

The More Things Change, The More They Stay the Same: Applying Section 5 to Emerging Marketing Practices

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AS TREMENDOUS ADVANCEMENTS in new media and marketing technologies have transformed electronic commerce over the last twenty-five years, the Federal Trade Commission has continued to protect American consumers from fraud with a statutory directive that has remained unchanged since the earliest computers were employed in the late 1930s, back when no one envisioned that computers would be used to sell products and services. The consumer protection prong of Section 5 of the Federal Trade Commission Act, declaring unfair or deceptive acts or practices unlawful, is as deliberately broad and general as the antitrust prong's prohibition on unfair methods of competition.¹ The wording of Section 5 allows the Federal Trade Commission to nimbly adapt its application in the consumer protection context as technologies change and innovative platforms for advertising and marketing emerge, and the Commission has done precisely that.

The last decade has seen an explosion of advertising practices involving new technologies, from cell phones to the Internet. To adapt Section 5 to these ever-evolving practices the FTC can prescribe trade regulation rules identifying the specific acts or practices that constitute a violation of Section 5.² However, given the stringent requirements of FTC rule-making, the Commission has instead applied Section 5 to these newer practices through strategic enforcement actions, typically resulting in consent orders, and agency guidelines.³ Although these methods have the benefit of being flexible and relatively quick, the downside is that they do not necessarily provide clear rules of the road for these new advertising mediums.

This article examines how the FTC has used enforcement actions and guidance to apply Section 5 to three newer methods of marketing—affiliate marketing, social media, and mobile marketing—and explains the implications for business compliance.

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Affiliate Marketing

In simple terms, affiliate marketers generate interest in a merchant's products or services, direct leads to the merchant's website, and receive payment from the merchant for each consumer inquiry or sale generated by the affiliate's activities. Today's affiliates earn huge payouts, as much as 50 percent of gross revenues, for generating leads or sales for merchants. Many merchants contract with affiliate "networks," which manage hundreds of affiliates that indirectly work for the merchant by sending commercial email messages, hosting landing pages with content created by the affiliate, placing ads on Websites that incentivize consumers to buy, writing articles, building links, texting, blogging, and tweeting. Even today, most merchants that use affiliate networks remain completely unaware of the identities of the hundreds or even thousands of affiliates and subaffiliates working within the network, and must rely on the network to monitor affiliate behavior and punish "bad" affiliates.

Affiliate marketing has a rocky legal past, and the FTC was somewhat slow to bring Section 5 enforcement actions against affiliates. One of the first notable offensives against affiliate marketing was private litigation waged by Oprah Winfrey and Dr. Mehmet Oz, who in 2009 famously sued about fifty defendants, including several affiliate marketers, for using their images to sell dietary supplements made with such ingredients as acai berry and resveratrol.⁴ Among other things, the complaint alleged fake news Websites, which were crafted by some affiliates after Dr. Oz appeared on Oprah, hyped the anti-aging benefits of resveratrol, a substance found in red wine.⁵ The alleged fake news articles, dubbed "farticles," seemed to provide actual reviews of a reporter's thirty-day trial of resveratrol pills and the positive effects experienced by the reporter.⁶ The sites were peppered with ads promoting a "free" trial of the product reviewed in the report. Upon settling with the various defendants, Oprah and Dr. Oz made it clear that they wanted to send a strong message to prevent marketers engaging in what they deemed to be false and deceptive marketing practices from taking advantage of consumers.⁷

For the FTC's part, legal guidance to merchants and affiliate marketers on when conduct may run afoul of Section 5

can be found in the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising. The Commission revised and updated these in 2009 to reemphasize, among other things, that customer testimonials used by advertisers to promote their products and services must reflect the experiences of actual consumers, and that if the advertiser has compensated the endorser in any way that a consumer would be unlikely to expect, then disclosure of such "material connection" between the advertiser and endorser must be made.⁸

In April 2011, the FTC announced its filing of ten lawsuits against affiliate marketers that allegedly operated fake news sites about acai berry weight-loss products.⁹ The complaints alleged Section 5 violations, including false and unsubstantiated product claims made by the affiliates about the products, misrepresentations about the fake news reports, and failure of the affiliates to disclose connections to the sellers.¹⁰ The FTC also sued marketers who allegedly used troublesome affiliates to sell the marketers' products and services.¹¹ In one case, the FTC alleged the marketer paid "millions of dollars" to lure consumers to the marketer's website by using fake news reports, and that the marketer violated Section 5 "directly or through affiliates acting on their behalf and for their benefit" by misrepresenting that objective news reporters had reviewed the product, that trial offers for the product were "free" or "risk free," and that using the product would result in substantial and rapid weight loss.¹²

