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WHITE PAPER

**THE EFFECTS AND IMPLICATIONS OF THE
REVISED FTC GUIDES IN ADVERTISING
AND IN SOCIAL MEDIA**

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THE EFFECTS AND IMPLICATIONS OF THE REVISED FTC GUIDES IN ADVERTISING AND IN SOCIAL MEDIA

I. INTRODUCTION

The Federal Trade Commission's revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "FTC Guides" or "Guides")¹ went into effect on December 1, 2009. Last updated in 1980,² the FTC Guides were revised to address a number of issues, including: the growing use of "word of mouth" advertising on social media (nonexistent in 1980); the recent research regarding the lack of effectiveness of "results not typical" disclaimers; and a perceived need to clarify disclosures of material connections between advertisers and endorsers.³

The impact of the FTC Guides on promotional activities using digital media has been widely discussed in both traditional and digital media.⁴ (Digital media include all media that are broadcast using digital data, e.g., the Web, cell phones, and other interactive media including social media such as Twitter and Facebook.⁵) Although the FTC's position is that advertising activities in digital media have always been under its jurisdiction and subject to the same standards and regulations as advertising in traditional media, the FTC Guides now leave no doubt that the FTC intends to regulate advertising in digital media. It has been made clear that the FTC Guides reach speakers previously

considered by some to be outside of the FTC's jurisdiction, e.g., third-party bloggers and participants in "word of mouth" advertising. And over the past six months, advertisers have begun to modify their promotional activities to comply with the FTC Guides.

In both traditional and digital media, prior to December 2009, the FTC Guides provided a "safe harbor" for aspirational testimonials—endorsements by individuals who experience exceptional results using a product⁶—when these statements were accompanied by a disclaimer of typicality, e.g., "results not typical" disclaimers. Disclaimers of typicality have been particularly prevalent in dietary supplement and weight-loss program advertisements. The FTC expressed concern that recent research indicated that consumers pay little attention to such disclaimers and expect to achieve similar exceptional results as touted in the aspirational endorsements. The revised FTC Guides eliminate the safe harbor of disclaimers of typicality and require advertisers to disclose average or expected results. Many advertisers who once relied upon such testimonials have added disclosures as to how the individuals achieved those exceptional results and/or disclosures of the expected results for a typical consumer (see Section IV.A).⁷

Another notable change is that the FTC Guides now mandate the disclosure of material connections between advertisers and endorsers, including celebrity and expert endorsers. Advertisements increasingly include disclosures that endorsers have been compensated for their appearances.⁸

This White Paper discusses the changes instituted by the FTC Guides and responses to those changes.

1 Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009).

2 Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,124 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

3 FTC Publishes Final Guides Governing Endorsements, Testimonials, at <http://www.ftc.gov/opa/2009/10/endortest.shtm> (last modified October 29, 2009).

4 See, e.g., Stephanie Clifford, "Notice Those Ads on Blogs? Regulators Do, Too," *The New York Times*, Aug. 11, 2009; Ian Paul, "FTC's New Rules for Bloggers: A Quick Guide," *PCWorld*, Oct. 6, 2009.

5 Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255) (noting in its review of comments regarding the Guides that the FTC will have oversight over statements made via these new media despite "the advertiser's limited control over the messages disseminated to the public" via these new media).

6 The term "product" "includes any product, service, company or industry." 16 C.F.R. pt. 255.0(d) (2009).

7 For example, Nutrisystem®'s celebrity endorsements are now accompanied by the expected weight loss for a typical person using the program, available at <http://www.nutrisystem.com> (last visited July 22, 2010). Jenny Craig®'s endorsements also have a similar disclaimer for the expected weight loss for a typical person using the program, available at <http://www.jennycraig.com> (last visited July 22, 2010).

8 See, e.g., Activia® yogurt's "Take the Activia Challenge" commercials, available at <http://activiachallenge.com/Home.aspx/Testimonials> (disclosing "Participants received compensation.") (last visited July 22, 2010).

