

# HOW NEW FTC GUIDELINES ON ENDORSEMENT AND TESTIMONIALS WILL AFFECT TRADITIONAL AND NEW MEDIA ♦

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## INTRODUCTION

Khloe Kardashian, the “reality” celebrity star, has introduced a new weight-loss product to the world: QuickTrim®. According to QTdiet.com, QuickTrim® is a fat cleanse that is designed to “rid the body of excess water weight, belly bloating and intestinal bulk.”<sup>1</sup> According to PopEater.com, Ms. Kardashian stated that QuickTrim® helped her lose twenty pounds in four weeks.<sup>2</sup>

Imagine that on November 30, 2009, Ms. Kardashian visited *The View*, a daytime talk show on ABC.<sup>3</sup> While discussing Ms. Kardashian’s weight-loss, Barbara Walters asks Ms. Kardashian about her diet secret. Further imagine that Ms. Kardashian says she owes it all to QuickTrim® and then changes the subject *without mentioning* that she is the owner and paid spokeswoman of QuickTrim®. After the show, Ms. Kardashian updates her twitter account, informing her followers that she was just on *The View* discussing her weight-loss, and then reiterates that she owes it all to QuickTrim®. She again fails to mention that she is the owner and paid spokeswoman for QuickTrim®. Under this hypothetical,

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<sup>1</sup> QuickTrim® Diet System, <http://qtdiet.com/> (last visited Oct. 29, 2010).

<sup>2</sup> PopEater Staff, *Kim and Khloe Take it Off With QuickTrim*, POPEATER, Sept. 1, 2009, <http://www.popeater.com/2009/09/01/kim-and-khloe-take-it-off-with-quicktrim/>.

<sup>3</sup> Please note that this entire paragraph is a hypothetical. Ms. Kardashian never visited *The View* nor updated her twitter account to discuss the appearance.

if Ms. Kardashian failed to properly disclose her entire relationship with QuickTrim® on or after December 1, 2009, Ms. Kardashian and QuickTrim® would not be in compliance with the Federal Trade Commission's (FTC) "Guides Concerning Use of Endorsements and Testimonials in Advertising" (the "2009 Guides").<sup>4</sup>

According to the FTC, the 2009 Guides "provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute."<sup>5</sup> The first proposal to change the 2009 Guides occurred in January 2007 when the FTC issued an administrative notice (the "Notice") in reference to the 2009 Guides.<sup>6</sup> The Notice was published seeking "comment on the overall costs, benefits, and regulatory and economic impact of its Guides."<sup>7</sup> After much controversy and debate,<sup>8</sup> the 2009 Guides were published on October 15, 2009, their first update since the last revision in 1980.<sup>9</sup>

When the Notice was issued, the advertising industry was healthy. In 2006, advertising revenues for Internet, Broadcast Television, and Radio were up 38%,<sup>10</sup> 5.3%,<sup>11</sup> and 1%<sup>12</sup> from 2006 to 2007, respectively. Today, however, revenue is down in all mediums. In the second quarter of 2009, Broadcast Television and Radio advertising revenues plummeted 12.8%<sup>13</sup> and 22%<sup>14</sup> respectively, from revenues in the second quarter of 2008. Additionally, in the first quarter of 2009, Internet advertising revenue fell for only the second time since 2002, by 5%.<sup>15</sup> The

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<sup>4</sup> 16 C.F.R § 255 (2009).

<sup>5</sup> *Id.*

<sup>6</sup> Guides Concerning the Use to Endorsements and Testimonials in Advertising, 72:11 Fed. Reg. 2214 (Jan. 18, 2007) (notice of public hearing).

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72, 374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>10</sup> See *Internet Advertising Revenues Close to \$4 billion for Q1 2006*, IAB, May 30, 2006, [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/4986](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/4986).

<sup>11</sup> See TELEVISION BUREAU OF ADVERTISING, TNS MEDIA INTELLIGENCE, 2006 TV AD REVENUE FIGURES (2009).

<sup>12</sup> See MILLER, KAPLAN, ARASE & CO., RADIO ADVERTISING BUREAU, RADIO REVENUE TRENDS (2009), <http://www.rab.com/public/pr/yearly.cfm>.

<sup>13</sup> See *Kantar Media Reports U.S. Advertising Expenditures Declined 12.3 Percent in 2009*, BUSINESS WIRE, Mar. 17, 2010, <http://www.businesswire.com/news/home/20100317005458/en/Kantar-Media-Reports-U.S.-Advertising-Expenditures-Declined>.

<sup>14</sup> See Alan Albarran, *Radio Advertising Continues to Suffer*, GERSON LEHRMAN GROUP, Aug. 24, 2009, <http://www.glggroup.com/News/Radio-Advertising-Continues-to-Suffer-42719.html>.

<sup>15</sup> See *Internet Advertising Revenues at \$5.5 Billion in Q1 '09*, IAB, Jun. 5, 2009,

global economic recession affected the U.S. advertising industry quite negatively and analysts forecast that the impact of the recession on the U.S. advertising industry will continue into 2011.<sup>16</sup>

Undoubtedly, the 2009 Guides will highly impact the advertising community. In fact, unlike the 1980 Guides, they will also have an impact on the individuals that endorse the advertiser's products. Under the 2009 Guides, individual endorsers must disclose when they are being paid monetarily or through an "in-kind" gift to endorse a product<sup>17</sup>; in fact, endorsers may face an unlikely, but possible, \$11,000 fine.<sup>18</sup>

The FTC also classifies bloggers as endorsers.<sup>19</sup> Attempting to regulate the blogging community is quite a feat in and of itself. According to the most recent study available as of 2007, there were 22.6 million bloggers in the United States and 50% of all U.S. Internet users read blogs.<sup>20</sup> Before the 2009 Guides, bloggers were not required to indicate whether or not they were compensated for their blog posts and thus, there is no data to suggest the amount of revenue that bloggers earn from endorsement.<sup>21</sup> Presumably, this information will become more readily attainable now that the 2009 Guides are in full force and effect. However, with the infinite number of blogs that are available on the Internet, reliable data is unlikely.

While the FTC promulgated the 2009 Guides to further protect consumers from misleading endorsements, its power to enforce the provisions of the 2009 Guides must be limited in light of the weakened advertising industry, an industry which, in 2008, employed almost 500,000 workers throughout the United States.<sup>22</sup> This Note contends that in order to limit the potential negative impact of the 2009 Guides, all industries utilizing endorsers must

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[http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-060509](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-060509).

