

INTELLECTUAL PROPERTY UPDATE

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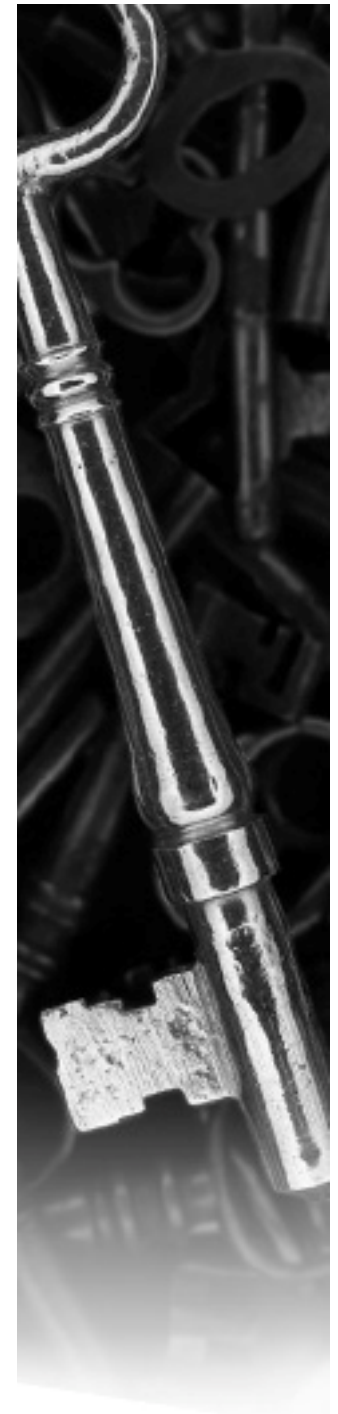
FTC Issues Guidance on Blogging-for-Pay, Testimonial Disclaimers, and Celebrity Endorsements in First Revision of Endorsement Guides in 29 Years

One of the privacy features of blogging is that bloggers can keep certain information about themselves private (while blogging on topics they choose). The FTC recently issued guidelines that will disallow bloggers from keeping private their affiliation to the makers of products receiving the bloggers' endorsements. On October 5, the FTC [issued the final revisions](#) to its [Guides Concerning the Use of Endorsements and Testimonials in Advertising](#) ("the Guides"), last revised in 1980, which are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. The Guides are advisory in nature and reflect situations in which the FTC may exercise its prosecutorial discretion to enforce Section 5. The revisions made a number of changes to provide guidelines for modernized advertising practices, including blogging, and here we'll highlight the most noteworthy changes.

"Word of mouth" endorsements through blogs and other online social media

In its revisions, the FTC specifically addressed the phenomenon of "word of mouth" marketing, by which individual endorsers are compensated for communicating with consumers on a direct and personal level, including through blogs, online message boards, and other social media. An example of this phenomenon are so-called "mom bloggers," whom [some marketers have especially sought due to their perceived authenticity](#). Emphasizing that such endorsements are no different than those made through more traditional media, the FTC stated that in these situations advertisers are responsible for any representations made, and that the endorsement must disclose any compensation received in consideration for the endorsement.

[Somewhat controversially](#), the Guides indicate that word-of-mouth endorsers — using bloggers as an example — are required to disclose that they received a product or service for free prior to giving a positive endorsement, even if the advertiser did not specifically direct the blogger to recommend it. In these situations, advertisers must also ensure that the statements by bloggers are substantiated, even if the advertiser does not direct the exact content of the endorsement. In doing so, the FTC placed an obligation on advertisers to advise bloggers of their disclosure obligation and to monitor their endorsements, and if the blogger makes unsubstantiated claims or does not make the required disclosures, to cease supplying free products. In either of these scenarios, the FTC



would consider both advertiser *and* the blogger to have violated the FTC Act, though in the [Federal Register Notice](#) accompanying the Guides and [subsequent interviews](#), the FTC indicated that its law enforcement activities will focus on advertisers.

The FTC acknowledged that bloggers and other word-of-mouth endorsers may be subject to different disclosure requirements than reviewers from traditional media outlets, which do not ordinarily need to disclose that they received a reviewed product for free, citing consumers' relative expectation that traditional media outlets (even online) receive products they review for free.

While these policies have (understandably) stirred the blogosphere, they seem just to apply familiar concepts to endorsements utilizing new media. The touchstone of the FTC disclosure requirement is that compensated endorsers must divulge the fact that they are compensated in the advertisement, if not otherwise apparent to the audience. The FTC has made a judgment that blogging and other word-of-mouth marketing techniques don't clearly demonstrate this link, and through these revisions to the Guides has announced its intention to prosecute advertisers who don't require their word-of-mouth endorsers to play by the FTC's rules.

Other disclosures of material connections

The revised Guides provide some other notable examples of material connections between advertisers and endorsers to clarify when such connections need to be disclosed. Regarding celebrities and experts, the revisions maintain the general presumption that consumers will expect a celebrity or expert appearing in an advertisement will receive payment or royalties, and that therefore such compensation need not be disclosed. However, if the celebrity or expert endorser has other unexpected financial interests in the endorsed product or service, such as an ownership interest in the company, that connection must be disclosed. The Guides also add examples of certain contexts in which celebrity endorsements would require disclosure of the connection between the advertiser and celebrity, such as when the celebrity is paid to endorse a product in interviews, on talk shows, or on a fan blog or Web site.

Another significant connection that the revisions require to be disclosed is the situation in which an advertiser pays the expenses of an outside organization that conducts a study later touted by the advertiser in substantiating the effectiveness of its product. The FTC would require this disclosure, proposed by a coalition of state attorneys general, regardless of whether the research was completely controlled by the outside organization.

Disclosure of "generally expected results"

Prior to the revisions, the Guides stated that endorsements describing results not representative of those attained by most users of an advertiser's product would otherwise be acceptable if qualified by a disclaimer stating that "results may vary," or "results are not typical." The revised Guides no longer consider such a disclaimer acceptable; instead, they require advertisers making atypical representations to "clearly and conspicuously disclose the generally expected performance in the depicted circumstances."

This is a significant change in the FTC's enforcement policy, as an advertiser making claims quantifying the effectiveness of a product must now be aware of the generally expected performance achieved through use of the product, rather than the mere fact that its claim of effectiveness is not typical. Addressing the criticism that it is often difficult or expensive to determine the generally expected performance, the FTC noted that it is acceptable to reasonably extrapolate the expected performance from clinical trials and accepted scientific principles. In the alternative, it advises advertisers to make non-quantitative statements of effectiveness (e.g., "This product is the best!"), or to simply not make claims of effectiveness at all.

Ultimately, the revisions to the Guides propagate the familiar FTC themes of disclosure and substantiation when it comes to endorsements and testimonials. With these revised Guides, the FTC has given notice that endorsements and testimonials are squarely on its radar, and advertisers must be diligent in complying with the new rules in order to stay out of the enforcement spotlight.

About the Intellectual Property Update

For more information about the matters discussed in this Update, please contact any Hogan & Hartson attorney with whom you regularly work or one of the authors listed below.

CHRISTOPHER WOLF
cwolf@hhlaw.com
202.637.8834
Washington, D.C.

TULASI A. LEONARD
tleonard@hhlaw.com
202.637.3570
Washington, D.C.

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