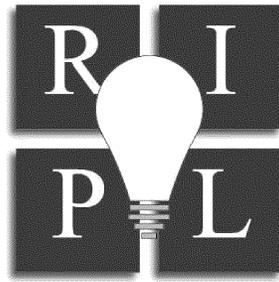


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



CONSUMER-GENERATED MEDIA AND ADVERTISING—ARE THEY ONE AND THE SAME? AN ANALYSIS OF THE AMENDED FTC GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

JESSICA GODELL

ABSTRACT

The advertising industry as well as the endorsements and testimonials that support advertising have been expanding into new mediums for years. As a result of this continual growth, the Federal Trade Commission (“FTC”) recently amended the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (“The Guides”). The FTC, which sought to apply The Guides to consumer-generated media for the very first time, had not amended The Guides prior to these revisions in three decades. As a result, the changes garnered a number of mixed reactions from the media, consumers and the advertising and legal industries. Under the amendments, The Guides provide that statements in new media fall within the scope of The Guides when a material connection exists between endorser and advertisers. If a material connection exists, The Guides advise parties to disclose their relationship to the consuming public through their choice of consumer-generated media. Furthermore, compliance with The Guides requires advertisers to ensure endorsers do not misrepresent the products or services which are the subjects of their endorsements. Although these requirements are seemingly straightforward, the mixed reactions to The Guides illustrated their ambiguity. This comment addresses the above issues and identifies a number of concrete solutions to help clarify The Guides’ application to consumer-generated media.

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JESSICA GODELL*

*The trick to marketing is to have something so cool, you'd want to talk about it
EVEN if you weren't in the business¹*

INTRODUCTION

In 2008, Dodge launched its new Grand Caravan by loaning 300 models of the new mini-van to “mom-fluential” bloggers.² The campaign surpassed Dodge’s expectations. Mom-fluentials throughout the blogosphere wrote about the vehicle, created user-generated content, and developed a resonating message about the product entirely on their own.³ HGTV also conducted a recent web launch, for the reality TV show, “Living with Ed.”⁴ The network encouraged bloggers to create personal recommendations and reviews of the show after it discovered that its search engine results were unsuccessful.⁵ Before long, HGTV’s website was the top search result when inquiring about “Living with Ed.”⁶ Additionally, Nokia took a recent product launch to the web and targeted bloggers to market its new smart phone.⁷ Within a month of the product launch, almost seventy percent of the nearly 200,000 consumers who read blog posts about the product said they knew someone who had purchased or planned to purchase the new phone.⁸

Are new media participants, such as bloggers, “in the business” of advertising? The answer to this question could ultimately change consumers’ opinions regarding the products and services bloggers write about. For instance, if bloggers and

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¹ Newt Barrett, *Talkability—That’s the Secret to Word of Mouth Marketing!*, CONTENT MARKETING TODAY (Aug. 29, 2008), <http://contentmarketingtoday.com/2008/08/29/talkability-thats-the-secret-to-word-of-mouth-marketing/>.

² *Case Study Library*, WORD OF MOUTH MARKETING ASS’N, <http://www.womma.org/casestudy/examples/interact-with-bloggers/momfluential-bloggers-drive-wo/> (last visited Sept. 30, 2010) (explaining that mom-fluential bloggers are mothers who author blogs and have a strong readership).

³ *Id.*

⁴ *Case Study Library*, WORD OF MOUTH MARKETING ASS’N, <http://www.womma.org/casestudy/examples/interact-with-bloggers/hgtv-drives-online-buzz-and-se/> (explaining that the show title originally garnered results for erectile dysfunction, not HGTV’s website) (last visited Sept. 30, 2010).

⁵ *Id.*

⁶ *Id.*

⁷ *Case Study Library*, WORD OF MOUTH MARKETING ASS’N, <http://www.womma.org/casestudy/examples/interact-with-bloggers/getting-bloggers-onside/> (last visited Sept. 30, 2010).

⁸ *Id.*

consumer-generated media participants are compensated for discussing products, should that compensation be disclosed to their readers? If so, would it change readers' perceptions of the bloggers whom they follow? If the information is not disseminated, should bloggers and advertisers be held liable for false advertising?

The Federal Trade Commission ("FTC") recently addressed the above implications in new amendments to the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising ("The Guides").⁹ Although the new amendments effectively extend The Guides to cover new media, there are many questions left unanswered. This comment will discuss the new amendments, the FTC's proposed solutions to new media issues, and the areas where clarification is needed. Part I provides a background on false advertising law, as well as an overview of the history and background of The Guides. Part II analyzes the issues which The Guides present, by comparing the new changes to the original guides as well as questions raised by consumer-generated and social media participants. Part III proposes a number of steps the FTC should take to improve and mold The Guides to the ever-evolving new media arenas present in advertising today. Finally, the article concludes with an overview of the issues and solutions already presented.

I. BACKGROUND

A. False Advertising in the United States

The advertising industry, and the regulations that control it, were developed based on the notion that advertisers controlled the content and the medium(s) used to disseminate information regarding products and services.¹⁰ The advent of consumer-generated and social media platforms has fragmented the marketplace and generated new sub-divisions in the advertising industry.¹¹ With the influx of blogging¹² and direct marketing,¹³ consumers now have the tools to disseminate information themselves, ultimately changing the face of advertising.¹⁴

This article begins with an outline of the three primary sources of false advertising law in the United States. Following a brief history of false advertising

⁹ FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising 16 C.F.R. §§ 255.0–5 (2010). While The Guides are extensive, only §§ 255.0–5 are relevant for this discussion.

¹⁰ *Advertising Trends and Consumer Protection: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the Comm. on Commerce, Sci., & Transp.*, 111th Cong. 2 (2009) [hereinafter Prepared Statement], available at <http://www.ftc.gov/os/testimony/090722advertisingtestimony.pdf>.

¹¹ *Id.*

¹² See generally Tania Ralli, *Brand Blogs Capture the Attention of Some Companies*, N.Y. TIMES, Oct. 24, 2005, at C1 (discussing brand blogging and its impact).

¹³ *WOM 101*, WORD OF MOUTH MARKETING ASS'N, 3 (2007), <http://womma.org/wom101/wom101.pdf>.

¹⁴ See Douglas MacMillian, *Blogola: The FTC Takes on Paid Posts*, BUSINESSWEEK (May 19, 2009), http://www.businessweek.com/technology/content/may2009/tc20090518_532031.htm ("Consumers increasingly turn to blogs and other amateur websites for information about the goods and services they buy.").

law generally in the United States, Part I.A.1 introduces the FTC and the FTC Act.¹⁵ Then, Part I.A.2 provides a brief synopsis of the Lanham Act¹⁶ and finally discusses state statutes which function similarly to the aforementioned federal legislation.

1. The Origin of False Advertising and the FTC

In 1911 the trade journal, *Printer's Ink*, proposed a model statute to recognize false advertising as a crime.¹⁷ Subsequently, forty-four states adopted statutes of a similar nature, and recognized false advertising as a misdemeanor.¹⁸ Although enforcement methods and standards have changed with time, nearly a century later every state has a false advertising statute in place.¹⁹ A number of courts that have dealt with false advertising litigation, as well as the administrative agencies responsible for implementing false advertising legislation, recognize FTC guides as pertinent to their interpretations.²⁰

On a broad scale, the goal of the FTC is to ensure the nation's markets are efficient and free of practices that may harm consumers.²¹ Accordingly, the FTC enforces various consumer protection regulations and methods to prevent deception, unfair business practices, and fraud in advertising and sales.²² One such regulation is the FTC Act.²³ The laws of the FTC Act are enforced under the direction of the FTC's Bureau of Consumer Protection.²⁴ The FTC Act requires commercial entities (advertisers included) to convey messages truthfully and refrain from creating misleading advertisements.²⁵ The FTC considers advertisements as misleading when relevant information is left out or when claims imply something that is not

¹⁵ Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2006).

¹⁶ Lanham Act § 43, 15 U.S.C. § 1125 (2006).

¹⁷ See generally Roland Cole, *Review of the Ten-Year Fight Against Fraudulent Advertising*, *PRINTER'S INK*, Feb. 24, 1921, at 17 (discussing the early history of the Printer's Ink Model Statute).

¹⁸ *Id.*

¹⁹ Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 446–48 (1991) (stating that false advertising regulations at the state level often fall within the boundaries of deceptive trade practices regulation).

