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EXPERTS, CELEBRITIES AND BLOGGERS BEWARE: THE
FTC PUBLISHES REVISED GUIDES CONCERNING THE
USE OF ENDORSEMENTS AND TESTIMONIALS IN
ADVERTISING

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I. Introduction

Effective December 1, 2009, the Federal Trade Commission published revised and updated Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Revised Guides”).¹ While FTC endorsement guides have existed since 1980, the Revised Guides have been adapted to the advertisement market in today’s world of social media.² As companies increasingly utilize endorsements and testimonials to endorse their products, so too comes an increased need for more stringent guidelines regulating the necessary disclosures required for compliance with the Federal Trade Commission Act (“Act”).

As such, the Revised Guides were created and operate as administrative interpretations of the Act.³ They are not binding law themselves, but serve to help guide the public to conduct its dealings in accordance with actual law.⁴ Section 5 of the Act is the applicable section that governs endorsements and testimonials in advertising.⁵ Violations of the Revised Guides or any practices inconsistent with the principles they prescribe could trigger corrective action by the FTC.⁶ The Revised Guides, however, are intended primarily to establish general principles and a sound basis on which advertisers and endorsers can rely to

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¹ See Press Release, FTC, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), *available at* <http://www.ftc.gov/opa/2009/10/endortest.shtml> [*hereinafter* FTC October Press Release].

² *Id.*

³ 16 C.F.R. § 255.0(a).

⁴ See FTC October Press Release, *supra* note 1.

⁵ 16 C.F.R. § 225.0(a).

⁶ *Id.*

protect themselves from engaging in unlawful conduct under the Act.⁷ While this undoubtedly increases their burden to ensure any advertisement or testimonial is not deceptive, the higher accountability standards also provide a mechanism through which advertisers and endorsers can protect their own interests from FTC prosecution. This promotion of voluntary compliance in turn creates increased protection for consumers.

The Revised Guides will have a substantial impact on bloggers, experts, celebrities, and other product promoters and endorsers.⁸ The Revised Guides now require that “material connections” between advertisers and endorsers must be fully disclosed, which broadens the scope of advertisements and endorsements that are subject to disclosure and defines a higher standard of relationship disclosure for the parties involved.⁹ In addition to providing the basic guidelines that the FTC will utilize in enforcing lawful advertisements and testimonials, the Revised Guides also supply a list, though not exhaustive, of useful examples and possible situations that demonstrate the potential application of the general principles to specific facts and circumstances.¹⁰

II. Understanding the Need for a Revision of the Guides

A. Purpose

The Revised Guides were published in order to provide a modernized version of the existing guidelines to help advertisers keep their endorsement and testimonial ads in line with the Act.¹¹ This is the most recent response the FTC has implemented in its effort to combat fraudulent and deceptive advertisement practices that have arisen from rapid technological advancements and the enhanced marketing tactics that have paralleled recent industrial achievements.¹²

⁷ *Id.*

⁸ See FTC October Press Release, *supra* note 1.

⁹ *Id.*

¹⁰ 16 C.F.R. § 225.0(a).

¹¹ See FTC October Press Release, *supra* note 1.

¹² See Press Release, FTC, FTC Testifies About Efforts to Combat Fraudulent and Deceptive Advertising (July 22, 2009), available at <http://www.ftc.gov/opa/2009/07/advertising.shtm>.

B. Recent Necessity

Over the past several decades, significant developments in every industry, from health and beauty to science and technology, have led to a drastic increase in goods and services that appeal to and are readily available to the public.¹³ Many of these products have been marketed aggressively throughout the internet, including social media and networking sites.¹⁴ This aggressive marketing, however, is not without limits. Advertisers must be prepared to substantiate and support the marketing claims they promote.¹⁵ Due to the ever-increasing number of mediums through which advertisers can reach consumers, the FTC's task of monitoring advertiser compliance with the Act has become a more complex and burdensome endeavor.¹⁶

Significant changes in the last three decades in the way products are marketed now warrant the need for an updated and revised version of the 1980 original guides.¹⁷ Not surprisingly, the original guides were designed to apply principally to newspaper and magazine advertisements and short television and radio commercials.¹⁸ Those original guides, however, are outdated and not easily applied to endorsements and testimonials in lengthy infomercials, online advertising, viral marketing, and consumer blogs.¹⁹

C. Eliminating Safe Harbors

Due to the propensity of consumers to interpret claims of product results as being "typical" for all consumers, the original guides provided that unless advertising claims that results are "typical" could be supported, advertisers should disclose reasonable performance expectations or that actual results might

