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New FTC Guidelines

“Results May Vary,” Social Media Marketing and Celebrity Endorsements

Effective December 1, 2009, the Federal Trade Commission (“FTC”) will make important changes in the guidance it gives to advertisers on how to keep their endorsement and testimonial ads lawful under the FTC Act. The guidance will make important changes that affect testimonial advertisements, bloggers, and celebrity endorsements.

On October 5, 2009, after a public comment period, the FTC announced it has approved the final versions of the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).¹ The Guides were last updated in 1980.²

Some of the more important issues raised by the Guides are the elimination of the safe harbor by use of the “Results May Vary” disclaimer, the addition of example scenarios concerning social media marketing, websites and blogs, and warnings that both advertisers and celebrity endorsers may be liable.

The Guides are not regulations that are binding law, but are warnings of what may be unlawful. The law will be decided by the courts on a case-by-case basis in actions brought under the FTC Act. Though not binding, the FTC has stated that “practices inconsistent with these Guides may result in corrective action by the Commission.”

While past common practice was to simply disclaim that the results shown in the ad are not the typical result experienced by the consumer, the new Guides present a higher burden. The 1980 version of the Guides allowed advertisers to depict best-case truthful scenarios in their advertisements, and disclaim the atypicality of the result (e.g. “results may vary”). During the comment period, the FTC noted that these types of disclaimers have often appeared in connection with claims relating to atypical pounds lost or money saved. Advertisers and endorsers need to be aware of these changes and apply them to their marketing practices to avoid potential liability. Under the new Guides, the advertiser must either depict the generally expected consumer experience, or clearly and conspicuously disclose the typical experience a consumer can reasonably expect.

Another change is that under the revised Guides, both advertisers *and* endorsers may be held liable for the endorser’s statements—previously only advertisers were liable. Any statement that represents a false or unsubstantiated claim of an objec-

tive quality or characteristic of a good or service requires adequate substantiation. Advertisers and researchers should also note that the Guides require companies with advertisements that report research findings reveal any connections to the researcher—such as the company sponsoring the research.

The new Guides also provide information on the use of social media marketing in advertisements. For instance, product or service endorsements must disclose the “material connections” between the endorser and company whose product or service is being endorsed. Given the widespread use of social media endorsements, which include celebrities, individual consumers, bloggers, experts and organizations endorsing products and services on the web, this aspect of the Guidelines will generate significant interest.

The examples set forth in the Guides have been updated to be relevant to today’s technological and social advances in advertising and marketing, such as the proliferation of blogging and other Internet-based marketing. The revised Guides provide updated examples of real-world scenarios to address the new ways advertisers connect with consumers and discuss how the FTC would potentially evaluate those situations. These examples include:

- If a blogger receives merchandise from an advertiser who requests that the blogger review the merchandise, but no compensation is paid other than the value of the merchandise, the blogger’s posts could be deemed an endorsement, depending on the merchandise’s value and/or on the frequency with which the blogger receives such requests.
- If a widely-read blogger often receives products from a company that targets the same demographics as the blogger’s readers, the blogger’s posts about the products she received likely will be deemed sponsored messages and subject to the disclosure requirement.
- If consumers who are members of “word-of-mouth” marketing programs receive products from time to time from companies for the consumer to evaluate publicly, those reviews likely will also be viewed by the FTC as endorsements.
- If a “pay-per-post” blogger (i.e., one who reviews a product by posting online and receives cash or other in-kind payment, such as product freebies) is an endorser, and that blogger’s “material connections” are not dis-

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closed within the endorsement, both the blogger and the company could face potential liability for failing to disclose their connection.

- If a blogger who is endorsing a product makes an unsubstantiated claim, both the blogger and the company for whom the blogger is posting could be subject to liability for making misleading or unsubstantiated representations.
- If a celebrity promotes a product or service in a non-traditional endorsement, such as appearing on talk shows or Tweeting, in return for payment of some kind, that celebrity must disclose her relationships with the advertiser.

