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FTC Applies Endorsement/Advertising Guides To Social Media

“Results not typical” safe harbor eliminated

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Hey, all you Bloggers and Twitterers and Social Media Mavens. The Federal Trade Commission has concluded that you all have made it to the Big Time. According to Uncle Sam, you are now part of the Media whose reach is so totally awesome that it needs to be subject to “guides” relative to their content. And sure enough, the FTC has come up with just the guides for you.

Actually, the FTC has had “Guides Concerning the Use of Endorsements and Testimonials in Advertising” in place for decades. They are primarily designed to insure accuracy and transparency in advertising presented as endorsements or testimonials: if somebody (or some organization) has been paid to endorse a product, that fact should be disclosed to the consumer, along with enough information to permit the consumer to evaluate the credibility/validity of the endorsement.

But those Guides had not been revised since 1980 (for reference purposes, Jimmy Carter was in the White House), and even the FTC had to admit that the world has changed a tad since then. Hence the revised guides.

The new guides are generally similar to the old ones. The consistent threads running throughout are that your average consumers should (a) not have to guess about whether or not what they are hearing or seeing in the media is a bought-and-paid-for ad; and (b) be let in on any information that might affect an endorsement’s apparent persuasiveness. The first prong, in particular, should sound familiar to broadcasters subject to the FCC’s sponsorship identification rules. Other traditional media are similarly accustomed to both of these concepts.

But the largely unregulated Internet has no such extended history of interaction with the Feds. Obviously, the FTC figures that it’s time for the government to step in to safeguard the people from entrepreneurs who see the vast profit potential that the new Internet-based social media have created. Twitter, Facebook, MySpace, blogging, etc. – there are now many ways in which to reach vast audiences instantaneously. And those vast

audiences can be targeted by factors such as age, socio-economic characteristics, political/religious/philosophical leaning, and so forth. This is an advertiser's dream, and the potential for mischief is considerable.

So the FTC wants us all to know that the same standards which have historically applied to traditional media also apply to the New Media: advertising messages must be disclosed as such, and grandiose claims of a product's benefits must be tempered with down-to-earth facts.

This doesn't mean that bloggers can't get up on their electronic soapboxes and sing the praises of products or services they like. They can do so anytime they want, using pretty much whatever language they want (assuming that it's accurate). But if they happen to have some "material connection" with the source of the product or service, they have to say so. For example, if the blogger (or Facebooker, or Twitterer, etc.) is being paid by that source, or if he/she enjoys some special relation with that source which entitles him/her to multiple free samples, other products or privileges, or some other benefits, that must be disclosed. (A single, unsolicited free sample would *not* ordinarily trigger that requirement.)

And even if social media users are on the take, big-time or otherwise, from the source of the goods/services being touted, they can *still* go on touting all they want – *as long as* they disclose their true relationship with the source of those goods/services. The ultimate goal is to let the consumer know of relationships between the blogger (or Twitterer, etc.) and the goods/services that the consumer would not otherwise expect. That way, so the theory goes, the consumer can better evaluate the importance, or credibility, of whatever is being said about the good or service.

In addressing the issue of disclosure, the FTC makes clear that people engaging in the role of "reviewer", with all that that traditionally implies, are generally *not* to be deemed endorsers. The FTC is *not* trying to discourage bona fide, free and open discourse about the relative merits or demerits of goods or services. It just wants to make sure that, if any participants in that discourse are getting compensated for that participation through some special relationship with the advertiser, the fact of that compensation is included in the conversation.

The FTC's attempt to wrangle all the social media users on the Internet presents a number of practical problems, not the least of which is the issue of enforcement: seriously, how can an agency with limited resources believe that it could ride herd on the millions upon millions of folks who might be guilty of undisclosed advertising? Of course, if you happen to be the one blogger who gets caught, it would stink to be you – but the odds that you might get caught certainly seem to be relatively small.

The FTC's Guides and accompanying explanatory discussion, which consist of more than 80 pages of text, address a wide range of advertiser/endorsement/testimonial-related matters that anyone – new and old media folks alike – should be aware of. Those matters include some new limitations. For example, as a historical matter ads which refer to one endorser's experience with a product could be disclaimed with verbiage along the lines of "results not typical", thereby opening the door to the presentation of wildly atypical examples, the extent of whose atypicality could be masked by those three little words. With the revised Guides that "safe harbor" has been eliminated: such ads must "conspicuously disclose the generally expected performance in the depicted circumstances".

The precise reach of the revised Guides is not entirely clear. The focus, of course, is on the advertisers themselves, and also on any "endorsers" who (a) assist in the promotion of the advertisers' wares while (b) accepting consideration from the advertiser and (b) failing to disclose that consideration. But what about an employer whose employee uses company facilities – *e.g.*, the corporate blog – to engage in undisclosed advertising. Is there potential liability there? Also, what if a broadcast station reports on a celebrity's Twitter activities, including references to specific products mentioned in the celebrity's Tweets . . . and what if the celebrity is being paid by the makers of those products to the word out? Would FCC sponsorship ID requirements obligate the broadcaster to check for the existence of some such relationship, and to slap an ID tag on any report about the Tweets?

Frankly, we're not sure how these or other such cases may get sorted out, but we think that it's best to worry about this sort of thing before any trouble arises.

Notably, the FTC itself has made a public effort to allay fears of massive, across-the-board crackdowns for alleged violations of the Guides. The agency claims that it's going after only the "most egregious actors", according to one press report. But check out the FTC's website for a video of an FTC spokesperson addressing the question "Is the FTC planning to sue bloggers?" We've watched it a number of times, and we still haven't heard her answer that specific yes/no question with a simple yes/no answer. (You can also find a number of brief, FTC-produced video snippets about the guides on the FTC's website.)

In the end, common sense and candor are probably the best protections against an FTC action based on alleged violations of the guides.