

Checking in with the FTC's Bureau of Consumer Protection – Trends, highlights, new developments and what lies ahead

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The Federal Trade Commission (FTC) Bureau of Consumer Protection is where the action is when it comes to identifying current and future trends related to consumer protection. Bureau actions are closely watched to identify enforcement priorities and issuance of key guidance on how the FTC contemplates exercising its authority in key areas, such as social media. Actions the FTC takes, or elects not to take, provide critical information to marketers committed to legal compliance in a way that does not hamper appropriate business objectives. The primary protector of consumers against fraud, deceptive advertising, and other practices that prey on unsuspecting consumers has recently updated its previous guidance on the use of endorsements and has taken enforcement action related to endorsements and several other focus areas. This article touches on a range of topics and is intended as a quick reference guide to recent developments with an eye on what lies ahead.

The FTC's key developments include the following:

1. Endorsement and testimonial guidance updated and first ever action against an individual social media influencer.
2. Warning Letters sent to dozens of firms cautioning them on the need to disclose material connections with endorsers touting products on Instagram.
3. Substantial penalties (\$40 million) imposed on company found to have violated an existing consent order related to weight-loss claims.
4. FTC failed in effort to challenge "Improves Memory" claims.
5. Hang-over product claims examined by FTC, which closes matter with no action, after firm quickly corrects advertising.
6. Acting Bureau Director Pahl questioned whether the FTC needs to rethink how it uses its enforcement powers in advertising substantiation cases.
7. Joint warning letters issued by FTC and the U.S. Food and Drug Administration (FDA) to marketers and distributors of opioid cessation products.
8. What lies ahead at the FTC and beyond.

This Update surveys these areas and provides context by which marketers can devise and execute effective, innovative campaigns in a manner that is well informed by the consumer protection environment now and in the future.

Endorsement Guidance Updated

Why Endorsements and Testimonials Get so Much Attention?

The FTC’s updated guidance and recent enforcement actions are the most recent steps in the agency’s ongoing efforts to prevent potentially misleading testimonials or endorsements in advertising. In October 2009, the FTC issued the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”) to explain how the Federal Trade Commission Act’s prohibition on unfair methods of competition applies in the context of endorsements. In particular, the Endorsement Guides require that “material connections” between an advertiser and an endorser (e.g., payment, free product, family relationship) that consumers would not expect must be disclosed. The FTC has since issued additional guidance—*Endorsement Guides: What People Are Asking*—responding to frequently asked questions related to how and when an endorser must issue a disclosure.

Over the past several years, the FTC has taken enforcement action against several companies and their hired promotion companies for failing to ensure that their hired social media influencers adequately disclose their relationship to the company, but it had not taken action against any of the individual influencers who failed to disclose their relationship with the marketers.

In April 2017, the FTC sent more than 90 educational letters to individual Instagram influencers and brands, alerting the recipients that influencers must disclose any material connection they have to the brands they are endorsing unless the connection is already clear from the context of the endorsement. The letters encouraged the recipients to consult the Endorsement Guides and related guidance for information on how to craft their disclosures. The prevalence and ever changing contours of “social media” present great challenges to regulators as they try to continually frame guidance to be relevant in a dynamic marketplace.

Updated Endorsement Guidance

The FTC’s revisions to *Endorsement Guides: What People Are Asking* in September 2017 largely reinforce the long-standing rules and principles for disclosing material relationships between an endorser and a marketer, but provide some additional specific examples to demonstrate these principles.^{1/} In addition, FTC states that it will continue to focus its enforcement activities on advertisers and their hired promotion companies, but notes that enforcement action against individual endorsers may be appropriate if the endorser has failed to make the required disclosures despite warnings.

When Disclosures Are Required

The revised guidance reiterates the principle that a disclosure must be made anytime there is any material connection between the endorser (e.g., social media influencer) and the marketer (e.g., food company) that may affect the weight consumers give to the endorsement. The new, detailed guidance represents an important signal to industry that these are the areas that will be closely scrutinized going forward. For your ease of reference we provide a detailed summary.

