



Blogging & New Media

DISCLOSURE

Information

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BLOGGING AND NEW MEDIA DISCLOSURE INFORMATION

Blogging and New Media Disclosures: What You Need to Know

- **Where disclosure language should be placed in blog posts**
- **What types of compensation and relationships require disclosure**
- **Whether site-wide disclosure links are effective**
- **How the FTC views disclosure on Facebook and Twitter**
- **Who is liable for failure to disclose**
- **How merchants should monitor bloggers and other influencers**

Introduction

As a blogger or new media professional, it is important to make sure that you stay within the guidelines established by the **Federal Trade Commission** (“FTC” or “Commission”) with regards to disclosure. These guidelines have been in place for years for other media such as television and print ads, and they help protect the consumer and maintain quality. Recently, the FTC released guidelines on how they expect bloggers and new media professionals to disclose paid relationships, and this PMA Informational Document will help you wade through the legal language and provide real life examples to help you stay within the guidelines.

Endorsements and testimonials are methods of advertising in which a business utilizes the statements and support of outside individuals or organizations in order to increase consumer interest in the product or services that it sells. The term "**endorsement**" is frequently associated with advertising messages featuring celebrities, while the term "**testimonial**" is frequently used to refer to advertising campaigns that utilize ordinary consumers. The terms are used interchangeably, herein.

For the most part, the FTC treats endorsements and testimonials similarly. Any promotional material disguised as neutral editorial content can be deceptive.

The [FTC's Endorsement and Testimonial Guides](#) (the “Guides”) and the [Frequently Asked Questions](#) associated with it are used to evaluate whether an endorsement or testimonial violates **Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices (the “Act”)**. Simply stated, the issue is whether the audience understands a blogger’s relationship to the merchant whose products or services are being reviewed.

The Guides apply to any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring merchant.¹ They reflect three basic truth-in-advertising principles.

- First, endorsements must be **truthful and not misleading**.
- Second, if the advertiser does not possess proof that the endorser's experience represents what consumers will achieve by using the product, the advertisement must **clearly and conspicuously disclose the generally expected results** in the depicted circumstances.
- Lastly, if there is a **connection between the endorser and the marketer** of the product that would affect how people evaluate the endorsement, it should be properly disclosed.

The primary focus of this document is the third principle. Specifically, that a reasonable consumer wants to know such things as whether a person who touts a product works for or has been paid by the company that sells it.

Many bloggers who mention products do not receive anything for their reviews and do not receive a commission if readers click on a link to buy a product. While the financial arrangements between some bloggers and merchants may be apparent to industry insiders, they may not be apparent to everyone else who reads a blog.

Under the law, an act or practice is deceptive if it misleads "a significant minority" of consumers. So even if some readers are aware of these deals, many readers are not. That is why disclosures are so important.

Under certain circumstances, **the Commission considers bloggers to be endorsers**. Online reviews purporting to be the work of independent writers, which are in fact advertisements in disguise, are prohibited.

Thus, **the post of a blogger that receives a free item, cash or in-kind payment to review a product raises issues because there is a "material connection" between the advertiser and the endorser**. As set forth herein, the Guides require a "clear and conspicuous" disclosure of material connections. False or unsubstantiated claims are also prohibited.

Both advertisers that attempt to influence bloggers without requiring them to disclose that they were either paid or received free goods or services, as well as those that post opinions about consumer products or services without properly disclosing material connections, could potentially be liable for a violation of the Act. Both are also potentially on the hook for false or unsubstantiated advertising claims made in an endorsement or testimonial.

Disclosure of Material Connections

It has always been the law that if an advertisement features an endorser who is a relative or employee of the marketer – or if an endorser has been paid or given something of value to tout the marketer's product – the advertisement is misleading unless the connection is made clear.

¹ The FTC revised the Guides in 2009 because truth in advertising is important in all media – including blogs and social networking sites. The FTC regularly reviews its guides and rules to see if they need to be updated. Because the Guides were written in 1980, they did not address social media mechanisms, including Twitter, Facebook, blogs and YouTube. The legal principles have not changed. The FTC revised the examples to show how these standards apply in today's marketing environment.

