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New FTC Guidance for Endorsements and Testimonials in Advertising

Social Networking Sites, Blogs, Twitter: Threats to Section 5 Compliance

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New FTC Guidance for Endorsements and Testimonials in Advertising, Social Networking Sites, Blogs, Twitter: Threats to Section 5 Compliance

Gary D. Hailey
Venable LLP
January 20, 2010



I. INTRODUCTION

1. What are the Guides?
 - a. They are neither statutes nor rules. The relevant statute, Section 5 of the Federal Trade Commission Act, was enacted in 1914 and has been substantially unchanged since 1927. It prohibits “unfair or deceptive acts and practices in or affecting commerce.”
 - b. They represent a statement by the chief federal law enforcement agency concerning what it thinks constitutes an unfair or deceptive act or practice when using an endorsement or a testimonial in advertising. In other words, it’s a Guide on “How Not to Get Sued.”



2. The original Guides were issued in final form in 1980 and have been unchanged since. The new Guides were announced on October 5, 2009 and have an effective date of December 1, 2009.

3. The three most important changes in the new Guides related to consumer endorsements, new media and, to some extent, celebrity endorsements.

4. The Guides define “endorsement” as “any advertising message that consumers are likely to believe reflects the opinions . . . of a party other than the sponsoring advertiser” – including consumer bloggers.



II. CONSUMER ENDORSEMENTS

A. The Old Guides

1. The original Guides, as issued in 1980 under which we have been operating, provide that a statement by a consumer testimonial (or endorsement, the two terms are used interchangeably) about the consumer's experience with a key attribute of the product or service being advertised will be taken as a representation by the advertiser that consumers can expect to have substantially the same kind of experience with the product or service as it described in the testimonial.

2. In other words, if a consumer endorser states that, in using a weight loss product, he/she lost, say, 30 lbs, the advertiser is representing that the average consumer will lose 30 lbs. using the product. If the advertiser does not have substantiation for that claim, and frequently they do not, the advertiser has two choices:



- a. State what the expected experience by a consumer will be (for example, state that “Average weight loss with this product is 10 lbs.”) or
- b. Disclaim the typicality of the consumer testimonial’s experience using the ubiquitous quote “Your experience will vary,” or “Experience not typical; yours will vary.”

3. The FTC did some tests with print advertising and concluded that most consumers were not paying attention to the disclaimers in consumer endorsements and, in fact, were continuing to take away the idea that the statement by the consumer described in the endorsement was, in fact, typical.



B. The New Guides

1. The amended Guides are different from the existing Guides in two major ways:

a. As opposed to the old Guides, which said that a consumer endorsement “will” be taken as a representation that consumers will have the same experience, the new Guides state: “ An advertisement containing an endorsement relating to the experience of one or more consumers on a central or key attribute of the product or service . . . will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use”



- b. However, the new Guides also remove the “safe harbor” that used to exist for the “typicality disclaimer” approach. They state: “If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.”
- c. So under the revised Guides, marketers will have two options: (1) The first will be the same option as they had under the previous Guides – if they cannot establish that the experience of the endorser is typical, state what they believe the generally expected performance will, in fact, be (*e.g.*,



“average weight loss is 2 lbs. per week”). (2) The second option is to make sure that the “net impression” of the advertisement removes any possibility that FTC could claim that the advertiser is making a representation that the experience of the endorser is typical.

Let’s explore both options.



III. DISCLOSURE OF GENERALLY EXPECTED PERFORMANCE IN THE DEPICTED CIRCUMSTANCES

This is new language in the Guides that was intended, according to the FTC, to provide “some reasonable leeway” to advertisers. That phrase was used instead of “average” in order to communicate that the disclosure does not have to be based on “exact mathematical average” results of users of the product. Also, if the average was based on a particular study, (user groups will not be sufficient), the experience of the population in the study can be described (*e.g.*, “In an 8-week clinical study, men who were at least 30 lbs. overweight lost an average of 2 lbs per week.”)

The details of what is good enough will take some time to work out.