Although Section 5 enforcement has likely made fake news sites a thing of the past, affiliate marketing continues to flourish. For example, while some affiliates transmit content created by a merchant only to the affiliate's email distribution list, other affiliates are writing articles that serve to generate interest in a company's products or services. In some cases, some articles seem intended to enhance the number of high-ranking, positive hits on a Web search when the company's online reputation is otherwise troubled by negative publicity and consumer complaints.¹³

How can a company that uses affiliates avoid indirect liability for violations of Section 5 committed by the affiliates? The FTC has indicated that companies must make almost herculean efforts to police their affiliate marketers' conduct.¹⁴ In consent orders obtained against two marketers earlier this year, the FTC required the companies to obtain full contact information for every affiliate, review and approve all of the marketer materials to be used by each affiliate prior to use, investigate each complaint against an affiliate, immediately terminate and stop paying any affiliate that fails to comply with the company's requirements, and refund each consumer whose sale was generated by affiliate misconduct.¹⁵ Given the complexities of affiliate marketing, including the roles of affiliate networks in managing hundreds or thousands of affiliates and subaffiliates around the world, and the ability of affiliates to swap out advertisements with a keystroke, the industry has regarded these "requirements" as practically impossible for any merchant to

carry-out.¹⁶ Nonetheless, the consent orders are important guidance regarding the FTC's expectations for compliance with Section 5 concerning affiliate marketing practices.

Social Media and Blogging

Businesses are voraciously incorporating Facebook, Twitter, Pinterest, and other social media platforms as key components of their customer outreach and marketing plans. Particularly since third-party ad agencies and affiliate marketers carry out many social media programs, the risks of disseminating false or deceptive content are substantial. The FTC has given fair warning that truth in advertising principles apply to blog and social networking sites, even though Section 5 enforcement actions have not yet focused on the misuses of social media.¹⁷

The FTC's 2009 revisions to its Endorsements Guides added examples of how Section 5 standards apply to social media.¹⁸ One example describes an advertiser who requests that a blogger try a new body lotion and write a review of the product on her blog. The blogger makes claims about the product that the advertiser does not otherwise make and does not ask the advertiser for substantiation for the claims that she makes. The FTC says that both the blogger and the advertiser are subject to liability for violating Section 5 for the unsubstantiated representation made through the blogger's endorsement.¹⁹ Another example describes a "video game expert" who maintains a personal blog about his gaming experiences.²⁰ When a manufacturer of a video game sends him a free copy and he writes a favorable review, the FTC Guides dictate that he should clearly and conspicuously disclose that he received the game free of charge because his relationship to the manufacturing company would not otherwise be obvious. The FTC also advises that the manufacturer should instruct the blogger that the connection must be disclosed, and it should have procedures in place to try to monitor the blogger's postings for compliance.²¹

Within months after the revised Endorsements Guides went into effect, the FTC investigated AnnTaylor Stores Corp. concerning the company providing gifts to bloggers who wrote about an AnnTaylor LOFT preview event. In an April 2010 letter to AnnTaylor's counsel, FTC staff wrote that "Section 5 of the FTC Act requires the disclosure of a material connection between an advertiser and an endorser when such a relationship is not otherwise apparent from the context of the communication that contains the endorsement."²² FTC staff ultimately decided to close the investigation, finding that only a small number of the bloggers posted any content about the fashion show, and several of them did disclose that LOFT had provided gifts.²³ Notably, the fact that LOFT adopted a written policy stating that it would not issue any gifts to bloggers without telling the bloggers to disclose the gifts factored into the closing decision. The closing letter cautioned LOFT to honor the written policy and take reasonable steps to monitor blogger compliance with the policy.²⁴

Similarly, a closing letter sent by FTC staff to Hyundai Motor America in 2011 reminded the company of the “material connection” disclosure standard set forth in the Endorsements Guides.²⁵ This time, the inquiry focused on whether bloggers who had been given gift certificates as an incentive to include links to Hyundai videos in their postings, or to comment on upcoming Hyundai Super Bowl ads, were told to disclose that they had received the gift certificates (and whether the bloggers were told *not* to disclose this information). Notably, the activities of most concern to the FTC were not engaged in by Hyundai employees, but by an individual working for an outside media firm hired by Hyundai to conduct the blogging campaign.²⁶ The FTC weighed that fact in its decision not to pursue an enforcement action. It also acknowledged that Hyundai did not know in advance about use of the gift certificates, a relatively small number of bloggers received the gift certificates, and some of them did actually disclose the gift certificates in their posts.²⁷ The FTC also found that Hyundai had an established social media policy that called for bloggers to disclose the receipt of any compensation.²⁸ Even though the FTC exonerated Hyundai, the outside media firm likely had some explaining to do, and industry got the message that it must pay attention to the actions of its outside agencies.

