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# But We've Always Done It This Way

2018 Legal Updates for the  
Triathlon Industry

Kelly Burns Gallagher

# Social Media Marketing & FTC Enforcement

# FTC Social Media Disclosure Requirements

- 2018 Enforcement Priority for the FTC is social media disclosures.
- Federal Trade Commission's (FTC) Endorsement Guides:
  - If someone is being compensated with “something of value” that relationship needs to be disclosed.
  - What is “value?” Actual cash compensation, future discounts on product, or being entered into a sweepstakes/contest for a significant prize.
  - It is not enough for the relationship to be disclosed in a social media profile.

# Disclosure Gone Wrong



Jackie Kenney Madden

@jfk Madden

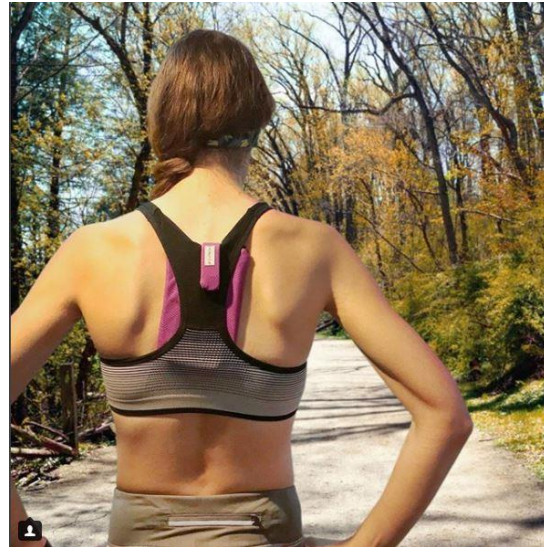
Follow

You need a @CycleOps #Fluid2! Join @BestTriClubEver for the giveaway #sbmandtrifectaclub #Bestriclubever@SwimBikeMom



### CycleOps Fluid 2 Trainer

We are giving away one (1) CycleOps Fluid 2 trainer!!! Please note: The contest is open to SBM & TriFecta Club members only. You must be a #BestTriClubEver member. [gleam.io](http://gleam.io)



fueledbylolz • Following  
Philadelphia, Pennsylvania

fueledbylolz I carry my phone on 99% of my runs. For safety, music, or selfies 📸. I use @koalaclip which clips right on the back of any sports bra. . I've used it with every sports bra I own and never had an issue with bounce, chafe, or irritation. I've used buried it under 10 layers in the cold and solo in the heat wave. Basically it's awesome! .

@koalaclip has generously decided to donate one for YOU! To enter all you have to do is:

1. Like this post and Follow me and @koalaclip
2. Tag as many friends as you want
3. Bonus: Share your best midrun selfie technique. .

Winner will be announced Mon. 1/29

Load more comments



784 likes

2 HOURS AGO

Add a comment...



rwbhoya • Follow

rwbhoya It's been a little while since I played kitchen chemist. Hope I remember how all this stuff works! @marinecorpsmarathon @baseperformance #racewithbase #saltsaves #fitmom #motherrunner #10weekspostpartum

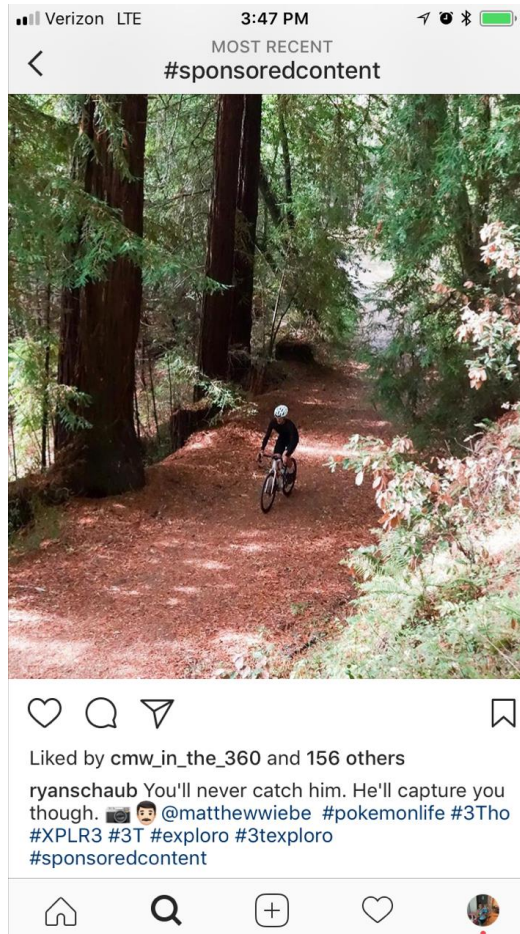


30 likes

OCTOBER 20, 2017

Add a comment...