IV. REMOVING THE IMPLICATION OF TYPICALITY

The other option: make sure that there is no representation of typicality that can be drawn from the consumer endorsement. Options for this include: (a) use a range of testimonial results (*e.g.*, in the case of a weight loss product, 10 lbs., 20 lbs., 30 lbs. and 90 lbs.); (b) where there is an “outlier” testimonial result, do a detailed interview to identify the reasons why the person’s outcome was so much better than the others; (c) statements by the host or voiceover describing what the advertiser thinks the expected outcome will be (perhaps based on an expert opinion from a qualified expert) coupled with statements that, for example, “what you get out of this is going to depend on what you put into it;” (d) finally, disclaimers are no longer the “magic bullet” but can be utilized and, if clear and prominent, will be taken into account by the FTC along with other features described above.



IV. SUMMARY ON CONSUMER ENDORSEMENTS

The consumer endorsement changes apply with the most force to “quantifiable” claims – pounds lost, money earned, amount of hair grown – rather than “softer” or “lifestyle” testimonials describing, for example, how the product made an endorser feel. Obviously, this means that the endorsement rules will have their greatest impact in the weight loss and business opportunity fields. Moreover, because the FTC focuses on certain areas of the American economy/advertising claims and not others – for example, the Commission acknowledges that it is much more interested in health care claims such as weight loss, stopping smoking and the like, rather than, for example, cosmetic claims – the impact of the Guides may depend on whether they are adopted by other agencies as well.



For example, most skin care claims are considered by the National Advertising Division of the Better Business Bureau or ERSP, not FTC. It is unclear how these entities will treat the new Guides. The adoption by network and station clearance officials and state courts is also unclear.



V. NEW MEDIA IN THE AMENDED GUIDES

Even under the old Guides unexpected connections between an endorser and the marketer had to be disclosed. For example, you can't pay someone for their endorsement unless you disclose it. Similarly, if endorsers are employees of the marketer, or a relative of the marketer, that must be disclosed.

All these rules continue under the new Guides but they have been expanded to include “new media” such as bloggers or “word-of-mouth” marketers. The fundamental question for each is whether the speaker is (1) acting independently or (2) acting on behalf of the advertiser or its agent. If the latter, the statement is an endorsement.

The critical question: whether the speaker was compensated by the advertiser, *i.e.*, whether the product or service was provided for free by the advertiser, the previous receipt of products or services from the same or similar advertisers, the likelihood of future receipt of such



products or services, and the value of the items or services provided, even if the advertiser does not control the specific statement in the blog or other form of consumer-generated media, the statement can still be an endorsement.

A consumer who posts about a product purchased with his or her own money is not providing an endorsement within the meaning of the FTC Guides – it is not a “sponsored” advertising message.

If a consumer receives a single free sample from a marketer and writes positively about it, the comment is not deemed an endorsement because of the lack of a continuing relationship with the advertiser.

But postings by a blogger who is paid to speak about an advertiser’s product will be covered by the Guides regardless of whether the blogger is paid by the marketer or by a third party on behalf of the marketer.



A “one off” transaction – “try this and tell us what you think” – will almost never be considered an “endorsement.” A stream of product where the recipient has an incentive to react positively to ensure receipt of future products will be likely deemed to give rise to an “endorsement” within the meaning of the Guides.

If the statement by the blogger is an endorsement, the relationship with the marketer must be disclosed both by the marketer and the blogger. This means that the advertiser must ensure that the advertising service it uses to interface with bloggers and word-of-mouth marketers has to provide guidance and training to ensure that statements by bloggers are truthful and substantiated.

The marketer must also be prepared to monitor bloggers and take steps to halt continued publication of deceptive representations when they are discovered – or at least terminate future relations with the bloggers.



Similar rules apply to, for example, postings by employees of the marketers on independent message boards where the relationship is not disclosed, as well as “street teams” whose members are paid to talk up the benefits of particular products in exchange for compensation such as prizes.



VI. SUMMARY

For the first time, the responsibility of a marketer does not end when the commercial is approved and trafficked. The marketer is now expected to follow up on what is being said about its product by third parties who have been directly, or indirectly, compensated by the marketer. How the Commission enforces these new rules will be a subject of considerable interest to the advertising community.





Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

SOCIAL/NEW MEDIA AND THE FTC'S REVISED GUIDES ON ENDORSEMENTS AND TESTIMONIALS

January 20, 2010

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What is Social Media?



WIKIPEDIA



What is Social Media?

- User-generated multimedia content
- Blogs/Vlogs/Chat rooms
- Wikis/Crowdsourcing
- Tweets
- Podcasts
- Word-of-mouth marketing, e.g., street teams
- Viral campaigns

Social Media: Is There an Endorsement?

