

FTC SOCIAL MEDIA ENDORSEMENT GUIDELINES: THE EFFECTS ON SOCIAL MEDIA USERS AND BUSINESS OWNERS

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Abstract: In the midst of heydays of social media, a social media user will inevitably face a product or service endorsement post in his/her social media feed or thread page. However, in the endorsement post, it is quite rare to see disclosure information as to whether the social media endorser has some kind of commercial relationship with the product manufacturer or service provider. On September 7, 2017 the FTC issued its first ever legal action against individual social media endorsers for posting endorsement posts without revealing their commercial relationship with the service providing company. This action by the FTC indicates its growing intention to strictly regulate over-flooding deceptive endorsement posts in various social media platforms.

I. INTRODUCTION

Seeing a product endorsement post from another social media user is a common occurrence for people that use social media platforms such as Facebook, Twitter, or Instagram. As one swipes down the screen of his/her smartphone, not only can one see commercial advertisements officially sponsored by social media platforms, but one can also see reviews or comments posted by other social media users about certain products that they have used.

Social media users' reviews or comments on different products are crucial advertising elements for business owners because social media peer communication has a profound impact on consumer decision making.¹ A research study suggested that consumers take product information posted on social media as more plausible because

¹ See Simona Vinerean, *The Effects of Social Media Marketing on Online Consumer Behavior*, 8 INT'L J. of BUS. AND MGMT. 66, 66 (2013) (discussing the nature of social media endorsement).

they assume that there is no commercial motivation involved in a social media post.² Consequently, consumers are turning away from the traditional medium of advertising and starting to consult various types of social media to make their purchasing decisions.³ The growing consensus in the field of marketing is that social media endorsements are perceived by consumers as more trustworthy than corporate-sponsored advertisements.⁴

Problems arise, however, when social media users rescind their objective product evaluation and assume social media postings to be more credible without proof.⁵ Realizing this pattern, many commercial manufacturers are strategically expanding their social media endorsements and starting to give out rewards or paychecks to third-party social media influencers in order to endorse their products.⁶

II. CONSEQUENCES OF FAILURE TO DISCLOSE COMMERCIAL RELATIONSHIPS

When business owners and social media influencers endorse certain products in social media platforms, they often times fail to disclose their commercial relationships.⁷ These failures to disclose commercial relationships are due to either a lack of legal knowledge or for intentional reasons so that more people rely on their product

² See *id.*

³ See W. Glynn Mangold, *Social Media: The New Hybrid Element of the Promotion Mix*, 52 *Bus. Horizons* 357, 360 (2009) (discussing the changing nature of marketing practices).

⁴ See *id.* at 360-61.

⁵ See Melissa Steinman, *When Marketing Through Social Media, Legal Risks Can Go Viral*, (May 2010), https://www.venable.com/files/publication/b4f467b9-0666-4b36-b021-351540962d65/presentation/publicationattachment/019f4e5f-d6f8-4eeb-af43-40a4323b9ff1/social_media_white_paper.pdf.

⁶ See *id.*

⁷ FTC, *The FTC's Endorsement Guides: What People Are Asking* (2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

endorsements without suspecting biases.⁸ This type of intentional omission of a commercial relationship might subject business owners or social media influencers to legal consequences.⁹

On May 20th, 2016 the Federal Trade Commission (“FTC”) issued a complaint against Lord & Taylor, a national fashion retailer, alleging that Lord & Taylor engaged in deceptive commercial endorsement actions under Section 5(a) of the FTC ACT, 15 U.S.C. §45, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹⁰ The complaint alleged that Lord & Taylor gifted the Paisley Asymmetrical Dress to 50 select fashion influencers who were paid, in amounts ranging from \$1,000 to \$4,000, to endorse the dress on Instagram during the weekend of March 27-28, 2015.¹¹ The contracts did not require the influencers to disclose in their postings that Lord & Taylor had compensated them and as an effect, the influencers did not post any negative comments about the product.¹² With the help from the influencers, Lord & Taylor’s product endorsement posts reached 11.4 million views from individual Instagram users and 328,000 brand engagements (such as likes, comments, or re-postings), and the product subsequently sold out.¹³

The case was settled in March 2016 and the settlement terms required Lord & Taylor to disclose future endorsement relationships.¹⁴ Although Lord & Taylor did not

⁸ See *id.*

⁹ See *id.*

¹⁰ Lesley Fair, *FTC’s Lord & Taylor case: In Native Advertising, Clear Disclosure is Always in Style*, FED. TRADE COMM’N (Mar. 15, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/03/fcs-lord-taylor-case-native-advertising-clear-disclosure>.

