

September 4, 2015

Edith Ramirez  
Chairwoman  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580

Re: Complaint Against former Sen. Scott Brown (R-MA)

Dear Chairwoman Ramirez:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests the Federal Trade Commission (“FTC”) investigate whether Scott Brown, a former United States Senator from Massachusetts who now frequently appears on television as a Fox News contributor, violated 15 U.S.C. § 45(a) by failing to disclose his material connection to AdvoCare International, L.P.’s nutritional products when he endorsed those products on Facebook and in other communications.

### **Former Sen. Brown’s Endorsement of AdvoCare Products**

Mr. Brown is a nationally known political figure and news commentator. He served as the United States Senator from Massachusetts from 2010 to 2013 following two terms in the Massachusetts House of Representatives and one term in the Massachusetts Senate.<sup>1</sup> After he was defeated in 2012, Mr. Brown became a contributor on Fox News, frequently appearing on the network’s television programs during part of 2013 and 2014.<sup>2</sup> Mr. Brown ran for United States Senate again in 2014, this time from New Hampshire, and became the Republican Party nominee but lost the race.<sup>3</sup> Mr. Brown then returned to Fox News as a contributor and continues in that position.<sup>4</sup> In that role, Mr. Brown regularly appears on Fox News, sometimes appearing on multiple programs in a single day.<sup>5</sup> Mr. Brown also continues to be involved in politics,

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<sup>1</sup> Biographical Directory of the United States Congress, Scott P. Brown, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001268>.

<sup>2</sup> Jordan Chariton, Scott Brown Out As Fox News Contributor, *TVNewser*, March 14, 2014, available at <http://www.adweek.com/tvnewser/scott-brown-out-as-fox-news-contributor/218390>.

<sup>3</sup> Biographical Directory of the United States Congress, Scott P. Brown.

<sup>4</sup> Hadas Gold, Scott Brown Rejoins Fox News, *Politico*, November 20, 2014, available at <http://www.politico.com/blogs/media/2014/11/scott-brown-rejoins-fox-news-199074>.

<sup>5</sup> See, e.g., Scott Brown, Facebook post, July 31, 2015, available at <https://www.facebook.com/ScottBrownNH>.

raising funds for political candidates and parties.<sup>6</sup> Beyond his television and political roles, Mr. Brown has a significant public presence on social media, including more than 370,000 Facebook followers.<sup>7</sup>

AdvoCare International, L.P. (“AdvoCare”) produces a range of nutritional, weight loss, energy, sports performance, and skin care products.<sup>8</sup> AdvoCare markets and distributes its products through a large network of distributors,<sup>9</sup> and commonly is described as a multi-level marketing company.<sup>10</sup> AdvoCare distributors can earn income in several ways.<sup>11</sup> Wholesale customers who become distributors receive a 20 percent discount on AdvoCare products, and distributors who sell the products to others earn between 20 and 40 percent profit on the sales.<sup>12</sup> Distributors who recruit and sponsor other distributors can earn wholesale commissions of 5 to 20 percent on products sold by the “down-line” distributors.<sup>13</sup> “Overrides” can provide additional income based on the volume of sales in the organization of a distributor at certain leadership levels, and further leadership bonuses can be paid to recognize high-level distributors.<sup>14</sup> Distributors also can receive other incentives, trips, and bonuses, including a “Rookie Bonus” for achieving certain targets in their first three months.<sup>15</sup>

On June 25, 2015, Mr. Brown put up a lengthy post on his Facebook page endorsing AdvoCare products and inviting his hundreds of thousands of followers to contact him for more information.<sup>16</sup> The post first stated Mr. Brown “wanted to answer a few questions that people have had about my recent weight loss.”<sup>17</sup> Mr. Brown asserted both he and his wife Gail Huff

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<sup>6</sup> Stephanie Ebbert, *Salesman Brown Pursues A Weight-Loss Constituency*, *Boston Globe*, July 2, 2015 (attached as Exhibit A); Dan Tuohy, *Political Ad Attacks Emerge in Senate Campaigns*, *Union Leader*, June 30, 2015, available at <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150630/NEWS06/150639994>.

<sup>7</sup> See <https://www.facebook.com/ScottBrownNH> (last visited September 2, 2015).

<sup>8</sup> AdvoCare website, “Products” page, available at <https://www.advocare.com/products/default.aspx>.

<sup>9</sup> *AdvoCare Int’l v. Ford*, 2013 Tex. App. LEXIS 1162, at \*2 (Feb. 5, 2013).

<sup>10</sup> See, e.g., Wikipedia, “AdvoCare” page, available at <https://en.wikipedia.org/wiki/AdvoCare>.

<sup>11</sup> AdvoCare website, “Opportunity” page, available at <https://www.advocare.com/opportunity/default.aspx>; *AdvoCare Int’l v. Ford*, 2013 Tex. App. LEXIS 1162, at \*2-3.

<sup>12</sup> AdvoCare website, “Opportunity” page; *AdvoCare Int’l v. Ford*, 2013 Tex. App. LEXIS 1162, at \*2-3.