What is an Endorsement?



- Ad message that consumers likely to believe reflects opinion of a party other than sponsoring advertiser
- May be same as advertiser's opinion
- Endorser may be individual, group or institution

Before: Focus on whether consumer likely to believe a statement reflects views of endorser

Now: Focus on whether advertiser *sponsoring* message

Is a Social Media Message “Sponsored”?

- Is speaker (1) acting independently or (2) acting on behalf of advertiser or its agent?
- Fact and circumstances dependent
 - Is speaker is compensated by the advertiser or its agent?
 - Was the product or service in question provided for free by the advertiser?
 - What are the terms of any agreement?
 - What is the length of the relationship?
 - Has the speaker previously received products or services? Future receipt likely?
 - What is the value of the items or services received?



Is there an Endorsement?

- Consumer purchases expensive dog food; she blogs that the food made her dog's coat shinier
- Consumer given free dog food at store because of store tracking her purchases
- Consumer given free dog food as member of trial marketing program
- Major pet magazine reviewer given free dog food for review purposes



Bloggers

- Bloggers are treated differently than other reviewers
- Bloggers' relationship with advertisers less clear
- Blogs, as a medium, fail to register with consumers as sources of news with "independent editorial responsibility"
- Social media advertising services and network marketing programs can pose particular risks
- Unclear how aggressively FTC will pursue bloggers



Need to Disclose Material Connection

- Disclosure of *material connection* required when sponsorship relationship exists
- *Endorser* is the primary party responsible for disclosing the material connection
- Advertiser not off the hook for failure of endorser to disclose
- As always, disclosure needs to be *clear and conspicuous*



One Reviewer's "About Me" Disclosures...

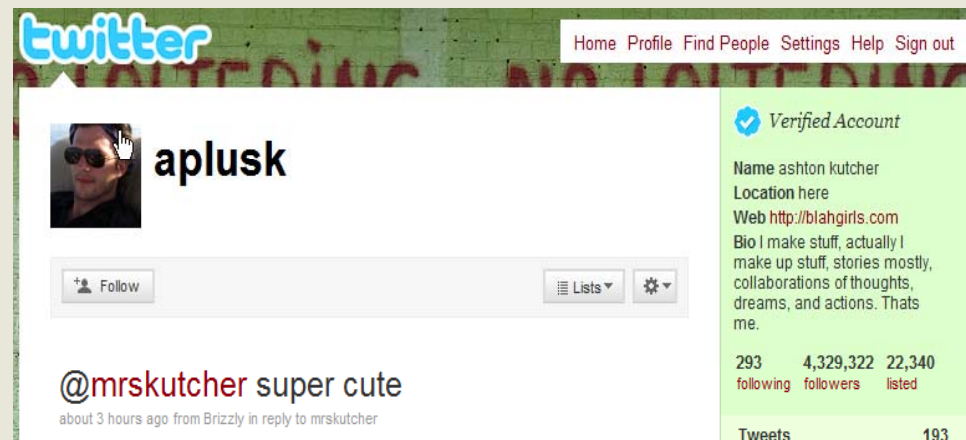
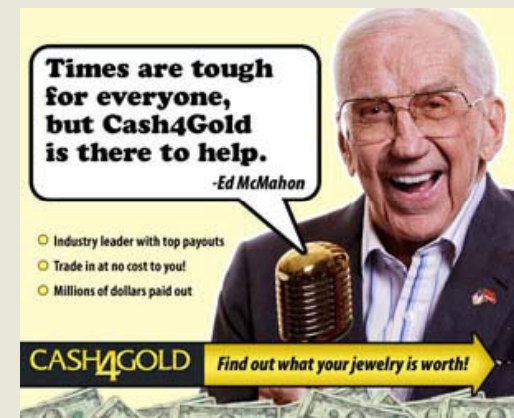
- I sometimes use Amazon Affiliate links to point to books I have reviewed.
- I am an affiliate for **Chris Pearson's DIY Themes** site for the **Thesis theme**. (Because I think the theme rules!)
- I am an affiliate for **Teaching Sells**, from Brian Clark (Because I think the product is worth it).
- I am an affiliate for **Beyond Blogging** (because I'm in the book).
- My site hosting is sponsored by **Rackspace Cloud**.
- I am an affiliate for **The Biz Web Coach** (Jim's a friend).
- I have occasionally put affiliate sales links in posts older than 10 days. If they are explicit ads for a specific product, they are products or services I endorse. Those links are explicit.