¹¹ Complaint at 3, Federal Trade Commission v. Lord & Taylor, LLC., (F.T.C. 2016) (No. C-4576).

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ Fair, *supra* note 10.

have to face legal consequences, the complaint showed the FTC's intention to intervene when endorsers are not disclosing their relationship to consumers.¹⁵ Accordingly, in September 2017, the FTC had updated its guidelines to give detailed instructions on proper social media endorsement practices.¹⁶

III. SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

The updated FTC Guidelines on social endorsement cannot be ignored by business owners or social media users because courts are likely to apply the FTC Guidelines when they social media endorsement lawsuits under Section 5 of the FTC Act. Section 5(a) states "The Federal Trade Commission Act prohibits unfair and deceptive acts or practices in or affecting commerce."¹⁷ Social media endorsements fall under the supervision of Section 5(a) because the law treats social media marketing as a subdivision of traditional marketing practices, such as TV, radio, and newspaper.¹⁸

In interpreting Section 5, courts are likely to use the specific regulations listed in the FTC Guidelines because the FTC is the administrative authority that produces enforcement instructions related to Section 5 of the FTC Act. The FTC not only has authority to investigate law violations by individuals and businesses but also has federal rule-making authority to issue industry-wide regulations.¹⁹ In other words, the FTC has authority to set out specific regulations or enforcement instructions regarding Section 5 of the FTC Act.²⁰ For example, most states have similar state laws modeled after the FTC

¹⁵ Fair, *supra* note 10.

¹⁶ See FTC, *supra* note 7.

¹⁷ 15 U.S.C. §45 (1914).

¹⁸ See *id.*

¹⁹ See FTC, Rules, <https://www.ftc.gov/enforcement/rules> (last visited Nov 23, 2017).

²⁰ See *id.*

Act, known as “mini-FTC Acts” and these statutes expressly state that the mini-FTC Act should be interpreted in accordance with the FTC’s enforcement rules and case laws.²¹ In other words, when state courts interpret mini-FTC Acts, the FTC Guidelines act as guidance for the courts to follow after examining the FTC’s intentions and policy goals. Consequently, the FTC Guidelines is likely to act as a powerful persuasive authority for Section 5 of the FTC Act in federal courts.

According to Section 5(a) of the FTC Act, there are two types of marketing practices which are regulated: unfair practices and deceptive practices.²² An unfair practice is a conduct which causes or is likely to cause misinformed purchasing decisions to consumers.²³ If such consequence cannot be avoided by consumers and has no outweighing benefits, the conduct is considered as unfair.²⁴ On the other hand, a deceptive practice is a conduct that misleads or is likely to mislead consumers, which might affect a consumers’ purchasing decisions in a way that they would not have made without such deceptive conduct.²⁵ With these definitions, social media users will be subjected to legal consequences if their endorsement postings are considered unfair or deceptive.

IV. LEGAL ACTION BY THE FTC AGAINST SOCIAL MEDIA USERS AND BUSINESS OWNERS

The FTC has narrowed down its guidelines and provided specific examples of illegal marketing practices because social media marketing has become increasingly

²¹ Steinman, *supra* note 5.

²² 15 U.S.C. §45.

²³ See *id.*

²⁴ See *id.*

²⁵ See *Id.*

common.²⁶ Although the FTC's intention was clear from its guidelines, people looked at the guidelines as mere warnings because the FTC was not taking legal action against social media users who did not follow the guidelines. However, this notion changed in 2017.

On September 7th, 2017 the FTC issued its first legal action naming individuals as defendants, a complaint against CSGOLotto, Inc., and its officers Trevor Martin and Thomas Cassell.²⁷ CSGOLotto stands for Counter-Strike Global Offensive Lotto, which provides a market place for online-video game virtual item transactions.²⁸ The complaint alleged that Martin and Cassell violated Section 5(a) of the FTC Act by engaging in illegal marketing practices on social media platforms.²⁹ According to the FTC's complaint, Martin and Cassell had an "influencer program," where they paid other social media influencers from \$2,500 to \$55,000 to post on their social media accounts about CSGO Lotto.³⁰ Also, when giving out payments, Martin and Cassell prohibited these social media influencers to say anything negative about CSGOLotto's website.³¹

Under Section 5(a) of the FTC Act, the "influencer program" can be classified as both unfair and deceptive.³² By encouraging endorsement posts without disclosing commercial relationships, Martin and Cassell deprived the consumers' opportunity to make informed purchasing decisions.³³ This complaint by the FTC signaled the changing atmosphere of the social media endorsement. The acting Chairman of the FTC commented

²⁶ See *id.*

²⁷ Complaint at 1, Federal Trade Commission v. CSGOLOTTO, INC., (F.T.C. 2017) (No. 162-3184).

