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**To:** Clients and Friends

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**Subject:** **FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising**

After months of anticipation, the Federal Trade Commission (FTC or Commission) finally announced its final adoption of revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides). The announcement on October 5, 2009, was the culmination of a revision process that began in January 2007. The Guides represent the FTC's interpretation of how Section 5 of the FTC Act could be applied in the context of testimonial advertising. The revised Guides address new forms of media such as blogs and they remove the "safe harbor" afforded by the original Guides to non-typical testimonials accompanied by a disclaimer of typicality. This memorandum outlines the most important aspects of the revised Guides.

### 1. Timing and Effective Date

The Guides, which were announced on October 5, 2009, become effective on December 1, 2009. They continue to be codified at 16 C.F.R. Part 255.

### 2. "Sponsoring Advertiser": The Voice Behind the Endorsement

Perhaps the most notable aspect of the final Guides is the Commission's discussion of when an advertising message becomes an endorsement. In the proposed Guides, issued in November, 2008, the FTC stressed the preeminence of the point of view of the consumer in the determination of whether a statement was or was not an endorsement. Essentially, under the old Guides, the sole criterion was whether consumers were likely to believe that the statement reflected the views of the endorser rather than of the advertiser. This definition created serious concern among advertisers particularly with regard to how the definition could be applied in the context of new media, such as blog sites and other

forms of social media. If all it took was an impression that the statement reflected the views of the “speaker” rather than of the advertiser, then a statement made by a blogger about a product could become an endorsement for the product regardless of the actions taken by the advertiser of the product. If all of the Guides applied to that statement, the advertiser could be held responsible for the truth of the statement, among other things. This broad conception of an “endorsement” could arguably become unworkable in the context of user-generated content (UGC).

The FTC helps to clarify this ambiguity in its statement of basis and purpose. In the Guides, the definition of an “endorsement” was “any advertising message ... 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.” The key word in this definition – particularly when it comes to UGC – is “sponsoring.” Implicit in the definition and now explicit in the FTC’s reasoning, is that an advertiser is subject to the Guides when it is “sponsoring” an advertising message. Thus, the primacy of consumer impression is now tempered by an appreciation that an advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of someone other than the advertiser become “endorsements” under the Guides only when the advertiser “sponsors” the advertising message.

This is an important shift in the Commission’s stated approach to the Guides, and it is one that should help advertiser’s put the Guides into context when it comes to social media. Recognizing that UGC is a part of the overall media mix, the FTC introduces “a construct for analyzing whether or not consumer-generated content falls within the definition of an endorsement.” By examining the relationship between the advertiser and the speaker, the Commission shifts the focus away from the impression of the consumer and places it on whether there is “sponsorship” of the statement. This construct emerges as the key to the entire Guides and helps to focus and limit application of the Guides to situations in which deception is most likely.

The FTC’s “construct” essentially rests on the question of whether the speaker (1) is acting independently; or (2) is acting on behalf of the advertiser or its agent. Only in the latter case would the

FTC consider the speaker to have been “sponsored” by the advertiser and, accordingly, only in the latter case would the FTC apply its Guides. Furthermore, whether the speaker-advertiser relationship falls in the first or second category can be determined by looking at various factors including:

- 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 between the speaker and the advertiser or its agent;
- The length of the relationship between the speaker and the advertiser or its agent;
- The previous receipt of products or services from the same or similar advertisers;
- The likelihood of future receipt of such products or services; and
- The value of the items or services received.

No one criterion appears to be definitive; however, together these factors will help make the determination as to whether the UGC is considered “sponsored.” Thus, for the first time, the Commission has articulated an approach to testimonials that looks to indicia of intent on the part of the advertiser to be the “voice” behind the endorsement. Without a sponsoring “voice,” there is no “endorsement” subject to the Guides, simply a statement of personal belief, experience, or opinion.

