

Client Alert

Intellectual Property Department

November 2009

FTC Issues Guidelines Concerning Endorsements and Advertising – Are You In Compliance?

In the ever-evolving world of Internet blogs, e-commerce and networking sites, recent action by the Federal Trade Commission (“FTC”) has clarified and placed restrictions on certain types of activities in which companies may engage to promote their goods and/or services. On December 1, 2009, the FTC’s “Guides Concerning the Use of Endorsements and Testimonials in Advertising” will take effect, providing guidance regarding the use of testimonials and endorsements in online marketing. Given the potential consequences if businesses do not comply with these guidelines, it is important for executives and marketing personnel to understand them and make sure their employees and consultants are in compliance.

These new guidelines primarily focus on online endorsements and reviews of goods and services. The guidelines define “endorsement” as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.” The guidelines also emphasize that all such endorsements “must reflect the honest opinions of the endorser” and “may not convey any express or implied representation that would be deceptive if made by the advertiser.”

Blogging and social networking sites have become marketing tools for many companies. Companies commonly hire reviewers or bloggers to espouse the benefits of the company’s products online in a blog or social networking or e-commerce site. Such reviews are often written as if coming from a neutral consumer, when in actuality the reviewer may be paid by the company or may obtain some other consideration for favorable reviews, such as free or discounted products. Under the new FTC guidelines, if the blogger fails to disclose the relationship with the company, both the blogger and company may be subject to liability. Similarly, if a company employee writes about the company’s products in an online social networking site, the company and the employee may both be subject to liability if the employee fails to disclose her relationship to the company.

The new guidelines also appear to place a heightened duty on companies to monitor what their employees or paid bloggers are writing about the company’s goods or services. As an example, the guidelines discuss a situation where a company gives a blogger a new body lotion to try and review. The company does not claim that the body lotion cures any skin conditions, but the blogger writes in her blog that the lotion cures

eczema. In this situation, both the blogger and the company would be subject to liability for false advertising.

We recommend that companies review their policies and procedures to determine whether they are in compliance with these new guidelines and whether procedures are in place to advise employees and consultants of their duties as well.

Please feel free to contact the attorneys listed below or any partner with whom you work if you would like to discuss the content of this alert and its potential ramifications.

Steven R. Gursky
sgursky@olshanlaw.com

Mary L. Grieco
mgrieco@olshanlaw.com

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