²⁰ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009) (violating 15 U.S.C. § 45); *B. Sanfield, Inc. v. Finley Fine Jewelry Corp.*, 168 F.3d 967, 973 (7th Cir. 1999) (stating that FTC guides “command deference from the judiciary”); *Surdyk's Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016, 1021–22 (D. Minn. 2000) (citing *Sanfield* and deferring to FTC interpretation when discussing whether defendant's conduct falls within the Lanham Act); *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 319 n.45 (S.D.N.Y. 2001) (violating 15 U.S.C. § 45).

²¹ Federal Trade Commission Act, 15 U.S.C. § 45 (2006).

²² Prepared Statement, *supra* note 10, at 18 (outlining the various methods the FTC facilitates to monitor advertising for deceptive or misleading content); *GALE ENCYCLOPEDIA OF EVERYDAY LAW* at 277 (Jeffrey Wilson ed., 2d ed. 2006) [hereinafter *GALE ENCYCLOPEDIA*].

²³ Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

²⁴ FTC Organization, Bureau of Consumer Protection 16 C.F.R. § 0.17 (2010) (stating that the Bureau of Consumer Protection investigates unfair or deceptive acts or practices).

²⁵ 15 U.S.C. § 45.

true.²⁶ Under the FTC Act, “unfair methods of competition . . . and unfair or deceptive acts or practices in . . . commerce are declared unlawful.”²⁷

The FTC Act does not provide a private cause of action for consumers.²⁸ In fact, consumer involvement in any FTC enforcement is considerably limited.²⁹ Although individual consumers can file initial complaints with the FTC, the FTC is ultimately responsible for progressing with administrative or judicial adjudication.³⁰

The FTC Act does provide that sellers are responsible for the claims they make about their products and services.³¹ Additionally, third party advertisers who post and create advertisements for sellers may also be held liable for deceptive or misleading advertisements.³² In an effort to ensure compliance with the FTC Act and avoid liability, the FTC promulgates rules and guides which set forth “appropriate standard[s] of conduct” for third parties and sellers to follow in their advertising practices.³³

2. Trademark Law: The Lanham Act, Section 43a and State Regulations

The Lanham Act also governs false advertising.³⁴ Specifically, § 1125(a) provides a private cause of action for advertisers and competitors who allege injuries to their trademarks through false or misleading advertising.³⁵ The Lanham Act defines false advertising as any advertising or promotion that “misrepresents the nature, characteristics, quality or geographic origin of goods, services or commercial activities.”³⁶ Unlike the FTC Act, the Lanham Act places the burden on the plaintiff to prove his trademark was injured in a false advertising suit.³⁷ Although the FTC does not regulate the Lanham Act, courts have given deference to FTC guides in

²⁶ See FTC, RULES OF THE ROAD, 2 (2000), available at <http://www.ftc.gov/bcp/edu/pubs/business/e-commerce/bus28.pdf>.

²⁷ 15 U.S.C. § 45(a).

²⁸ See 15 U.S.C. 45(b); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 281 (9th Cir. 1973); *Sovern*, *supra* note 19, at 440–41.

²⁹ *Sovern*, *supra* note 19, at 440–42.

³⁰ See 15 U.S.C. § 45(b); *Manny, Moe & Jack, Inc., v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941); *GALE ENCYCLOPEDIA*, *supra* note 21, at 280–81 (illustrating that the FTC’s administrative complaints initiate a formal proceeding before an administrative law judge, which is similar to a trial in federal court).

³¹ 15 U.S.C. § 45(a) (placing all burden on “persons, partnerships, and corporations” to not use deceptive acts or practices in or affecting commerce).

³² *GALE ENCYCLOPEDIA*, *supra* note 21, at 278 (discussing liability for an advertising agency’s participation in the preparation of a challenged advertisement when the advertising agency knew or should have known that the advertisement included false or deceptive claims).

³³ FED. TRADE COMM’N, FTC OPERATING MANUAL § 8.3.2, available at www.ftc.gov/foia/ch08industryguidance.pdf (last visited Sept 21, 2010) [hereinafter *FTC OPERATING MANUAL*].

³⁴ Lanham Act, 15 U.S.C. §§ 1051–41.

³⁵ See *id.* § 1125(a).

³⁶ *Id.* § 1125(a)(1)(B).

³⁷ *Id.* § 1125(a)(3).

some Lanham Act cases.³⁸ The relevancy of FTC guides in these cases demonstrates their importance in all false advertising cases, not just those initiated by the FTC.

In addition to the aforementioned federal law, many states have enacted trade practice and consumer protection statutes modeling the FTC Act.³⁹ These state statutes prohibit unfair, fraudulent, and deceptive trade practices.⁴⁰ Additionally, they offer individuals the opportunity to file suit in state court for actions otherwise governed by federal law.⁴¹ In cases where injury cannot be quantified and the Lanham Act is thus inapplicable,⁴² filing an action under a state statute allows consumers an alternative and sometimes more proactive measure to filing an FTC complaint.⁴³ Furthermore, if the FTC Act is considered in regulations promulgated by Attorneys General at the state level, the states must inferentially look to FTC guides for direction.⁴⁴

In summary, the FTC promulgates guides to clarify the federal false advertising law set forth by the FTC Act.⁴⁵ Additionally, courts have referred to FTC guides in the past to enforce and identify Lanham Act violations.⁴⁶ Finally, state false advertising laws are oftentimes modeled after the FTC Act, and therefore, must implicitly use FTC guides for direction on enforcement.⁴⁷ Irrefutably, although FTC guides are advisory in nature, they play a significant role in false advertising litigation and legislation at every level.

³⁸ See *B. Sanfield, Inc. v. Finley Fine Jewelry Corp.*, 168 F.3d 967, 973 (7th Cir. 1999); *Surdyk's Liquor, Inc. v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016, 1021–22 (D. Minn. 2000).

³⁹ See COLO. REV. STAT. § 6-1-105 (2010); DEL. CODE ANN. tit. 6, § 2532 (2010); GA. CODE ANN. § 10-1-372 (2010); HAW. REV. STAT. § 481A-3 (2009); 815 ILL. COMP. STAT. 510/2 (2010); ME. REV. STAT. tit. 10 § 1212 (2010); MINN. STAT. § 325D.44 (2010); NEB. REV. STAT. § 87-302 (2010); N.M. STAT. ANN. § 57-12-3 (2010); OHIO REV. CODE ANN. § 4165.02 (2010); OKLA. STAT. ANN. tit. 78 § 53 (2010).

⁴⁰ See COLO. REV. STAT. § 6-1-105; DEL. CODE ANN. tit. 6, § 2532; GA. CODE ANN. § 10-1-372; HAW. REV. STAT. § 481A-3; 815 ILL. COMP. STAT. 510/2; ME. REV. STAT. tit. 10 § 1212; MINN. STAT. § 325D.44; NEB. REV. STAT. § 87-302; N.M. STAT. ANN. § 57-12-3; OHIO REV. CODE ANN. § 4165.02; OKLA. STAT. ANN. tit. 78 § 53.

⁴¹ Sovern, *supra* note 19, at 448 (describing state statutes as “Little FTC Acts” that “arm consumers with a powerful weapon against merchants, enabling consumers to prevail even when it may not be in society’s interest for them to win”).

⁴² See Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1041 (1990) (recognizing that “the Lanham Act requires demonstrating the likelihood of damage”).

⁴³ See, e.g., ILL. COMP. STAT. § 510/2(b) (“[I]n order to prevail . . . a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.”).

⁴⁴ Letter from Nat’l Ass’n of Att’ys General to FTC (June 18, 2007), <http://www.ftc.gov/os/comments/endorsementguides/527492-00013.pdf>.

⁴⁵ See discussion *supra* Part I.A.1.

⁴⁶ See discussion *supra* Part I.A.2.

⁴⁷ See discussion *supra* Part I.A.2.

B. FTC Guides

1. Background on FTC Guides

The FTC provides commercial entities and consumers with rules and guides to best address the FTC's regulatory interests.⁴⁸ FTC rules "prohibit specific acts or practices that the FTC has found to be deceptive or unfair."⁴⁹ FTC guides, on the other hand, are the administrative interpretations of FTC laws.⁵⁰ As such, guides are not legally binding on the FTC or the public in enforcement actions.⁵¹ Thus, when an individual chooses to plead a violation of an FTC guide on behalf of a competitor or advertiser, the subsequent case will be brought under a relevant statute, not as a direct violation of the guides.⁵²

Guides are typically published when there are a large number of violations in one area of law.⁵³ The foregoing section discusses The Guides in just this context—after a brief chronological history, Part I.B.2 introduces the reasons for the recent amendments.⁵⁴ Following the discussion on The Guides, Part I.B.2.a recognizes existing industry self-regulations, and addresses the issues which the new amendments to The Guides present to the legal, marketing, and advertising industries.

