

Lessons from FTC Enforcement Actions Over Online Consumer Endorsements

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In 2009, for the first time in nearly 30 years, the Federal Trade Commission revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.¹ The Guidelines, which explain in general terms when the FTC may find endorsements or testimonials unfair or deceptive, were revised in part to address today's world of the Internet. Companies benefitting from consumer-generated media and gamification may avoid future liability if they are mindful of recent enforcement actions by the FTC and other regulatory authorities, as well as some of the Guideline's often-overlooked provisions.

In March 2011, Legacy Learning Systems, Inc., a company that sells a popular series of guitar-lesson DVDs, agreed to pay \$250,000 to settle FTC charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers. According to the FTC's press release²:

According to the FTC's complaint, Legacy Learning advertised using an online affiliate program, through which it recruited "Review Ad" affiliates to promote its courses through endorsements in articles, blog posts, and other online editorial material, with the endorsements appearing close to hyperlinks to Legacy's website. Affiliates received in exchange ... substantial commissions on the sale of each product resulting from referrals. According to the FTC, such endorsements generated more than \$5 million in sales of Legacy's courses.

...

"Whether they advertise directly or through affiliates, companies have an obligation to ensure that the advertising for their products is not deceptive," said David Vladeck, Director of the FTC's Bureau of Consumer Protection. "Advertisers using affiliate marketers to promote their products would be wise to put in place a reasonable monitoring program to verify that those affiliates follow the principles of truth in advertising."

¹ The Guidelines are available at <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.

² FTC press release, Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online "Consumer" and "Independent" Reviews (Mar. 15, 2011) (at <http://www.ftc.gov/opa/2011/03/legacy.shtml>).

In another enforcement action, a public relations agency hired by video game developers agreed to pay \$250,000 in August 2010 to settle FTC charges that it engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the developers.³ The company also agreed to set up a monitoring program to ensure compliance going forward.

Other regulators have taken similar actions. In July 2009, Lifestyle Lift, a cosmetic surgery company, paid \$300,000 to settle with the State of New York over the publishing of fake online consumer reviews reporting positive results from its face-lift procedures.

In addition to the above enforcement actions, companies should be aware of the following lesser-known provisions of the Guidelines that apply to consumer-generated media and relate to gamification:

- The Guidelines cover any advertising message, including consumer-generated media, that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of the endorser. The Guidelines also cover consumer testimonials, such as reviews or recommendations on any social media site, not just blogs.
- When a connection exists between the endorser and the seller of an advertised product that might materially affect the weight or credibility of the endorsement (including when the endorser receives cash or in-kind payment to review the product), such connection must be fully disclosed. In one example, the Guidelines state that if a blogger receives a free copy of a video game to evaluate and review, he must clearly and conspicuously disclose that he received the game for free. In another example, it states that if someone receives redeemable points each time they tell friends about a product, this fact needs to be clearly and conspicuously disclosed as well.
- In both these examples, the Guidelines also state that the company needs to advise the endorser giving the testimonial that this connection should be disclosed, and it should have procedures in place to try to monitor the endorser's postings for compliance.
- Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers may also be liable.
- Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement. This raises potential gamification issues with leader boards, badges, and expert status to the extent that this implies an "expert" status that the user does not actually possess.

Many aspects of consumer-generated media provide great business opportunities, but it is important to ensure that your use, and your employees' use, of such media is done in way that does not create legal liability.

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³ FTC press release, Public Relations Firm to Settle FTC Charges that It Advertised Clients' Gaming Apps Through Misleading Online Endorsements (Aug. 26, 2010) (at <http://www.ftc.gov/opa/2010/08/reverb.shtml>).

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