Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of Machinima, Inc., File No. 1423090

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Machinima, Inc. ("Respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Respondent is a video entertainment company that produces and distributes content relating to video games and gaming culture via a multi-channel network ("MCN") on YouTube.com. In 2013, Respondent was hired by Microsoft Corp. ("Microsoft"), through its advertising agency Starcom MediaVest Group ("Starcom"), to market the Xbox One gaming console and three companion video games ("Launch Titles") on Respondent's YouTube network. As part of Respondent's advertising campaign for Microsoft, Respondent engaged and compensated its "influencers" (or "endorsers") to create videos promoting the Xbox One and the Launch Titles. As part of its agreement with Starcom, Respondent promised that the influencer videos would "not portray [Microsoft], the Xbox One, or the Launch Titles in a negative manner," and Microsoft could request that Respondent take down any video that violated this promise.

According to the complaint, in numerous instances, Respondent's influencers did not disclose that Respondent offered compensation to the influencers in exchange for creating and uploading the videos as part of the advertising campaign. The FTC's complaint alleges that Respondent's influencers' videos were false and misleading because they did not reflect the independent opinions of impartial video game enthusiasts. The complaint also alleges that these videos were deceptive because they failed to disclose the material fact that the influencers who posted the reviews were compensated in connection with their endorsements.

Part I of the proposed order prohibits Respondent from misrepresenting in any Influencer Campaign, that the Endorser is an independent user or ordinary consumer of the product or service. The proposed order defines an "Influencer Campaign" as any arrangement whereby, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, Respondent engages an Endorser (also known as an Influencer) to create, publish, or otherwise disseminate an online Endorsement for which the Influencer is to receive compensation from either Respondent, the advertiser for whom Respondent conducts the campaign, or anyone else acting on their behalf.

Part II of the proposed order requires Respondent to clearly and prominently disclose in any Influencer Campaign a material connection, if one exists, between the Endorser and the advertiser whose product is being endorsed. The proposed order defines "material connection" as any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

Part III of the proposed order requires Respondent to take reasonable steps to ensure that its Influencer Campaigns comply with Parts I and II. Respondent is required to provide each influencer with a plain language statement of his or her responsibility to disclose clearly and conspicuously any material connection to the advertiser on whose behalf Respondent is conducting the campaign, and Respondent must obtain a signed acknowledgment of receipt of this statement from the influencer. Respondent must also institute specific monitoring procedures for online video endorsements that are part of its Influencer Campaigns. Respondent may not compensate an influencer for a video endorsement that has been posted online or otherwise been made publicly available until Respondent verifies that the endorsement contains a clear and conspicuous disclosure about the influencer's material connection to the advertiser. In addition, between two weeks and ninety days of compensating the influencer, Respondent must conduct another review of each video endorsement that is still publicly accessible or reasonably accessible to Respondent to ensure that any required disclosures remain.

Part IV of the proposed order contains recordkeeping requirements that, among other things, require Respondent to maintain records sufficient to demonstrate its compliance with Parts I through III of the order.

Parts V through VII of the proposed order require Respondents to: deliver a copy of the order to principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure, discontinuance of current business or employment, or affiliation with any new business or employment that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part VIII provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the complaint or proposed order or to modify the proposed order's terms in any way.