

The Debate Continues About New FTC Guidelines For Bloggers Who Fail To Disclose Endorsements

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Author: [Dan Chambers](#)

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Bloggers who fail to disclose paid reviews or endorsements can face up to \$11,000 fines from the Federal Trade Commission, according to a recent agency ruling – “Guides Concerning the Use of Endorsements and Testimonials in Advertising” that was issued in October. The news set off a wave of protest and unrest in the blogosphere and the debate goes on.

Here is an excerpt from the October 5th FTC release:

“The revised Guides add new examples to illustrate the long standing principle that ‘material connections’ (sometimes payments or free products) between advertisers and endorsers--connections that consumers would not expect--must be disclosed. These examples address what constitutes an endorsement when the message is conveyed by bloggers or other ‘word-of-mouth’ marketers. The revised Guides specify that while decisions will be reached on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Thus, bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service.”

The FTC also set new rules for celebrities. “Celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.”

For example - if a celebrity praises a new car on Twitter and it turns out that the car was given away for free, the celebrity could be fined by the FTC.

Here is the FTC guideline on celebrities:

“Celebrity endorsers also are addressed in the revised Guides. While the 1980 Guides did not explicitly state that endorsers as well as advertisers could be liable under the FTC Act for statements they make in an endorsement, the revised Guides reflect Commission case law and clearly state that both advertisers and endorsers may be liable for false or unsubstantiated claims made in an endorsement – or for failure to

disclose material connections between the advertiser and endorsers.”

Then - a week after the ruling was announced, FTC assistant director Richard Cleland attempted to clarify the FTC’s position.

“It doesn’t matter whether it’s \$16,000 or \$11,000. The root problem here is that reports that there is a monetary penalty for violating these guidelines is untrue. The FTC does not have the authority to impose a fine for a violation to the FTC act,” says Cleland who heads the FTC’s division of advertising practices. “There is a provision that allows for a proceeding in federal court that allows for imposing of a monetary penalty for violation of trade regulation laws. The guidelines are not trade regulation laws.”

Richard Cleland said the blogger or endorser would not be fined, but the advertiser would. “We have never brought a case against a consumer endorser and we’ve never brought a case against somebody simply for failure to disclose a material connection,” he said. “Where we have brought cases, there are other issues involved, not only failing to disclose a material connection but also making other misrepresentations about a product, a serious product like a health product or something like that. We have brought those cases but not against the consumer endorser, we have brought those cases against the advertiser that was behind it. If people think that the FTC is going to issue them a citation for \$11,000 because they failed to disclose that they got a free box of Pampers, that’s not true. That’s not going to happen today, not ever.”

Here are only a few of the questions many people are asking

1. It will be virtually impossible to police. There are thousands of bloggers out there and thousands of marketers. It is hard to imagine the FTC being able to monitor something this vast.
2. Why \$11,000 and where did that figure come from? FTC Public Affairs Specialist Elizabeth Lordan explains: “\$11,000 is what people used to have to pay when they violated a federal court order that resulted from FTC charges of deceptive advertising, The current figure is \$16,000. So the \$11,000 figure is old information that used to be a part of the boilerplate in our press releases when court order violations were announced.”
3. Who is a celebrity and who determines this? This is a very subjective word according to many legal experts.

The FTC will certainly have a difficult time enforcing these regulations. The new guidelines may or may not bring bloggers and marketers into line and may not even hold up in court. Many will definitely continue to push the ethical boundaries and this is unlikely to go away because of these new rules. One thing the new ruling has done for sure – it has given bloggers a lot more to write about.

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