2. Background on the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

False and misleading advertising cases have "always been at the core" of the FTC's "consumer protection law enforcement agenda."⁵⁵ In support of this agenda, the FTC developed The Guides in the early 1970s to offer advice to businesses regarding endorsements.⁵⁶ The FTC promulgated the first three sections of The Guides in 1975 and enacted additional sections five years later.⁵⁷ The original Guides stayed in force and untouched for nearly thirty years.⁵⁸

⁴⁸ FTC Application of Guides in Preventing Unlawful Practices 16 C.F.R. § 17.0 (2010); FTC OPERATING MANUAL, *supra* note 33, at 1.

⁴⁹ See GALE ENCYCLOPEDIA, *supra* note 21, at 277.

⁵⁰ See FTC OPERATING MANUAL, *supra* note 33, § 8.3.2.

⁵¹ *Id.* (explaining that the guides contain "general advice" for the public).

⁵² *Id.*

⁵³ *Id.* § 8.3.3 (discussing possible reasons for issuing a new guide).

⁵⁴ FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. 72,374, 72,376 (Nov. 28, 2008) (recognizing that it would be useful to apply The Guides' long-established principles to new media, while noting that the fields are still evolving).

⁵⁵ Prepared Statement, *supra* note 10, at 1.

⁵⁶ See FTC Proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 Fed. Reg. 25,548 (Dec. 1, 1972).

⁵⁷ FTC Final Guides Concerning the Use of Endorsements and Testimonials in Advertising, 45 Fed. Reg. 3870 (Jan. 18, 1980) (codified as amended at 16 C.F.R. pt. 255).

⁵⁸ See FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. 72,374.

In January 2007, however, the FTC proposed a number of amendments to The Guides.⁵⁹ Pursuant to FTC practice, the Commission sought public comment on the new amendments and on the overall effectiveness and economic impact of The Guides.⁶⁰ The responses which the FTC received prompted the Commission to propose further amendments for public comment in late 2008.⁶¹ After another round of responses in early 2009, the FTC published an updated version of The Guides in October that year.⁶² The Guides took effect two months later in December.⁶³

The FTC's decision to update The Guides is logical, considering ever-evolving technology and the breadth of advertising practices today. When The Guides were first introduced in the 1970s, advertising existed in essentially two forms: print advertisements and thirty- to sixty-second media commercials.⁶⁴ When a traditional advertisement included an endorsement message, consumers knew the endorser was somehow affiliated with the advertiser.⁶⁵ Today, however, advertising is no longer always entirely advertiser-controlled, nor is it always identifiable.⁶⁶ Under the scope of new media that has developed in the past thirty years, consumers can no longer easily recognize whether media participants are speaking independently or on behalf of someone else.⁶⁷ This confusion is at the center of the amendments, as the FTC attempts to identify and define when messages are considered advertising messages in new media sources.⁶⁸

a. A Comparison of Past Guides to New Changes

The amendments to The Guides propose that brand manufacturers and advertisers should be responsible for ensuring that endorsers disclose endorsements in a clear and transparent way, and that their statements are "truthful and substantiated."⁶⁹ Additionally, The Guides recommend that advertisers monitor consumer-generated media participants who are paid to promote products.⁷⁰

⁵⁹ *Id.*; see also FTC OPERATING MANUAL, *supra* note 33, § 8.3.3 (noting that the FTC has "adopted a policy of reviewing each of its guides at least once every ten years").

⁶⁰ FTC OPERATING MANUAL, *supra* note 33, § 8.3.8 (stating that even though only rules and policy statements need to be published in the Federal Register, the FTC also publishes notice of proposed industry guides to obtain public comment).

⁶¹ FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. 72,374, 72,376 (Nov. 28, 2008). The comments are what motivated the FTC to consider adding further amendments to incorporate new media. *Id.* Comments specifically suggested that the FTC consider whether The Guides should be revised to deal with new types of advertising (*e.g.*, to include examples using email or the Internet). *Id.*

⁶² FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124 (Oct. 15, 2009).

⁶³ *Id.*

⁶⁴ Prepared Statement, *supra* note 10, at 9.

⁶⁵ Letter from BzzAgent to FTC (Feb. 26, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00004.pdf>.

⁶⁶ Letter from Reed Smith LLP on behalf of the Word Of Mouth Marketing Association ("WOMMA") to FTC 2-3 (June 26, 2007), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00009.pdf>.

⁶⁷ FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009).

⁶⁸ Letter from Reed Smith LLP on behalf of the WOMMA to FTC, *supra* note 66, at 2-3.

⁶⁹ FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,139.

⁷⁰ *Id.*

Ultimately, The Guides seek to regulate consumer-generated media and companies that market online in an effort to provide consumers with reliable, transparent, and truthful information.⁷¹

The FTC's broad definition of endorsements and testimonials in The Guides has not changed significantly since 1980. The Guides identify endorsements and testimonials as any advertising messages that consumers are likely to believe reflects the honest "opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."⁷² Furthermore, The Guides state that endorsements may not contain any representations that would be "deceptive, or could not be substantiated, if made directly by the advertiser."⁷³

The Guides also require advertisers to disclose any "material connections" that exist.⁷⁴ A material connection is recognized as a relationship that might affect the weight or credibility of the endorsement in the eyes of the consuming public.⁷⁵ This type of relationship exists when an endorser is acting on behalf of an advertiser or brand manufacturer.⁷⁶ Identifying a material connection is a different task when dealing with readily identifiable endorsers in traditional advertising mediums, than when dealing with endorsers in the context of consumer-generated media and blogging.⁷⁷

Although the FTC amended every section of The Guides, for purposes of this comment the relevant sections are 16 C.F.R. § 255.0, § 255.1, and §255.5. Section 255.0 defines the relevant terms used throughout The Guides, most notably "endorser" and "endorsement."⁷⁸ Section 255.1 provides a broad introduction to The Guides and recommends that endorsements must not be presented out of context or reworded so as to distort an endorser's opinion or experience with a product.⁷⁹ This

⁷¹ See Miguel Bustillo & Ann Zimmerman, *Paid to Pitch: Product Reviews by Bloggers Draw Scrutiny*, WALL ST. J., Apr. 23, 2009, at B9; Prepared Statement, *supra* note 10, at 8–9 (providing that the goal of the revisions is to lead to more effective consumer protection in a new era of advertising).

⁷² 16 C.F.R. § 255.0(b) (2010).

⁷³ FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. 72, 374, 72,375 (Nov. 28, 2008).

⁷⁴ 16 C.F.R. § 255.5.

⁷⁵ *Id.* For example, if an endorser is an employee or relative of the advertiser, that fact must be disclosed because it is relevant to how much weight a consumer would give to the endorsement. *Id.*

⁷⁶ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53,125–26 (Oct. 15, 2009).

⁷⁷ See *id.*

⁷⁸ 16 C.F.R. § 255.0.

(b) For purposes of this part, an endorsement means 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 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).

Id.

⁷⁹ 16 C.F.R. § 255.1(a)–(b).

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any

section also requires that endorsers be bona fide users of products they endorse.⁸⁰ Finally, § 255.5 provides that material connections between endorsers and advertisers must be fully disclosed to the consumer.⁸¹ With the inclusion of consumer-generated media and the possibility of extended liability, the changes have caused tension in the marketplace.⁸²

express or implied representation that would be deceptive if made directly by the advertiser

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. . . . An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals 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 competitors' products, and the advertiser's contract commitments.)

Id.

⁸⁰ 16 C.F.R. § 255.1(c).

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.

Id.

⁸¹ 16 C.F.R. § 255.5.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser.

Id.