²⁸ *Id.*

²⁹ *Id.* at 1-2.

³⁰ *Id.* at 1.

³¹ *Id.* at 4.

³² See 15 U.S.C. §45.

³³ CSGOLotto, *supra* note 27 at 4.

“This action, the FTC’s first legal action against individual influencers, should send a message that such connections (commercial relationships) must be clearly disclosed so consumers can make informed purchasing decisions.”³⁴

Further examples of the FTC ensuring that social media users are following the guidelines includes the FTC sending more than 90 educational letters to social media influencers that urge the influencers to disclose relationships with the company if they are monetarily profiting off of the company.³⁵ Additionally, on September 7th, 2017, following the issuing of the CSGOLotto complaint, the FTC announced that 21 warning letters were sent to social media influencers.³⁶ The FTC’s legal action and warnings demonstrate its desire to deter social media influencers from engaging in illegal marketing practices and its sincerity in pursuing legal action against users who do not follow rules.³⁷

In reaction, social media platforms are setting their own regulations for users in order to prevent unfair and deceptive practices within their platforms. For example, Twitter, under the ‘Advertiser Policies’ section, has recommended to its users, to not post purely commercial advertisement without clearly disclosing their relationships with the product.³⁸

A. Disclosure Rules for Social Media Endorsers

One area of ambiguity for social media users is when and if to disclose their relationship with product manufacturers. The FTC asked this question on behalf of social

³⁴ Press Releases, *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *id.*

³⁸ Twitter, *Twitter Ads Policies*, <https://support.twitter.com/articles/20169693> (last visited Oct. 29, 2017).

media users: “What if all I get from a company is a \$1-off coupon? Does that still have to be disclosed?”³⁹ To this question, the FTC answered that social media users need to decide whether receiving such compensation would affect the weight or credibility of their endorsements.⁴⁰ The FTC suggested that for situations where such determination is unclear or difficult to make, it is better to disclose all commercial relationships with the company.⁴¹

Another area of ambiguity for social media influencers is when the influencer receives a product as a gift from a product manufacturer and is unsure about whether or not to disclose information regarding this gift when promoting or reviewing the product.⁴² The FTC stated that an endorser should disclose when he/she receives a gift from the manufacturer to social media users, so that users can determine the effect that the gift had on the endorser himself.⁴³ Whether or not the motive was purely gratuitous is not the central concern in the FTC disclosure requirement.⁴⁴ The FTC cares about allowing consumers to make their own opinions about a social media endorser’s credibility after having all of the relevant information.⁴⁵

Additionally, social media users have to take extra precautions when they do make a relationship disclosure.⁴⁶ Instead of trying to vaguely disclose a commercial relationship by using phrases such as “Thank you (A brand or product name),” social media

³⁹ FTC, *The FTC’s Endorsement Guides: What People Are Asking* (2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ *Id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

influencers have to articulate any compensation that they received from a product manufacturer or marketer.⁴⁷ One core question that all social media influencers who try to endorse a certain product should ask themselves is: “Would a person who does not know about my commercial relationship with the product manufacturer be unsure whether the commercial relationship exists after reading this disclosure statement?” If the answer is yes, then all disclosures must be clearly worded in order to avoid legal consequences.⁴⁸

B. Disclosure Rules for Business Owners

Standards for hiring social media endorsers cause much confusion for business owners. If a business owner provided some form of compensation to a social media influencer, then the owner is required to disclose in the social media endorser’s post, that the social media endorser was paid to review the product.⁴⁹ Business owners should not encourage customers to post positive product reviews by offering customers free or discounted products because these incentives may bias the reviews and deceive potential customers.⁵⁰

The core message from the FTC to business owners is quite simple: endorsements must be honest, not misleading.⁵¹ The guidelines repeatedly emphasize that business owners should disclose their relationships with social media influencers whenever there can possibly be a slight bias between a business owner and a consumer.⁵²

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.*

V. CONCLUSION

The FTC guidelines show the FTC's intention to regulate illegal marketing practices on various social media platforms. The United States Congress might take legislative action to prevent illegal social media marketing practices in following the FTC's footsteps. The message of the FTC Guidelines could be summarized with this phrase: "Do not deceive or confuse consumers over biased posts." Under the rapidly growing social-media system, social media endorsers and business owners need to take adequate precautions against possible legal actions from the FTC or consumers who will be exposed to their endorsements.