New FTC Guides Impact Use of Social Media for Companies and Athlete Endorsers

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Introduction

In 2012, Nike became the first company in the United Kingdom to have a Twitter campaign banned after the Advertising Standards Authority (ASA), the U.K.'s equivalent of the United States' Federal Trade Commission, held that soccer star Wayne Rooney had violated rules for clearly communicating to the public that his tweets were advertisements for Nike (Furness, 2012). Nike, through its endorsement deal with Rooney, encouraged Rooney to engage in Twitter messaging as part of its wider “Make It Count” advertising campaign. Rooney’s tweet, which went out to his 4.37 million followers, said: “My resolution – to start the year as a champion, and finish it as a champion... #makeitcount gonike.me/make it count.”

As stated by the ASA, “We considered that the Nike reference was not prominent and could be missed. We considered there was nothing obvious in the tweets to indicate they were Nike marketing communications” (Furness, 2012).

Athlete endorsement deals have historically been rather straightforward transactions. In exchange for a monetary or in-kind compensation, the company uses the athlete’s name and likeness in its advertising and promotion campaigns, and the athlete typically wears apparel that features the company’s logo, uses the company’s products/services, and makes appearances on behalf of the company. However, the emergence and popular acceptance of social media platforms such as Facebook, Twitter, and YouTube have greatly expanded the playbook for promoting endorsement deals, for both companies and athletes alike. Such social media “advertising” has also recently led to substantial revisions of the guidelines governing commercial endorsements and testimonials (McKelvey & Masteralexis, 2011).

Seeking to address a landscape now more commonly known as the Twitterverse and blogosphere, the Federal Trade Commission (“FTC”) in 2009 established new guidelines of engagement for companies and endorsers seeking to leverage social media to promote products and services (Guides Concerning the Use of Endorsements and Testimonials in Advertising, 2009). Although the Guides specifically refer only to endorsers, it is clear that the Guides are meant to apply to athletes as well as celebrity entertainment endorsers. The new Guides establish that both advertisers and endorsers must disclose “material connections” between companies and athlete endorsers (Guides, § 255.1). The Guides additionally clarify that endorsers have a duty to disclose their relationships with companies when making endorsements outside the context of traditional advertising in which the audience would not otherwise reasonably expect that a financial connection exists between the celebrity and the advertiser. Given the requirements of the new Guides, companies utilizing athlete endorsers should fully understand the rules, as well as the potential liability, for athlete endorsers’ use of social media platforms.

Overview of FTC Guides

The FTC periodically publishes so-called Guides (administrative interpretations of the laws) in order to inform the public and businesses. The Guides are a basis for voluntary compliance with standards imposed by the law. Failure to comply with the Guides typically results in demands for “corrective action” by the FTC; however, under the Federal Trade Commission Act, violators may be subject to substantial fines based on...
the ability of the FTC to bring legal actions in federal district court if the alleged company or endorser refuses to take corrective action.

In enacting the new Guides (the first update in 29 years), the FTC acknowledged the novel questions that social media have posed about how to distinguish between communications that are considered “endorsements” within the meaning of the Guides and those that are not. According to the new Guides, an endorsement is defined as:

- any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) 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 party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution. (Guides, § 255.0(b))

According to the FTC, in order to determine if a statement is an endorsement, the fundamental question is whether, viewed objectively, “the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message’” (Notice of Adoption, p. 53126):

In other words, in disseminating positive statements about a product or service, is the speaker:
- (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign? (Notice of Adoption, p. 53126)

As examples, the notes adherent to the Guides included: whether the speaker is compensated; whether the product or service was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers; or the likelihood of future receipt of such products or services; and the value of the items or services received.

The most significant difference in the newly enacted Guides is that they place much more responsibility on both the advertiser and the individual endorser than the prior Guides. For instance, a new section of the Guides states that, “[a]dvertisers are subject to liability for false or unsubstantiated 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 endorsements” (Guides, § 255.1(d)). For example, if an athlete falsely claims that a product works well and is effective, then the athlete endorser can be held liable. Whether reading from a script or using their own words, endorsers must be especially careful with statements that amount to testimonial.

Section 255.5 of the new Guides offers additional guidance concerning endorsements by listing nine hypothetical examples. Hypothetical 3 is relevant to sports figures, their endorsements and comments on the Internet and concerns an appearance by a well-known professional tennis player on a television talk show. In this example, the host of the television show compliments the player on her recent play, which had been the best of her career. The player responds by giving credit to her improved play to her improved vision because she had laser vision correction surgery at a clinic that she identifies by name. The player raves about the ease of the procedure and the kindness of the eye doctor and other benefits, such as the ease of driving at night. The player does not reveal that she has a contractual relationship with the eye doctor for speaking at a clinic, but she does not appear in any commercials. This hypothetical states that the weight and credibility of the players’ endorsement is adversely affected because consumers are unaware of the contractual relationship that the player has with the eye doctor. In this particular example, the Guides direct that persons in the player’s position must disclose the relationship or the FTC could find that the endorsement is deceptive. In addition, the Guides caution that if consumers believe that the player’s experience was typical of those who have laser vision correction surgery the advertiser must have substantiation for the claim.