Through additional examples, the guidance demonstrates that disclosures may be required:

- When donations are made to charities in exchange for reviews;
- When endorsers are related to the marketer (e.g., family members or employees of a new restaurant);

^{1/} The revised guidance is available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

- When endorsers have received anything free from the marketer (e.g., free/discounted meal, free/discounted product, travel and accommodations to an event, a reciprocal review), even if:
 - the endorser is not specifically asked to provide an endorsement in return for the free goods or services; or
 - the receipt of the free goods or services does not affect the endorser’s judgment;
- When social media influencers tag a brand in their posts (e.g., an Instagram user tags the brand of an item shown in the photo), even if:
 - the influencer does not comment about the brand in their description of the picture; or
 - the influencer routinely only tags the brands of their sponsors;
- When endorsers are paid for their endorsement, even if:
 - the endorser does not live in the United States;
 - the endorser posts on one form of social media (e.g., Facebook) when they are only paid to post an endorsement on another form of social media (e.g., Twitter); or
 - the endorsement is only aspirational (e.g., “I’d love to own this car”).

Where to Place Disclosures

The FTC does not prescribe the location of disclosures, as long as the disclosure is clear and conspicuous. The revised guidance provides the following additional advice on the placement of disclosures:

- **Blog Post Disclosures:** The FTC advises that a disclosure in blog posts is best positioned very close to, or as part of, the endorsement to which it relates. Disclosures at the bottom of a blog post or the very top of a page may be overlooked by consumers.
- **Built-In Disclosures:** Endorsers cannot necessarily rely on built-in features in social media platforms to disclose paid endorsements. Factors such as the disclosure’s placement, font and background color, and wording all should be considered.
- **Disclosures in Comments or Descriptions:** Disclosures in the comments or description of a social media post should be visible when viewing the post on a smartphone without having to click “more” (e.g., as the FTC previously explained, disclosures on Instagram posts should be within the first three lines displayed).
- **Instagram and Snapchat Stories:** Disclosures on Instagram or Snapchat stories can be made by superimposing the text over the images. Factors to consider in evaluating the effectiveness of the disclosure include how much time followers have to look at the image, the amount of competing text, the size of the disclosure, and how well it contrasts against the image. The FTC cautions that audio disclosures may not be heard by many users.
- **#ad:** Though not required to appear at the beginning of a post, the FTC warns that placing the disclosure “#ad” in the middle or end of a post is less likely to be effective. Readers also may skip over the disclosure if it is mixed in with links or other hashtags.

Content of Disclosures

The FTC similarly does not prescribe the content of disclosures, as long as the disclosure clearly explains the relationship between the endorser and the marketer. The revised guidance provides the following additional advice on how to draft disclosures to clearly convey the endorser-marketer relationship:

- **Thank-You:** The FTC warned that merely thanking a company or brand (e.g., “Thanks XYZ”) does not necessarily communicate that the endorser got something for free or received compensation for an endorsement. However, a more detailed statement such as “Thanks XYZ for the free ABC” would suffice if the item in the statement included everything received from the brand.
- **Combined Hashtags:** The FTC cautioned that consumers likely will not understand the significance of the word “ad” in a hashtag combined with the name of a brand (e.g., “#XYZad”).
- **“XYZ Company asked me to try their product”:** According to the FTC, a statement that a company asked an influencer to try a product may not be sufficient if it is not clear from the context that the person received product for free or if the person also was paid.
- **#Ambassador:** The FTC advises that the hashtag “#ambassador” is ambiguous, and consumers are unlikely to know what it means. By contrast, including the brand name (e.g., “#XYZ-Ambassador”) would likely be more understandable by consumers.

These revisions reveal the FTC’s perspective on the type of conduct it considers problematic that remains widespread in the marketplace, and we encourage companies to review the revised guidance and update their internal guidelines as needed.

Recent Endorsement-Related Enforcement Actions

The updated guidance came at the same time that the FTC announced its first-ever settlement with individual media influencers, as well as its issuance of 21 warning letters to Instagram influencers the agency had contacted previously in April 2017.

Settlement with Social Media Influencers

The FTC entered into a consent order with Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, two social media influencers who are widely followed in the online gaming community.^{2/} The order settles charges that the two deceptively endorsed the online gambling service SCGO Lotto without disclosing that they jointly own the company. The FTC also alleges that they paid other influencers to promote the site on various social media without requiring the other influencers to disclose they had been paid to endorse the site.