Perhaps in light of the AnnTaylor and Hyundai experiences, or by the light of good counsel, many companies have adopted social media policies for their advertising and marketing, especially larger companies that work with third-party ad agencies and affiliate networks that need well-documented controls. The guidance from the FTC is to have these policies in place, although the content of these social media policies required by the FTC is still unclear. Whatever the social media policy provides, the key for companies is to honor it, as the FTC will be the first to come knocking when a company fails to follow its own social media policy.²⁹

Mobile Marketing

Mobile marketing encompasses many new things, including promotional text messaging, location-based couponing, and mobile applications and sales offers. The Commission has responded to new mobile technologies through law enforcement actions, the workshops related to consumer privacy issues, and guidelines for meeting truth-in-advertising obligations for mobile application developers.³⁰ The FTC does not enforce any special laws applicable to mobile marketing, but again has used the flexibility of Section 5 to address a number of potential problems in the mobile space.

The FTC has applied Section 5 to cases involving endorsements and advertising substantiation related to gaming apps and unauthorized charges on wireless phone bills (also called “cramming”) for purchases of apps.³¹ An FTC workshop on phone bill cramming studied how mobile and landline billing platforms worked and the development of cramming prevention mechanisms.³² Even though the Federal Communications Commission has primary jurisdiction over sending

unwanted text messages, the FTC has applied Section 5 to unsolicited commercial text messages sent to cell phones.³³

The Commission’s efforts in mobile marketing have been marked by a deep level of cooperation with industry, including through workshops and town halls, as well as the Commission’s willingness to recognize mobile as a legitimate marketing platform.³⁴ These efforts should bode well for companies who want to incorporate mobile into their marketing, as the FTC’s guidance and Section 5 enforcement policies are likely to incorporate consideration of industry’s views.³⁵ Nonetheless, to date, the FTC has issued specific guidance only to one sub-group in the industry, mobile app developers. That guidance primarily re-hashes the obligation to “tell the truth” about the features of an app and directs developers to abide by the “clear and conspicuous” standard by making disclosures about the app large and clear enough to read.³⁶

Conclusion

With a broad and vague mandate from Congress to guard against unfair and deceptive trade practices, the FTC has employed strategic enforcement actions and industry guidance (revisions to its Endorsement Guides, closing letters, and workshops), to adapt Section 5 to new technologies and marketing platforms. When the Commission makes a concerted effort to gain technical expertise and marketplace understanding related to a new technology or marketing platform, its Section 5 guidance reflects a genuine interest in enabling marketers to use the medium flexibly and effectively while the FTC retains appropriate, but not overly burdensome, checks on marketing practices because of consumer protection concerns. In contrast, when the FTC seems to have an inherent distrust for a particular technology or practice, as may be the case with affiliate marketing and some aspects of social media marketing, it tends to provide enforcement guidance unilaterally through consent orders that include heavy-handed restrictions that may not reflect the realities of the industry or practice.

At the end of the day, Section 5 provides the FTC the flexibility and muscle it needs to police emerging marketing practices on the Internet and mobile technologies. Perhaps this is attributable to the old adage, “The more things change, the more they stay the same.” ■

1 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a)(1), states: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” See Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 228 (1980) (explaining that “the language of Section 5 was left broad and general”).

2 Examples of trade regulation rules promulgated by the FTC include the Telemarketing Sales Rule, 16 C.F.R. §310; the Children’s Online Privacy Protection Act, 16 C.F.R. §312; and the Wool Products Labeling Act, 16 C.F.R. § 300.

