SOCIAL MEDIA AND MARKETING: EXPLORING THE LEGAL PITFALLS OF USER-GENERATED CONTENT

Brian D. Wright, Esq.[1]

I. INTRODUCTION AND SUMMARY

The goal of advertising has always been to deliver a marketing message that connects with customers. For years, advertisers used a conventional model of informing, persuading, and reminding *groups* of customers using *non-personal presentations* delivered by the advertiser in a *paid form* from an *easily identifiable sponsor*.[2] While there have been historically well-known and controversial breaks from this conventional advertising model (e.g., Reese's Pieces® in E.T. and Ray-Ban® in Risky Business[3]), advertisers traditionally controlled the content, frequency, timing, and medium of the advertising message and were easily identified as the advertising sponsor.[4] However, the cheap availability and the direct

---

[1] Mr. Wright is an attorney in the Cincinnati, Ohio office of the law firm of Faruki Ireland & Cox P.L.L. ("FI&C"). FI&C is a mid-sized law firm with a national complex business litigation trial practice. FI&C handles commercial disputes of all types, including class actions, intellectual property (e.g., patent, copyright, trademark and trade secrets), antitrust, securities, false advertising, employment and discrimination, and product liability cases. This article represents the opinions of the author and not necessarily the opinions of FI&C or its clients.

[2] Jef I. Richards & Catharine M. Curran, *Oracles on "Advertising": Searching for a Definition*, 31 J. OF ADVERTISING 63, 63-77 (2002) (summarizing the various definitions of advertising). "Advertising is a paid, mediated form of communication from an identifiable source, designed to persuade the receiver to take some action, now or in the future." *Id.* at 74.

[3] E.T.: THE EXTRA TERRESTRIAL (Universal Pictures 1982) (protagonist Elliot enjoyed Reese's Pieces with E.T.); RISKY BUSINESS (The Geffen Company 1983) (Tom Cruise wore Ray-Ban sunglasses).

[4] *See* W. Glynn Mangold & David J. Faulds, *Social Media: The New Hybrid Element of the Promotion Mix,* 52 BUS. HORIZONS 357, 359 (2009) ("In the traditional communications paradigm, the elements of the promotional mix are coordinated to develop an IMC [(Integrated Marketing Communication)] strategy, and the content, frequency, timing, and medium of communications are dictated by the organization in collaboration with its paid agents (advertising agencies, marketing research firms, and public relations consultants).").

connectivity of social media (and its rapidly increasing use) have changed the conventional model and turned it on its head,[5] creating interesting and often difficult issues for lawyers practicing in advertising law.

With the increasing popularity of social media websites and user-generated content-based features, there has been a paradigm shift in the way advertisers communicate with customers.[6] Under the conventional model, advertising messages were controlled and disseminated by the advertiser or the agent of the advertiser (e.g., advertising agencies and public relations consultants).[7] Now, under what has become known in the industry as consumer-to-consumer ("C2C") or consumer-generated media ("CGM") marketing,[8] advertising messages are often encouraged (and even developed) by the advertiser or agent, but then controlled and disseminated by the consumer.[9] There is little question that websites like Twitter, Facebook, MySpace, and LinkedIn have become an important route for providing C2C or CGM advertising messages, and advertisers are quickly moving to utilize social media marketing strategies.[10] The viral nature of social media can make marketing strategies that employ this new method of communication extremely successful.[11] If social media marketing campaigns are implemented improperly, however, then such marketing strategies can be filled with legal (and brand) risks.

II. LEGAL STANDARDS AND GENERAL ADVERTISING PRINCIPLES APPLICABLE TO C2C OR SOCIAL MEDIA MARKETING

A. Section 5 of the Federal Trade Commission Act, "Mini-FTC Acts" and Other Consumer Protection Statutes

Advertising has long been governed by both federal and state law.[12]

---

[5] *Id.* at 358-60.

[6] *Id.* at 359-61.

[7] *Id*.

[8] PETE BLACKSHAW, SATISFIED CUSTOMERS TELL THREE FRIENDS, ANGRY CUSTOMERS TELL 3,000: RUNNING A BUSINESS IN TODAY'S CONSUMER-DRIVEN WORLD 3 (2008). The use of social networking websites and consumer-to-consumer advertising messages has also been called "'integrated marketing communication' ([or] IMC)." Ellen P. Goodman*, Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 686 (2007).

[9] Mangold & Faulds, *supra* note 4, at 357-58 ("This form of media 'describes a variety of new sources of online information that are created, initiated, circulated and used by consumers intent on educating each other about products, brands, services, personalities, and issues.'").

[10] Brian Womack, *Social Networking and Games Leap in Web Use*, BLOOMBERG BUS. WEEK (Aug. 2, 2010, 12:01 AM), http://www.businessweek.com/technology/content/aug2010/tc2010081_994774.htm; Andy Beal, *If Time is Money, Spend Your Advertising Dollars on Social Networks!*, MARKETING PILGRIM (Aug. 2, 2010), http://www.marketingpilgrim.com/2010/08/if-time-is-money-spend-your-advertising-dollars-on-social-networks.html.

