

## FTC Changes And Social Media

By Robert Wheatley, 10 hours ago

Could proposed sweeping changes in Federal Trade Commission (FTC) guidelines shipwreck social media marketing and alter the common practice of using third-party spokespeople to deliver brand messages?

"Agencies and clients, especially those working in the social media space, must understand that the FTC's efforts to address deceptive practices can create liability and exposure," said Michael Lasky, senior partner at Davis & Gilbert LLP, a New York law firm that specializes in advertising and communications law.

At issue are additions and modifications now under consideration in the FTC's, "Guides Concerning the Use of Endorsements and Testimonials." Final ruling on the Guides is expected sometime later this summer or early fall. Behind the proposed changes is what Lasky terms, "The 10 Commandments of commercial marketing as found in Section 5 of the FTC Act -- summed up as -- thou shall not commit a false or deceptive practice." The FTC is working to address this: A blogger or spokesperson's failure to disclose a fact or event that could alter the consumer's decision regarding a product or service.

The exploding role citizen journalists and bloggers now play, and the long-standing practice of employing third-party spokespeople for media interviews sit squarely in the bull's-eye of the proposed ruling.

Where's the Danger Zone?

Clients and agencies should look closely at the FTC's efforts in order to steer out of harm's way and any attending legal entanglements. The danger zone and acquired liability arise when marketers pay bloggers or provide other "consideration" such as free products and services in return for a favorable post. The problem is not in the consideration or payment but failure to disclose it. And, thus, tempting a breakdown of the Mom Test -- would mom feel differently about what she reads or hears in a blog post or interview if certain facts were disclosed, whether they be material data or the matter of payment?



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## Need for Transparency

With liability looming on the horizon, now is the time to carefully examine practices and procedures to help address the disclosure issue up front.

## Written Guidelines

Agencies and clients, if they haven't already, should adopt written guidelines that come into play when any "consideration" is involved. The guidelines must work explicitly to "make it clear the company wants the blogger to disclose whether any compensation or any other item of tangible value, such as free product, has been received in return for a favorable post or review," said Allison Fitzpatrick, associate counsel at Davis & Gilbert LLP.

## Spokesperson Agreements

When outside third-party experts or celebrity spokespeople are retained for interviews, the acid test is whether or not the consumer will recognize the relationship is paid. According to Lasky, if it is not readily apparent that a celebrity or expert is under contract, then the relationship with the marketer should be mentioned.

Again, the disclosure rule of thumb is transparency first. Spokesperson agreements should specify that the relationship be acknowledged in any interview. This can be accomplished through a statement such as, "I'm here today on behalf of (brand name goes here)."

Again, these rules apply when "consideration" is involved. The world changed concerning what is protected under the First Amendment during the famed Nike vs. Kasky case that put press releases in the spotlight as a commercial marketing tool.

So in the new age of transparency and disclosure, brands should navigate the communications landscape with care about being upfront. Look to the Mom Test as a starting point in your decisions about what to say and when.