The reason is obvious. Knowing about the connection is important information for anyone evaluating the credibility of the endorsement.

When there exists a connection between a blogger and the merchant 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 reader), it must be fully disclosed. However, there is no requirement for a blogger to disclose whether a product or service was obtained for free each and every time that the product or service is mentioned.²

Additionally, if you merely mention a product or service that you paid for yourself, the Guides are not an issue unless a different type of material connection exists (e.g., a familial relationship, ownership interest in the company, etc.). Nor are the Guides an issue if you receive the product for free because a store is giving out free samples to all of its customers.

The Guides cover endorsements that are made on behalf of a sponsoring merchant and focus upon reviews for a product or service that a blogger has not paid for. In circumstances where a reader would not reasonably expect such a material connection between the reviewer and the manufacturer, the FTC requires the disclosure of a freebie.³

For example, an endorsement would be covered by the Guides if a merchant – or someone working for a merchant – pays a blogger or gives a blogger something of value to mention a product or service, including a commission on the sale of a product or service. Bloggers receiving free products or other perks with the understanding that they will promote the merchant’s products in their blogs would be covered, as would bloggers who are part of network marketing programs where they sign up to receive free product samples in exchange for writing about them or working for network advertising agencies.

Truth in advertising is important in all media – including blogs and social networking sites. If you have a relationship with a merchant who is sending you freebies in the hope that you will write a positive review, it is best that readers know that you received the product or service for free.

Essentially, any situation where there are facts that a reasonable consumer might want to know, is covered. It is always best to be open and transparent with your readers.

Clear and Conspicuous Disclosures

There is no magic disclosure language. The point is to give readers the essential information in an effective manner. A disclosure as simple as “Company X gave me [name of product] to try, and I think it is great!” gives readers the information they need.⁴

Disclosures must be “clear and conspicuous.” There is no litmus test for determining whether a disclosure is clear and conspicuous. Rather, **disclosures are assessed objectively, based upon the overall “net impression upon a reasonable consumer.”**

² A casual remark like “I use X brand food processor” may not raise an issue under the Guides, but each new positive endorsement made without a disclosure could be deceptive.

³ A disclosure would most likely not be required for a negative review even if the reviewer had received the product for free. A negative review is unlikely to be the kind of sponsored content about which the FTC is concerned.

⁴ Or, at the start of a short video, you might say, “Some of the products I am going to use in this video were sent to me by their manufacturers.” That would provide the necessary heads-up to viewers.

In evaluating whether a disclosure is likely to be clear and conspicuous, **bloggers should consider its placement and its proximity to the relevant claim.**⁵ The closer the disclosure is to the claim to which it relates the better. In fact, when practical, **bloggers should incorporate relevant disclosures into the underlying claim, rather than having a separate disclosure regarding a material relationship with the advertiser.** This is especially true for space-constrained advertisements that require a disclosure.

A single disclosure on a website Home page will most likely not be enough because people visiting your website might read individual reviews or watch individual videos without seeing the disclosure. Additionally, **do not just drop disclosures at the bottom of posts. Material and essential terms should be placed at the top or the beginning of posts.**

A disclosure of material terms at the end would be of concern because consumers might not read all the way through, especially if there are hyperlinks before the disclosure that might take them to other pages. If necessary, remaining non-essential details may be placed at the bottom or the end of posts.

Images used at the top of posts that link to a merchant website must contain all material disclosures in close proximity thereto, and be presented prior to a consumer leaving the website. Such disclosures should be prominent, clear and conspicuous. They should be understandable by the reasonable consumer and, as always, include all material conditions, limitations, restrictions and exclusions.

Disclosure considerations include, without limitation:

- The prominence of the disclosure;
- Whether it is unavoidable;
- Whether it effectively communicates the information in question;
- The size, color and graphic treatment of the disclosure in relation to other parts of the webpage;
- Whether other parts of the advertisement distract attention from the disclosure;⁶
- Whether the disclosure needs to be repeated at different places on a website;
- Whether the disclosure needs to be presented in a manner that either translates between fixed and mobile screens without loss of clarity, or whether there should be a mobile-optimized version of the website; and
- Whether the language of the disclosure is understandable to the intended audience.

