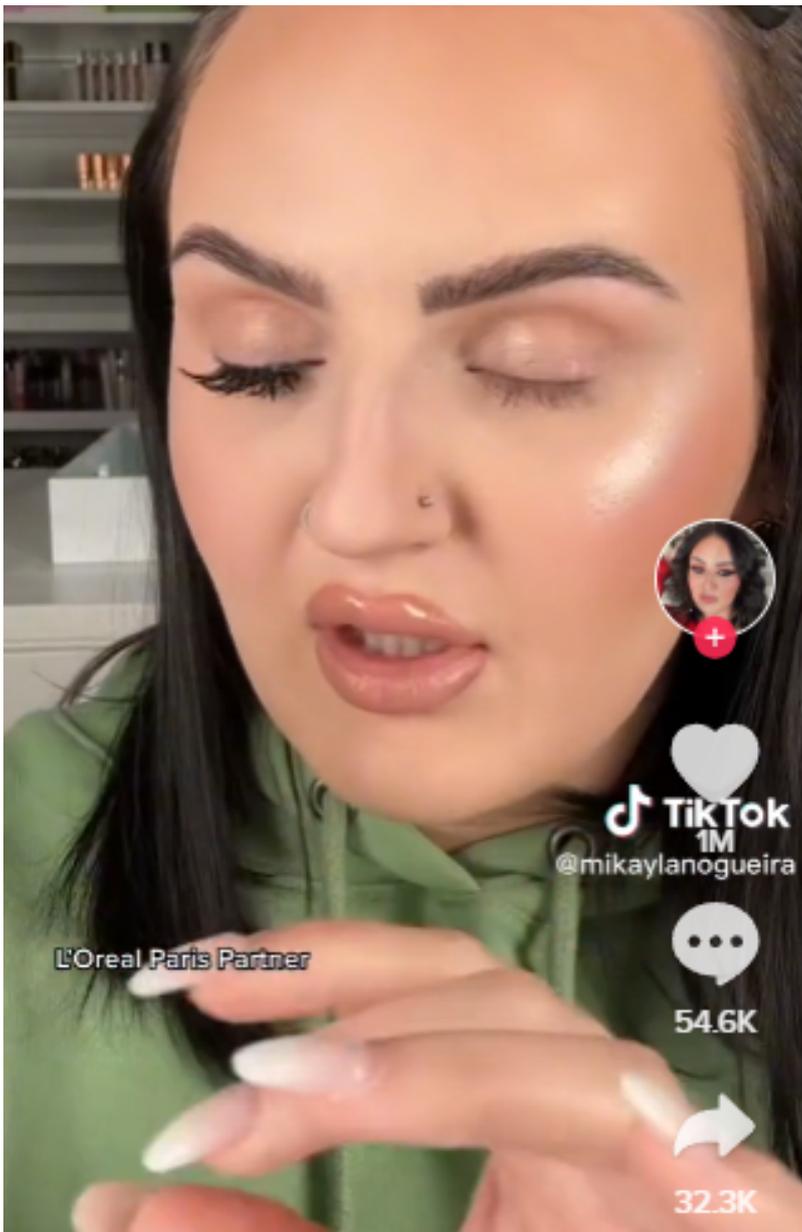




**Rob Freund** @RobertFreundLaw Sat Jan 28 02:15:34 +0000 2023

Lot of requests to discuss the legal issues with Mikayla Nogueira's controversial L'oreal ad on TikTok.

Let's look at this from an FTC compliance standpoint: <https://t.co/Mml8ZxHOyQ>



To recap, Mikayla uploaded a video reviewing the L'Oreal Telescopic Life mascara.

It appears to be sponsored content.

It also looks like she applied fake lashes to exaggerate the mascara's effects, which led to a surge of backlash.

I see two main issues here:

- 1) Ineffective disclosure of the sponsored nature of the content; and
- 2) False or misleading claims in the endorsement.

Taking each in turn:

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Disclosures first:

The FTC requires that any "material connection" between an endorser (e.g., an influencer) and an advertiser (like L'Oreal) must be disclosed "clearly and conspicuously."

Otherwise, the ad is deceptive and violates Section 5 of the FTC Act.

This disclosure requirement is why we have #ad and the like.

A material connection is any relationship that might effect the weight or credibility the audience would give the endorsement.

Idea being, if you knew the review was paid for, you'd consider that when deciding to buy.

But it's not enough just to have the disclosure—it also must be clear and conspicuous, which basically means that you can't miss it.

That generally means it must be made in large enough, readable font, in a place it will be seen, and in a way that will be understood.

Here, the "L'Oreal Paris Partner" disclosure is in very small font and appears for just a few seconds of the video.

That, to me, is not clear and conspicuous, and I would bet that the FTC would feel similarly.

Now to the fake lashes:

The FTC requires that all advertising must be truthful, not misleading, and substantiated.

In the influencer context, that means that all endorsements must reflect the honest beliefs of the influencer, who must have actually used the product.

Here, Mikayla claims she's demonstrating the effect of the mascara and expresses her disbelief.

But if the lashes are fake, she's not giving an honest review, and that violates the law.

Remember that it's not just the influencer who is potentially liable for violations of the FTC Act—the brand is, too.

That's why it's critically important for brands to have monitoring and compliance programs in place for all influencer campaigns.

Finally, I expect that L'Oreal's agreements include requirements that the influencers will comply with the FTC's Endorsement Guides, so it's likely she's breached that contract.

If your brand is not using properly drafted agreements with your influencers, fix that today.

And if you're a creator, don't gloss over your agreements! Make sure you understand everything in them before you sign.

Colleagues practicing in my niche weigh in:

"The FTC has noted that advertisers and influencers can be held liable for misleading or unsubstantiated representations regarding a product's performance or effectiveness."

<https://www.adlawaccess.com/2023/01/articles/influencers-long-lashes-could-raise-ad-law-issues/>