⁸² Compare Letter from BzzAgent, Inc., to FTC, *supra* note 65 (pro-amendments), and Letter from Personal Care Products Council ("PCPC") to FTC (Mar. 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00018.pdf> (pro-amendments), and Letter from Promotion Mktg. Ass'n ("PMA") to FTC (Mar. 2, 2009) (pro-amendments), and Letter from Public Relations Society of Am. ("PRSA") to FTC (Mar. 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00011.htm> (pro-amendments), and Letter from WOMMA to FTC (June 26, 2007) (pro-amendments), with Letter from the Am. Ass'n of Adver. Agencies, Am. Adver. Fed'n, Council for Responsible Nutrition, Direct Mktg. Ass'n, Direct Selling Ass'n, ERA, Interactive Adver. Bureau, Promotion Mktg. Ass'n, & U.S. Chamber of Commerce ("AAAA") to FTC (Mar. 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00013.htm> (anti-amendments), Letter from Direct Mktg. Ass'n ("DMA") to FTC (Mar. 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00007.htm> (anti-amendments), and Letter from Interactive Adver. Bureau ("IAB"), Inc., to FTC (Mar. 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00005.pdf> (anti-amendments), and Letter from Reed Smith, LLC on behalf of Ass'n of Nat'l Advertisers ("ANA") to FTC (June 16, 2007), <http://www.ftc.gov/os/comments/endorsementguides2/539124-00006.pdf> (anti-amendments), and Letters from Washington Legal Foundation ("WLF") to FTC (June 19 & 26, 2007), <http://www.ftc.gov/os/comments/endorsementguides/527492-00022.pdf> (anti-amendments).

The relevant change to § 255.0 uses an example to illustrate how the term “endorser” should be interpreted in situations involving new media.⁸³ The example provides three different scenarios in which an individual receives a product and later discusses it on her blog.⁸⁴ When the individual purchases the product on her own, or receives a free sample from a store, she is not considered an endorser under The Guides.⁸⁵ In circumstances where the manufacturer provided her with the product directly, coupled with the expectation that she will provide a review of the product on her blog, she qualifies as an endorser and falls within the scope of The Guides.⁸⁶

The relevant amendments to § 255.1 address policies that were already in practice prior to the publication of The Guides.⁸⁷ These revisions solidify the theory that advertisers and endorsers are subject to liability for any “false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and endorsers.”⁸⁸ To best illustrate this theory, the FTC added a new example.⁸⁹ In the example, a blogger makes a general statement about the effectiveness of a product, which the consuming public could easily interpret as an approved claim on behalf of the product manufacturer.⁹⁰ Because the blogger’s message is not an approved endorsement, the false implication could expose both parties to potential liability.⁹¹

The new amendments to § 255.5 provide three new examples that build off the liability standard introduced in the amendment to § 255.1.⁹² These new examples set forth the requirement that any relationship which exists between endorser and advertiser that could potentially affect the weight or credibility of the endorsement should be disclosed to the consumer.⁹³

The first new example describes a situation where a niche blogger, who writes solely about specific topics or products, receives a free product in exchange for a review on his blog.⁹⁴ The example illustrates that the blogger must clearly and conspicuously disclose the receipt of the free product to his readers.⁹⁵ The next new example illustrates that an employee who participates in an online message board discussion sponsored by her employer and regarding one of her employer’s products must also clearly and conspicuously disclose her relationship to the sponsoring company.⁹⁶ The third example suggests that if an individual participates in a “street

⁸³ See 16 C.F.R. § 255.0 ex. 8.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *E.g.*, *FTC v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1184 (N.D. Ga. 2008) (finding an expert liable for deceptive endorsement); *In re Snore Formula, Inc.*, 136 F.T.C. 214 (2003) (issuing consent order because Snore Formula refused to disclose that sufferers of sleep apnea should consult physicians before taking medications).

⁸⁸ FTC Notice of Proposed Changes, 73 Fed. Reg. 72,374, 72,377–78 (Nov. 28, 2008).

⁸⁹ *Id.* at 72,392.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.1(c), 255.5 (2010).

⁹³ *Id.*

⁹⁴ *Id.* § 255.5 ex. 7.

⁹⁵ *Id.*

⁹⁶ *Id.* § 255.5 ex. 8.

team,” and is responsible for promoting new products in exchange for compensation, he will be required to disclose to consumers his relationship with the seller of the product(s) he is promoting.⁹⁷

The preceding modifications were met with mixed reactions, as illustrated by the public comments received and subsequent news media coverage.⁹⁸ Reactions surfaced from every direction, and commentators hailed from traditional media, legal foundations and organizations, marketing and advertising groups and, of course, new media sources.⁹⁹ A substantial portion of commentators found that the original Guides sufficiently directed the advertising industry for thirty years and need not be updated.¹⁰⁰ They also supported the idea that self-regulation is more important and effective than broad, overarching FTC guidance.¹⁰¹ For example, these commentators recognized that certain new media organizations such as the Word of Mouth Marketing Association, the Blog Council, and the Direct Marketing Association have already created independent guidelines for new media influencers regarding endorsements.¹⁰² Furthermore, these commentators argued that The Guides already applied to new media, as many of the existing industry regulations refer to the FTC for direction.¹⁰³

⁹⁷ *Id.* § 255.5 ex. 9.

⁹⁸ See Letter from DMA to FTC, *supra* note 82; Letter from PCPC to FTC, *supra* note 82; Letter from PMA to FTC, *supra* note 82; see also FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. at 72,376 (stating that many commentators “specifically praised the current Guides for striking an appropriate balance between protecting consumers and allowing advertisers to communicate creatively and effectively to potential customers”).

⁹⁹ See e.g., Letter from Brittany Adams to FTC (Feb. 7, 2007), <http://www.ftc.gov/os/comments/endorsementguides/527492-00001.htm>; Letter from ANA to FTC, *supra* note 82; Letter from Nat’l Ass’n of Attys General to FTC, *supra* note 44; Letter from PRSA to FTC, *supra* note 82; Letter from WLF to FTC, *supra* note 82; Letter from WOMMA to FTC, *supra* note 82.

¹⁰⁰ See Letter from the Am. Ass’n of Adver. Agencies and Am. Adver. Fed’ (“AAA”) to FTC 8 (June 22, 2007), <http://www.ftc.gov/os/comments/endorsementguides/527492-00020.pdf> (stating that revising the FTC Guides will require numerous other “self-regulatory entities” to revise their own guidelines, which are effectively based on the FTC Guides); Letter from DMA to FTC, *supra* note 82, at 3 (stating that the original Guides were sufficiently effective for thirty years); Letter from IAB to FTC, *supra* note 82, at 1 (stating that the IAB appreciates the FTC’s interest in updating The Guides, but recognizes there are more “appropriate opportunities to provide guidance for new media”); Letter from Reed Smith, LLC on behalf of ANA to FTC, *supra* note 82, at 8 (stating that “structural” changes are not warranted, based on The Guides’ previous success); Letter from WLF to FTC, *supra* note 82, at 1 (urging the FTC not to update The Guides based on the “adequate guidance” which they already provide).

¹⁰¹ See Letter from the AAAA to FTC, *supra* note 82, at 8; Letter from DMA to FTC, *supra* note 82, at 3; Letter from IAB to FTC, *supra* note 82, at 3; Letter from Reed Smith, LLC on behalf of ANA to FTC, *supra* note 100, at 2.

¹⁰² See WORD OF MOUTH MKTG ASS’N, ETHICS TOOLKIT 4 (2009), <http://womma.org/ethics.ethicscode.pdf> [hereinafter WOMMA ETHICS TOOLKIT]; SOCIAL MEDIA BUS. COUNCIL, DISCLOSURES BEST PRACTICES TOOLKIT (2009), available at <http://www.socialmedia.org/disclosure/>; DIRECT MKTG. ASS’N, DIRECT MARKETING ASSOCIATION GUIDELINES FOR ETHICAL BUSINESS PRACTICES (2009), <http://www.dmaresponsibility.org/>.

¹⁰³ See FTC Notice of Proposed Changes to Guides, 73 Fed. Reg. at 72,390; see also WOMMA ETHICS TOOLKIT, *supra* note 102, at 4–5 (explaining in standard four that WOMMA members must comply with FTC Guides).

Other commentators were in support of the new changes, although many believed the new amendments were not defined with enough clarity.¹⁰⁴ Specifically, commentators recognized three overarching issues: (1) the FTC failed to clearly define what qualifies as a “material connection” in new media;¹⁰⁵ (2) the FTC failed to provide which methods of disclosure will adequately suffice in new media;¹⁰⁶ and (3) the FTC failed to provide means for policing the new breadth of third party liability.¹⁰⁷ These issues are analyzed in more depth in the following section.