Understandably, these examples are for illustrative purposes only, and the FTC will continue to evaluate all potential accountability on a case-by-case basis. Perhaps the continued standard of individual evaluations of liability is needed now more than ever due to the multitude of scenarios that could arise, given the constant innovation presently occurring in social media technology. Nonetheless, advertisers and endorsers alike must be continuously vigilant in reviewing their social media marketing campaigns to avoid potential liability related to endorsement when adopting new forms of communication with potential customers.

While revisions to the Guides were a long time coming, they bring welcome clarity to many current advertising situations. The ever-changing nature of social media will certainly test the application of the revised Guides as advertisers find new ways of spreading the message—or Tweet—about their new products and services.

For more information on this topic, please contact any of the authors or any member of Locke Lord's Advertising & Marketing Group.

Endnotes

- 1 Guides Concerning the Use of Endorsements and Testimonials in Advertising, __ Fed. Reg. __ (Oct. 5, 2009) (to be codified at 16 C.F.R.pt. 255), available at <http://www.ftc.gov/os/2009/10/091005endorsement-guidesfnnotice.pdf>. The FTC previously released a notice soliciting comments about revisions to the Guides in November 2008. See Notice of Proposed Changes to Guides, 73 Fed. Reg. 72374 (Nov. 28, 2008), available at <http://edocket.access.gpo.gov/2008/pdf/E8-28294.pdf>.
- 2 FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1980), available at <http://www.ftc.gov/bcp/guides/endorse.htm>.

About the Authors

Gregory T. Casamento is a partner in Locke Lord's New York office. He focuses his practice on business, commercial, insurance and intellectual property litigation and technology transactions. Mr. Casamento has significant experience litigating trademark infringement claims, technology, contract and restrictive covenant disputes, and insurance issues for his clients before both State and Federal Courts. His experience also includes advising clients on e-Matters issues, including, e-signature, e-discovery, e-admissibility and e-records management.

Paul Van Slyke practices intellectual property, advertising, and related litigation and arbitration matters at Locke Lord. An experienced litigator and trial lawyer, Mr. Van Slyke litigates and counsels clients in patent, copyright, trademark, trade dress, advertising, trade secret, licensing, computer, Internet, and related intellectual property and unfair competition matters. He is a well-respected member of several national legal committees and has experience in bench and jury trials before numerous state and federal courts throughout the United States for major U.S. companies. He has also obtained preliminary injunctive relief in dozens of cases. Mr. Van Slyke has significant experience in anti-counterfeiting litigation and has obtained seizures of counterfeit computer software and luxury merchandise for Fortune 100 companies. In addition, he provides a full range of services for Internet domain names, including litigation under the Anti-Cybersquatting Act, domain name arbitrations under the Uniform Dispute Resolution Protocol (UDRP), and transactions involving domain names. He also practices regularly before the Trademark Trial and Appeal Board in trademark opposition and cancellation actions. Mr. Van Slyke is listed in *Who's Who Legal: Texas 2008* (2nd. ed. Int'l Bar Assn.) as one of the world's preeminent lawyers in trademark law.

Jason Mueller is an associate in the Locke Lord's intellectual property section. His experience includes working with business ranging from large international organizations to start-ups on intellectual property matters. He also has extensive experience in advertising and marketing law, as well as issues relating to patents, copyrights and trademarks. His experience includes reviewing print, television, outdoor and radio advertisements for potential legal issues, analyzing FTC and state law compliance issues, and providing counsel throughout the creative process and production of advertisements.

Kathryn A. Barrett is an associate in Locke Lord's New York City office. Ms. Barrett focuses her practice on complex domestic litigation in the areas of intellectual property, banking and corporate matters. In addition to her litigation experience, Ms. Barrett prepares patent and trademark applications and reviews corporate transactions.