II. SCOPE OF THE FTC⁹

The FTC regulates advertising activities within the U.S. and also advertising from outside the United States targeting U.S. consumers.¹⁰ The FTC is not authorized to regulate advertising activities in other countries.¹¹ The FTC will focus on compliance of advertising materials dated on or after December 1, 2009, as the FTC Guides are not intended retroactively to affect material dated prior to December 1, 2009. Where a past and now-noncompliant advertisement is in a clearly dated document such as a press release or copyrighted case study, those materials are not required to be re-edited to comply with the current FTC Guides. However, continued use of pre-December 1, 2009, noncompliant advertising materials after that date may provoke action by the FTC.¹²

Additionally, the FTC has posted a video series of Mary Engle, Associate Director of the Bureau of Consumer Protection. Associate Director Engle explains that while the FTC does not intend to target bloggers in enforcement actions, it did revise the FTC Guides in order “to make it clear that everybody should be playing by the same rules, whether you’re a professional reviewer or an amateur reviewer.”¹³ Further, the FTC has stated that it concentrates on cases that can affect consumers’ health or safety such as deceptive health claims of foods or over-the-counter drugs.¹⁴ Of the 15 actions initiated by the

9 16 C.F.R. pts. 255.0–255.1 (2009).

10 See *Prepared Statement of the Federal Trade Commission Alternative Hormone Replacement Therapy Product Before the Senate Special Committee on Aging*, 2007 FTC LEXIS 38, at *11-17 (Apr. 19, 2007).

11 See, e.g., *In re Telebrands, Corp.*, No. 9313, 2004 FTC LEXIS 43 (Feb. 25, 2004) (observing that the FTC Act does not apply extraterritorially).

12 Telephone interview with Shira D. Modell, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, U.S. Fed’l Trade Comm’n, Washington D.C., 20580 (Oct. 29, 2009).

13 Mary Engle, Associate Director of Bureau, Consumer Protection, U.S. Fed’l Trade Comm’n, About the Endorsement Guides, available at <http://www.ftc.gov/multimedia/video/business/endorsement-guides.shtm> (last visited July 22, 2010); see also *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53,124, 53,134 n. 79 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255) (“As with traditional media, the Commission’s law enforcement activities will continue to focus on advertisers.”); *The FTC’s Revised Endorsement Guides: What People are Asking*, at 2, U.S. Fed’l Trade Comm’n, (June 2010), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf> (“We’re not monitoring bloggers and we have no plans to.”).

14 See *Frequently Asked Questions: Answers for Small Businesses*, at 7, U.S. Fed’l Trade Comm’n, available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus35.pdf> (Apr. 2001) (response to “How does the FTC decide what cases to bring”) (last

National Advertising Division (“NAD”) and/or the Council for Responsible Nutrition¹⁵ since December 1, 2009, 13 involved health claims of food and dietary supplements.¹⁶ At least one of these complaints also involved the improper use of a disclaimer of typicality.¹⁷ However, competitors and others such as consumer interest groups can also bring complaints before the NAD.

III. ENDORSEMENTS

A. DEFINING ENDORSEMENTS

The FTC defines an “endorsement” as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the advertiser, even if the views expressed by that party are identical to those of the advertiser.”¹⁸ The FTC defines the “endorser” to be the “party whose opinions, beliefs, findings, or experience the message appears to reflect and may be an individual, group, or institution.”¹⁹ Accordingly, an endorser could include a celebrity, an organization, a third-party blogger, or a participant in a word-of-mouth advertising campaign. Whether a party is determined to be an endorser of the product depends upon whether there is a material connection between the party and the advertiser.

visited July 22, 2010); see, e.g., *In re Nestlé HealthCare Nutrition, Inc.*, No. 092 3087, available at <http://www.ftc.gov/os/caselist/0923087/index.shtm> (May 18, 2010) (To resolve the FTC-administrative complaint, the proposed consent order requires Nestlé to refrain from making the challenged health claims regarding BOOST Kid Essentials children’s beverage until the claims were substantiated by “at least two adequate and well-designed human clinical studies of the product.”).

