

GROWING PROMOTIONAL USE OF SOCIAL MEDIA IN THE GOVERNMENT'S CROSSHAIRS THE NEW FTC GUIDELINES

By Alan L. Friel¹

Increasingly, marketing is occurring virally, particularly via the Internet, mobile and other evolving media, through word-of-mouth (“WOM”). Consumer-driven social media is well suited for WOM promotional purposes, and can take many forms ranging from paying or encouraging an influencer to post to a blog or tweet about a brand or a product they have reviewed or sampled, motivating consumers to initiate e-mails that send product listings or other information to friends via “send-to-a-friend” e-mail tools made available to consumers by online merchants or marketers; displaying a user’s name and/or picture in connection with an ad that is directed to the user’s friends on a social networking site; and eliciting product reviews on retail websites. Indeed, an August 2009 Communications Industry Forecast by private equity firm Veronis Suhler Stevenson predicts that PR and WOM spending will increase 4.9% in 2009, and will grow at a 9.2% compounded annual rate from 2008–2013, due in large part to the increase of brand promotion via social networks.

However, in response to abuse of social media by marketers, the Federal Trade Commission (“FTC” or “Commission”) has issued new guidelines that require certain policies and procedures for use of social media for commercial promotion as of December 1, 2009. The FTC has authority to hold the consumer, and the advertiser and its agency, liable for an online consumer-generated endorsement that fails to disclose a material relationship with the advertiser (such as “I get free products to review” or “I got an entry into a

sweepstakes to post about this TV series”) or includes a false, misleading or unsubstantiated claim. The FTC also issued new guidance on use of celebrity spokespersons and typicality disclaimers. Some brands and their agencies have certainly misused evolving media tools and betrayed the trust of consumers and the social communities with which they interact. Too frequently, campaigns have involved a marketer paying Internet users to post disingenuous positive product reviews, or “astroturfing,” where advertisers or their agents pretend to be unaffiliated consumers and spread misleading or false information in furtherance of the advertiser’s objectives via third party sites or FLOGS—fake blogs that purport to be objective but are really designed to covertly promote a product of the clandestine operator of the site. The Electronic Retailing Self-Regulation Program of the National Advertising Review Counsel, an industry self-regulatory entity, has filed actions against advertisers who ran supposedly informational blogs about topics such as diet and beauty and used them to promote their own products in seemingly objective editorial reviews. As another example, last January, it was widely reported in the media that the lead sales rep of networking-technology manufacturer Belkin was allegedly paying consumers to post positive reviews on Amazon.com and Newegg.com, without regard to whether they used or liked the product, and to mark negative reviews posted by others as “not helpful,” and was further counseling them on how to do so and to keep the connection to the company a secret.

FOOTNOTES

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SIMON SAYS

The FTC, which regulates both on-line and traditional advertising, has been concerned with the growth of such activities and, after much public comment by industry to its proposals, on October 2, 2009, published new guidance that will impact both rogue and good-intentioned evolving media marketers and their agencies. The FTC's updated guidance makes it clear that those involved in encouraging a message about their or their clients' products or services in non-traditional media, such that there is any kind of material connection between the marketer and the speaker, are responsible for the message. Although the FTC acknowledges the limited ability in social and other evolving media to clear and control these types of consumer-generated messages, it places the burden of the risk on both the sponsor and the speaker. The FTC notes that it has prosecutorial discretion and will likely target the more egregious cases and repeat offenders; however, it also instructs that it expects all brands and their agencies to have rules requiring disclosure of material connections and prohibiting the speakers from making unsubstantiated or misleading claims, to train them in these requirements and to monitor them and to take appropriate corrective actions if not followed. You may be surprised at how little consideration or connection, such as providing free product for a blogger to review, may be enough to trigger responsibility for what the blogger says about the product.

In January of 1980, the FTC published its *Guides Concerning Use of Endorsements and Testimonials in Advertising* (the "Guides"). Although intended as guidance for self-regulation, failure of marketers to comply with the Guides is grounds for the FTC to bring enforcement actions under its authority to regulate "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). In January of 2007, the FTC began the process of reviewing and revising the Guides and, in November 2008, it published a proposed version of the new Guides ("Proposed Guides"). The FTC solicited public comment to the Proposed Guides. Seventeen comments were submitted, most from major advertising-industry organizations. On October 2, 2009, notice of the final revised Guides ("New Guides") was issued by the FTC, making some modifications and additions to the Proposed Guides regarding evolving media and providing commentary on the public comments that had been filed. The New Guides are effective as of December 1, 2009 and call, among other things, for marketers to institute social and evolving media policies and procedures by that time.

