

FTC Publishes Final Guides Concerning the Use of Endorsements and Testimonials Prepared for the Council of Public Relations Firms by Davis & Gilbert LLP

The Federal Trade Commission (FTC) announced that it has approved final revisions to its Guides Concerning the Use of Endorsements and Testimonials (Guides). Because the revised Guides represent the most sweeping changes in almost thirty years to endorsements and testimonials, they will likely affect PR firms and their clients' use of endorsements and testimonials, particularly with respect to consumer-generated media, such as blogs and social networking sites.

Disclosure of Material Connections in Blogs and Other Forms of Consumer-Generated Media

The FTC has long held that “material connections” (e.g., payments or free products that the consumer would not expect) between marketers and endorsers must be disclosed. However, not all statements in consumer-generated media (e.g., blogs, social networking sites, etc.) about product attributes or consumer experiences are considered “endorsements” within the meaning of the Guides. Whether messages conveyed by bloggers or other “word of mouth” marketers are “endorsements” will be decided by the FTC on a case-by-case basis.

The fundamental question is whether, when viewed objectively, the relationship between the marketer and the speaker (e.g. blogger, Facebook friend) is such that the speaker's statements can be considered “sponsored” by the marketer and, therefore, a “marketing message.” A key question to ask is whether or not the speaker is: (i) acting solely independently, in which case there is no endorsement; or (ii) acting on behalf of the advertiser or its agent, such that the speaker's statement is an “endorsement” that is part of the overall marketing campaign?

While the facts and circumstances that will determine the answer are extremely varied, they would include:

- Whether the speaker is compensated by the marketer or its agency
- Whether the product or service in question was provided for free by the marketer
- The term of any agreement
- The length of relationship
- The previous receipt of products or services
- The value of the items and services received

For example, a consumer who purchases a product with his or her own money and praises it on a personal blog or an electronic message board will not be providing an endorsement, while postings by a blogger who is paid to speak about a marketer's product will be covered by the Guides, regardless of whether the blogger is paid directly by the marketer itself or by a third party on behalf of the marketer.

These two examples likely represent the far ends of the spectrum. However, the FTC also provided another example where the issue is more ambiguous. According to the FTC, if a blogger receives merchandise from a marketer with a request to review it, but is not paid any compensation other than the value of the product itself, whether or not any positive statement the blogger posts would be deemed an "endorsement" would depend on, among other things, the value (While there is no specific dollar amount, this is where judgment and discretion come into play and probably a discussion with counsel) of the product and whether the blogger routinely receives such requests from any market within the same product of service category.

Significantly, the FTC will consider the marketer's efforts to:

- Advise the blogger of the blogger's responsibility to disclose his/her relationship with the marketer
- Monitor the blogger's online behavior prior to taking any action against a marketer (or its PR firm) for a blogger's failure to disclose a "material connection."
- Advise the blogger of what the marketer's product or service can do.

Thus, it is important for a marketer (or its PR firm) to advise bloggers (or other "word of mouth" marketers) that they should disclose "material connections" with the marketer if sponsoring consumer-generated media; when posting positive reviews about the marketer or its products. The marketer (or its PR firm) should also institute procedures for monitoring the blogger's statements and should take appropriate steps (e.g., cease sponsoring the blogger) if the blogger does not make the necessary disclosures.

Misleading or Unsubstantiated Statements in Blogs and Other Forms of Consumer-Generated Media

Under the revised Guides, a marketer could be liable for a blogger's or other "word of mouth" marketer's misleading or unsubstantiated statements in consumer-generated media. However, a marketer would only be subject to liability if an endorser-sponsor relationship exists. If such a relationship exists, and the blogger makes a misleading or unsubstantiated statement about the marketer's product, the FTC, when determining what action, if any, would be warranted, will consider the marketer's efforts to:

- Advise the blogger of blogger's responsibilities
- Monitor the blogger's on-line behavior

However, if the marketer hires a blog service for the purpose of promoting its products, the FTC believes it is reasonable to hold the marketer responsible for statements made by blogger.