<b>Factors that Tend to Show “Sponsorship”</b>	<b>Factors that Tend to Show a Lack of “Sponsorship”</b>
<ul style="list-style-type: none"> <li>• A blogger who is paid to speak about an advertiser’s product.</li> <li>• A blogger receives merchandise from a marketer with a request to review it but with no compensation paid other than the value of the product itself, where the value of the product received is great and the blogger routinely receive such requests and</li> </ul>	<ul style="list-style-type: none"> <li>• A consumer who purchases a product with his own money and praises it on a personal blog or message board.</li> <li>• A blogger receives merchandise from a marketer with a request to review it but with no compensation paid other than the value of the product itself, where the value of the product received was not very great</li> </ul>

<p>is known to have a wide readership within a particular demographic group that is the manufacturer's target market.</p> <ul style="list-style-type: none"><li>• Consumers who join word of mouth marketing programs that periodically provide them products to review publicly.</li></ul>	<p>and the blogger does not routinely receive such requests.</p> <ul style="list-style-type: none"><li>• Consumers who join word of mouth marketing programs that periodically provide them products but only request that they give feedback to the advertiser.</li></ul>
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The Commission confirms its construct in the context of typical sampling scenarios. In one of its new hypotheticals, the Commission describes a mechanism whereby a coupon for a free product is generated by a store computer based on purchase behavior. "Given the absence of a relationship between the speaker and the manufacturer or other factors supporting the conclusion that she is acting on behalf of the manufacturer (i.e., that her statement is 'sponsored'), her [positive] review [of the product on her blog] would not be deemed to be an endorsement." If on the other hand, there was "an ongoing relationship" between the consumer and a network marketing program, including economic gain by the consumer based on a stream of products, the blog postings would be deemed to be endorsements.

In sum, the FTC has helped to clarify its approach to new media forms that involve UGC. It has done so by acknowledging that the determination of whether an advertising statement is an endorsement or not cannot turn solely on whether consumers believe that the statement comes from someone other than the advertiser. It must be "sponsored" by the advertiser. The Commission further provides criteria that help to determine whether there is a sponsorship relationship between the advertiser and the speaker. This addition makes the Guides significantly more useful in the context of social media and other forms of media that involve UGC.

### 3. Liability of Endorsers and Advertisers: The Benefit of Blogging Guidelines

The FTC makes it clear in its revised Guides that the sponsoring advertiser should be liable for statements made by endorsers who use new media. The Commission introduced this concept in its

proposed revisions to the Guides in November, 2008 to the consternation of many advertisers who complained that they should not and cannot be responsible for statements over which they do not have control. However, the FTC clarifies its approach to liability in part relying on the concept of the “sponsoring advertising” as described above. The FTC states that nothing in the Guides is meant to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the advertiser and the blogger. To the contrary, “imposing liability in these circumstances hinges on the determination that the advertiser chose to sponsor the consumer-generated content such that it has established an endorser-sponsor relationship.”

As with any sponsorship endeavor, the sponsoring advertiser takes on a set of responsibilities when it engages in this type of marketing. According to the FTC, an advertiser can address its responsibilities by making reasonable efforts to advise the bloggers of their duties under the Guides and to monitor their behavior. The Commission states clearly that such reasonable efforts could help to dissuade it from bringing an action against the advertiser: “The Commission, however, in the exercise of its prosecutorial discretion, would consider the advertiser’s efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.” One can glean from this discussion that an advertiser would be wise to establish “rules of the road” for the bloggers with whom they intend to engage for marketing purposes.

Thus, in confirming the potential liability of advertisers for the statements of a blogger whom they employ or otherwise engage, the Commission underscores the essential “sponsorship” relationship that is a prerequisite for application of the Guides and promotes the use of guidelines or contracts by which sponsoring advertisers can exert some control over the bloggers or at least can advise them of their legal obligations related to advertising and promotion of the advertiser’s goods or services.

#### 4. Celebrities and Talent Agreements

The Guides codify an enforcement policy that has already been placed in question by at least one court. In *FTC v. Garvey*, 383 F.3d 891 (9<sup>th</sup> Cir. 2004), the court held that the FTC could not recover restitution from a celebrity who had participated in an advertising campaign and had delivered advertising

messages that turned out to be false. The FTC maintains that the case did not prevent the Commission from holding a celebrity liable for injunctive relief. With this case as a backdrop, the FTC makes clear in the Guides that a celebrity “may have an obligation to make reasonable inquiries of the advertiser that there is an adequate basis for assertions that the script has them making.” Thus, in essence, the FTC does not believe that celebrities can just be paid to stand in front of a camera and say things that are patently false. This raises the issue of talent contracts and whether those who represent talent will need to negotiate approval rights for the claims being made.