[11] Emily Glazer, *Social Media Initiatives Drive Sales, Product Development*, DOW JONES NEWSWIRES (July 27, 2010), http://www.nasdaq.com/aspx/company-news-story.aspx?storyid=201007271104dowjonesdjonline000322.

[12] Both state and federal law overlap to govern advertising. Under federal law, most advertising is governed by Section 5 of the Federal Trade Commission Act which states generally that advertising must be truthful and non-deceptive, have evidence to substantiate claims, and cannot be unfair. 15 U.S.C. § 45

Legal standards that expressly address C2C or CGM marketing are in their infancy, and new laws and regulations are in the process of rapidly catching up to the realities and needs of this new form of media.[13] Importantly, advertisers using social media must comply with the same existing advertising legislation and regulation that is used to police advertisers who use the conventional model.[14] Regulations propounded by and enforcement actions brought by the Federal Trade Commission (the "FTC") provide a minimum starting point.[15] Decisions from courts in cases involving consumer protection statutes also provide guidance by which advertising may be reviewed.[16] It is through the magnifying glass of these regulatory activities and court decisions that the new advertising must be considered because these laws will be used to judge the advertising.

Most advertising regulations and state consumer protection laws have their genesis in section five of the Federal Trade Commission Act (the "FTC Act").[17] Section five of the FTC Act states, in part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[18] While the FTC Act does not provide for a private cause of action to individual plaintiffs,[19] the FTC has authority under the FTC Act to both

---

(2006). Depending on the service or product being advertised, other federal regulations and laws may need to be considered to ensure that social media marketing strategies do not run afoul of the law. For example, companies that make or market U.S. Food & Drug Administration-regulated products have additional regulations that must be adhered to and considered when using social media marketing strategies. Additionally, every state has consumer protection laws that govern ads running in that state. *See* SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION vii (2009) (analysis of state consumer protection laws and comparison with FTC enforcement). Finally, self-regulatory decisions from the National Advertising Division also provide guidance to advertisers seeking to present truthful and non-deceptive advertising. *See* NAT'L ADVER. DIV., http://www.nadreview.org (last visited Nov. 19, 2010).

[13] Statements about products or services occur all of the time without the involvement of an advertiser. Comment postings, product review blogs, and videos on sharing websites like YouTube are littered with thousands of examples of consumers detailing the benefits (and shortcomings) of products independent of any involvement from the producer of the product or provider of the service. Advertising law and regulations govern commercial speech and not non-commercial statements made by persons independent of the marketer. In other words, if the marketer is not involved in the speech, then the speech is not commercial speech subject to advertising law and regulation. *See, e.g.*, Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130, 141-42 (S.D.N.Y. 1990) (holding that section 43(a) of the Lanham Act did not apply to artwork in a pamphlet that was critical of public funding of the arts, stating that the Lanham Act "has never been applied to stifle criticism of the goods or services of another by one, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service.").

[14] *See, e.g.,* FTC, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD (2000), *available at* http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus28.pdf.

[15] 15 U.S.C. § 45 (allowing the FTC to propound regulations and bring enforcement actions to prevent unfair methods of competition).

[16] *See supra* note 12.

[17] 15 U.S.C. § 45.

[18] *Id.* § 45(a)(1).

[19] St. Martin v. KFC Corp., 935 F. Supp. 898, 907 (W.D. Ky. 1996) (citing Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-89 (D.C. Cir. 1973) (finding no implied private right of action under FTC Act)).

propound regulations and to initiate investigations or enforcement actions.[20] Under its Section 5 authority, the FTC also issues guidelines or administrative interpretations that are intended to provide guidance about compliance with the law.[21] These guidelines do not have the force of law and are not formal regulations issued by the FTC, and there are no direct fines issued for violations of the guidelines; however, violations of the guidelines likely will be viewed as violations of section 5 of the FTC Act and could result in an enforcement action.[22]

While the FTC has issued guidelines and policy statements in a number of different areas of advertising law (the "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising" [hereinafter Endorsements and Testimonial Guidelines] are discussed in more detail in Section III below), together they convey a number of separate and very basic advertising principles, including:

> (1) a representation, omission, or practice is deceptive if it is likely to mislead consumers and affect consumers' behavior or decisions about the product or service;[23]
>
> (2) a claim can be misleading if relevant information is withheld or if the claim implies something that is false;[24]
>
> (3) claims must be substantiated, especially when the claims concern health, safety, or performance;[25]
>
> (4) third parties—such as advertising agencies or website designers and catalog marketers—also may be liable for disseminating deceptive claims if they participate in the preparation or distribution of the advertising, or know about

---

[20] 15 U.S.C. § 45. As an example, through its regulatory authority under the FTC Act, the FTC has issued its Policy Statement Regarding Advertising Substantiation, which requires that advertisers must have substantiation for advertising claims before the advertiser uses the claim in marketing materials. FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *reprinted in In re* Thompson Med. Co., 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

[21] *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a) (2010).

