

## **FTC Rulings That Could Affect Your Business: New Red Flags Rule Compliance Date and New Guidelines for Endorsement and Testimonial Ads**

By [Jacob A. Feldman](#) and [Curtis Capeling](#)

It seems like you cannot read the news lately (well, the tech news, that is) without seeing something about the Federal Trade Commission and what it might be doing. The FTC enforces federal laws that protect consumers, and recent stories link the FTC to possible investigations of [Apple](#), [Google](#) and [Facebook](#) (for the App Store terms of use, AdMob acquisition and privacy policy changes, respectively).

While these recent stories are interesting, they are largely speculative. You should be aware of some actions the FTC has actually taken recently that received less press coverage. In particular, the FTC extended the Red Flags Rule compliance date (again), and released new guidelines for advertisers that cover endorsement and testimonial ads.

### [Red Flags Rule Extension](#)

The FTC's Red Flags Rule requires companies implement a program to catch "red flags" for identity theft (not all companies, but the rule is extremely broad). Enforcement of the Red Flags Rule was originally supposed to begin in early 2009, but the FTC delayed it several times in order to give organizations time to develop and implement their policies (likely because the FTC takes a very broad view of who the rule applies to, surprising many who thought they would not be subject to it).

With enforcement set to begin on June 1, 2010, the FTC again extended the compliance deadline at the last minute until December 31, 2010. While there is always the chance of further enforcement delays, now is a good time to analyze whether or not the Red Flags Rule applies to your organization.

### [Revised Endorsement and Testimonial Guides](#)

Section 5 of the FTC Act makes unfair or deceptive acts or practices unlawful. To provide advertisers with guidance on what the FTC believes are "unfair or deceptive acts or practices," the FTC recently released revisions to its "Guides Concerning the Use of Endorsements and Testimonials in Advertising". The following is a brief summary of [the Guides](#).

The Guides define an "endorsement" as "any advertising message...that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser," and define an "endorser" as the "party whose opinions, beliefs, findings, or experience the [endorsement] appears to reflect." The Guides treat a "testimonial" as a type of endorsement.

In general, the Guides provide that any endorsements in your ads must:

- reflect the "honest opinions, findings, beliefs or experience" of the endorser;
- present opinions in context without rewording "so as to distort [them] in any way";
- use only endorsers that were bona fide users of the endorsed product at the time the endorsement was given; and
- disclose the results that consumers can generally expect if the ads feature a consumer and convey his or her experience with a product or service (meaning you no longer can describe unusual results and just include a disclaimer such as "results not typical").

Widely reported on (and criticized), the Guides include a requirement to disclose "material connections" (e.g. payments or free products) between advertisers and endorsers that consumers would not expect. The Guides treat a blog post written by a blogger who received cash or in-kind payment to review a product or service as an endorsement and require the blogger, as the endorser, to disclose their material connections with the seller of the product or service. In legal speak, "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."

The FTC has stated that this applies to users of Twitter and Facebook. As noted in a [CNET News](#) article, this means that:

"Here's a sample scenario: a celebrity or other prominent figure with loads of friends on Facebook receives free hotel stays from Hotel Chain X in exchange for running Hotel Chain X ads on his or her blog. If that person then signs up as a Facebook fan of Hotel Chain X--which, remember, could mean that the person's name can show up for his or her Facebook friends alongside Hotel Chain X display ads on the social network--he or she could be held liable by the FTC.

"It would be the same thing if you were going to pay the celebrity a thousand dollars to go register as a fan," [an FTC spokesman] said. "In that case, there wouldn't be any question about it."

Not only does this mean that bloggers must be careful to disclose any free goods or services they receive, but the FTC also expects companies giving away free goods or services to "have procedures in place to try to monitor...postings for compliance." While it is uncertain exactly how the FTC intends to enforce the Guides (given the sheer numbers of social networking users that could potentially run afoul of them and the limited resources of the FTC), it is better to be safe than sorry. If you run advertisements, you should familiarize yourself with the Guides. For more information on the Red Flags Rule or other FTC compliance issues, please contact [Jacob Feldman](#) (615.251.1085) or [Curtis Capeling](#) (615.251.1053).