

# FTC Investigation into a Blogging Promotion Holds Lessons for Advertisers

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## Introduction

Last year, the Federal Trade Commission released a new version of its Guides Concerning the Use of Endorsements and Testimonials in Advertising.<sup>1</sup> The new Guides contain various provisions that apply to messages in social media, such as blogs, word-of-mouth marketing, and other promotions in which companies encourage consumers to speak on their behalf. Shortly after the Guides became effective, the FTC conducted an investigation to determine whether AnnTaylor Stores Corporation had violated the Guides in the context of a blogging promotion. Although the FTC ultimately decided not to pursue an enforcement action, the Guides and the FTC's rationale for dropping the investigation hold valuable lessons for marketers.

## What Types of Statements are Covered

According to the FTC, a statement made by a consumer in social media will be deemed to be an "endorsement" if, when "viewed objectively, the relationship be-

tween the advertiser and the speaker is such that the speaker's statement can be considered 'sponsored' by the advertiser."<sup>2</sup> The FTC encourages advertisers to ask whether, in making statements about a product or service, the speaker is acting independently or on behalf of the advertiser. If the speaker is acting independently, the statement will not be an "endorsement" subject the Guides. However, if the speaker is acting on behalf of the advertiser, the statement will qualify as an "endorsement" and be subject to the Guides.

The FTC writes that the facts that will determine the answer to this question "are extremely varied and cannot be fully enumerated," but would include various factors, including: "whether the speaker is compensated by the advertiser or its agent;

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whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.”<sup>3</sup> Unfortunately, the question of whether a specific statement is subject to the Guides will often have to be determined on a case-by-case basis.

One of the most troubling aspects of the FTC’s analysis is that an “advertiser’s lack of control over [a] specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an ‘endorsement’ within the meaning of the Guides.”<sup>4</sup> Therefore, a consumer who blogs about an advertiser’s product or service may be considered an “endorser” and an advertiser may be liable for the endorser’s statements, even if the advertiser did not authorize those statements or have the ability to control them. The FTC’s position on liability for statements made by bloggers could greatly expand the scope of content over which advertisers are responsible.

## Liability for Claims Made by Bloggers

Most advertisers know they must ensure that claims in their ads are truthful, and that they may be held liable for any false or misleading claims. And savvy advertisers know that they may also be held liable if they take a false or misleading claim made by a consumer and use it in their ads. However, the Guides go a step further and state that an advertiser may be liable for claims made by consumers, even if the advertiser does not use those claims itself. The FTC provides an example of an advertiser that asks a blogger try a new lotion. Although the advertiser does not make any claims about the lotion’s ability to cure skin conditions, the blogger writes that the lotion cures eczema. The FTC writes that the “advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger’s endorsement.”<sup>5</sup>

Although the FTC acknowledges that an advertiser may have no control over statements made

by an endorser, the FTC still believes liability may be appropriate because it is “foreseeable” that an endorser may make a false claim and, therefore, that by engaging in social media, the advertiser has assumed the risk “and the potential liability that accompanies that risk.” The FTC does note, however, that it would exercise its “prosecutorial discretion” and 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.”<sup>6</sup>

## Disclosure of Material Connections

The Guides state that if there is a “material connection” between an advertiser and an endorser, the endorser must disclose that connection.<sup>7</sup> Although this may not seem controversial, what constitutes a material connection may be broader than most people think. For example, even though giving a blogger a free low-value sample may not trigger the disclosure requirement, giving the blogger a series of those samples can. Even intangible benefits, such as a chance to win a prize, could necessitate a disclosure. The FTC states that although the endorser has “primary responsibility” for disclosing the connection, advertisers should establish procedures to make sure endorsers make the disclosures and to take appropriate steps if an endorser does not.<sup>8</sup>

## AnnTaylor Stores Investigation

Earlier this year, the staff of the FTC’s Division of Advertising Practices conducted an investigation into whether AnnTaylor Stores violated Section 5 of the FTC Act in connection with a blogging promotion conducted by the company’s LOFT division. LOFT had provided gifts to bloggers who attended previews of its Summer 2010 collection, and the FTC was concerned that some of the bloggers failed to disclose that they received gifts for posting blog content about that event.

Ultimately, the FTC staff decided not to recommend enforcement. In a letter addressed to LOFT’s attorneys, the FTC staff explained that their decision was based primarily on three factors.<sup>9</sup> First, there had only been one preview event, so presumably there was no pattern of violations. Second, only a small number of bloggers

posted content about the preview, and several of those bloggers disclosed that LOFT had provided them with gifts at the preview. And third, LOFT adopted a written policy stating that “LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog.” The staff noted that they expected LOFT to honor its policy and to monitor bloggers to make sure they comply.

## Protect Yourself

The letter to LOFT contains valuable lessons to companies who use bloggers (or other endorsers) to advertise. You should prepare a contract or guidelines for bloggers who speak on behalf of your company. The document should require bloggers to disclose any connections between them and the company. Moreover, because your company may be liable for false claims made by the endorsers, the document should include some guidance about what bloggers can and cannot say. Keep in mind, though, that according to the Guides, endorsements “must reflect the honest opinions, findings, beliefs, or experience of the endorser.”<sup>10</sup> So you must walk a fine line between providing guidance and putting words in the mouths of the bloggers.

It is not enough to simply have an agreement with endorsers, however. As the FTC noted in its comments to the Guides—and in the letter to LOFT—advertisers must also monitor bloggers and take steps to ensure they comply with the advertiser’s policies. Therefore, it may be neces-

sary for your company to assign an employee to periodically review statements in social media to make sure that claims are accurate and that the appropriate disclosures are being made. If a blogger does not comply with your policies, you should contact the blogger to correct the problem or, if the problems continue, terminate your relationship with the blogger.

Unfortunately, there is no one-size-fits-all approach to social media. Your company’s marketing team should work closely with your legal team to identify the company’s goals, the social media platforms you want to leverage, the types of claims endorsers may make, the incentives that may be given to the endorsers, and a variety of other factors in order to come up with an approach that best fits your needs and offers legal protection. Companies that take shortcuts in this area are much more likely attract unwanted attention from regulators.

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### NOTES

1. 16 C.F.R. § 255 *et seq.* (2010).
2. 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009).
3. *Id.*
4. *Id.*
5. 16 C.F.R. § 255.1.
6. 74 Fed. Reg. at 53127.
7. 16 C.F.R. § 255.5.
8. 74 Fed. Reg. at 53,135-53,136.
9. See Letter from FTC to AnnTaylor Stores Corp. (Apr. 20, 2010), available at <http://tinyurl.com/32nh8c3>.
10. 16 C.F.R. § 255.1.