II. ANALYSIS

The FTC’s advertising regulations recognize that “consumers have a right to know when they are being subjected to a sales pitch.”¹⁰⁸ This recognition is simple in traditional media because television, radio, and print advertisements are generally easy to identify. With the incredible breadth of consumer-generated media in recent years, however, monitoring whether consumers are being subjected to a sales pitch is becoming a much more difficult task.¹⁰⁹

The FTC is attempting to evolve alongside new media through the amendments to The Guides described above.¹¹⁰ Each new example introduces a hypothetical situation illustrative of the potential scenarios that could give rise to false advertising law violations.¹¹¹ Applying these new paradigms to the standards upon which The Guides were built, Part II.A discusses the areas which the public considers problematic.

A. Issues with the New Guides

The FTC provides that statements in new media will fall under the relevant scope of The Guides when a material connection exists between endorser and advertiser.¹¹² If a material connection exists, The Guides advise parties to disclose their relationship to the consuming public through their choice of consumer-

¹⁰⁴ See Letter from BzzAgent, Inc., to FTC, *supra* note 65; Letter from PCPC to FTC, *supra* note 82; Letter from PMA to FTC, *supra* note 82, at 2; Letter from PRSA to FTC, *supra* note 82, at 2; Letter from WOMMA to FTC, *supra* note 82.

¹⁰⁵ See discussion *infra* II.A.1.

¹⁰⁶ See discussion *infra* II.A.2.

¹⁰⁷ See discussion *infra* II.A.3; J. Thomas Rosch, Comm’r, Federal Trade Commission, American Conference Institute’s Regulatory Summit for Advertisers and Marketers at 4 (June 25, 2009) (on file with the Federal Trade Commission).

¹⁰⁸ Prepared Statement, *supra* note 10, at 11.

¹⁰⁹ See Letter from Reed Smith LLP on behalf of the WOMMA to FTC, *supra* note 66; see also Cecilia Kang, *FTC Sets Endorsement Rules for Blogs*, THE WASH. POST, Oct. 6, 2009, at A18 (depicting that with “tens of millions of blogs, podcasts and other forms of new media content . . . growing every day” the new FTC Guides will be difficult to enforce).

¹¹⁰ See *generally* FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (discussing reasons for the changes to The Guides).

¹¹¹ See 16 C.F.R. § 255.0–.5.

¹¹² See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,137.

generated media.¹¹³ Furthermore, compliance with The Guides requires advertisers to ensure endorsers do not misrepresent the products or services which are the subjects of their endorsements.¹¹⁴ Facially, this application of The Guides to consumer-generated media is seemingly straightforward; however, the problem lies in the fact that none of the above standards is conveyed in a definite and clear fashion.¹¹⁵

Each new example presented in this comment provides a clear platform with which to introduce the issues The Guides present for consumer-generated media.¹¹⁶ Part II.A.1 illustrates those platforms by first examining the ambiguity of the “material connection” standard as a prerequisite for disclosure. Second, Part II.A.2 discusses the inexplicit requisite standards for disclosing a material connection in new media. Third, Part II.A.3 analyzes third party liability and the difficulty advertisers will encounter in policing the new standards.

1. Material Connection: What “Compensation” is Required?

A material connection must exist between endorser and advertiser before the relevant sections of The Guides apply.¹¹⁷ As mentioned, The Guides characterize material connections as those which may affect the credibility of endorsements in the eyes of consumers.¹¹⁸ This principle is built upon the belief that consumers are entitled to notice when a product’s manufacturer or advertiser has a potentially influential effect on its endorser.¹¹⁹ Example seven in § 255.5 supplements this circumstance.¹²⁰ The Guides explain that readers’ perceptions of a blogger are likely to change if they find he received a free high-value item from one of the companies

¹¹³ *Id.*

¹¹⁴ *See id.* at 53,126.

¹¹⁵ *See id.* at 53,138–43.

¹¹⁶ *See* 16 C.F.R. §§ 255.0 ex. 8, 255.1 ex. 5, 255.5 exs. 7–9 (2010).

¹¹⁷ *Id.* § 255.5.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* § 255.5 ex. 7.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Id.

mentioned in his blog.¹²¹ The FTC reasons this is because the blogger is a well-known aficionado in his niche, and his readers will not expect him to receive products for free.¹²² Instead, they will expect him to purchase such items because of his devoted interest to the subject.¹²³

The material connection requirement for new media is no different from the standard that has applied to traditional media for years.¹²⁴ Whether a relationship between advertiser and endorser in new media qualifies as a material connection, however, has become a topic of debate.¹²⁵ In consumer-generated media, the answer depends on the type and amount of compensation the endorser receives and the resulting consumers' opinions.

There is little public dispute that when an endorser receives monetary compensation from an advertiser, a material connection exists.¹²⁶ Comparatively, when an individual purchases a product on his own volition and blogs about it at a later time, there is no material connection.¹²⁷ Furthermore, when an individual contributes regularly to an established organization's website as an employed writer, the individual is not considered an endorser under The Guides.¹²⁸ Despite The Guides' clarity in the above circumstances, a grey area exists when individuals are compensated in-kind, such as through the receipt of free products or services.¹²⁹

Some commentators believe a blogger's credibility will not be affected by the fact he receives free products or services to write about.¹³⁰ In fact, these commentators compared blogger product reviews with traditional media reviews, and argued there is no difference between the two scenarios.¹³¹ This point of view relies on the assumption that bloggers do not let in-kind compensation sway their written opinions about those respective topics. In response, a representative from the FTC pointed out that reviews in traditional media are not considered endorsements because they are conducted in the scope of employment and compensation is expected.¹³² The FTC further clarified that when bloggers write about products they

¹²¹ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53,135–36 (Oct. 15, 2009).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Compare 16 C.F.R. § 255.5 (2010), with 16 C.F.R. § 255.3 (1972).

¹²⁵ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,134 (illustrating that many sources debated the definition of endorsements when the FTC sought comments on The Guides); Kang, *supra* note 109 (reporting that some organizations, such as the Blog World & New Media Expo, believe that bloggers should disclose every form of compensation, suggesting that "material connections" exist when any amount of monetary compensation or free product is received).

¹²⁶ See Letter from PMA to FTC, *supra* note 61, at 16 (recognizing that most people understand the nature of paid spokespeople's relationships with advertisers).

¹²⁷ See 16 C.F.R. § 255.0, ex. 8 (illustrating this exact scenario).

¹²⁸ Interview with Richard Cleland, Assistant Director, FTC (Oct. 5, 2009).

¹²⁹ See Letter from PMA to FTC, *supra* note 82, at 18; Letter from BzzAgent to FTC, *supra* note 65, at 9.

¹³⁰ See Letter from PCPC to FTC, *supra* note 82, at 2.

¹³¹ See Letter from AAAA to FTC, *supra* note 82, at 6.

¹³² See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,134, 53,136 (Oct. 15, 2009); Interview with Richard Cleland, *supra* note 128 (Richard Cleland stating, "I expect when I read my local newspaper, I may expect that the reviewer got paid. His job is to be paid to do reviews. Your

received for free, unbeknownst to their readers; the in-kind compensation is not expected and therefore should be disclosed.¹³³

In response to the above, the FTC set forth two very broad standards in The Guides regarding in-kind compensation. First, The Guides provide that individuals should disclose any relationship that results in “routine” or regular receipt of free products.¹³⁴ Second, they provide that individuals should disclose isolated receipts of free high-value items.¹³⁵ The Guides do not decipher, however, what qualifies as regular receipt or how to determine whether an item is considered high-value.¹³⁶

For instance, regular receipt could apply to situations where a blogger receives free products once a year from an advertiser. On the other hand, regular receipt could refer to something more frequent, such as weekly or monthly distribution. Moreover, should a “mom-fluential” who receives a KitchenAid® mixer valued at around \$500.00 be required to disclose this information? Does high-value refer to something more, like a new flat screen TV or even a car? The aforementioned value labels are relative to the recipient’s own personal situation and therefore prone to subjective interpretation.

The above questions were further complicated when the FTC introduced an additional stipulation following the announcement of The Guides in October 2009.¹³⁷ This stipulation allows an endorser to forego disclosure as long as he returns a product after an endorsement.¹³⁸ Although this seems like a protective measure from liability, monitoring the return of products will be a monumental task for the FTC. Furthermore, there is no way to guarantee that consumers will know whether an endorser returned a product. It is still possible that a consumer’s opinion of an endorser’s credibility could be influenced even if the endorser returns products after writing about them. Consequently, returning an item after an endorsement should not encroach on the material connection that could clearly still exist.