Preferably, design advertisements so that “scrolling” is not necessary in order to find a disclosure. When scrolling is necessary, use text or visual cues to encourage consumers to scroll to view the disclosure.

⁵ Bloggers must always take into account the various devices and platforms consumers may use to view advertising and any corresponding disclosure. If an advertisement is viewable on a particular device or platform, any necessary disclosures should be sufficient to prevent the advertisement from being misleading when viewed on that device or platform. If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of an FTC rule, and it is not possible to make the disclosure clearly and conspicuously, then that advertisement should not be disseminated. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.

⁶ If a blog post contains hyperlinks that might lead a reader away from the blogger's website before they get to the end of the post and disclosure, the disclosure should appear before those links.

Space Constrained Advertisements

In an environment with limited real estate, such as Twitter, the Commission has always stated that the disclosure **must be proximate to the endorsement.**⁷ Recommendations for how to handle Twitter disclosures include, without limitation, making the disclosure in every tweet within which a disclosure would otherwise be necessary. A reviewer cannot simply tweet a single disclosure that covers the whole conversation because there is no guarantee that readers will see the disclosing statement.

The FTC does not mandate the specific wording of space-constrained disclosures. However, the same general principles apply across the board, regardless of the advertising medium. All disclosures be in understandable language and convey information essential for a consumer to evaluate the statements.

This means that using **hashtags such as “#spon” or “#spons” may not be readily understandable to all viewers. It is advisable to use “ad” in a prominent location at the beginning of tweets** to clarify that a tweet or link within a tweet includes compensated content. Using a “#ad” or “#paidad” hashtag after a URL or shortlink, alone, is highly prone to be overlooked.

When an advertising claim merits a longer disclosure than is practical for the format, a hyperlink may be placed on a webpage entirely separate from the relevant claim. Hyperlinks can provide a useful means to access disclosures that are not integral to the triggering claim, provided certain conditions are met. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and disclosure are read at the same time.

Hyperlinks must be clear and conspicuous and should be labeled to communicate the specific nature of the information to which it leads (e.g., “Service plan required”).⁸ You cannot conceal material disclosures in hyperlinked pages, but you may provide additional details.

Disclosures which are an integral part of a claim should never be communicated via a hyperlink. They should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information.

While not sufficient alone, introductory Twitter posts that explain the sponsored content, up front, are also recommended. Best practices should also include making material disclosures in each Twitter post, not just the first and not just the last. Each individual tweet that requires a disclosure should have one.

Sample Factual Scenarios

The following should not be considered to be an exhaustive list of factual scenarios pertaining to the necessity of social media disclosures. What follows below is provided for informational purposes only.

⁷ With respect to "space-constrained ads" (e.g., tweets), when a tweet about a reviewed freebie reflects the reviewer's positive opinion, the new FTC guidance indicates that the reviewer should include the required disclosure in the text of the tweet. However, a disclosure in the text of the tweet is probably unnecessary if the positive nature of the review is not apparent on the face of the tweet. For example, where a tweet merely includes a link to a review without spoiling the nature of the review, any required disclosures could probably be presented on the review site instead.

⁸ Hyperlinked disclosures may be particularly useful if, for example, the disclosure is lengthy or if it needs to be repeated due to the existence of multiple triggering claims.

- A blogger receives an item that she is reviewing, for free. Although she discloses the connection, the disclosure is made at the end of her blog post and there are several hyperlinks before the disclosure that could distract readers and cause them to click away before they get to the end of the post. Given these distractions, the disclosure likely is not clear and conspicuous.
- A skin care products merchant participates in a blog advertising service. The service matches up merchants with bloggers who will promote the merchant's products on their personal blogs. The merchant requests that a blogger try a new body lotion and write a review of the product on her blog. Although the merchant does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the merchant 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 merchant 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 potentially liable if she fails to disclose clearly and conspicuously that she is being paid for her services.
- A college student who has earned a reputation as a video games expert maintains a personal "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinion 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 a 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.
- A famous athlete has thousands of followers on Twitter and is well-known as a spokesperson for a particular product. A disclosure that he is being paid every time he tweets about the product is not necessary every time that he tweets about it if his readers understand that he is being paid to endorse that product. However, if a significant number of his readers do not know that, a disclosure would be necessary. Determining whether followers are aware of a relationship could be tricky in many cases, so a disclosure is recommended.

