

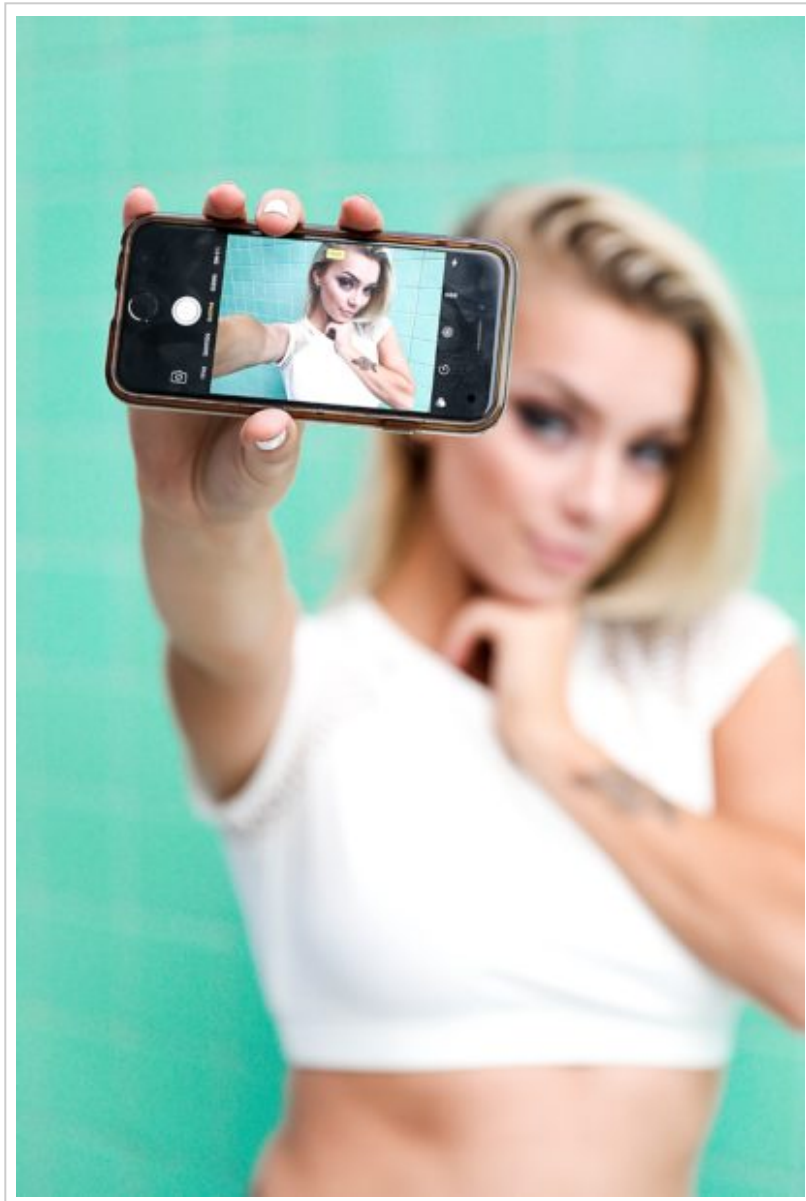


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FTC Brings First Ever Enforcement Action Against Individual Social Media Influencers; Updates Warnings and Guidance for Influencers and Marketers

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On the heels of issuing more than 90 letters to celebrities, bloggers and other influencers in April 2017, as well as receiving continued petitions by watchdog organizations such as Public Citizen, the Federal Trade Commission (FTC) brought its first direct action against individual influencers for failing to disclose their material connections on social media.

At the same time, the FTC sent a second round of warning letters to a subset of the original 90 letter recipients, and also updated its staff publication “The FTC’s Endorsement Guides: What People are Asking” (the FAQs) with additional guidance and clarification for both influencers and marketers.

The FTC’s Complaint

According to the FTC’s complaint against Trevor “TmarTn” Martin (Martin) and Tom “Syndicate” Cassell (Cassell), Martin and Cassell owned and operated the CSGOLotto.com website (CSGO Lotto), which capitalized on certain features of the first-person shooter video game “Counter-Strike Global Offensive” (CS:GO). CS:GO allows players to collect virtual items that can be bought, sold and traded for real money.

The FTC alleged that, since 2015, both Martin and Cassell have posted YouTube and social media videos stating that they had discovered the site, describing their experience and touting their purported winnings. For example, Martin made statements in his videos such as, “We found this new site called CSGO Lotto ... they’re like talking to me about potentially doing like a skins sponsorship,” and, “Made 13k in about 5 minutes on CSGO betting. Absolutely insane,” while Cassell posted similar videos and screenshots of himself winning betting pools of over \$2,100 on the site with captions such as, “Not a bad way to start the day!” However, in none of these posts or videos (some of which were viewed more than five million times on sites such as YouTube) did Martin or Cassell disclose their “material connection” to the company – in this case, the fact that they co-owned and co-operated the site.