In addition to requiring that Martin and Cassell clearly and conspicuously disclose any material connections with an endorser, the consent order requires them to take steps to instruct their endorsers on their responsibilities to disclose their material connection to the marketers, implement a system to monitor and review the disclosures of their endorsers, terminate those endorsers who fail to satisfy their requirements, and create reports showing the results of their monitoring activities, among other requirements.

Warning Letters to Social Media Influencers

The FTC sent letters to 21 Instagram influencers following up on the more than 90 letters the agency previously had sent to educate recipients on the requirement that material relationships between an endorser and an advertiser must be disclosed.^{3/} The warning letters cite specific posts the FTC considers potentially problematic and explain why they may violate FTC requirements. The FTC asks that the recipients advise the agency as to whether they have a material relationship to the brands endorsed in their posts and, if so, how they plan to disclose

^{2/} *In re CSGOLotto, Inc.*, No. 162-3184.

^{3/} The FTC did not disclose the recipients of the letters.

those relationships. While one may not agree with all of the examples the FTC deemed potentially problematic, the letters provide invaluable insight into conduct that may draw FTC enforcement scrutiny in the future.

Though the agency's focus remains on companies and their hired promotional firms, these actions indicate the FTC is expanding its enforcement activities to include individual endorsers, and they underscore the need for companies to have clear disclosure requirements for any endorsers they hire, as well as a monitoring system to ensure endorsers are meeting their disclosure requirements.

The take-away message is clear: Failure to effectively disclose a material relationship between a company and endorser when required remains a high priority at the FTC. Having expended substantial resources and effort to educate industry, those that fail to heed FTC guidance could well become a target of an enforcement action. Vigilance within companies in this area is of critical importance. The most conservative approaches are not the only options available, and there remains some room for innovation in how endorsers' relationships to advertisers are conveyed, when necessary.

Enforcement in Other FTC Target Areas

Other hot topics in the enforcement arena include health claims targeting aging consumers (e.g., reduce or eliminate joint pain, inflammation, memory loss), anti-aging claims (e.g., stop or reverse gray hair), weight-loss claims, probiotic claims, opioid withdrawal treatments, and health apps. The FTC has taken several notable enforcement actions in these areas.

Judgment Against Weight-Loss Supplement Marketers for Violating Existing Order

On October 10, 2017, a federal district court imposed a \$40 million judgment against multiple defendants who were found in contempt of a previous court order related to their sale of weight-loss dietary supplements.^{4/} For background, in 2004, the FTC filed a complaint charging Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech") and several individual plaintiffs, among others, with making deceptive claims about the efficacy and safety of purported weight-loss products containing ephedra. In 2008, the United States District Court for the Northern District of Georgia found in favor of the FTC and ordered the defendants to pay \$15.8 million in damages. The court also barred the defendants from claiming their products cause rapid or substantial weight loss or fat loss, of affect body fat, appetite, or metabolism, unless the claims are true and supported by scientific evidence.

The FTC sought sanctions against Hi-Tech and the individuals in 2011, alleging that they were in violation of the 2008 order because beginning in 2009 they made prohibited weight-loss claims for various dietary supplements, despite lacking competent and reliable scientific evidence to substantiate the claims. The claims included statements such as "rapid fat loss," "fat burner," "EXTREME WEIGHT LOSS GUARANTENED," and "curbs the appetite." According to the court's order, the defendants "very clearly exhibited a pattern of contemptuous conduct" and "dispensed deception to those with the greatest need to believe it"

In addition to the \$40 million judgment, the defendants also must recall from retail outlets all the supplements identified in the order that have violative product packaging and labels.

FTC Bars Advertising Firm from Assisting in the Marketing of Weight-Loss Supplements

^{4/} *FTC v. National Urological Grp., Inc.*, No. 1:04-cv-3294-CAP (N.D. Ga. Oct. 10, 2017).

