



## CONSUMER ADVERTISING UPDATE

### The Consumer Products Practice of Sidley Austin LLP

For over four decades, major international clients have been turning to Sidley for comprehensive defense of bet-the-company products liability cases. The firm has tried, handled and/or appealed cases in nearly every state in the union as well as in every federal circuit. Increasingly, products liability problems involve not only civil litigation, but also interaction with state and federal regulatory agencies and criminal authorities. Our lawyers have experience in all phases of the regulatory- and criminal-litigation interface. We have negotiated on behalf of our clients with agencies and prosecutors. We have participated on behalf of our clients at hearings and negotiations with the Consumer Product Safety Commission, the United States Environmental Protection Agency, the United States Food and Drug Administration, the United States Department of Agriculture, the Federal Trade Commission, and other state and federal agencies.

To receive future copies of Consumer Advertising Updates via email, please send your name, company or firm name and email address to  
**Jeremy Peterson at  
jhpeterson@sidley.com**

This **Consumer Advertising Update** has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

*Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000. Prior results do not guarantee a similar outcome.*

### FTC Proposes Significant Revisions to Endorsement and Testimonial Guides

The Federal Trade Commission (“FTC”) is proposing new Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guides”). Some of these proposals entail significant modifications that will seriously affect advertisers who use consumer endorsements or testimonials in any manner, including on the internet. These advertisers will be required not only to alter the content of these materials but also to undertake major steps to upgrade the quality and quantity of the substantiation they assemble before running their advertisements or even placing certain links on their websites.

All advertisers running such advertisements or using such links (e.g., to blogs that could be considered endorsements or testimonials) who wish to have a reasonable degree of confidence that they are in compliance with the new FTC guidance need to undertake an immediate and thorough review of their marketing efforts and claims substantiation practices.

The proposed new Guides in effect would require that all endorsements or testimonials represent the typical experience a consumer will have with the advertised product or service. If an endorser with an atypical experience is silent regarding the typical experience, the FTC will require that other elements of the advertisement unmistakably convey the typical experience.

The new Guides would eliminate the current safe harbor which permits advertisers to use cautionary language, such as “results not typical” (16 C.F.R. 255.2(a)), instead of supplying generally expected performance details. The FTC asserts that consumer research it conducted recently demonstrates that these types of disclaimers are not effective caveats for many consumers.

If the proposed new Guides are adopted, advertisers will be required to substantiate that an endorser’s experience is typical, or “clearly and conspicuously disclose the generally expected performance in the depicted circumstances... and possess and rely on adequate substantiation for that representation.” In some instances, this even will force advertisers to possess “competent and reliable scientific evidence” regarding what constitutes a typical experience; consumer endorsements alone will not satisfy this standard.

To be sure, the new Guides purport to permit the use of “strong” disclaimers if the advertiser possesses consumer perception data proving that the net impression of the advertisement is not misleading. However, any advertiser utilizing this option would confront chilling twin risks. In such circumstances, the FTC retroactively could decide either that it is unconvinced by the proof of the non-misleading nature of the advertisement or that it is not impressed by the “strength” of the disclaimer language.

The new Guides also contain important changes in the requirements for expert and celebrity endorsements. Most notably, the FTC now would require that an expert or celebrity endorser’s financial interest in the promoted product or service (excluding any fee paid solely for appearing in an actual advertisement) be disclosed.

The FTC concedes that many products and services do not readily lend themselves to quantitatively typical results or experiences. Accordingly, products and services “for which consumer reactions are inherently subjective” (such as the taste

of foods or the ambiance of restaurants) may be promoted with endorsements or testimonials that do not specify a typical result or experience.

The new Guides also expressly state that both advertisers and endorsers may be held liable for false, misleading, or unsubstantiated advertising.

The FTC has invited interested parties to submit by January 30, 2009 written comments on the proposed new Guides. Specifically, the Commission is seeking: (1) comment on whether there are product categories for which the proposed provisions regarding “typicality” would not be applicable or appropriate; (2) comment on whether disclosure of expert or celebrity endorsers’ financial interest in an advertised product or service is material; and, (3) information concerning the costs and benefits to advertisers, consumers, competition of the proposed revisions. Because all submitted comments will become part of the public record, advertisers should not include sensitive or proprietary information in submissions to the Commission.

Please contact **Andrew Strenio** at 202.736.8614 (email: [astrenio@sidley.com](mailto:astrenio@sidley.com)) or **Deborah Zerwitz** at 202.736.8216 (email: [dzerwitz@sidley.com](mailto:dzerwitz@sidley.com)) if you or your company might wish to submit comments about the proposed new Guides, or if you have questions about the proposed new Guides or how to comply with them, or about consumer advertising generally.

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.

[www.sidley.com](http://www.sidley.com)

*Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm’s offices other than Chicago, London, Hong Kong, and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.*

SIDLEY AUSTIN LLP  
**SIDLEY**