15 The National Advertising Division of the Council of Better Business Bureaus is a private, self-regulatory group. It investigates complaints of false or deceptive advertising and gives advertisers a means for resolving disputes voluntarily and outside of the federal or state courts. When an advertiser fails to comply with NAD determinations, the NAD may refer the case to the FTC for further action. See generally National Advertising Division, www.nadreview.org.

16 Telephone interview with Shira D. Modell, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, U.S. Fed’l Trade Comm’n, Washington D.C., 20580 (Oct. 29, 2009).

17 Lifes2good Natural Healthcare, Case No. 5136, National Advertising Division (Jan. 13, 2010).

18 16 C.F.R. pt. 255.0(b) (2009).

19 *Id.*

A consumer who purchases a product and writes an unsolicited review of the product would not be considered to be an endorser under the FTC Guides.²⁰ If the advertiser has a material connection to the individual who makes statements about the advertiser or its products and services, the FTC considers the statement to be sponsored by the advertiser, *i.e.*, an endorsement, and therefore an advertisement.²¹ The FTC analyzes statements in the following way:

whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message." In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker's statement is an "endorsement" that is part of an overall marketing campaign?²²

In its analysis of whether a statement is an endorsement, the FTC may consider, among other facts, the following:

- 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;
- the length of the relationship;
- the previous receipt of products or services from the same or similar advertisers or the likelihood of future receipt of such products or services; and
- the value of the items or services received.²³

20 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

21 16 C.F.R. pt. 255.5 (2009).

22 Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

23 *Id.*

The FTC specifically observes that a statement may still be considered an endorsement and within the FTC's oversight even if an advertiser has no control over a specific statement made via digital media such as blogs or Twitter.²⁴

B. REQUIREMENT OF DISCLOSURE OF MATERIAL CONNECTIONS

Providing incentives for an individual or entity to make an endorsement—*e.g.*, a free product or reward or an opportunity to appear on television—creates a material connection between the endorser and the advertiser. A material connection must be clearly and conspicuously disclosed by the endorser. One example of a material connection requiring disclosure would be a company providing a free product to a blogger for a review because the blogger has wide readership within a particular demographic.²⁵ Although the FTC has stated that the revisions were not intended to provide grounds for the FTC to sue bloggers,²⁶ there has been substantial media coverage regarding blogger compliance.²⁷ Additionally, in the competitive environment of the blogosphere for reader traffic, bloggers, like traditional advertising competitors, may police compliance by reporting violations of the FTC Guides to the NAD.

Disclosure examples: "Individuals are remunerated."²⁸

"Participants received compensation."²⁹

The advertiser is responsible for informing the endorser to disclose his/her connection to the advertiser. (The advertiser

24 *Id.*

25 *Id.*

26 Mary Engle, Associate Director, Bureau of Consumer Protection, U.S. Fed'l Trade Comm'n, Is the FTC Planning To Sue Bloggers?, http://www.ftc.gov/multimedia/video/business/endorsement-guides/endorse_mary-q5.shtm (last visited July 22, 2010) ("Is the FTC planning to sue bloggers? Well, let me put it this way. That is not why we issued this guidance. We issued this guidance to make it clear that everybody should be playing by the same rules, whether you're a professional reviewer or an amateur reviewer.")

27 See, *e.g.*, Tricia Romano, "Look What I Bought (or Got Free)," *The New York Times*, May 5, 2010, <http://www.nytimes.com/2010/05/06/fashion/06skin.html?ref=fashion#>.

28 Nutrisystem® weight loss program, at http://www.nutrisystem.com/jsps_hmr/success_stories/index.jsp?weightLoss=20 (last visited July 22, 2010).

