Create Social Media Buzz But Don't Get Zapped! Follow the Federal Trade Commission Rules

By Clem Turner

You're about to launch your company or release your film. What better way to create a buzz about this venture than to have friends and family use the internet to circulate rave reviews about your product or project. If they post a testimonial on your web site, on social media sites, on industry message boards, in their blogs or via any other online resource - you need to be careful. In December of last year, the Federal Trade Commission (FTC) released revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides). These guidelines set forth the procedures you must follow to avoid an action by the FTC for deceptive advertising.

The FTC treats endorsements (statements by celebrities and experts) and testimonials (statements by "typical" users) as identical, so the guidelines discussed in this article will apply to both situations and these terms are used interchangeably in this article.

General Considerations

In order to be lawful, endorsements must reflect the honest opinions, findings or experiences of the endorser. Furthermore, the endorsement must not contain any statement or implication that is factually deceptive. One area of particular concern regarding friend and family testimonials is that you will be liable for any false or unsubstantiated statement that they write. In addition, you are liable if your endorser fails to disclose a "material connection" between themselves and you. They may also face liability for the statements they make in their online testimonials.

So if your mother posts on your website that your invention "works brilliantly" but you know that she has never used it, you should remove the post. Similarly, if your venture manufactures a new skin care lotion designed to relieve very dry skin, and your aunt claims that it cured her eczema, you may both be liable for deceptive advertising practices. If your film is a dark tale about the futility of life and death, and your brother posts "it was uproariously funny and I never laughed so hard" you may be at risk if you use his testimonial without further disclosure.

Furthermore, if your family members and friends are making statements on message boards, in their blogs, or other situations where their association with you is not obvious, there may be liability if they do not disclose the relationship. Although the FTC is silent regarding your obligations in this situation, they are very concerned about "material connections" between the endorser and the sellers of the product they are endorsing. This article will discuss the topic of material connections in greater detail below.

Ann Taylor - A "Real World" Example to Consider

On January 26, 2010, the LOFT division of Ann Taylor stores held a preview of their Summer collection and invited fashion industry bloggers. The bloggers who attended were provided with gifts and incentivized to blog about the collection. Despite posting a sign at the preview informing bloggers that they should disclose the gifts in any online testimonial, not all bloggers did so. As a result, the FTC's Division of Advertising Practices investigated Ann Taylor. The FTC was concerned that these gifts created a "material connection" to the bloggers that must be disclosed. (Section three will provide an overview of this reasoning.) On April 20, the FTC determined not to pursue an enforcement action. The FTC noted, among other reasons, that the LOFT adopted a written policy shortly after the preview stating that they will not issue any gift to a blogger without first telling the blogger that he or she must disclose the gift in his or her blog.

The key consideration for you to remember is that the FTC is actively policing its Guides. The Guides were released in December, and this event took place in January. The FTC stated in its letter to Ann Taylor's counsel that they expect "that LOFT will both honor [its] written policy and take reasonable steps to monitor bloggers' compliance with the obligation to disclose gifts they receive from LOFT." A word to the wise: The FTC is watching.

Consumer Testimonials

You must be able to provide adequate "substantiation" for any claims made or opinions expressed in consumer testimonials by individuals with whom you have a material connection. This substantiation includes, when appropriate, reliable scientific evidence. You cannot avoid liability for deceptive advertising by having others make representations in their testimonials that you could not state in your advertising directly. Therefore, if an endorser's experience with or opinion of your wares is not representative of a typical consumer's, you will need to disclose the "generally expected" experience or viewpoint - and you will need adequate support for your disclosure. It is no longer adequate to post a simple disclaimer, such as "results not typical" or "your results may vary." With respect to the example given in above, regarding your brother who finds your dark film "humorous," you should conspicuously post a statement similar to: "This viewer's opinion is not typical, as most viewers of this film are moved to tears" - assuming you can prove that this statement is true.

The Guides do not specify exactly what qualifies as adequate substantiation for product claims, as reasonable evidence may vary depending on the nature of the product and the representations being made. However, you probably should obtain a wide sampling of user experiences and your results should establish a clear normative result. If your claim relates to a comparison of competitive products, you must have actually tested consumer reaction to the brands mentioned in the claim. If you are unclear about the documentation you need to support an endorsement, you should consult an attorney.