If The Guides are not further amended to provide a more precise definition for endorsers and advertisers, it will be virtually impracticable for these parties to know when disclosures are warranted. Furthermore, it will be a monumental task for the FTC to adequately oversee every product that is returned by endorsers under the product return stipulation. As a result, the FTC must clarify correct standards to follow, by defining what constitutes regular receipt and providing a threshold for when products or services are high value.

economic model is the advertising on the side.”); Deborah Yao & Emily Fredrix, *FTC: Bloggers, Testimonials Need Better Disclosure*, PITTSBURGH POST-GAZETTE, Oct. 6, 2009, at A5.

¹³³ FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,136.

¹³⁴ *Id.* at 53,126, 53,134.

¹³⁵ *Id.*

¹³⁶ *Id.* (using the term “high-priced” rather than “high value” to refer to the same instance discussed herein).

¹³⁷ See Interview with Richard Cleland, *supra* note 128 (Richard Cleland stating that if blogger returns a product once a review is complete, this may not be considered compensation).

¹³⁸ See *id.* (Cleland stating that the above mentioned action would safeguard bloggers from falling within the scope of The Guides).

2. Adequate Disclosures of Material Connections—What Qualifies as such in all Forms of New Media?

As previously indicated, material connections transpire when individuals act on behalf of advertisers through compensation and advertising initiatives. A clear definition of this relationship, however, will not solve all the ambiguities in The Guides. In fact, the next ambiguity lies in standards of mandated disclosure.

Once a material connection is deemed to exist, the endorser and advertiser are required to disclose their relationship under The Guides.¹³⁹ The Guides apply this obligatory disclosure standard to all forms of new media.¹⁴⁰ For instance, in example nine of § 255.5, The Guides provide that a member of a “street team,” who receives redeemable points each time he mentions a sponsoring product, must always disclose his relationship with the sponsoring company.¹⁴¹

Although disclosure is mandated, nowhere in the amendments does the FTC provide standards for how to communicate disclosures.¹⁴² The FTC provides only that disclosures must be done “clearly and conspicuously.”¹⁴³ This provision, although seemingly straightforward, still does not dictate means of disclosure and, consequently, there is no lucid standard for endorsers to follow.

Because of the ambiguous nature of the disclosure requirement, commentators argued it would be unfair to subject advertisers to potential sanctions if they or their endorsers fail to disclose a significant relationship in a manner acceptable to the FTC.¹⁴⁴ The FTC responded that it has always refrained from dictating advertising disclosures.¹⁴⁵ Instead, the FTC has allowed advertisers to make endorsement

¹³⁹ 16 C.F.R. § 255.5 (2010).

¹⁴⁰ See Kang, *supra* note 109.

¹⁴¹ 16 C.F.R. § 255.5 ex. 8.

A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member’s endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

Id.

¹⁴² Gordon Crovitz, *Information Age: Bloggers Mugged by Regulators*, WALL ST. J., Oct. 19, 2009, A19 (questioning whether the new Guides will require strict adherence and contemplating how much of a 140 character Tweet on Twitter must be dedicated to disclosures).

¹⁴³ 16 C.F.R. § 255.5 ex. 7.

Because his review was disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the [item] free of charge in exchange for his review . . . this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the [item] free of charge.

Id.; See also Yao & Fredrix, *supra* note 132 (reporting that FTC Assistant Director, Richard Cleland, stated that disclosures must be “clear and conspicuous” no matter what form they take).

¹⁴⁴ Letter from BzzAgent to FTC, *supra* note 65, at 4; see also Yao & Fredrix, *supra* note 132 (mentioning that advertisers are more likely to be found liable than bloggers, and recognizing that the new Guides fail to specify how disclosures must be communicated).

¹⁴⁵ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,130 n.55.

disclosures as “large and clear as deemed appropriate” with respect to the context of the actual advertisements and information conveyed.¹⁴⁶

The current standard will not suffice, however, because advertisers are no longer in complete control of advertising messages.¹⁴⁷ Under the current subjective standard, advertisers and endorsers will be unable to determine which methods are suitable. For example, it will be impossible to determine whether a one-line, blanket disclosure on the “About Me” page of a blog, Twitter page, or website is sufficiently appropriate to meet the FTC standard.¹⁴⁸ Or, alternatively, whether individual disclosures are necessary following each and every reference to a sponsored product throughout a web post.¹⁴⁹

Furthermore, “clearly and conspicuously” is likely to require different disclosure efforts with various consumer-generated mediums.¹⁵⁰ For instance, in circumstances involving street teams or other direct marketing approaches, some forms of disclosure will almost certainly thwart consumers’ opinions of the endorser and advertiser.¹⁵¹ Using the previous example as a template, when a street team member approaches consumers and initiates a conversation with a blanket disclosure, it is highly unlikely that consumers will take his endorsement seriously.¹⁵² On the other hand, if the individual is wearing a t-shirt with the sponsor’s logo and information displayed prominently on the front, consumers may not recognize that the street team member is necessarily affiliated with the logo on his shirt. Additionally, they may not even notice the shirt.

As the “street team” example illustrates, clear and conspicuous disclosures may sometimes generate adverse reactions to endorsements, which insinuates that the above standard may not be appropriate for certain types of new media and should be further defined.¹⁵³

3. Third Party Liability—Who Should be Concerned: Advertisers, Endorsers or Both?

After establishing a material connection and disclosure method, endorsers must still be cognizant of The Guides when relaying messages about a product or service. It is first important to recognize that The Guides have always defined endorsements and testimonials as any advertising message that “consumers are likely to believe

¹⁴⁶ *Id.*

¹⁴⁷ See Prepared Statement, *supra* note 10, at 2.

¹⁴⁸ See David Colker, *FTC Targets Blogger Freebies*, L.A. TIMES, Oct. 6, 2009, at B1 (quoting Richard Cleland from the FTC as he clarified that disclosures are “left up to the endorser,” that they “can be a banner, part of the review,” and that the “only requirement is that it be clear and conspicuous”).

¹⁴⁹ *Id.*

¹⁵⁰ Compare 16 C.F.R. § 255.5 ex. 7 (2010), with 16 C.F.R. § 255.5 ex. 9 (discussing a blogger and disclosure on his written blog and discussing a street team member and the necessity for verbal disclosure in face-to-face encounters).

¹⁵¹ See 16 C.F.R. § 255.5 ex. 9.

¹⁵² See *id.*

¹⁵³ See *id.* The only amendment to the definition of “endorsement” in The Guides is the text “even if the views expressed by that party [endorsing party] are identical to those of the sponsoring advertiser.” See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53, 125 n.9 (Oct. 15, 2009).

reflects the honest opinions . . . of a party other than the sponsoring advertiser.”¹⁵⁴ Moreover, endorsements may not contain any messages that could not be substantiated if made directly by the advertiser.¹⁵⁵

While the FTC’s definitions and standards for third party liability have remained facially consistent for the past thirty years, new media arenas have changed their application.¹⁵⁶ Advertisers can no longer regulate the content of consumer-generated media in the same manner as traditional media.¹⁵⁷ Due to this inability, many commentators believe that advertisers should not be held liable for endorsements they cannot control.¹⁵⁸ Although the FTC concedes that advertisers are in fact unable to control consumer-generated endorsements, it has also reasoned that advertisers are in a better position to assume the risk of liability than endorsers who may misrepresent products or fail to disclose material connections.¹⁵⁹

Example five of § 255.1 supplements the above new applications. In the example, an advertiser provides an individual with a product and the recipient then discusses her honest belief about the item on her blog.¹⁶⁰ The recipient states that the product (a lotion) “cures eczema” rather than stating more specifically that it cured *her* eczema.¹⁶¹ This statement could lead consumers into believing the lotion is clinically approved to cure eczema. If that is not the case, the endorsement is one which “could not be substantiated” and is, therefore, misleading.¹⁶² As a result of this potential risk, the FTC points out that advertisers should advise and monitor endorser statements. Otherwise, advertisers could be held liable for the false representation of their product(s).¹⁶³

In an effort to avoid unanticipated third party liability for endorsements which advertisers cannot control, advertisers should institute policies to comply with The Guides when dealing with new media participants. Although such policies may require more effort on the part of the advertisers, the benefit certainly outweighs the

¹⁵⁴ 16 C.F.R. § 255.0(a)–(b).