#### 5. The Virtual Death of “Disclaimers of Typicality”

Perhaps the aspect of the proposed Guides that received the most attention over the last several months was the proposed elimination of the “safe harbor,” which served to permit a disclaimer such as “Results Not Typical” when the endorsement by a consumer was truthful but not typical of what a consumer could reasonably expect to achieve with the advertised product or service. The Guides now provide that if the advertiser does not have substantiation that the endorser’s experience with the product or service is representative of what consumers can reasonably expect to achieve, the advertisement should “clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.” The fear from industry was that this new articulation of the Guides would require advertisers to have substantiation for a claim they were not making and to make that claim against their wishes. Thus, this provision raised serious “free speech” concerns. Moreover, many in industry argued that the Commission did not have reliable support for the proposition that consumers were confused by atypical endorsements and that disclaimers of typicality were often and generally ineffective. In the final analysis, the FTC retained its revised provision concerning typicality. That is, a consumer endorsement is likely to be interpreted as reflecting “typical results,” and therefore if the results are atypical the statement is false. Such “atypical” endorsements may be used but only in conjunction with a disclosure of what would be “generally expected” results.

Despite arguments posed by some commenters, the Commission maintains that it is not stating that all consumer endorsements always communicate typicality. The FTC admits that it believes that most

consumer endorsements will communicate typicality, but each case will be evaluated on its own facts. In other words, if a consumer endorsement does not communicate that the results are typical, then there is no requirement to present “generally expected” results as part of the advertisement.

As a practical matter, this assurance offers cold comfort. It essentially requires advertisers to conduct copy testing on all advertisements that contain consumer testimonials to determine whether they communicate a message of typicality. Although the Commission acknowledges that it would still have the burden of proof in litigation to show that the consumer takeaway is one of typicality, the practical advice given by the FTC in its statement of basis and purpose is for advertisers to “conduct consumer research to determine whether its ad is misleading.”

Although this position undoubtedly will increase the cost of consumer endorsements, the change arguably places these sorts of advertisements on the same footing with all other advertisements and all other types of claims. In no other context can an advertiser simply disclaim a false statement. Even if there are several interpretations of a claim and only one is potentially misleading, the advertiser is responsible for all interpretations and can be held liable for the one that is misleading. Thus, an advertiser is always faced with the question as to whether an advertisement is misleading in light of the overall takeaway. The prior approach to consumer endorsements permitted an advertiser to present a consumer experience that was atypical and, assuming that there might be an impression that the results were typical, to avoid liability simply by disclaiming the misleading interpretation. That would not have worked for any other claim, according to the FTC, and accordingly, the Commission has decided to place consumer endorsement claims on par with other advertising claims.

The impact will be felt by those who use aspirational consumer endorsement frequently, such as those in the diet plan industry. There will be, one would assume, some others who will benefit from this change. One might surmise that those who are spending large sums of money substantiating their advertising claims (e.g., in the cosmetic industry) have resented that others who sell similar products could advertise without conducting studies and could rely instead on disclaimed consumer endorsements. Therefore, the Guides may serve to level the playing field in certain industries.

Another very important aspect of the final revised Guides and the accompanying explanation is that the FTC is not requiring that an advertiser disclose what a typical consumer would experience. It is only requiring that the advertiser who presents an atypical consumer endorsement disclose the “generally expected performance in the depicted circumstances.” Thus, it is unnecessary to determine what the exact average experience would be; rather, it would be sufficient to use information “extrapolated from valid, well-controlled clinical studies of patients matching the profile of the persons in the ad, even though consumers’ real world results are not likely to match exactly the results in the clinical study.” Although this would seem initially to lower the standard for establishing the appropriate basis for a disclosure of “generally expected” performance, it really is still quite a high standard, far more expensive and burdensome than simply disclaiming typicality. We note that the FTC states in a footnote (Guides fn.72) that the “disclosure should also describe the source of the data.” This actually goes beyond what other advertisers are required to do and seems to be inconsistent with the stated goal of placing consumer endorsements on equal footing with other advertising claims.

One interesting aspect of the FTC’s discussion focuses on situations in which an advertiser may not have the information available to them to be able to disclose the generally expected performance of their products to consumers. The Commission offers the following choice: Make sure you are not implying typicality or “rely on statements of general endorsement of the product.” This is a curious carve out, which will undoubtedly engender a great deal of discussion. Essentially, the FTC is saying that one does not need to worry about the typicality concerns if the endorsement is general in nature, e.g., “I’ve tried many products and this was the best.”