3 The FTC must not only carry out the conventional Administrative Procedure Act steps for rulemaking, but must also publish two notices of proposed

- rulemaking, hold informal hearings at which interested parties are given limited rights of cross examination, and promulgate, if appropriate, a final rule along with a statement of basis and purpose. 15 U.S.C. §§ 57a(b)(1), (2). Furthermore, the FTC is not allowed to issue a notice of proposed rulemaking unless it believes that the unfair or deceptive acts or practices are “prevalent.” 15 U.S.C. § 57a(b)(3).
- ⁴ *Oz v. FWM Laboratories, Inc.*, Civ. 09 CV 7297, 2009 WL 2775256 (S.D.N.Y. Aug. 18, 2009).
- ⁵ Dirk Smillie, *A Headache for Dr. Oz*, FORBES.COM (June 16, 2009), <http://www.forbes.com/2009/06/15/mehmet-oz-oprah-business-media-resveratrol.html>.
- ⁶ In one example described by the FTC, an investigative-sounding headline—“Acai Berry Diet Exposed: Miracle Diet or Scam?”—purported to document a reporter’s first-hand weight loss experience with acai berry supplements. Press Release, Fed. Trade Comm’n, *FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products* (Apr. 19, 2011), available at <http://www.ftc.gov/opa/2011/04/fakenews.shtm>.
- ⁷ Susan Donaldson James, *Oprah Winfrey and Dr. Mehmet Oz Settle in Acai Lawsuit*, ABCNEWS.COM (May 5, 2010), <http://abcnews.go.com/Health/oprah-dr-mehmet-oz-settle-monavie-image-acai/story?id=10561547>.
- ⁸ See 16 C.F.R. §§ 255.5(c) & 255.5. The FTC Endorsements Guide addresses the applicability of Section 5 to endorsements and testimonials in advertising and sets forth a basis for voluntary compliance with the law by advertisers and endorsers. According to the FTC, “[P]ractices consistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.” 16 C.F.R. § 255.0(a).
- ⁹ FTC Press Release, *supra* note 7.
- ¹⁰ E.g., *FTC v. IMM Interactive, Inc.*, No. 1:11-cv-2484 (N.D. Ill. Apr. 13, 2011).
- ¹¹ *FTC v. Leanspa, LLC*, Case No. 3:11-cv-01715-VLB (D. Conn. Nov. 7, 2011); Amended Complaint at ¶¶ 26 & 105, *FTC v. Willms*, No. 2:11-cv-00828-MJP (W.D. Wash. Sept. 2, 2011) (referencing affiliate marketers and false endorsements by Oprah Winfrey and Rachael Ray); *FTC v. Johnson*, No. 2:10-cv-02203-RLH-GWF (D. Nev. Dec. 21, 2010); *FTC v. Central Coast Nutraceuticals, Inc.*, No. 1:10-cv-4931 (N.D. Ill. Aug. 5, 2010).
- ¹² *FTC v. Leanspa, LLC*, No. 3:11-cv-01715-VLB (D. Conn. Nov. 7, 2011).
- ¹³ Legacy Learning Systems, Inc., FTC File No. 102 3055, available at <http://www.ftc.gov/os/caselist/1023055/index.shtm>.
- ¹⁴ Stipulated Order for Permanent Injunction and Final Judgment, *FTC v. Central Coast Nutraceuticals, Inc.*, at 12–13 [hereinafter *Central Coast Nutraceuticals Order*] (stating that if the marketer only has access to certain affiliates through an affiliate network, which acts as an aggregator to connect advertisers with multiple affiliates in a network, then the marketing materials should be provided to the affiliate network). See also *FTC v. Willms*, No. 2:11-cv-00828-MJP (W.D. Wash. Sept. 2, 2011).
- ¹⁵ *Central Coast Nutraceuticals Order*, *supra* note 14, at 12–14.
- ¹⁶ See Jerry Schoemaker, *FTC Orders Stronger Policing of Affiliates*, SHOEMONEY.COM (Mar. 13, 2012), <http://www.shoemoney.com/2012/03/13/ftc-orders-super-policing-of-affiliates>.
- ¹⁷ Other federal agencies have issued guidance regarding the use of social media. For example, in 2010, the Financial Industry Regulatory Authority issued a notice regarding the use of social media by its member firms to emphasize that “[t]he content provisions of FINRA’s communications rules apply to interactive electronic communications that the firm or its personnel send through a social media site.” Financial Industry Regulatory Authority, *Regulatory Notice* (10-06), available at <http://www.finra.org/industry/regulation/notices/2010/p120760>.
- ¹⁸ Until the 2009 revisions, the FTC had not updated the Endorsements Guides since 1980. The Endorsements Guides “are administrative interpretations of the law intended to help advertiser comply with the Federal Trade Commission Act; they are not binding law themselves.” Press Release, Fed. Trade Comm’n, *FTC Publishes Final Guides Governing Endorsements, Testimonials* (Oct. 5, 2009), <http://www.ftc.gov/opa/2009/10/endortest.shtm>.