¹⁵⁵ *Id.* § 255.1.

¹⁵⁶ See Letter from PMA to FTC, *supra* note 82, at 17.

¹⁵⁷ *Id.*

¹⁵⁸ Letter from BzzAgent to FTC, *supra* note 65, at 3.

¹⁵⁹ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,127.

¹⁶⁰ See 16 C.F.R. § 255.1 ex. 2.

A skin care products advertiser participates in a blog advertising service.

The service matches up advertisers with bloggers who will promote the advertiser’s products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for false or unsubstantiated statements made through the blogger’s endorsement. The blogger also is subject to liability for representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.

Id.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*; see also Notice of Adoption of Revised Guides, 74. Fed. Reg. 53,124, 53,127 (Oct. 15, 2009).

burden of potential litigation arising from unsubstantiated claims.¹⁶⁴ Furthermore, because the FTC recognizes that advertisers are responsible for monitoring endorsers' online statements under The Guides, it is only logical to provide a means for doing so.¹⁶⁵ Thus, if there is no enforcement or monitoring system in place, third party liability will be nearly impossible to regulate. The final section of this comment proposes steps the FTC should take in order to better clarify and adapt The Guides.

III. PROPOSAL

This section recognizes that placing consumer-generated media into the regulated world of advertising will not be an effortless task. Naturally, it will take time for all advertisers and consumer-generated media participants to align their practices with the amendments to The Guides.¹⁶⁶ This poses the risk that, if consumer-generated media participants do not adhere to The Guides as quickly as new media expands and transforms, the amendments to The Guides may become wholly irrelevant to the mediums themselves.¹⁶⁷

This section proposes various measures the FTC and advertisers should follow to improve The Guides. First, this section introduces a number of definitions and examples to clarify the ambiguities in addressing material connections. Second, this section adopts a standard from other FTC guides for advertisers and endorsers to follow regarding disclosures. Finally, this section presents a method for advertisers to utilize in monitoring their endorsers and avoiding encounters with unsubstantiated claims.

A. Defining Material Connection Will Take Little Effort

The in-kind compensation requisite for material connections is not a clear standard.¹⁶⁸ In fact, the FTC's broad guidelines are seemingly arbitrary.¹⁶⁹ With compensation identifiers such as regular receipt and high value, it will be practically unfeasible for the FTC and consumers to identify a material connection in new media forums, because each new media participant is bound to place a different value on these requirements.¹⁷⁰ These varying interpretations will hinder consistent

¹⁶⁴ See, e.g., Federal Trade Commission Act § 5; 15 U.S.C. § 45(b) (2006); see FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,133–34.

¹⁶⁵ See Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,139 (stating that to limit potential liability advertisers should ensure that they provide guidance and training to bloggers “concerning the need to ensure that statements they make are truthful and substantiated”).

¹⁶⁶ *Id.*

¹⁶⁷ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. at 53,126 n.23 (quoting comments submitted by the Word of Mouth Marketing Association).

¹⁶⁸ See discussion *supra* Part II.A.1 (discussing the problems with ambiguity in the qualifications for a material connection to exist between advertiser and endorser).

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

adherence to The Guides.¹⁷¹ Therefore, the FTC should specifically define what it means to routinely receive products and also what exactly qualifies as high value.

Existing regulations can provide a benchmark for the FTC to clarify the meaning of routine or regular receipt.¹⁷² The Department of Labor refers to regular receipt in defining “salary basis” for certain employees in the employment law context.¹⁷³ Because the goal of identifying material connections is, essentially, to determine whether a consumer-generated media participant is an endorser, thereby affiliated with a brand manufacturer or advertiser, it is logical to use a definition from employment law in the present context.¹⁷⁴ The FTC could adopt the existing use of the phrase regular receipt and develop a definition for routine receipt based on such use. The definition could read “receipt of products of the same or similar nature, or provided by the same supplier, at a rate equivalent to that of a salary or base pay rate, either weekly, bi-weekly or monthly.”¹⁷⁵ A concrete definition would provide a point of referral for advertisers and endorsers to look to in scenarios when an endorser’s material connection is in question.

The high value standard must be addressed in a slightly different manner. What may be high value to one consumer may not be high value to a particular endorser or advertiser. Alternatively, an endorser may believe he is endorsing a high value item whereas his consumer followers may not view the item as such. In addition, each industry is bound to define high value differently. For example, the iPhone is a high priced cell phone, but certainly not high value when compared to laptop computers.¹⁷⁶ This provides a bit of a challenge for purposes of consistency. Therefore, the FTC should not define high value as a specific pecuniary amount, but instead should define it in the context of endorsers’ messages.¹⁷⁷

The FTC should consider an item as high value for purposes of The Guides when “an objective consumer is able to identify the value of the item as significantly higher than the value of other products or services which an endorser has previously discussed.”¹⁷⁸ This definition can be further refined by an equation. Using an arbitrary ratio as an example, The Guides could read: “If a new product is more than ten times the value of products which an endorser regularly discusses, then the new product is considered high value.” An equation will solve the ambiguity in the high priced standard and could easily be supplemented with a new example in § 255.5. The example could read as follows:

¹⁷¹ *Id.*

¹⁷² *See, e.g.*, 29 C.F.R. § 541.602 (2010) (defining salary requirements under Department of Labor regulations).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* (“An employee will be considered to be paid on a ‘salary basis’ within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation . . .”).

¹⁷⁶ *Compare* APPLE-MAC, <http://www.apple.com/macbook/> (last visited Sept. 21, 2010) (listing prices for the MacBook starting at \$999.00), *with* APPLE IPHONE, http://store.apple.com/us/browse/home/shop_iphone/family/iphone?aid=AIC-WWW-NAUS-K2-BUYNOW-IPHONE-INDEX (last visited Sept. 21, 2010) (listing prices for the iPhone starting at \$99.00).

¹⁷⁷ *See* Prepared Statement, *supra* note 10, at 8 (reiterating the importance of audience expectation and consumer opinions).

¹⁷⁸ New definitions for “regular receipt” and “high-priced item” could be added to the text of § 255.5. The new definitions could be placed directly before the last sentence of paragraph one.

When a blogger whose followers are generally stay-at-home parents, and who usually endorses products such as diapers and baby food, is asked to endorse a \$500 stroller, this would be considered high value in comparison to the other items she usually discusses. Categorizing the item as high value would not depend on the blogger's subjective opinion as to whether the stroller is expensive, rather it would be based on the price of the stroller in comparison to the other items the blogger typically endorses or has endorsed in the past.

Additionally, if the blogger has received a week's supply of baby formula from manufacturers at various times in the past, and subsequently receives a year's supply of baby food or formula, the difference in quantity will constitute a latter receipt of high value. The larger amount raises the value of the baby food in comparison to that which she received in the past.

This example could be used to illustrate regular receipt as well, if the blogger receives a fixed supply of baby food or formula once weekly for a continuous period of time.

Ultimately, the high value equation will require endorsers and advertisers to individually evaluate and compare the price values of each item they plan to endorse, but will also provide a consistent standard to follow. Moreover, by implementing both of the above definitions, the FTC will provide a referral point for endorsers and advertisers, and will remove the guessing-game that is likely to ensue with the current broad standards.¹⁷⁹

B. Acceptable Methods for Clear & Conspicuous Disclosure Have Already Been Defined

The "clearly and conspicuously" disclosure standard is nearly as ambiguous as the material connection standard. Because the FTC has provided only bare minimal requirements regarding clear and conspicuous disclosure,¹⁸⁰ advertisers and endorsers will be unlikely to include disclosure language that will interfere with the content of their advertising. Furthermore, with no definitive standard to follow, advertisers and endorsers will have a strong argument to support why their own procedures are sufficient.¹⁸¹

Although the FTC did not provide a detailed definition for the "clearly and conspicuously" disclosure standard in the current version of The Guides, the FTC adequately addressed a similar standard in the FTC Dietary Supplements: An Advertising Guide for the Industry ("Dietary Supplement Guides").¹⁸² The Dietary

¹⁷⁹ See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53,134 (Oct. 15, 2009).

¹⁸⁰ 16 C.F.R. § 255.1, ex. 5 (2010).