Employees are Endorsers

- Employees will always have material connection
- Employee policies should cover social media use
 - Remind employees of responsibilities
 - Employees need to acknowledge employment when discussing company matters
 - No disclosure of sensitive information

Celebrities and Social Media

- **Before:** a celebrity is assumed to have been compensated for making an endorsement, so no disclosure generally necessary
- **Now:** a celebrity endorsement in a “nontraditional” context (e.g., blogging or Tweeting) requires disclosure of the material connection



Social Media Challenges

- Making advertising disclosures in social media can be challenging, e.g., difficult to disclose endorsement in a single Tweet
- Public may not know whether endorser is an “official” marketer
- Advertisers are liable for an endorser’s message without control over the content or dissemination
- Social media “lives forever”



Best Practices for Advertisers Using Social Media for Endorsements

- Clear External Guidelines. Establish written guidelines and train social media endorsers
- Contractually Bind Social Media Endorsers. For example, endorsers should be contractually bound to disclose material connections
- Monitor. Be diligent in monitoring social media endorsers and in taking prompt action
- Use Technology. Use technical monitoring tools (e.g., subscribe to RSS feeds, commercial monitoring)
- Retain Records. Keep written record of your monitoring and enforcement.
- Clear Internal Policies and Control. Limit who speaks for company. Assign central responsibility for managing social media presence and endorsements.
- Standardize Disclosure Practices. Short posts to longer articles enable clear disclosure. Consider standardized disclosures like CMP.ly.
- Audit Use and Benefit. Evaluate benefit of use of free products and payment practices

Social Media and Endorsements

The Sky is Not Falling...

Social Media Endorsement Food for Thought

- Car company provides well-known celebrity interest-free financing on its newest electric car. Celebrity also happens to be an avid online gamer who uses his real name for his character in his favorite online role-playing game (MMORPG), where he has a large following. Celebrity creates virtual replica of the car (still keeps its original name). Celebrity adds features and performance not available on the real car. Celebrity hypes the performance of his virtual car and real car in game, claiming that car gets better gas mileage than any other car on the market.

"New Media" Provisions of Revised FTC Endorsement and Testimonial Guides by: Gary D. Hailey

The Federal Trade Commission recently announced that it has approved final revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 C.F.R. Part 255), which address endorsements and testimonials by consumers, experts, organizations, and celebrities in advertising.¹

The revised Guides (which have an effective date of December 1, 2009) add "new media" examples to illustrate the longstanding principle that "material connections" (*e.g.*, monetary payments) between advertisers and consumer endorsers must be disclosed. In the words of Part 255.5 of the Guides, "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed."

The new examples address what constitutes an endorsement when the message is conveyed by bloggers or other "word-of-mouth" marketers. In most cases, the post of a blogger who receives cash or a free sample to review a product is considered an endorsement governed by the Guides, and the blogger must disclose his or her relationship with the seller of the product or service. (Concerns that the FTC is planning to enforce the Guides against individual bloggers are widespread in the blogging community, but the FTC's staff has tried to clarify that the agency's enforcement efforts will focus on advertisers and marketers, not individual bloggers.) We quote the "new media" examples that have been added to the Guides below, and explain the FTC's reasoning with regard to each.²

After summarizing the contents of the revised Guides, we have discussed two recent Electronic Retailing Self-Regulation Program ("ERSP") actions concerning advertiser-sponsored product-review websites – or "flogs." We wouldn't be surprised to see the FTC or state attorneys general bring cases targeting similar websites in the future.

When Is a Blogger a Product "Endorser"?

The Guides define "endorsement" as "any advertising message that consumers are likely to believe reflects the opinions . . . of a party other than the sponsoring advertiser" – including consumer

¹ The Guides represent administrative interpretations concerning the application of Section 5 of the FTC Act to the use of endorsements and testimonials in advertising. They are advisory in nature, and do not expand the scope of liability under Section 5. Rather, they are intended to provide guidance as to how the Commission intends to apply governing law to various facts.