- ¹⁹ See 16 C.F.R. § 255.1 Example 5. 16 C.F.R. 255.1(d) states: “Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.”
- ²⁰ 16 C.F.R. § 255.5 Example 7. 16 C.F.R. § 255.5 states: “When there exists 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.”
- ²¹ *Id.* The FTC also provides an example targeted at company employees who participate in online message boards and discuss the company’s products or services without properly disclosing their employment relationship to members and readers of the message board. 16 C.F.R. § 255.5 Example 8.
- ²² Letter from FTC to Kenneth A. Plevan, Esq. Re: *AnnTaylor Stores Corp.* (Apr. 20, 2010), available at <http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf>.
- ²³ *Id.* The FTC also noted that LOFT posted a sign at the event informing bloggers that they should disclose the gifts if they wrote about the event, but it was not clear how many bloggers saw the sign.
- ²⁴ *Id.*
- ²⁵ Letter from FTC to Christopher Smith, Esq. Re: *Hyundai Motor America* (Nov. 16, 2011), available at <http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf>.
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ E.g., *Google Inc.*, FTC File No. 102 3136 (Oct. 13, 2011) (alleging that Google used deceptive tactics and violated its own privacy promises to consumers when it launched Google Buzz), available at <http://www.ftc.gov/os/caselist/1023136/index.shtm>; *FTC v. Wyndham Worldwide Corp.*, Case No. 2:12-cv-01365-SPL (D. Ariz. June 26, 2012) (alleging that Wyndham’s privacy policy misrepresented the security measures that the company and its subsidiaries took to protect consumers’ personal information); *Myspace LLC*, FTC File No. 102 3058 (May 8, 2012) (alleging that despite the promises contained in its privacy policy, Myspace provided advertisers with the Friend ID of users who were viewing particular pages on the site), available at <http://www.ftc.gov/os/caselist/1023058/index.shtm>.
- ³⁰ See *Prepared Statement of the Federal Trade Commission on Consumer Privacy and Protection in the Mobile Marketplace Before the Committee on Commerce, Science, and Transportation, U.S. Senate* (May 2011), <http://www.ftc.gov/os/testimony/110519mobilemarketplace.pdf> [hereinafter *FTC Mobile Marketplace Testimony*]; Fed. Trade Comm’n Bureau of Consumer Protection, *Marketing Your Mobile App, Get it Right from the Start* (Sept. 2012), <http://business.ftc.gov/documents/bus81-marketing-your-mobile-app> [hereinafter *Mobile App Guidelines*].
- ³¹ See *FTC v. Reverb Commc’ns, Inc.*, FTC Docket No. C-4310 (Nov. 22, 2010) (complaint), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbcmpt.pdf>; *FTC v. INC21.com*, No. C 10-00022 WHA (N.D. Cal.) (complaint), available at <http://www.ftc.gov/os/caselist/0923171/100301inc21cmpt.pdf>.
- ³² See *FTC Workshop, Phone Bill Cramming* (May 11, 2011), <http://www.ftc.gov/bcp/workshops/cramming/>.
- ³³ See *FTC v. Flora*, CV-11-00299 (C.D. Cal. Feb. 22, 2011) (alleging that defendant sent unsolicited text messages offering to help recipients obtain mortgage loan modifications and that messages falsely implied that the sender was part of a government-sponsored program). The Telephone Consumer Protection Act (TCPA) and the Federal Communications Commission rules implementing the TCPA make it unlawful for any person to use an automated dialing system to place any call (or text) to any cell phone without the called party’s prior express consent. See 47 C.F.R. § 64.1200(a). The FTC’s Telemarketing Sales rule does not have a parallel provision.
- ³⁴ See *FTC Mobile Marketplace Testimony*, *supra* note 30, at 2.
- ³⁵ See *Mobile App Guidelines*, *supra* note 30, at 1, which starts with the following preamble: “CONGRATULATIONS! The app business is booming and you’ve decided to get in on the boom.” It is not yet clear whether new guidelines for mobile app developers issued by the FTC in September 2012, which are somewhat sparse and focus more on data privacy than on disclosures and placement, will be valued by industry.
- ³⁶ *Id.* at 2.