

Legal Updates & News

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FTC Approves Final Revisions to Advertising Guides Concerning Endorsements and Testimonials

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On October 5, 2009, the Federal Trade Commission (“FTC”) announced the release of long-awaited revisions to its Guides Concerning the Use of Endorsements and Testimonials (the “Guides”), which take effect on December 1, 2009. Although the Guides do not have the force of law, they provide advertisers with important guidance to avoid potentially unfair and deceptive advertising practices under Section 5 of the FTC Act. Two of the FTC’s revisions are likely to have the greatest impact on advertisers.

First, the Guides clarify their application to every form of media, including new forms of media, such as blogs and viral and social media. The Guides have long required that material connections between endorsers and advertisers be disclosed, so that consumers can give appropriate weight to the endorser’s statements. The revised Guides specifically apply this requirement to blogs and other forms of social and viral media, when the advertiser has “sponsored” the individual’s endorsement. The question of whether an endorsement is “sponsored” turns on whether the speaker is acting independently (e.g., a publication with independent editorial responsibility that has its employees write product reviews) or whether he/she is acting on behalf of the advertiser or its agent (e.g., a blogger paid by the advertiser to provide reviews). According to the Guides, an endorsement can be “sponsored” by virtue of the exchange of various types of consideration, including, in some cases, providing the endorser with a free product sample. As a result, endorsements posted in blogs or on popular social networking sites like Facebook and Twitter may now be subject to the Guides’ requirements. Under the revised Guides, an endorser must clearly and conspicuously disclose his or her material connection to the advertiser. For example, the FTC notes in an example that a blogger who reviews video games must disclose a free game received from the video game company in his or her blog review of that game. If he or she does not, then both the blogger and the advertiser can be held liable. In addition, depending on the circumstances, both the endorser and the advertiser may be held liable for false or misleading statements about a product, potentially even if the advertiser has no control over the endorser’s statements. The Guides accordingly advise advertisers to implement procedures to ensure that its endorsers make the required disclosures, as well as to monitor their conduct.

Second, the FTC abolished the “results not typical” safe harbor for ads containing endorsements. Prior to the revisions, endorsements that did not reflect most users’ experiences were generally

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permissible as long as the advertiser included a “results not typical” disclaimer. As of December 1, 2009, that disclaimer is insufficient. Under the revised Guides, a consumer endorsement will generally be interpreted as representative of typical consumer experience. Accordingly, advertisers must be able to substantiate that the endorser’s experience is representative of generally expected results or, if the endorser’s results are atypical, disclose the results consumers can generally expect to achieve. In its commentary to the revised Guides, however, the FTC noted that all advertising will be considered on a case-by-case and “net impression” basis – meaning that it is conceivable that a disclaimer is not necessary if the advertisement, viewed in its entirety, is not misleading. To prevail in a challenge by the FTC, however, an advertiser would probably have to have consumer survey evidence showing that the ad is not misleading.

The revised Guides are important because advertisers may need to reevaluate how they procure and use endorsements. For more information on this topic and other advertising matters, please contact [Julie O'Neill](#), [Reed Freedman](#), or [Heather Moser](#).