Regulating Online Buzz Marketing: Untangling a Web of Deceit

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INTRODUCTION

During the past fifteen years, the Internet has swelled into its own virtual world of commentary, opinion, criticism, news, music, videos, gaming, role playing, shopping, banking, finance, and digital commerce. Coupled with the growth of blogs and social networking sites, millions of Americans appear willing to share online their own thoughts and experiences regarding products, services, and companies.

In response to the public’s interest, companies have begun to rely more heavily in recent years on word-of-mouth marketing, often referred to as “buzz marketing,” a technique that attempts to generate conversations among and with current and potential customers. Marketers have discovered that the Internet is an excellent interactive medium to promote goods and services. Some marketers have begun to engage in the flourishing business of “stealth marketing,” a method of communicating with potential customers in a way that disguises the originator of the communication.

The increase in use of the Internet as a marketing medium gives rise to a conundrum: consumers are bombarded by, skeptical of, and generally ignore overt commercial messages, but consumers are more likely to pay attention to—even seek out—and regard as credible, reviews and opinions by fellow consumers. Marketers therefore hope to convey their advertising messages through consumer comments (endorsements/testimonials). However, if consumers know a marketer sponsors the

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comments, the comments are less likely to be viewed as credible, and if the marketers do not disclose the sponsorship, they are potentially deceiving the public.

This article examines legal issues associated with online buzz, and particularly stealth, marketing. Part I reviews the development of buzz and stealth marketing techniques and their emerging and growing use on the Internet. Because many stealth marketing techniques can be classified as sponsored product endorsements, Part II examines the Federal Trade Commission’s (FTC) role in regulating deceptive sponsored endorsements. Part III of this article analyzes updated guidelines which the FTC has adopted as of December 1, 2009, for use in regulating sponsored endorsements, with particular emphasis on the FTC's recognition of online communications techniques and platforms. Part IV examines the obstacles the FTC may face in implementing and enforcing its revised guidelines, particularly relating to industry concerns, the potential shifting of liability to individuals publishing product-related comments, and possible application of federal law granting immunity to publishers for user-generated online content. Part V of this article offers proposed solutions to the aforementioned FTC enforcement obstacles, with the goal that the FTC be able to effectively regulate against deceptive online product endorsements without unduly stifling speech on the Internet.

I. ONLINE MARKETING—FROM BUZZ TO STEALTH

The average consumer is bombarded with marketing communications, most of which are either ignored or regarded with skepticism.1 It has long been a given in communication and marketing disciplines, however, that consumers are immensely susceptible to word-of-mouth communications.2

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2 Johan Arndt, Role of Product-Related Conversations in the Diffusion of a New Product, 4 J. Marketing Res. 291, 291 (1967). See also Dee T. Alsp et al., Word-of-Mouth Research: Principles and Applications, 47 J. Advertising Res. 398, 398 (2007) (noting that abundant research demonstrates that word of mouth is one of the most influential channels of communication in the marketplace).
Personal recommendations are considered the strongest of all consumer triggers, primarily because they come from a trusted source rather than a corporate third party.

Companies eventually began to analyze customer interactions and how they influence each other to orchestrate marketing campaigns to generate “explosive self-generating demand,” resulting in consciously engineered buzz in relational networks. Buzz marketing, also more formally known as word-of-mouth marketing, is based on the premise that informal conversation and relational networks are especially influential. Buzz may be engineered through a network of consumers, who voluntarily promote products they like (often in return for coupons or discounts), or by hiring actors to pose as consumers in daily

3Andrew M. Kaikati & Jack G. Kaikati, Stealth Marketing: How to Reach Consumers Surreptitiously, 46 CAL. MGMT. REV. 6, 9 (2004). See also James M. Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 TEX. L. REV. 637, 645 (1973) (“Any endorsement has an impact on a consumer’s decision to make a purchase. A recommendation by the salesman at the point of purchase (‘I am not just saying this to make a sale; I drive one myself, you know.’) affects the decisional process.”).

4Laine Lister, Making Word-of-Mouth Work, B&T MAG., July 18, 2008, at 10. The FTC published the results of two studies analyzing the effect of consumer endorsements which found that multiple testimonials about a product effectively communicate efficacy claims (i.e., that the product works for all, most, or about half the people who use it, a typicality claim. Manoj Hastak & Michael B. Mazis, The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement, Sept. 30, 2003, http://www.ftc.gov/reports/endorsements/study1/report.pdf; Manoj Hastak & Michael B. Mazis, Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements, Sept. 22, 2004, http://www.ftc.gov/reports/endorsements/study2/report.pdf. See also Alsop et al., supra note 2, at 398 (noting that word of mouth is seen as more credible than marketer-initiated communications because it is perceived as having passed through the unbiased filter of “people like me”).


7See generally id. Part of these relational networks are customer communities—a body of consumers who are involved with a company in a social relationship and who interact among themselves. Ravi S. Achrol & Philip Kotler, Marketing in the Network Economy, 63 J. MARKETING 146, 160 (1999). See also William McGeeveran, Disclosure, Endorsement, and Identity in Social Marketing, 2009 U. ILL. L. REV. 1105, 1109 (“Word of mouth’ describes peer-to-peer interactions in which an individual passes on opinions about a product to others.”) (footnote omitted).
settings. This “commercialization of chitchat” is most effective when consumers do not even notice the commercial message.

At the same time, the Internet, and particularly the World Wide Web, has established itself as an essential communications medium. Over 25% of the world’s population, and 75% of North Americans, use the Internet in some form. There are approximately 70–100 million online blogs chronicling every conceivable topic, many with the capability for readers to post comments to entries. The two most popular social networking sites, MySpace and Facebook, which allow users to create online profiles and share information, photos, and videos with other users, together boast over 400 million users worldwide.

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8See generally Carl, supra note 6. See also Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power 132-34 (2004) (describing a variety of methods in which corporations have engaged in “undercover marketing”); Suzanne Vranica, Getting Buzz Marketers to Fess Up, WALL ST. J. ONLINE, Feb. 9, 2005, at http://online.wsj.com/article/0,,SB1107908378180449447,00.html; Rob Walker, The Hidden (in Plain Sight) Persuaders, N.Y. TIMES MAG., Dec. 5, 2004, at 68. For example, in 2002 Sony Ericsson hired sixty actors in ten cities to pose as tourists, asking strangers to take their pictures with a Sony Ericsson camera phone the actors were carrying—at the same time commenting on “what a cool gadget it was.” Walker, supra (noting the actors were told to identify themselves only when asked directly). See generally Kelly D. Martin & N. Craig Smith, Commercializing Social Interaction: The Ethics of Stealth Marketing, 27 J. PUB. POL’Y & MARKETING 45 (2008) (discussing the ethical implications of the Sony Ericsson and two additional stealth marketing efforts).

9Walker, supra note 8.

10Kaikati & Kaikati, supra note 3, at 9.


Twitter, an emerging social networking platform, allows participants to post messages of up to 140 characters of text and is widely considered the fastest growing tool of Web influence.\textsuperscript{14} Twitter has at least 6 million users.\textsuperscript{15} The percentage of U.S. Internet users posting on Twitter increased 900% from 2008 to 2009.\textsuperscript{16}

It was only a matter of time before buzz marketing moved to the Internet, transforming word of mouth to “word of mouse.”\textsuperscript{17} What better place to engage consumers than within a medium that fosters conversation—blogs, microblogs, and social networking sites.\textsuperscript{18} Companies have embraced the online community in a variety of ways. Some companies, for example, have created “social-shopping” sites, a blend of social networking and e-commerce.\textsuperscript{19} These sites offer product recommendations, some by the site’s staff and some by users, and allow users to create wish lists, comment on products, and purchase products.\textsuperscript{20}

But the dichotomy between the efficacy of personal recommendations versus the skepticism toward corporate marketing measures has caused buzz marketing to morph into stealth marketing, which has been described as advertisers pressing products and positions on audiences

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id}.
\item Kaikati & Kaikati, supra note 3, at 9.
\item See Alsop et al., supra note 2, at 398 (noting that, while word of mouth “has always played an important role in the formation of consumer opinions, over the past decade it has become an even more powerful force, due to a technology-driven explosion in the number and types of informal communication channels[,]”); Joseph T. Plummer, \textit{Word of Mouth—A New Advertising Discipline?}, 47 J. ADVERTISING Res. 385, 385 (2007) (referring to word of mouth as the oldest form of advertising and finding it interesting that “the world’s most recent technological breakthrough—the [I]nternet— . . . has propelled [word of mouth] from being an afterthought or perhaps a random occurrence to possibly a new advertising discipline[]”); Terence A. Shimp et al., \textit{Self-Generated Advertisements: Testimonials and the Perils of Consumer Exaggeration}, 47 J. ADVERTISING Res. 453, 453 (2007) (noting that “the rapid growth of online communication media—such as product chat rooms, blogs, message boards, and ratings websites— . . . have amplified the voice of the consumer and greatly enhanced consumers’ ability to talk with one another about products and brands . . .”).
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
while masking their identities. Petty and Andrews differentiate between overt advertising, in which consumers know the communication originates directly from the seller, and covert advertising, in which “marketers hope to avoid both consumer disinterest and skepticism of marketing communications by communicating in ways that are perceived as not being marketing communications.”