29 Activia® "Take the Activia Challenge" commercials, at <http://activiachallenge.com/Home.aspx/Testimonials> (last visited July 22, 2010).

must also train and monitor third-party endorsers for compliance to the FTC Guides. See *infra* Section E below.)

If the advertiser uses the statements of individuals who have received compensation for participation in pilot studies or other advertiser-sponsored tests, studies, or focus groups, then the advertiser must also disclose that the individuals were compensated for evaluating the product or service.³⁰ Even when the endorser is posting to an advertiser-sponsored site or forum, the endorser is still required to make the disclosure of his/her connection to the advertiser.

C. USE OF CELEBRITY ENDORSEMENTS³¹

Celebrity endorsers are subject to the same regulations as any other endorser of a product or service, *i.e.*, “endorsers may also be subject to liability for their statements.” Even when the celebrity’s endorsement is clearly a scripted endorsement, the FTC requires that the endorsing celebrity have a good faith belief in the truth of the endorsement.³² In support of its position of liability, the FTC points out that a celebrity who chooses to accept payment for his/her endorsement must accept the potential liability for that endorsement activity—that the endorsing statements “reflect [her/her] honest opinions, findings, beliefs, or experience.”³³ A celebrity endorsing a product or a service in a forum that is not clearly an advertisement, *e.g.*, during an interview, must disclose any existing material connection between the celebrity and the advertiser. If the celebrity makes no representation about the product or service, then no disclosure is required. As with other endorsers, a celebrity endorser must make reasonable efforts to understand that his/her assertions are truthful and accurate.³⁴

30 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

31 16 C.F.R. pt. 255.2 Example 4 (2009); 74 Fed. Reg. 53,124, 53,127-29 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

32 74 Fed. Reg. 53,124, 53,128 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

33 *Id.*

34 *Id.*

D. ADDITIONAL REQUIREMENTS FOR ENDORSEMENT USE³⁵

The FTC Guides require endorsements to “reflect the honest opinions, findings, beliefs, or experiences of the endorser.”³⁶ An endorsement cannot make any express or implied representation that would be deceptive if the same representation were made directly by the advertiser. The FTC can impose liability on both the advertiser *and* the endorser for such deceptive representations.³⁷ See *infra* Section V.

When the advertisement represents that the endorser uses the endorsed product, the endorser must have been an actual user of the product at the time the endorsement was given. The advertiser can run the advertisement using the endorsement only as long as it has good reason to believe that the endorser remains an actual user of the product.³⁸ If an endorser is not an actual user of the endorsed product, then the advertiser must clearly and conspicuously disclose that the person in the advertisement is not an actual consumer of the product unless the advertisement is obviously a fictional dramatization.³⁹

E. TRAINING AND MONITORING OF ENDORSERS

If the advertiser utilizes individuals on social media to make statements on behalf of the advertiser, then the advertiser is also required to provide those endorsers with guidelines and training to comply with FTC regulations and other laws (such as fair use and false advertising).⁴⁰ The advertiser’s guidelines and training should include instructions on the proper use of the advertiser’s trademarks, brands, and logos, and respect of copyright and other intellectual property. The advertiser is

35 16 C.F.R. pt. 255.5 (2009).

36 *Id.* pt. 255.1(a) (2009).

37 *Id.* pts. 255.1(d), 255.5 (2009).

38 *Id.* pts. 255.1(b)-(c) (2009) (outlining that an advertiser may satisfy the “good reason to believe” requirement by “securing the endorser’s views at reasonable times where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of the competitors’ products, and the advertiser’s contract commitments.”).

39 *Id.* pt. 255.0 Example 2 (2009).