<sup>13</sup> AdvoCare website, “Opportunity” page; *AdvoCare Int’l v. Ford*, 2013 Tex. App. LEXIS 1162, at \*2-3.

<sup>14</sup> AdvoCare website, “Opportunity” page; *AdvoCare Int’l v. Ford*, 2013 Tex. App. LEXIS 1162, at \*2-3.

<sup>15</sup> AdvoCare website, “Opportunity” page.

<sup>16</sup> Scott Brown, Facebook post, June 25, 2015, available at <https://www.facebook.com/ScottBrownNH/posts/10153358881128168> and <https://www.facebook.com/ScottBrownNH> (attached as Exhibit B). See also Ebbert, *Boston Globe*, July 2, 2015.

<sup>17</sup> Scott Brown, Facebook post, June 25, 2015.

decided to go on a diet, and his “son-in-law turned me onto a product called Advo care.”<sup>18</sup> Mr. Brown said he “immediately started with the 24 day challenge”<sup>19</sup> – described on the AdvoCare website as a “comprehensive supplementation and nutrition program.”<sup>20</sup> The product was inexpensive and natural, Mr. Brown said: “Pretty short money, about \$180 total and all natural.”<sup>21</sup> By the second week, Mr. Brown represented, he “noticed a few pounds coming off slowly but surely,” and at “the end of the 24 days I lost 30 pounds.”<sup>22</sup> Mr. Brown claimed he lost a total of 42 pounds using AdvoCare products, and the weight loss had made him “extremely competitive” in triathlons.<sup>23</sup> The post also include “before” and “after” photos of Mr. Brown.<sup>24</sup> Mr. Brown concluded by telling his followers: “If you have any interest in learning about Advo care please drop me a note via Facebook or email me at [Scottbrowntri@gmail.com](mailto:Scottbrowntri@gmail.com). By the way, Gail lost pounds and looks and feels great. Let me know.”<sup>25</sup>

News reporters who sent responded to Mr. Brown’s Facebook post received emails from Mr. Brown further endorsing AdvoCare products.<sup>26</sup> The emails asserted that as could be seen “from my story and pictures, these products from AdvoCare really do work.”<sup>27</sup> Mr. Brown said he was “here to help you get started,” and “[i]f you’re ready to get your health back on track, allow [Mr. Brown’s son-in-law] Keith and me to get you signed up today!”<sup>28</sup> Mr. Brown then listed several benefits, including “[s]aving 20-40% off products” if the person became an AdvoCare distributor.<sup>29</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> AdvoCare website, “24-Day Challenge” page, available at <https://www.advocare.com/products/challenge.aspx>.

<sup>21</sup> Scott Brown, Facebook post, June 25, 2015.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Warren Rojas, [Scott Brown Is Listed As AdvoCare Distributor](#), *Roll Call*, July 2, 2015 (attached as Exhibit C); Olivia Nuzzi, [Scott Brown’s Newest Campaign: Shady Diet Pills](#), *Daily Beast*, July 2, 2015 (attached as Exhibit D).

<sup>27</sup> Rojas, *Roll Call*, July 2, 2015; Nuzzi, *Daily Beast*, July 2, 2015.

<sup>28</sup> Rojas, *Roll Call*, July 2, 2015; Nuzzi, *Daily Beast*, July 2, 2015.

<sup>29</sup> Rojas, *Roll Call*, July 2, 2015; Nuzzi, *Daily Beast*, July 2, 2015.

Following his initial Facebook post, Mr. Brown posted a Facebook comment asserting: “FYI, I’m not a paid spokesman for them. Neither is Gail.”<sup>30</sup> In a separate Facebook comment, Mr. Brown reiterated neither he nor Ms. Huff “are paid spokesrepresentatives for Advocare,” and again asserted he “just thought the post would answer a lot of questions people have had about my sudden weight-loss and help a few folks.”<sup>31</sup>

Mr. Brown, however, is or was an AdvoCare distributor. The AdvoCare website listed him as a distributor, which an AdvoCare representative confirmed.<sup>32</sup> Ms. Huff further acknowledged Mr. Brown was a distributor and received a 20 percent discount on his purchases.<sup>33</sup> In comments to a newspaper, Ms. Huff stated Mr. Brown “was never a salesman, he never made a penny from it,” and “at no point did he ever suggest anyone ever purchase it. He is not selling diet pills.”<sup>34</sup> In another Facebook post Mr. Brown apparently posted on July 7, 2015, he maintained he did not “want to sell anything” and was not a salesman, asserting his “only intent was, and continues to be, letting folks know what I’ve been up to.”<sup>35</sup> Mr. Brown further said any inquiries he received about the “program” were passed on to his son-in-law, and concluded by representing “[a]gain, I do not, and will not, receive any money from Advocare.”<sup>36</sup>

### **Potential Violations**

Mr. Brown’s Facebook post and his emails in response to inquiries appear to violate the Federal Trade Commission Act and FTC guidance by failing to disclose his financial interest in endorsing AdvoCare products. The Federal Trade Commission Act broadly prohibits “unfair or deceptive acts or practices in or affecting commerce,”<sup>37</sup> and FTC regulations provide specific guidance on using endorsements and testimonials in advertising.<sup>38</sup> Under those guides, “[a]dvertisers are subject to liability . . . for failing to disclose material connections between themselves and their endorsers,” and “[e]ndorsers also may be liable for statements made in the

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<sup>30</sup> Nuzzi, *Daily Beast*, July 2, 2015.