A classic example of this covert marketing approach occurred in 2006, when Laura St. Claire and Jim Thresher began chronicling, on a blog called Wal-Marting Across America, their journey in an RV from Las Vegas to Georgia, parking overnight in Wal-Mart parking lots. Laura and Jim (as they were known on the blog), a couple living in Washington, D.C., originally came up with the idea to take advantage of Wal-Mart’s policy to allow RV travelers to park overnight in its parking lots for free as a way to travel from Washington D.C. to Pennsylvania and North Carolina to visit two of their children. Laura, a freelance writer, also planned to chronicle the trip for RV magazines. When Wal-Mart’s public relations firm, Edelman Worldwide, learned of the trip, it decided to expand and sponsor the trip—flying the couple to Las Vegas (to

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21 Ellen P. Goodman, Stealth Marketing and Editorial Integrity, 85 Tex. L. Rev. 83, 83–84 (2006). Stealth marketing “is considered to be a viable alternative to conventional advertising because it is perceived as softer and more personal than traditional advertising.” Kaikati & Kaikati, supra note 3, at 6. See also Pradnya Joshi, When a Blogger Voices Approval, a Sponsor May Be Lurking, N.Y. Times, July 13, 2009, at B1 (“Marketing companies are keen to get their products into the hands of so-called influencers who have loyal online followings because the opinions of such consumers help products stand out amid the clutter, particularly in social media.”); Stephen D. Rappaport, Why We Talk: The Truth Behind Word-of-Mouth—Seven Reasons Your Customers Will or Will Not Talk About Your Brand, 47 J. Advertising Res. 535, 535 (2007) (book review) (“[I]ndividuals talk to establish or raise their status among family, friends, and peers. . . . [T]alk perceived as helpful, newsworthy, insightful, or applicable is valued and raises or maintains status; commercial or manipulative talk is devalued, as may be the speaker who risks losing status.”). Kaikati & Kaikati, supra note 3, at 11, describe the earliest known attempt at stealth marketing when, sometime in the 1920s, Macy’s reportedly attempted to unload a large inventory of unsold long white gloves by hiring twenty-five well-dressed women to don the gloves on the subway.

22 Petty & Andrews, supra note 1, at 7 (citation omitted). Petty and Andrews further define “masked marketing” as “marketing communications that appear not to be marketing communications.” Id.


24 Gogoi, supra note 23.

25 Id.
serve as the starting point of the journey), providing the RV, paying for the gas, and paying Laura to chronicle the trip on a blog.\textsuperscript{26} According to one account, the blog entries were “relentlessly upbeat” and looked “like a roll call of happy Wal-Mart workers[,]” and nowhere on the blog was it disclosed that “Wal-Mart . . . paid for the flight [to Las Vegas], the RV, the gas, and the blog entries.”\textsuperscript{27} What is disturbing is that Richard Edelman, founder of Edelman Worldwide, is one of the founders of the Word of Mouth Marketing Association (WOMMA) and helped write the Association’s code of ethics,\textsuperscript{28} which promotes standards of conduct including disclosure of marketers’ identities in relation to marketing initiatives and disclosure of relationships between marketers and word-of-mouth participants.\textsuperscript{29} If Edelman Worldwide had followed WOMMA’s code of ethics, there would have been a disclosure on the blog that it was at least supported, if not sponsored, by Wal-Mart.

Companies have also discovered the potential of social networking sites for some degree of stealth marketing. For example, 24-year-old singer and guitarist Marié Digby became quite well known as a result of her own MySpace page and YouTube (the online video repository)—homemade music videos of her performing her songs have been viewed more than 2.3 million times on YouTube.\textsuperscript{30} A 2007 press release from Walt Disney Company’s Hollywood Records implied that Ms. Digby’s online popularity had led to her signing a record deal with Hollywood Records.\textsuperscript{31} What the press release did not disclose was that Ms. Digby had signed with Hollywood Records in 2005 and that Hollywood Records had helped devise her Internet strategy, consulted with her on the type of songs she

\begin{itemize}
\item \textsuperscript{26}Id.
\item \textsuperscript{27}Id.
\item \textsuperscript{28}Frazier, supra note 23.
\item \textsuperscript{31}Smith & Lattman, supra note 30.
\end{itemize}
posted online, and distributed a high-quality studio recording of one of her songs to radio stations and iTunes (Apple Computer’s online music store). Hollywood Records used MySpace to promote Ms. Digby’s image as that of a struggling artist achieving notoriety on her own while, in fact, she was receiving support from a major record label.

An aspect of the online information-sharing platforms that lends itself to stealth marketing is the fact that identities can easily be hidden or disguised on the Internet. For example, interns at record labels reportedly spend hours in online chat rooms trying to build buzz for their artists. This sort of activity may be the norm. An executive of a major public relations firm reported that, in recent interviews with job candidates for its new media public-relations practice, many of the candidates “are boastful about how they go into blogs and post anonymously and have great success. These are thoughtful, smart people, but they thought this was OK.”

Many bloggers have also discovered they can subsidize their blogging hobby by placing advertisements on their sites—some can even support themselves with the advertising. New advertising agencies go beyond just placing ads on blogs, however. They also place ads on blogs that correspond to reviews the bloggers have written about the advertised product. Other companies directly pay bloggers (in cash or in kind) for reviews. Blogging mothers have been particularly targeted because “[r]eaders flock to these blogs for real opinions from real moms whose lives appear to resemble their own.” However, many of these bloggers

32 Id.
34 Frazier, supra note 23.
37 Katy McLaughlin, The Price of a Four-Star Rating, WALL ST. J., Oct. 6, 2007, at W1. See also Joshi, supra note 21 (describing a variety of situations in which bloggers have received gifts and other remuneration in return for writing and posting product reviews).
38 Melissa Rayworth, Mom Blogs Dole out Advice—With Corporate Backing, ASSOCIATED PRESS, May 31, 2009, available at http://www.timesargus.com/article/20090531/FEATURES07/905310321/ 1016/FEATURES07. See also Joshi, supra note 21 (describing one mother’s popular Web site which contains nearly 1500 product reviews and which attracts “free items from companies eager to promote their products to her readers.”).
have “relationships” with companies in which the bloggers receive perks, such as free samples, gifts, and trips, in exchange for reviewing the companies’ products.\(^39\) In many cases, these relationships are not disclosed.\(^40\) As a result, it can be difficult to discern “which impromptu post about lunch with toddlers is also a carefully crafted sales pitch.”\(^41\)

In some cases, individuals are recruited specifically to post favorable online reviews. Belkin, a company that provides computer and consumer electronics products, was discovered to have paid individuals to post favorable reviews of Belkin products on Amazon.com.\(^42\) Individuals were instructed to not only “[w]rite as if you own the product and are using it[,]” but also to “[m]ark any other negative reviews as ‘not helpful’ once you post yours.”\(^43\) In a similar situation, the publisher Elsevier reportedly offered to give contributors to a clinical psychology textbook a $25 Amazon gift certificate if they published a five-star review of the textbook on Amazon.com and Barnes & Noble’s Web site.\(^44\) Some companies even create their own online endorsements. Lifestyle Lift, a cosmetic surgery company, reached a settlement with the State of New York concerning its alleged

\(^39\)Rayworth, supra note 38.

\(^40\)Id.


attempts to fake positive online consumer reviews—reportedly ordering employees to pretend they were satisfied customers and write glowing reviews of the company’s face-lift procedure and creating its own Web sites of face-lift reviews to appear as independent sources.\textsuperscript{45} 

Twitter has been adopted by various companies to spread the word about their products, and recently Land Rover launched a Twitter campaign which involved payments to “Tweeters” (those who have a Twitter account and post messages) to enhance its marketing efforts for new Land Rover models being shown at the New York Auto Show.\textsuperscript{46} Although the Tweeters weren’t paid significant amounts—one Tweeter reported having been paid $2.50 for Land Rover’s sponsorship of his Twitter profile page for seven days—others with large Twitter followings have been paid amounts reportedly totaling hundreds of dollars.\textsuperscript{47} The significance of this effort is that individual Tweeters are reaching hundreds and thousands of their contacts with product recommendations costing the advertising company only pennies. As one business forecaster remarked, “it is peers and their data, rather than brands, who will become the primary way we make decisions.”\textsuperscript{48} 

The Internet has provided an expanding forum for hiding identities and affiliations with marketers, which, as will be discussed, has caught the attention of the FTC. Regardless of this relatively new medium, paying someone to comment about a product or service can constitute a sponsored endorsement or testimonial. And failing to disclose a sponsorship underlying an endorsement or testimonial may be a deceptive act in violation of the Federal Trade Commission Act (FTCA).


