



# Advertising in the Age of Social Media

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# Roadmap of Today's Webinar

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1. The Backdrop
2. Contests and Sweepstakes
3. User Generated Content
4. Influencer Programs

# The Backdrop

# The Relevant Players

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- Federal Trade Commission
- Industry specific regulators like Food & Drug Administration or U.S. Department of Agriculture
- Competitors
- Consumers
- “Consumer watchdog” groups like Truth in Advertising or the Better Business Bureau
- State government consumer advocates like attorneys general
- Plaintiffs’ class action bar

# The FTC's "Truth-In-Advertising" Law

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- Advertising substantiation (or claim substantiation) is the process of providing supporting evidence for claims made in advertising, point of sale materials, packaging, and other types of marketplace communications
- **Principles:**
  - Advertising must be truthful and not misleading; and
  - Before disseminating an advertisement, advertisers must have adequate substantiation for all objective product claims (whether express or implied)

# The FTC Act

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- Endorsement disclosures must:
  - “Clearly and Prominently” disclose any “material connection”
  - Be “Clear and Conspicuous”
- FTC crackdown on social media disclosures
  - Shifting of priorities – both brands & influencers have responsibility to ensure compliance

# What is a “sponsored message?”

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- The FTC will look at several factors:
  - Is the speaker receiving compensation or other consideration from the advertiser?
  - Is the speaker receiving free or discounted goods or services?
  - How long have the speaker and advertiser had a relationship?
  - What is the previous history (if any) between the speaker and the advertiser?
  - Is there any agreement in place between the speaker and advertiser, and if so, what are the terms of that agreement?
  - Is there a likelihood that the speaker may receive products, services, discounts, compensation, or any other consideration from the advertiser in the future?

# The IP Rules Still Apply

**Elie Tahari** @ElieTahari  
@linhniller caught us in our footsteps wearing head to toe #ElieTahari. We love how she styled the whole look.

📷: Mark Alan lantosca for @BoF



5:42 pm • 20 39+ 2019

**Duane Reade** @DuaneReade  
Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore bit.ly/1gLHctI pic.twitter.com/uGTc3k1Mii



RETWEETS 74 FAVORITES 181

- Trademark
- Copyright
- Right of Publicity





# Contests & Sweepstakes

## State Lottery Laws

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- The elements of an “illegal lottery:” *Chance + Consideration + Prize*
  - Eliminate chance → Contest of Skill
  - Eliminate consideration → Sweepstakes
  - Eliminate prize → Unpopular
- State bonding & registration requirements

# Consideration Issues

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- Equal Dignity Rule
- What counts as “consideration?”
  - Mail-in forms, call-in registration, texts, store visits + surveys, etc.
  - Personal or proprietary data + some applications + subscriptions
  - Copyright assignment
  - Right of Publicity
- Beware sneaky consideration

## Chance Issues

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- Beware 'vote for your favorite' without more
- Beware inadvertently introducing chance, or introducing chance in one round of a multi-round contest

## Risk Mitigation

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- You literally write the rules! Use it!
- Use of vendors – close review of indemnity provisions
- Think through what kind of entrant this is going to attract
  - Where is this being promoted?
  - How big is the prize?
- Pre-screens of any user-generated content contests

# User Generated Content

# Cole Haan – Wandering Sole (2014)

The screenshot shows a Pinterest board titled "Wandering Sole" with the description "Beautiful cities, hidden gems, must-see spots." The board has 144 pins and 6,284 followers. A "Follow board" button is visible in the top right corner. The board contains a grid of images and their associated captions and user interactions:

- Image 1:** A person's legs wearing patterned pants and colorful sandals. **Caption:** "Love hitting up the farmers markets #wanderingsole" (19 likes, 4 hearts, 1 comment). Pinned by Jennifer Chong.
- Image 2:** A white leather crossbody tote bag. **Caption:** "Bellport Leather Crossbody Tote - Women's Handbags: Colehaan.com #wanderingsole" (24 likes, 4 hearts). Pinned by Jennifer Chong.
- Image 3:** A person's feet in sandals standing on a path under purple flowers. **Caption:** "#wanderingsole" (10 likes, 6 hearts, 1 comment). Pinned by Jennifer Chong. Comment: "Wine Refrigerator Now Very nice. That's a bright purple!"
- Image 4:** A plate of seafood. **Caption:** "A little bit of seafood by the beach #wanderingsole" (40 likes, 11 hearts, 1 comment). Pinned by Jennifer Chong. Comment: "Gallery 24Seven What a great combination!"
- Image 5:** A person's feet in colorful sandals. **Caption:** "How about a little pop of color! #wanderingsole" (13 likes, 1 heart, 1 comment). Pinned by Jennifer Chong. Comment: "Gallery 24Seven Very cute. Great colors."
- Image 6:** A white food truck with "Roja" and "Kogi" branding. **Caption:** "while in LA don't miss the food trucks like kogi truck #wanderingsole" (45 likes, 10 hearts). Pinned by Jennifer Chong.
- Image 7:** A colorful patterned tote bag. **Caption:** "Loving the colors on this tote! #wanderingsole" (11 likes, 3 hearts).
- Image 8:** A city street view.
- Image 9:** A storefront with a sign.
- Image 10:** A framed piece of art.
- Image 11:** A plate of food with a "baco" logo.