<sup>31</sup> Rojas, *Roll Call*, July 2, 2015; Nuzzi, *Daily Beast*, July 2, 2015.

<sup>32</sup> Rojas, *Roll Call*, July 2, 2015; Ebbert, *Boston Globe*, July 2, 2015.

<sup>33</sup> Gayle Fee, Gail Launches Weighty Defense Of Hubs Scott, *Boston Herald*, July 7, 2015 (attached as Exhibit E).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The *Boston Herald* quoted this post, but CREW was unable to locate it on Mr. Brown’s Facebook page.

<sup>36</sup> *Id.*

<sup>37</sup> 15 U.S.C. § 45(a).

<sup>38</sup> 16 C.F.R. § 255.0(a).

course of their endorsements.”<sup>39</sup> The statute and the guides apply to social media, including Facebook.<sup>40</sup> While there are no fines for violations of the statute, enforcement actions can result in orders requiring violators to give up money received from their deceptive practices.<sup>41</sup>

Mr. Brown’s Facebook post and emails failed to disclose material connections between him and AdvoCare. As the guides provide, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.”<sup>42</sup> Mr. Brown’s Facebook post and emails clearly did not disclose any material connection with AdvoCare. Mr. Brown did not disclose the 20 percent discount he received for becoming a distributor and touting the products nor any of the other potential income he could receive as an AdvoCare distributor. To the contrary, Mr. Brown denied he was a paid spokesman for AdvoCare. Even if this technically was true (and it is not known if it is), a “material connection” is not limited to being paid to endorse the product. Receiving a percentage of gross product sales, free product samples, or even just the opportunity to appear in television advertising can constitute a material connection, as long as a consumer’s knowledge of the connection might affect the weight or credibility of the endorsement.<sup>43</sup> Here, Mr. Brown’s discount and other potential income might have that impact.

An example in the guides issued by the FTC closely parallels Mr. Brown’s endorsement and failure to disclose his material connection. The example involves a well-known professional tennis player who had laser vision correction surgery then entered into a contract that paid her for speaking publicly about her surgery when she could do so.<sup>44</sup> The tennis player then

touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information

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<sup>39</sup> 16 C.F.R. § 255.1(d).

<sup>40</sup> FTC, The FTC’s Endorsement Guides, What People Are Asking, at 3, available at <https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs.pdf>.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> 16 C.F.R. § 255.5.

<sup>43</sup> 16 C.F.R. § 255.5, Examples 4, 5, 7; FTC, The FTC’s Endorsement Guides, What People Are Asking, at 4-5.

<sup>44</sup> 16 C.F.R. § 255.5, Example 4.

might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.<sup>45</sup>

So, too, here. Mr. Brown touted the result of his using AdvoCare products (mentioning them by name) on Facebook, where he otherwise posts about what is happening in his life. In this context, and considering that Mr. Brown's endorsement was presented as simply answering questions about his weight loss, his followers may not have reasonably expected he had a connection to AdvoCare that could affect the weight or credibility of his endorsement. As a result, Mr. Brown should have disclosed his relationship with AdvoCare.

Mr. Brown also cannot claim his Facebook post and emails are not endorsements. The guides broadly define an "endorsement" to include "any advertising message . . . that consumers are likely to believe reflect the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser."<sup>46</sup> Mr. Brown clearly expressed his experiences, opinions, and beliefs about AdvoCare products in his communications. Mr. Brown and Ms. Huff's claims that Mr. Brown was not a salesman for AdvoCare products and he only wanted to inform people about his weight loss, therefore, do not exclude his communications from the statute and the FTC guides.

Accordingly, Mr. Brown may have violated the Federal Trade Commission Act.

### **Conclusion**

Knowing that someone promoting a product has a financial interest in it "is important information for anyone evaluating the endorsement."<sup>47</sup> As Jessica Rich, Director of the FTC's Bureau of Consumer Protection, said just this week: "When people see a product touted online, they have a right to know whether they're looking at an authentic opinion or a paid marketing pitch."<sup>48</sup> Mr. Brown failed to disclose his material connection to AdvoCare in his Facebook post and email communications. As a result, CREW respectfully requests the FTC commence an immediate investigation into Mr. Brown to determine if his endorsements of AdvoCare violated the law.

Thank you for your prompt attention to this matter.

Sincerely,

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<sup>45</sup> *Id.*

<sup>46</sup> 16 C.F.R. § 255.0(b).

<sup>47</sup> FTC, The FTC's Endorsement Guides, What People Are Asking, at 2.

<sup>48</sup> Press Release, FTC, Xbox One Promoter Settles FTC Charges That It Deceived Consumers With Endorsement Videos Posted By Paid 'Influencers', September 2, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers>.

Edith Ramirez  
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Page 7

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