#### 6. Endorsements by Organizations: The Need for Internal Processes

Under the Guides, an organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization.” The FTC states in its accompanying analysis that in order to comply with this guideline, an organization should have a process in place to ensure that its endorsements reflect the “collective judgment of the organization.” The Commission offers the suggestion that an organization’s management could adopt specific procedures and standards to be applied in the review process, including, for example, “clear statements

concerning the qualification of the individual(s) conducting the review, the criteria against which products are to be judged, and any other requirements or prohibitions management deems appropriate.” Thus, the Commission has added additional clarification as to how to apply the Guides to organizations.

#### 7. Material Connections

With regard to UGC and social media, the discussion of “material connections” often is the starting point. Advertisers want to know whether they need to disclose the free products that they send to bloggers and other influencers. Furthermore, they want to understand what sort of liability they will have if the bloggers over whom they exert little control fail to disclose the material connections to the consumer. The FTC largely retained its proposed Guides in place but underscored the importance of establishing procedures, protocols, and guidelines not only for an advertiser’s employees but for the bloggers they employ or engage for marketing purposes.

The initial step in the analysis harkens back to the definition of an endorsement. As discussed above, there is no “endorsement” unless there is sponsorship. Thus, where there is no sponsorship and no endorsement, there is no need to disclose any “material connections.” The obligation of disclosure of material connections only kicks in when there is a sponsorship relationship between the advertiser and the speaker.

One of the changes to the Guides that will likely be a point of contention in the coming months and years is the Commission’s statement that one factor in determining whether a connection between an advertiser and its endorsers should be disclosed is the “type of vehicle being used to disseminate that endorsement.” The FTC appears to create a spectrum of media through which consumers “are likely to recognize” a statement as sponsored speech. This somewhat subjective spectrum, as explained by the Commission, suggests that there may be some interesting assumptions being made about various types of media. The Commission states that “under usual circumstances,” it would not consider reviews published in “traditional media” to be sponsored advertising messages. The reason for this is that typically those “traditional media” with “independent editorial responsibility” assign an “employee” to review various products or services “as part of his or her official duties.” Then the medium publishes

those reviews. According to the Commission, the fact that the medium that publishes the review paid for the review would not affect the weight consumers give to the reviewer's statements. This appears to make sense. When we read a review of a movie in the newspaper written by a reporter or even a free-lance writer, we assume he was paid by the newspaper and was given access to the movie for free, and we do not need to be reminded of that fact in order to evaluate the review. The Commission states that this dynamic would hold true for an "Internet news website with independent editorial responsibility."

But, what about a blog? A critical component of the FTC's revised Guides is the assumption that consumers are not yet comfortable with the idea of bloggers as responsible publishers. In the final revision of the Guides, the FTC explains this in §255.5 example 7. There, the FTC presents a blogger who received a video game system for free with the expectation that he will review it on his blog. The rationale for the disclosure is that "his consumer-generated endorsement appears in a medium that does not make his association with the advertiser apparent to consumers." That is, the medium, itself, according to the FTC, fails to register with the consumer as a source of news with "independent editorial responsibility." The FTC admits that "bloggers may be subject to different disclosure requirements than reviewers in traditional media," but it does not explain why. There is likely to be dissatisfaction with the Commission's treatment of the free merchandise to bloggers as described in §255.5 example 7.

Apart from the Commission's approach to the consumer's inherent understanding of various types of media, the general question as to whether receipt of a product constitutes a material connection that requires disclosure is central to the FTC's application of the Guides to "new media." It is here that the identity of an endorsement and the concept of material connections merge. In essence, as a practical matter, if a consumer's review of a product via UGC qualifies as an endorsement because it is sponsored speech, a connection will exist that must be disclosed. As the Commission explains, "That outcome is simply a function of the fact that if the relationship between the advertiser and the speaker is such that the speaker's statement, viewed objectively, can be considered 'sponsored,' there inevitably exists a relationship that should be disclosed, and would not otherwise be apparent, because the endorsement is not contained in a traditional ad bearing the name of the advertiser."

