



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Mary K. Engle
Associate Director for Advertising Practices

December 7, 2006

Gary Ruskin, Executive Director
Commercial Alert
4110 S.E. Hawthorne Boulevard, #123
Portland, OR 97214-5246

Dear Mr. Ruskin:

On October 18, 2005, Commercial Alert filed with the Federal Trade Commission a Request for Investigation of Companies That Engage in "Buzz Marketing."¹ The petition asserts that it is a violation of Section 5 of the Federal Trade Commission Act for a marketer to compensate a consumer for disseminating a message to other consumers, especially children, without disclosing the consumer's relationship with the marketer. The petition asks the Commission to issue guidelines and initiate law enforcement actions relating to this practice, which the petition calls "buzz marketing."² For the reasons set forth below, the FTC staff concludes that it is not necessary to issue guidelines at this time and that the staff will determine on a case-by-case basis whether law enforcement action is appropriate.

I. Background

"Word of mouth marketing" includes a broad range of activities in which a marketer induces and facilitates communication between and among consumers about the marketer's products. The Word of Mouth Marketing Association ("WOMMA"), which describes itself as "the official trade association for the word of mouth marketing industry," defines "word of mouth marketing" as "giving people a reason to talk about your products and services, and making it easier for that conversation to take place." See "Word of Mouth 101: An Introduction to Word of Mouth Marketing," at http://www.womma.org/content/womma_wom101.pdf. Some word of mouth is "organic," *i.e.*, it "occurs naturally when people become advocates because they

¹ Letter dated October 18, 2005, from Gary Ruskin, Commercial Alert, to the Federal Trade Commission ("the petition").

² The petition refers to such marketing practices variously as "buzz marketing," "guerilla marketing," and "stealth marketing." The Word of Mouth Marketing Association and other commentators have proposed definitions for these three terms that appear to have different meanings than the meaning ascribed to them in the petition. See, *e.g.*, <http://www.womma.org/ethicscode.htm>. To avoid confusion, this response will not use these terms and instead will consider them as subsets of the category of "word of mouth marketing."

are happy with a product and have a natural desire to share their support and enthusiasm.” Id. Other word of mouth is “amplified,” i.e., it “occurs when marketers launch campaigns designed to encourage or accelerate [word of mouth marketing] in existing or new communities.” Id.

Commercial Alert’s petition raises concerns about a specific type of amplified word of mouth marketing, specifically, the practice of marketers paying a consumer (the “sponsored consumer”) to distribute a message to other consumers without disclosing the nature of the sponsored consumer’s relationship with the marketer.

II. Discussion

As the petition states, an act or practice is deceptive under Section 5 of the FTC Act if: 1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and 2) that representation or omission is material to consumers. FTC Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 175 (1984); see, e.g., FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988). A representation or omission is material if it is “likely to affect [consumers’] choice of, or conduct regarding a product.” Kraft, Inc. v. FTC, 970 F.2d 311, 323-24 (7th Cir. 1992), quoting Cliffdale Assocs., 103 F.T.C. at 165. The Commission presumes certain categories of claims to be material, including express claims and claims the seller intends to make. Kraft, 970 F.2d at 324; Thompson Medical, 104 F.T.C. 648, 816-17 (1984).³

The main question the petition presents is whether it is deceptive in violation of Section 5 of the FTC Act to fail to disclose that a marketer is paying⁴ a sponsored consumer to make claims to other consumers about the marketer’s product.⁵

In addressing similar concerns, the Commission’s Endorsement Guides state that “[w]hen there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement . . . , such connection

³ This presumption can be rebutted with sufficient evidence that the claim is not material. Deception Policy Statement, 103 F.T.C. at 183 n.47.

⁴ While some word of mouth marketers provide cash payments to consumers, others provide consumers with product samples, coupons, “inside” information about new products, the ability to influence marketing campaigns, or similar incentives to disseminate a message. The petition does not indicate if Commercial Alert believes that non-pecuniary forms of compensation constitute “payment.”

⁵ As with any advertisement, if an advertiser makes deceptive claims through an agent (for example, unsubstantiated product performance claims), the FTC can bring an action under Section 5, even if the paid relationship is clearly disclosed.

must be fully disclosed.”⁶

The Endorsement Guides look to whether the connection between the seller and the endorser is likely to have a material effect on the weight or credibility of the endorsement, that is, if the “connection [between them] is not reasonably expected by the audience.” For example, in Cliffdale Associates, the marketers of a fuel efficiency device made the deceptive claim in advertisements that the product would improve automobiles’ gasoline mileage. In these ads, the marketers also included testimonials from purported consumers claiming that they had improved their gasoline mileage with the device, although the purported consumers were actually business associates of the marketers. The Commission concluded that the failure to disclose the relationship between the marketers and the purported consumers was likely to materially affect the weight that consumers granted to the deceptive lower gasoline mileage claims, and, therefore, that it was deceptive to fail to disclose that relationship.⁷

Another illustrative example is Trendmark International.⁸ In that case, marketers allegedly made deceptive weight loss claims in advertisements for a dietary supplement. In their advertisements, the marketers had presented purported consumer endorsers claiming that they had lost substantial weight using the supplement. In fact, one of the purported consumer endorsers was an independent distributor of the product and two others were the spouses of independent distributors. The Commission alleged that it was deceptive for the marketer to fail to disclose its relationship with the purported consumer endorsers, presumably because the failure to do so was likely to have caused consumers to give greater weight to the allegedly deceptive weight loss claims.