This hypothetical continues, but alters the facts to analyze the player instead discussing the eye doctor on a social media site.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery—mentioning the clinic by name—on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed. (Emphasis supplied.) (Guides, § 255.5)

In summary, the new Guides reiterate the FTC’s expectation that persons who endorse products or
services using social media platforms must disclose any contractual relationship, or otherwise material connection, that they have with a company in any situations where the audience would not otherwise "reasonably expect" that a material connection exists.

**Implications for Sport Managers**

For companies using athletes as an endorsement vehicle, it is important to remember the underlying purpose of the Guides: consumers have a right to know when they are being subjected to a sales pitch. Although the Guides do not attempt to address each and every potential scenario involving companies' use of athletes, endorsements, and social media, they do provide a framework for marketers as well as athletes and their representatives to use in making decisions about the use of social media platforms to communicate promotional messages as part of endorsement deals. In order to determine if the Guides are applicable to a post on a social media platform, companies are advised to consider the following questions:

1. **Would the audience “reasonably expect” that a financial connection exists between the company and the athlete?** If the person who reads the message “reasonably expects” that a financial connection exists, then no public disclosure is required. Historically, this standard has been easily met where traditional broadcast media are used, since consumers have come to readily expect athletes who appear in commercials are somehow being compensated by the advertiser. However, in nontraditional media such as tweets, blogs, and athlete-generated media such as videos that may appear on YouTube, this connection can be far less apparent.

2. **Does a “material connection” exist to a level that would invoke the Guides?** Clearly, such a material connection exists when a contract provides for some form of remuneration in exchange for endorsement messages. However, the inquiry gets muddied when the company is simply providing free products or services to the athlete. This inquiry is very fact-sensitive. For instance, the quantity of free products or services provided, the regularity with which the free products or services are provided, and the value of the free products or services all need to be considered in determining if it rises to the level of “material connection” as contemplated by the Guides.

3. **Is the athlete making an “endorsement” within the meaning of the Guides?** A consumer may think that any time an athlete says anything on behalf of or in relation to a company, he or she is acting as an endorser. However, pursuant to the Guides, the athlete needs to be making, either directly or indirectly, a specific statement of endorsement for the Guides to apply. An athlete making a positive statement that the consumer would reasonably perceive as reflecting his or her personal views or experiences on a quality or efficacy of a product or service would constitute an endorsement. Conversely, a mere mention of a company or brand is likely not enough to constitute an endorsement under the Guides. Hence, in the context of athletes’ use of social media, the lynchpin issue is whether any statements made are going to be considered to be endorsements as defined by the Guides.

In addition to determining answers to the above questions, companies should regularly monitor the social media activity of all of its athlete endorsers to ensure that they are not inadvertently making undisclosed endorsements. This includes continually reminding their athlete endorsers of the need to avoid making false, misleading or unsubstantiated comments in their social media posts.

Companies should also require that their athlete endorsers publicly disclose all official endorsement deals on the athlete's personal website homepage. As the FTC suggested, it is incumbent on the sponsoring companies to be proactive in ensuring that their athlete endorsers adhere to the Guides:

> The Commission recognizes that, because the advertiser does not disseminate the endorsements made using these new consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, if the advertiser initiated the process that led to these endorsements being made ... it potentially is liable for misleading statements ... (Notice of Adoption, p. 53127)

The FTC has also recommended that companies engaging endorsers for the purpose of generating positive word of mouth or spurring sales “establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of these endorsers (Notice of Adoption, p. 53134). Doing so would provide a strong argument for the exercise of the Commission’s prosecutorial discretion. Such was the case involving a blogging campaign that had been initiated by one of Hyundai’s advertising agencies without Hyundai’s knowledge and approval in conjunction with Super Bowl XLV (Hyundai Escapes, 2011). The FTC absolved Hyundai of liability in large part because the corporation had in place rules and
regulations regarding the promotional use of social media (Hyundai escapes, 2011).

Companies utilizing athlete endorsers should also provide training and guidance to the athlete in how to use social media in a manner that adheres to the Guides. Such measures will best address the potential liability of both the company as well as the athlete endorser. For instance, with respect to Twitter, the FTC has recommended that endorsers end tweets with a identifying hashtag such as #ad, #spon, #amp, #paid or #promo, depending on the specific nature of the endorsement message (Chapman, 2011).

Some social media savvy athletes and their agencies have begun taking proactive measures to comply with the Guides. For instance, the Twitter page, Facebook page and website for New Orleans Saints quarterback Drew Brees each include the following disclaimer: “Please note that Drew Brees is an endorser for several companies and promotes them through his social media” (Bercovici, 2010). This disclaimer is a legitimate effort to inform consumers that a material connection exists between Brees and the products that he endorses via his social media platforms.

Conclusion

Given the vast number of athletes who are utilizing social media platforms, the potential liability for violations of the Act can be significant. At its simplest level, the Guides require that sponsoring companies and its athlete endorsers be forthcoming and honest in situations where a contractual relationship exists. Fans are attracted to social media posts that are genuine statements of opinion or beliefs by the athlete. If an athlete fully discloses that a product was provided to him or her free of charge or that he or she is a paid endorser of the product, it will provide the consumer with information that may be helpful in making informed purchasing decisions. On the other hand, if an athlete hides his or her connections with a company, they risk not only alienating their social media fan base if the connection with the advertiser is revealed at a later date, but also risks running afoul of the FTC guidelines.

References


Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0-255.5 (2009).