<sup>16</sup> See David B. Wilkerson, *U.S. Advertising Seen Plunging 13% in 2009*, MARKETWATCH, Mar. 12, 2009, <http://www.marketwatch.com/story/us-advertising-revenue-plunge-13-2009>.

<sup>17</sup> See Holly Sanders Ware, *FTC Takes Aim at Celebs, Web Hype-sters*, N.Y. POST, Oct. 6, 2009, at 25.

<sup>18</sup> See Eric P. Robinson, *FTC Seeks to Clarify-and Justify-Its Blogger Endorsement Guidelines*, CITIZEN MEDIA LAW PROJECT, Jul. 30, 2009, <http://www.citimedialaw.org/blog/2010/ftc-seeks-clarify-and-justify-its-blogger-endorsement-guidelines>.

<sup>19</sup> See 16 C.F.R. § 255 (2009).

<sup>20</sup> See Matt Sussman, *Day 4: Blogging Revenues, Brands, And Blogs: SOTB 2009*, TECHNORATI, Oct. 22, 2009, <http://technorati.com/blogging/article/day-4-blogging-revenues-brands-and/>.

<sup>21</sup> See *Prepared Statement of the Federal Trade Commission on Advertising Trends and Consumer Protection: Hearing Before the H. Subcomm. on Consumer Protection, Product Safety, and Insurance of the Comm. On Commerce, Science, and Transportation*, 111<sup>th</sup> Cong. 9 (2009) (statement of David Vladeck, Director, Bureau of Consumer Protection at the Federal Trade Commission).

<sup>22</sup> See Bureau of Labor Statistics: *Career Guide to Industries*, 2010-11 Edition, <http://www.bls.gov/oco/cg/cgs030.htm> (last visited Oct. 29, 2010).

understand the provisions of the 2009 Guides and implement corporate policies and practices that will make the industries less susceptible to FTC imposed injunctions and/or massive financial penalties.<sup>23</sup> Part I will explain the history of the FTC's decision to issue the 2009 Guides and explain the FTC's enforcement powers. Part II will discuss certain sections of the 2009 Guides that could negatively affect celebrity endorsers, their advertisers, and connected third parties. Part III will discuss the immediate effects that the 2009 Guides will have on the blogging community, the legal differences between bloggers and traditional endorsers as they pertain to the 2009 Guides, as well as how the 2009 Guides have changed the relationship between bloggers and the advertising community. Finally, the conclusion will explain recent developments concerning the 2009 Guides and how companies have reacted to such developments. Such developments illustrate why the advertising and blogging communities, as well as any company that utilizes social media, must understand the 2009 Guides and how the 2009 Guides will affect day-to-day business and future business.

#### I. HISTORY OF THE FTC ENDORSEMENT GUIDELINES

Throughout the 1970s, the Bureau of Consumer Protection at the FTC was primarily concerned with challenging deceptive advertising by prosecuting advertisers and their advertising agencies.<sup>24</sup> To demonstrate to advertisers how to comply with the regulations, the FTC promulgated various guides that were intended to clarify the types of advertisements that the FTC would not consider deceptive or misleading. For example, in 1971, the FTC issued the Guide Concerning Use of the Word "Free" and Similar Representations, as they pertained to advertisements.<sup>25</sup>

To further promote their agenda, the FTC issued a notice for public comment for the Guide Concerning the Use of Endorsements and Testimonials in Advertising in December 1972.<sup>26</sup> On May 21, 1975, sections still present in the 2009 Guides, were issued by the FTC: definitions of the terms, expert endorsements, and endorsements by organizations.<sup>27</sup> To ensure

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<sup>23</sup> See *FTC v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008) (promotion of a bracelet intended to cure chronic pain was false and defendants were enjoined from selling the product and ordered to pay \$16 million plus interest to its consumers).

<sup>24</sup> See J. THOMAS ROSCH, FEDERAL TRADE COMMISSION, LOOKING BACKWARD AND FORWARD: SOME THOUGHTS ON CONSUMER PROTECTION 1-2 (2009), <http://www.ftc.gov/speeches/rosch/090311backwardforward.pdf>.

<sup>25</sup> See *id.* at 9.

<sup>26</sup> See *id.* A notice for public comment is where the FTC issues a statement to all involved parties and asks for their comments. Here, the FTC was asking the advertising community for any comments, both positive and negative, on the proposed Guide.

<sup>27</sup> 16 C.F.R. § 255 (2009).

that the advertisers fully comprehended the meaning of each section, examples illustrating each guideline were included.<sup>28</sup> Lastly, on January 18, 1980, the commission adopted three final sections: 1) general considerations that advertisers should ponder when utilizing endorsements in a campaign; 2) a broad overview of consumer endorsements; and 3) disclosures of material organizations.<sup>29</sup> For example, the 1980 Guides required a celebrity to disclose the connection between herself and the endorser when a connection is “reasonably expected” by the audience.<sup>30</sup>

Until the new millennium, the FTC gave no indication of any desire to change the 2009 Guides. In 2003, however, the FTC’s attitude changed when Commercial Alert, an advertising and marketing watchdog group, submitted a petition to the FTC claiming that the section concerning Disclosure of Material Connections (“Material Connections”) was not being followed by celebrities.<sup>31</sup> Specifically, the petition mentioned a *New York Times* article, which stated that many celebrities go on talk shows and highlight various products without giving any indication that they are being paid by the advertiser.<sup>32</sup>

Eventually, the mainstream media began reporting about the Commercial Alert petitions. According to a December 12, 2006 article in the *Washington Post*, the FTC was petitioned in October 2005 by Commercial Alert for a third time.<sup>33</sup> Commercial Alert urged the FTC to issue guidelines concerning all word-of-mouth marketers, including bloggers.<sup>34</sup> Specifically, Commercial Alert requested that bloggers be required to disclose whether or not they were being paid for endorsing a product.<sup>35</sup> Significantly, a survey was conducted in which “29 percent of participants age 20 to 34 and 41 percent of those age 35 to 49 said they would be unlikely to trust a recommendation . . . from a friend whom they later learned was compensated for making the suggestion.”<sup>36</sup> Within one month, the FTC issued its January 2007 notice concerning the 2009 Guides.

