On October 5, 2009, the Federal Trade Commission (FTC) published its revised Guides Concerning Use of Endorsements and Testimonials in Advertising. The Guides provide the FTC's regulatory guidance on the advertising use of consumer, celebrity, and expert endorsements and testimonials. The new revisions reflect the FTC's recent efforts to modernize and strengthen the reach of federal advertising laws, particularly as applied to "new media" such as blogs and other social networks.

The Guides, as revised, now make clear that:

- advertisers who actively encourage blogging and viral marketing of their products or services may be liable for the bloggers’ and marketers’ actions;
- advertisements containing consumer endorsements, or so-called "testimonials," must clearly disclose the results that consumers can expect;
- advertisers can no longer generally rely on the industry-standard practice of qualifying a consumer endorsement with disclaimers such as "results not typical";
- the Guides apply in the realm of bloggers and other "word-of-mouth" marketers, and that such bloggers and marketers must disclose any "material connection" to a company when reviewing the company’s products or services;
- both advertisers and endorsers can be jointly liable for false or unsubstantiated claims made in an endorsement; and
- advertisers must make clear any connection with research organizations whose findings they cite in ads.

While the Guides are not law, the FTC can bring enforcement actions against companies and individuals that fail to comply with federal advertising law as explained in the Guides. The updated Guides take effect on December 1, 2009.

**Blogs, Social Networking, and New Media**

The revised Guides provide that an advertiser who initiates the process leading to an endorsement made online or via other new media—for example, by providing products to well-known bloggers—is potentially liable for misleading statements made by an endorser. According to the FTC, the advertiser assumes the risk that bloggers or endorsers may fail to disclose a material connection or misrepresent a product, and the potential liability that comes with it.

The Guides further clarify that bloggers and other word-of-mouth and new media marketers are subject to the same endorsement rules as advertisers working in traditional media. Prominent users of social networking sites like Twitter and Facebook, according to an FTC official, are also subject to the Guides.

Blogging and other new media endorsers will now be required to disclose any material connections to advertisers. For example, if a popular blogger regularly receives free sample products in exchange for discussing the products on his blog, he is required to disclose his tie to an advertiser when he reviews its product. Payments or other benefits given to a blogger or new media endorser by a third party on behalf of an advertiser (for example, as part of an affiliate marketing program or a blog advertising service) can also constitute a material connection that must be disclosed.

The Guides also make clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional media, such as on social networks or talk shows.

**Consumer Endorsements**

Whereas the FTC has traditionally taken the view that an explicit disclaimer in a consumer endorsement (saying, for example, that "results may vary") was sufficient to avoid any consumer misimpression, it now believes that consumers do not pay sufficient attention to such "disclaimers of typicality." The revised Guides indicate that an advertiser’s mere use of such a disclaimer no longer provides a safe harbor from liability.

Under the revised Guides, advertisements containing consumer endorsements, or testimonials, must make clear to consumers the actual results that they can expect. In other words, anendorser’s statement about a product or service will be deemed to be a representation that the product or service will be similarly effective for other consumers.

Take, for example, an advertisement for a replacement laptop battery where three satisfied users indicate that they now get two hours’ more use than with their prior batteries. Until now, an advertiser would almost certainly have been immune—even if

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in reality only 20 percent of users would see an increased battery life of two hours—merely by clearly disclosing that “results may not be typical.” Under the revised Guides, the ad would be viewed as deceptive unless it clearly and conspicuously disclosed the generally expected benefit, such as “the typical user will see an increased battery life of 45 to 60 minutes.”

Advertisements and Endorsers May Both Be Liable

While the original Guides did not explicitly state that advertisers and endorsers could be jointly liable for statements made in an endorsement, the revised Guides make that point clear. Both an advertiser and an endorser could be on the hook for false, misleading, deceptive, or unsubstantiated statements made, as well as for failing to disclose material connections between the advertiser and the endorser. For example, if an advertiser were to ask a blogger to try its new software for data compression and write a review about it, the advertiser would be liable if the endorser made unsubstantiated claims about the product’s efficacy. Under the new Guides, if the blogger claimed that the software compresses all types of data (and it didn’t), the advertiser could be held liable, even if the advertiser never made claim itself.

Connections to Research Organizations Must Be Disclosed

If a company refers in an advertisement to the findings of a research organization that conducted research sponsored by the company, the advertiser must make the connection between the advertiser and the research organization clear. For example, a drug company that commissions an outside lab to test the efficacy of a new product and pays a substantial share of the expenses (even if the lab determines the protocol for the study and is independently responsible for conducting it) must disclose its payment of expenses in advertisements citing the lab’s findings.

Practical Tips for Advertisers Using Endorsements or Testimonials in Light of the Revised Guides

- **Remember Traditional Advertising Laws Apply Online.** Operate blog and new media advertising campaigns with the same care that you would operate any traditional marketing campaign.
- **Reconsider the Practice of Providing Free Products or Gifts to Bloggers and Reviewers.** Even if you do not specifically request a review, you may still be liable for misrepresentations made about that product or failure to disclose the connection.
- **Train Bloggers and Consider Adopting a Blog Policy.** Train bloggers with whom you have a material connection to avoid making false or deceptive statements. Consider adopting a formal blog policy that requires bloggers to disclose their connection and educates them on advertising law and company requirements.
- **Monitor Endorsers’ Statements Where You Have a Close Connection to Them.** When you have a material connection (for example, when you’ve provided a product in exchange for a review), monitor bloggers’ and others’ statements about your product and promptly take corrective action if there’s a failure to disclose the connection or if any misrepresentations are made. The FTC has indicated that it would consider the advertiser’s efforts to advise endorsers of their responsibilities and to monitor their online behavior to determine what, if any, action would be warranted.
- **Make Sure Prior Substantiation Exists for an Endorser’s Statement.** Advertisers should work to maintain prior and adequate substantiation to support any endorser representation. Proving “after the fact” that an endorser’s statement is true may not be sufficient.

Further Guidance

For further guidance on these or any related issues, please contact Aaron Hendelman, John Slafsky, or Lydia Parnes in the retail, consumer, and advertising practice at Wilson Sonsini Goodrich & Rosati.