MARKETING

Required Disclosures in Social Media

by Ashly Iacullo Boesche

With the emergence of new media and advertising methods come the application of "new" rules. These new rules, however, are based on old principles—truth and transparency.

In December 2009, FTC revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides) to clarify they apply to social media. The Guides are designed to ensure endorsements reflect the honest opinion, belief, finding or experience of the endorser. They also emphasize that advertisers may be liable for failing to disclose material connections between the advertiser and endorser. Essentially, the Guides require advertisers and their endorsers to disclose whether a product review, blog or other related content is a result of a compensated relationship that consumers might not otherwise expect. Before offering incentives to boost positive online reviews, it is important for advertisers to know the implications of allowing compensated bloggers to pose as ordinary consumers.

In 2010, FTC conducted its first public investigation under the Guides, which involved a well-known women's apparel retailer, Ann Taylor LOFT. In its promotion of its 2010 collection, Ann Taylor hosted a fashion show and encouraged attendees to blog about the collection for an opportunity to win a $10 gift card. Although Ann Taylor posted a sign at the event instructing attendees to disclose the gift card incentive, it was not clear how many attendees actually saw the sign, and consequently, many failed to do so. Ultimately, FTC decided not to pursue any further enforcement, citing mitigating factors, including the small number of attendees who actually posted content and Ann Taylor's written policy, which states it will not issue any gift to any blogger without providing notification to the blogger that she must disclose the gift in his or her review.

In its second public investigation, FTC initiated an enforcement proceeding against a public relations firm, Reverb Communications, for failing to sufficiently disclose its material connection to a client while promoting the client's gaming software by posting favorable reviews on the iTunes store. FTC believed these reviews created the false impression that ordinary consumers of the software authored the reviews rather than those compensated by software developer. Reverb was ordered to remove the endorsements and was further barred from publishing reviews of any product where a material connection existed unless the connection is "clearly and prominently" disclosed.

The Reverb decision is particularly instructive on what constitutes a "clear and prominent" disclosure in various types of media. In text communications, the disclosure must be "sufficiently noticeable" for an "ordinary consumer" to read and comprehend in a print that contrasts with the background on which they appear. In video advertisements, the same standards apply, but the disclosure must appear on the screen for a sufficient time to allow consumers to actually read them. In audio communications, the disclosure must be of sufficient volume and cadence for an ordinary consumer to hear and understand them. And, finally for interactive media advertisements, such as Internet and software, the disclosure must be "unavoidable" and consistent with the requirements for text, audio and video disclosures.

In its most recent action involving the Guides, FTC elaborated on the importance of the advertiser's obligation to monitor these disclosures. In Legacy Learning Systems Inc., Legacy recruited "Review Ad" affiliates to promote its instructional guitar courses through positive online reviews, blogs and articles that contained hyperlinks to Legacy's website in close proximity to the endorsement. Legacy paid a commission for these referrals, which generated more than $5 million in sales. Despite the existence of a disclosure policy, many affiliates provided inconspicuous disclosures or none at all. Because the disclosures were nonexistent or insufficient, they created the appearance that the authors were ordinary consumers or independent reviewers. FTC concluded Legacy failed to implement a reasonable monitoring program to ensure its affiliates clearly disclosed their material connection or relationship to Legacy. Accordingly, FTC determined the positive online reviews were false and misleading, and the failure to disclose the connection was deceptive. Legacy agreed to the consent order, which included a $250,000 civil penalty, requirements for clear and prominent disclosures and a 20-year monitoring program with monthly reporting requirements.

The Legacy case highlights the importance of advertisers' obligations to monitor all sponsored posts for appropriate disclosures.

Like endorsers, employees are also obligated to disclose their affiliation when posting online reviews of their company's products or services. Even if an employee's Facebook page states they are employed by the advertiser, the employee should disclose the connection in the actual post.

No doubt social media platforms provide advertisers with the ability to reach an ever increasing audience—750 million-plus active accounts on Facebook who spend approximately 700 billion minutes logged in to the site per month; more than 100 million plus active users on Twitter tweeting almost 200 million times a day; and more than 490 million unique users on YouTube that draw in more than 92 billion views per month. Yet, these new technologies present new legal challenges and exposure. Advertisers are not only required to have social media policies for their compensated bloggers and employees, but need to take part in the education and monitoring process. ■

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