It is important to understand that the 2009 Guides are

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<sup>28</sup> 16 C.F.R. §§ 255.0, 255.3, 355.4 (1975).

<sup>29</sup> 16 C.F.R. §§ 255.1, 255.2, 255.5 (1980).

<sup>30</sup> *Id.*

<sup>31</sup> See *Commercial Alerts Asks FCC, FTC to Require Disclosure of Product Placement on TV*, COMMERCIAL ALERT, Sept. 30, 2003, <http://www.commercialalert.org/news/news-releases/2003/09/commercial-alert-asks-fcc-ftc-to-require-disclosure-of-product-placement-on-tv>.

<sup>32</sup> Stuart Elliott, *Hiding a Television Commercial in Plain View*, N.Y. TIMES, May 24, 2002, at C1.

<sup>33</sup> Annys Shin, *FTC Moves to Unmask Word-of-Mouth Marketing: Endorser Must Disclose Link to Seller*, WASH. POST, Dec. 12, 2006, at D1.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> *Id.*

advisory; they are simply the mechanism the FTC uses to interpret the Act.<sup>37</sup> However, if the FTC meets its burden in establishing that the accused violated the Act by not following the 2009 Guides, courts will likely side with the FTC.<sup>38</sup> In court, the 2009 Guides are given respect because they have the power to persuade; thus the court is deferential in these legal scenarios.<sup>39</sup> According to the FTC, the purpose of the 2009 Guides is to “assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act” (the “Act”).<sup>40</sup>

In 1914, Congress created the FTC to enforce the Act. Section 5 of the Act prohibits “unfair methods of competition,” and in 1938, was amended to prohibit “unfair or deceptive acts or practices.”<sup>41</sup> To bring a claim under Section 5, the alleged representation, omission, or practice must be deceptive, which means “(1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material, that is, likely to affect consumers’ conduct or decisions with respect to the product at issue.”<sup>42</sup> In 1994, Congress amended Section 5, stipulating that an “act or practice is *unfair* if the injury it causes or is likely to cause to consumers is: (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves.”<sup>43</sup>

To hold violators of Section 5 accountable, the FTC may sue violators in federal district court under Section 13(b) of the Act, 15 U.S.C Section 53(b).<sup>44</sup> No notice to the alleged violator is required.<sup>45</sup> Under section 13(b):

[W]henver the Commission has “reason to believe” that any party “is violating, or is about to violate” a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct, pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful. Further, under the second proviso of Section 13(b), “in proper cases,” the Commission

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<sup>37</sup> See 16 C.F.R. § 255 (2009).

<sup>38</sup> See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72,374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>39</sup> See *id.*

<sup>40</sup> Guides Concerning the Use to Endorsements and Testimonials in Advertising, 72:11 Fed. Reg. 2215 (Jan. 18, 2007) (notice of public hearing).

<sup>41</sup> Appendix 1: Laws Enforced by the FTC, <http://www.ftc.gov/opp/gpra/append1.shtml> (last visited Oct. 29, 2009).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfowrvw.shtml> (last visited Oct. 29, 2009).

<sup>45</sup> See *id.*

may seek, and the court may grant, a *permanent* injunction.<sup>46</sup>

The FTC may also bring a claim against an alleged infringer under Section 12 of the FTCA.<sup>47</sup> Section 12 states that the dissemination of false advertisements, by certain means, which are likely to induce the purchase of food, drugs, devices, services, or cosmetics, is unlawful.<sup>48</sup> The dissemination of these false advertisements is considered an “unlawful” or “deceptive” practice under Section 5.<sup>49</sup>

## II. CELEBRITY ENDORSER LIABILITY UNDER THE 2009 GUIDES

The 1980 Guides are much significantly different from the 2009 Guides because the current Guides place more responsibility on the advertiser and the individual endorser.<sup>50</sup> In 1980, celebrities were the primary endorsers of products.<sup>51</sup> Traditionally, these endorsements were solely found in the mainstream media via television commercials and print advertisements.<sup>52</sup> Because this practice of incorporating celebrities into advertisements was commonplace, the FTC naturally assumed that viewers and readers understood that the celebrities were paid endorsers, and thus, the celebrity did not have to necessarily disclose the relationship with the advertiser.<sup>53</sup> Today, however, celebrities are finding creative outlets to endorse a product. Through a variety of vehicles, the celebrities are making endorsements in less conspicuous ways, such as on social networking sites and blogs.

### A. *Direct Celebrity Liability*

Under the Guides, celebrities are held to a greater standard of accountability for the products they endorse if the FTC assumes that the majority of the American public would not understand that the celebrity is endorsing a product. The FTC made this quite clear by implementing new language under Section 255.1(d): “Endorsers . . . may be liable for statements made in the

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<sup>46</sup> *Id.* See also A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfowrvw.shtm> (last visited Oct. 29, 2010).

<sup>47</sup> See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 5, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>48</sup> See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfowrvw.shtm> (last visited Oct. 29, 2010); see also 15 U.S.C. §52.

<sup>49</sup> *Id.*

<sup>50</sup> See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72, 374 (adopted Oct. 5, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See Ira Teinowitz, *FTC Cracks Down on Celebrity Endorsements*, THE WRAP, Oct. 5, 2009, <http://www.thewrap.com/article/ftc-cracks-down-celebrity-endorsements-8233>.

course of their endorsements.”<sup>54</sup>

Case law applying the 1980 Guides illustrates why the 2009 Guides implemented the language of Section 255.1(d). In *FTC v. Garvey*, the FTC alleged, under Section 5 and Section 12 of the Act, that Steve Garvey, a retired baseball player, violated the 1980 Guides because he made false and misleading statements, and thus, was either personally liable or liable as an endorser.<sup>55</sup> Garvey was a paid spokesperson for the Enforma® system, a weight loss supplement.<sup>56</sup> After receiving complaints from the public that the product was ineffective, the FTC brought charges against Garvey, Enforma®, and others.<sup>57</sup> The FTC argued that Garvey endorsed the product; a violation of Section 255.1 of the 1980 Guides. Section 255.1 of the 1980 Guides stated that an “[endorsement] may not contain any representations which would be deceptive, or could not be substantiated if made directly by an advertiser.”<sup>58</sup> The FTC argued that because Garvey was an endorser of the product, he was liable for the material misrepresentations.<sup>59</sup>

