

Implications of FTC Endorsement Guidelines

On October 5th, the Federal Trade Commission (“FTC”) announced revisions to its Guides Concerning the Use of Endorsements and Testimonials (“Guides”). As the most significant changes in almost 30 years, the regulators had a lot of catching up to do.

The revised Guides (which went into effect on December 1st) make clear that traditional marketing law principles apply equally to the world of blogs and social media. While there were many aspects to the revised Guides, the two key changes for the affiliate marketing industry are: (1) disclosing material connections between a marketer and a blogger (or anyone online) and (2) insufficiency of the “results not typical” disclaimers.

It is well known in our industry that bloggers occasionally receive free products from marketers in the hopes that the bloggers will speak positively about such products. Some marketers will even pay bloggers outright to influence their comments.

However, the FTC is worried about the effect upon consumers when such reviews are presented as unbiased. If the blogger is writing positively about a product because they have been paid or received free products, then the Guides demand that such relationship be disclosed because the comments may be considered “sponsored” by the marketer and are therefore an “advertising message.”

The revised Guides would also require that celebrities disclose their relationship with a marketer when touting the marketer’s product or service on talk shows, interviews or social media sites.

Another major change in the Guides was



guidance regarding advertising disclaimers. We are all familiar with the “results not typical” tag line. The revised Guides now require that if the results displayed in the ad are truly not typical, then the typical results must be disclosed. So if the ad says that the user of a dietary supplement lost 50 pounds but in reality typical users of the supplement spontaneously explode, then the marketer needs to disclose the typical result.

What does this all mean for affiliate marketers?

New terms and policies from marketers

- The FTC has stated that if a material relationship between a marketer and a blogger is not disclosed, it is the marketer who will likely be liable. Therefore, bloggers who previously received free items from marketers can expect to either see fewer free items, or receive such free items only if they agree to agreements that require the blogger

to make certain disclosures online. Marketers will do their best to set forth policies in this area, and then seek to hold the bloggers liable if they violate such policies and expose the marketer to liability.

Results not typical – Try and forget that tag line. What might become typical is the harsh response from regulators if marketers seek to avoid disclosing typical results to consumers and mislead them into believing that one person’s experiences with a product are typical.

Social media policies – Before taking any actions against a marketer, the FTC will consider the existence of a social media policy. Therefore, all companies should have written social media policies that bloggers affirmatively accept.

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