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THE WARNINGS WERE REAL: HOW TO AVOID REGULATORY ACTION AGAINST INFLUENCERS

by Allison Fitzpatrick and Paavana Kumar

The notice period is over. After months of intensifying regulatory activity, which saw the Federal Trade Commission issue warning letters to over 90 influencers and marketers who may have failed to disclose their material connections in social media, the FTC finally brought its first enforcement action against individual influencers.

While the FTC may have monitored certain influencers in the past, particularly those who are celebrities in their own right (like controversial influencer Pewdie Pie, who was specifically mentioned in the FTC's prior complaint against Warner Brothers), the FTC generally has not brought direct actions against influencers. Instead, it has held marketers liable for their influencers' failure to disclose their relationships in their social media posts.

However, with the FTC's most recent action, the FTC is announcing to the world that influencers will no longer be off the hook from liability. To bring the point home, the FTC also issued follow-up warning letters to 21 of the original recipients whom it suspects are still not complying.

FIRST EVER FTC ACTIONS AGAINST INFLUENCERS

According to the FTC, Tom Cassell and Trevor Martin owned and operated the CSGOLotto.com website, which capitalized on features of the video game "Counter-Strike Global Offensive." CS:GO allows players to collect virtual items that can be bought, sold and traded for real money. According to the FTC, both Martin and Cassell posted social media videos stating that they had discovered the site, showering praise on their experiences and touting their purported winnings—all without disclosing that they co-owned and co-operated the site.

Further, the pair managed their own influencer program for CSGO Lotto, which posed two issues: (i) influencers were prohibited from making any negative statements about the website, in contravention of the FTC Endorsement Guides requiring endorsers to only express their truthful and honest opinions; and (ii) not only did Cassell's and Martin's posts falsely represent that they were expressing independent opinions as impartial users, but so did the posts made by their paid influencers. Martin and Cassell settled the action with the FTC, agreeing to refrain from making any such misrepresentation and to clearly and conspicuously disclose their material connections in the future.

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WHAT DOES THIS ACTION MEAN?

It's clear that certain influencers may be on thin ice—particularly those who received follow-up warning letters—including celebrities such as Naomi Campbell, Vanessa Hudgens, Sofia Vergara and Lindsay Lohan. These celebrity influencers are now required to provide a written response to the FTC advising the status of their “material connections” to brands. And any influencers who do not comply, or who continue to fail to make disclosures when they have brand relationships, could well be the subject of the FTC’s next action.

It's also clear that the FTC will continue to closely monitor influencers, as well as all related parties involved in influencer campaigns, such as marketers, their agencies and their influencer networks. So the question pressing the industry is now: What do all involved parties need to know to stay on the right side of the ever-watchful regulators?

WHAT YOU NEED TO KNOW

The updated FAQs address more than 20 new questions about the FTC Endorsement Guides relevant to influencers and marketers. In a clear attempt to keep pace with the rapidly evolving social media sphere, the FTC expressly included FAQs about Instagram Stories and Snapchat, as well as the built-in disclosure tools for various social media platforms (e.g., Instagram’s “branded content” tool). With respect to these new FAQs, the FTC has emphasized placement and context as key.

For example, when scrolling through a “stream of eye-catching photos,” a viewer may not see a disclosure placed above the picture or off to the side, or below a “click more” button. And while the FTC now says that disclosures on Snapchat or Instagram Stories can be made by superimposing a disclosure over the image, the FTC will also consider how much time followers have to look at the image, how much competing text there is to read, how large the disclosure is and how well it contrasts against the image. Ultimately, disclosures need to be understandable, readable (or audible, depending on the platform) and hard to miss. Here are some of the key takeaways from the updated FAQs:

- >> Influencers should avoid ambiguous disclosures such as “#thanks,” “#collab,” “#sp,” “#spon” or “#ambassador.” Combining a brand name with a certain disclosure may be clearer.
- >> A post saying “thank you” to a company or brand does not necessarily communicate that the influencer received something for free. “Thanks [Brand] for the free product” would be a better disclosure, assuming that it is true.
- >> For videos that consumers are likely to view in-feed on a social media platform without sound, disclosures should be included in the visuals as well.
- >> Tagging a brand in a post qualifies as an endorsement of the brand if the influencer has a relationship with that brand. Simply tagging the brand is not sufficient to convey the material connection to consumers.

>> Even if an influencer lives abroad, to the extent that it is reasonably foreseeable that the influencer's videos will be seen by U.S. consumers, U.S. law applies, and an FTC-compliant disclosure is required for those videos. Influencers should keep in mind that the U.K. and several other countries have similar laws and policies with respect to paid endorsements and take steps to ensure compliance with those requirements as well.

Remember that the FTC's current focus on the form and sufficiency of influencer disclosures does not mean that marketers, publishers, influencer networks and/or agencies can rest easy—or that the other key principles of the underlying Endorsement Guides, such as the need for influencer statements to be truthful and honest, are obsolete. All involved parties should ensure they have procedures in place to comply with the Endorsement Guides and the most recent guidance so that they do not become the FTC's next target.

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