Social Media Marketing:

CAGING THE UN-CAGED TWEETER

30-SECOND SUMMARY It is easy to forget that social media is really a form of advertising, and therefore, subject to federal and state laws and regulations, as well as industry guidelines. In contrast to traditional advertising, which involves the one-way transmittal of content to a target audience, social media is an interactive, usually public conversation between a company and its audience. The interactive, real-time nature of these conversations limits company control of posted content and can present a risk to a company's reputation and brand. Despite the myriad risks – legal and reputational – social media marketing is both highly effective and, in today's culture, crucial to most companies' sales and marketing efforts. Implementing a well-drafted social media policy and a comprehensive monitoring and compliance program can help minimize the risks and promote success.

By Emily Neisloss Roisman and Brian Socolow

Tweety Bird: [singing and swinging in his cage] I'm a tweet wittle birdie in a gilded cage … I'm safe in there from that ole puddy tat. ©Warner Bros. 1950

Companies of all sizes — from Fortune 100s to small, privately held businesses in every industry — are reaching out to their existing and potential customers, tweeting, texting and posting on social media pages to promote brand awareness and to accomplish marketing and advertising goals previously dependent on TV, radio and print advertising. Consumers are not just targets of social media advertising; they are also participants in its creation and distribution. But unlike Tweety Bird, social media tweeters — and the companies and brands they promote — are not protected by any "gilded cage."

While the term "social media" has become synonymous with internet-based third-party platforms such as Facebook, Twitter, YouTube and Pinterest, in its broadest sense, social media encompasses a vast array of ways for consumers and companies to connect and converse with each other 24 hours a day. These unique features make social media a valuable marketing tool, but, like many high-reward investments, it can be high risk. New platforms for making connections and sharing information and content are emerging constantly — and with them come legal and practical challenges, most of which are not "new" in terms of legal theory, but which will require new methods of compliance with traditional advertising law and consumer protection principles.

Social media is advertising

It is easy to forget that social media is really a form of advertising, and therefore, subject not only to the terms of use of the specific platform (and each platform does have its own array of terms and conditions), but also to federal and state laws and regulations, as well as industry self-regulatory guidelines.

At the federal level, the Federal Trade Commission (FTC) Act prohibits false and deceptive advertising in any medium. A claim could be misleading if relevant information is omitted or if the message (taken as a whole) implies something that is false. In addition, claims made in social media, especially those that concern health, safety or performance of a product, must be capable of substantiation. Earlier this year, the FTC released an updated version of *Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising* (2000), reminding companies that consumer protection laws apply equally across all mediums, whether an ad is delivered online, on a mobile device or through more traditional media, such as television, radio or print. Disclosures must be clear and conspicuous on all devices and platforms that consumers may use to view the ad, and if required disclosures cannot be made clearly and conspicuously given the constraints of the particular platform of choice (e.g., Twitter limitation of posts to 140 characters), then the ad should not be published. The FTC recommends placing disclosures "as close as possible" to the relevant claim, and discourages the use of hyperlinks for disclosures that involve pricing information or certain health and safety issues; however, if hyperlinks are used, they must be labeled as specifically as possible. State laws also prohibit false and misleading advertising and often provide a private right of action for violation of consumer protection and unfair competition laws.[1]

Social media provides a fertile ground for advertising through endorsements and testimonials in formats that range from branded social media pages or accounts, and company-owned and operated sites, to online reviews by third parties, including blogs by "independent" bloggers, Twitter feeds or the Facebook pages of others. The FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* define endorsements and testimonials broadly as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser. While the Guides are advisory in nature and do not have the force of law, the FTC does use them to evaluate whether advertising is false and misleading in violation of the FTC Act. Under the Guides, any endorsements or testimonials must reflect the honest opinions or experience of the endorser, and may not contain any representations that would be deceptive, or could not be substantiated, if the advertiser made them directly. Any material connection, such as a gift, incentive or other compensation that might affect the weight or credibility of the endorsement, must be disclosed to the consumer.[2]

Even giving a blogger free products to sample and review triggers an obligation to disclose a material connection. Having a social media policy that includes blogger guidelines — and providing those guidelines to any bloggers that review your products and services — may help your company avoid an FTC enforcement action.[3]

Companies may also be held responsible for the actions of agencies hired to act on their behalf, and lack of knowledge of or control over these agencies likely will not provide protection from an FTC enforcement action or the damage to reputation that might occur if an undisclosed material connection between a reviewer or blogger and the company is later revealed.[4]

