

News from our Trademark, Copyright & Advertising Group

The Federal Trade Commission Releases Final Guides Concerning Endorsements and Testimonials and Increases the Possibility of Liability

On October 5, 2009, the Federal Trade Commission (“FTC”) published its final revised guides with respect to endorsement and testimonial advertising. The FTC’s revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guides”) are effective December 1, 2009 and significantly increase the possibility of liability under the FTC Act. Although FTC guides are not binding law, they are administrative interpretations intended to help advertisers comply with the FTC Act. While the Guides refer to the advertising of “products,” the Guides apply equally to the advertising of products, services, companies, and industries.

Overview of the final guides

The revised Guides discuss possible liability for advertisers and endorsers. Endorser is defined to include an individual, group, or institution. With respect to advertisers, the revised Guides no longer contain the long-standing safe harbor that allowed the description of unusual results in a testimonial so long as the advertisement included a disclaimer that the results were not typical. The revised Guides also require advertisements to disclose material connections between the advertiser and the endorser. Failure to do so can result in liability under the FTC Act for the advertiser as well as the endorser. For example, if an advertisement touts the findings of a research organization that conducted a study paid for by the advertiser, the advertisement must disclose that connection. The requirements extend beyond traditional media and are imposed

when an endorser makes a statement, for example, on a talk show, blog, or other social media.

Specific guidelines

The stated goal of the Guides is to make sure that endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.” As noted above, both the advertiser and the endorser can face liability. The Guides provide, in part, the following requirements and direction:

- ▶ “Material” connections between an advertiser and an endorser must be disclosed unless the connection is “reasonably expected” by the consumer. One example provided by the Guides addresses the situation when an advertisement depicts individuals who give a positive statement about a movie. Under the Guides, the advertisement must disclose that the individuals received free tickets in exchange for speaking about the movie on camera. But payments to celebrities to endorse a particular product in a television commercial (as opposed to endorsements at public appearances), according to the Guides, are expected by the consumer and need not be disclosed.
- ▶ Advertisers can no longer disclose simply that “results are not typical,” or similar language. Instead, unless an advertiser has substantiation that an endorser’s experience is “representative of what consumers will generally achieve,” the advertisement must “disclose the

generally expected performance in the depicted circumstances.”

- ▶ An endorser must be a “bona fide” user of a product if the advertisement represents that the endorser uses the product. So long as the advertisement is run, the endorser must continue to be a “bona fide” user of the product. An advertisement also cannot represent, either directly or by implication, that the endorsers are “actual consumers” if they are not.
- ▶ Expert endorsements must be based on an evaluation that includes “examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.” Similarly, endorsements by organizations must be supported by a “process sufficient to ensure” that the endorse-

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ment reflects the collective view of the organization.

- ▶ Advertisers participating in a blog advertising service may be held liable for statements made by bloggers about the advertiser's products. The blogger, too, may be held liable for his or her statements about the product.

Strategic considerations

In view of the FTC's Guides, companies that rely in any way on third parties to endorse its products, services, or industry should reevaluate its advertising to make sure that it complies with the revised Guides. This review should include any traditional advertising as well as non-

traditional advertising, such as blog and social media marketing. Companies may also face increased litigation or claims for indemnification from endorsers who are the target of FTC actions or civil lawsuits. Over time, we expect that many endorsers will demand contractual indemnity to protect them from potential liability. While this may be commercially reasonable for traditional media when the company controls the advertising, indemnification is a more complicated issue for new media when the endorser controls the advertising. The attorneys listed on this Cooley Alert are available to discuss the revised Guides as well as other information pertaining to advertising and the FTC. ■