¹³ See *Advertising Trends and Consumer Protection: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. of the Comm. on Commerce, Sci., and Transp.*, 111th Cong. 1 (Jul. 22, 2009) (statement of David Vladeck, Dir. of the Bureau of Consumer Prot. at the Fed. Trade Comm'n), available at http://commerce.senate.gov/public/?a=files.Serve&file_id=adc49123-7b48-4386-bbef-5532ab8215c0 [*hereinafter* Advertising Trends].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ *Id.*

differ among consumers.²⁰ This requirement, however, has proved to be ineffective in preventing consumer deception.²¹ Advertisers have recently misused this disclaimer by using statements such as “results may not be typical,” which has deprived consumers of adequate and accurate information.²²

Advertisers in the weight loss and health supplement industry are particularly guilty of employing typicality disclosures in advertisements.²³ In a 2002 Report on the current trends in weight loss advertising, the FTC found that of the advertisements studied, thirty six percent included a form of typicality disclaimer.²⁴ Interestingly, almost seventy five percent of those disclaimers were either inconspicuous or not proximate to the actual endorsement.²⁵ These disclaimers were usually entrenched in fine print or flashed quickly on a screen, making it difficult for consumers to read or comprehend.²⁶ Even if a consumer was able to read and decipher a disclaimer, it divulged so little information that it was not of use to the consumer.²⁷

Generally, weight loss advertisers made no legitimate attempt to inform consumers of the results they could reasonably expect to achieve when using their products, which perpetuated deceptive endorsements in advertisements.²⁸ Even more troubling, however, was that consumer research revealed that consumers were prone to believing that results were attainable, despite prominent disclaimers.²⁹ Thankfully, this number dropped significantly when consumers encountered disclosures of actual expected results rather than a generic disclaimer of typicality.³⁰ In response to these disconcerting findings, and in light of advertisers’ increased usage of deceptive disclosures, the FTC has eliminated the safe harbor of typicality disclosures in the Revised Guides.³¹

²⁰ *Id.* at 8.

²¹ *Id.* at 9.

²² *Id.* at 10.

²³ *Id.*

²⁴ RICHARD L. CLELAND ET AL., FTC, WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS 11 (2002), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Advertising Trends, *supra* note 13, at 10-11.

³⁰ *Id.* at 11.

³¹ See FTC October Press Release, *supra* note 1.

III. Significant Revisions in the 2009 Guides

A. General Considerations

In addition to eliminating the typicality disclaimer safe harbor mentioned above, the Revised Guides implement several new advisory components, including modified term definitions and various examples and applications.³² The Revised Guides set forth general considerations on endorsements and state that they must express honest statements or experiences of the endorser.³³ They cannot communicate any representation that, if the advertiser made directly, would deceive consumers.³⁴

While endorsements do not necessarily need to constitute the endorser's actual wordage verbatim, unless of course the advertisement claims such, any endorsement must be presented in the appropriate context to avoid distorting an endorser's truthful estimation of a product.³⁵ The use of expert or celebrity endorsers is permitted, but advertisers must reasonably ensure that endorsers continue to maintain allegiance to their original opinions as advertised.³⁶ Advertisers can ensure that their endorsements remain valid by checking with their endorsers at reasonable time intervals, to be measured by any material changes in the product's performance, function, effectiveness or changes in the competitors' products.³⁷

Additionally, any endorser who claims to have used a product must, in good faith, have actually used the product prior to giving the endorsement.³⁸ Similarly, an advertisement may only be used so long as an advertiser has a good faith belief that the endorser is continuing to use the product he or she is endorsing.³⁹ Finally, another major shift in the Revised Guides is that advertisements must disclose any material connections that exist between the advertiser and the endorser.⁴⁰ On the whole, advertisers can be held liable for any untrue or unsupported statements made in an endorsement, just as the endorser can be held liable for his or her own statements made in an

³² See 16 C.F.R. § 255.1.

³³ 16 C.F.R. § 255.1(a).

³⁴ *Id.*

³⁵ 16 C.F.R. § 255.1(b).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 16 C.F.R. § 255.1(c).