¹⁸¹ 16 C.F.R. § 255.0 (2010) (stating that the purpose of The Guides is to provide a basis for voluntary compliance with the law by advertisers and endorsers, and that practices that are inconsistent with The Guides may result in corrective action by the FTC).

¹⁸² FED. TRADE COMM'N, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY (Apr. 2001) at 6–8, [hereinafter DIETARY SUPPLEMENT GUIDES] (defining this standard in a detailed manner in section three, Clear and Prominent Disclosure). This section of the Dietary Supplement

Supplement Guides suggest advertisers should use “clear language, avoid small type, place any qualifying information close to the claim being qualified and avoid making inconsistent statements or distracting elements that could undercut or contradict the disclosure.”¹⁸³ The FTC should use a similar standard in The Guides.¹⁸⁴ Using the above definition as a template, the FTC should suggest endorsers disclose using “clear and distinctive language incorporated into or accompanying the context of the endorsement, which is apparent and noticeable to consumers but does not distract from the ultimate endorsement message.” To further clarify the appropriate methods of disclosure, the FTC should accompany the definition with illustrations in a new example to § 255.5. The new example could read as follows:

Clear and conspicuous disclosures can be presented in a variety of forms, so as to apply to all new media. Acceptable disclosure methods include: (1) when a street team participant distributes a simple, easy to read hand-out describing his material connection with an advertiser or wears a pin on his shirt that reads “Ask me about my Sponsor”; (2) when a blogger concludes each entry with a disclosure statement in bold type-face; or (3) when an author on Twitter or an online community message board with little room for actual text, provides an identifiable and eye-catching hyperlinked “disclosure icon” that sends the reader to a separate page providing a list of all the author’s material connections.

By incorporating the above into the standard for disclosure methods, the FTC will provide advertisers and endorsers with a comprehensible standard to reference in an effort to secure uniform acceptance and application of The Guides. If the methods above are employed and monitored regularly, they will soon become second-nature in the context of new media.

C. Monitoring Third Party Liability is Not as Difficult a Task as it Seems

Although monitoring all potential third party liability issues belies the informal nature of the consumer-generated media world, there are reasonable procedures that brand manufacturers and advertisers can implement to make the task manageable.¹⁸⁵ The FTC recognized the important responsibility of monitoring

Guides also states that “because consumers are likely to be confused by ads that include inconsistent or contradictory information, disclosures need to be both direct and unambiguous to be effective.” *Id.*

¹⁸³ *Id.*

¹⁸⁴ The adopted definition for “clear and conspicuous disclosure” could be inserted before the sentence, “Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below,” in § 255.5.

¹⁸⁵ See discussion *supra* Part II.A.3 (discussing the problem of enforcing and monitoring third party liability); DIETARY SUPPLEMENT GUIDES, *supra* note 182, at 7–8. The Dietary Supplement Guides state that “advertisers should not make qualified claims where the studies they rely on are contrary to a stronger body of evidence.” DIETARY SUPPLEMENT GUIDES, *supra* note 182, at 7–8. The Dietary Supplement Guides also state that “marketers need to verify there is adequate support for their claims” which is exactly what advertisers are being asked to do in monitoring endorsers through the new Guides. *Id.* The FTC explains that all advertisers must have a reasonable basis

sponsored relationships and implementing sanctions for failing to comply with The Guides, but it did not address how to do so. Instead, the FTC left the decision to advertisers themselves.¹⁸⁶ In an effort to facilitate compliance, a definite standard is warranted, which can be outlined in a simple initial agreement. Advertisers will effectively be able to create safeguards against potential liability issues by setting forth the terms of their endorsement relationship in this agreement, which should include at least three important provisions.

First, the agreement should set forth the sort of claims endorsers can and cannot make about particular products or services. This provision will ensure that endorsers do not mistakenly make a false claim about the products or services they endorse.¹⁸⁷ Additionally, this provision should include product information if necessary and any standards which the product has or has not met. For example, standards might include whether a certain product has been FDA approved or physician endorsed. Furthermore, this provision should include types of statements that would be misleading. This will not provide endorsers with a script per se, but it will provide them with guidelines to follow in creating their own, personal messages. Using example five from § 255.1 as a template, a provision of this nature could read:

To avoid a misrepresentation of the product, any consumer-generated media participant with a material connection to our company, who uses our product and subsequently endorses it, should be cognizant of the following information. This lotion is approved to alleviate dry skin conditions, but is not pre-approved to correct any existing skin condition. If this lotion does in fact provide the user with relief beyond that of dry skin, the user must speak directly to the advertiser before making public any statements to that effect.

Second, advertisers should institute a well-defined “quality control” provision outlining necessary steps to take in the event an endorser erroneously makes an unsubstantiated claim.¹⁸⁸ The term quality control is adopted from trademark licensing agreements, and is essentially for the same purpose herein.¹⁸⁹ This provision will protect manufacturers and advertisers’ brands in the same way that a trademark licensing agreement will set forth terms to protect the use of a trademark when used by another party.¹⁹⁰ As previously discussed, the FTC will only step in if it receives a formal complaint from a competitor or consumer regarding false advertising. If effective, the quality control provision will minimize the possibility of false advertising complaints filed by competitors or consumers. Finally, the quality

for all express and implied product claims, which is considered and determined on a case by case basis. *Id.* Again, this is the same theory imposed in the third party liability attachment to endorsements in new media. *Id.*

¹⁸⁶ FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,123, 53,136 (Oct. 15, 2009).

¹⁸⁷ See 16 C.F.R. § 255.1 ex. 5 (2010) (illustrating the problem with potential liability for misleading advertising).

¹⁸⁸ See generally Irene Calboli, *The Sunset of “Quality Control” in Modern Trademark Licensing*, 57 AM. U. L. REV. 341 (2007) (discussing quality control in the context of trademark licensing).

¹⁸⁹ *Id.* at 344–45.

¹⁹⁰ *Id.*

control provision should include steps on how to quickly identify unsubstantiated claims, effectively communicate the identification to consumers, and correct the claims in a timely fashion.

The agreement should also set forth terms of the working relationship between advertiser and endorser—requiring endorsers to update the advertisers they work with on a regular basis regarding the endorsements made and the feedback received. Because advertisers can no longer always guarantee what their endorsers say or the medium used to disseminate statements, setting forth a reporting schedule will provide advertisers with up-to-date information on the endorsements of their products and keep endorsers honest in their messages.¹⁹¹

Because there is no guarantee that endorsers will follow this policy, advertisers should clarify that a failure to report will result in a termination of the endorsement agreement.¹⁹² This simple step will safeguard advertisers and endorsers from unexpected third party liability for falsely representing products in the future.¹⁹³ Conclusively, the recent amendments to The Guides have encompassed new media under the umbrella of potential FTC regulation. Although sanctions are unlikely for individual participants, compliance with The Guides is important to avoid liability issues for advertisers and support growth of endorsements and testimonials in new media arenas.

CONCLUSION

The advertising industry as well as the endorsements and testimonials that support advertising have been expanding into new mediums for years.¹⁹⁴ The FTC's reaction to this growth was to implement carefully considered amendments to adapt The Guides Concerning the Use of Endorsements and Testimonials in Advertising to new media.¹⁹⁵ The amendments were not introduced quietly. The plethora of responses which the FTC received, both positive and negative, and from all facets of the advertising industry, exemplified the weight The Guides have in the advertising world. There is no question as to the importance of The Guides and their influence in advertising and marketing practices, which is why it is imperative for the FTC to monitor the reception of these amendments and work to continually improve them. This is especially important considering the rate at which new media progresses, and is the only way The Guides will sustain relevancy in an ever-expanding new media market.

¹⁹¹ See Rosch, *supra* note 107, at 4.

¹⁹² See FTC Notice of Adoption of Revised Guides, 74 Fed. Reg. 53,124, 53,136 (Oct. 15, 2009) (stating that advertisers could “cease providing free products” to individuals who do not follow proper disclosure methods).

¹⁹³ See 16 C.F.R. § 255.1 ex. 5 (illustrating erroneous claims).

¹⁹⁴ See Maha Atal, *FTC Takes on Pay-Per-Post*, CNNMONEY.COM (Oct. 5, 2009, 6:11 PM), <http://tech.fortune.cnn.com/2009/10/05/ftc-takes-on-pay-per-post/> (reporting that social media has become a relevant marketing force and the FTC started looking at expanding The Guides to incorporate this new medium in 2004).

¹⁹⁵ See 16 C.F.R. §§ 255.0–5 (2010).