

BRENT TURMAN DETAILS FTC'S INCREASED SCRUTINY OF SOCIAL MEDIA INFLUENCER POSTS IN HEADNOTES PIECE

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Attorney [Brent A. Turman](#) authored the Dallas Bar Association *Headnotes* article titled, “Lifting the Veil on Sponsored Social Media Influencer Posts.” The piece looks at developments in enforcement by the U.S. Federal Trade Commission (FTC) with respect to social media activity that could be considered promotional, but is not clearly labeled. Turman looks at the September 2017 enforcement action by the agency against the online trading site CSGO Lotto. Via CSGO Lotto, gamers who play “Counter-Strike: Global Offensive” (CSGO) can buy, trade and gamble – using real world currency – cosmetic enhancements/modifications called “skins.” Competitors can then use these “skins” in the game. As Turman details, several well-known gamers posted videos on YouTube where they gamble and win on CSGO Lotto, without disclosing that they were using free, CSGO Lotto provided “skins” and that they held financial positions and were officers in the company. The FTC brought action against the two individuals in question for false claims of independent reviews, deceptive failure to disclose that endorsers were owners and officers and deceptive failure to disclose that other endorsers were paid to promote CSGO Lotto, leading to a fine and eventual settlement.

Turman looks at the CSGO Lotto matter and considers several lessons for companies active on social media and working with influencers, including: 1) the need for an influencer to disclose any financial relationship with a brand that appears on any post; and 2) the need for an influencer to ensure that all sponsorship disclosures are conspicuous and hard to miss. He also looks at hashtags and offers thoughts on which ones are the most-blessed, historically, by the FTC and how to format social media posts. Turman

closes with a call for companies to review carefully the raft of social media guidance the FTC has provided in the past year.

Lifting the Veil on Sponsored Social Media Influencer Posts

Whether you are an online influencer, utilize online influencers, or you represent one, you will want to know how the Federal Trade Commission (FTC) recently made it clear that it will flex its muscles against social media influencers. As the nation's consumer protection agency, the FTC has a long history of going after sponsored advertisements and promotional messages that could mislead consumers into believing that the content is independent, impartial, or not sponsored by an advertiser. However, those lines have become blurry with the prevalence of social media over the past few decades.

The world of online gaming gave the legal community its first look into how the FTC would use its enforcement powers in this arena in September 2017, when the FTC settled its first enforcement action against influencers for alleged deceptive advertising and endorsements. This specific dispute revolves around "Counter-Strike: Global Offensive" (CSGO), an online multi-player shooting game. In CSGO, users can purchase "crates," which contain "skins." Skins are cosmetic upgrades that do not affect game play—basically paint jobs for a player's weapons. Skins are often bought and sold for actual money outside of the game. One website, CSGOLotto.com (CSGO Lotto), allowed users to gamble their skins against others.

Two individuals who were well-known in the gaming community posted YouTube videos of them gambling and winning big on CSGO Lotto. However, those men did not give their audience the full story. Specifically, they did not tell viewers they each owned 42.5 percent of the company that operated CSGO Lotto, they were both officers of that company, and they were gambling with free skins provided by CSGO Lotto. On top of that, they paid other influencers, both in money and in skins, to promote the website on various platforms including Twitch, Twitter, Facebook, and YouTube. As a result of their actions, the FTC brought claims against both men for false claims of independent reviews, deceptive failure to disclose that endorsers were owners and officers, and deceptive failure to disclose that other endorsers were paid to promote CSGO Lotto.

What can we learn from the FTC's recent interest in social media influencers? Based on the CSGO Lotto charges, recent updates in the FTC's endorsement guides, and warning letters the FTC sent to other influencers in 2017, there are several steps that online influencers can take to be more transparent and avoid the wrath of the FTC.

First, the influencer should disclose any financial relationship with a brand that appears on any post. If there is a material connection between an influencer and an advertiser or marketer, the influencer needs to make it abundantly clear that the connection exists. In other words, if there is a connection that might affect the weight or credibility that consumers give the endorsement—such as a business or family relationship, monetary payment, or the gift of a free product—that connection should be disclosed



clearly and conspicuously. The influencer should never assume that viewers or followers know about his or her brand relationships.

Next, the influencer should ensure that all sponsorship disclosures are conspicuous and hard to miss. The influencer should not assume that disclosures built into a social media platform are sufficient. Moreover, the influencer should not rely on disclosures that people will see only if they click "more" in the comments below the post. For example, consumers viewing Instagram posts on their phones typically see only the first three lines of posted text unless they click "more." Additionally, including a hyperlink that sends the customer to a disclosure on another webpage is insufficient.

The disclosures can get tricky with social media that primarily focuses on images. For example, the FTC recommends that on image-only platforms like Snapchat, the influencer superimpose disclosures over the image. While this probably will not mesh with the influencer's aesthetic, it definitely removes doubt as to whether the content is sponsored or a form of advertising.

Tags and hashtags are not exempt. Sponsored tags, including tags in pictures, are treated like any other endorsement. When using hashtags to disclose, the influencer should ensure that they are not ambiguous. For example, it would likely be insufficient disclosure for an influencer to use the following: #thanks, #collab, #sp, #spon, #partner, or #ambassador. On the other hand, #Paid, #Ad, and #Sponsored would be better disclosures. The FTC also noted that placing a disclosure in a large string of hashtags may not be conspicuous enough because it likely will not stand out.

Over the past year, the FTC has provided more guidance regarding promotional and sponsored activity on social media than ever before. Attorneys can use this guidance to assist their clients in this industry, whether they are teaching influencers how to make clear and transparent disclosures or assisting companies in building agreements and guidelines for the endorsers and influencers they work with.

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