In affirming the decision of the District Court, the Ninth Circuit held that Garvey was not personally liable or liable as an endorser.<sup>60</sup> To persuade the court that Garvey was directly liable, the FTC needed to prove that Garvey had actual knowledge of the material misrepresentation, was recklessly indifferent to the truth of his statements, or was aware that fraud was highly probable and nonetheless, intentionally avoided the truth.<sup>61</sup> The court held that the FTC did not meet its burden in showing that any of the three elements were met.<sup>62</sup> Also, the court noted that Garvey was not liable because he was a mere spokesperson.<sup>63</sup> The court held that the spokesperson is analogous to the mere layperson and thus, the spokesperson is not held to a higher standard when it comes to doing his or her due diligence in deciding whether or not to endorse a product.<sup>64</sup>

Evaluating the claim under the 1980 Guides, the court held Garvey was *not* an endorser, even though he claimed to have lost eight pounds using the system and promoted the product on one particular show.<sup>65</sup> The court evaluated the FTC’s claim under two

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<sup>54</sup> 16 C.F.R. § 255.1(d) (2009).

<sup>55</sup> *FTC v. Garvey et al.*, 383 F.3d 891 (9th Cir. 2004).

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* at 903.

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 904.

<sup>61</sup> *Id.* at 904-05.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 902.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 904.

prongs: liability and substantiation.<sup>66</sup> The FTC's claim failed the liability prong because Garvey's statements reflected his true beliefs.<sup>67</sup> Also, the FTC's claim for substantiation failed because Garvey did, in fact, lose eight pounds on the system, thereby substantiating the product's promise of weight-loss.<sup>68</sup> Thus, the Ninth Circuit held that Garvey was not an endorser because his statements reflected his own beliefs and he was able to substantiate those beliefs by his own experiences.<sup>69</sup>

However, if the *Garvey* court heard the case after the 1980 Guides were promulgated, the result would likely be different based on the Material Connections section. The Material Connections section<sup>70</sup> states, "[celebrities] may have an obligation to make reasonable inquiries of the advertiser that there is an adequate basis for assertions that the script has them making."<sup>71</sup> In the 2009 Guides, the FTC included Section 255.1(d) to avoid *Garvey*-like court rulings. In its Notice, the FTC wrote: "[t]he celebrity has decided to earn money by providing an endorsement. With that opportunity comes the responsibility for the celebrity or his or her legal representative to ensure in advance that the celebrity does not say something that does not reflect honest opinions, findings, beliefs, or experience."<sup>72</sup> Accordingly, a celebrity's decision to endorse a product and reap the monetary benefits of such an endorsement creates an added responsibility. By being vested with a heightened sense of responsibility, the celebrity is no longer treated as the equivalent of a layperson and thus, courts could be persuaded differently by this updated approach. This is despite the fact that the *Garvey* court expressed that endorsers should not be held to a subjective standard, by citing the FTC's own statement in an earlier decision.<sup>73</sup> While the FTC still has the burden at trial, its argument is now much stronger. Garvey would not only be responsible for substantiating his own claims, but he also would be responsible for making sure that the product is effective for the entire community.<sup>74</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255); see also Elina Shatkin, *FTC Announces New Guidelines, Says Bloggers Must Reveal Payments for Reviews*, L.A. TIMES, Oct. 5, 2009, <http://latimesblogs.latimes.com/dailydish/2009/10/ftc-announces-new-guides-says-bloggers-must-reveal-payments-from-advertisers.html>.

<sup>72</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>73</sup> *Garvey*, 383 F.3d 891, 902.

<sup>74</sup> See 16 C.F.R. § 255.2(b) (2009).

Accordingly, the Guides make celebrities more responsible for investigating the products they endorse. All endorsers must also disclose their relationship with the products in a setting where it is not obvious that the celebrity is actually endorsing a production.<sup>75</sup> When a viewer sees an advertisement on television or in a magazine and a celebrity is the endorser, consumers generally know that the celebrity is being paid. But the Material Connections section focuses on the celebrity discussing a product in less predictable settings, such as on a talk show or via social media. Specifically, new example three, (hereinafter “Example Three”) of this section<sup>76</sup> has caused a great deal of concern. Example Three makes it clear that a celebrity will be held accountable if she fails to disclose that they are being paid to endorse a product.<sup>77</sup> For example, suppose a talk show host asks a celebrity how she lost the weight after giving birth and the celebrity responds, “because of new product X.” If that celebrity is paid by the advertiser to endorse the product, the celebrity endorser must state that she is being paid. Unfortunately, the Guides do not explain how the celebrity endorser must make this disclosure. Thus, it is within the discretion of the endorser to either have a text message displayed at the bottom of the screen or verbally state that he or she is an endorser of the product.

But what if the celebrity endorser fails to make this connection clear? Does fault lie with the advertiser (the marketer of the product), or with the celebrity endorser? In the Notice, the FTC says, “[the] advertiser has the concomitant responsibility to advise the celebrity in advance about what he or she should (and should not) say about that product or service, and about the need to disclose their relationship in the course of the interview.”<sup>78</sup>

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<sup>75</sup> See 16 C.F.R. § 255.5 (2009). Example 3 states:

During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

Therefore, there is a duty on the part of the advertiser to relay the message to their celebrity endorser and to make sure the celebrity endorser understands when and where she must mention the connection between herself and the product. If the advertiser does its due diligence and informs the celebrity endorser of her responsibilities under the 2009 Guides, but the celebrity still does not make the disclosure, the FTC has the right to prosecute the celebrity endorser under Section 13(b).<sup>79</sup>

So let us revisit *Garvey* for a moment.<sup>80</sup> Suppose Garvey went on *The Tonight Show with Jay Leno*. Mr. Leno comments on Mr. Garvey's weight-loss. Garvey thanks him and mentions the new diet system he is on, but inadvertently forgets to disclose the material connection after Leno cracks a joke and moves on. According to Example Three, Garvey would be held accountable because the viewing public may not realize that the celebrity is a paid endorser of the product.<sup>81</sup>

The responsibility lies with both the advertiser and the celebrity endorser, but the advertiser bears the greater burden. Under the 2009 Guides, Garvey would be held accountable only *if* it can be shown that the advertiser did tell him that he must disclose the connection. As the FTC concedes in its comment, the FTC would need to conduct a factual inquiry to determine whether or not the advertiser explained the ramifications of not disclosing the connection to the endorser.<sup>82</sup>

Interestingly, the FTC makes no mention of a pattern of a failure to disclose. Does a celebrity endorser's failure to disclose a connection once make them liable under Section 15 or Section 12? In Example Three, the situations involve seemingly rehearsed statements by the celebrities, whether it is an example of visiting a late night talk show or hosting an infomercial. Throughout all the examples, there is no mention what penalty, if any, there would be for a minimal first time infraction, such as a celebrity saying on a talk-show that she "found" a dress at a department store, when in reality the store sent her the dress versus a second, more substantial infraction.<sup>83</sup>

Many marketing commentators find this troubling. In an October 6, 2009 article for CNBC.com, correspondent Julia Boorstin discussed many of the unanswered questions.<sup>84</sup> In her

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<sup>79</sup> *Id.*

<sup>80</sup> For a thorough discussion of the *Garvey* facts, see *infra* pp. 10-11.

