

**THOMPSON
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**PRIVACY & INFORMATION
SECURITY UPDATE****FTC Adopts Revised Guides Concerning Use of Endorsements and Testimonials in Advertising—Impacts on New Media/Bloggers**

On October 5, the Federal Trade Commission (FTC) adopted the long-awaited updated “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” the first revisions to the Guides since 1980. These revised Guides become effective on December 1, 2009. Importantly, the updated Guides address endorsements and testimonials in “new media,” such as blogging, social network sites and the like. Bloggers (and others providing testimonials) who fail to disclose that they received free products, goods or services from an advertiser may be subject to substantial penalties, although the FTC has indicated it will continue to focus its law enforcement activities on advertisers.

We provide here a short summary of certain key points in the FTC’s revised Guides; for the full text of the FTC’s action, see www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf.

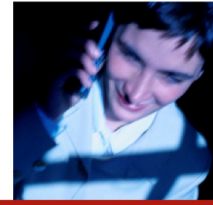
WHAT IS COVERED?

The Guides cover “endorsements”—“any advertising message (including verbal statements, demonstrations or depictions of 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.”

GENERAL PRINCIPLES ON ENDORSEMENTS

Endorsements must reflect the honest opinions, findings, beliefs or experiences of the endorser, and may not convey any express or implied representation that would be deceptive if made by the advertiser. When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given, and while the advertisement continues to run. Liability may be assessed on advertisers for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. **Endorsers may also be liable for statements made in the course of their endorsements.**

Further, advertisements that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect. The revised Guides deleted a provision in the 1980 version of the Guides allowing advertisers to describe unusual results in a testimonial as long as they included a disclaimer such as “results not typical.” This marks a significant change in the Guides, and will



require advertisers to materially change how they tout the results of use of their products when using outlier examples.

APPLICATION TO NEW MEDIA

The development of consumer-generated new media poses new questions about how to distinguish between communications that are considered “endorsements” within the meaning of the Guides and those that are not. The FTC will consider each use of these new media on a case-by-case basis for purposes of law enforcement, similar to other advertising reviewed by the FTC.

FACTORS THE FTC WILL CONSIDER IN REVIEWING “NEW MEDIA” ENDORSEMENTS

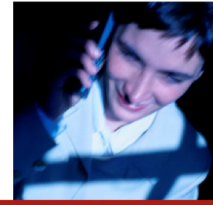
The revised Guides articulate several factors the FTC will consider in reviewing whether consumer-generated media constitute “endorsements” within the meaning of the revised Guides. The crux of the FTC’s review is **“whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”** Some key factors that will be analyzed in answering this question are whether, in disseminating positive statements about a product or service, the speaker is:

- Acting solely independently, in which case there is no endorsement; or
- Acting on behalf of the advertiser or its agent, such that the speaker’s statement is an “endorsement” that is part of an overall marketing campaign.

Some indications of “acting on behalf of the advertiser or its agent” include:

- Whether the speaker is compensated by the advertiser or its agent;
- Whether the product or service in question was provided for free by the advertiser;
- The terms of any agreement;
- The length of the relationship;
- The previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and
- The value of the items or services received.

The FTC states that a consumer who purchases a product with his or her own money and praises it on a personal blog will not be deemed to be providing an endorsement. However, a blogger who is paid to speak about an advertiser’s product will be covered by the FTC’s endorsement Guides. A blogger who regularly receives free samples of products for families of young children and discusses those products on his or her blog would be required to disclose that he or she received for free the recommended items.



Endorsers are responsible for disclosing material connections with advertisers. Some industry groups (such as the Word of Mouth Marketing Association) already require these disclosures in their codes of ethics. Advertisers who sponsor endorsers must establish procedures to advise endorsers that they should make the necessary disclosures and monitor endorsers' conduct.

LIABILITY

An advertiser may be liable under Section 5 of the FTC Act for a blogger's misleading statements if the advertiser initiated the process that led to these endorsements being made. Moreover, both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsements. The FTC indicates that its law enforcement activities will continue to focus on advertisers. However, endorsements by bloggers are now covered by the Guides and bloggers should be careful to review the revised Guides and the examples provided by the FTC.

In instances where a "rogue" employee ignores his or her employer's policies and practices concerning social media participation and does not comply with the Guides, the FTC states that it is unlikely to take action against the employer. Thus, companies may wish to review their social media policies in light of this recent guidance.

FOR MORE INFORMATION

If you would like more information on navigating the FTC's revised Guides, please contact:

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