\textsuperscript{46} Jeremy Mullman, \textit{Land Rover Taps Twitter as Campaign Cornerstone}, \textit{80 Advertising Age} 3, 25, Apr. 20, 2009.

\textsuperscript{47} \textit{Id. See also} Joshi, \textit{supra} note 21 (describing one micro blogger who is “well compensated” by the cable network TNT for “sending out several messages to her more than 10,000 Twitter followers on Tuesday nights, when a new episode of ‘Saving Grace’ is shown.”).

II. SPONSORED ENDORSEMENTS AND IMPRESSIONISTIC DECEPTION

In 1914, Congress, under Section 5 of the FTCA, empowered the FTC to prohibit unfair methods of competition. The FTC was established as a quasi-judiciary body to initially determine what constitutes an unfair method of competition. The Wheeler-Lea Act of 1938 broadened the scope of the FTC’s authority, authorizing it to also challenge unfair or deceptive acts or practices. Fundamentally, the purpose of Section 5 of the FTCA is to abolish the rule of caveat emptor, though the FTC is empowered to act only when the acts and practices are unfair and deceptive to the public generally.

The FTC was granted broad powers to define and proscribe deceptive trade practices. These elements have been restated somewhat by the courts. Currently, “[t]o establish liability under Section 5 of the FTCA, the FTC must establish that (1) there was a representation; (2) the representation was likely

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50 S. REP. NO. 75–221, at 2 (1937). See Schwartz et al., supra note 49, at 96–97 (noting that Congress left it to the FTC to determine what is an “unfair” practice out of concern that such a broad provision was an unconstitutional delegation of legislative power).


52 FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (“That rule [caveat emptor] can no longer be relied upon as a means of rewarding fraud and deception, and has been replaced by a rule which gives to the consumer the right to rely upon representations of facts as the truth.”) (citations omitted). See also Bailey & Pertschuk, supra note 51, at 866.

53 S. REP. NO. 75–221, at 2.

54 Bailey & Pertschuk, supra note 51, at 872.
to mislead customers acting reasonably under the circumstances, and (3) the representation was material.”

Because an act or practice need only have a tendency or capacity to mislead, the FTC need not find that consumers have actually been misled to declare an act or practice deceptive. And because the purpose of the FTCA “is to protect the public, not to punish a wrongdoer, and it is in the public interest to stop any deception at its incipiency[,]” the FTC “has traditionally focused on the effects of conduct in order to afford the most protection possible for the public.” As a result, a showing of intent to deceive is not required. In addition, the FTC need not show either actual damage to the public or actual deception.

“A representation is material if it is of a kind usually relied upon by a reasonably prudent person.” A presumption of actual reliance arises once the FTC has proved that a defendant “made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant’s product.” Not only is a representation material if it “induces a purchaser’s decision to buy,” but also if

56Bailey & Pertschuk, supra note 51, at 875–76.
57Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) (citations omitted).
58Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1368 (11th Cir. 1988) (quoting In re International Harvester Co., 104 F.T.C. 949, 293 (1984)) (internal quotations omitted).
59Id. (noting that courts have held that proof of a party’s intent has no bearing on the question of whether a Section 5 violation has occurred); In re International Harvester Co., 104 F.T.C. 949, 293 (1984) (“[I]t is not necessary to examine whether a seller engaging in a potentially misleading practice intends to deceive or acts in bad faith.”); FTC v. Bay Area Business Council, Inc., 423 F.3d 627, 635 (7th Cir. 2005) (“The FTC is not . . . required to prove intent to deceive.”). See also Bailey & Pertschuk, supra note 51, at 876.
60Bailey & Pertschuk, supra note 51, at 876.
it is likely to affect the average consumer in deciding whether to purchase a product.64

Because many factors can induce a consumer to purchase a product or service, it may be extremely difficult to establish that a particular misrepresentation caused consumers to choose differently and even more difficult to show that they were “injured” by the different choice.65 As such, the fact that consumers were not harmed because they would have purchased the product anyway is not relevant; materiality requires neither reliance on the misrepresentation nor an injury.66 When a fact is misrepresented intentionally, the FTC normally can infer that the misrepresentation is material. A company’s decision to make a misrepresentation is a convincing basis for the inference that it is important to potential purchasers.67 Finally, the omission of material information can also be misleading. The FTC has found, on the basis of its own expertise, that it is deceptive to fail to disclose different types of product information to consumers.68

When individuals post messages on the Internet and create online social profiles without any mention of sponsorship from a commercial enterprise, they are conveying the impression that their opinions, experiences, or activities are their own and that they are true and spontaneous.69 In reality, they are being sponsored to endorse a product or service. In 1972, the FTC initially proposed “Guides Concerning Use of Endorsements and Testimonials in Advertising,”70 which were first published in

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64Bailey & Pertschuk, supra note 51, at 892; Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992).
65Bailey & Pertschuk, supra note 51, at 893.
66Id.
67Id.; Colgate-Palmolive Co., 380 U.S. at 392 (holding that when the FTC “finds deception it is also authorized . . . to infer that the deception will constitute a material factor in a purchaser’s decision to buy[”’]”); Kraft, Inc., 970 F.2d at 322 (holding the FTC “is entitled to apply, within reason, a presumption of materiality[”’]). Although specifically discussing monopolies, the Supreme Court has also recognized that “[m]ost businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers.” Central Hudson Gas & Elec. Co. v. Public Serv. Comm’n, 447 U.S. 557, 567 (1980).
68Bailey & Pertschuk, supra note 51, at 894.
69“The baseline of a true endorsement should be defined as an accurate and voluntary declaration of support.” McGeveran, supra note 7, at 1127.
1975, updated in 1980, and updated most recently in 2009 with an effective date of December 1. Although the FTC Guides on Endorsements are not themselves statutory or regulatory authority, they outline and provide guidance on the FTC’s position on endorsements.

The FTC Guides on Endorsements define an endorsement as any advertising message (including verbal statements . . . or depictions of the name, . . . likeness or other identifying personal characteristics of an individual . . .) 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.

The consumer realizes that at the time of purchase he or she can make a judgment regarding only the likelihood that the product will serve the purpose for which it is purchased. Endorsements are important because they persuade the consumer in making that judgment. The regulation of testimonials and endorsements is therefore not the regulation of the truth or falsity of statements, but the regulation of the end result of those claims in the form of the impression the consumer forms with respect to the product. Endorsements affect consumers’ impressions of products or services.

74Consuelo Lauda Kertz & Roobina Ohanian, Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases, 19 Hofstra L. Rev. 603, 607 (1991) (noting that the Guides on Endorsements provide guidance about what the FTC considers to be unfair or deceptive practices). Kertz and Ohanian note that the “guides are not themselves statutory or regulatory authority, they outline the Commission’s position on endorsements and testimonials and give guidance about what the Commission considers to be unfair or deceptive practices.” Id. As demonstrated infra at notes 81–82 and accompanying text, the FTC will use them as the basis for regulatory actions.
75FTC Guides on Endorsements, supra note 73; 16 C.F.R. § 255.0(b). “Testimonial” and “endorsement” are often used interchangeably. See, e.g., Hall et al., supra note 72, at 823; Washburn, supra note 70, at 697 n.1. Contrast this with “slice-of-life” advertisements, obvious fictional dramatizations of ordinary life that do not purport to represent the opinions and beliefs of real individuals. Id.
The FTC Guides on Endorsements set forth different standards for the use of endorsements depending on the status and perceived expertise of the endorser, including special requirements for consumer endorsers and expert endorsers. The status of the endorser determines whether and to what extent a connection between the endorser and seller of the product must be disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement.

The lack of disclosure of a connection between the marketer and an endorser can be deceptive. “When 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 (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed.” These standards also apply to opinions. “Claims phrased as opinions are actionable . . . if they misrepresent the qualifications of the holder or the basis of his opinion . . . .”

The FTC cites In re TrendMark International, Inc. as an example where a lack of disclosure of a connection was deceptive. In TrendMark, the marketer was accused of deceptive acts by not disclosing connections between purported endorsers of its products and the company. The endorsements in question were published on the marketer’s Web page. One can therefore

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77Kertz & Ohanian, supra note 74, at 608.
7816 C.F.R. § 255.5.
82In re TrendMark, 126 F.T.C. at 376. The FTC alleged TrendMark had engaged in deceptive acts or practices because it did not disclose that the endorsers were either independent...
infer that statements published by a company on its Web site (at least regarding its products or services) qualify as “advertisements” by an “advertiser” for purposes of Section 5 of the FTCA.

