

# FTC Consumer Protection Alert: Advertisers, Bloggers, Endorsers and Testimonialists Beware! FTC Revises Guides on Endorsements and Testimonials in Advertising

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On October 5, 2009, the Federal Trade Commission (FTC) voted to revise its Guides Concerning the Use of Endorsements and Testimonials in Advertising for the first time since 1980.<sup>1</sup> These revisions affect the manner in which advertisers may use endorsements and testimonials to promote consumer products or services in advertisements. Most notably, for ads using testimonials featuring “non-typical” product or service results, the FTC will require clear disclosure of what consumers should generally expect. A “results not typical” disclaimer is no longer sufficient for compliance. Additionally, the FTC will apply the Guides to endorsements disseminated through new media outlets such as blogs (and presumably social networking sites). Failure to comply with these new guidelines may result in potential enforcement actions and other penalties. The new Guides will take effect on December 1, 2009.

## Safe Harbor Provision for “Non-Typical” Testimonials Eliminated

In the new guidelines, the FTC eliminated a safe harbor provision of the 1980 Guides, which allowed advertisers to feature and describe “non-typical” testimonials in advertisements as long as a disclaimer, such as “results not typical,” accompanied the testimonial. Advertisers can no longer rely on a general disclaimer when advertising atypical results. The new Guides require the advertisement to clearly disclose the results consumers should expect in the depicted circumstances. Advertisers must possess and rely on adequate substantiation for this representation. The practical effect of this revision is to treat ads that use testimonials in the same manner as all other ads. Currently, non-testimonial ads are required to use typical results in support of their performance claims.

## Endorsements Disseminated Through New Media

The new Guides also seek to provide greater transparency for consumer products and services being reviewed in the blogosphere. The FTC for the first time applied the Guides’ interpretations on endorsements to new forms of “consumer generated media,” such as the use of blogs in “word of mouth marketing campaigns.” Messages disseminated to the public through blog reviews or

other postings may constitute an endorsement of a product or service under the revised Guides if the speaker (*e.g.*, a blogger) is “sponsored” by the advertiser. Factors to be considered by the Commission include:

1. whether the speaker is compensated
2. whether the product in question was provided for free
3. the terms of any agreement
4. the length of the relationship
5. past receipt of products and the likelihood of future receipt
6. the value of the products or services received.

For example, if a blogger were to receive a cash payment or a stream of merchandise from a marketing program to review a product, the blog posting would likely constitute an endorsement. When an endorsement is disseminated by the endorser through new media, the FTC will place primary responsibility upon the endorser for disclosing material connections with the advertiser.

Moreover, the FTC’s guidance clarifies that an advertiser may be held liable for misleading statements made by endorsers who employ new media. An advertiser is potentially liable if it initiated the process that lead to endorsements being made on a blog and an endorser-sponsor relationship has been established between the advertiser and the blogger. An advertiser and endorser are thus *both* liable for misleading or unsubstantiated representations made in the course of a blogger’s endorsement, or for the non-disclosure of material connections shared with the seller of the product or service.

## Potential Liability of Endorsers Such as Celebrities and Experts

The revised FTC guidelines also contain new language stating that endorsers, not just advertisers, face potential liability associated with their endorsement activities. An endorser may be liable for any false or unsubstantiated claim, or for failure to disclose material connections with the advertiser. This is of particular importance to celebrities or experts who make endorsements of products and services for advertisers. Moreover, the Guides include new language stating that a celebrity is responsible for disclosing relationships with advertisers when making endorsements through non-conventional advertisements such as public appearances—for example, on talk shows. The FTC also places responsibility on advertisers to advise the celebrity in advance about what he or she should (or should not) say about a product or service, and the need to disclose the relationship in the non-conventional advertisement setting.

The FTC will examine all endorsements and testimonials, and each use of new media, on a case-by-case basis. All entities who advertise, but particularly those who use endorsements and testimonials, should examine carefully whether their current advertisements comply with the new FTC guidelines.

## Endnotes

<sup>1</sup>The Guides represent the Commission's non-binding administrative interpretations regarding the application of Section 5 of the FTC Act (15 U.S.C. § 45) to the use of endorsements and testimonials in advertising. They are located at 16 C.F.R. Part 255.

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*If you have questions regarding any of these issues, please contact one of the attorneys listed below or any member of your Mintz Levin team.*

**Bruce D. Sokler**

(202) 434-7303

[BDsokler@mintz.com](mailto:BDsokler@mintz.com)

**Charles A. Samuels**

(202) 434-7311

[CASamuels@mintz.com](mailto:CASamuels@mintz.com)

**Harvey Saferstein**

(310) 586-3203

[HSaferstein@mintz.com](mailto:HSaferstein@mintz.com)

**Michele Floyd**

(650) 251-7723

[MFloyd@mintz.com](mailto:MFloyd@mintz.com)

**Robert Duggan**

(617) 348-1780

[RDuggan@Mintz.com](mailto:RDuggan@Mintz.com)

**Cynthia J. Larose**

(617) 348-1732

[CJLarose@mintz.com](mailto:CJLarose@mintz.com)

**Susan Neuberger Weller**

(202) 585-3510

[SNWeller@Mintz.com](mailto:SNWeller@Mintz.com)

**Robert G. Kidwell**

(202) 661-8752

[RGKidwell@mintz.com](mailto:RGKidwell@mintz.com)