The FTC has announced that Marketing Architects, Inc. (MAI), an advertising agency alleged to have created and disseminated deceptive advertisements for weight-loss supplements marketed by its client, Direct Alternatives, has settled the claims against it with a \$2 million payment.^{5/} Direct Alternatives previously was subject to FTC enforcement action in 2016. It is notable that the complaint alleges not only that MAI created and disseminated false or unsubstantiated claims, but also that MAI was “previously made aware of the need to have competent and reliable scientific evidence to back up health claims” through documents from its client. The proposed court order bans MAI from making claims that the FTC has advised are always false with regard to dietary supplements, requires MAI to use competent scientific evidence to support other future claims, and prohibits it from misrepresenting tests or studies that may be performed. A rare occurrence, it is significant that FTC’s enforcement action targeted the ad agency.

District Court Finds Memory Improvement Claims Substantiated

A federal district court dismissed a case by the FTC and the State of New York challenging claims that Prevagen, a dietary supplement with a protein called apoaequorin as its primary ingredient, improves memory.^{6/} Some of the notable claims challenged included the following:

- Prevagen “has been clinically shown to improve memory”;
- “A landmark double-blind and placebo controlled trial demonstrated Prevagen improved short-term memory, learning, and delayed recall over 90 days”; and
- “Prevagen is clinically shown to help with mild memory problems associated with aging.”

The FTC alleged that Quincy Biosciences Holding Company Inc. (“Quincy”) and several other defendants lacked adequate substantiation for the claims and, thus, their establishment claims were false. The court noted Quincy had conducted a “gold standard” double-blind, placebo controlled, randomized clinical trial (RCT) on the effects of apoaequorin on cognitive function in older adults. At various intervals throughout the study, participants were tested on nine quantitative cognitive tasks. No statistically significant results were observed for the study population as a whole. However, it was argued that statistically significant results were observed within the subgroups of study participants.

According to the FTC, the study’s conclusions were based on “post hoc analyses of the results looking at data broken down by several variations of smaller subgroups,” which according to FTC “greatly increases the probability that the statistically significant improvements shown are by chance alone.”^{7/} The FTC’s position is that given the sheer number of comparisons conducted with the data, the few positive findings on isolated tasks for small subgroups do not provide reliable evidence of a treatment effect. FTC also argued that Quincy had no studies showing that orally administered apoaequorin can cross the human blood-brain barrier. In fact, studies conducted by Quincy showed the orally administered apoaequorin is rapidly digested in the stomach.

In its decision granting Quincy’s motion to dismiss, the court found that FTC had “fail[ed] to do more than point to possible sources of error” without alleging that any actual errors occurred in the studies of the subgroups. Consequently, FTC did not demonstrate that reliance upon the subgroup data is likely to mislead consumers acting reasonably under the circumstances. Beyond the possibility that post hoc data analysis may be viewed as sufficient substantiation, the court’s ruling raises the prospect that the FTC’s often exacting expectations regarding “competent and

^{5/} The press release is available at <https://www.ftc.gov/news-events/press-releases/2018/02/advertising-firm-barred-assisting-marketing-sale-weight-loss>.

^{6/} *FTC v. Quincy Bioscience Holding Co.*, No. 1:17-cv-00124-LLS (S.D.N.Y. Sept. 28, 2017).

^{7/} In a scientific study, post-hoc analysis (from Latin post hoc, “after this”) consists of analyses that were not specified before seeing the data. Post hoc analysis that is conducted and interpreted without adequate consideration of this problem is sometimes criticized because the more one looks, the more likely something will be found.

reliable scientific evidence” may be subject to further scrutiny by courts in the future. Both the FTC and the State of New York have appealed the case.

One court ruling likely will not lead most companies to make wholesale changes in their approach to substantiation. The case does suggest that a plausible, science-based justification for a claim may be acceptable to a court even if the FTC identifies flaws in the substantiation. At the same time, as has often been the case, companies with strong science enjoy a competitive advantage in the marketplace.

Quick Exit from Allegedly Unsupported Claims Prompts FTC to Close Investigation

The FTC closed an investigation into claims made in connection with the dietary supplement “BuzzKill.”^{8/} In its close out letter to Fortis BioPharma Nutritionals, LLC (Fortis), the FTC said the company claimed that the dietary supplement: (a) reduces blood alcohol concentration; (b) is proven to reduce blood alcohol concentration; (c) protects the liver; and (d) reduces or prevents hangovers. The closeout letter is noteworthy because it indicates the FTC is willing to close an investigation without taking further action in instances where the product has a limited market presence and the marketer responds quickly to the FTC’s concerns. In this instance, Fortis agreed to stop all marketing and sales of BuzzKill, perform an online review to determine whether any third parties are promoting the product, and have any promotions identified removed.

