

The FTC's Quest For Better Influencer Disclosures

By Julie O'Neill and Adam Fleisher (February 22, 2018, 11:30 AM EST)

In the last few years, as advertising has followed consumers from legacy media such as television to online video and social media platforms, the Federal Trade Commission has been attempting to ensure that participants in this new advertising ecosystem understand the importance of complying with the FTC's "Guides Concerning the Use of Endorsements and Testimonials in Advertising," or the endorsement guides.[1] The endorsement guides require advertisers and endorsers (also referred to as influencers) to, among other things, clearly and conspicuously disclose when the advertiser has provided an endorser with any type of compensation in exchange for an endorsement.

A failure to make appropriate disclosures may be a violation of Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices. In recent enforcement actions, press releases, guidance, closing letters and letters sent directly to endorsers (including prominent public figures), the FTC has made clear its belief that: (1) appropriate disclosures by influencers are essential to protecting consumers; and (2) in too many instances, such disclosures are absent from celebrity or other influencer endorsements.

Given the repetition of this message, it is apparent that the FTC believes it is still not being heard. With influencer marketing campaigns showing no signs of losing popularity, it would not be surprising if the next step the FTC takes is to bring an enforcement action against a major celebrity, as well as the brand or brands with which the celebrity is associated. So, with the FTC on the prowl, brands, advertisers and marketing companies should all be making sure they have a compliance program in place to increase the likelihood that the FTC makes its splash elsewhere. In this article, we recount how the FTC has gotten to where it is today and, thus, why it might be heading for a celebrity enforcement action next.

In the Beginning

The FTC's activity in the endorsement and influencer space is grounded in its endorsement guides, which outline how the FTC believes a business may lawfully use consumer and other endorsements in its advertising. The endorsement guides provide, in relevant part, that any "material connection" between an endorser and an advertiser — in other words, a connection that might affect the weight or credibility



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that consumers give the endorsement — must be clearly and conspicuously disclosed. The FTC’s thinking is typified by this example from its endorsement guide FAQs:[2]

Say you’re planning a vacation. You do some research and find a glowing review on someone’s blog that a particular resort is the most luxurious place he has ever stayed. If you knew the hotel had paid the blogger hundreds of dollars to say great things about it or that the blogger had stayed there for several days for free, it could affect how much weight you’d give the blogger’s endorsement. The blogger should, therefore, let his readers know about that relationship.

The scope of a material connection, as stated in the endorsement guides and as interpreted by the FTC, including in the FAQs, is quite broad. It includes, for example, a business relationship, a payment, a gift or a sweepstakes entry. The scope of actors subject to the rules is also quite broad: it includes advertising and marketing companies that facilitate campaigns on behalf of advertisers (i.e., brands), those advertisers/brands themselves, and the endorsers or influencers acting on behalf of the marketing companies or brands. As discussed below, the FTC’s enforcement actions have involved each of these types of participants in influencer marketing activities.

First, the Marketing Firms

The FTC’s efforts to regulate this ecosystem began in late 2014 when the FTC brought its first enforcement action specifically related to social media activity (though this case also included straightforward allegations of deceptively made statements). The FTC alleged that the advertising firm Deutsch LA Inc. engaged in deceptive activities relating to the promotion, through Twitter, on behalf of its client Sony, of the PlayStation Vita handheld gaming console.

In a story that would become familiar over the next few years, the FTC’s complaint[3] alleged that company employees responded to a request from an assistant account executive at the company to use their personal Twitter accounts to post positive comments about the Sony console, each using the “#gamechanger” hashtag. The complaint includes examples of the employees’ tweets, such as, “One thing can be said about PlayStation Vita...it’s a #gamechanger.” The FTC alleged that the employees’ tweets were deceptive because they falsely purported to be endorsements from actual users of the Sony gaming console. Moreover, the fact that the tweets were written by employees of Sony’s ad agency would have been material to consumers in making decisions about whether to purchase the console. For this reason, the tweeters’ failure to disclose their connection to Deutsch LA (and, in turn, to Sony) was allegedly deceptive.

In September 2015, the FTC brought a very similar case against Machinima Inc., an online entertainment network. Machinima allegedly paid video bloggers to promote the Microsoft Xbox One system by producing and uploading to YouTube videos of themselves playing Xbox One games. The FTC alleged that Machinima did not require any disclosure of the compensation the influencers received and that many videos lacked any such disclosure. Because the payments would not be reasonably expected by YouTube viewers, the failure to disclose them was deceptive in violation of Section 5.

Then, the Brands

In connection with the Machinima matter, the FTC also issued a closing letter[4] reflecting that it had also investigated Microsoft and its advertising agency Starcom in relation to the influencers’ videos. (Starcom managed the relationship with Machinima.) Even though the FTC did not ultimately take action against Microsoft (or Starcom), the closing letter made clear the FTC’s position that a company whose products are promoted bears responsibility for the actions of its ad agencies — as well as the actions of

those engaged by its ad agencies. In particular, Microsoft avoided an enforcement action because it had a “robust” compliance program in place that included specific guidance relating to the FTC’s endorsement guides and because Microsoft made training relating to the endorsement guides available to employees, vendors and personnel at Starcom. (The FTC also subsequently updated its endorsement guides FAQs to formalize the expectations that were foreshadowed in the closing letter, including the statement that “[a]dvertisers need to have reasonable programs in place to train and monitor members of their network.”)