An increasingly popular but risky method of social media promotion is celebrity endorsements. Celebrities are often required by their endorsement contracts to tweet or blog regularly,

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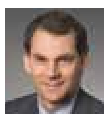

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sometimes a minimum number of times per day or per week. Although it is obvious that the individual making the statement would be liable for its false or misleading nature, the sponsoring company may also be liable for these statements. Whenever celebrities are promoting products or services in their social media postings (e.g., Facebook pages, Twitter feeds, and even on their own websites, or during interviews and appearances), they must disclose that their statement is an "ad" or is "sponsored" through use of a hashtag (in a tweet) or a longer disclaimer in other forms of social media that would allow for a longer message. Celebrities can also inflict significant brand damage through their personal use of social media. Following the 2011 tsunami that devastated Japan, comedian Gilbert Gottfried, the voice of AFLAC's famous duck, made a number of inappropriate jokes about the tsunami in his personal Twitter feed. Citing the fact that it had a significant market in Japan, the company apologized to its Japanese customers and fired the comedian.

Social media is, by its very nature, social, and the sharing of information from user to user is crucial to its success as a part of a company's marketing strategy. Thus, the temptation exists to give consumers incentives to promote a brand on social media. Avoid offering any type of compensation or incentive to encourage consumers to "like" your Facebook page, "share" a post, re-tweet a specific tweet, pin or re-pin a certain image on Pinterest, or provide a positive review of your company or its products, unless the incentive is conspicuously disclosed.

Industry self-regulatory agencies like the National Advertising Division of the Council of Better Business Bureaus (NAD) provide guidelines for recommended social media procedures, and NAD operates voluntary dispute resolution proceedings on false and misleading advertising to resolve claims between competitors, as well as claims brought by consumers and actions initiated by the NAD as a result of the organization's monitoring efforts. While the sole remedy of the NAD proceedings is a NAD recommendation, the threat of a referral to the FTC for further enforcement action puts some teeth into the organization's program.

In 2011, in a case of first impression, the NAD evaluated an eyeglass and contact lens company's offer for "free glasses" to people who "like" the advertiser's product, which the NAD termed a "like-gated" promotion, as well as the advertiser's statements about how many people "like" its products, which the NAD said was an endorsement. Competitor 1-800-Contacts challenged Coastal Contacts' Facebook promotion, asserting that Coastal Contacts should have disclosed the material terms and conditions in conjunction with the offer, such as consumers would be charged shipping and handling charges, not all styles of glasses were available as part of the promotion, and only a certain number of glasses would be given away as part of the promotion. 1-800-Contacts also challenged statements about how many people "liked" Coastal Contacts' products, arguing that these statements were fraudulent endorsements, because some consumers may have "liked" the products in order to qualify for the promotion.

The NAD agreed with the challenger that Coastal Contacts should have clearly disclosed the material terms and conditions in conjunction with the offer, and that certain conditions of the free offer (e.g., that there was a limit on the total number of glasses to be given away) were sufficiently significant that they should be included as part of the advertising itself, or in close conjunction with the claim, and that it was not sufficient to include them in the disclosure. Although the NAD determined that the statements about how many people "like" the advertiser's page constituted one of general social endorsement, the NAD noted that had evidence demonstrated that consumers who participated in the like-gated promotion could not or did not receive the benefit of the offer, or that the advertiser used misleading or artificial means to inflate the number of Facebook "likes," the outcome of the case would not have been as favorable to Coastal Contacts.

Social media is a conversation

In contrast to traditional advertising, which involves the one-way transmittal of content to a target audience, social media is an interactive, usually public conversation between a company and its audience, which invites consumers to participate in the creation and distribution of company marketing and advertising. In most conversations, each speaker is responsible only for his own statements; however, in a social media "conversation," the advertiser could be held responsible for the entire conversation, from both a legal and a brand perspective.

User-generated content (UGC) on a company's branded social media pages and accounts, and on company-owned sites, is subject to the laws and regulations covering deceptive and false advertising and claim substantiation. As exemplified by *Subway Restaurants v. Quiznos Restaurants*, UCG can also subject a company to liability — even

if the content was not company-approved or authorized. Quiznos sponsored a video contest on *www.meatnomeat.com*, asking consumers to compare its sandwich to a Subway sandwich, and posted video entries that had been submitted by consumers. Some entries included statements like: "There's no meat in the Subway sandwich." Subway sued Quiznos for false advertising under the Lanham Act. The district court denied Quiznos' motion to dismiss, finding that because Quiznos had invited consumers to submit these videos and had offered incentives to consumers to do so, Quiznos was liable for false and misleading statements made in the videos. Consumer postings in social media, if prompted or encouraged by the company, could also subject the company to liability for claims of defamation, disparagement, rights of publicity and privacy rights.

