

Legal Update

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Complying with the FTC's Blogging Guidelines

By Seth A. Stern

Federal Trade Commission (FTC) Guidelines impose new requirements for businesses that use blogs and other new media for marketing. The Guidelines provide that “[a]dvertisers are subject to liability for false or unsubstantiated statements . . . or failing to disclose material connections between themselves and their endorsers. Endorsers may also be liable for statements made in the course of their endorsements.”

Thus, a business must be aware of the Guidelines both when allowing an affiliated website to discuss the business's services and when discussing an affiliate's services on its own site.

When an Endorsement is Problematic

In determining whether a connection with an endorser must be disclosed, the FTC looks to several factors, including whether the endorser was compensated; whether the endorser received the endorsed item for free; the length and nature of the relationship between the endorser and the endorsed company; and the value of the products or services the endorser received. A blogger's employment by or affiliation with an endorsed company would likely need to be disclosed, as would an arrangement between two companies for reciprocal endorsement of each other's products.

The Guidelines provide the example of a respected video-gaming blogger who, on several occasions, has received new video game systems from a manufacturer, and state that:

Because [the blogger's] relationship to the advertiser is not inherently obvious . . . the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

On the other hand, the Guidelines explain that someone who gets a sample bag of pet food because the grocery store where she shops generates coupons of interest to its customers need not disclose the free pet food if she were to review it on a blog. This is likely due to the absence of a *quid pro quo* arrangement – the store did not provide the pet food with the expectation that the customer would review it on a blog.

Endorsements may be subject to numerous requirements in addition to disclosure of “material connections” – for instance, endorsements must reflect the honest opinions and experiences of the endorser and an endorsement cannot falsely represent that the endorser uses a product. Advertisers, as well as endorsers, are subject to liability for false or unsubstantiated statements made in endorsements.

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Until the FTC or the courts resolve the numerous gray areas regarding the Guidelines' reach, companies should err on the side of caution and disclose any connection that might be material.

New Media v. Traditional Media

The Guidelines define "material connection" as a connection "not reasonably expected by the audience." The FTC subjects bloggers to stricter disclosure requirements because their readers do not assume that they have been compensated. For instance, the FTC would not require disclosure by a newspaper movie critic who attends free critics' screenings, as it "does not consider reviews published in traditional media to be sponsored advertising." An independent blogger, however, is required to disclose free tickets.

Further, the FTC explains that the "material connections" disclosure requirement applies more strictly to new media than traditional media because the FTC assumes that traditional media outlets exercise "independent editorial responsibility."

Distinctions are not just made between newspapers and blogs. Sometimes the outcome depends on the identity of the blogger. Movie star Gwyneth Paltrow recently blogged her praises of a Moroccan hotel after attending its grand-reopening. Asked if Paltrow should have disclosed her presumably free stay, an FTC official responded, "celebrity endorsements are a little different" because consumers expect that celebrities "are always getting free stuff."

As evidenced by the Paltrow example, the Guidelines' reach is uncertain and will lead to further questions as online marketers continue to innovate. Some practices which commentators have noted could be problematic include "affiliate marketing," where a business rewards outside websites for each visitor or customer directed to the business's site, and online "astroturfing" campaigns designed to give orchestrated marketing the appearance of a grassroots movement.

Conclusion

To comply with the Guidelines, companies should remind any affiliated bloggers of their obligation to clearly and conspicuously disclose their affiliation with the company. Companies should also disclose "material connections" with companies they mention on their own blogs.

The FTC notes that "the establishment of appropriate procedures would warrant consideration in its decision as to whether law enforcement action should be appropriate" against a company or blogger. FVLD creates blogging and social media policies that incorporate the FTC's blogging Guidelines as well as other policies designed to prevent and minimize potential liability arising from use of new media.

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