# Disclosure Done Right



# Disclosure Guidelines

- Default disclosure hashtags are #ad or #sponsored
- If you create brand ambassador / athlete tags, use tags that make it clear the ambassador has a relationship with your brand.
  - #SkratchTasteAgent vs #SkratchAmbassador
  - #OiselleVolee vs #OiselleAmbassador
- For contests (such as a contest for a free entry) you need to use #contest
- Disclosure must be “above the fold”

# DATA PRIVACY

# FTC Act

- The Federal Trade Commission Act (15 U.S.C. §§41-58)
- Prohibits unfair or deceptive practices and has been applied to offline and online privacy and data security policies.
- Applies to most companies and individuals doing business in the US.
- FTC's Behavioral Advertising Principles are "best practices."



# FTC Data Protection Enforcement Actions

- Since 2002, the FTC has brought over 60 cases against companies that put consumers' personal data at unreasonable risk.
- Significant recent cases include:
  - Ashley Madison
  - Lab MD
  - ASUS

# HIPAA – Is It Applicable to RDs?

- The Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. §1301 et seq.) regulates medical information. It can apply broadly to health care providers, data processors, pharmacies and other entities that come into contact with medical information.
  - Most over used statutory threat
  - “Covered Entities” Question
  - Even though HIPAA likely does not apply medical information still covered by FTC Act and should be kept securely

# CAN-SPAM Act

- The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) (15 U.S.C. §§7701-7713 and 18 U.S.C. §1037) and the Telephone Consumer Protection Act (47 U.S.C. §227 et seq.) regulate the collection and use of e-mail addresses and telephone numbers, respectively.
- Opt out requests – must be honored across platforms
- Does not apply to Facebook / Social Media Marketing (e.g. you can re-market to someone on Facebook who has opted out of emails)

# COPPA

- Children's Online Privacy Protection Act of 1998 ("COPPA")
- Requires websites and apps to obtain explicit parental consent before collecting personal information from children under 13.
- Since 2000, the FTC has brought over 20 COPPA cases and collected millions of dollars in civil penalties.
- Run Sign Up and Active both comply with COPPA