<sup>81</sup> See *supra* note 74.

<sup>82</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

<sup>83</sup> 16 C.F.R. § 255 (2009).

<sup>84</sup> Julia Boorstin, *What the New FTC Blog Rules Mean for the Future of Marketing*, CNBC, Oct. 6, 2009, <http://www.cnbc.com/id/33197491>.

article, Boorstin made valid points regarding the 2009 Guides and their effect on celebrity endorsers. For example, many celebrities are given handbags and designer clothing for free. In exchange for the free items, celebrities wear these items as an endorsement. Also, it is common knowledge that some celebrities are given special treatment at restaurants. Must the celebrity disclose the preferential treatment on a talk show that next day if the host asks the celebrity what restaurant she went to? Boorstin concludes that it will be nearly impossible to regulate such connections except for the “most egregious examples.”<sup>85</sup>

### B. *Third Party Liability*

The 2009 Guides also raise the question of third-party liability. In the *Garvey* hypothetical, if Leno, as a talk show host, knows that Garvey is supposed to mention the connection but fails to, are Leno and/or his parent company, NBC Universal, liable for aiding in the misleading statements to the public?

In *FTC v. Direct Mktg. Concepts*, the FTC sought injunctive and monetary relief for false and misleading advertising of two products: coral calcium and supreme greens.<sup>86</sup> In its motion for summary judgment, the FTC alleged that a media-buying agency, King Media, as well as others, were liable under Sections 5 and 12 for deceptively marketing coral calcium.<sup>87</sup> In *Direct Mktg.*, King Media’s role was to buy the television commercial airtime for coral calcium and there was no evidence to suggest that King Media had actual knowledge of the misleading advertisements.<sup>88</sup>

The district court found that King Media and its Chief Executive Officer, Allen Stern, were liable under Section 12.<sup>89</sup> In pertinent part, Section 12 states that it is unlawful to “disseminate or cause to be disseminated, any false advertisement.”<sup>90</sup> King Media claimed it did not disseminate any false advertisement but rather acted as a middleman by sending the advertisements to the local television affiliates;<sup>91</sup> thus, the producers of the infomercial

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<sup>85</sup> *Id.*

<sup>86</sup> *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285 (D. Mass. 2008).

<sup>87</sup> *Id.* at 292. It is important to note the exact function of a media-buying company. Media-buying companies are responsible for the purchase of commercial time and commercial air space for the delivery of advertising messages throughout a host of mediums, including, but not limited to, television, radio, and the Internet. The function of the media-buying department is to purchase the media for the client; they are not involved in the creation of the advertisement in any capacity.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 312. Stern was the CEO of both King Media and Triad, the company that created the work. The two entities are separate corporations.

<sup>90</sup> A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, <http://www.ftc.gov/ogc/brfowrvw.shtml> (last visited Oct. 29, 2009).

<sup>91</sup> *Id.* Additionally, a local television affiliate is a city or town’s actual network affiliate. For example, in New York City, WNYW is the Fox local affiliate, which is owned and operated

and the local television stations should be held liable, not King Media.<sup>92</sup> The district court did not agree. In finding King Media liable, the district court ruled that by purchasing the airtime, King Media *caused* the dissemination, and was liable.<sup>93</sup> With regards to Stern, the court held that regardless of whether Stern had actual knowledge of the misleading advertisement, he was “at least willfully blind or recklessly indifferent to the deceptive nature of the infomercial.”<sup>94</sup> When the matter was resolved in August 2009 on appeal, Stern, along with King Media, and his other corporation, Triad Marketing, were ordered to pay damages in excess of \$20 million under Section 13(b) of the FTCA because they acted jointly and were joint and severally liable along with the company that produced the “infomercial” as well as the manufacturer of the product.<sup>95</sup> This figure was “a reasonable estimate of net non-retail sales, or net consumer loss, resulting from the deceptive sales of Coral Calcium.”<sup>96</sup>

The manifestation of the issue of whether the FTC will enforce the 2009 Guides against third parties is seen through *Direct Mktg.* Relating back to the earlier hypothetical, under the *Direct Mktg.* rationale, NBC-Universal, the producer of the Jay Leno program, may be liable.<sup>97</sup> This notion is not without merit. The court in *Direct Mktg.* found a media-buying company, whose sole objective is to buy media, liable because they caused the dissemination of the information, as defined by Section 12.<sup>98</sup> In the hypothetical, the same argument can be made about NBC-Universal. NBC’s broadcast of *The Tonight Show with Jay Leno* caused the false information to be disseminated to the public; in fact, this very argument was advanced by the FTC in *Direct Mktg.*, where the court decided that King Media was liable.<sup>99</sup>

This example proves a simple point: The FTC must define exactly who is liable for the dissemination of false information under Section 12. Under the definition proposed by the *Direct Mktg.* court, it seems that any entity that aided in the

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by Fox. However, other local affiliates are owned by a separate entity, such as the CW affiliate in Syracuse, which is owned and operated by Sinclair Broadcasting Group.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 309.

<sup>94</sup> *Id.* at 312.

<sup>95</sup> *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 221 (D. Mass. 2009).

<sup>96</sup> *Id.* at 220.

<sup>97</sup> As of the writing of this Note, NBC is a wholly owned subsidiary of General Electric. According to an Oct. 1, 2009 article on CNBC.com, Comcast is negotiating with General Electric to purchase 51% of NBC-Universal. David Faber, *GE is in Talks to Spin Off NBC, Give Comcast 51% of New Unit*, CNBC, Oct. 1, 2009, <http://www.cnbc.com/id/33123120>.

