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FTC Gives New Guidance on Paid Social Media Influencers

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The Federal Trade Commission has recently updated guidance on the use of endorsements in *The FTC's Endorsement Guides: What People Are Asking*, which address the use of social media and paid influencers to promote companies and products. Companies that encourage users to endorse their products should update their guidelines and training to account for this new guidance.

The FTC also announced enforcement action against individual influencers, hyped as the "FTC's First-Ever Complaint Against Individual Social Media Influencers." In fact, the targeted influencers were also the owners of the company, not a typical endorser – which highlights the potential for actions against owners of closely held companies that use social media individually to promote their company and company products.

Updates clarify what constitutes an endorsement and compensation

The FTC requires that endorsers who are compensated – whether through money, discounts, free products, contest entries or the like, or have some material connection to a company such as a familial or employee relationship – disclose the connection to the brand or product being endorsed.

The updated FTC guidance clarifies that tagging a brand, even without further description or praise for the product, is an endorsement requiring disclosure of material connections.

The FTC guidance also advises that it considers free travel and making a donation to a charity of the endorser's choice to be compensation that must be disclosed.

Additionally, if a company displays an average review rating, the FTC states that the company must disclose if any of the ratings were received from customers that received compensation – such as free or discounted products or contest entries in exchange for submitting a rating – on the theory that those customers are more likely to give positive reviews.

To avoid being held responsible for the actions of endorsers, companies should ensure that compensated influencers receive training regarding endorsement disclosures, including endorsers outside the United States if there is potential they will promote products to customers in the United States.

Updates advise that some common disclosure practices are not adequate

The FTC is now advising that the hashtags #employee or #ambassador may not be sufficient to convey the material connection between a company and an influencer. The FTC suggests the use of #XYZ-employee or #XYZ-ambassador (where XYZ is the company name) to make the relationship clear.

The FTC guidance also indicates it does not view adding "ad" to the end of a company name to be sufficient disclosure. For example, if a company is named "XYZ," then #xyzad is not sufficient. The newest guidance similarly rejects the use of ambiguous terms and hashtags such as #Thanks, #collab and #Spon and warns influencers not to assume that their use of the "built-in" disclosure tools provided by social media networks will be sufficient. The updated guidance also include some detailed recommendations for endorsements posted on Instagram and Snapchat, including directions to place disclosures above the "more" button, and warns

influencers against relying on disclosures placed solely on a profile page.

Recent enforcement action targeted company owners based on use of social media

Earlier this month, the FTC announced its first-ever complaint against social media influencers, the owners of CSGOLotto, a company that operates the csgolotto.com website, enabling consumers to gamble using "skins," collectible virtual items, as virtual currency using the online multiplayer, first-person shooter game, Counter-Strike: Global Offensive, known as "CS: GO."

In fact, the case *In re CSGOLotto, Inc.* was brought against both the company and its owners, who were also officers of the company. The FTC alleged that they misrepresented that videos of the owners and others gambling on CSGOLotto and their social media posts about CSGOLotto reflected the independent opinions or experiences of impartial users of the service, by failing to disclose that they were owners and officers of the company. The FTC also alleged that the company paid other influencers to endorse the company without requiring the influencers to disclose that they were compensated. Such influencers were contractually prohibited from making "statements, claims or representations … that would impair the name, reputation and goodwill" of the company.

The FTC order against the company and its owners prohibits future misrepresentations, requires disclosure of material connections, and requires the company to institute a compliance training and monitoring program and report annually to the FTC for 10 years. Violations of the order will subject both the company and its owners to civil penalties of more than $40,000 per day.

It is also worth noting that, following up on letters sent to 90 social media influencers earlier in 2017 identifying specific posts that the FTC believed did not comply with its Endorsement Guides, the FTC sent a "warning letter" to 21 of the 90 influencers in September identifying recent posts that the FTC believes did not comply with the Guides. The letter requires the influencers to provide the FTC with information regarding material connections with each of the identified brands and the influencer's plan to ensure that future social media posts have the proper disclosure. This effort could lead to additional enforcement actions.

Companies are required to have “reasonable” training and monitoring programs for compensated influencers

FTC guidance interprets the Endorsement Guides to require companies to have a "reasonable" training and monitoring program if a company induces others to provide endorsements for the company.

The scope of the "reasonable" training and monitoring required depends on the type of program being run by the company, as well as the type of products or services being advertised.

For example, if a small company is seeking reviews from customers by offering future discounts, the FTC recommends that the company (1) tell the customer "in advance that they should disclose what they received" from the company and (2) that the company should condition the discount on the disclosure being made.

However, if a company has a network of compensated influencers that promote the company, the FTC expects a "reasonable" training and monitoring program to be more extensive. Similarly, if a company's products or services are health- or safety-related, the FTC requires more extensive supervision from the company.

A 2016 enforcement action is instructive. Machinima, hired by Microsoft's advertising agency as part of an Xbox One marketing campaign, was held responsible for paid influencers failing to adequately disclose their material connection to the advertising company within their social media content.

In 2016, the FTC issued an order prohibiting Machinima from misrepresenting that paid influencers were independent or objective and failing to disclosure material connections with the advertising company. Machinima also was required to implement a compliance monitoring system for paid influencers.

Neither Microsoft nor its advertising agency were subject to a similar FTC enforcement action, even though the agency identified both as responsible for the influencers' failure to disclose their material connection. The FTC appeared to credit the companies' training and monitoring programs and quick response to remedy the Machinima influencer materials after they discovered the lack of disclosures.

Steps to avoid becoming a target of FTC enforcement

To avoid becoming a target for similar FTC enforcement, marketers should ensure that company training programs and materials provided to influencers reflect current agency guidance.

Companies can also look to the requirements imposed in previous FTC orders for instruction and (1) adopt written policies that will provide guidance to social medial influencers and other endorsers of company products and services, (2) enter into signed agreements with endorsers who receive free products or other compensation requiring them to disclose that they are compensated in accordance with the company's policy, (3) train employees to review sponsored content and endorsements, (4) monitor endorsers to ensure they are disclosing material connections, and (5) terminate endorsers who do not disclose material connections.

For additional information regarding the topics discussed in this alert, contact one of the authors or your regular Cooley contact.

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Key Contacts

Scott Dailard San Diego	sdailard@cooley.com +1 858 550 6062
Sarah Swain Washington, DC	sswain@cooley.com +1 202 728 7032

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