³⁹ *Id.*

⁴⁰ 16 C.F.R. § 255.1(d).

endorsement.⁴¹

B. Consumer, Expert and Organization Endorsements

According to the Revised Guides:

An endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying 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 sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.⁴²

For purposes of the Revised Guides, both endorsements and testimonials are treated as identical terms, and thus both carry the same definition.⁴³ Initially, the original guides were established to help advertisers use endorsements in a permissible manner, and to ensure that they were not misleading.⁴⁴ The standards for an advertisement to qualify as an endorsement were, and continue to be, relatively low. As a general definition, any advertising message that reflects a third party's honest opinion or experience, which might lead consumers to believe that the third party was truthful, qualifies as an endorsement.⁴⁵ Simply because a product or service is not endorsed directly by an advertiser does not authorize third parties to expressly or impliedly make deceptive or unsubstantiated representations.⁴⁶ The Revised Guides also advise that experts who endorse products or services need to possess the qualifications they represent and appropriately exercise their expertise with respect

⁴¹ *Id.*

⁴² 16 C.F.R. § 255.0(b).

⁴³ 16 C.F.R. § 255.0(c).

⁴⁴ See Advertising Trends, *supra* note 13, at 8.

⁴⁵ *Id.*

⁴⁶ *Id.*

to any particular endorsement.⁴⁷

i. Modified Advisements

Recognizing the need for an up-to-date version of the original guides, the FTC initiated a formal review of the original guides in 2007.⁴⁸ It became abundantly clear that significant modification was needed in several advisory areas of the original guides due to substantial scientific and technological developments during the last three decades.⁴⁹ While the basic framework of the original guidelines has remained unchanged, revisions have been made to take into account these developments.⁵⁰

The revisions largely stem from an increased use of new media outlets and advertising forms, which are predominantly internet-based. As internet usage continues to increase, so too does the population of online viewership and subscription bases that advertisers are able to target. Additionally, advertisers are no longer the sole endorsers of their products.⁵¹ Consumer bloggers are routinely endorsing products, whether or not they intend to do so.⁵² This shift in advertising practices has created a need to revise the original guides in order to enable efficient FTC enforcement and to discourage consumer deception.⁵³

ii. Consumer Endorsements

In light of the evident need for revision, the FTC has provided specific qualifications and advisements for consumer, expert, and organizational endorsements. The FTC has noted that consumers will interpret endorsements as representing that the advertised product is effective for the purpose illustrated.⁵⁴ Thus, under the Revised Guides, when an advertiser uses a consumer endorsement in which one or more consumers testify about the performance of a product, the advertiser must support the claim.⁵⁵ As such, in order to support the claims made by the

⁴⁷ *Id.*

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See* 16 C.F.R. § 255.2(a).

⁵⁵ *Id.*

endorsers, the advertiser must rely on sufficient substantiation and, when proper, “competent and reliable scientific evidence.”⁵⁶ Not surprisingly, consumer opinions do not qualify as competent and reliable scientific evidence.⁵⁷

Similarly, advertisements that contain endorsements relating experiences about a product’s performance or capabilities will likely cause consumers to assume that the endorser’s experience is representative of what they will achieve with the same product.⁵⁸ In light of this, the same standard of adequate substantiation applies to advertisers in that an endorser’s experience should accurately represent what consumers can generally expect to achieve.⁵⁹ This revision effectively eliminates the safe harbor of the typicality disclaimer.⁶⁰ Now, if an endorsement presents an unlikely or atypical result, there must be a clear and conspicuous disclosure of what result can be generally expected by consumers given the circumstances in the advertisement.⁶¹

Despite the implementation of these regulations regarding advertisement disclaimers in general, the FTC revealed a surprising finding in its testimony before the Senate on July 22, 2009. The FTC discovered that even when disclaimers displayed clear and prominent testimonials, such as “These testimonials are based on the experiences of a few people and you are not likely to have similar results,” as opposed to vague statements like, “Results not typical,” consumers were generally just as likely to disregard the clear limited applicability of the experiences depicted.⁶² The FTC, however, still claims that stronger disclaimers could be effective on a case-by-case basis, and could result in more effective deterrence of advertisers initiating deceptive disclaimers in the first place.⁶³

iii. Expert Endorsements

Generally, if an advertisement directly states or implies that an endorser is an expert in relation to his or her statements or

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 16 C.F.R. § 255.2(b).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Advertising Trends, *supra* note 13, at 7.