<sup>98</sup> It must be noted that for two years, the author of this Note was employed by Clear Channel Communications as an account manager. In that capacity, the author sold airtime across five radio stations and often negotiated with large media-buying agencies, similar to the one described in *Direct Mktg.*

<sup>99</sup> *Direct Mktg.*, 569 F. Supp. 2d at 309.

dissemination of false information regardless of involvement in the creation of such information will be held liable. Must any potential indirect violator, from the network that without constructive or actual knowledge airs a false material misrepresentation to the media-buying agency that purchases air time for the alleged misrepresentation, be so discerning when deciding who or what to invite onto their airwaves or take on as a client?

The FTC's power under Section 12 is vast. If most courts are to treat it as broadly as the Court did in *Direct Mktg.*, then the need for clarification is even greater. Because the FTC does not solely challenge the creators of a false advertisement and its endorsers, *which* third parties may be held liable in certain situations must be made clear so that businesses will not be afraid to work with advertisers and endorsers.

### III. BLOGGERS AND THE 2009 GUIDES

The 2009 Guides do not only target celebrities. The more controversial and groundbreaking targets of the 2009 Guides are bloggers, a group that is seemingly impossible to regulate.

The FTC's main reason for including examples affecting bloggers was its concern that bloggers were endorsing products in exchange for cash or products without alerting readers. As a hypothetical example, suppose Dove Skin Care wants to target young mothers. Instead of having an advertisement on television, the advertising agency creates a viral campaign, whereby bloggers of motherhood-related websites are sent the Dove product, and in exchange, the blogger raves about the benefits of using Dove Skin Care. This hypothetical example is similar to the one discussed in the 2009 Guides' example five of the General Considerations section.<sup>100</sup> The FTC created Example Five because the connection between advertiser and blogger is not "conspicuous" enough.<sup>101</sup> Unlike television endorsements, the American public is seemingly unaware of this material connection and may mistakenly believe that the blogger actually went out and purchased the product.<sup>102</sup>

Many in the interactive advertising community feel that the bloggers are being unfairly targeted. In a letter to the FTC, Randall Rothenberg, the CEO of the Interactive Advertising Bureau claimed that the FTC was being unfair in its treatment towards bloggers.<sup>103</sup> Specifically, Rothenberg makes a bold claim

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<sup>100</sup> 16 C.F.R. § 255.1 (2009).

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> Letter from Randall Rothenberg, President, Interactive Advertising Bureau, to Jon

by asserting that the FTC is unconstitutionally restricting bloggers' First Amendment rights because traditional reviewers, such as television or newspapers reviewers, are not subject to the heightened standards.<sup>104</sup> Rothenberg is correct in his latter statement: in the 2009 Guides, the FTC admitted that bloggers are subject to "different disclosure requirements" because traditional media reviews, such as in the newspaper or on television, are not considered sponsored messages.<sup>105</sup> Many commentators may be quick to assert that Rothenberg's argument regarding constitutionality is illogical, because false or misleading information is not granted First Amendment protection.<sup>106</sup> However, Rothenberg's argument asks a valid underlying question: is failure to disclose payment or receipt of the work considered misleading? According to the FTC, it is.

As discussed previously, the FTC considers blogger reviews to be "sponsored messages" unlike traditional reviews in the newspaper or on television. Sponsored messages are the equivalent of commercial speech. Blog reviews are sponsored messages because the blogger receives the product from the advertiser in exchange for the review. By not disclosing this relationship, the blogger, according to the FTC, is misleading his or her reader because the relationship is not "inherently obvious," while the relationship between a newspaper reviewer and the advertiser is.<sup>107</sup>

But what are the true differences between a blogger and a newspaper reviewer? Richard Cleland, the FTC Assistant Director, stated that a newspaper reviewer is different from an independent blogger because the newspaper reviewer is an employee of the newspaper.<sup>108</sup> For example, when a newspaper critic reviews a

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Leibowitz, Chairman, Federal Trade Commission (Oct. 15, 2009), *available at* [http://www.iab.net/insights\\_research/public\\_policy/openletter-ftc](http://www.iab.net/insights_research/public_policy/openletter-ftc).

<sup>104</sup> *Id.*

<sup>105</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (adopted Oct. 2009) (to be codified at 16 C.F.R. 255).

<sup>106</sup> *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (false or misleading information is not entitled to First Amendment protection). The plaintiff, Central Hudson, an electric utility company, sued the defendant, Public Service Commission, a government entity, for banning its promotional advertising. *Id.* To determine whether or not the government had the power to ban Central Hudson's promotional advertising, the Court first needed to determine if the speech was misleading or related to unlawful activity. *Id.* Because the speech was commercial in nature, the Court held that the speech was entitled to less protection. *Id.* The Court wrote, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.* at 563. The court held that the speech was not misleading or related to unlawful activity because neither side stipulated that it was. *Id.*

<sup>107</sup> 16 C.F.R. 255.5 (2009).

<sup>108</sup> Edward Champion, *Interview with the FTC's Richard Cleland*, EDWARD CHAMPION'S RELUCTANT HABITS, Oct. 5, 2009, <http://www.edrants.com/interview-with-the-ftcs-richard-cleland/>.

book, according to Cleland, the newspaper itself, as an institution, decides what to do with the book; also, the reader understands that the reviewer is an employee of the newspaper and is paid for her review.<sup>109</sup> However, in the same book review scenario, the FTC believes that because the blogger is an individual and is not an employee of a corporation, the book seemingly serves as compensation.<sup>110</sup> Thus, a blogger review is “sponsored” because unlike a newspaper organization that presumably monitors the reviewer, a blogger is not monitored by a third party. The question one should be asking is not what happens to the book after it is reviewed. Rather, the FTC should be asking itself: does a consumer expect that a blogger actually purchased a book or does it realize that a blogger received the book from the publisher, just like the newspaper reviewer?

#### A. *Celebrity Bloggers vs. Mainstream Bloggers*

The FTC has admitted that it will be hard to patrol the hundreds of thousands of blogs that exist in cyberspace. However, if the FTC is to go after a blogger, is it more likely that they will seek out celebrity bloggers or relatively obscure bloggers? Recent controversy answered this question. The actress, Gwyneth Paltrow, recently raved about her stay at the La Mamounia Hotel in Marrakesh, Morocco on her Goop Lifestyle Blog.<sup>111</sup> It is reputed that Ms. Paltrow, visiting the hotel for its grand re-opening, did not pay to stay at the hotel.<sup>112</sup> Under the 2009 Guides, she would presumably need to make this disclosure on her blog to comply with the 2009 Guides.

