

The Federal Trade Commission (FTC) And Social Media Advertising

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Litigation

In recent years, companies have been expanding their marketing practices to embrace blogging and other social media, such as Facebook, Twitter and Pinterest. Generally speaking, the FTC treats social media the same as it does traditional media – the same three basic principles apply that apply to any advertising under the **Federal Trade Commission Act**: (1) the advertising must be truthful and non-deceptive; (2) the advertiser must have evidence to back up its claim and (3) the advertisement cannot be unfair.^[1]

Recognizing, however, that the digital marketing landscape is both exploding and rapidly changing, the **Federal Trade Commission** (“**FTC**”) is currently re-examining its online advertising guidelines known as the “Dot Com Disclosures.” On May 30, 2012, the FTC hosted a one-day public workshop to solicit industry input regarding the need for new guidance to address rapidly emerging mobile marketing technologies and to update the Dot Com Disclosures enacted in 2000. From May 30 to July 11, 2012, FTC accepted public feedback following that workshop and is now in the process of reviewing the information submitted from the public. FTC has not indicated when the new guidelines will be published, but it is certain that they will have a significant impact on how companies implement social media marketing in the future and on the types of disclosures that they make.

I. The Dot Com Disclosures

The Dot Com Disclosures were initially promulgated to address online shopping and advertising in a web-based environment. Among other things, the FTC: (1) reminded advertisers that the same consumer protection laws that apply to commercial activities in other media apply online; (2) also reminded them that disclosures are required to prevent an ad from being misleading and must be clear and conspicuous; (3) explained to advertisers how to make a disclosure “clear and conspicuous” on the web^[2]; and (4) advised advertisers that Commission rules and guides that use specific terms such as “written,” “writing,” “printed” or “direct mail” are applicable to new technologies. It is these guidelines that the FTC is in the process of updating to adapt them to smartphones and other new technologies.

II. The Endorsement Guidelines

The Endorsement Guidelines (the “Endorsement Guides” or “Guides”) address application of

Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides give the FTC the power to prevent “unfair methods of competition in or affecting commerce . . .”^[3] However, they are administrative interpretations of the law intended to help advertisers comply with the FTC Act; they are not binding law themselves.^[4]

The Endorsement Guides were originally published in 1975 and updated in 1980. They were updated again in 2009 to address social media and Internet advertising. Under the revised Guides, advertisements that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect. In contrast to the 1980 version of the Guides – which allowed advertisers to describe unusual results in a testimonial as long as they included a “results not typical” disclaimer – the revised Guides no longer include this safe harbor.^[5]

The revised Guides added new examples to illustrate the long-standing principle that “material connections” between advertisers and endorsers – connections that consumers would not expect – must be disclosed. The revised Guides specified that while decisions will be reached on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement.^[6] Likewise, if a company refers in an advertisement to the findings of an organization that conducted research sponsored by the company, the advertisement must disclose the connection between the advertiser and the organization.

Endorsements may include statements in consumer-generated media, which require disclosure of the connection between the advertiser and the endorser. The FTC defines endorsement as any advertising “that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”^[7] The revised Guides make it clear that both advertisers and endorsers may be liable for false or unsubstantiated claims made in an endorsement – or for failure to disclose material connections between the advertiser and endorsers. Endorsers also have a duty to disclose their relationships with advertisers when making endorsements outside of traditional ads, such as on talk shows or in social media.^[8]

The FTC included the following example to highlight when a statement in consumer media is an endorsement, and when it is not:

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog’s fur noticeably softer and shiner, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchase, and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.^[9]

Ann Taylor Stores

Not long after the revised Guides went into effect, the FTC launched an investigation of Ann Taylor Stores Corp. regarding the company providing gifts to bloggers “who the company expected to post blog content about the company’s LOFT division.”^[10] The FTC was concerned that bloggers who attended previews of the summer 2010 collection “failed to disclose that they received gifts for posting blog content about the event.”^[11] In a letter to Ann Taylor’s counsel, the FTC wrote “Section 5 of the FTC Act requires the disclosure of a material connection between an advertiser and an endorser when such a relationship is not otherwise apparent from the context of the communication that contains the endorsement.”^[12] The FTC ultimately decided not to pursue an enforcement action against Ann Taylor, reasoning that only a small number of the bloggers posted any content about the show, and many of them disclosed that Ann Taylor had provided gifts. In addition, Ann Taylor had adopted a written policy after the show, wherein it stated that “it would not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog.”^[13]