[22] *Id.* ("The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.").

[23] FTC POLICY STATEMENT ON DECEPTION, *reprinted in In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 171 (1984) ("[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.").

[24] *Id.* at 174.

[25] POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *reprinted in In re* Thompson Med. Co., 104 F.T.C. 648 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986).

> the deceptive claims prior to its distribution;[26] and
>
> (5) disclaimers and disclosures must be clear and conspicuous, but a disclaimer or disclosure alone usually is not enough to remedy an otherwise false or deceptive claim.[27]

In addition to compliance with the FTC Act, most states have statutes that are modeled after the FTC Act and many of these "mini-FTC Acts" provide for a private cause of action to individual plaintiffs (or even allow plaintiffs to bring private attorney general actions).[28] For example, Ohio's Consumer Sales Practices Act prohibits unfair or deceptive sales practices in consumer transactions and is commonly used by plaintiffs to bring lawsuits to remedy allegedly false and misleading advertising.[29] Ohio's Consumer Sales Practices Act declares the conduct below, among other things, to be deceptive:

> (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
>
> (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
>
> * * *
>
> (9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have . . . .[30]

In addition, the Ohio statute expressly states that courts are to "give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of

---

[26] 16 C.F.R. § 255.1.

[27] FTC, *supra* note 14, at 3.

[28] A number of states have modeled statutes on the Federal Trade Commission Act. *See, e.g.,* California Unfair Competition Act, CAL. BUS. & PROF. CODE. § 17200 (West 2008); Connecticut Unfair Trade Practices Act, CONN. GEN. STAT. § 42-110b (2007); Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.204 (2009); Georgia Fair Business Practices Act, GA. CODE ANN. § 10-1-391 (2003); Hawaii's Antitrust and Consumer Protection Laws, HAW. REV. STAT. § 480-2 (2008); Louisiana Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. §§ 51:1401-1426 (2003); Maine Unfair Trade Practices Act, ME. REV. STAT. tit. 5, §§ 207-214 (2002); Massachusetts Consumer Protection Act, MASS. GEN. LAWS ch. 93A § 2 (2006); Montana Unfair Trade Practices and Consumer Protection Act, MONT. CODE ANN. §§ 30-14-103 to -104 (2009); Nebraska Consumer Protection Act, NEB. REV. STAT. §§ 59-1601 to -1623 (2004); New York Consumer Protection Act, N.Y. GEN. BUS. LAW § 349 (McKinney 2004); North Carolina Monopolies, Trusts and Consumer Protection Act, N.C. GEN. STAT. § 75-1.1 (2000); Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02 (LexisNexis 2004); Rhode Island Deceptive Trade Practices Act, R.I. GEN. LAWS §§ 6-13.1-2 to .1-3 (2006); South Carolina Unfair Trade Practices Act, S.C. CODE ANN. § 39-5-20 (1985); Vermont Consumer Fraud Statute, VT. STAT. ANN. tit. 9, §§ 2451-2453 (2007); Washington Consumer Protection Act, WASH. REV. CODE § 19.86.920 (1999).

[29] OHIO REV. CODE ANN. § 1345.02.

[30] *Id.* §§ 1345.02(B)(1)-(2), (9).

subsection 45 (a)(1) of the 'Federal Trade Commission Act,' 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended."[31]

Some states have enacted even more aggressive legislation that is aimed to prohibit false advertising. For example, section 17200 of the California Business and Professions Code addresses false advertising in the context of unfair competition and states: "[a]s used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ."[32] Section 17500 of this same Code addresses false advertising and states:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property . . . to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, . . . any statement, concerning that real or personal property . . . or concerning any circumstance or matter of fact connected with the proposed . . . disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .[33]

Until the passage of Proposition 64 in 2004, individuals or groups that *never suffered any loss or harm* could file a lawsuit under section 17200 on behalf of the "general public" without satisfying traditional class action requirements.[34] Additionally, the statute's pleading requirements and

---

[31] *Id*. § 1345.02(C).

[32] CAL. BUS. & PROF. CODE § 17200.

[33] *Id.* § 17500.

[34] CAL. BUS. & PROF. CODE § 17204 (West 1997) (current version at CAL. BUS. & PROF. CODE § 17204 (West 2008)) ("Actions for any relief [under the UCL would be] prosecuted . . . by the Attorney General or any district attorney or by any county counsel . . . [or] by a city prosecutor . . . [or] by a city attorney . . . or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."). Proposition 64 was passed by referendum in November 2004, and now requires that the plaintiff to show standing by proving that he or she has suffered an actual injury and has lost money or property as a result of such unfair competition or false advertising. CAL. BUS. & PROF. CODE §§ 17203-17204 (as amended by Proposition 64). The California Supreme Court has recently held that only the representative plaintiff in a class action must meet the Proposition 64 standing requirements. *In re* Tobacco II Cases, 207 P.3d 20, 25 (Cal. 2009). The court focused on the use of the terms "person" and "claimant" in the statute, and found that by using the singular forms, the drafters indicated that only the representative plaintiff in a class action must establish standing under Proposition 64. *Id.* at 32. The court further expressed the view that traditional class action standing requirements, which do not require absent class members to establish standing, and the

standards of proof were very liberal and allowed recovery, sometimes on a representative basis, upon a determination that the challenged conduct was "unfair" or "likely to deceive a reasonable consumer" *without any proof of actual injury*.[35]