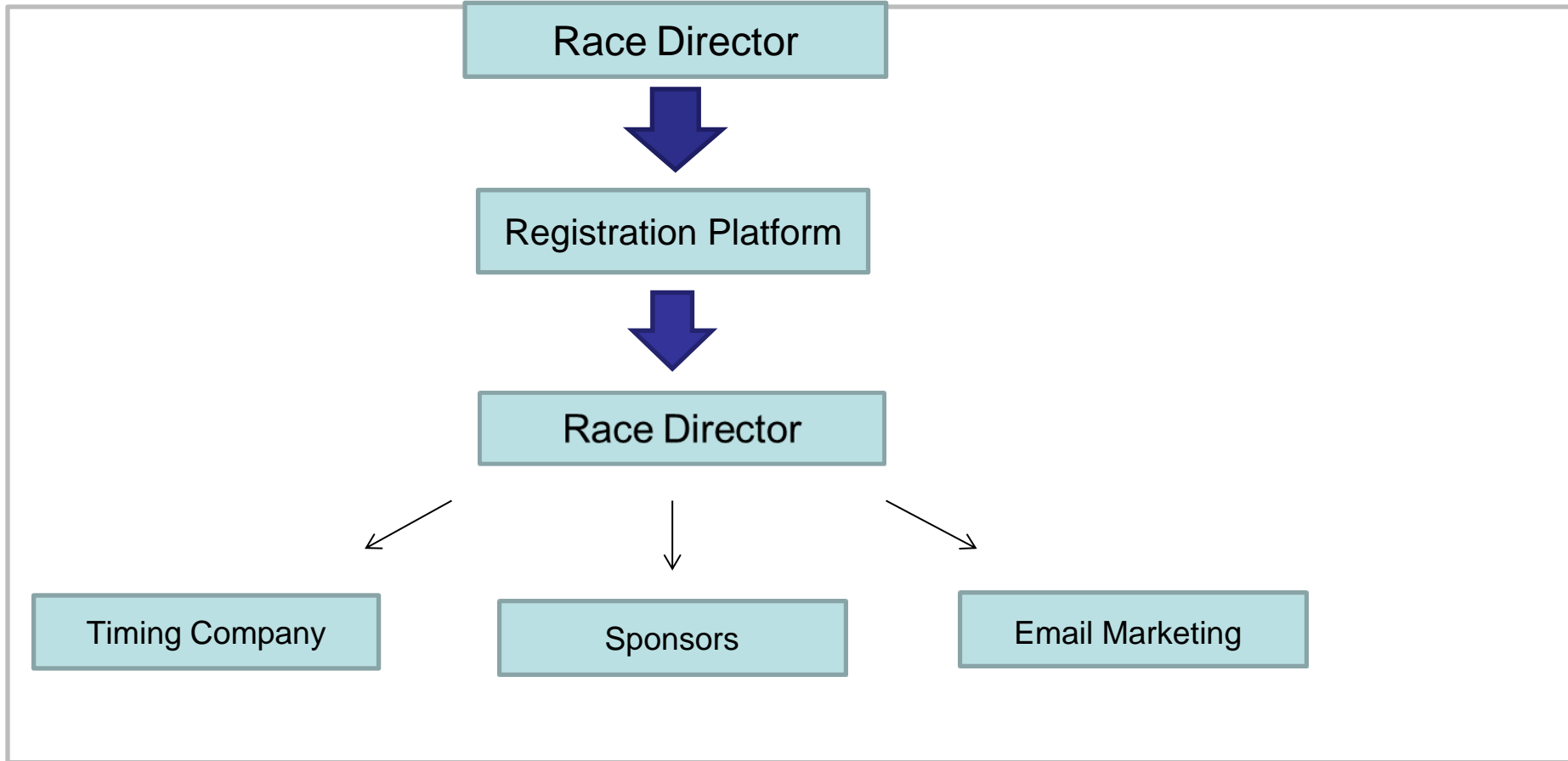
# State Laws on Data Privacy

- Most states have enacted some form of privacy legislation, however California leads the way in the privacy arena.
- 48 states, as well as the District of Columbia, Puerto Rico and the US Virgin Islands all have enacted laws requiring notification of security breaches involving personal information. Alabama and South Dakota are the only states with no security breach law.

# What are your obligations / best practices?

- Only ask for information you truly need.
- Have a privacy policy.
- Follow it!
- If you change the policy, all people an opportunity to opt out of the new privacy practice.
- Limit who has access to information. Make sure they protect it (secure file sharing).
- In California (or when dealing with California resident) encrypt personal information .

# Multiple Parties / Multiple Obligations



# Know Your Third Party Providers

- Most race directors don't run their own registration platforms. Data is collected by a third party (e.g. Active, Run Sign Up).
- Do you actually own your registration data?
- Do you control what happens to your data when you pass it on to timers, sponsors or email marketing platforms?



# **Non Compete, Non Disclosure & Non Solicitation**

# Ways to protect your business & confidential information

- Non-Disclosure and Non-Solicitations -- no employment relationship required.
- Can protect sensitive and confidential information, including customer information.
- Can require the return of all information upon leaving a company.
- Information does not need to be a trade secret to be protected.

# Enforceable Non-Competes

- Non-Compete Agreements
  - Only with employees. Cannot have a non-compete with an independent contractor
  - Not permitted in CA (except in sale of business)
  - Limited in other states
  - Must be reasonable in scope and duration
  - Require consideration
  - Costly to enforce
  - Best course is often a non-disclosure / non-solicitation

# Update on Wage and Hour Law

# DOL Enforcement of Wage & Hour Law

- DOL Fact Sheet #71 (updated January 2018)
  - Relaxed enforcement under Trump Administration
  - Guidance for internship programs
  - Provides more flexibility
  - Seven factor “economic realities/primary beneficiary” test
  - Prior test required that the employer derive no immediate advantage from the intern’s activities; the new test contemplates that the work of interns may complement (but not displace) that of paid employees.

# *Liebesman v. Competitor Group*

- *Liebesman v. Competitor Group* – Missouri State Court
  - Whether race day volunteers are “employees” for the purposes of the state wage and hour laws.
  - Federal claims dismissed on a technicality.
  - Summary judgment fully briefed in state court claimss.
  - Trial scheduled for **March 12, 2018** (likely to be continued pending decision on summary judgment).

# Questions?