40 See, *e.g.*, Social Media Governance’s Online Database of Social Media Policies, <http://socialmediagovernance.com/policies.php> (last visited July 15, 2010) (database of 138 social media policies).

required to implement a monitoring and enforcement policy for the statements made by the endorser.⁴¹

IV. OTHER ADVERTISING ACTIVITIES

A. ADVERTISING WITH PERFORMANCE CLAIMS

A performance claim is a representation, implied or express, that use of a product will yield specific results.⁴²

1. Elimination of “Disclaimer of Typicality”

Safe Harbor

For advertising with performance claims, the FTC has eliminated the safe harbor of disclaimers of typicality, e.g., the “results not typical” disclaimer. Prior to the revision of the FTC Guides, an advertiser could present an account of exceptional results from product use and avoid false advertising liability with a disclaimer of typicality, e.g., “results not typical.” The FTC Guides eliminate this safe harbor from false advertising claims and now require specific substantiation of performance claims made in an advertisement.⁴³ In response to this change in the FTC Guides, there has been an increase in advertisers adding disclosures of expected or average results. See *supra* Section I & n.6 and *infra* Sections 2-3.

2. Requirement of Substantiation for Performance Claims⁴⁴

The FTC Guides require the substantiation of a performance claim whether the claim is made directly by the advertiser or by an endorser.⁴⁵ The substantiation requirement also applies to statements made on digital media. Both express and implied performance claims must be substantiated.

The advertiser must have valid scientific evidence of the validity of the performance claim. An advertisement using endorsements by one or more consumers about the

performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement and requires substantiation. However, the FTC does not consider the results experienced by one or a few consumers to be competent and reliable scientific evidence for the basis of supporting a performance or result claim.⁴⁶ As an example, for weight-loss programs, the exceptional weight loss results of a few consumers are not reliable scientific evidence of the expected weight loss of the typical consumer. Companies have added disclosures of the typical expected results. The Jenny Craig® weight loss program includes the following disclosure: “Clients following our program on average lose 1-2 pounds per week.”⁴⁷ The Nutrisystem® weight loss program has a disclosure: “On Nutrisystem, you can expect to lose at least 1-2 pounds per week.”⁴⁸

The FTC Guides provide an example of an endorsement in which the endorser “clearly described the limited and truly exceptional circumstances under which she achieved her results,” as an example of an ad that is not likely to mislead consumers and does not require a disclosure of expected results.⁴⁹ An informal review of advertisements since the FTC Guides came into effect suggests that many advertisers who had previously relied upon disclaimers of typicality are now using these detailed descriptions of the endorser’s method of achieving results to meet the FTC’s requirements. Again, endorsers of the Jenny Craig® and Nutrisystem® weight-loss programs often include specifics as to how they obtained their exceptional weight loss results.⁵⁰

3. Disclosure of Generally Expected Results⁵¹

Statements about expected results must either reflect generally expected results or be accompanied by clear and

41 16 C.F.R. pt. 255.5 & Example 7 (2009); see also *The FTC’s Revised Endorsement Guides: What People are Asking*, at 6, Bureau of Consumer Protection, U.S. Fed’l Trade Comm’n, (June 2010), available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf> (noting that the scope of the monitoring program “depends on the risk that deceptive practices by . . . participants could cause consumer harm—either physical injury or financial loss.”).

42 *Id.* pt. 255.2 (2009).

43 *Id.* pt. 255.2(b) & n. 1 (2009).

44 *Id.* pt. 255.2(a) (2009).

45 *Id.*

46 *Id.*

47 Jenny Craig® weight loss program, <http://www.jennycraig.com>, (last visited July 22, 2010).

48 Nutrisystem® weight loss program, at <http://www.nutrisystem.com>, (last visited July 22, 2010).

49 16 C.F.R. pt. 255.2 Example 4 (2009).

50 See, e.g., George Z. Lost 25 lbs., http://www.nutrisystem.com/jsp/hmr/success_stories/success_story.jsp?id=23800194&weightLoss=20 (last visited July 22, 2010); Russel’s success story, <http://www.jennycraig.com/successstories/details/437/> (last visited July 22, 2010).