² The other major revision to the Guides was the deletion of the "safe harbor" that has long allowed advertisers to use testimonials who reported specific successful experiences with an advertised product or service as long as the advertiser included a disclaimer such as "Results not typical." 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.

bloggers. The fundamental question is whether the speaker is (1) acting independently or (2) acting on behalf of the advertiser (or its agent). If the latter, the speaker's statement is an endorsement.

The facts and circumstances that will determine the answer to this question include whether the speaker was compensated by the advertiser, whether the product or service in question was provided for free by the advertiser, the previous receipt of products or services from the same or similar advertisers, the likelihood of future receipt of such products or services, and the value of the items or services received.

Just because the advertiser does not control the specific statement made in a blog or other forms of consumer-generated media does not necessarily mean that the statement is not an endorsement within the meaning of the Guides. The issue is whether the consumer-generated statement can be considered "sponsored." A consumer who posts about a product purchased with his or her own money is not providing an endorsement for purposes of the FTC Guides because the post is not a sponsored advertising message.

And even if that consumer receives a single free sample from a marketer and writes positively about it on a personal blog or on a public message board, his or her comments are not likely to be deemed an endorsement given the lack of any continuing relationship with that advertiser that would suggest that the consumer is disseminating a sponsored message. In contrast, postings by a blogger who is paid to speak about an advertiser'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.

Let's assume that a blogger receives merchandise from a marketer with a request to review it, but with no compensation paid other than the value of the sample product itself. In this situation, whether or not a positive review by the blogger would be deemed an endorsement in the FTC's eyes will depend on, among other things, the value of that product, and on whether the blogger routinely receives such requests. If that blogger frequently receives products from manufacturers because he or she is known to have wide readership within a particular group that is within the marketer's target audience, the blogger's statements are likely to be deemed to be endorsements, as are postings by participants in network marketing programs.

Similarly, consumers who join "word of mouth marketing" programs that periodically provide them products to review publicly (as opposed to simply giving feedback to the advertiser) will also likely be viewed as giving sponsored messages. The fact that the participants might be free to say nothing about any particular product they receive through the program does not change the FTC's view that any positive statements are endorsements.

The FTC added the following hypothetical examples to the revised Guides to help illustrate these principles:

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 shinier, 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 purchases 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.

In the first hypothetical, the blogger's statement is not deemed to be an endorsement because there is no relationship between the speaker and the manufacturer. In the second hypothetical, given the absence of a relationship between the speaker and the manufacturer or other factors supporting the conclusion that she is acting on behalf of the manufacturer, her review would not be deemed to be an endorsement. In the third hypothetical, there is an ongoing relationship between the consumer and a network marketing program that results in an economic benefit to the consumer (the stream of product samples), so the blog posting is deemed to be an endorsement within the meaning of the Guides.

Who is Responsible for a Deceptive Endorsement by a Blogger?

Another hypothetical example in the revised Guides discusses whether the marketer, the blogger, or both are liable for deceptive endorsements:

A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement.

The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.

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 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.

The FTC recognizes that because the advertiser does not disseminate the endorsements made in blogs or other consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, the agency believes that if the advertiser initiated the process that led to these endorsements being made – *e.g.*, by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it is potentially liable for misleading statements made by those consumers .

Whether liability will be imposed in these circumstances may turn on a determination that the advertiser chose to sponsor the consumer-generated content and, therefore, established an endorser-sponsor relationship. It is foreseeable that a blogger may exaggerate the benefits of a free product or fail to disclose a material relationship where one exists. By employing this means of marketing, the advertiser has assumed the risk of the blogger misbehaving. But before deciding that an advertiser is in fact liable, the FTC will consider the advertiser's efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.

The hypothetical example above should not be read to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the two. However, when the advertiser hires a blog advertising agency for the purpose of promoting its products – as assumed by the specific facts set forth in this example – the FTC believes it is reasonable to hold the advertiser responsible for communicating approved claims to the service (which, in turn, would be responsible for communicating those claims to the blogger).

Some have expressed concern that the blogger in the example above could be liable for giving her honest opinion of the product (that it cures eczema) and discussing her personal experiences with it. But the blogger in this example did not give her opinion about subjective product characteristics (*e.g.*, that she liked the fragrance) or relate her own experience with it (the example does not say that she personally suffered from eczema). Rather, she made a blanket claim that the product "cures" eczema without having any substantiation for that claim. According to the FTC, both the advertiser

and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

Of course, it is quite unlikely that the FTC will target individual bloggers – that would be like killing gnats with a sledgehammer (or an M16). Rather, the agency is likely to point the finger at the companies whose products and services are endorsed by bloggers if those blogs don't make the appropriate disclosures. The blog universe contains tens and millions of blogs and is continuing to expand at a rapid pace. Is it fair to expect advertisers to monitor and police individual bloggers? According to the FTC, it is if the advertiser encourages them.