## Cole Haan – Wandering Sole (2014)

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- Sweepstakes with \$1,000 shop card prize
- Rules:
  - Pinterest board called “Wandering Sole”
  - Pin 5 images from Cole Haan’s Wandering Sole Board
  - Pin 5 images of “favorite places to wander”
  - Use #wanderingsole in each pin description
- FTC says “pins” are endorsements of Cole Haan products, and entry in contest is a “material connection”
- #wanderingsole is not a sufficient disclosure of the connection



# User Generated Content: What Can Brands Do?

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- Reserve the right to take UGC down
- Prohibit the use of third party trademarks
- Prohibit (or at least, don't solicit) content about your competitors or their products/services
  - Doctor's Assocs. Inc v. QIP Holder Inc. the court left it to a jury to decide whether the defendant advertiser shaped the content of a video uploaded by a consumer, either through its editing and vetting process or through its initial solicitation
- Consider whether shields of the Communications Decency Act (CDA) or Digital Millennium Copyright Act may apply
  - Registration and takedown requirements
  - Are you editing or "curating" content?

# Influencer Programs

# Lord & Taylor (2016)

- 50 influencers were given a free dress and \$1,000-4,000 to post a photo of them in the dress tagging @LordandTaylor and using #DesignLab – no disclosure required
- Photos reached over 11.4M Instagram users
- Lord & Taylor contracted with Nylon magazine to post the dress on its Instagram account and run an article about the dress
- No mention in the contract of disclosure that this was advertising
- Appeared to consumers to be an editorial article, but it was in fact an advertisement
- Consent order with five years of oversight of their endorsements by the FTC



# Lord & Taylor (2016)

wendyslookbook (spring awakening)  
Pairing a cropped trench with  
@lordandtaylor's exclusive #DesignLab  
handkerchief-hem dress 🌸 Really enjoyed  
seeing how others styled this vibrant piece!



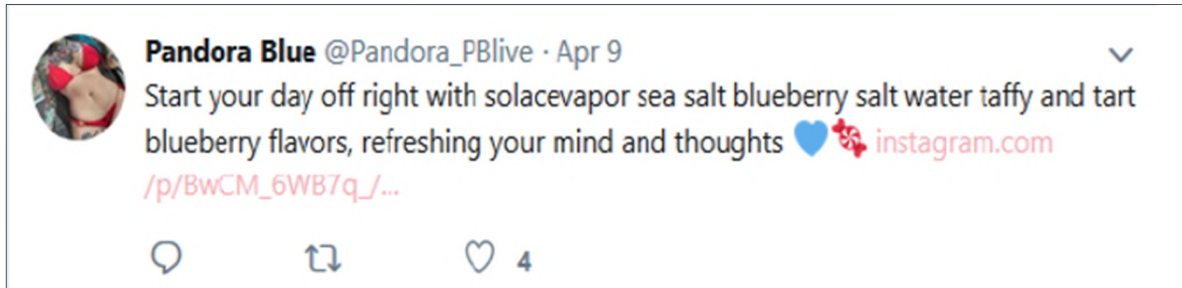
# Lord & Taylor (2016)

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**feralcreature** Spring in my step and on my body. Getting festival-ready is a piece of cake with this dress thanks to **@lordandtaylor** and their new **#DesignLab** collection. Holla at me, Coachella.



# FDA & FTC Warning Letters to E-Liquid Brands



# DOs and DON'Ts of Disclosures

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- Endorsement Disclosures must be “clear and conspicuous”
  - DO #ad or #sponsored
    - DON'T #spon
    - DON'T bury it in other hashtags
  - DO “BRAND gave me this item, and I think it’s great!”
    - Only works if free item was ONLY consideration
    - Need to disclose if there was also \$\$ involved
  - DO “I’m excited to work with BRAND to bring you this post!”
  - DON'T “I love my BRAND item”
  - DO put disclosures in the Tweet/Instagram caption/video itself
    - DON'T put disclosures at a link
    - MAYBE Platform-provided “sponsored” notifications
    - DON'T put disclosures in bio/video description

# Influencer Content: What Can Brands Do?

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- Provide any influencer with statement of his/her responsibility to clearly & conspicuously disclose “material connection”
  - In contract, if you have one
  - If no formal agreement, as part of the informal exchange, in writing
- Ensure influencer knows any special regulations or sensitivities around your product and follows any disclosure requirements
- Monitor compliance
  - If you have right of approval, disclosures should be part of what you’re looking for
  - Terminate influencers that don’t make proper disclosures (One strike rule)
  - Keep records of monitoring efforts





**Questions?**