51 16 C.F.R. pt. 255.2(b) (2009).

conspicuous disclosures of what the generally expected results would be in the advertisement's depicted circumstances. The disclosure of generally expected results is required if the statements (a) convey to consumers that the speaker's results are "representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions for use"; and (b) describe a claim for which the advertiser does not have adequate substantiation.⁵² If (a) and (b) apply, then the disclosure example would be, "The generally expected performance in the depicted circumstances is []." The FTC chose the term "generally expected results" rather than "average" because the disclosure does not have to be based on the precise mathematical average of users of the product, such as might be developed from a valid survey of actual users.⁵³

If the advertiser does not have the information to determine the generally expected results in the depicted circumstances of an endorsement, then the advertiser should not explicitly or implicitly make a performance claim. Instead, the advertiser may rely on statements of general endorsement: The FTC suggests "I've tried many products, and this was the best."⁵⁴

4. Commissioned Research Disclosure

If the advertiser commissions research by a third party, then any advertisement mentioning the research results must also disclose clearly and conspicuously that the advertiser funded the research.⁵⁵

Disclosure example: "[The advertiser] sponsored this research."

B. ADVERTISING INVOLVING EXPERTS⁵⁶

1. Expert Endorsements

An expert is "an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what

ordinary individuals generally acquire."⁵⁷ The determination of whether an advertisement contains an expert endorsement depends on the direct or implied representation made by the endorser to the consumer in the message. The analytical framework is whether the consumer would understand the endorsement to be a statement of the expert's use of the advertiser's product as a client or as an expert.⁵⁸

2. Use of an Expert Endorsement

When an advertisement represents, directly or implicitly, that the endorser is an expert with respect to the endorsement message, then the endorser's qualification must in fact give the endorser the expertise that he/she is represented as possessing with respect to the endorsement.⁵⁹

In endorsing a product, an expert may consider factors not within his/her area of expertise, but the endorsement must be supported by the exercise of the expert's expertise in evaluating the product features. Furthermore, those evaluated features must be relevant to an ordinary consumer's use of or experience with the product and be available to the ordinary consumer. The expert's evaluation must have included an evaluation of the product at least as extensive as someone with the equivalent level of expertise would employ to draw similar conclusions.⁶⁰

The same substantiation requirements as described in Section A.2 above apply to expert endorsements. If the advertisement implies that the expert's endorsement was based on a comparison to competitor's product, the expert must have conducted such a comparison during the evaluation.⁶¹ In making the comparison, the expert should have determined that the endorsed product was at least generally equivalent to the competitor's products. The expert also should have compared the relevant product features available to the ordinary consumer.⁶² When the overall impression created by the expert endorsement is that the endorsed product is superior to competing products with

⁵² *Id.*

⁵³ *Id.* pt. 255.5 Example 1 (2009).

⁵⁴ 74 Fed. Reg. 53,124, 53,132 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

⁵⁵ 16 C.F.R. pt. 255.5 Example 1 (2009).

⁵⁶ *Id.* pt. 255.3 (2009).

⁵⁷ *Id.* pt. 255.0(e) (2009).

⁵⁸ *Id.*

⁵⁹ *Id.* pt. 255.3(a) (2009).

⁶⁰ *Id.* pt. 255.3(b) (2009).

⁶¹ *Id.*

⁶² *Id.*

respect to such features, then the expert using his expertise must have found such superiority.⁶³

C. ADVERTISING INVOLVING ORGANIZATIONS⁶⁴

An organization's endorsement must be reached by a "process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization."⁶⁵ If an organization is represented as being an expert, then it must use an expert or experts recognized by the organization or standards previously adopted by the organization and suitable for judging the relative merits of the endorsed products.⁶⁶ Where the organization is an expert endorser, the FTC Guides for expert endorsements also apply to the organization's endorsements (see Section IV.B).

