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FTC Paid Endorser Settlement Sets Framework for Advertiser Best Practices

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Teami, LLC ("Teami"), a marketer of teas and skincare products, agreed to settle FTC charges alleging that its retained social media influencers did not sufficiently disclose that they were being paid to promote Teami's products. The FTC's Complaint also included allegations that Teami made unsupported weight-loss and health claims about its products, an issue that is beyond the scope of this blog post. The Stipulated Order for Permanent Injunction and Monetary Judgment was approved by a Florida district on March 17, 2020.

This settlement is significant in that it identifies clear steps that an advertiser can follow in the interest of avoiding similar FTC allegations of deception with respect to paid endorsers. Compliance in this area remains an ongoing concern as the FTC reiterated in a statement accompanying the settlement that: "[T]he Commission is committed to seeking strong remedies against advertisers that deceive consumers because deceptive or inaccurate information online prevents consumers from making informed purchasing decisions…."

Under the FTC's Endorsement Guidelines, if someone endorses a product through social media, the endorsement should make it obvious when there is a relationship with seller of the product. Section 255.0 of the Endorsement Guides provides: "Where the connection between the endorser and the product seller might 'materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience)' the connection must be 'fully disclosed.'" The FTC has in the past reminded businesses of their obligations in this area: in November 2019 the FTC released its "Disclosures 101 for Social Media Influencers" about the responsibility of influencers to disclose "material" connections with brands; in April 2017, the FTC sent 90 letters to influencers in April 2017 (and sent letters in March 2020 to ten paid Teami influencers); and prior to that, the agency published an Endorsement Guides FAQ. Moreover, in recent years, the FTC has undertaken a number of investigations and enforcement actions relating to social media endorsements, including against a marketing agency, clothing retailer and videogame publisher, as well as makers of fitness and health-related products.

According to the FTC's complaint, Teami paid celebrities and social media influencers to endorse its products on Instagram but the influencers failed to clearly and conspicuously disclose that fact in their posts. In 2018, the FTC wrote to Teami. It notified Teami that any material connections to endorsers needed to be conspicuously disclosed, namely, that disclosures should be made above the "More" link in a post given that when consumers view posts in a mobile feed, the text becomes truncated and many people may never click to read the full post and see the disclosure. In response, Teami purportedly implemented a social media policy, which was distributed to influencers, instructing them to make sure posts clearly disclose connections with Teami above the "More" button. The policy instructed influencers to, among other things:

"[E]nsure that all posts for which you receive free product or any type of compensation as an inducement to make the post … [u]se hashtags or words that clearly let the public know of the connection between you and Teami" and "DON'T … [m]ake the disclosure below the 'more' button – the disclosure needs to be seen in the first part of your post without clicking anything else."

According to the FTC complaint, paid influencers were contractually required to obtain approval from Teami for their Instagram posts before publishing them, but numerous influencer posts allegedly did not comply with Teami's policy. For example, the FTC asserted that many Instagram posts still contained disclosures after the "More" button or, in the case of video endorsements, did not contain any disclosures at all in the video itself (but contained disclosures in the text accompanying the videos beyond the "More" button).

The FTC brought this action and charged that Teami failed to disclose adequately to consumers that the influencers were paid to endorse Teami's products, constituting a deceptive act or practice under the Section 5 of the FTC Act.

Specifically, the FTC's allegations cited the lack of conspicuous disclosures in photo and video posts:

"Although the above Instagram post includes the disclosure "#teamipartner," the disclosure was not visible to followers viewing the post in their Instagram feeds unless they clicked "more." Thus, it was not clear and conspicuous. In addition, there was no disclosure in the video. Because the video could be viewed without anyone seeing a disclosure, you should disclose any material connection in the video itself, and not just the text portion of your post. There are many ways you could make a disclosure in a video, such as by saying that, "{*Brand*} sponsored this post" or "I'm partnering with {*Brand*}."

If you are endorsing a product or service in a photo you post to Instagram (such as by prominently featuring a branded product in the photo or by tagging a brand in the photo), the same rule applies: the disclosure must be above the "more" button. A disclosure should not be hidden among multiple tags, hashtags, or Instagram handles. In addition, you should put a disclosure in each and every social media post and not assume that consumers will see and associate multiple posts."

As part of the settlement, Teami is required to pay $15.2 million (suspended upon payment of $1 million) and clearly and conspicuous disclose any unexpected material connection for advertisements involving influencers or other endorsers. The FTC's additional claims that Teami made unsupported weight-loss and health claims about its products contributed to the size of the settlement.

Importantly, the settlement imposes endorser monitoring requirements on Teami. These requirements, which are explained by the FTC in a blog post about the settlement, are based on the sentiment that "a contract provision is a fine start, but it's probably not enough."

What does the settlement require Teami to do? Specifically, Teami must "take sufficient steps designed to ensure compliance" including:

- providing each social media endorser with a statement of his or her responsibilities to disclose a material connection "clearly and conspicuously, and in close proximity to the endorsement" and requiring each endorser to return a signed and dated acknowledgement of such policy
- maintaining a system to monitor and review disclosures by influencers, "including reviewing each specifically contracted online video and social media posting promptly after publication"
- terminating relationships with non-compliant endorsers
- creating reports showing the results of the compliance program.

Under the proposed order, however, there is a slightly more lenient structure built for endorsers who merely receive free products or minimal payments. This flexibility is presumably welcome news for businesses gauging the FTC's practical stance on compliance, as a social media campaign might not merely involve highly-paid influencers but also a small army of unpaid bloggers and others who receive discounts or promotional goods.

The lessons from the Teami enforcement are two-fold. First, it should certainly act as a reminder to advertisers that they should have reasonable programs in place to train and monitor members of their influencer network. Advertisers should compare their existing policies and practices to the compliance requirements imposed on Teami and make any adjustments as necessary. In this settlement, the FTC repeatedly stressed the need for an effective endorsement policy with checks built in ("A written policy for influencers without effective monitoring and follow-through [is ineffective]").

Second, influencers themselves should remain aware of disclosure requirements. As the FTC noted, “by accepting compensation for endorsements, influencers have taken on certain legal obligations.” As noted earlier, as recently as this month, the FTC sent letters to ten social media influencers who previously promoted Teami to remind them of their disclosure obligations and request a reply on what steps such influencers are taking to comply.

By carefully following the principles set out in the Teami Settlement and Consent Order, an advertiser may be able to avoid an FTC challenge to its paid endorser practices.

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