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ALERT
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FTC Announces Revised Guides for Endorsements and Testimonials

The Federal Trade Commission announced that it has completed its review of its Guides Concerning the Use of Endorsements and Testimonials and issued a final, revised version of the Guides. The new Guides take effect December 1, 2009.

The revised Guides contain significant changes that will likely impact the advertising and marketing practices of many companies that use endorsements, testimonials, blogs and other new media platforms.

The Guides, which were last updated in 1980, are administrative interpretations of the law intended to help advertisers comply with the Federal Trade Commission Act; they are not binding law themselves. Specifically, they provide guidance and examples for advertisers for conforming their endorsement and testimonial advertising practices with the FTC's interpretation and application of Section 5 of the FTC Act which prohibits unfair or deceptive ads. However, as the Guides themselves state, "practices inconsistent with these Guides may result in corrective action by the Commission under Section 5" and the Guides set forth the general principles that the FTC will use in evaluating endorsements and testimonials.

The final version of the Guides largely mirrors the proposed version issued in November, 2008. (We summarized the proposed Guides in a January 2009 client alert, "*FTC Endorsements and Testimonials Guides*".)

The Guides define an endorsement 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. In the Guides, the term endorsement includes testimonials.

As a general matter, the new Guides make clear that advertisers can be held liable for any false or unsubstantiated statements made by endorsers, and for not disclosing any material connections between themselves and the endorsers. In addition, endorsers, including expert endorsers and celebrities, may be held liable for their statements.

The new Guides also address new media platforms such as blogs and word-of-mouth marketing. In one example involving a blog, the Guides states that if an advertiser requests that a blogger try a new product and write a review, the advertiser is subject to liability for false or unsubstantiated statements made through the blogger's endorsement. In addition, the blogger is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement, and the blogger is liable if she fails to disclose clearly and conspicuously that she is being paid for her services. The Guides suggest that the advertiser provide guidance and training for its bloggers concerning the need to ensure that statements bloggers make are truthful and substantiated. And the Guides suggests that the advertiser monitor bloggers who are being paid to

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promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

Regarding word-of-mouth marketing, the Guides state that if an advertiser provides free products or other incentives (such as points that can be redeemed for prizes) to individuals every time they mention the advertiser's products or services to their friends, these incentives should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

Advertisers using social networking sites and online message boards, to the extent these sites provide a platform for pitching products and services in a similar fashion as bloggers and word-of-mouth advertising, could also be impacted by the new Guides.

Celebrity endorsers also are addressed in the revised Guides. The revised Guides make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.

The revised Guides also make changes to requirements for atypicality disclosures. Previously, the Guides allowed advertisers to use truthful testimonials, even if the testimonial did not generally represent what consumers could expect when using the advertised product, if the advertiser (1) clearly and conspicuously disclosed what the generally expected performance would be, or (2) disclosed the limited applicability of the endorser's experience to what consumers could generally expect to achieve (called "disclaimers of atypicality").

According to the FTC, disclaimers of atypicality in consumer endorsements have provided a safe harbor to advertisers, allowing them to avoid the general requirement that

they be able to substantiate all material claims conveyed by their advertising. The revised Guides eliminate this safe harbor. If an advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.

The Guides note, however, that not all testimonials will necessarily need disclosures about representative results. Testimonials for certain products - such as movies, games, or restaurants - are usually based on a consumer's subjective opinion and therefore consumers would probably not interpret such statements as conveying a typicality message.

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