As with other endorsers, if the organization has any material connection to the advertiser, then its statement is an endorsement and therefore an advertisement.⁶⁷ Providing an incentive, such as an opportunity to promote the organization, creates a material connection that requires disclosure. If the organization makes statements promoting the advertiser or its products, the organization must disclose its material connection to the advertiser in a clear and conspicuous disclosure.

Disclosure examples: "[Organization] received a discount from the advertiser to review [product]."
"[Advertiser] is providing me with an opportunity to speak about [Organization]."

As with other third-party endorsements, it is the advertiser's responsibility to inform the organization that it must clearly and conspicuously disclose its connection to the advertiser.⁶⁸ This disclosure must be made even if the

statement is made on an advertiser-sponsored site.⁶⁹ Likewise, the advertiser may use the endorsement as long as the advertiser has good reason to believe that the organization still subscribes to the views being presented.⁷⁰

V. LIABILITY

The FTC Guides impose liability on both the endorser and advertiser for any false, misleading, disparaging, or unsubstantiated statements made in the course of the endorsement. Although the FTC recognizes that the advertiser may have little or no control over consumer-generated content such as a blog post, the FTC considers that the advertiser chose to sponsor the content and establish the material connection between itself and the endorser and therefore should also be responsible for the endorser's false or misleading statements.⁷¹ The advertiser is also subject to liability for the endorser's failure to disclose material connections between the advertiser and the endorser. Additionally, the advertiser must implement procedures to monitor endorsements and to stop continued publication of deceptive statements in an endorsement once the statements are discovered.⁷²

Advertisers police compliance to the FTC Guides by alerting the FTC of violations by competitors. These claims of violations are frequently heard by the NAD, which can refer matters to the FTC when advertisers do not participate in the proceedings or do not abide by the NAD's decisions. False advertising claims can also be brought by competitors in federal district court under the Lanham Act or in state court under the state's respective consumer protection laws. The penalties for violations of the FTC Guides depend on the

63 *Id.*

64 *Id.* pt. 255.4 (2009).

65 *Id.*

66 *Id.*

67 *Id.*

68 16 C.F.R. pt. 255.1(d) (2009).

69 16 C.F.R. pts. 255.4 & Example, 255.5 & Example 1 (2009).

70 16 C.F.R. pt. 255.1(c) (2009).

71 74 Fed. Reg. 53,124, 53,127 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

72 *The FTC's Revised Endorsement Guides: What People are Asking*, at 6, Bureau of Consumer Protection, U.S. Fed'l Trade Comm'n (June 2010) (providing the core elements of monitoring programs for advertisers using social media marketing and noting that it would be "unlikely that the activity of a rogue blogger would be the basis of a law enforcement action" if the company had a reasonable training and monitoring program.).

nature of the violation.⁷³ The remedies that the FTC and the courts have imposed include the following:

- cease-and-desist orders—legally binding orders that require the company to stop running the deceptive advertisement, to have substantiation for claims in future advertisements, to report periodically to FTC staff about substantiation for claims in new advertisements, and to pay a fine of \$16,000 per day per advertisement if the company violates the law in the future;
- civil penalties, consumer redress, and other monetary remedies; and
- corrective advertising, disclosures, and other informational remedies.

VI. CONCLUSION

The effects of the revisions of the FTC Guides can already be seen in advertisements of weight loss, dietary supplement, and pharmaceutical products. As compliance grows with the aforementioned product categories, it is likely and expected that the FTC will turn its attention to other product and service categories that affect the health and safety of the American public. It is also likely that companies will add the revised FTC Guides to their “arsenal” when challenging competitors’ advertising statements in the context of either claims before district courts or advertising challenges before the NAD.

⁷³ *Advertising and Marketing on the Internet: Rules of the Road*, Bureau of Consumer Protection, U.S. Fed’l Trade Comm’n (2000).

VII. LAWYER CONTACTS

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