

## **FTC Releases Guidelines Detailing Advertiser and Blogger Responsibilities in Social Media**

**October 13, 2009**

The Federal Trade Commission (FTC) has announced revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides), effective December 1, 2009. In particular, the revisions delineate how the FTC intends to apply its existing powers prohibiting deceptive and unfair business practices to nontraditional consumer-generated media, such as blogs and social networking sites, and to celebrity endorsers and advertisers using new media. These changes represent the first modifications to these FTC advertising guides since 1980.

For the first time, the Guides expressly address when consumer-generated media constitutes an “endorsement” for which an advertiser may be liable. The Guides include examples pertaining to social media, such as blogs, of when payments or free products from advertisers to bloggers or other posters fall within the Guides’ prohibition of deceptive and unfair business practices. Recognizing differences between traditional and new media, the Guides state that the endorsement post of a blogger who receives cash or an in-kind payment (for example, goods or services) to review a product may be misleading, unless that payment is conspicuously disclosed. Bloggers reviewing products who do not disclose that the products reviewed were provided to them at no cost may find themselves running afoul of the Guides. While not directly referencing the use of Facebook, MySpace, or Twitter, the FTC rationale for bloggers’ disclosures apply equally to endorsements through these other types of social media.

Likewise, advertisers may find themselves responsible for bloggers’ or other posters’ lack of disclosure of payments or other material facts, so long as the advertiser initiated the process by providing products to well-known bloggers or posters enrolled in marketing programs. Liability hinges on whether the advertiser chose to sponsor the content, in effect creating an endorser-sponsor relationship. The FTC states that the advertiser, by choosing the means of marketing, assumes the risk that an endorser may fail to properly disclose a material connection or misrepresent a product. Advertisers can minimize this risk by demonstrating efforts to advise bloggers/posters of their responsibilities and to monitor the online behaviors of the bloggers/posters with whom they work, presumably to ensure that the advertiser only works with bloggers/posters complying with the Guides.

The FTC does not categorically state how the relationship between bloggers/posters, on the one hand, and advertisers, on the other hand, can or should be disclosed. Rather, the Guides state only that the disclosure must be “clear and conspicuous” to be effective. Presently, bloggers/posters vary in the level and prominence of disclosures they may provide as to any relationship with advertisers of the products



and promotion; agreements, policies and procedures involving the Internet, social media, and traditional media; substantiation of advertising claims and advertising-related litigation; consumer privacy protections; patents, trademarks, and copyrights; intellectual property litigation; intellectual property licensing; unfair competition litigation; intellectual property enforcement programs; trade secret protection; franchise issues; outsourcing and managed services; and the full range of intellectual property issues that arise in business transactions.

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