⁶³ 16 C.F.R. § 255.3(a).

opinions, then that endorser must actually possess the qualifications the advertisements hold him or her out to possess.⁶⁴ An expert may, however, extend his or her opinion beyond the bounds of a particular field of expertise, such as taking into account matters of personal taste or the price of a product.⁶⁵ Although, experts must have actually exercised their expertise in evaluating the product as it relates to a reasonable consumer's use of the product.⁶⁶ The expert endorser's evaluation and product testing must be, at a minimum, as thorough an evaluation that someone with comparable expertise would need to conduct in order to reach substantiation for the claims represented in the advertisement.⁶⁷ Moreover, if a comparison is involved in an expert endorsement, the expert must have incorporated the comparison in his or her evaluation and subsequently deduced that the product being endorsed is at least equal to competitors' products with respect to those features he or she claims to have expert knowledge.⁶⁸ An even higher standard exists when an endorsement suggests that a product is superior to that of a competitor.⁶⁹ In this situation, the expert endorser must have found that superiority does in fact exist in terms of the product features evaluated.⁷⁰

iv. Organizational Endorsements

Expert organizations, like experts, are held to an elevated standard when it comes to endorsements. Organizations typically are seen as a collective group of people whose knowledge and experience outweighs that of an individual endorser, and are viewed as being void of subjective elements that could distort professional endorsement opinions as compared to an individual.⁷¹ In light of this appearance of collaboration, the Revised Guides require that a legitimate process exist to demonstrate that an organization's endorsement is an accurate reflection of the organization's communal judgment.⁷² Furthermore, if an organization holds itself out as being expert, it

⁶⁴ 16 C.F.R. § 255.3(b).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 16 C.F.R. § 255.4.

⁷² *Id.*

must accordingly use experts qualified to evaluate the particular features of a product, and then properly exercise that expertise.⁷³

C. Disclosure of Material Connections

Relationships between advertisers and endorsers are expected to be disclosed when that relationship would not reasonably be ascertainable by a consumer.⁷⁴ Failure to disclose a material connection not only risks diminishing an advertisement's credibility, but also decreases protection to consumers.⁷⁵ This includes endorsers who appear in advertisements who are either not represented as an expert or who are not known to a large portion of the public.⁷⁶ These "lay" endorsers are now required to provide clear and conspicuous disclosure of any payment or promise of benefit made prior to and in return for the endorsement.⁷⁷ Additionally, if an endorser has reason to know that he or she will eventually be compensated or benefit in any other way from endorsing a product, he or she is required to disclose that information.⁷⁸

D. The Federal Trade Commission's Current Enforcement Agenda

Over the past thirty years, the FTC has drastically transformed its enforcement and monitoring of advertising.⁷⁹ Even though the FTC has more advertising mediums to regulate today, it also has more sophisticated tools to use in enforcing the Act and protecting consumers.⁸⁰ Just as the internet has vastly increased the medium opportunities for advertising, it has also assisted the FTC in detecting deceptive ads and unlawful practices.⁸¹ Both the FTC's Consumer Response Center ("CRC") and the Consumer Sentinel Network ("Network") receive and respond to complaints of unfair and deceptive advertising.⁸² The CRC has been collecting information and fielding complaints

⁷³ *Id.*

⁷⁴ 16 C.F.R. § 255.5.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Advertising Trends, *supra* note 13, at 18.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

since 1997 on a domestic level, while the Network is a secure online database that facilitates an international effort, incorporating nearly 1,700 law enforcement agencies worldwide.⁸³

Endorsements and testimonials are one particular area that is at the forefront of the FTC's enforcement efforts in terms of the advertising program.⁸⁴ Due to the fact that the task of monitoring deceptive practices and unlawful advertising activities has become so complex, there has not been a paralleled increase in resources to sufficiently combat the ever-growing problem.⁸⁵ While the FTC's staff is highly qualified and committed to carrying out their consumer protection mission, the FTC claims that, in order to continue to successfully fend off unlawful practices and eventually reach a solution to deceptive advertising, more resources and media industry efforts are necessary.⁸⁶

IV. Practical Effects and Advertiser Response

When the FTC solicited public comments on its proposed revisions to the original guides in 2007, it was hit with widespread criticism and opposition from many major industries and organizations negatively affected or burdened by the proposed revisions. The FTC's request sought comments concerning the foreseeable costs, benefits, regulatory conflicts, and economic concerns that would occur if the proposed revisions were implemented.⁸⁷

A. Formal Comments in Opposition to the Amendments

Three major organizations that submitted comments on the proposed revisions to the guides were the American Association of Advertising Agencies ("AAAA"), American Advertising Federation ("AAF"), and the Association of National Advertisers ("ANA"). All three of these organizations vehemently opposed the adoption of guide revisions, and yet they praised the effectiveness of the existing enforcement measures in regulating

⁸³ *Id.*

⁸⁴ *Id.* at 19.