Social media marketing campaigns or strategies must comply with these laws and regulations. As a starting point, advertisers must ensure that all marketing claims (even sponsored or encouraged social media marketing claims) are truthful and accurate. If advertisers are using social media advertising strategies where their customers are encouraged to convey the advertising claims, then the advertisers must still ensure that they have adequate and reliable substantiation before the claims are disseminated by the customers to other potential customers. Moreover, the advertiser must make attempts to ensure that social media marketing claims convey all relevant information to the customer and avoid conveying any implicitly false statements. Advertisers must make attempts to ensure that advertising claims are conveyed in such a way as to clearly and conspicuously disclose all material information regarding the claim in the advertisement.

In addition, when third parties (like advertising agencies and websites) are conveying advertising claims from other parties, the third parties should also independently review the substantiation for the advertising claims to confirm that the advertising presented is true and accurate. To illustrate the potential for third-party liability, a recent class action lawsuit was filed in federal court against Zynga Game Network, Inc. and Facebook alleging that Zynga disseminated false and misleading advertising through the third-party advertising offered through games that Zynga offered on Facebook.[36] The lead plaintiff, Rebecca Swift, alleged that Zynga falsely advertised "free" offers in exchange for "YoCash" that could be used in Zynga's "YoVille" virtual world. Even though Zynga's ad offers were provided by third parties (and not by Zynga or Facebook), the suit claimed that both Zynga and Facebook were liable because they knowingly displayed the fraudulent offers.[37] While Facebook has been dismissed from the lawsuit, the case against Zynga continues with Zynga arguing that the company is protected by the Communications Decency

---

reasoning for passing Proposition 64, preventing "shakedown" suits by private citizens unaffected by the defendant's actions, supported its holding. *Id.* at 332, 334-36.

[35] *See supra* note 34. Importantly, a defendant's knowledge of the falsity of the advertisement is not an element of a Section 17200 or a Section 17500 claim, as California's UCL prohibits both negligent and intentional dissemination of misleading advertising. Feather River Trailer Sales, Inc. v. Sillas, 158 Cal. Rptr. 26, 34 (Cal. Ct. App. 1979); Khan v. Med. Bd. of Cal., 16 Cal. Rptr. 2d 385, 392 (Cal. Ct. App. 1993); People v. Forest E. Olson, Inc., 186 Cal. Rptr. 804, 806 (Cal. Ct. App. 1982); Schnall v. Hertz Corp., 93 Cal. Rptr. 2d 439, 457 (Cal. Ct. App. 2000) ("unlike common law fraud," under the UCL "it is only necessary to show that members of the public are likely to be deceived").

[36] Class Action Complaint and Jury Trial Demand, Swift v. Zynga Game Network, Inc., No. 3:2009-CV-05443 (N.D. Cal. Nov. 17, 2009).

[37] *Id.* ¶¶ 18-23 (describing advertising campaign and the revenue made by Zynga and Facebook from this advertising).

Act.[38]

B. False Advertising Under the Lanham Act

While the FTC Act and state consumer protection statutes provide several means by which an advertiser could face liability from a customer for false or misleading advertising, competitor litigation under the Lanham Act could also arise from false or misleading advertising claims distributed through social media marketing campaigns.[39] Section 43(a) of the Lanham Act provides, in relevant part, that "[a]ny person who . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which—in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . another person's goods, services, or commercial activities, shall be liable in a civil action . . . ."[40]

Section 43(a) "creates a cause of action for false or misleading advertisement."[41] To establish a claim under the Lanham Act under section 43(a), a plaintiff must establish that: (1) defendant made a false or misleading statement of fact in advertising; (2) the statement actually deceived or had the capacity to deceive a substantial segment of the audience; (3) the deception was material, in that it was likely to influence the purchasing decision; (4) defendant caused the false statement to enter interstate commerce; and (5) plaintiff has been or is likely to be injured as a result.[42]

Many states have statutes or other false advertising laws that are modeled after the Lanham Act.[43] For example, the Ohio Deceptive Trade

---

[38] Notice of Dismissal of Facebook, Inc. Without Prejudice, Swift v. Zynga Game Network, Inc., No. CV 09-5443 SBA (N.D. Cal. Jan. 22, 2010).

[39] At least one court has held that "commercial advertising or promotion" includes advertising claims made in methods and means beyond those typically used in the traditional mass media advertising campaign. *See, e.g.*, Procter & Gamble Co. v. Haugen, 222 F.3d 1262, 1275-76 (10th Cir. 2000) (holding that an email message could constitute commercial advertising or promotion).

