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Leisure Industries

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Contributions to this newsletter are always welcome and should be sent to David Grant at the following e-mail address:

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Bloggers beware

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Can't wait to put social media to use to promote your resort, your airline, your package tour? If the promoting will occur in the United States, you should look at the Federal Trade Commission's Guides Concerning Use of Endorsements and Testimonials in Advertising (16 CFR Part 255), revisions to which took effect on 1 December 2009. One big change means advertisers and bloggers (and Twitterers and all other e-communicators, real or virtual) face FTC Act Section 5 liability if they fail to disclose 'material connections' between advertisers and others affecting statements deemed to be endorsements or testimonials.

The FTC treats a statement as an endorsement if it is both an advertising message and a statement which consumers are likely to believe reflects the opinions, beliefs, findings or experiences of someone other than the advertiser. Personal opinion becomes something more if its author is part of a viral marketing campaign or has 'connections' to the seller which 'might materially affect the weight or credibility of the endorsement,' and would not reasonably be expected by the audience. If the resort I praise in my widely read travel blog lets me use the Imperial Suite for free, that's a material connection. The Guides suggest that incentives to participate in network marketing programmes also require disclosure.

The 'material connection' can be subtler still. If I own a restaurant and sing its praises on a popular food blog under an alias, or if I work for a cruise line and blog about our great new ship without disclosing my employment, there may be trouble. It is not hard to imagine other situations not outlined in the Guides where someone could get in trouble – for

instance a Twitterer, unconnected to any advertiser, raves about a recent package trip, and everyone in the agency offering the tour hops on Twitter and 'ReTweets' that great review, pushing it to the top of the most-read topics.

The key question is whether the consumer generated statement is 'sponsored' by the advertiser. The commission provides a non-exhaustive list of factors it would consider:

'... whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of product or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.'

Both advertiser and endorser can be liable for the statements. Moreover, the FTC says advertisers should be providing guidance and training to bloggers about the need to make sure statements are truthful and substantiated, and also should be monitoring paid bloggers and halting the publication of deceptive statements.

The Guides have separate provisions dealing with statements by experts in endorsements, endorsements by organisations and celebrity endorsements. In particular, an advertiser with a celebrity promoter now seems obliged to make sure the celebrity knows what must be revealed about any material connection.

The FTC retains prosecutorial discretion in particular circumstances. But the Guides can help avoid turning 'on line' into 'pay fine'.