However, according to Richard Cleland, Ms. Paltrow may not need to follow the new endorsement guidelines because of her celebrity status. According to an interview with the *DailyFinance*, Cleland stated that Ms. Paltrow would be absolved from liability, because most readers would understand that celebrities of Ms. Paltrow’s stature often receive free gifts, including hotel stays.<sup>113</sup> As a result, the bar is set higher for the layperson blogger than the celebrity blogger.<sup>114</sup>

Cleland’s statements reiterate a hard to believe reality:

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<sup>109</sup> *Id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See* Jeff Bercovici, *Gwyneth Paltrow: Will the FTC Call About Her ‘Ridiculously Lavish’ Vacation?*, DAILY FINANCE, Dec. 17, 2009, <http://www.dailyfinance.com/story/media/gwyneth-paltrow-will-the-ftc-call-about-her-ridiculously-lavis/19285779>.

<sup>112</sup> *See id.*

<sup>113</sup> Jeff Bercovici, *How the FTC’s Endorsement Rules Unfairly Favor Celebrities*, DAILY FINANCE, Jan. 6, 2010, <http://www.dailyfinance.com/story/media/how-the-ftcs-endorsement-rules-unfairly-favor-celebrities/19305508/>.

<sup>114</sup> *See id.*

everyday bloggers stand to lose more for not complying with the 2009 Guides than celebrity bloggers do. Because bloggers have not achieved the stature of the celebrities, their actions and opinions, in the minds of the FTC members, are not easily discernable. As a result, bloggers must make sure to comply with the FTC's guidelines, because it is more likely that the FTC will seek to impose possible financial penalties on them rather than the renowned blogger.

### B. *Effect on Advertisers*

The other targets of the new blogger rules are advertisers. According to Carolyn Goldberg, a former account executive with Euro RSCG HealthCare Public Relations, the practice of sending product to bloggers is typical in the advertising community.<sup>115</sup> Goldberg said, "in order to provide our clients with a comprehensive campaign, the utilization of bloggers to relay a personal message is key."<sup>116</sup> Goldberg stated that while the relationship between blogger and the advertiser varies, typically, money is not exchanged and the stories the blogger tells are genuine and not manufactured by the advertiser.<sup>117</sup> Goldberg fears, like many others in the advertising community, that the "common touch" that the blogger has with their readers will be lost if every material connection is made available and such connection has no bearing on the legitimacy of the blog.<sup>118</sup>

But Goldberg and others in like positions are more concerned with Example Five, because it affects advertisers, bloggers, and advertising agencies.<sup>119</sup> Based on Example Five, if the blogger does make misrepresentations, the advertiser has the greatest liability, because it is liable for the advertising agency's failure to properly instruct the blogger as well as for its own failure

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<sup>115</sup> Interview with Carolyn Goldberg, Account Executive, EURO RSCG Public Relations in N.Y., N.Y. (Oct. 30, 2009).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* To describe the relationship between blogger and advertising service, Example 5 highlights a skin care line and a blogger who discusses non-existent advantages to using the product. To warn the advertiser and the blogger, the 2009 Guides say:

The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger is also subject to liability for misleading or unsubstantiated 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. In order to limit its potential liability, the advertiser should ensure that the advertising service provides training and guidance to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

<sup>16</sup> C.F.R. § 255.1 (2009).

to halt publication of the blog.<sup>120</sup>

A recent example shows that this fear is not without merit. In January 2010, Ann Taylor Loft Stores invited fashion bloggers to come review their new line of products for summer 2010.<sup>121</sup> If the blogger came to the event, they automatically received a gift card, worth up to \$500.00. Thirty-one bloggers attended the event and all wrote a positive review.<sup>122</sup> However, of the thirty-one bloggers who attended the event, only two mentioned the gift cards; thus, the other twenty-nine bloggers violated the policy of disclosure under the Material Connections section.<sup>123</sup> When asked for a comment, Ann Taylor's president, Gary Muto, stated, "We don't incentivize the press. We would never do that."<sup>124</sup>

The FTC did investigate. In an April 20, 2010 letter to Ann Taylor's legal representation, the FTC issued a warning against Ann Taylor.<sup>125</sup> The FTC decided not to take enforcement action because this was the only preview event that Ann Taylor held, some bloggers did disclose their connection, and Ann Taylor adopted a blogger policy.<sup>126</sup> Mary Engle, FTC Associate Director of Advertising Practices, however, issued this letter because the FTC was "concerned that bloggers . . . failed to disclose that they received gifts for posting blog content about that event."<sup>127</sup>

#### CONCLUSION

This Note does not seek to change FTC policies. Rather, it seeks to educate advertisers, traditional endorsers, and bloggers about the potential liabilities that they may face because of the 2009 Guides. Borrowed from the preceding section, Ann Taylor Loft is just one example of an advertiser who did not understand the ramifications of its creative marketing plans.<sup>128</sup> At this time, the economy is in a deep recession and the advertising community is being battered. Advertisers are looking for creative out-of-the box opportunities and those opportunities are readily found

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<sup>120</sup> 16 C.F.R. § 255.1 (2009).

<sup>121</sup> See Jezebel.com, Fashion Bloggers Run Afoul of New FTC Rules?, <http://jezebel.com/5463427/fashion-bloggers-run-afoul-of-new-ftc-rules> (last visited Oct. 29, 2010).

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*; see also 16 C.F.R. § 255.5.

<sup>124</sup> *Id.*

<sup>125</sup> Letter from Mary Engle, Associate Director, Federal Trade Commission, to Kenneth A. Plevan, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, (Apr. 20, 2010), available at <http://www.scribd.com/doc/30705068/FTC-Ann-Taylor>.

<sup>126</sup> See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Jezebel.com, Fashion Bloggers Run Afoul of New FTC Rules?, <http://jezebel.com/5463427/fashion-bloggers-run-afoul-of-new-ftc-rules> (last visited Oct. 29, 2010).

online and by seamlessly incorporating products into television programs.