The FTC also recognizes that informal, sponsored consumer statements about products or services can materially affect a consumer’s decision to purchase a product or service and can thus be deceptive. In particular, “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.”\textsuperscript{83} For example, according to the FTC, if a sponsored consumer tells his or her friends about the quality of a cell phone speaker or about the performance of a dishwasher, the friends may give greater weight or credibility to the statements than they otherwise would if it was disclosed, or clear from the context, that the consumer was being paid by the marketer to communicate about the product in question.\textsuperscript{84} In these examples, the FTC concludes that “the failure to disclose the relationship between the marketer and consumer would be deceptive unless the relationship were otherwise clear from the context.”\textsuperscript{85}

In the years since the previous FTC Guides on Endorsements were updated in 1980, the Internet evolved into a significant communications medium. The recent update to the FTC Guides on Endorsements reflects the FTC’s recognition of the growing prevalence and influence of buzz and stealth marketing, particularly on the Internet.\textsuperscript{86}


\textsuperscript{83}Letter from Mary K. Engle, \textit{supra} note 80, at 4 (footnote omitted).

\textsuperscript{84}\textit{Id.}

\textsuperscript{85}\textit{Id.}

\textsuperscript{86}\textit{See} Tim Arango, \textit{Soon, Bloggers Must Give Full Disclosure}, \textit{N.Y. TIMES}, Oct. 6, 2009, at B3 (quoting one professor regarding the updated FTC Guides on Endorsements, “It crushes the idea that the Internet is separate from the kinds of concerns that have been attached to previous media[,]”); Kayleen Schaefer, \textit{Fessing Up About Freebies}, \textit{N.Y. TIMES}, Oct. 15, 2009, at E6 (noting that the updated FTC Guides on Endorsements “reflect the [C]ommission’s concern about how advertisers are using bloggers and social networking sites to pitch their products[.]”).
III. FTC CONCERNS WITH ONLINE BUZZ AND STEALTH MARKETING ARE ADDRESSED BY UPDATES TO THE FTC GUIDES ON ENDORSEMENTS

It is arguable that marketers’ use of consumers to blog about specific products or services, such as blogging mothers,87 or even the creation or support of a blog or social networking profile to promote a company or its products, such as the Wal-Marting Across America blog,88 or Marie Digby’s MySpace profile,89 are deceptive practices without a disclosure of sponsorship. The FTC Guides on Endorsements state that, when there is 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.90 As discussed below, the FTC is not only clarifying new instances of when sellers (sponsors) can be liable for deceptive endorsements, but also adding scenarios in which endorsers themselves may be held liable.

The FTC has added three new examples specifically addressing buzz (word-of-mouth) and online marketing activities. In the first of these three new examples:

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.91

According to the FTC, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge because: (1) his review is contained in a blog he writes, rather than in a traditional advertisement in which his relationship to the advertiser would be inherently obvious; (2) readers of his blog are unlikely to expect that he has received the video game

87 See supra notes 38–41 and accompanying text.
88 See supra notes 23–27 and accompanying text.
89 See supra notes 30–32 and accompanying text.
91 Id.
system free of charge in exchange for his review of the product; and (3) given the value of the video game system, these facts would likely materially affect the credibility his readers attach to his endorsement. In addition, the FTC states that the manufacturer should advise the blogger to disclose the relationship with the manufacturer and have procedures in place to monitor the blogger’s postings to ensure compliance. 

In a related new example in the FTC Guides on Endorsements, the FTC clarified its position that the greater the degree of coordination between the consumer and the advertiser, the more likely the consumer’s blog about a product could be considered an endorsement subject to regulation:

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. In this example, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board, because knowledge of the poster’s employment likely would affect the weight or credibility of her endorsement.

In the third of these three new examples: “A young man signs up to be part of a ‘street team’ program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics.” The FTC states that the incentives should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided, because the incentives would materially affect the weight or credibility of the team member’s endorsements.

The updated FTC Guides on Endorsements require that an advertiser who uses consumer endorsements must possess and rely upon adequate

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92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
substantiation to support efficacy claims made through endorsements, just as
the advertiser would be required to do if it had made the representation
directly.98 The FTC has also added a new liability standard for both adver-
tisers and endorsers: “Advertisers are subject to liability for false or unsub-
stantiated statements made through endorsements, or for failing to disclose
material connections between themselves and their endorsers. . . . Endorsers
also may be liable for statements made in the course of their endorse-
ments.”99 As part of this revision, the FTC offers a new example:

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.100

In this example, according to the FTC, the advertiser is subject to liability
for misleading or unsubstantiated statements made through the blogger’s en-
dorsement.101 The blogger also is subject to liability, not only for mis-
leading or unsubstantiated representations made in the course of her en-
dorsement, but also if she fails to disclose clearly and conspicuously that she
is being paid for her services.102 The FTC states that, in order for the ad-
vertiser to limit its potential liability, it should: (1) 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 and (2)
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.103

98 Id. § 255.2(a). This is the corollary to the principle that endorsements may not contain
representations that would be deceptive if made directly by the advertiser. 73 Fed. Reg. 72378
n.16 (Nov. 28, 2008).


100 Id. § 255.1.

101 Id.

102 Id.

103 Id.
It is understandable that the FTC is concerned about the potential for deception through endorsements. Early research indicates sponsored testimonials may be an area ripe for content-based misrepresentations. As one scholarly work explains, “the act of writing testimonials following a brand-usage experience can induce positive perceptions of that experience through a process of reconstructed memory; in turn, this memorial adjustment may engender a more positive evaluation of the brand than what existed following the actual consumption experience.” Recall that intent to deceive is not required to allege deceptive practices. In addition:

Prize-motivated testimonials may encourage consumers to inflate brand-related evaluations and suppress negative evaluations. Consumers may exaggerate their written comments in hopes of increasing their odds of winning and thus infer that their glowing praise of the target of the contest was motivated not by a true liking of the brand, but rather by the promise of a reward.

And some bloggers only write positive reviews—that is, they only write about products they like and do not write about products they do not like. Thus the blog does not present a true critical review but rather only endorsements of products, which may or may not be understood by the reader.

While the revisions to the FTC Guides on Endorsements reflect recognition of sponsored endorsements taking place in relatively new and expanding online media, some aspects of the changes, particularly related to imposing liability on the endorsers themselves, may pose significant challenges.

IV. OBSTACLES TO REGULATING ONLINE BUZZ AND STEALTH MARKETING

There are three principal obstacles to regulating online buzz and stealth marketing. First, industry marketers are concerned that it may be difficult
to define a level of sponsorship appropriate for different types of consumer communications and are also concerned that even if such level of sponsorship is defined, the monitoring required by the industry to control the sponsored marketers would be prohibitive. Second, some commentators have expressed concern that the FTC’s measurement of what can constitute deceptive speech is not sufficiently precise. Finally, the FTC Guides on Endorsements may not integrate well with existing law protecting speech on the Internet.

A. Industry Concerns

Marketers have taken advantage of the opportunities presented by social media to bring their message to the consumer in a variety of new ways. While these new ways sometimes involve action by the consumers themselves, there should not be an expectation that liability would necessarily be imposed on marketers for all actions of consumers. On the one hand, consumers should be free to express their opinions about products, services, and companies. And one would not expect a marketer to have any control over, or consequent liability for, statements made spontaneously and independently by a consumer. However, when marketers bear responsibility for soliciting such statements, the consumer statements are not spontaneous or independent, and both the marketer and potentially the consumer benefit commercially. In those cases, it is logical to impose liability on the marketer. The problem lies in those situations that fall in between consumer opinion and sponsored opinion. If a marketer provides free samples of a product with no further action imposed upon the


We are now at a new and critical moment in how marketers are beginning to engage with consumers, specifically because control in many cases is shifting into consumers’ hands. With consumers having a greater share of voice as a result of opinion-sharing media such as blogs, social networks and online review sites and further accelerated by the interest and ability for consumers to ‘tune out’ traditional messages, marketers have sought to engage naturally occurring consumer discussions more and more, by creating programs that engage consumers directly.

Id.

109See id. at 12–13 (“[M]arketers have sought to engage naturally occurring consumer discussions more and more, by creating programs that engage consumers directly.”).
consumer, it is less clear that any resulting statements by the consumer about the product are commercial, even though the consumer benefited commercially by the receipt of the product.