Consistent with its incremental approach, the FTC followed these actions with its first complaint against a brand for its use of social media influencers. In early 2016, the FTC alleged that Lord & Taylor gifted a dress to 50 “fashion influencers” and paid them to post photos of themselves wearing the dress on their Instagram accounts. According to the FTC, Lord & Taylor’s role in the promotional effort was not appropriately disclosed. The FTC thus alleged that the company violated Section 5’s prohibition on deceptive practices by, among other things, failing to disclose that the influencers’ Instagram posts did not reflect their independent and impartial statements, but rather were specifically created as part of an advertising campaign in which they were paid to participate.

The FTC followed the Lord & Taylor action with a similar settlement relating to a company’s alleged failure to disclose that it had paid online influencers to post positive reviews in YouTube videos and on social media. Here, while the company allegedly instructed influencers to provide a written disclosure that videos were sponsored, they did not “require that the YouTube influencers be instructed to place a sponsorship disclosure clearly and conspicuously in the video itself.”[5]

Taken together, these actions show how the FTC has moved incrementally, starting with matters involving standard-fare alleged deceptive practices by marketing companies that also involved social media endorsements, and then escalating to enforcement actions against brands based on specific failures to include disclosures in a specific manner.

To Individual Endorsers (Sort Of)

Having covered two of the major parts of the social media advertising ecosystem, the logical next step for the FTC is individuals who are paid to make endorsements. Here, as with previous actions, the FTC has started (relatively) conservatively with an enforcement action announced in September 2017 against a company — and two of its officers — in connection with endorsements made by the officers in YouTube videos and social media. The company, CSGO Lotto Inc., runs an online virtual currency gambling website. The FTC alleged[6] that the company provided two individuals (who were also owners and officers of the company) with free virtual currency to gamble on the site and that the two did not disclose their material connections to the company when they promoted it online. For example, both of the individuals created YouTube videos promoting CSGO Lotto and disseminated tweets linking to their videos and directly promoting the site (e.g., “Bruh ... I’ve won like \$8,000 worth of CS:GO Skins today on @CSGOLotto I cannot even believe it!”).

The FTC’s allegations in this case are similar to those of the previous influencer cases, such as that the company failed to include appropriate disclosures of sponsorship in YouTube videos. But, the FTC also alleged that the officers of the company — who were named individually in the complaint — engaged in violation of Section 5 as influencers by, among other things, failing to disclose that they were owners/officers of the company, which “would be material to consumers in their decisions regarding using CSGO Lotto.”

What's Next?

The CSGO Lotto case sets the stage for an enforcement action against an influencer alone. Perhaps to drive home the point, the FTC accompanied its announcement of its settlement of that case with the disclosure that it had sent follow-up letters to 21 influencers who, in April 2017, had received letters from the FTC regarding brand endorsements. The FTC noted that it asked the recipients to tell the FTC whether “they have material connections to the brands” in social media posts the FTC flagged and, if so, “to spell out the steps they will be taking to make sure they clearly disclose their material connections to brands and businesses.”[7]

Given the FTC’s activity in this space, the parameters for running an influencer campaign within the parameters of Section 5 are becoming well established. To help mitigate the risk of being the FTC’s next example, some practical considerations include:

- Implementation of a process for obtaining signed and dated acknowledgements of disclosure and related obligations from each influencer with a material connection (which may include, for example, a paid relationship, a professional relationship, or free goods or services);
- An explicit requirement that the endorser make clear and prominent disclosures of the material connections between the endorser and the advertiser;
- A process for monitoring and reviewing social media influencers for compliance; and
- Maintaining the right to immediately terminate the arrangement in light of noncompliance.

Influencers should also understand that they must clearly and conspicuously disclose their affiliations with the brands that they promote, above the jump in the post or video. And all companies that use social media influencers should consider the policies and procedures they have in place or need to develop to ensure that they, their influencers and any other parties they work with in this space are meeting the FTC’s expectations. If they don’t, they risk falling victim to the FTC’s next efforts to promote itself as the top cop on the endorsement beat.

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[1] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

[2] “The FTC’s Endorsement Guides: What People Are Asking,” available at: <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

[3] In the Matter of Deutsch LA, Inc., FTC Docket No. 122-3252.

[4] Federal Trade Commission Closing Letter, FTC File No. 142-3090 (Microsoft/Starcom) (Aug. 26, 2015).

[5] In the Matter of Warner Bros. Home Entertainment, Inc., FTC File No. 152-3034.

[6] In the Matter of CSGOLotto, Inc. et al., FTC Docket No. 162-3184.

[7] "Three FTC actions of interest to influencers" (Sept. 7, 2017), available at: <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.