⁸⁵ *Id.*

⁸⁶ *Id.* at 20.

⁸⁷ See News Release, FTC, FTC Requests Public Comments on Endorsement Guides (Jan. 16, 2007) (on file with author) [*hereinafter* FTC January News Release].

the advertising industry for the past three decades.

In their joint comments, the AAAA and AAF claimed nationwide networks of professionals and offices numbering in the tens of thousands.⁸⁸ The AAAA claimed to be dedicated to preserving a free market concerning disseminating both commercial and noncommercial ideas, while the AAF boasted its mission as protecting and promoting the health of advertising by maintaining a national grassroots network of advertisers and related entities.⁸⁹ Together, the AAAA and AAF felt that they “represent a broad cross-section of the advertising industry, including the nation’s leading brands, corporations and Fortune 500 companies.”⁹⁰

As might be expected, the comments conveyed a general opposition to guide revisions and urged the FTC not to adopt any changes to the original guides. They claimed that due to a lack of evidence that deceptive endorsements actually harmed consumers, in either traditional or new media, the “overly-broad” revisions were not warranted.⁹¹ The two organizations argued that the proposed revisions were too strict, and that they would deter advertisers from continuing to use legitimate techniques, such as consumer endorsements, and that they would cause advertisers to reject new media venues like blogs and viral marketing.⁹² The organizations also objected to the elimination of the typicality safe harbor. Arguing that these disclaimers were a “valuable and long-standing advertising technique,” the AAAA and AAF stated that without them, advertisements requiring the new “Generally Expected Result Standard” would be unfairly burdened in light of the current voluntary guidelines.⁹³

The organizations also complained of increased economic costs for advertisers in attempting to determine generally expected results, which are difficult if not impossible to calculate.⁹⁴ Conducting research and comprehensive studies of that magnitude to satisfy this proposed mandatory disclosure rule would deplete advertisers’ resources, and in turn prevent them

⁸⁸ See Letter from Richard F. O’Brien, Executive V.P., Am. Ass’n of Adver. Agencies & Jeffrey L. Perlman, Executive V.P. of the Am. Adver. Fed’n, to FTC 2 (Mar. 10, 2009) [*hereinafter* O’Brien Letter].

⁸⁹ See O’Brien Letter, *supra* note 85, at 2.

⁹⁰ *Id.*

⁹¹ *Id.* at 3.

⁹² *Id.*

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 8.

from employing consumers for endorsements.⁹⁵

In addition to arguing about the burdens imposed on traditional advertisers, the AAAA and AAF attempted to advocate for new media advertisers by citing their interests as well.⁹⁶ Because the proposed revisions would impose liability on a larger spectrum of advertisers, there was potential for unfair burdens to be placed on regular consumers, such as bloggers.⁹⁷ Advertisers, in attempting to protect their own interests, also advocated for bloggers who, while not intending to formally endorse a product, would end up being treated as an endorser under the proposed revisions.⁹⁸

Moreover, the AAAA and AAF attempted to fend off the FTC by focusing on the infancy of media forms that would come under scrutiny under the proposed revisions.⁹⁹ They claimed that regulating media venues that are still developing would have a stunting effect, resulting in a general discouragement of bloggers and viral advertisers from publishing content.¹⁰⁰ The organizations stated that if up-and-coming bloggers are unaware that liability exists, or are fearful that they will be subject to prosecution stemming from seemingly harmless endorsements, the result would have an overall detrimental effect on new media.¹⁰¹

The other major advertising entity that submitted comments in response to the FTC's request was the Association of National Advertisers ("ANA"). The ANA had a similar response to the proposed revisions, stating that the revisions would conflict with the purpose of the original guides, which provide certainty in the marketplace and promote efficiency with commercial activity through a useful interpretation of the FTC's authority.¹⁰² Furthermore, ANA claimed that through implementing the proposed revisions, the system of self-regulating and voluntary action on the part of advertisers would be undermined.¹⁰³

The AAAA, AAF, and ANA uniformly agreed on the same

⁹⁵ *Id.* at 9.

⁹⁶ *Id.* at 16.

⁹⁷ See O'Brien Letter, *supra* note 85, at 16.

⁹⁸ *Id.* at 17.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Letter from John P. Feldman & Anthony E. DiResta, Counsel to the Ass'n of Nat'l Advertisers, to FTC 1 (Mar. 2, 2009).