Comments to the proposed FTC Guides on Endorsements included the suggestion that the FTC should distinguish between “consumer endorsers,” who are controlled by marketers to deliver a positive message of endorsement on a marketer’s behalf, and “actual consumers,” who are not controlled or required to deliver an endorsement or positive message,110 because actual consumers include those who spread positive messages about a product after receiving a free sample at the store.111 The problem with the actual-consumers approach is that those consumers may be under a continuing, beneficial relationship with marketers by receiving multiple perks and gifts over time. It is understandable that under such an arrangement the opinions of actual consumers may be influenced by the gift-giving of marketers. The FTC, in dismissing commentators’ concerns regarding the ripeness of the need for guidance in this area, discusses its rationale for setting forth a construct for analyzing consumer-generated content as endorsements.112

The FTC agreed that “the recent development of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered ‘endorsements’ within the meaning of the [FTC Guides on Endorsements] and those that are not.”113 However, the FTC disagreed that there is not yet an adequate basis to provide guidance in this area.114 The FTC concluded its response to comments by the industry in this area by stating that the updated FTC Guides on Endorsements provide a construct for analyzing whether consumer-generated content falls within the definition of an endorsement.115 However, the FTC also states that it will continue to consider each use of new media on a case-by-case basis for purpose of law enforcement.116 Essentially the FTC is

110 Id. at 5.
111 Id. at 7.
113 Id.
114 Id.
115 Id.
116 Id. Senator Arlen Specter has noted that “[t]he FTC has always embraced a strong post-market enforcement system, which relies not on burdensome pre-market approvals, but in-
reserving the right to continue to broaden its interpretation of the definition
of endorsement by acknowledging that the FTC Guides on Endorsements
cannot possibly reflect all of the scenarios that could take place given the
speed of evolution of new media and its use in marketing.

Martin and Smith note that, while not all buzz or word-of-mouth mar-
keting is deceptive, intrusive, or exploitative, “it is perhaps because of the de-
ception, intrusion, or exploitation inherent in stealth marketing that these
practices have proved effective.”117 This is why marketers are tempted to en-
gage in truly stealth marketing efforts, as exemplified by real-world events118
and at least one of the FTC’s updated examples.119 The reaction to the FTC’s
updated examples may be attempts at even “stealthier” endorsements.

The FTC posits the fundamental question as to whether a speaker’s state-
ment can be considered to be sponsored by an advertiser given a par-
ticular relationship. This is determined by whether the speaker is acting
independently or on behalf of the advertiser or its agent. If the speaker is
acting independently, there is no endorsement according to the FTC, while if
the speaker is acting on behalf of the advertiser, there is an endorsement and
the FTC will examine the facts and circumstances on a case-by-case basis to
make its determination.120 The challenge, of course, lies in the cases between
the two extremes.

For example, the FTC has stated that bloggers who are known to
have wide readership within the marketer’s demographic area are consid-
ered as making endorsements if manufacturers provide free product to
such bloggers.121 Consider the monitoring that must be done by the man-
ufacturer to determine whether each blogger’s readership falls within the

stead on vigorous enforcement against individual companies. These procedures appear to
allow for a narrow targeting of violations and strike the proper balance between reducing
deception and protecting First Amendment rights.” Letter from Arlen Specter, U.S. Senator,
to Donald S. Clark, Secretary of the FTC 2 (July 31, 2007), available at http://www.ftc.gov/os/
comments/endorsementguides/527492-00028.pdf. See also generally Robert C. Bird, Commer-
cial Regulation of Deceptive Advertising: Why More Regulation Is not Necessarily Better, 42 Bus. L.
Rev. 17 (2009) (discussing the history of private litigation supplementing the FTC’s false adver-
tising enforcement efforts).

117 Martin & Smith, supra note 8, at 46.
118 See supra notes 23–27, 30–32, 42–45 and accompanying text.
119 See supra note 94 and accompanying text.
121 Id.
demographic area. Substantial reporting must be completed between the blogger and the manufacturer who provided the product in order for the manufacturer to determine which bloggers to send notification to regarding his or her responsibility to post acknowledgment of sponsorship. Placing this responsibility on manufacturers creates a burdensome system of research for which the manufacturer is not readily prepared.

In addition, it is arguable that this proposed revision may require a lay consumer to understand the efficacy of a product from the marketer’s point of view, which is based on substantially more information than the consumer would normally possess. Facing such potential liability, consumer bloggers could very well be hesitant to comment on any product if there is any connection, however tenuous, between the blogger and the marketer. For example, one blogging mother has expressed concern that even a casual mention of an all-natural cold remedy she bought—and believes worked well for her family—could be the subject of an FTC probe. Some bloggers have complained that, with FTC oversight, they are worried that innocent posts will get them into trouble—so they may simply quit or post less frequently.

The marketing industry is concerned with two additional potential problems with the FTC’s Guides on Endorsements. First, lack of disclosure of sponsorship is actionable only if it is material. As Goodman points out, stealth marketing content more likely contains consumer impressions as opposed to outright statements of fact. Under the updated FTC Guides on Endorsements, the FTC will have to decide whether consumer impressions, without disclosure of sponsorship, are materially deceptive.

Second, the FTC Guides on Endorsements now hold both sponsors and sponsored consumers liable for not only failing to disclose their connection, but also for any unsubstantiated statements made through endorsements. This proposed liability could have a significant chilling effect on Internet communications. Marketers would have to provide to consumers specific disclaimer and disclosure language, as well as closely


123Id.

124See supra note 55 and accompanying text.

125Goodman, supra note 21, at 109.

126See supra note 100 and accompanying text.
monitor communications by their sponsored consumers to ensure compliance.\textsuperscript{127} Word-of-mouth marketers are understandably concerned about this potential liability.\textsuperscript{128}

The risk of a chilling effect on speech as a result of overly broad regulation has sparked a warning by Senator Arlen Specter: “Supreme Court jurisprudence . . . requires that restrictions on advertising be no more extensive than necessary to achieve the FTC’s objectives in reducing deception.”\textsuperscript{129} Senator Specter and word-of-mouth marketers suggest that the FTC’s history of postmarket, case-by-case enforcements have been effective,\textsuperscript{130} allowing “for a narrow targeting of violations and strike the proper balance between reducing deception and protecting First Amendment rights.”\textsuperscript{131} The FTC, however, concludes that self-regulation works best when it is backed up by a strong law enforcement presence.\textsuperscript{132} Clearly, it is not self-regulation if a regulatory body is providing the enforcement.

\section*{B. Constitutional Limitations to Regulating Deceptive Endorsements}

The Supreme Court has established with certainty that commercial speech is afforded limited protection under the First Amendment to the Constitution,\textsuperscript{133} though it was not until 1980 that the Court specified the extent to

\textsuperscript{127} See \textit{supra} notes 102–04 and accompanying text.


\textsuperscript{129} Letter from Arlen Specter, \textit{supra} note 116 (commenting on the FTC’s first proposed revisions to its Guides on Endorsements). See also infra note 135 and accompanying text.

\textsuperscript{130} Letter from Arlen Specter, \textit{supra} note 116. See also, e.g., Comments on Behalf of the Word of Mouth Marketing Association, \textit{supra} note 128.

\textsuperscript{131} Letter from Arlen Specter, \textit{supra} note 116.

\textsuperscript{132} 74 Fed. Reg. at 53,126.

\textsuperscript{133} Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (holding that, although commercial speech is protected, that does not mean that it can never be regulated in any way); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (“[S]peech is not stripped of First Amendment protection merely because it appears . . .” in the form of a commercial advertisement). The Supreme Court views commercial speech as potentially more hearty than political speech, requiring less First Amendment protection: “[C]ommercial speech may be more durable than other kinds. Since advertising is the \textit{sine qua non} of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.” \textit{Va. State Bd. of Pharmacy}, 425 U.S. at 772 n.24.
which commercial speech can be regulated. Holding that “[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech[,]” the Court crafted a four-part analysis to determine the scope of proper regulation of commercial speech: (1) does the speech concern lawful activity and not mislead, (2) is the asserted government interest substantial, (3) does the regulation directly advance the governmental interest asserted, and (4) is the regulation no more extensive than is necessary to serve that interest? If all four parts are answered in the affirmative, then the regulation restricting the speech is considered constitutionally acceptable. If the speech fails the first part, it is afforded no protection at all.

This so-called Central Hudson test established an intermediate standard of review for lawful, nonmisleading commercial speech. There need only be a reasonable fit between the government interest and the regulation imposed to accomplish that regulation. The Central Hudson test remains the law regarding the extent to which the state may regulate commercial speech.

135Id. at 566.
136See O. Lee Reed, Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence, 34 Am. Bus. L.J. 1, 13 (1996) (noting that, because commercial speech is considered “more hardy” than political speech, less susceptible to discouragement, and more verifiable, it can be regulated upon the showing of a “substantial” state interest).
137Central Hudson, 447 U.S. at 563–64 (“The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”) (citations and footnote omitted). In Central Hudson, the Court held that a total ban on advertising by utilities did not meet the fourth part of the test: “In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson’s advertising.” Id. at 571 (footnote omitted). See also Bolger v. Youngs Drug Corp., 463 U.S. 60, 75 (1983) (holding that a total prohibition on the mailing of unsolicited contraceptive advertisements was unconstitutional).
140Id. at 184. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), provides a recent application of the Central Hudson test, in which the Supreme Court held: a ban on tobacco advertising within 1000 feet of any school or playground failed the fourth part (i.e., it was not shown to be no more extensive than necessary to advance the state’s interest). Id. at 561–65. Furthermore,
Initially, the updated FTC Guides on Endorsements appear to meet the requirements of the *Central Hudson* test. After all, misleading speech is not afforded constitutional protection. As one paper explains, “[t]he primary limitation on commercial speech, which does not apply to political speech, is a requirement of truth.” The Supreme Court has taken the position that merely misleading, rather than patently false, speech may be restricted.

regulations restricting point-of-sale advertising in stores within 1000 feet of schools or playgrounds failed the third and fourth parts (i.e., they did not advance the state’s purposes and were too extensive). *Id.* at 566–67. However, regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such products did pass all four parts. *Id.* at 568–69. See also generally Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 Am. Bus. L.J. 127 (2007) (tracing the development of the commercial speech doctrine).