Social Media Participation

The revised Guides would require that an employee who promotes his/her employer's products or services on an online message board to clearly and conspicuously disclose his/her employment relationship to readers of the message board. Although this has been the preferred practice by Marketers for some time, this has now become required.

In instances where the employer has instituted policies and practices concerning employee "social media participation" and the employee fails to comply with such policies and practices, the FTC agreed that the establishment of appropriate procedures would warrant consideration in any decision whether it would take action against the employer. Accordingly, (to the extent a marketer has not already done so), marketers are strongly encouraged to institute employee social media policies and procedures.

Celebrity Endorsements

Previous version of the Guides did not explicitly state that celebrity endorsers as well as marketers could be held liable under the FTC Act for statements they make in an endorsement. However, the revised Guides make clear that both marketers and celebrity endorsers may be held liable for false and unsubstantiated claims made in an endorsement.

The revised Guides also require that a celebrity touting a product or service outside of traditional advertising, such as in talk shows, interviews, or social media (e.g., Twitter, Facebook, etc.), disclose his/her relationship with the marketer if such relationship is not readily apparent to the audience. The FTC provided the example of a well-known tennis player who appears on a television talk show and touts the success of her recent laser vision correction surgery at a clinic identified by name but does not disclose that she has a contractual relationship with the clinic. Absent such a disclosure, this endorsement would likely be considered deceptive and could subject the marketer and celebrity to liability. Notably, however, evidence that the marketer had previously advised the celebrity about what she should and should not say and the need to disclose their relationship in the course of the interview, would provide a strong argument for the FTC not to take action against the advertiser if the celebrity failed to disclose her relationship or made unauthorized claims about the marketer's product.

THE BOTTOM LINE

The revised Guides will likely require marketers to alter their use of endorsements and, to the extent they have not done so already, adopt policies regarding blogs and other forms of consumer-generated media. We strongly encourage marketers and their public relations firms to be proactive in their response to the revised Guides by establishing policies and procedures that respond to the FTC's changes, including the following:

- Marketers should advise bloggers with whom they have a material connection (e.g., provide payment or free product (in certain instances), blog service, etc.) to disclose their relationship with the Marketer whenever making a positive review about the Marketer or its products or services.
- Marketers should monitor their bloggers to ensure that they make the necessary disclosures and that their statements are not misleading or unsubstantiated. If the blogger does not make the necessary disclosures or makes misleading or unsubstantiated statements about the Marketer's products, the Marketer should cease sponsoring the blogger and take steps necessary to halt the publication of misleading or unsubstantiated representations when they are discovered.
- If hiring a blog service, the Marketer should confirm that the service provides guidance and training to its bloggers to ensure that the necessary disclosures are made and the statements made by bloggers are truthful and substantiated.
- Employees of the Marketer or its PR firm should clearly disclose their relationship to Marketer if posting messages on on-line discussion boards.
- Marketers should institute policies and procedures concerning employee "social media participation."
- "Street Team" members who receive any form of consideration for promoting Marketer's products (e.g., rewards points) should disclose their connection to the Marketer and the Marketer should take steps to ensure that these disclosures are being provided.
- When celebrities are paid for touting products in media, such as talk shows, interviews and social media sites (e.g., Twitter, Facebook, etc.), the celebrity should disclose his/her relationship with the Marketer.

- Spokespeople should undergo media training to ensure they understand what disclosures must be made in non-traditional media, such as talk shows, interviews and social media sites (e.g., Twitter, Facebook, etc.), and what representations they can make about the Marketer's product.

The following document is intended to provide guidance to the public relations industry regarding the revised Guides and recommended best practices. However, it does not cover every nuance of the revised Guides or all applicable state and federal laws. As such, always consult legal counsel when planning or preparing to engage in any of the activities discussed in this memo.

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