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Marketing

State 'Mini-FTC Acts' Raise Non-Compliance Risks With New FTC Endorsements Guidance

Marketers using compensated endorsers to promote products online should not overlook the possibility of state attorney general actions to enforce the Federal Trade Commission's recent revised guidance on endorsements and testimonials, a marketing attorney cautioned Oct. 8.

Because every state has a "Mini-FTC Act" outlawing deceptive and unfair trade practices, the FTC's new rules on endorsements could shape the enforcement of those state laws as well.

The FTC's updated "Guides Concerning the Use of Endorsements in Advertising," published Oct. 5 (191 ECD, 10/6/09), state that advertisers should require individuals who are paid or receive free products in exchange for posting product reviews online to disclose the sponsorship. Brands should also monitor endorsements to ensure compliance, the commission advised.

The guides take effect Dec. 1, and brands should now begin instructing endorsers to disclose sponsorships when posting reviews, according to an attorney with the Word of Mouth Marketing Association, a Washington, D.C.-based trade association. The guides also require brands to monitor for compliance, they said.

Guides Will Reach Beyond FTC Actions. The FTC may institute proceedings to enforce its interpretations of law as stated in its guides.

The commission updated its guides on endorsements Oct. 5 after a proposal and comment period. The updated guides explain, among other things, that material connections between online product reviewers and

brands should be disclosed so that advertisements are not unfair or deceptive.

In the updated guides, the FTC listed several components it said would factor into its determination of whether a given online endorsement qualifies as advertising governed by Section 5 of the FTC Act: (1) whether a speaker is compensated or receives free products; (2) the terms of any agreement between the speaker and the brand owner or advertiser; (3) the length of any relationship between the parties; (4) a speaker's previous receipt of compensation or free products; and (5) the value of items received.

If a sponsorship relationship exists, then the relationship must be disclosed by the endorser, the guides explained. The commission instructed advertisers to educate endorsers about the need to disclose the relationship, and monitor their activities for compliance.

The guides would not apply if a consumer raved about a product online with no involvement from the brand owner. But when a reviewer is paid, gets a free product, or receives other consideration to post a positive product review, the review is in effect a sponsored advertisement, the guides explained.

As a result, consumers should be notified of the relationship because the benefit conferred by the brand might influence a reviewer's enthusiasm for a product, Tony DiResta, WOMMA's general counsel and partner in Manatt Phelps & Phillips Washington, D.C. office, said.

"But the FTC is just a piece of the puzzle," DiResta cautioned. "The guides also can be used by state attorneys general to define 'deceptive' or 'unfair' practices, and in corporate litigation and consumer class actions," DiResta explained.

Marketers looking to push the envelope because an FTC investigation may be unlikely should consider those additional hazards in their overall risk management strategies, DiResta warned. "All states have 'mini-FTC Acts' that prohibit unfair and deceptive practices," he noted, and state attorneys general may use the guides to inform what they define as "deceptive."

The guides are forward-looking, Paul Rand, WOMMA's president-elect explained, so companies do not need to "fix" past campaigns that may not have complied with the guide's standards. But going forward, brands should—when sending free products to online reviewers or paying individuals to review products online—tell the reviewer to include a notice that he or she was paid or received a free product to post a review, and monitor for compliance.

Rand urged marketers to consult WOMMA's code of marketing ethics, which the FTC said in the guides was "very much in line" with the commission's approach.

BY AMY E. BIVINS

Full text of the updated endorsements guide available at the Federal Trade Commission website, <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>

The Word of Mouth Marketing Association's code of ethics and standards available at <http://womma.org/ethics/ethicscode.pdf>