Similarly, because social media encourages the creation, sharing and exchange of information and ideas, intellectual property issues can arise. UGC that contains a third party's logos or trademarks can result in claims of trademark infringement and dilution, and unlike copyright law, no safe harbor exists for trademark infringement claims (although some use of other's trademarks could be considered fair use or permitted comparative advertising). Contest rules should give the contest sponsor the ability to reject or remove content for any reason and prohibit the posting of any UGC that contains third-party owned copyrighted material or trademarks.

Social media is a public conversation

While social media is a conversation between a company and its consumers, it is a very public one. The interactive, real-time nature of the medium limits company control of posted content, and can present a risk to a company's reputation and brand. You cannot "recall" a tweet, and posts — even if taken off of a company's social network website — reside in internet archives forever. When you invite users and consumers to submit UGC describing your company's products and services, you risk tarnishing your brand. For example, General Motors sponsored a contest asking users to submit their own commercials about the Chevy Tahoe using high-quality footage provided by GM; an environmental group submitted dozens of videos that criticized the Tahoe's low fuel mileage and blamed the company for global warming.

GM's experience demonstrates the risks in a social media campaign, especially if a social media failure "goes viral" quickly. Your company's responses to UGC, especially negative content, can have as much — or more — of a brand impact as the original content. The ChapStick brand experience illustrates this with its "Where Do Lost ChapSticks Go?" advertising campaign, which featured the jeans-clad backside of a model searching for her lost Chapstick behind a couch. Consumers flooded the page with crude comments about the ad and criticism that the ad was sexist and offensive. When the page administrator removed the critical posts but not the salacious comments, the negative criticism went viral, with bloggers and others commenting not only on the company's ad campaign, but also on its ill-advised response.

Fortunately, with careful planning, communication and execution, as well as a healthy dose of creativity, not only with respect to your company's social media postings, but also in company responses to the consumer's side of the conversation, the risks of social media marketing can be minimized. Examples of successful planning and execution capitalizing on the real-time nature of social media include the Oreo Super Bowl Twitter triumph, in which the brand used a negative situation — the blackout at the 2013 Super Bowl — to its advantage, sending out tweets to its followers based on its "Oreo dunking" ad campaign, with messaging, including images, like "Power out? No problem. You can still dunk in the dark." Women's clothing company Ann Taylor LOFT capitalized on comments complaining that its recent Facebook offer for its new slim cargo pants was misleading, that the pants would only fit and flatter women shaped like the tall, thin model pictured on the page and requesting that the company show the pants on "real women." The next day, the company responded with pictures of a variety of women drawn from the company's design, marketing and sales departments, wearing the pants.

In contrast, poor planning, communication and execution can all cause very public problems for your company. Consider, for example, Coca-Cola's 2010 Dr. Pepper Facebook (UK) promotion, "What's the Worst Thing That Could Happen?" The promotion required participants to allow Coca-Cola's advertising agency to hijack their Facebook pages and post embarrassing status updates in exchange for the chance to win approximately $1,500 each week. Participants chose the level of embarrassment they were willing to allow (Mildly Embarrassing, Embarrassing and Properly Embarrassing) — the

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higher the level of embarrassment, the more likely a participant would win the cash prize. A parent publicized her displeasure on a parenting blog after she saw an update Coca-Cola posted on her young teenage daughter's Facebook page that referenced a particularly offensive hard-core pornographic movie. Coca-Cola was forced to pull the campaign after its initial response to the parent's direct complaint about the egregious post (an offer of show tickets and an overnight stay in London) provided further fuel for the viral fire in the social media sphere.

One critical aspect of planning is knowing who has the ability to speak on behalf of your company; in other words, who has the keys to the social media car? In 2011, an automaker had just launched a multi-media advertising campaign touting the fact that its products were made in Detroit, when an employee of the digital media agency hired by the company tweeted, on the company's official Twitter account: "I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to f***ing drive." The employee claimed that he meant to tweet from his personal account while stuck in traffic, but mistakenly tweeted from the Chrysler account to which he had access through an interface intended to help people manage multiple Twitter accounts. The automaker removed the tweet from its feed shortly after it was discovered, issued an apology in a blog post the same day and terminated its relationship with its social media agency.