¹⁰³ *Id.*

points, and were certain that any proposed changes to the original guides would be damaging to the industry as a whole. They claimed that the proposed revisions frustrated the current self-regulatory system, that the proposed modernized examples added to the complexity of the original guides, and that any moderation of the new media venues, such as blogging and viral marketing, would stifle their growth and deter endorsers from taking part in advertising out of fear of legal liability. By using a simplified “if it’s not broken why fix it” approach, advertisers took the position that the original guides were effective in governing the honesty and accuracy of endorsements, and were sufficient in deterring deceptive advertising practices.¹⁰⁴

B. Public Response to the Amendments

Advertising companies and organizations were not the only forces at play in the opposition against the proposed revisions. Various internet blogs and media sites have featured columns and articles on the projected effects of the Revised Guides, as well as responses from those most affected.

Interestingly, Facebook and other networking sites are not exempt from the Revised Guides.¹⁰⁵ In fact, as CNET reports, the FTC plans to monitor social networks as well as blogs in efforts to quell deceptive advertising and endorsements.¹⁰⁶ The article cited associate director of the FTC’s advertising division, Richard Cleland, who acknowledged the daunting task of regulating the near half million blogs on the internet.¹⁰⁷ However, Cleland stated that the current focus is on education, which should help bloggers understand when and how proper disclosures must be made.¹⁰⁸ Despite educative efforts, it may not be so easy for some bloggers to comply with the Revised Guides because some blogging sites have minimal space in which to publish content.¹⁰⁹ Twitter is one such site that limits the amount

¹⁰⁴ See O’Brien Letter, *supra* note 85, at 2.

¹⁰⁵ See Caroline McCarthy, *Yes, new FTC guidelines extend to Facebook fan pages*, CNET, Oct. 5, 2009, available at http://news.cnet.com/8301-13577_3-10368064-36.htm.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Alan Friel, *Navigating FTC’s Guidance on Social Media Marketing*, ADWEEK, Nov. 30, 2009 available at http://www.adweek.com/aw/content_display/community/columns/other-columns/e3i5bf1e98f0ce98d79ff2629077ea6b78a.

of content that can be posted, which may make disclosure difficult.¹¹⁰

Independent bloggers have voiced strong opposition to the Revised Guides, claiming that the FTC has no authority to regulate speech unless it is commercial speech.¹¹¹ One such blogger, Jeff Bercovici, expressed his discontent with the Revised Guides, stating that the FTC is attempting to redefine journalism as commercial speech.¹¹² According to Bercovici, the distinction between bloggers and journalists is on the verge of disappearing.¹¹³ He claims that the Revised Guides expand the definition of journalists, which could expose many unwitting bloggers to regulatory action, regardless of whether they are an amateur or professional, paid or unpaid.¹¹⁴

V. Conclusion

The FTC's Revised Guides, while attracting some harsh criticism, seem to be a necessary evil for advertisers in the new media age. Increased regulation surrounding consumer, expert, and organizational endorsements hopefully will bring industry-wide transparency to endorsements and testimonials in advertising. The requirement that endorsers must disclose material connections appears particularly reasonable, and likely will lead to better protection for consumers in the long run. Additionally, the elimination of the typicality disclaimer safe harbor is a crucial step forward in clarifying disclosure practices. If advertisers wish to endorse products that have atypical results, it seems logical that they should carry the burden of properly disclosing the expected results or experience to consumers. Requiring substantiation and support for endorsement claims, as well as demanding that sufficient and legitimate processes exist for determining that endorsements are adequately researched and stated, are imperative and reasonable measures.

Although many advertising entities are expressing concerns that the Revised Guides represent a significant

¹¹⁰ *Id.*

¹¹¹ See Jeff Bercovici, *Why the FTC's truth in blogging guidelines are truly terrible*, DAILY FIN., Oct. 6, 2009, available at <http://www.dailyfinance.com/story/media/why-the-ftcs-truth-in-blogging--guidelines-are-truly-terrible/19186439/>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

departure from the original guides, the revisions are necessary to bring the existing guidelines into the new media arena. Leaving the new media venues unregulated would be irresponsible, and while uninhibited growth would likely occur, the resulting advertising trends and practices would be extremely unpredictable and could potentially threaten consumer protection. Moreover, if the sole authoritative guides regulating the advertising industry are outdated, it becomes difficult for the FTC to enforce the Act, making it just as difficult for advertisers to interpret the guides and avoid prosecution for deceptive practices. While the Revised Guides may not please everyone, the revisions are certainly a step in the right direction for the FTC and the advertising industry, and they surely will result in an increased level of protection for consumers.