Acting Director of Consumer Protection Pahl Hints at New Course at FTC

In a November 14, 2017, speech, Thomas Pahl, the Acting Director of the FTC’s Bureau of Consumer Protection, raised the value of the FTC revisiting the forum and remedies in challenging deceptive advertising based on insufficient substantiation. Over the years, the FTC has increasingly brought advertising substantiation cases in federal court, seeking monetary relief in many cases. Mr. Pahl stated that use of an administrative proceeding without any monetary remedy was a more desirable approach. In his view, only cases involving dishonesty or fraud would warrant bringing a court case seeking monetary relief

Pledging continued enforcement, Mr. Pahl seemingly only advocates a change in the FTC’s approach to regulation, which will allow for the agency to “protect consumers without imposing undue or unnecessary costs on advertisers.” The FTC must balance helping consumers make well-informed decisions, and allowing advertisers to freely use commercial speech. By “changing the direction of the FTC’s consumer protection program,” Mr. Pahl suggests a continued focus on deceptive advertising, while taking care to avoid chilling truthful advertising claims that are beneficial to consumers. The extent to which this apparent shift in emphasis will be embraced by the Commission in the future will be one of many developments to follow.

FTC, FDA Warn Companies Selling and Marketing Opioid Cessation Products

On January 24, 2018, the FTC and the FDA issued warning letters to 11 marketers and distributors of opioid cessation products.^{9/} The FTC issued additional warning letters to four other unidentified marketers of opioid cessation products. The agencies allege that the companies are using online platforms to illegally market these unapproved products with unproven claims about their ability to aid the treatment of opioid addiction and withdrawal, in violation of both the Federal Food, Drug, and Cosmetic Act and the Federal Trade Commission Act. Some examples of the claims made include “#1 Selling Opiate Withdrawal Brand” and “Break the pain killer habit.”

^{8/} The closeout letter is available at https://www.ftc.gov/system/files/documents/closing_letters/nid/fortis-closing_letter.pdf.

^{9/} The letters are available at <https://www.ftc.gov/ftc-fda-opioid-warning-letters>.

The large number of warning letters issued and the nature of the joint action demonstrate the importance of this issue to the FTC and the FDA. According to a joint agency press release announcing the action, opioid cessation products can cause serious health risks, as they have not been demonstrated to be safe, and they may prevent vulnerable patients from seeking appropriate, FDA-approved treatments.^{10/} Acting FTC Chairman Maureen K. Ohlhausen also said that the FTC and the FDA will continue to work together to regulate opioid cessation products.

What Lies Ahead?

The Commission is independent, but once all open positions are filled the party in the White House will hold a 3-2 margin. It should be of no surprise that the FTC will continue to go about its business of protecting consumers. Mr. Pahl's speech certainly suggests possible changes in how the FTC challenges substantiation cases, but there is no indication that the FTC will move to the sidelines and deeply curtail its enforcement presence in the marketplace. Still one cannot rule out a shift to industry voluntary compliance and modest enforcement at the FTC which arose during the Reagan Administration.

A less active FTC could see the reemergence of what we have termed "the Reagan Effect." When the Reagan administration stressed voluntary compliance in favor of enforcement, the gap was filled by state attorneys general. Multi-state investigations spawned multiple state-initiated enforcement actions against deceptive advertising across many industry sectors. This Reagan-Effect could reemerge depending on the FTC's presence as a "cop on the beat." Class action lawsuits targeting the food industry will likely continue, serving as another variable to consider in understanding the regulatory environment in which companies operate. Savvy marketers who pay close attention to the regulatory environment will be well positioned to make informed business decisions.

^{10/} "FTC, FDA Warn Companies about Marketing and Selling Opioid Cessation Products," (Jan. 24, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/01/ftc-fda-warn-companies-about-marketing-selling-opioid-cessation>.

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