For purposes of this article, it will be assumed that the FTC is attempting to regulate commercial speech because the FTC Guides on Endorsements address a form of advertising. The Supreme Court has not precisely defined what constitutes commercial speech, but has described it as speech that proposes a commercial transaction. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993). See also Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–74 (1989).

*E.g.,* *Central Hudson*, 447 U.S. at 593 (“False and misleading speech is not entitled to any First Amendment protection.”).


In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser’s access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. *Id.* at 777. According to Brannigan and Ensor, this is the justification allowing for the continuance of programs, such as those administered by the FTC, which control false advertising. Brannigan & Ensor, *supra* note 143, at 586. Stated another way, courts seek to discourage speech leading to “bad” consumption, that is, when consumers purchase something as a result of believing false facts stated or implied by commercial speech, and encourage speech leading to “good” consumption, that is, purchasing in the absence of false facts. David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1398 (2006).
And as noted above, an intent to deceive does not have to be established in order to find an advertisement or endorsement deceptive. McKenzie argues that “[s]ince the vital first amendment concern is the protection of a consumer’s access to complete and accurate information, an inquiry into the promoter’s intent is not relevant. The appropriate inquiry is what advertising message the consumer perceives.” The underlying justification is that “[f]alse commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations.”

While the FTC can use evidence of consumer perceptions to determine whether there has been deception, the FTC is also authorized to use its own expertise to determine both the express and implied claims made in the advertisement. But the FTC does not appear to rely too heavily on extrinsic evidence of consumer perception. Unfortunately, the Supreme Court has not made clear what it means by misleading speech. Further, Schmidt and

145 See supra note 59 and accompanying text. "Consumer protection laws in general—and false advertising laws in particular—allow the government to punish deceptive ‘commercial speech,’ regardless of whether the speaker was or should have been aware of the speech’s misleading nature.” Bruce E.H. Johnson & Jeffrey L. Fisher, Why Format, Not Content, Is the Key to Identifying Commercial Speech, 54 CASE W. RES. L. REV. 1243, 1243 (2004).


147 Erwin Chemerinsky & Catherine Fisk, What is Commercial Speech? The Issue Not Decided in Nike v. Kasky, 54 CASE W. RES. L. REV. 1143, 1146 (2004). "The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.” Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

148 Petty, supra note 51, at 321 (citing FTC v. Colgate, 380 U.S. 374, 391 (1965); J.B. Williams Co. v. FTC, 381 F.2d 884, 889 (6th Cir. 1967); Zenith v. FTC, 143 F.2d 29, 31 (7th Cir. 1944)).


150 Hoffman, supra note 144, at 1422–23 (“The Court’s current commercial-speech jurisprudence is confused as to why speech with the latent possibility of being false—misleading speech—should receive ‘less’ constitutional protection than fully truthful speech.”).
Burns warn that legitimate commercial speech can be chilled by uncertainties in the federal regulation of advertising; therefore, even some false and misleading speech should be protected to provide breathing room for legitimate commercial speech.\(^{151}\) In particular, they suggest that the process of determining misrepresentation by implication is “needlessly imprecise, difficult of application, and conducive to considerable uncertainty.”\(^{152}\) Petty asserts that removing the “substantial number of consumers” requirement for finding deception “adds to uncertainty regarding enforcement initiatives.”\(^{153}\)

And as noted by Howard, the courts, including the Supreme Court, have subjected very few regulations of deceptive speech to First Amendment review.\(^{154}\) Bennigson summarizes the arguments for why ordinary protections for false or misleading speech should not apply to commercial speech: “(1) particular commercial harms are associated with false or misleading commercial speech; (2) a commercial speaker is usually in the best position to verify claims about his products or operations; and (3) the profit motive makes commercial speech less easily chilled by regulation.”\(^{155}\) But he concludes that “[n]one of these rationales adequately explain why false commercial speech should receive less protection than false political speech.”\(^{156}\)

In commercial speech cases, the Supreme Court has also “emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required in order to dissipate the possibility of con-


\(^{153}\)Petty, *supra* note 51, at 323.


\(^{156}\)*Id.* at 392 (asking why is it assumed that commercial harms may have more severe consequences to its victims than, say, a political candidate misleading the public about the dangers of some environmental or economic policy, or about the evidence of the military threat posed by another country).
sumer confusion or deception.”  

However, the Supreme Court recognized that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”  

In addition, a governmental entity has the burden of justifying its reasons for restricting commercial speech, and this “burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”  

The FTC has yet to detail how at least thousands, and potentially millions, of bloggers and Tweeters will be required to provide adequate disclosure of sponsorship. This could be particularly troublesome for Twitter messages, as they are already constrained by the technology to 140 characters per message. A potentially more intractable problem regulating the content of blogs, social networking profiles, and Twitter messages is the very nature of that content. People generally think of blogs “as personal, informal, off the cuff and coming from the heart—unfiltered, uncensored and unplanned.”  

Many bloggers believe they have a near-absolute right to express their opinion. The culture of the blogosphere may therefore be very resistant to formal guides on what can and cannot be said online.

158Id.
160For example, would the inclusion of “[sp]” (meaning sponsored post) in a Twitter message satisfy the revised FTC Guides on Endorsements? See Joshi, supra note 21.
161Yao, supra note 122.

[T]he FTC assumes—as media people do—that the internet is a medium. It’s not. It’s a place where people talk. . . . They’re connecting. They’re talking. So for the FTC to go after bloggers and social media—as they explicitly do—is the same as sending a government goon into Denny’s to listen to the conversations in the corner booth and demand that you disclose that your Uncle Vinnie owns the pizzeria whose product you just endorsed.
Id.
C. Immunity for User-Generated Content

One online marketing approach adopted by some companies is to provide an Internet-based forum in which consumer comments and participation are solicited. Consider, for example, *Doctor’s Assocs., Inc. v. QIP Holder, LLC*, involving a recent promotion undertaken by the Quiznos sandwich franchise in which it invited customers to submit video entries comparing Quiznos sandwiches to sandwiches of its rival Subway. Quiznos then posted selected videos on the iFilm Web site. Subway sued, alleging that the advertising statements encouraged and promoted by Quiznos were false and misleading in violation of the Lanham Act.

Quiznos moved to dismiss the claim, in part, on the basis that its Internet postings were entitled to immunity under Section 230 of the Communications Decency Act (CDA), which provides immunity to Internet publishers of third-party (user-generated) content. There was no dispute that Quiznos was a provider or user of an interactive computer service. The critical issue was whether Quiznos was actively responsible for the creation and development of disparaging representations about Subway contained in the videos or merely a publisher of information provided by third parties. The court denied Quiznos’ motion for summary judgment on the Section 230

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164 *See* *Doctor’s Assocs., Inc. v. QIP Holder, LLC*, No. 06-cv-1710, 2010 U.S. Dist. LEXIS 14687, at *3 (D. Conn. Feb. 19, 2010).

165 *See id.* at *4. While this case does not involve specific FTCA violations, its application to false and misleading acts can be extrapolated to unfair and deceptive acts and practices stated in Section 5 of the FTCA.

166 *See id.* at *65.

167 “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2009). An “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” Id. § 230(f)(2). An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Id. § 230(f)(3). “Essentially, the CDA protects website operators from liability as publishers, but not from liability as authors.” *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *7 (D. Ariz. Oct. 10, 2007).


169 *Id.* at *68.
immunity defense because it could not determine, at the pretrial stage, whether or not Quiznos actively participated in creating or developing the third-party content in question.  

What is not settled is the degree of involvement required to become an information content provider—and therefore not qualified for immunity. In *Doctor’s Associates*, the court was concerned that Quiznos had actively solicited disparaging representations about Subway and was therefore responsible for the creation or development of the offending videos.  

The court in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* reached a similar conclusion.  

Before individuals can use the Roommates.com service, they must create profiles, which previously required disclosures as to sex, sexual orientation, and whether children would be brought into a household. The plaintiffs sued Roommates.com, alleging its business violated the federal Fair Housing Act and California housing discrimination laws. The court refused to grant Roommates.com CDA immunity because it both elicited the allegedly illegal content and made aggressive use of it in conducting its business. In other words, Roommates.com was directly involved with developing and enforcing a system that subjected users to allegedly discriminatory housing practices.