[40] 15 U.S.C. § 1125(a)(1)(B) (2006).

[41] Iams Co. v. Nutro Prods., Inc., No. 3:00-cv-566, 2004 U.S. Dist. LEXIS 15134, at *8 (S.D. Ohio July 3, 2004).

[42] United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998).

[43] *See, e.g.*, Deceptive Trade Practices Act, ALA. CODE §§ 8-19-1 to -15 (2002); Deceptive Trade Practices Act, ARK. CODE ANN. §§ 4-88-101 to -207 (2004); Consumer Protection Act, COLO. REV. STAT. §§ 6-1-101 to -114 (2002); Uniform Deceptive Trade Practices Act, DEL. CODE ANN. tit. 6, §§ 2531-2537 (2006); Uniform Deceptive Trade Practices Act, GA. CODE ANN. §§ 10-1-370 to -375 (2003); Uniform Deceptive Trade Practice Act, HAW. REV. STAT. §§ 481A-1 to -5 (2008); Uniform Deceptive Trade Practices Act, 815 ILL. COMP. STAT. §§ 510/1 to /7 (2008); Uniform Deceptive Trade Practices Act, ME. REV. STAT. tit. 10, §§ 1211-1216 (2009); Uniform Trade Practices Act, MINN. STAT. §§ 325D.43-.48 (2004); Uniform Deceptive Trade Practices Act, NEB. REV. STAT. §§ 87-301 to -306 (2008); Unfair Practices Act, N.M. STAT. ANN. §§ 57-12-1 to -22 (2003); Deceptive Trade Practices Act, OHIO REV. CODE ANN. §§ 4165.01-.04 (LexisNexis 2007); Deceptive Trade Practices Act, OKLA. STAT. tit. 78, §§ 51-55 (2002); Unlawful Trade Practices, OR. REV. STAT. tit. 50, §§ 646.605-.656 (2009); Unfair Trade Practice and Consumer Protection Act, R.I. GEN. LAWS §§ 6-13.1-1 to -9 (2006); Deceptive Trade Practices and Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (West 2002).

Practices Act[44] prohibits false advertising and provides that:

> A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:
>
> (1) Passes off goods or services as those of another;
>
> (2) Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
>
> (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
>
> * * *
>
> (7) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
>
> (8) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
>
> (9) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
>
> (10) Disparages the goods, services, or business of another by false representation of fact;
>
> * * *
>
> (12) Makes false statements of fact concerning the reasons for, existence of, or amounts of price reductions . . . .[45]

To some extent, mini-Lanham Act statutes like the Ohio Deceptive Trade

---

[44] OHIO REV. CODE ANN. §§ 4165.01-.04.
[45] *Id*. § 4165.02(A).

Practices Act provide more risk to advertisers because a private cause of action may be brought by persons and there is no requirement that the person be a competitor. For example, a private cause of action can be brought under the Ohio Deceptive Trade Practices Act by any "person," which includes individuals and commercial entities.[46]

There has already been some Lanham Act litigation related to social media or user-generated content marketing campaigns. In *Doctor's Assocs., Inc. v. QIP Holders, LLC*, the operators of the Subway sandwich chain sued the operators of the Quiznos sandwich chain over certain user-generated advertisements. Quiznos (and the video-sharing site iFilm) sponsored a nationwide contest called "Quiznos v. Subway TV Ad Challenge," whereby Quiznos encouraged contestants to submit videos comparing Quiznos sandwiches to Subway sandwiches using the theme "meat, no meat."[47] The contestants submitted their videos to a website called www.meatnomeat.com and iFilm published the entries on its website.[48] The contestant-created videos remained on the iFilm website after the end of the contest and the selection of the winner.[49] Taking issue with several of the contestant-created videos, Subway filed suit against QIP Holders, LLC (Quiznos and iFilm) in federal court in Connecticut alleging, among other things, that the contestant-created entries contained false and misleading advertising in violation of the Lanham Act.[50]

Quiznos moved for summary judgment on the Lanham Act claim asserting that it had immunity for publication of user-generated content found in the Communications Decency Act, which is codified in 47 U.S.C. section 230(c).[51] In denying Quiznos' motion, the court explained that Quiznos could be found to have actively participated in the creation or development of the submitted contestant-created content.[52] If such a finding

---

[46] *Id.* § 4165.03(A)(2); Bower v. IBM, 495 F. Supp. 2d 837, 843 (S.D. Ohio 2007) (holding the consumers and the class that they purported to represent were individuals, and the Ohio Deceptive Trade Practices Act by its plain language placed no limitation on the type of individuals who were considered to be a "person" who could pursue a claim).

[47] Doctor's Assocs., Inc. v. QIP Holder LLC, No. 3:06-cv-1710 (VLB), 2010 U.S. Dist. LEXIS 14687, at *17 (D. Conn. Feb. 19, 2010).

[48] *Id.* at *3.

[49] *Id.* at *18-21.

[50] *Id.* at *1.