⁶ The connection typically is that the seller is paying the endorser, but the connection also may include other circumstances in which there is a connection that may bias the endorser’s views, for example, if the endorser is a close business associate or relative of the seller. 16 C.F.R. § 255.5. Citing this principle, the Word of Mouth Marketing Association’s ethical code encourages word of mouth advocates to disclose their relationship with the marketer, stating that word of mouth advocates should be “open and honest about any relationship with a marketer and about any products or incentives that they may have received.” The code also disapproves of “shill” and “undercover” marketing in which people are paid to make recommendations without disclosing their relationship with the marketer. WOMMA Code Sec. 2, Honesty of Relationship. Many word of mouth marketing companies agree that if consumers are paid to recommend products, then the consumer’s relationship with the marketer should be disclosed.

⁷ Cliffdale Associates, 103 F.T.C. 110, 172 (1984). On the other hand, payments to expert and celebrity endorsers appearing in advertising ordinarily would not need to be disclosed because, in that context, consumers would ordinarily expect such payments.

⁸ TrendMark Int’l, Inc., 126 F.T.C. 375, 378 (1998) (consent order).

Similarly, in some word of mouth marketing contexts, it would appear that consumers may reasonably give more weight to statements that sponsored consumers make about their opinions or experiences with a product based on their assumed independence from the marketer.⁹ For example, a sponsored consumer may tell his friends about the impressive sound quality of his new cell phone's speaker phone. If the sponsored consumer's friends do not know that he is being paid to talk about the cell phone, they may give greater weight or credibility to his statements than they otherwise would if he did disclose, or if it were otherwise clear from the context, that he is being paid by the marketer to communicate about the telephone. Likewise, if a sponsored consumer raves to her friends about how well her new dishwasher cleans dishes even when they are not pre-rinsed, such an opinion is likely to be given greater weight or credibility without a disclosure of sponsorship than with a disclosure that the marketer is paying the consumer to speak about its product. In such circumstances, it would appear that the failure to disclose the relationship between the marketer and the consumer would be deceptive unless the relationship were otherwise clear from the context.

III. Word of Mouth Marketing and Children

Finally, the petition raises concerns about exposing children to amplified word of mouth marketing that could deceive them, as well as using children to communicate messages in such marketing. The Commission generally shares your concern that deceptive advertising aimed at children may cause harm. As we noted in our response to Commercial Alert's prior petition regarding product placement in television programs, the FTC has taken action to protect children from unfair or deceptive practices.¹⁰

In evaluating amplified word of mouth marketing directed to children, the same general principles apply as with adults. Specifically, the relationship between the word of mouth marketer and the endorser should be disclosed if that connection would materially affect the weight or credibility of the endorsement, *i.e.*, if consumers would not reasonably expect that relationship. However, the Commission has recognized that teens and children are more vulnerable to marketing messages than adults. In determining whether teens and children would reasonably expect a relationship between a word of mouth marketer and an endorser, the Commission would consider consumer expectations from the standpoint of an ordinary child or

⁹ See Deception Policy Statement, 103 F.T.C. at 181 (advertising should not misrepresent the source and limitations of opinion claims; opinion claims are actionable if they are not honestly held or if they misrepresent the qualifications of the holder or the basis of his opinion).

¹⁰ *E.g.*, Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (consent order); Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order); Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order); Audio Communications, Inc., 114 F.T.C. 414 (1991) (consent order); Teleline, Inc., 114 F.T.C. 399 (1991) (consent order).

teenager.¹¹

In addition, the petition also raises concerns that parents of children who communicate messages for word of mouth marketers may not be aware of their children's marketing activities. If a company operates a website directed to children under age 13 or has actual knowledge that its website is collecting personal information from such children, the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 *et seq.*, and its implementing Rule, 16 C.F.R. Part 312, require that the operator obtain verifiable parental consent to the collection of the information. However, if the website is not directed to children under age 13 or the operator does not have actual knowledge that it is collecting personal information from such children, the Act and the Rule do not require that the operator obtain such consent.

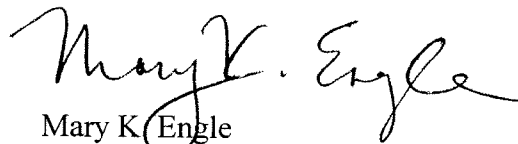
IV. Conclusion

In conclusion, the FTC staff will determine on a case-by-case basis whether to recommend law enforcement actions to the Commission. We encourage you and other members of the public to submit information about any such instances, so that we can consider this information and recommend that the Commission take law enforcement action when appropriate. In addition, the Commission will continue to evaluate these issues.

Finally, we emphasize that the decision not to recommend formal action in this matter should not be construed as a formal Commission determination of whether the actions challenged in the Commercial Alert submission comply with Section 5, and we invite Commercial Alert to continue to bring to our attention instances in which word of mouth marketing practices may cause consumer injury.

Thank you for contacting the Commission about this issue.

Very truly yours,



Mary K. Engle
Associate Director for Advertising Practices

cc: Washington Legal Foundation, Association of National Advertisers (commenters of record)

¹¹ In the context of advertising directed to children, the Commission examines the ad from the standpoint of an ordinary child. Deception Policy Statement, 103 F.T.C. at 179.