Hyundai

During SuperBowl XLV, Hyundai hired a PR firm to build buzz around its Super Bowl commercial. Bloggers were asked to write about the commercial and include links to Hyundai videos in their postings, and they were given a gift certificate. FTC sent Hyundai a letter in 2011 reminding the company of the “material connection” disclosure standard set forth in the Endorsement Guides.^[14] Significantly, the actions that concerned the FTC were not undertaken by Hyundai employees, but by the PR firm hired by Hyundai to conduct the social media campaign.^[15] The FTC considered this factor in deciding not to pursue an enforcement action against Hyundai, noting that Hyundai did not know in advance that gift certificates would be used, and some of the bloggers did disclose the gift certificates in their posts.^[16] Finally, as with Ann Taylor, the FTC also weighed the fact that Hyundai had an established social media policy that called for bloggers to disclose the receipt of any compensation in its decision not to pursue an enforcement proceeding.^[17]

In The Matter Of Reverb Communications

In late 2010, the FTC enforced the Guides against Reverb Communications, a company that performs marketing for gaming clients.^[18] Reverb employees posted positive reviews about client gaming applications in the iTunes store, creating the impression that they had been submitted by independent consumers.^[19] The FTC alleged that Reverb’s failure to disclose this connection between its employees and the postings was a “deceptive practice.”^[20] The result was a consent decree with injunctive relief and a decision that defined “material connection” as “any relationship that materially affects the weight or credibility of any endorsement and that would have not reasonably been expected by consumers.”^[21] After finding that Reverb failed to disclose an existing material connection, the FTC issued an order with reporting and compliance provisions for a period of 20 years, but did not assess monetary sanctions.^[22]

III. Conclusion

Both Ann Taylor and Hyundai benefited from good counsel and the adoption of written social medial policies for their advertising and marketing. Reverb was, arguably, not as prepared but was fortunate insofar as the FTC did not pursue monetary relief. The FTC has employed strategic enforcement actions and industry guidance to adopt the FTC Act to emerging technologies and marketing

platforms. It is critical that companies that use social media advertising develop a written social media policy that articulates standards of conduct for both employees and sponsored speakers or bloggers. For third parties and agencies, companies need to ensure that there is a clear demarcation of responsibility when it comes to training and monitoring speakers and bloggers. Standards of conduct must require that communications by sponsored speakers or bloggers reflect honest beliefs, opinions or experiences; not make objective claims about products or services without authorization; not be offensive, harassing, profane or derogatory; and not constitute deceptive or misleading statements about the products or services. Failure to follow these basic principles could result in the imposition of monetary penalties and/or reporting and monitoring requirements.

[1] Advertising FAQs: A Guide for Small Business/BCP Business Center, <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business>.

[2] By, for example, placing the disclosure on the same screen as the triggering claim, making hyperlinks to disclosures obvious and displaying the disclosures prior to consummation of the purchase.

[3] 15 U.S.C. 45(a)(1).

[4] <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

[5] *Id.*

[6] *Id.*

[7] 16 CFR § 255.0(b).

[8] <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

[9] 16 CFR § 255.0.

[10] See Letter from FTC to Kenneth A. Plevan, Esq. Re: Ann Taylor Stores Corp. (April 20, 2010) available at <http://ftc.gov/os/closings/100420anntaylorclosingletter.pdf>.

[11] *Id.*

[12] *Id.*

[13] *Id.* at note 19.

[14] Letter from FTC to Christopher Smith, Esq. Re: Hyundai Motor America (Nov. 16, 2011), available at <http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf>.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] See In the Matter of Reverb Communications, Inc., unpublished decision and order of the FTC, issued November 22, 2010 (Docket No. C-4310), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

[19] See In the Matter of Reverb Communications, Inc., unpublished complaint of the FTC, issued November 22, 2010 (Docket No. C-4310), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbcmpt.pdf>.

[20] *Id.*

[21] See In the Matter of Reverb Communications, Inc., unpublished decision and order of the FTC, issued November 22, 2010 (Docket No. C-4310), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

[22] *Id.*

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