Further, as the pair operated their own influencer program for CSGO Lotto, Martin and Cassell paid other online gamers between \$2,500 and \$55,000 in virtual currency to post in their social media circles about their experiences using the gambling site. However, the influencer contracts prohibited the influencers from making any “statements, claims or representations ... that would impair the name, reputation and goodwill” of CSGO Lotto, violating another key principle of the Endorsement Guides – that an endorsement must represent the honest, true and accurate experience and opinion of the endorser. Moreover, the FTC charged Martin and Cassell for the failure of their paid influencers to disclose their material connection to CSGO Lotto. As such, not only did Cassell’s and Martin’s videos and posts create the false impression that the posts reflected their independent opinions as impartial users, but so did the videos and posts made by their paid influencers. The proposed settlement prohibits Cassell, Martin and their company from misrepresenting that an endorser is an independent user or ordinary consumer of their products or services, and requires clear and conspicuous disclosures of any material connections with their endorsers in the future.

New Influencer Warning Letters

The FTC also sent follow-up warning letters to 21 of the influencers who received letters in April 2017, citing additional specific social media posts that the FTC suspects may not be in compliance with the Endorsement Guides. In its initial letters, the FTC merely identified influencers whom it suspected might have a material connection to one or more marketers or brands, but the FTC did not conduct its own diligence to determine whether those influencers were actually paid or otherwise incentivized to post on behalf of the brands. In the most recent set of letters, the FTC explicitly asked influencers to provide a written response to the FTC by September 30, 2017, advising on whether they have material connections to the brands in the identified social media posts. If so, the influencers must provide a detailed description of the actions that they have or will be taking to ensure clear and conspicuous disclosure of their relationships with the sponsoring brands in each of their Instagram posts.

Updates to the FAQs

In a third step that emphasizes the FTC’s ongoing focus on clear and conspicuous disclosures in influencer marketing, the FTC released an updated version of its FAQs, addressing more than 20 new questions about the Endorsement Guides relevant to influencers and marketers on topics such as Snapchat and Instagram disclosures, photo “tags,” obligations of foreign influencers and built-in disclosure tools on popular social media platforms.

The FTC has highlighted the below key updates and principles to keep in mind:

- Do not assume that using a platform’s disclosure tool is sufficient. While the FTC did not specifically name Instagram’s recent “branded content tool” or opine on the related “paid partnership” disclosure that the tool automates, the updates to the FAQs emphasize that the

adequacy of the disclosure will be context-dependent. For example, placement is key – when scrolling through a “stream of eye-catching photos” (e.g., on Instagram), a viewer may not see a disclosure placed above the picture or off to the side. This suggests that influencers should not rely on the disclosure tool if the photos themselves are distracting or pull the eye away from the caption. Further, influencers should not rely on disclosures placed after a “click more” link or in another easy-to-miss location.

- Influencers should avoid ambiguous disclosures such as “#thanks,” “#collab,” “#sp,” “#spon” or “#ambassador.” While the updates to the FAQs state that disclosures such as “Brand-Ambassador” may be more understandable, the adequacy of each disclosure will depend upon the context and must also be prominent, noticeable and readable. In a similar vein, hashtags such as “#client” to denote a blogger or marketer promoting a client’s products, or “#consultant” to denote a marketing advisor relationship, may also be ambiguous or confusing – though combining a brand name, such as “#BrandConsultant” may be clearer, provided the disclosure is also prominently made.
- A post saying “thank you” to a company or brand does not necessarily communicate that the influencer received something for free or in exchange for an endorsement. “Thanks [Brand] for the free product” or “Thanks [Brand] for the gift of X product” would be a better disclosure, assuming that the statement is true and accurately describes everything that the influencer received.
- Disclosures on Snapchat or Instagram Stories can be made by superimposing a disclosure over the image (just as one can superimpose any other words over the images on those platforms). The disclosure should be easy to notice and readable within the period of time the image is visible to the influencer’s followers. The FTC will consider how much time the influencer gives followers 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. For example, having a solid background behind the disclosure helps. 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 (e.g., an influencer tags the brand of a dress he/she is wearing) qualifies as an endorsement of the brand if the influencer has a relationship with that brand, and therefore, that action requires a disclosure; 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 (e.g., YouTube 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.

While the updates to the FAQs focus primarily on the form and adequacy of influencer disclosures, the FTC action against Martin and Cassell serves as an important reminder of the FTC’s continuing and expanding application of its existing principle that an endorsement must represent the accurate experience and opinion of the endorser. In addition, influencers should not make unsubstantiated claims about a marketer’s products or services, as the FTC has explicitly stated that influencers will be subject to liability for making claims without having a reasonable basis for those claims. Remember: marketers, too, can be held liable for their influencers’ unsubstantiated claims if marketers do not carefully review their influencers’ posts.

Bottom Line

The FTC’s action against Martin and Cassell and the new round of FTC warning letters make clear that the FTC will bring actions against influencers who violate the Endorsement Guides. Consequently, all parties involved in influencer marketing, from marketers, agencies, influencer networks, affiliate

marketers, to the influencers themselves, can be subject to FTC action for failure to comply with the Endorsement Guides. In light of the FTC's emphasis on clear and conspicuous disclosures in influencer marketing, all members of the influencer ecosystem should ensure that they have documented procedures in place to comply with the Endorsement Guides, including the FTC's most recent guidance.

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