

Sponsored Endorsements: FTC Isn't Your Only Concern

By **Meegan Brooks and Anthony Anscombe** (January 29, 2019)

There has been a yearslong push by the Federal Trade Commission to raise awareness among brands, advertising agencies, influencers and the public of potentially deceptive practices relating to sponsored endorsements. In the spring of 2017, the FTC sent warning letters to 91 brands and influencers, with many follow-up letters later that year. Although the FTC has continued to monitor compliance, the expected “bang” in enforcement actions has yet to arrive. Nevertheless, paid endorsers have created quite a bit of legal trouble for themselves and their sponsors.



Meegan Brooks

In recent months, the FTC has reached consent judgments in two cases that focused on failure to disclose material information about the endorsers’ sponsorships. And another government enforcer, the U.S. Securities and Exchange Commission, recently obtained very substantial recoveries in connection with celebrity endorsements of cryptocurrencies. Meanwhile, a PR agency brought suit against an influencer for breaching its contract, and a celebrity influencer brought an action against a brand for failing to compensate her for efforts undertaken pursuant to an “oral contract.” These and other stories, discussed below, should remind brands to be cautious about their sponsored content, and to consider legal problems beyond those posed by FTC enforcement.



Anthony Anscombe

The FTC Squashes a Swarm of Mosquito Repellent Endorsements

On Nov. 20, 2018, the FTC proposed consent orders against two Georgia-based companies, PR firm Creaxion Corporation and Inside Publications LLC, publisher of Inside Gymnastics magazine, and their principals, for promoting HealthPro Brands Inc.’s FIT Organic mosquito repellent through sponsored endorsements that lacked appropriate disclosures.

HealthPro Brands — which the FTC did not target — approached Creaxion to help launch its mosquito repellent. They agreed that Creaxion would produce a “strategic media relations campaign ... tied to the worldwide outbreak of the Zika Virus.” Creaxion, in turn, contacted Inside Publications to obtain athlete endorsers and to publish sponsored content.

As a result of this partnership, Olympic gold medal gymnasts Carly Patterson Caldwell and Jacob Dalton each received several thousand dollars to promote the insect repellent on their social media feeds. The posts did not disclose that the athletes were paid endorsers. Creaxion and Inside Publications drafted, reviewed and monitored the posts, which Inside Publications reposted without disclosure. The FTC further alleged that Inside Gymnastics ran paid ads for the product disguised as features or routine articles, and that Creaxion conducted an online consumer review program that reimbursed Creaxion employees and “friends” for buying FIT repellent and reviewing the product online, again without disclosing their affiliation with the brand.

The FTC’s complaint alleged that this conduct violated Section 5 of the FTC Act by: (1) falsely representing that endorsements reflected the independent opinions and experience of impartial users; (2) failing to disclose material connections between the endorsers and the marketer of the product, specifically that certain endorsers were paid or reimbursed by, or employees of, the PR firm promoting the product; and (3) falsely representing that paid ads were the independent statements and opinions of impartial publications.

The proposed settlements with Creaxion and Inside Publications prohibit any misrepresentations about the status of any endorser or reviewer; require the clear and conspicuous disclosure of any unexpected material connection; and prohibit any misrepresentation that paid advertising is coming from an independent or objective publisher or other source.

And in May 2018, the FTC filed a different complaint against another mosquito-repellent advertiser, Mikey & Momo Inc., for falsely advertising that its Aromaflage line of mosquito repellent sprays and candles — which do not contain DEET — repel mosquitoes as effectively as 25 percent DEET.

The FTC claimed to have tested the products and, after 30 minutes, more mosquitoes were in the segment of the chamber sprayed with Aromaflage than in the untreated segment — apparently suggesting that a majority of mosquitos think Aromaflage smells good. The FTC's complaint also alleged that five-star testimonials for Aromaflage on Amazon were posted by one of the company's officers, her mother, and her two aunts, without disclosure of the reviewers' material connections to the company.

The FTC approved a final consent order on Sept. 27, 2018. The order bars the company and its owners from engaging in such deceptive conduct in the future and requires them to clearly and conspicuously disclose any material connections between a reviewer or endorser and the product.

Consumer Watchdog Group Requests That FTC Take Action Against Premium Vodka Brand for Undisclosed Endorsements

On Dec. 10, 2018, nonprofit watchdog organization Truth in Advertising sent a letter to the FTC urging the commission to investigate liquor maker Diageo's use of influencers to market its Cîroc vodka on Instagram. According to the letter, TINA identified 50 social media influencers — including Cîroc brand manager and chief marketing officer Sean "Diddy" Combs — who have allegedly posted more than 1,700 Cîroc alcohol endorsements. The letter alleges that Diageo's influencers have failed to disclose their material connection to the brand in a clear and conspicuous manner as required by the FTC's endorsement guides.

Some of the Cîroc posts at issue do make disclosures. For example, model Alessandra Ambrosio posted with the "Paid partnership with" feature at the top of her post, although the FTC has refused to bless in-app disclosures as a silver bullet for compliance. Similarly, actor Mikaela Hoover posted with the hashtag #CirocPartner.

This is not the first time Combs or Cîroc have run into endorsement issues. Combs, in fact, received one of the FTC's warning letters in 2017, reminding him of the FTC's endorsement rules. And on March 29, 2018, TINA sent music producer Khaled Khaled (known as "DJ Khaled") a warning letter for endorsing alcohol brands, including Cîroc, on his social media accounts without disclosing his connection to those brands. According to that letter, between June 2017 and March 2018, Khaled promoted alcoholic drinks more than 100 times on Snapchat; more than 190 times on Instagram; 30-plus times on Facebook; and nearly 20 times on Twitter. After receiving the letter, media outlets reported that Khaled removed numerous posts from his social media accounts.