This article explores the changes to the Guides, with regard to how the New Guides affect recommendation and social marketing in evolving media channels and counsels advertisers and agencies to enact policies and practices regarding social media that explain, and direct observance of, the principles of the New Guides, monitor for compliance and, where possible, require corrective action for non-compliance.² There are a myriad of other issues, such as vicarious or contributory copyright or trademark infringement, blurring of advertising and editorial, CAN SPAM³ regulation of commercial e-mail, TCPA⁴ and MMA⁵ regulation of mobile marketing, privacy and data security regulation, constraints on marketing to children and sweepstakes and lottery laws that should also be incorporated into such policies and practices, but that are beyond the scope of this article.⁶

THE NEW GUIDES

A significant revision to the introductory sections of the Guides is the addition of § 255.1(d), which the FTC notes was added to "explicitly recogniz[e] two principles that the FTC's law enforcement activities have already made clear. The first is that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. The second is that endorsers may also be subject to liability for their statements." The FTC, however, suggests some ways sampling and engagement of consumers via evolving media channels should, in the FTC's opinion, be conducted: "In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and

FOOTNOTES

² This article does not discuss all of the changes and clarifications set forth in the New Guides, particularly those not directly related to evolving media (e.g., requiring disclosure of payment of an outside research's study costs when that study is later touted by the advertiser).

³ The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or CAN SPAM, and the regulations thereunder, create a federal scheme for commercial e-mail. States have limited retained authority to regulate e-mail in the area of fraud and computer crime.

⁴ The Telephone Consumer Protection Act, or TCPA, and related regulations, impose requirements on marketing to mobile devices.

⁵ The Mobile Marketing Association ("MMA") provides self-regulatory best practices regarding mobile marketing, and updated its U.S. Consumer Best Practices Guidelines on July 1, 2009.

⁶ See Friel and Derwin-Weiss, "As Technologies Evolve, Web Sites Play Compliance Catch-Up," *Daily Journal* (March 10, 2009) and "Evolving Media Tools Require Companies to Navigate Changing Waters," *Daily Journal* (March 17, 2009) (both republished as "Evolving Media Tools," *M/E Insight—The Journal of the Association of Media and Entertainment Counsel* (July 2009), and Friel and Derwin-Weiss, "So You Want to Run a Promotion?," *Corporate Counselor* (Spring 2009).

substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.” Such policies and practices are not a safe harbor, however, and the FTC will look at the totality of the circumstances in determining whether to bring an action.

Not every consumer-generated recommendation of a product or brand will be deemed an “endorsement” for which the brand will be responsible. The Commission outlined a “construct for analyzing whether or not consumer-generated content falls within the definition of an endorsement.... such that the speaker’s comment can be considered ‘sponsored’ and therefore an ‘advertising message,’ “the FTC will ask: “In disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’...” The FTC’s commentary suggests a “spectrum,” where a blogger’s one-time receipt of a low value product would likely not be treated as an endorsement, but if the product had a high value or the blogger routinely was sent product to review, sponsorship would likely be found. If any payment is made, sponsorship is certain. With respect to celebrities, the FTC now requires them to disclose sponsor relationships when promoting products on talk shows or in social media, finding that consumers would not necessarily assume they have been paid or received something of value such as they would when a celebrity appears in an ad or a television commercial (where disclosure is not required).

The New Guides further clarify that those engaging endorsers, including consumer and celebrity endorsers, in social media, “possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support efficacy claims made through endorsements, just as the advertiser would be required to do if it had made the representation itself.” Anecdotal evidence about the individual experience of consumers is not sufficient to substantiate claims, and if the consumer’s message is deemed a sponsored message, the advertiser is responsible for what is said. The New Guides do away with the current safe harbor provided by disclaimers of typicality. The prior Guides allowed advertisers that use non-representative consumer testimonials to “clearly and conspicuously disclose the limited applicability of the endorser’s experience to what consumers may generally expect to achieve.” That is, a clear and conspicuous disclosure that “results are not typical” sheltered the advertiser from liability. The New Guides require that, when a testimonial conveys that the endorser’s results are what consumers can generally expect to achieve and the advertiser does not possess adequate substantiation for that claim, the advertiser must “clearly and conspicuously disclose the generally expected performance in the depicted circumstances.” The New Guides also clarify celebrity spokesperson liability if the endorser makes statements, even if scripted and contractually required to be read, he personally makes contrary to “what he observed with his own eyes, not for things outside of his control” or that he should know are exceptional or unlikely.