[51] Quiznos made the same argument in a motion to dismiss. The court denied the motion, holding that the Communications Decency Act provides defendants an affirmative defense, which can be raised on a motion for summary judgment, but not on a motion to dismiss. Doctor's Assocs. Inc. v. QIP Holders, LLP, No. 3:06-cv-1710 (JCH), 2007 U.S. Dist. LEXIS 28811, at *1-5 (D. Conn. Apr. 18, 2007).

[52] *Doctor's Assocs., Inc.*, 2010 U.S. Dist. LEXIS 14687, at *68-71.

> The distinction between merely publishing information provided by a third-party as an interactive computer service and actually creating or developing any of the information posted as an information content provider is critical. That distinction determines whether the CDA provides immunity to a provider or user of an interactive computer service.

Id. at *68 (citing MCW v. Badbusinessbureau.com, No. 3:02-cv-2727-G, 2004 U.S. Dist. LEXIS 6678, at *23-24 (N.D. Tex. Apr. 19, 2004).

was made or evidence supporting such involvement was shown, then immunity under the Communications Decency Act would not exist and Quiznos could be found liable under the Lanham Act for false advertising. More specifically, the court stated that the following facts could weigh in favor of destroying immunity:

> (1) Quiznos expressly invited contestants to submit contestant-created videos proclaiming that Quiznos is better than Subway;
>
> (2) the domain name "meatnomeat.com" is arguably a literal falsity because it implies that Subway sandwiches contain no meat; and
>
> (3) the four sample videos created by Quiznos to shape the contestant-created entries may contain false claims implying that Subway sandwiches have no meat or less meat than Quiznos sandwiches.[53]

The case settled shortly after the court denied Quiznos' motion for summary judgment. While the settlement prevented further development of the law relating to false advertising claims and user-generated marketing messages, the case (and the settlement) does demonstrate that advertisers could face litigation from competitors under the Lanham Act if false or misleading advertising claims are distributed through social media marketing campaigns.

III. FTC GUIDELINES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

The FTC has recently made it clear that it views the social media marketing strategies to be like other marketing strategies. In late 2007, the FTC began reviewing its Endorsements and Testimonials Guidelines to address endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers.[54] The Endorsements and Testimonials Guidelines (which had not been revised by the FTC since 1980) went into effect on December 1, 2009.

The Endorsements and Testimonials Guidelines (like other guidelines issued by the FTC) are not law; rather, these guidelines "represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in

---

[53] *Id.* at *70.

[54] Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2010). In January 2007, the FTC published a Federal Register notice seeking comment on "the overall costs, benefits, and regulatory and economic impact of its Guides." Endorsements and Testimonials Guidelines, Request for Public Comments, 72 Fed. Reg. 2214 (proposed Jan. 18, 2007) (to be codified at 16 C.F.R. pt. 255).

conformity with legal requirements."[55] In addition, the FTC gives the following description of the Guidelines:

> [t]he Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.[56]

The Endorsements and Testimonials Guidelines cover only those messages which are "sponsored" messages—endorsements or testimonials that are paid for or solicited directly or indirectly by the advertiser.[57] The guidelines cover advertising messages that consumers are likely to believe reflect the personal opinion or experience of a person or organization.[58] The FTC's concern appears to be that when customers (or other endorsers) are speaking for marketers, the audience does not know it is an advertising message.

The examples provided by the FTC in the guidelines make clear that the FTC views the social media marketing strategies to be like other marketing strategies. For instance, in example eight of section 255.0, the FTC provides the following illustration:

> A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting ***would not*** be deemed an endorsement under the Guides.
>
> Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand.

---

[55] 16 C.F.R. § 255.0(a) ("Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising.").

[56] *Id.*

[57] *Id.* § 255.0(b) ("For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.").

[58] *Id.* Stated another way, the Guidelines cover advertising claims that could be viewed or perceived to be statements of the personal views of the speaker.

> Again, her posting ***would not*** be deemed an endorsement under the Guides.
>
> Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review ***would*** be considered an endorsement under the Guides.[59]

The FTC's citation of the "personal blog" in the above example evidences an apparent view that it expects that advertisers or marketers will comply with the law when the advertiser employs social media marketing strategies.

The guidelines (like other advertising laws and regulations) prohibit deceptive or unsubstantiated representations.[60] The guidelines require that endorsements "reflect the honest opinions, findings, beliefs, or experience of the endorser" and "may not convey any . . . [claim] that would be deceptive if made directly by the advertiser."[61] The guidelines also limit the ability of advertisers or marketers from taking the statements of endorsers and presenting those statements out of context.[62] The FTC states that, "[t]he endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product."[63]

The guidelines also state that:

> [w]hen the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.[64]

Again, the FTC makes clear in the guidelines that the rules apply to social media advertising. In example five of section 255(1), the FTC provides the following illustration:

---

[59] *Id.* § 255.0 (Ex. 8) (emphasis added).

[60] *Id.* § 255.2(a) ("An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements.").