Your company can be impacted not only by what your employees and agencies do with social media on your behalf, but also what they do on their own time and on their own social media accounts.

Internal control and communication over a company's social media accounts is as important as oversight and control over its outside agencies. Consider, for example, the now famous HMV firing Twitter fiasco. The struggling British entertainment company conducted a mass firing of employees, many of whom were in the marketing function and had access to the company's social media accounts. Employees live-tweeted the firing on the company's official Twitter account, and management lacked the ability and knowledge to stop them.

Your company can be impacted not only by what your employees and agencies do with social media on your behalf, but also what they do on their own time and on their own social media accounts. Consider the recent example of Taco Bell employees who posted distasteful pictures and videos from the restaurant's kitchen on their personal websites, including one of an employee licking a stack of taco shells. The company responded that the pictures did not represent food-handling practices in their franchises' kitchens, that this (unidentified) restaurant had passed all of its inspections, and that the images were taken during an employee training session, with taco shells that were not served to customers but rather thrown away. Not only had the brand damage been done, however, but some commentators also criticized the company for a tepid public relations response.

Despite the myriad risks — legal and reputational — social media marketing is both highly effective and, in today's culture, crucial to most companies' sales and marketing efforts. Implementing a well-drafted social media policy and implementing a comprehensive monitoring and compliance program can help minimize the risks and promote success. **ACC**

NOTES

1 All 50 states have enacted consumer protection laws that in some way prohibit false or misleading advertising. *See, e.g.,* California's Unfair Competition Law, California Business and Professions Code §§ 17200 et seq. and Louisiana's Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. §§ 51:1401 to 51:1426. At least 20 states have adopted the Uniform Deceptive Trade Practices Act, which makes it a deceptive trade practice to "represent that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have." *See, e.g.,* 815 Ill. Comp.

Stat. Ann. 510/1 – 510/7, as well as the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. Ann. 505/1 – 505/12. Some states have laws that specifically address advertising. See, e.g., New York's Consumer Protection from Deceptive Acts and Practices Laws, New York Gen. Bus. Law §§ 349 – 350-f-1 and Louisiana's False Advertising Act: La. Rev. Stat. Ann. §§ 51:411 to 51:414.

2 *In the Matter of Legacy Learning Systems, Inc.*, FTC File No. 102 3055 (2011). Legacy Learning Systems, a company that sells guitar-lesson DVDs, and its owner, paid $250,000 to settle FTC charges that it violated the FTC Act by failing to disclose that independent reviews of its products were written by online affiliate marketers who were paid for every sale they generated. *See also In the Matter of Reverb Communications,* FTC File No. 092 3199 (2010). Reverb, a public relations agency hired by video game developers, settled FTC charges that it engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the agency. The settlement required that the company remove all reviews that misrepresented the posters as independent users or ordinary consumers, and failed to disclose a relationship between the agency and the game manufacturer.

3 *In the Matter of HP Inkology*, FTC File No. 122-3087 (2012). Hewlett-Packard gave holiday gift packs to bloggers that included two $50 gift cards, one for the blogger to keep and one to give away to a reader. The FTC investigated, expressing concern that bloggers failed to disclose the $50 gift certificate they were entitled to keep, but decided not to file a formal enforcement action, in part because most of the bloggers who wrote about the product disclosed the gifts and because HP and its public relations company revised their social media policies to adequately address the FTC's concerns.

4 *In the Matter of Hyundai America*, FTC File No. 112-3110 (2011). The public relations agency hired by the car manufacturer gave gift certificates to bloggers as an incentive to comment on or post links to Hyundai's Super Bowl ads. The FTC did not file an enforcement action because some of the bloggers disclosed the gift certificates, Hyundai did not appear to know about the use of the gift certificates, and the public relations company addressed the issue quickly. Damage to reputation can also result from failure to disclose a material connection. In 2006, citizen-bloggers "Jim and Laura" toured the United States in their RV, camping in Wal-Mart parking lots, and posting positive stories and pictures on their blog "Wal-Marting Across America." Jim and Laura, it was later revealed, were a real couple, a professional photographer and a freelance writer, and while it was originally their idea, their trip was entirely sponsored (including plane fare, the RV, gas and compensation to Laura for her posts) and directed by Working Families for Wal-Mart, an organization formed by Wal-Mart's public relations firm, to counter criticism against the store.

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