#### 8. Liability for Failure to Disclose Material Connections: The Celebrity Shift

Once we determine that such a relationship exists (using the construct described above), any connection that would materially affect the weight a consumer would give to the endorsement must be disclosed clearly and conspicuously. But, where does the liability lie? The Commission notes that traditionally the duty to disclose material connections fell on the advertiser. In the context of UGC, the Commission states that the *endorser* is the party primarily responsible for disclosing material connections with the advertiser. Nevertheless, the FTC is not letting the advertiser off the hook. The advertisers who sponsor these endorsers “should establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of those endorsers.” Moreover, from an enforcement perspective, the FTC is not likely to shift its attention to bloggers. It will continue to focus its regulatory aim on advertisers (*See* Guides fn. 79). Thus, it is critical that advertisers establish guidelines that will form the “rules of the road” for all of their blogging activities.

In one of its new examples, the Commission describes a situation in which a celebrity has entered into a contract with a surgical clinic that requires her to speak publicly about her own surgical experience. The celebrity praises the clinic during a television interview. Under the old Guides, a celebrity is assumed to have been compensated for making an endorsement. In the revised Guides, the example (§255.5 example 3), the Commission states, “Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement.” Thus, in this context, the Commission states that the failure to disclose that the celebrity has been engaged as a spokesperson for the clinic would be deceptive. The example goes on to apply the same principle to a social networking site: if the celebrity touts the results of the surgery at the clinic on a fan area in Facebook or on Twitter, for example, “given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser.”

This modification to the Guides confirms an important shift in enforcement with regard to celebrities. It has long been assumed that celebrities would not talk about any particular product and endorse it unless they were compensated. Accordingly, there was never a need to disclose that a celebrity had been paid

or compensated for the endorsement. (We note that children are treated differently. They are not able to discern the difference between advertising and editorial content and consequently advertisers have to be very careful when presenting celebrity or character endorsements. *See* CARU Guidelines II(D)(2)(d)). It has never been a concern before that consumers might think that a beaming celebrity might not be a paid endorser and could be “just a satisfied customer.”

This shift places new responsibilities on talent. The endorser will be held liable. But, as a matter of enforcement, the FTC will also look to the advertiser. Recognizing that the advertiser will not be likely to have control over what the celebrity says in an interview, the FTC suggests that it would be likely to exercise its prosecutorial discretion with regard to bringing an action against the advertiser if the advertiser can provide evidence that it advised the celebrity in advance about what he or she should and should not say about the product or service and about the need to disclose the relationship. This approach could create confusion as to the contexts in which disclosure would be required. Apparently, the blogosphere is a “medium” that requires disclosure as is a televised interview. What is the next medium that falls into this category? This uncertainty could place a chilling effect on the use of celebrities as spokespersons except in the most “traditional” contexts.

#### 9. Material Connections Disclosed in Social Media

In one of the new examples in the revised Guides, the FTC describes an “online message board” built for music aficionados, particularly related to MP3 players. “Unbeknownst to the message board community,” an employee for an MP3 player manufacturer posts messages promoting the manufacturer’s product. The example (§255.5 example 8) states that the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board. The Commission discusses liability for the failure to disclose this material connection in terms of the sort of guidelines and procedures that the manufacturer should have in place. According to the Commission, “The establishment of appropriate procedures would warrant consideration . . . as to whether law enforcement action would be an appropriate use of agency resources.” The FTC did not, however, spell out what those “appropriate procedures” would be.

#### 10. Sponsorship of Clinical Trials

Finally, the FTC was convinced by a coalition of attorneys general to add additional language to §255.5 example 1, which could have very significant implications, particularly for pharmaceutical and dietary supplement marketers. The Commission states that consumers “reasonably can be more skeptical about research conducted by outside entities but funded by the advertiser than about studies that are both conducted and funded independently, because financial interest can create bias (intentional or unintentional) in the design of a study.” The additional language in example 1 now reads, “Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in this advertisement.” This example does not require that advertisers always disclose that the clinical studies upon which they are relying for substantiation were funded by the advertisers. However, if the advertiser states in an advertisement that its claims are supported by the “findings” of the organization that conducted the tests, the advertiser should disclose the advertiser’s payment of expenses to the organization. This is a complete departure from the prior Guides, which stated that as long as the organization exercised its collective judgment in accordance with the guides on endorsements by organizations and the general considerations applicable to all endorsements and testimonials, such disclosure of funding would not be required. The Commission cites two academic articles on conflicts of interest in biomedical and clinical research as its basis for making this important shift in enforcement policy.

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Please feel free to call if you have any questions.

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