[61] *Id.* § 255.1(a).

[62] *Id.* § 255.1(b).

[63] *Id.*

[64] *Id.* § 255.1(c).

> A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.[65]

Likely recognizing the expected reaction and concerns from advertisers about becoming liable for statements being made by third parties,[66] many of

---

[65] *Id.* § 255.1 (Ex. 5).

[66] The FTC did receive numerous comments on Example five and responded by stating:

> The [FTC] recognizes that because the advertiser does not disseminate the endorsement made using these new consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, if the advertiser initiated the process that led to these endorsements being made—*e.g.*, by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs—it potentially is liable for misleading statements made by those consumers.
>
> Imposing liability in these circumstances hinges on the determination that the advertiser chose to sponsor the consumer-generated content such that it has established an endorser-sponsor relationship. It is foreseeable that an endorser may exaggerate the benefits of a free product or fail to disclose a material relationship where one exists. In employing this means of marketing, the advertiser has assumed the risk that an endorser may fail to disclose a material connection or misrepresent a product, and the potential liability that accompanies that risk. The [FTC], however in the exercise of its prosecutorial discretion, would 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.
>
> New Example 5 should not be read to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the two. However, when the advertiser hires a blog advertising agency for the purpose of promoting its products -- as posited by the specific facts set forth in this example -- the [FTC] believes it is reasonable to hold the advertiser responsible for communicating approved claims to the service (which, in turn, would be responsible for communicating those claims to the blogger). The commenters expressing concern that the blogger in new Example 5 potentially could be liable for giving her honest opinion of the product (that it cures eczema) and discussing her personal experience with it appear to have

whom (if not most of whom) the advertiser has little to no control over, the FTC added:

> In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.[67]

Advertisers using social media marketing strategies (and the bloggers communicating those social media advertising messages) must ensure that statements made are true and non-misleading (even if the statements were not made directly by the advertiser).

Importantly (at least in the context of social media marketing), the guidelines have a much broader definition of "sponsored advertising" and have more restrictive requirements relating to the disclosure of any "material connections" that the user may have with the producer of any product.[68] The guidelines state that "[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."[69]

The revised guidelines provide several examples and illustrations to show that the FTC is applying a broader interpretation of "sponsored advertising" where advertisers need to disclose "material connections" (payments or free products) between the advertiser and the endorsers.[70] The examples provided by the FTC in the guidelines make clear that the FTC would find Twitter and Facebook statements to be advertising.[71] In example

---

> misread the example. The blogger did not either give her opinion about subjective product characteristics (e.g., that she liked the fragrance) or relate her own experience with it (the example does not say that she had eczema). Rather, she made a blanket claim that the product 'cures' eczema without having any substantiation for that claim. The [FTC] is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53127 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) (alteration in original text).

[67] 16 C.F.R. § 255.1 (Ex. 5).

[68] *Id.* § 255.5.

[69] *Id.*

[70] *Id.*

[71] Given the nature of social media websites like Twitter (where only 140 characters are permitted for each Tweet), disclosure is difficult, if not impossible. The FTC recognizes this issue and in response, has confirmed that "the same general principle—that people have the information they need to evaluate

three of section 255.5, the FTC states:

> During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.
>
> Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery—mentioning the clinic by name—on a ***social networking site*** that allows her fans to read in ***real time*** what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic

---

sponsored statements—applies across the board, regardless of the advertising medium." *FTC Fact's for Business*, *The FTC's Revised Endorsement Guides: What People are Asking*, FTC.GOV, http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.shtm (last visited Nov. 19, 2010). While the FTC isn't recommending any specific wording in a tweet, the FTC did state that "[a] hashtag like '#paid ad' uses only 8 characters. Shorter hashtags—like '#paid' and '#ad'—also might be effective." *Id.*

should be disclosed.[72]

The FTC has also made clear that the guidelines apply to user-generated content. In example seven of section 255.5, the FTC states:

> A college student who has earned a reputation as a video game expert maintains a personal weblog or 'blog' where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of ***consumer-generated media*** in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.[73]

The FTC also makes clear that the guidelines apply to less formal communications, like on-line message board communications. In example eight of section 255.5, the FTC states:

> An ***online message board*** designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message

[72] 16 C.F.R. § 255.5 (Ex. 3) (emphasis added).
[73] *Id.* § 255.5 (Ex. 7) (emphasis added).

board.[74]

There are several key messages that can be taken away from the Endorsements and Testimonials Guidelines, including:

(1) The definition of endorsement is very broad and can include "[(a)] verbal statements, [(b)] demonstrations, or [(c)] depictions of the name, signature, likeness or other identifying personal characteristics of an individual or [(d)] the name or seal of an organization;"[75]

(2) "Endorsements must reflect the honest opinions, findings, beliefs, or experiences of the endorser;"[76]

(3) Endorsers "may not convey any express or implied representation that would be deceptive if made directly by the advertiser;"[77]

(4) "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;"[78]

(5) "Endorsers also may be liable for [false or misleading] statements made in the course of their endorsement;"[79]

