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Revised FTC Guidelines: Blogger Beware

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Regular readers of blogs and other Internet-based newsletters know it is not unusual to see product reviews in these publications. While sometimes the reviews appear to be careful, impartial journalism, at other times the writer seems just a wee bit too enthusiastic about the post's subject matter.

There are good reasons to question just how impartial the authors of these reviews might be. Advertisers often "comp" writers with free products or other benefits in the hopes of receiving favorable reviews, though it does not have to go that far. A Web site or blog that depends on click-through traffic for revenue may be so hungry for copy that its authors simply cut and paste blurbs received from a product's public relations department, without ever receiving or using the product that is the subject of the post.

To the casual reader it appears as though the blog author has tried the product and is offering an independent evaluation of its merits when, in fact, the text is simply parroting the advertiser's copy. In another situation, an apparently impartial "consumer" review may actually be written by someone closely associated with the advertiser.

On Oct. 5, the Federal Trade Commission issued a set of "[Guides Concerning the Use of Endorsements and Testimonials in Advertising](#)" [[FOOTNOTE 1](#)] that impact many of these and other sorts of non-obvious or stealth marketing situations.

Clients that have embraced the growing number of ways technology can be used to spread a message to consumers about their product or service need to become conversant with the increased obligations and potential for liability under the revised FTC guidelines.

FOCUS ON ENDORSEMENTS

The focus of the revised guidelines is on "endorsements." An "endorsement" is "any advertising message ... that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser." (A "testimonial" is treated by the FTC as being the same thing as an "endorsement.")

The emphasis on what "consumers are likely to believe" is what makes the revised guidelines particularly dangerous for advertisers that currently rely on relatively uncontrolled third parties -- such as bloggers -- to spread positive reports of their products or services.

The revised guidelines consider three main types of specific endorsements (consumer, expert and organizational), as well as a fourth that can be considered to be a subtler form, "material connections."

Consumer endorsements in particular are likely to be implicated when an advertiser relies on third parties to spread the word about a product or service. [[FOOTNOTE 2](#)]

The guidelines require that endorsements "reflect the honest opinions, findings, beliefs, or experiences of the endorser." Both advertisers and endorsers may be "subject to liability for false or unsubstantiated statements made through endorsements," as well as "for failing to disclose material connections between themselves and their endorsers."

Consider the situation where a manufacturer sends sample products to bloggers, hoping some will try the products and write favorable posts about them. The first question is whether each blogger is thus an "endorser" under the new guidelines. The answer: [It depends.](#)

If a blogger regularly receives sample products from manufacturers for review, the FTC suggests that the blogger's "positive review would be considered an endorsement under the Guides." If it happens, however, that the blogger's receipt of a sample is an irregular event, or one that was not necessarily designed by the advertiser to elicit a review, then the FTC suggests the blogger may not be an "endorser."

The FTC, in its comments on the revised guidelines, notes that when deciding whether to prosecute an advertiser for the false or misleading statements of an endorser blogger it would "consider the advertiser's efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted."

It also makes clear, however, that by using this kind of third-party marketing, "the advertiser has assumed the risk that an endorser may fail to disclose a material connection or misrepresent a product, and the potential liability that accompanies that risk."

Under the revised guidelines, advertisers that employ these kinds of indirect or third-party marketing techniques now have an obligation not only to police what the bloggers who receive their products are saying about them, but also to advise those bloggers of what their obligations are as "endorsers" under the FTC guidelines.

At first glance, the advertiser burden associated with policing what solicited bloggers are writing about products may appear to be enormous. To the extent that an advertiser is not presently monitoring what blogs and sites that receive promotional products are writing about those products, the burden of now doing so could be substantial.

It can be reduced by implementing external guidelines for recipients of promotional products that explain the mutual obligation to be honest about the reviewed product or service and include a requirement that the advertiser receive a copy of any post in which the product is reviewed or discussed in detail.

Similarly, blogs and sites that write about advertiser-supplied products need to realize that by accepting and writing about these products, they may be connecting themselves with those advertisers in a material way that was not apparent before. In particular, a post that simply parrots a false or misleading statement fed to it by an advertiser may make the blog or site liable, together with that advertiser, for the improper statement.

AN EXAMPLE

The revised FTC Guides contain a number of examples that offer a troubling look at how an advertiser could become liable for the statements of a blogger.

One describes a skin care products advertiser that works with a blog advertising service. The service provides a blogger with a sample of the advertiser's new body lotion and asks the blogger to write about it. The advertiser makes no specific claims about the lotion's ability to cure skin conditions, but the blogger writes that the lotion cures eczema and recommends it to eczema sufferers. The FTC concludes that the "advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement."

The FTC suggests that, to limit liability, the advertiser "ensure that the advertising service provides guidance and training to its bloggers" about making statements that are "truthful and substantiated." It also suggests that the advertiser monitor the bloggers who write about its products, and, of course, take steps to "halt the continued publication of deceptive representations when they are discovered."

HIDDEN CONNECTIONS

The FTC's guidelines concerning the disclosure of "material connections" is another one that may have a significant impact on advertisers that take advantage of technology to promote their products or services in nontraditional ways. The FTC requires that "a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement ... must be fully disclosed."

The FTC offers several examples of such "material connections." These include an advertiser supplying a product to a blogger with a request that the blogger write about it; an advertiser employee posting messages that promote the advertiser's product or service on an Internet message board; and an advertiser compensating an individual to be a member of a "street team" whose job it is to talk with friends and acquaintances about the advertiser's products. In each of these cases, the "material connection" between the person promoting the product and the advertiser is one that the FTC requires to be "clearly and conspicuously disclosed."

It will be interesting to see what effect the requirement to disclose "material connections" will have on the burgeoning number of sites that provide user reviews of products or services. The practice of providing reviews has become almost standard, both with direct-sale retail product sites and indirect referral sites, such as those used by the travel industry.

There have been questions raised, for example, about how many hotel reviews found on popular travel sites are written by actual, impartial travelers versus hotel employees working to boost the ranking of their establishment compared with other hotels in the area. A well-publicized FTC enforcement action could thus have a real effect on your next vacation.

PROTECTIVE STEPS

Advertisers that rely on third-party blogs or Web sites to review and report on products or services should develop a set of rules for bloggers consistent with the revised FTC guidelines to ensure that what bloggers post about the advertiser's products meets the advertiser's obligations under the law.

These would include a prohibition against making unsubstantiated claims about the product as well as a requirement that the blog disclose any material connection between the blog and the advertiser (such as that the advertiser had supplied the reviewed product free of charge).

The advertiser should also monitor solicited blog posts to assure compliance. Internal advertiser rules should either prohibit employees from posting any reviews of the advertiser's own product or service, or from doing so without revealing the employee's connection with the advertiser.

Blogs and sites that are in the business of accepting advertiser-supplied products or services and reviewing them need to be aware that they may have an independent obligation not to pass along misleading or unsubstantiated advertiser claims. Internal procedures can require that published reviews be based not solely on advertiser-supplied copy, but also on the author's independent evaluation of the product.

Just as an advertiser can be liable for the misstatements of a blogger, so too can a blogger be liable for the misstatements of an advertiser.

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;;;FOOTNOTES;;;

FN1 The revised guidelines are available at <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>. The related Federal Register notice is available at <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.

FN2 While this article focuses on consumer endorsements and disclosure of material connections, the guidelines relating to expert and organizational endorsements are important to review as well. For example, a professional race car driver who endorses a line of tires may be held to the endorsement standards that apply to an expert, and a chiropractic organization that endorses a line of mattresses will be expected to have independently evaluated the product line.

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