
Hughes Hubbard & Reed

#ThinkBeforeYouPin: FTC Considers "Pinning" by Contest Entrants an Endorsement Requiring Disclosure

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Over the past decade, social media has emerged as one of the world's most dominant marketing tools for obvious reasons: it is cost-effective, easily accessible, highly scalable and can dramatically increase brand awareness across multiple outlets and platforms. Arguably, the most advantageous aspect of social media marketing is the ability for companies — both large and small — to directly engage with their consumers and target their specific interests.

One way companies have recently been capitalizing on the benefits of deploying marketing campaigns on social media is through the use and administration of contests and sweepstakes. However, running a social media contest or sweepstakes is not without risk. Not only must companies comply with both state and federal sweepstakes laws as well as the social media platform's own promotion rules, but as confirmed in a [recent closing letter issued by the Federal Trade Commission to fashion brand Cole Haan](#), sweepstakes and contest administrators must also ensure compliance with the implied endorsement mandates of the Federal Trade Commission Act (the "FTC Act"). The FTC began its investigation into Cole Haan after being alerted of a contest which the fashion brand had launched on Pinterest to promote its footwear line. The contest rules instructed participants to create Pinterest boards with 5 images from Cole Haan's Pinterest board (note: Pinterest revised its [contest rules](#) to prohibit users from requiring a certain number of pins, or pinning from a specific selection, as a requirement for contest entry), 5 images of the participants' "favorite places to wander", and the hashtag #WanderingSole as part of each pin description. The contestant with the most creative board was eligible to win a \$1,000 Cole Haan shopping spree. Based on the unobvious "material connection" between the contestants and Cole Haan, however, the FTC determined that requiring contestants to pin Cole Haan products constituted an "endorsement" under Section 5 of the FTC Act, necessitating a disclosure that contestants were incentivized to pin to win the shopping spree.

Aimed at protecting consumers from deceptive or unfair practices by advertisers, [Section 5 of the FTC Act, 15 U.S.C. §45](#), requires that "material connections" between endorsers and advertisers be disclosed when the nature of their relationship is not otherwise clear to the public. In the Cole Haan case, the FTC determined that contest participants were financially incentivized to pin images of Cole Haan products—as entry to a contest to win a significant prize—and the "material connection" between the contestants and Cole Haan was not reasonably apparent to viewers of the contestants' pins. Instead, the FTC determined that Cole Haan should have instructed its contestants to label their pins and boards to make clear that they were created as part of a contest. The FTC further found that Cole Haan's requirement that contestants include the hashtag #WanderingSole was not enough to alert viewers that the creators of the boards had pinned product images in order to be considered for a prize.

Ultimately, the FTC declined any enforcement action against Cole Haan, noting that this was the first time the agency had publicly addressed whether entry into a contest was a form of material connection. Additionally, the FTC noted Cole Haan's decision to adopt a social media policy addressing FTC concerns in the wake of this incident.

What this Means for You

Although the fact pattern presented before the FTC was limited to promotions on Pinterest, the same statutory analysis used by the FTC and resulting determination can easily be applied to similar promotions on other social media services and platforms. To avoid running afoul of the FTC Act, companies running or sponsoring online promotions should clearly disclose the nature of the relationship between the contestants and the company itself as a condition for entry. In other words, if a brand's sweepstakes or contest requires entrants to engage in any activity that may constitute an endorsement of the brand's products or services (e.g., posting a video which directly or indirectly promotes the brand or its related products or services) as a condition for entry to such sweepstakes or contest, then the rules associated with the promotion should also require that the post include a clear statement that it was made in connection with the brand's promotion. For example, including the word "contest" in the hashtag may suffice (e.g., #WanderingSoleContest). Prior to launching any online sweepstakes or contest initiative, companies should also do the following:

- Carefully review the rules of the social media platform being used to promote the sweepstakes or contest involved. Promotion rules vary from platform to platform and are frequently amended by the platform providers, so be sure to regularly check for updates.
- Ensure that an enforceable, up-to-date social media policy is in place.
- Know the differences between "contests" and "sweepstakes" and ensure that the exploitation of the promotion is fully compliant with state and federal law.
- Ensure that all rules for the promotion are clearly posted and include all required legal disclosures.
- Take reasonable steps to monitor social media campaigns to ensure compliance.

The DigitalHHR team continues to monitor the latest developments surrounding online promotions and social media marketing campaigns. If you have any questions, please feel free to reach out to us.

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