Hiring celebrities to endorse products will become more difficult because of the financial repercussions and possible litigation that the endorser may personally face. Unlike the common blogger, most celebrities are armed with legal counsel. Thus, their lawyers should try to place the requirements of the 2009 Guides, especially as they pertain to Material Connections, in the talents' contracts. For example, if an A-list talent is hired to sponsor a product, the talent should try to negotiate for an indemnity clause, whereby the advertiser indemnifies the talent from any financial liability.

While an indemnity clause may protect the celebrity, it will not be as effective for the advertiser. In fact, Richard Cleland, the FTC Assistant Director, stated that the FTC will focus its attention primarily on advertisers.<sup>129</sup> But how will advertisers financially protect themselves from liability without the luxury of an indemnity clause?

First, advertisers must educate their endorsers about the 2009 Guides. For example, legal counsel for advertisers should draft a condensed copy of the 2009 Guides for the endorsers and highlight the sections that pertain to the endorser. Because the advertiser most likely has the final word in regards to the creative aspect of the advertisement, advertisers should provide hypothetical examples of the types of endorsements that the celebrity is being paid for. Regardless, advertisers should have the endorser sign a waiver, which states that the endorser has read the 2009 Guides and agrees to abide by its terms.

Recent headlines demonstrate why celebrity endorsers must be aware of the 2009 Guides. For example, in December 2009, the Advertising Standards Authority of Great Britain determined that an advertisement featuring Twiggy, the English model, was misleading.<sup>130</sup> The advertisement, featured in magazines and newspapers across the United Kingdom, was for Olay's Definity eye cream.<sup>131</sup> The advertisement was a close up of Twiggy's face. On the bottom left-hand corner, the advertisement reads "Olay is my secret to brighter looking eyes" and immediately below is Twiggy's signature.<sup>132</sup> The Standards Authority deemed the

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<sup>129</sup> Telephone Interview with Richard Cleland, Bureau of Consumer Protection (Oct. 5, 2009).

<sup>130</sup> See Lucy Cockcroft, *Twiggy Advert, which Airbrushed Wrinkles Out to Sell Eye Cream was 'Misleading'*, DAILY TELEGRAPH, Dec. 16, 2009, <http://www.telegraph.co.uk/news/newstopics/celebritynews/6816376/Twiggy-advert-which-airbrushed-wrinkles-out-to-sell-eye-cream-was-misleading.html>.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

advertisement misleading because of the obvious re-touching employed to Twiggy's face.<sup>133</sup>

As the Twiggy example illustrates, celebrities must be aware of the ramifications of their actions, even if they seemingly have no control. While this was a decision by the courts of the United Kingdom, it is relevant to American celebrities as well. Celebrities and their lawyers must request final approval before any advertisement begins circulation. While it is only speculation, had these advertisements been circulated throughout the United States, Twiggy could have been susceptible to FTC-imposed fines.

Second, advertisers and all employers that use social media must create social networking policies within their companies and for their clients. Education will be the key to understanding the intricacies of the 2009 Guides. Right now, strict compliance is the better route. For example, H.J. Heinz Company has a written policy pertaining to the 2009 Guides.<sup>134</sup> In the policy, the company advises that employees disclose their Material Connections with the company if publishing something on a blog or if they directly speak with a blogger.<sup>135</sup>

While internally managing their employees is a notable step, Heinz and other companies must also distribute materials to their potential endorsers as well. For example, because advertisers will have the upper hand when bargaining with bloggers, the advertiser must explain in detail what the blogger can or cannot say about the product and what she must disclose. In February 2010, Ann Taylor adopted a written policy with respect to bloggers.<sup>136</sup> The policy required that if Ann Taylor offers a gift to a blogger, Ann Taylor must first tell the blogger to disclose the gift.<sup>137</sup> This is one of the reasons why the FTC did not investigate Ann Taylor further.<sup>138</sup> This is a simple and cost-effective tool to comply with the 2009 Guides.<sup>139</sup> While these steps may seem far-reaching, the advertiser must comply with regulations or face intense and costly scrutiny by the FTC.

Bloggers can also be proactive on their own. As this Note stressed, policing cyberspace will be a massive feat for the FTC. Thus, the blogger should try to disclose their connection to the

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<sup>133</sup> *See id.*

<sup>134</sup> *See* Malia Spencer, *Social Media Meets the Employee Handbook*, PORTFOLIO, Jan. 12, 2010, <http://www.portfolio.com/resources/2010/01/12/bayer-heinz-among-firms-with-social-media-policies/>.

<sup>135</sup> *See id.*

<sup>136</sup> *See* Letter from Mary Engle, Associate Director, Federal Trade Commission, to Kenneth A. Plevan, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, (Apr. 20, 2010), *available at* <http://www.scribd.com/doc/30705068/FTC-Ann-Taylor>.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

product in a way that will not detract a reader's attention away from the blog post. For example, Christine Young, operator of a blog entitled, "FromDatestoDiapers.com," includes a standard line of text throughout her blog, which reads in pertinent part, "I am not compensated for reviews of products or services. I always give my honest opinions, findings, beliefs, or experiences on any topics or products."<sup>140</sup> And if Ms. Young is not compensated for her endorsement, she simply includes a line of text, which stipulates that she was not given any compensation but that she just wanted to share a great product with her readers.<sup>141</sup>

As this Note explored, celebrity endorsements made via television and print are no longer the norm. The 2009 Guides have answered very little questions in regards to the endorser's liability, the advertiser's liability, and any third-party liability. The only question it did answer is that the marketplace for endorsements will change, and that the advertising community must comply. But even more troubling, and seemingly less realistic, are the 2009 Guides attempt to regulate the blogosphere. Blogs, which number in the hundreds of thousands, will be impossible to regulate. There is no denying that. But, the blogging world will, like the advertising world, transition into an entirely different place with the 2009 Guides.

The horrific economy has crippled the advertising community. Advertisers, bloggers, and celebrities must be proactive to not become susceptible to the holes that the 2009 Guides created. Stricter guidelines, which carry high monetary penalties, will surely change the nature of the industry. It is the duty of advertisers, endorsers, and related third parties to comply with the 2009 Guides, because it is unlikely that the 2009 Guides will revert back to their former self.

*Jason Goldstein\**

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<sup>140</sup> Kate Kaye, *How Bloggers are Dealing with FTC's Disclosure Rules*, CLICKZ, Dec. 4, 2009, <http://www.clickz.com/3635826>.

<sup>141</sup> *See id.*

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