There is no one magic rule. Disclosures should be simple and straight forward.

Guidance and Training

In order to limit potential liability, **merchants should have reasonable programs in place to train and monitor its marketing teams and network members.** Such programs must include, without limitation, guidance pertaining to the importance of truthful advertising, claim substantiation, and when and how to make proper marketing disclosures. Always follow up if you find questionable practices.

Advertisers should monitor what bloggers who are being paid to promote its products or services are saying, and take steps necessary to explain what can and cannot be said. Documenting efforts to halt the continued publication of deceptive representations when they are discovered will also go a long way.

The scope of such training and monitoring programs depends upon the degree of risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, the risk inherent in the sale of health products is significantly greater and may require more supervision than the sale and promotion of a new line of handbags.

It is unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if a merchant's company has a reasonable training and monitoring program. Historically speaking, **corporate education with strict enforcement policies surrounding social media platforms are a significant factor that is considered by the FTC when contemplating the closure of an investigation or the initiation of an enforcement action.**

Investigations and Enforcement Actions

FTC guidance provides no real insight as to specifics surrounding whether or when it intends to take enforcement action against individual bloggers and reviewers. To date, it appears as though the Commission is more interested in pursuing merchants that attempt to buy positive reviews with freebies than they are the reviewers themselves.

That said, the discussion of blogs in the new guidance relates directly to how bloggers themselves comply with disclosure requirements. The Guides have changed the way that brands themselves use bloggers, social media and viral marketing as part of marketing campaigns.

There have been numerous social media-related investigations over the years pertaining to the Guides and the failure to disclose material incentivization (e.g., Ann Taylor LOFT, Hyundai Motor America, Hewlett-Packard, Nordstrom Rack, Cole Hahn, etc.).

While these “influence program” investigations ultimately serve as warnings, most of them had common denominators that resulted in their closure. Specifically, the limited nature of the events at issue and the fact that those with clearly-defined social media policies in-place revised them in order to address the Commission's concerns.

Notably, in 2011, **Legacy Learning Systems Inc. and its owner settled FTC allegations that it deceptively advertised its products in articles, blog posts and other online editorial material through affiliate marketers who falsely posed as ordinary consumers or “independent reviewers.”** The endorsements in question appeared close to hyperlinks to Legacy's website. Affiliates allegedly failed to disclose that they were being paid for every sale that was generated. Terms of the settlement included a hefty monetary fine, as well as onerous monitoring and reporting obligations. These included monitoring top affiliates every month as well as routinely spot checking other affiliates.

Clearly, the implementation of policies on endorsements that comport with the Guides, in addition to promptly addressing any compliance issues, may save merchants and advertising agencies from investigations evolving into enforcement actions. Make sure people who work for or with you know what the rules are. Always monitor what others are doing on your behalf.

Blogging and New Media Disclosures: The Basic Rules

- **Both free products for review and affiliate compensation may trigger the need for disclosure of the relationship.**
- **Disclosure should be clearly and conspicuously placed at the top of blog posts.**
- **Site-wide disclosure in a sidebar, menu, or footer or disclosures buried on one page of the site are not adequate.**
- **Disclosure of the connection to the merchant should include language that is understandable by the “reasonable consumer.”**
- **Space constraints on social media do not alleviate the need for disclosure. Endorsements on Twitter or Facebook should include a non-ambiguous hashtag such as #ad before any affiliate links.**
- **Merchants, bloggers, and agencies can potentially be held liable for failure to disclose.**
- **Merchants must educate anyone who endorses them in return for free products or monetary compensation. In addition, they must regularly monitor those endorsers for compliance with the Guidelines.**
- **No set language is required by the FTC, but rather the FTC will consider the overall net impression upon the reasonable consumer.**

The content and guidance in this document is general in nature and is not intended to constitute legal advice. You should consult with your own legal counsel prior to taking, or refraining from taking, any actions regarding these issues. The Performance Marketing Association provides this document “as is” and makes no representations regarding whether the guidance herein complies with applicable law.