Disclosing "Material Connections" Between Advertisers and Endorsers

If an advertiser pays a blogger to review its product, it is clear that must be disclosed. But what about non-monetary compensation? Is the provision of a free sample to a consumer blogger in and of itself a material connection that has to be disclosed by that blogger? If so, is there a threshold monetary value below which that obligation would not be triggered?

The first issue to consider here is whether the speaker's statement qualifies as an "endorsement" under the Guides. If not, no disclosure need be made. However, if the statement does qualify as an endorsement because it is "sponsored," disclosure of the connection between the speaker and the advertiser will likely be warranted regardless of the monetary value of the free product provided by the advertiser. For example, an individual who regularly receives free samples of products for families with young children and discusses those products on his or her blog would likely have to disclose that he or she received the items being recommended for free. Although the monetary value of any particular product might not be significant, the blogger's expectation that he or she will receive a continuing stream of free merchandise could affect the weight or credibility of his or her endorsement if that connection is not reasonably expected by readers of the blog.

Similarly, receipt of even a single high-priced item could also constitute a "material connection" between an advertiser and a "sponsored" endorser.

Participants in social network marketing programs are also likely to be deemed to have material connections that warrant disclosure. The FTC disagreed with the assertion that modern network marketing programs are just updated versions of traditional supermarket sampling programs, where companies distribute free samples in grocery stores. The primary goal of those programs was to have the shopper who tasted the advertiser's product continue down the grocery store aisle and purchase the product. But according to the FTC, the primary goal of the new viral marketing programs is to have these individuals spread the word about the product to others.

The FTC says that if a consumer's review of a product disseminated via one of these new forms of consumer-generated media qualifies as an "endorsement," that consumer will likely also be deemed to have a material connection with the sponsoring advertiser that should be disclosed. That outcome is simply a function of the fact that if the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored," there is a relationship that would not otherwise be apparent because the endorsement is not part of a traditional ad bearing the name of the advertiser.

The revised Guides contain the following hypothetical example, which addresses the issue of whether there must be disclosure if the advertiser provides a free sample product to the blogger

A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, 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.

The FTC revised this hypothetical example to clarify two points. First, the reason this endorser needs to disclose that he received the video game system for free is that his endorsement appears in a medium that does not make his association with the advertiser apparent to consumers. Second, the revised example states more clearly that although the blogger has primary responsibility for disclosing that he received the video game system for free, the manufacturer has an obligation to advise the blogger at the time it provides the gaming system that he should make the disclosure in any positive reviews of the system. The manufacturer also should have procedures in place to monitor the bloggers who are sent free products to ensure that the proper disclosures are being made and take appropriate steps if they are not (*e.g.*, cease providing free product to that individual).

One obvious question is whether every book or movie reviewer must disclose that he or she got a free copy of the reviewed book or a free ticket to the reviewed movie. (A similar issue appears to be presented by "product placement" – paying TV or movie producers to feature a particular brand-name product in a sitcom or movie.) Reviewers in traditional media do not have to disclose this information, so why should reviewers in nontraditional media platforms such as blogs, online discussion boards, and "street teams" be treated any differently?

The FTC acknowledged that bloggers may be subject to different disclosure requirements than reviewers in traditional media. That's because the agency does not consider reviews published in traditional media (*i.e.*, a newspaper, magazine, or television or radio station with independent editorial responsibility that assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages. Accordingly, such reviews are not endorsements within the meaning of the Guides. Under these circumstances, the Commission believes that knowing whether the media entity that published the review paid for the item in question would not affect the weight consumers give to the reviewer's statements. (Of course, this view could be different if the reviewer were receiving a benefit directly from the manufacturer.)

In contrast, if a blogger's statement on his personal blog or elsewhere (*e.g.*, the site of an online retailer of electronic products) qualifies as an "endorsement" – a sponsored message – due to the blogger's relationship with the advertiser or the value of the merchandise he has received and has been asked to review by that advertiser, knowing these facts might affect the weight consumers give to his review.