(6) Disclosure of any "material connections" between the advertiser/seller and its endorser is required;[80]

(7) A "material connection" is information that could impact the weight or credibility a consumer gives to the endorsement;[81]

(8) A "material connection" could be consideration given to a speaker or blogger by an advertiser in the form of benefits or incentives (e.g., cash, free products, prizes, and special access privileges);

(9) A "material connection" could be the relationship between the advertiser and speaker (e.g.,

---

[74] *Id.* § 255.5 (Ex. 8) (emphasis added).
[75] *Id.* § 255.0(b).
[76] *Id.* § 255.1(a).
[77] *Id.*
[78] *Id.* § 255.1(d).
[79] *Id.*
[80] *Id.* § 255.5.
[81] *Id.*

employment);[82] and

(10) Disclosure must be clear and conspicuous and language should be easily understood and unambiguous.[83]

As a best practice, a marketer should create a culture of compliance by educating all external advertisers (including bloggers) and the advertisers' employees of the advertiser about their responsibilities (or product being advertised). Marketers should require that all external advertisers (including bloggers) provide the required disclosure of all "material connections."[84] For example, if a marketer provides free products to an external advertiser in the hope of obtaining a positive review, then the marketer should instruct the external advertiser to disclose that the product was provided to them by the company for providing the review.[85] The marketer should also monitor all marketing claims (including those made by external advertisers) to make sure that all material disclosures are being provided, and the marketer should remind the external advertisers if there is a lack of disclosure.[86]

Given that the Endorsements and Testimonials Guidelines state that the endorser could be liable (with the advertiser) for conveying false and misleading messages, all external advertisers (including bloggers) should confirm the understanding of responsibilities with any marketer before engaging in any advertising.[87] The external advertisers should disclose all material connections when conveying any advertising message, regardless of the platform used to convey the message.[88] The external advertisers should also work proactively with the marketer to demonstrate compliance with the law.[89] While disclosures need to be "clear and conspicuous," the disclosure does not need to be extensive.[90]

IV. CONCLUSION

Because of the viral nature of social media, advertisers (and attorneys reviewing advertising "copy" and marketing strategies) must be

---

[82] *Id.*

[83] *Id.* Placement must be easily viewed and appear in a readable and noticeable font size/color. FED. TRADE COMM'N, ADVERTISING PRACTICES FREQUENTLY ASKED QUESTIONS: ANSWERS FOR SMALL BUSINESS 11 (2001), *available at* http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.pdf.

[84] 16 C.F.R. § 255.1 (Ex. 5).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* § 255.5.

[89] *Id.* § 255.1 (Ex. 5).

[90] *See id.* § 255.5. For example, the external advertisers could satisfy disclosure obligations by simply stating that "I received (product or sample) from (company name)," "(company name) sent me (product or name)," "I was paid by (company name)," or "I am an employee or representative of (company name)" before making any advertising statement.

even more vigilant to ensure that marketers behind advertising campaigns (especially social media marketing campaigns) consider advertising laws and regulations and do not run afoul of these laws. While attempts to overlay existing advertising laws and regulations can be difficult (and in some cases impossible), advertisers must be cognizant of the legal issues. Advertisers must incorporate existing and newly-created laws and regulations (and the lessons learned by other social media marketers) into their advertising campaigns. Ignoring the legal issues and lessons is fraught with peril and can cause severe adverse consequences to both the advertiser and brand being advertised.[91]

[91] Highlighting the increased scrutiny of social media marketing strategies, the FTC recently completed its first investigation under the "Endorsements and Testimonials Guides." To promote the launch of its summer collection, Ann Taylor LOFT invited bloggers to attend an exclusive preview of its 2010 summer collection and were told they would receive a special gift. Letter from Mary K. Engle, Associate Director, Federal Trade Commission, to Kenneth A. Plevan, Esq., Skadden, Arps, Slate, Meagher & Flom LLP (Apr. 20, 2010), *available at* http://www.adlawbyrequest.com/uploads/file/100420anntaylorclosingletter%5B1%5D.pdf. Furthermore, Ann Taylor told bloggers that those who post coverage from the event will be entered in a mystery gift card drawing where you can win up to $500 at LOFT! *Id.* The FTC stated that "[w]e were concerned that bloggers who attended a preview on January 26, 2010 failed to disclose that they received gifts for posting blog content about that event." *Id.* According to the letter, the FTC decided "not to recommend enforcement action at this time" and based its decision on several factors, including the fact that (1) the event was the first and only preview event to date, (2) only a small number of bloggers participated (and some disclosed the material connection), (3) a sign was posted at the preview informing bloggers that they should disclose the gifts, and (4) Ann Taylor subsequently adopted a written policy regarding blogger outreach and advertising. *Id.* Although the FTC ultimately took no action against Ann Taylor (or the bloggers who covered the event), it is clear that the FTC is scrutinizing social media advertising campaigns to ensure compliance with the Endorsement and Testimonial Guides.