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171 *Doctor’s Assocs.*, 2010 U.S. Dist. LEXIS 14687.

172 521 F.3d 1157 (9th Cir. 2008).

173 *Id.* at 1161.

174 *Id.* at 1162.

175 *Id.* at 1172.

176 *Id.* "Roommate[s.com] does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate[s.com]'s work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site." *Id.* But see Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (upholding immunity for online classified ad provider because it did not “cause” any discriminatory statements to be made). See also Eric Weslander, *Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 291–95 (2008) (discussing the extent of liability/immunity arising from a Web site’s “development” of content based on the *Fair Housing* case).
The *Fair Housing* court did state that an editor’s minor changes to the spelling, grammar, and length of third-party content would not remove CDA immunity.\(^{177}\) Similarly, the *Doctor’s Associates* court noted that Quiznos would be immune from liability if it only exercised traditional publisher functions, such as deciding whether to publish, withdraw, postpone, or alter content.\(^{178}\) Ultimately, the question may be whether the “the website did absolutely nothing to encourage the posting of defamatory [(illegal)] content . . . .”\(^{179}\) For marketers to qualify for CDA immunity, the key will be the extent to which they encourage or manifest deceptive online comments and endorsements by their sponsored consumers.

Degree of involvement is a familiar concept in determining liability for creating or disseminating false or deceptive advertisements. While a marketer can be held liable for its false advertisements even if those advertisements were disseminated by others,\(^{180}\) liability requires proof of actual participation in the creation or dissemination of the advertisements.\(^{181}\) In late 2009, in the

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\(^{177}\) *Fair Housing*, 521 F.3d at 1170 (citing Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004)). See also Global Royalties, Ltd. v. Xcentric Ventures, LLC, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *9 (D. Ariz. Oct. 10, 2007) (“[M]inor and passive participation in the development of content will not defeat CDA immunity, which can even withstand more active participation.”).


\(^{179}\) *Fair Housing*, 521 F.3d at 1171. See also *Goddard v. Google, Inc.*, No. C 08-2738, 2009 U.S. Dist. LEXIS 67203, at *4–5 (N.D. Cal. June 30, 2009) (dismissing the plaintiff’s amended complaint without leave to amend, which alleged liability on the part of Google for advertisements to fraudulent Web sites generated through Google’s ‘‘AdWords’’ program, holding the plaintiff’s amended complaint failed to substantiate the ‘‘labels and conclusions’’ by which she alleged collaboration and control over the content by Google which would remove CDA immunity); Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 199 F. App’x 738, 743 (11th Cir. 2006) (denying defendants’ CDA motion for summary judgment, in part, because defendant’s policy regarding redactions implied that its agents had the power to edit consumer complaints before they were posted). “[T]he CDA defines an information content provider as any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* at 744 (citation omitted; internal quotations omitted).


\(^{181}\) *Id.* at *6 (citing *In re Dobbs Truss Co.*, No. 5808, 48 F.T.C. 1090, at *50–51 (Apr. 3, 1952); *In re Rizzi*, No. 8937, 83 F.T.C. 1183, at *21–22 (Jan. 3, 1974)).
case of *In re Gemtronics, Inc. and Isely*, an FTC administrative law judge dismissed a complaint against the American reseller of a dietary supplement alleging that the reseller had published unsubstantiated claims on a Web site that the supplement could cure cancer.\(^{182}\) The judge dismissed the complaint because the claims were published on the supplement manufacturer’s Web site, not the reseller’s.\(^{183}\) Specifically, the judge determined there was no proof that the reseller had any role in creating, or participating in creating, the challenged claims.\(^{184}\) The judge also noted that assertions of general participation in the Web site displaying the challenged claims would not substitute for proof of participation in creating or disseminating those claims.\(^{185}\) Finally, the judge also noted that the FTC was unable to cite any case supporting the proposition of liability on the basis of referring people to a Web site.\(^{186}\) *Gemtronics* demonstrates that the FTC must continue to prove that a marketer must be, at a minimum, an active participant in the creation and dissemination of the advertisement in question.

*Doctor’s Associates* demonstrates that, if marketers merely publish third-party content, Section 230 will provide immunity for liability arising from that content. The CDA does provide that this immunity has no effect on other laws—but those other laws are enumerated and do not include the FTCA.\(^{187}\) If marketers are afforded CDA immunity for consumer messages they sponsor, none of the objectives of either the FTC Guides on Endorsements or the CDA will be achieved.\(^{188}\) Marketers will be able to avoid liability for deceptive online statements, leaving the sponsored consumers to face liability by themselves,\(^{189}\) particularly if there is no evidence

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\(^{182}\) *Id.* at *1.

\(^{183}\) The manufacturer’s Web address is http://www.agaricus.net while the reseller’s Web address was http://www.our-agaricus.com.

\(^{184}\) *In re Gemtronics, Inc. and Isely*, No. 9330, at *54.

\(^{185}\) *Id.*

\(^{186}\) *Id.* at *53.


\(^{189}\) See *supra* note 99 and accompanying text (discussing proposed FTC regulations holding consumer endorsers potentially liable for statements made in the course of endorsements).
of active participation by the marketers in the creation or dissemination of those statements. As a result, consumers may be less willing to post comments online regarding a company’s products or services, chilling online speech that Section 230 of the CDA hoped to avoid.  

V. REVISIONS TO THE FTC GUIDELINES ON ENDORSEMENTS IN ORDER TO OVERCOME THE OBSTACLES TO REGULATING ONLINE BUZZ AND STEALTH MARKETING

As detailed above, attempts to apply existing laws and regulations to new-media forms of Internet communication and to blended consumer and marketer communications have not resulted in consistent approaches in this area, nor have such attempts necessarily met the goal of not chilling free speech. This has been true in the past and continues to hold true after the adoption of the updated FTC Guides on Endorsements. In order to facilitate consistency, fairness, and the greatest freedom of speech possible, higher thresholds for application of enforcement by the FTC should be established that more appropriately take into account the new forms of communication via the Internet, as well as new relationships between marketers and consumers. As further discussed below, higher thresholds of liability could be established that combine a certain degree of caveat emptor. This presumes the consumer should bear some responsibility of risk to make determinations of reliability and advisability of purchases, despite access to some new-media material with tenuous connections to sellers without rational seller control over such new-media messages. This will also necessitate a degree of materiality with respect to the market as a whole rather than individual consumer perceptions. Finally, de minimus exceptions to the definition of endorsements will have to be identified in order to not overly chill free speech or unduly burden the free exchange of ideas on which the Internet revolution has come to rely.

190 See Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (holding that Congress’s intent in enacting Section 230 was to avoid the chilling effect on Internet speech resulting from potential tort liability); Mary Kay Finn et al., Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act Of 1996—Should E-Buyers Beware?, 31 U. Tol. L. Rev. 347, 349 (2000) (noting that, in passing the CDA, Congress was concerned “that imposing liability on providers and users of Internet services would quell free speech, and stifle the growth of a medium of interactive exchange whose benefits to consumers far outweigh any concerns about its shortcomings[,]”).
A. Increased Thresholds of Liability for Endorsers and Advertisers Incorporating Standards of Caveat Emptor and Materiality

The requirement of a consumer acting reasonably in the circumstances includes the presumption that in doing so consumers must first understand the necessity to act with a certain degree of caveat emptor, taking responsibility to minimize risk by investigating products on their own before purchase, rather than assuming that government regulation will protect them in all circumstances—no matter how unreasonable the reliance.\footnote{Pridgen and Preston make an interesting argument that the FTC’s initial emphasis to eliminate deceptive advertising discouraged advertisers from providing much useful information about their products. Dee Pridgen & Ivan L. Preston, Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission, 14 GA. L. REV. 635, 636 (1980). Ironically, in the 1970s the FTC began to adopt remedies that supported “the marketplace notion that more information is better than less.” Id. at 649 (footnote omitted). As noted supra notes 129–30 and accompanying text, the updated FTC Guides on Endorsements, rather than encouraging more information, may actually stifle speech. “Information restraints are generally anticompetitive because they tend to keep prices high, restrict new entrants, and hinder the formation of markets for alternative forms of service.” Pridgen & Preston, supra, at 668 (footnote omitted).} Unless some responsibility is placed on consumers to minimize their own risk of reliance on marketers by investigating multiple sources for accuracy of recommendations, the full cost and burden of monitoring will fall on marketers, and enforcing all messages regarding products will fall on the FTC, which could result in discretionary application of enforcement due to lack of resources.\footnote{See, e.g., The FTC Demands Full Disclosure, BUZZMARKETING DAILY, Oct. 6, 2009, at http://blog.thekbuzz.com/2009/10/the-ftc-demands-full-disclosure.html (arguing that the FTC does not have the resources to monitor every blog and social media user).} To further avoid cost-prohibitive and ineffective regulatory control, the FTC should expand and uphold a modified version of the principal components of the law of deception to continue both the requirement that the practice be examined from the perspective of a consumer acting reasonably in the circumstances and the requirement that the representation, omission, or practice must be material.\footnote{See supra note 55 and accompanying text.} Materiality could be defined with respect to the consumer market for a particular type of product or service as a whole, rather than a particular product or service within that category. Such consideration would further reduce unnecessary and costly enforcement and monitoring by the FTC.
The modified materiality requirement would be similar to the “severe and/or pervasive” requirement necessary for a hostile work environment determination.\textsuperscript{194} The severe and/or pervasive requirement in a hostile work environment results in conduct that is either so severe that a single incident is sufficient to create liability, so pervasive or frequent an activity as to create liability, or a combination of severe and pervasive activity of such a combined degree as to result in liability.\textsuperscript{195} Applying the severe and/or pervasive requirement to the materiality requirement of the law of deception would result in the determination that a single incident involving lack of disclosure would be insufficient for a finding of deceptive conduct unless the incident was sufficiently severe to render reasonable consumers unable to objectively evaluate the endorsed product. However, several incidents involving lack of disclosure (pervasive) when combined with the degree of harm to the consumer group (severe) would be sufficient for a finding of deceptive conduct. By defining materiality with reference to a more rigorous standard, material endorsements about products and services would be easier to regulate because immaterial instances would not burden the FTC with unnecessary enforcement and would result in greater consistency and efficiency. As Pridgen and Preston explain:

Information is an essential element in the proper function of a free market economy. . . . Unlike the ideal, all-knowing buyer who provided the theoretical basis for the rule of \textit{caveat emptor}, today’s consumer cannot count on having all the relevant facts simply by relying on marketplace forces. Modern conditions compel government intervention to achieve the competitive goals of the laissez-faire philosophers. FTC regulatory initiatives in particular have sought to break down barriers to the provision of commercial data by willing parties through advertising, as well as requiring sellers to disclose information. . . . As long as such regulations are carefully tailored to avoid undue interference with market forces, they can help build the necessary information environment that can spawn a healthy, competitive marketplace.\textsuperscript{196}

\textbf{B. De Minimus Threshold Necessary for Finding Liability}

As previously discussed, the revised FTC Guides on Endorsements address online marketing activities but do not include a test for materiality of


\textsuperscript{195} See, e.g., Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 \textit{Emory L.J.} 271, 297–98 (1994).

\textsuperscript{196} Pridgen & Preston, \textit{supra} note 191, at 679–80.
sponsorship in order to determine whether such sponsorship must be disclosed. Depending upon how the FTC determines its basis for case-by-case enforcement, it will be cost prohibitive and therefore ineffective for the FTC to attempt to police a multitude of bloggers with any relationship to sponsors, including the dissemination by the sponsor of free product samples to the blogger. The concept of materiality alone will not sufficiently reduce the burden on the FTC for onerous enforcement of a multitude of marketing messages. Therefore, de minimus sponsorship of marketing messages should be excluded from FTC monitoring and enforcement, similar to de minimus exceptions to Internal Revenue Service income exclusion in the area of fringe benefits. A de minimus exception could be applied in a number of ways. First, if the sponsorship does not result in goods or services paid to the blogger with a value in excess of $250 per year, then the relationship should not have to be disclosed. Or, if a multitude of bloggers are given goods and services totaling less than $250, and which in the aggregate do not comprise at least 15% of the sponsor’s total marketing budget, the relationships should not have to be disclosed. Otherwise, the requirement should be that the relationship must be disclosed with a general statement that acknowledges that the blogger may have received goods or services related to the products discussed in the

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198 Petty & Andrews, supra note 1, at 15 (posing the question of whether there are some connections that are so small that consumers would not expect the incentive to bias their views and therefore suggesting the possibility of a de minimus exception). See also Eric Goldman, Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman’s Stealth Marketing and Editorial Integrity, 85 Texas L. Rev. 11, 13 (2006), http://www.texasrev.com/seealso/vol/85/responses/goldman (suggesting that disclosure of sponsorship can be detrimental to consumers based on empirical evidence that, when viewing information, consumers tend to discount relevancy of the same information if it is labeled as advertising).

199 Under the Internal Revenue Code, a de minimus benefit is one which is so small as to make accounting for it unreasonable or impractical when considering the value of the benefit as well as the frequency with which it is provided. 26 U.S.C. § 132 (2009). One example of a de minimus benefit provides that up to $120 per month of the cost of either (a) transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee’s residence and place of employment or (b) any transit pass, and the cost of up to $230 per month for qualified parking, may all be excluded from an employee’s income. 26 U.S.C § 132(f).

200 This recommendation fits within BzzAgent’s attempt to differentiate between “consumer endorsers” (who should be subject to regulation) and “actual consumers” (who should not be regulated). See supra notes 110–11 and accompanying text.
blog but that the statements made therein reflect only the opinion of the blogger. Excluding de minimus sponsorship relationships from regulation and enforcement affords the FTC the opportunity to concentrate on more significant relationships between speakers and sponsors and therefore a more efficient use of taxpayer funds.  

The de minimus sponsor, as well as the endorser, would not be liable, because the relationship would not give rise to a sponsorship under the proposed exceptions. Establishing de minimus exceptions to disclosure of sponsorship would therefore result in the FTC not holding both marketers and sponsored consumers liable for unsubstantiated statements made through insignificant endorsements. Otherwise, if the de minimus sponsor and endorser were subject to liability, the FTC, in order to apply the FTC Guides on Endorsements fairly, would have to monitor and enforce all instances of sponsorship, regardless of monetary value. The cost of doing so would most likely outweigh any consumer benefits achieved.

CONCLUSION

There has been a significant convergence of communications approaches on the Internet: individuals have embraced the Internet as a medium to

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201 One counter argument to a de minimus threshold is that it might understate the cumulative effect of large numbers of claims. “A small degree of deceptiveness in each instance can amount to a lot overall, as may multiple repetitions of the same claim.” Ivan L. Preston, Puffery and Other “Loophole” Claims: How The Law’s “Don’t Ask, Don’t Tell” Policy Condomes Fraudulent Falsity in Advertising, 18 J.L. & Com. 49, 105 (1998) (discussing FTC regulation of advertising claims). However, state laws often allow consumers to pursue class action claims, potentially alleviating the concern that the relatively de minimus nature of deceptive endorsements would deter initiation of consumer litigation. See James S. Wrona, False Advertising and Consumer Standing Under Section 43(A) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?, 47 Rutgers L. Rev. 1085, 1150–51 (1995) (discussing Lanham Act claims). See also CAL. BUS. & PROF. CODE § 17204 (2009) (allowing a person who has suffered injury in fact and has lost money or property as a result of unfair competition, which includes false advertising under CAL. BUS. & PROF. CODE § 17500 (2009), to bring an action); Note: Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses, 96 Harv. L. Rev. 1621, 1626 (1983) (noting that “Little FTC Acts [adopted by virtually every state] make litigating small claims economical[.]”).

202 Establishing a de minimus standard would also promote self-regulation for the small-value endorsements, in line with existing attitudes and approaches. See, e.g., Code of Ethics and Standards of Conduct for the Word of Mouth Marketing Association, Word of Mouth Marketing Ass’n, at http://womma.org/ethics/code/ (last visited Apr. 13, 2010) (requiring compliance by members with the FTC Guides on Endorsements). See also Bird, supra note 116 (discussing the history of private litigation supplementing the FTC’s false advertising enforcement efforts).
share ideas and opinions; contemporaneously, marketers are embracing peer promotions, sometimes stealthily, to enhance the marketing of their products. Consumers who turn to the Internet to educate themselves about commercial products and services may not appreciate that some of the comments and reviews published online are sponsored by marketers with the use of free samples, prizes, and sometimes cash. The FTC has recognized this growing trend, incorporating what it considers to be deceptive online endorsements and testimonials in its newly adopted revised FTC Guides on Endorsements. Unfortunately, however, the FTC has not differentiated among the various degrees of sponsorship occurring online, imposing upon itself the burden of monitoring for enforcement potentially millions of online communications.

This article has made specific recommendations to attempt to alleviate the uncertainties caused by the current state of the law. Recognizing that consumers with de minimus contacts with marketers should still be free from regulation to publish their opinions of and experiences with a marketer’s products or services is a first step. It requires a recognition that when someone writes about a product or service they have received for free, or for which they have received token remuneration, the fact they have not disclosed this minimal sponsorship does not deceive reasonable consumers. This recognition will also decrease marketers’ incentives to completely hide their sponsorship of testimonials, which does have a clear potential to deceive. To preserve individual free speech, a degree of caveat emptor will also have to be accepted. In the meantime, the unwelcome result of all of this uncertainty may well be unnecessary stifling of Internet-based speech.