Expert Endorsements

If you or others post statements on your website or other websites that purport to be made by "experts," then the endorser must possess the expertise and qualifications that he or she is representing to have with respect to the endorsement. For example, if your product is a health care device, and you ask your sister, who holds a Ph.D. in Art History, to submit posts on medical message boards as a "Doctor," you may both be liable for deceptive practices in advertising. Although a Ph.D holds a doctorate degree, use of this title without clarification is deceptive in this context, as it implies a medical expertise that your sister does not possess. You face similar liability if you ask your roommate to post an online review of your film as a "film critic" if there is no supportable basis for this claim.

In addition, an expert's endorsement must be supported by the actual exercise of his or her expertise, including an appropriate evaluation of your product and, if applicable, an actual comparison to competitive products. If your roommate is a bona fide film critic, and he posts a glowing review of your movie based on your description of how great it is (without viewing it himself), the endorsement would likely be deceptive. The roommate's method of forming his opinion was not based upon the exercise of his expertise and is not consistent with an evaluation a film critic would consider adequate to support a conclusion about your film's merits. Finally, if your film critic roommate states that your film was the "best feature shown at the Downtown Film Festival," you need to document the fact that your roommate viewed every full length movie in the festival.

What is a Material Connection?

The FTC is primarily concerned about testimonials when there is a material connection between the endorser and the company marketing the product. A "material connection" is a connection between the endorser and the seller of a product that is not "reasonably expected by the audience" and might "materially affect the weight and credibility of the endorsement." Under the Guides, these connections must be disclosed. Typically, the FTC is concerned about arrangements in which the endorser has received compensation or other benefit that is not obvious to the reader of the endorsement. For example, if you are paying a celebrity to tout your wares on a social networking site, or you have issued a well regarded doctor an equity interest in your company to discuss the benefits of your health care product in his blog, the relationship should be disclosed.

However, what constitutes a material connection extends beyond direct payment of cash or issuance of equity. The Guide provides several examples of indirect benefits, some of which are described below. If a manufacturer sends valuable free goods to a popular blogger, with a request for him to write about the merchandise, the free goods are a benefit and disclosure is required. Above, I looked at the FTC's investigation of Ann Taylor's LOFT division, as a result of free gifts they provided to fashion bloggers. Be advised that even a small gift may be enough to create a material connection. The gift Ann Taylor presented to the bloggers was only believed to be worth

$10. In addition, marketing schemes involving points redeemable for prizes must also be disclosed, when points are awarded each time a person mentions a product to his or her connections. Even the relationship between an employer and an employee is a material connection that must be disclosed, if the employee is visiting online message boards pertinent to the employer's industry and posting positive messages about the employer's product.

Of course, if no benefit is being exchanged for a person's positive statements about your venture (and you have no pre-existing relationship with the endorser), no disclosure is necessary. If someone buys your product and blogs about how wonderful it is, you should have no liability for any claims made. Similarly, if you ask three consumers leaving your movie about their opinions and promise no benefit in exchange, you should not face liability for their statements. However, if you had approached three individuals outside the theater and offered them free tickets if they agreed to talk about your movie, you should disclose this arrangement.

Conclusion

So how do the new Guides relate to your capitalizing on the reach of your friends' and family's online social networks and online activities to promote your endeavor? What responsibilities confront you and them when promoting your enterprise in a lawful manner? First, they should be truthful, and provide their honest experiences and opinions regarding your product. You may have to provide support for every declaration they post. Your friends and family want to help you and may be prone to exaggerate. You should caution them as to why this could be to your detriment, and theirs.

Second, you should consider having them disclose their preexisting relationships with you. The FTC did not provide guidance concerning the disclosure required when securing testimonials from friends and family, however prudence suggests this disclosure is a good idea. The FTC believes connections and relationships that materially affect the weight and credibility of an endorsement should be disclosed. It would not be unreasonable for the FTC to adopt the view that personal relationships affect the weight and credibility of their reviews. For blogs and posts on message boards this disclosure can be as simple as: "My cousin just made a really humorous movie about..."; "My father just designed a great software program, which..."; or "My college roommate recently launched a terrific service that..."

Furthermore, in certain circumstances, you should make sure your family and friends disclose how they obtained your goods. If they paid the market price for your merchandise, no disclosure is necessary. However, if you gave them the product, service or DVD for free, this benefit should be disclosed. This disclosure could be similar to: "My neighbor gave me a free sample of his... and I've been using it for four weeks. I think...";

Finally, if you intend to launch a widespread social media campaign, you should strongly consider adopting and enforcing a written policy that is consistent with the Guides. Remember the lesson learned from the Ann Taylor example, discussed in Section One: The FTC is paying attention. Failure to abide by the Guides could subject you to an FTC enforcement action for deceptive advertising under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).