The FTC also clarified that these rules apply to a company’s employees and those of its agencies. In one example given by the Commission, an employee of a company that manufactures MP3 players posts messages online at a message board designed for discussion of MP3 players. The employee’s posts promote her employer’s products, but she does not reveal that she is employed by the manufacturer. Because “knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement,” she must clearly and conspicuously disclose her relationship to the manufacturer. This example is far less controversial than the examples involving consumers, given that the employee is capable of being directed and controlled by the advertiser, even when acting during personal time. In response to a comment by industry that a company that has a social media participation program and appropriate policies and practices should not be responsible for a rogue

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employee that fails to follow the rules, the FTC responded that “appropriate procedures would warrant consideration” and noted that it had never brought an enforcement action against a company for an isolated incident of failure to follow adequate company policy.

The FTC goes on to state that “the advertiser should take steps to ensure that these disclosures are being provided,” but does not give guidance as to what it expects to see in the form of disclosures or monitoring and corrective action. Disclosure becomes more difficult in a chat room or on Twitter, where there is a limitation on the amount of content that can be posted. An evolving disclosure method in such instances is to add the text “Sponsored Post”, “#paid” or “#Ad.” A new service at <http://cmp.ly/> provides free mini URL links to detailed disclosures and upsells monitoring services. Whether these notices and monitoring efforts will meet the FTC’s requirements is yet to be determined. As for corrective action when monitoring indicates non-compliance, the FTC suggested that an appropriate corrective action to a consumer blogger that failed to follow appropriate rules relating to sponsored posts might include to “cease providing free product to the individual” and to sever relationships with those that don’t follow the rules.

The failure to disclose a material connection might also support unfair business practices, fraud or other causes of action. For instance, in his December 2009 defamation law suit against celebrity Kim Kardashian, Dr. Sanford Siegal, of the Cookie Diet Fame, alleges “Kardashian failed to include in her... [allegedly false tweets about the Cookie Diet] the fact that she is a paid spokesperson for Quick Trim, thereby providing her with the commercial motive for her to defame Dr. Siegal and Dr. Siegal’s Cookie Diet Company.”*

THE NEED TO DEVELOP POLICIES AND FOLLOW BEST PRACTICES

In traditional media, it is relatively easy for an advertiser that is selecting and publishing consumer endorsements to meet FTC requirements. In emerging media, however, even where the advertiser is paying or otherwise motivating consumers to blog, tweet, e-mail or text, it frequently lacks the ability to review the substance prior to publication and, in many instances, will not even have the ability to see what was published. Nonetheless, the FTC may hold the brand and its agency liable for such claims; particularly if they did not exercise best efforts to control, prevent and rectify the misleading, unsubstantiated or otherwise legally insufficient statements of the consumer.

Accordingly, the FTC is placing the risk of viral and social marketing’s lack of control on marketers and their agencies, and telling them that they had better institute sound policies and practices to make reasonable efforts to prevent activities that may result in consumer confusion, including monitoring celebrity spokespersons

in non-traditional media and employees, vendors and consumers it engages to send sponsored messages into social media, and to take appropriate actions when violations are discovered.

Every company, and all PR, marketing and advertising agencies that utilize social media for promotional activities, should have and enforce policies and practices for its own use of social and other evolving media, as well as use by its employees, spokespersons, vendors and agents, including regarding how consumers are engaged, educated, monitored and handled. Best practices reflective of the FTC’s guidance are already emerging and many companies have already instituted the policies and procedures foreshadowed by the Proposed Rules. In May of 2009, in anticipation of the New Guides, IZEA, a blog-network-advertising firm that pairs advertisers’ products with relevant bloggers, began providing its clients with reports tracking whether its bloggers were disclosing compensation arrangements. Companies can also look to industry best practices to guide them in developing their own policies. The FTC specifically pointed to the Word of Mouth Marketing Association (“WOMMA”) Ethics Code and Code of Conduct (www.WOMMA.org/ethics/) as an “important step” to ensuring “transparency for marketers who engage in new forms of marketing.” WOMMA requires disclosure, veracity and transparency and prohibits cash payments to consumers for their support. The Interactive Advertising Bureau (“IAB”) has published Social Media Advertising Best Practices (<http://www.iab.net/socialads>). The Children’s Advertising Review Unit (“CARU”), another industry self-regulatory body, is currently examining use of social media for sell messaging to children as part of soon to be announced guidelines on blurring, which counsels for a more conservative approach regarding children and teens. These various industry best practices are a good place for a company to start when developing policies and practices under the guidance of experienced legal counsel. Such policies and practices, along with ongoing training and compliance review, will help you navigate the complexity of this developing field and reduce potential liability and negative consumer backlash.

* [Dr. Sanford Siegal & Dr. Siegal's Direct Nutritionals, LLC v. Kim Kardashian, Circuit Court Miami - Dade County, FL \(Case No. 09-93439CA15, filed December 9, 2009\)](#)

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