect to social and mobile channels that have emerged since the original report. Required disclosures must be 'clear and conspicuous', and the report goes as far as saying that 'if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures'.

Disclosures must also be unavoidable, in close proximity to the claim that requires disclosure, and give context to the message and function as intended across all formats. Furthermore, hyperlinks to disclosure should be 'obvious' and explicitly labelled in language that clearly conveys information about the linked page's content.

For more information on the FTC's '.Com Disclosures' report, see C.M.P.L.Y.'s white paper.⁷

FTC: Investigation — Cole Haan/Pinterest

In March 2014, the FTC published a closing letter with respect to an investigation into a promotional marketing

campaign that was run by Cole Haan Inc, leveraging the Pinterest platform.⁸ In the contest, participants were encouraged to ‘pin’ photos related to the programme and include the hashtag #WanderingSoul in the post in order to enter to win a US\$1,000 prize. The FTC determined that the incentivised posts required disclosure of the material connection between the sponsoring brand and the contest entrant publishing the content within their social networks.

This closing letter highlights the importance of incentives used in promotional activities and reinforces that contest entries and the chance to win a prize are sufficient consideration to require disclosure and that disclosure requirements apply to marketing initiatives, even in the absence of monetary consideration. Importantly, the FTC’s remit does not cover contest and promotional activities in the USA; as such, the issues surrounding the inclusion or display of official rules and terms were not addressed in this closing letter.

SEC: ‘Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 – Netflix, Inc., and Reed Hastings’

In April 2013, the SEC released a report describing the investigation of Netflix CEO Reed Hastings and his disclosure of material, nonpublic information via his personal Facebook page. The SEC used this report as an opportunity to update the ‘Commission Guidance on the Use of Company Websites’ originally published in 2008 to take into account the use of social media channels.⁹

The report reinforces the language of the original document and underscores that the original guidance was intended to apply to new technologies for dissemination of information as they develop. More specifically, the report provides further clarification that social

media networks — when used properly — are acceptable platforms for dissemination of corporate information. It also clarifies that Regulation FD applies equally to social media communications and identifies the most important factors for achieving compliance with the regulation when using social media for corporate communications.

For more information on the SEC Netflix ruling, see the analysis published by CMP.LY.¹⁰

FDA: ‘Guidance for Industry: Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics’

In November 2009, the FDA first promised to release its own guidance on social media use by the pharmaceutical industry; however, the agency continued to push back the deadline a number of times.

After Congress mandated that guidance be published by June 2014, the FDA released initial draft guidance in January of this year that highlighted submission guidelines for interactive promotional material along with indications that comprehensive advertising and social media guidance would be published within the first half of 2014.

BEST PRACTICES FOR TRANSPARENCY AND DISCLOSURE IN SOCIAL MEDIA

Marketers need to review and update their social media policies to implement these guidelines. Brands and agencies should have a conversation to ensure that policies and practices are aligned — doing so can avoid further inquiry and costly investigation by regulators.

Marketers selling and promoting goods online should review current practices to

ensure that the placement and prominence of required disclosures are sufficient, in light of both ethical considerations and compliance with the guidelines issued by their governing bodies. For instance, the FTC also now requires that marketers take into account responsive design for various mobile and alternate device resolutions and limitations (for example, mouse-over does not work on mobile or touchscreen devices).

For marketers promoting or marketing in social and mobile channels, the changes are more pronounced. Some *ad hoc* disclosure methods were called into question by the FTC — in particular using unclear hashtags like #SPON, the use of generic link shorteners and the practice of including an accompanying disclosure in an additional message or tweet. Clear and prominent disclosures that provide unavoidable context must be used moving forward.

Do not forget that, under the FTC's 'Guide for Testimonials and Endorsements',⁶ reasonable monitoring of disclosures is required. This requirement goes beyond mere social listening and includes monitoring known third parties for the omission of required disclosures and the inclusion of false, misleading or unsubstantiated claims.

Marketers should not avoid programmes simply because of compliance requirements; process and automation solutions do not need to be onerous or restrictive. With some foresight and planning, programmes can be structured, managed and measured more effectively as a result of applying best practices.

A few key considerations are fundamental to developing and establishing best practices:

- ensure the delivery of notice and/or disclosures, as well as a good user experience;
- provide audiences with access to all relevant information;
- build in ways for programmes to be reasonably monitored for both the inclusion and omission of disclosures;
- streamline and standardise disclosure methods;
- use clear, attention-getting labels and plain language; and
- educate the marketplace, employees, partners and advocates with regard to the importance and meaning of disclosures.

BEST PRACTICES FOR THE USE OF SOCIAL MEDIA TO DISSEMINATE INFORMATION TO THE PUBLIC

Companies with an existing practice of using social media to distribute information should determine whether or not they have provided appropriate notice of that fact to the public. Likewise, those that are planning new social dissemination efforts should review their plans to publicise the account(s) they will be employing. Best practice is to give notice both through the channel itself and through existing recognised channels, such as the corporate website, press releases, etc. Companies should then continue to provide notice of all their recognised social channels periodically on an ongoing basis.

Once a company has effectively established the appropriate social media accounts as recognised distribution channels, it should focus on diligent adherence to the 2008 guidelines.⁸ The SEC judges Regulation FD violations on a facts-and-circumstances basis, so it is essential to comply not just with the letter, but also the spirit of the regulation.

A few key considerations are fundamental to developing and establishing best practices:

- keep account(s) current, active and accurate;
- using existing channels, provide the public with advance notice of which

social media accounts will be used to publish information;

- provide access to the full information, either in context or via hyperlink placed in close proximity to the relevant content;
- avoid hyperlinking to false or misleading information (even a prominent disclaimer provides no protection from charges of fraud if deceptive content is knowingly disseminated);
- make representatives of the company aware of their responsibilities in social media and the fact that they cannot avoid these responsibilities by purporting to speak in their 'individual' capacities;
- if choosing to use social media channels to release material, non-public information as an alternative to providing it in an Exchange Act report, certify that the chief executive and chief financial officer are responsible for maintaining controls and procedures and the information has been made known to them;
- avoid using the personal social media accounts of officers and employees unless it is specifically planned to designate them as sources of company information; and
- apply the same level of scrutiny to information disseminated through social media that would be done elsewhere.

A CALL TO ACTION

WOMMA's Ethics Committee is energised about its role in making ethics and transparency in marketing and communications a top concern for the industry in 2014, and is encouraging marketing and communications professionals who care about these issues to contribute to this conversation. It is important to consider not just how to comply with current guidelines but —

more importantly — how to create organisations that consider these ethical questions to be at the core of their marketing and communication strategy, and how to ensure that the prioritisation of ethics and transparency permeate the communications of all those who communicate on behalf of, or have a material connection to, our organisations.

Note

Portions of this piece were previously published in: Ford, S. (2014) 'Top priority for marketers: the ethics of content creation', *Advertising Age DigitalNext*, 15th January, available at: <http://adage.com/article/digitalnext/top-priority-marketers-ethics-content-creation/291029/>.

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