Frankly, the logic of this distinction escapes us. Perhaps the FTC just trusts traditional media companies to maintain their independence from the influence of the book publishers or movie producers whose products they review. Or maybe what the FTC is really saying is that the public understands that book and movie reviewers for newspapers and other traditional media don't pay for books and movie tickets – so you don't need to tell them that explicitly.

Here's another hypothetical example from this section of the revised Guides:

An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

One commenter asserted that if the employer has instituted policies and practices concerning social media participation by its employees, and the employee fails to comply with such policies and practices, the employer should not be subject to liability in this case. The FTC agrees that the establishment of appropriate procedures would warrant consideration in its decision as to whether law enforcement action would be an appropriate use of agency resources given the facts set forth in the example. Indeed, although the Commission has brought law enforcement actions against companies whose failure to establish or maintain appropriate internal procedures resulted in consumer injury, it is not aware of any instance in which an enforcement action was brought against a company for the

actions of a single "rogue" employee who violated established company policy that adequately covered the conduct in question.

The FTC decided that it did not need to spell out the procedures that companies should put in place to monitor compliance with the principles set forth in the revised Guides. Advertisers will be allowed to determine that for themselves, according to the agency, because they have the best knowledge of their business practices and the processes that would best fulfill their responsibilities. A more cynical view is that the FTC doesn't want to spell out what compliance monitoring is required because that might tie the agency's hands in future enforcement proceedings. (For example, the FTC requires "clear and conspicuous" disclosures of material facts in advertising, but doesn't specify how big a font you need to use, etc. That way, the agency has much more leeway to go after advertisers – if it specified a minimum font size, an advertiser might outsmart it by figuring out a way to use the specified font size but still obscure the disclosure to the extent that it was not noticed or understood by consumers.)

Here's the FTC's final "new media" hypothetical example:

A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

This example requires little discussion – it simply substitutes the "street team" context for a blog. The FTC would apply the same principles discussed above.

Recent ERSP Actions Relating to Marketer-Sponsored Product Review Sites

Several weeks before the FTC issued its revised Guides, the Electronic Retailing Self-Regulation Program ("ERSP") found that it was deceptive for a marketer to operate websites that purported to be an unbiased and independent source of product reviews (including reviews of some of its own products) without making certain disclosures. Such sites are sometimes referred to as "flogs."

The www.weknowdiets.com website and certain other websites are presented as product-review forums for popular diet and weight-loss products. Urban Nutrition – which marketed several weight-loss supplements featured on these websites, including MiracleBurn® (which was singled out on the site as "The Most Popular Product" and winner of the "Customer Choice Award") – owned and controlled the sites. In addition, individuals were paid \$20 by Urban Nutrition for submitting reviews

for the website. But Urban Nutrition did not disclose either that it was the marketer of products reviewed on the websites or that it compensated the product reviewers.

ERSP concluded that Urban Nutrition's failure to disclose these facts was deceptive – a conclusion that is consistent with the FTC Guides, which require the disclosure of the "material connections" between an advertiser and an endorser. The advertiser voluntarily agreed to make disclosures, which ERSP said should be made in such a way so that consumers see them "immediately upon visiting the site" – at the top of the home page. The company also agreed to modify or remove certain superiority claims, and add contact information to the site for use by those who believe the reviews contained inaccurate or outdated information.

While ERSP is a voluntary self-regulatory program, it refers matters to the FTC when an advertiser either ignores it or fails to make the required changes to its advertising in a timely fashion. In fact, that happened very recently, when ERSP referred advertising disseminated by Blazingkeywords.com to the FTC.

That company was the owner of websites such as www.miamigazettenews.com, which ERSP alleged were presented as an unbiased and independent newspaper site. The site purported to be reporting on a business opportunity that was, in fact, sold by the site's owner. The site contained a number of earnings claims for the product, including what may have been fabricated consumer testimonials in a "comments" section. When ERSP contacted the advertiser, it claimed that it was not responsible for the claims on the site, but failed to respond to a follow-up inquiry from ERSP. ERSP then referred the matter to the FTC.

While the FTC may or may not pursue this particular inquiry, it would not be surprising to see the FTC or other law enforcers challenge other marketers who use purported product-review sites to promote their products without disclosing that fact.