SEC Slugs Mayweather and DJ Khaled for Promoting Cryptocurrency Without Disclosures

DJ Khaled has not confined his endorsement efforts to promoting cocktails. On Nov. 29, 2018, the U.S. Securities and Exchange Commission announced that it had settled charges against Khaled, along with professional boxer Floyd Mayweather Jr., for failing to disclose

payments they received for promoting investments in initial coin offerings.

The SEC found that Khaled failed to disclose a \$50,000 payment from Centra Tech, a startup offering Centra virtual currency, which Khaled touted on his social media accounts as being a “game changer.” In a separate order, the SEC found that Mayweather failed to disclose promotional payments from three ICO issuers. For example, Centra allegedly paid Mayweather \$100,000 to promote its ICO, including promoting on Twitter that the ICO “starts in a few hours. Get yours before they sell out, I got mine.”

Without admitting or denying the findings, Khaled agreed to pay \$50,000 in disgorgement, a \$100,000 penalty, and \$2,725 in prejudgment interest, and Mayweather agreed to pay \$300,000 in disgorgement, a \$300,000 penalty, and \$14,775 in prejudgment interest. Khaled and Mayweather also agreed not to promote any securities (digital or otherwise) for the next two and three years, respectively. Mayweather further agreed to continue to cooperate with the SEC’s investigation.

SEC Enforcement Division Co-Director Stephanie Avakian described the importance of disclosing material connections in the same way the FTC has promoted disclosures in the past: “With no disclosure about the payments, Mayweather and Khaled’s ICO promotions may have appeared to be unbiased, rather than paid endorsements.”

Snapchat PR Firm sued for Breach of Influencer Agreement

On Oct. 30, 2018, Snapchat’s public relations firm, PR Consulting Inc., filed a suit in New York against influencer Luka Sabbat for breaching its influencer agreement. According to the complaint, PRC engaged Sabbat to post four social media posts — one Instagram feed post and three Instagram story posts — each subject to different and detailed requirements. As consideration for the foregoing, PRC agreed to pay Sabbat the sum of \$60,000, \$45,000 of which was paid to Sabbat upon signing the agreement.

According to the complaint, Sabbat only made two of the four required posts and failed to satisfy many of the agreement’s other requirements. The lawsuit seeks the \$45,000, plus interest, attorneys’ fees and other damages.

This case illustrates the risk of paying influencers upfront: If the influencer fails to satisfy his or her obligations, it can be difficult for the brand to recover its money.

Singer Becky G Files \$105 Million Lawsuit Claiming She Was Pressured to Endorse Core Water

On Nov. 28, 2018, singer Becky G (born Rebecca Gomez) filed suit against Core Nutrition LLC, makers of Core Hydration bottled water, claiming that she was pressured into promoting Core water by her former label boss Lukasz “Dr. Luke” Gottwald, who allegedly co-founded and owns a 40 percent stake in Core.

The complaint alleges that Becky G was “directed” to promote Core in interviews, music videos, social media, and at events. Becky G and Core never entered into a formal marketing agreement, but Becky G claims to have been promised 50,000 Class A shares of the company as compensation. She further alleges that “Dr. Luke made it clear both directly and implicitly that Ms. Gomez’s ability to have a music career would be tied to her continuing involvement in promoting Core.”

The singer seeks the present value of the 50,000 Class A shares in Core, or alternatively, 20 to 50 percent of Core’s outstanding stock, which she claims is the industry standard for a key endorser. The singer also seeks punitive damages for Core’s alleged conduct, “which

was undertaken with fraud, oppression, malice and with the intent or reckless disregard for the truth.” The complaint, filed in the Los Angeles County Superior Court, includes causes of action for breach of oral contract, breach of implied-in-fact contract, fraud, negligent misrepresentation, violation of business and more.

London (Well, the U.K.) Is Calling for Influencer Disclosures

On Jan. 23, 2019, the United Kingdom’s Competition and Markets Authority reported that it has investigated and sent warning letters to numerous celebrities for posting sponsored endorsements on social media, without disclosing that they were paid to do so. According to the CMA, the posts could potentially constitute misleading advertising.

In response to the CMA’s investigation — which did not result in any findings of liability — 16 celebrities (including pop stars Rita Ora and Elie Goulding) have voluntarily agreed to change their social media practices, to disclose when they were paid or otherwise incentivized to promote a brand or product.

The CMA’s statement about these agreements^[1] is reminiscent of the FTC’s endorsement guides:

[W]here [] stars are paid or rewarded to promote a product in their social media feeds, consumer protection law requires them to disclose that they’ve been paid or incentivised to endorse a brand. Otherwise, they risk giving a misleading impression that a post represents their personal view about a product or service.

The CMA has published a guide for social media influencers, marketing companies, agents and brands to ensure they are aware of their legal obligations. Additionally, in September 2018, the CMA and the Committee of Advertising Practice jointly issued “An Influencer’s Guide to Making Clear That Ads Are Ads.”

Conclusion

The stories above reinforce our long-standing recommendation that brands should have comprehensive agreements in place with their influencers that clearly set forth each side’s obligations while providing protection in case of a breach. Further, companies should review the FTC’s endorsement guides to make sure their practices are compliant and also take steps to promote compliance among third-party endorsers.

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[1] https://www.gov.uk/government/news/celebrities-pledge-to-clean-up-their-act-on-social-media?utm_source=5fbf83d1-4c99-4642-816a-7cb8bb5ae401&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate