



# Advertising & Marketing

## Mobile Marketing

Technological advancements have created an increasingly wireless world, especially among the core consumer advertising market. Today, over 64.1 million users access the mobile web, and trends suggest consumers will soon access the Internet more often from mobile devices than from personal computers. Thus, to reach those mobile consumers, marketers and advertisers will spend substantially more for mobile marketing-focused campaigns in 2010. The increased funding on advertising and marketing tied directly to mobile marketing will inevitably sprout an assortment of new legal issues and consumer protection challenges that advertisers and marketers must meet in 2010.

Moreover, advertisers are increasingly seeking to send location-based or other behavioral advertising to consumers through the use of Radio Frequency Identification devices (RFIDs) or other tracking mechanisms connected to mobile phones. Legal challenges will come from consumer advocacy groups and increasingly stringent laws, federal and state governments and agencies concerned about mobile marketers' use, storage and protection of personally identifiable or otherwise sensitive consumer information.

Locke Lord's Advertising & Marketing Group is knowledgeable about and assists clients with mobile marketing and privacy issues. We are especially well positioned to assist mobile marketers and advertisers with identifying and resolving legal issues as they relate to the increasing expansion of mobile marketing in 2010.

## Advertising with Customer Testimonials and Celebrity Endorsements

If you use customer testimonials or celebrity endorsements in your advertising, beware, the rules have changed. For the first time since 1980, the Federal Trade Commission (FTC) has updated its "Guides Concerning the Use of Endorsements and Testimonials in Advertising." The new Guides went into effect on December 1, 2009.

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In the past, testimonials or endorsements could feature consumers or celebrities making claims that were not typical of results generally expected in a given situation as long as it was accompanied by a properly worded and formatted "**RESULTS NOT TYPICAL**" disclosure. The new Guides remove that safe harbor. Claims in testimonials now must pass the same reasonable prior substantiation standards as a regular direct or indirect performance claim. In fact, the FTC has taken the obligation for substantiation one step further. In a claim made in a testimonial or endorsement, the company must have reasonable prior substantiation that the performance claimed matches the performance that consumers can generally expect in the depicted circumstances.

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**Advertising with Customer Testimonials and Celebrity Endorsements** (cont'd.)
 

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Before the Guides were adopted, when commentators pointed out that about the only way to determine what consumers can generally expect from

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a product is to perform expensive studies, the FTC basically agreed. Advertisers will not be able to use a standard form disclosure to sidestep the need for substantiation. Each disclaimer will probably need to be tailored to refer to the specific results a consumer generally obtains under the same conditions and circumstances referred to in the testimonial.

The new Guides also clarify a number of other key points. Unlike the previous version, the new Guides are clear that both advertisers and endorsers may be liable for false or misleading claims. An endorser should confirm that the company has in its possession evidence to substantiate the claims that the endorser is making. Also, advertisers must disclose material connections, even when making endorsements in non-traditional ads, such as in blogs, social media, and talk shows. The Guides make it clear that they are intended to apply to all advertising.

We can help clients in compliance with the new FTC Guides, and we work with advertisers to review existing advertising and collateral marketing pieces, revise advertising disclaimers, and guide research to determine what results consumers generally obtain with a product or service.

### Advertising in Blogs and Social Media

Millions participate in social media like Facebook, Twitter and blogs. As users continue to join, companies find new ways to market and sell products and services, conduct public relations and provide customer service through social media. Concurrently, users, based on their experience, have begun touting—or tarnishing—a product, service or company's reputation. As social media becomes more prevalent and new forms emerge, companies must continually review policies and monitor company and third-party activities related to social media.

For example, a Facebook user's status update about a product she loved—or hated—can become viral quickly. Companies should plan potential responses to protect its image and enforce any legal rights. While taking a tough approach might seem beneficial, sometimes a softer stance is preferred since many users are unaware and surprised their actions have potential legal implications. These situations are bound to happen, and companies should design policies accounting for use of a company's product, brands, service or reputation in social media.

Companies must also consider their actions related to social media. The spark in social media use for promoting a company's products or services has lit a fire under consumer advocacy groups to ensure companies do not extinguish civil rights, like free speech and privacy, or engage in unfair/deceptive trade practices. In response, federal agencies like the Federal Trade Commission (FTC), legislatures and courts have tightened restrictions on social media marketing. For example, the FTC recently revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising to provide information about using social media as advertisements. All social media marketing campaigns should be reviewed to ensure compliance with new laws and regulations.

Balancing the promotion and protection of products and services in social media while complying with regulations, laws and industry standards protecting consumers can seem daunting, but it is much easier with trusted advisors and counselors.

**...tightened restrictions  
on social marketing**

### Green Deceptive Marketing: More Risk in 2010

Deceptive and misleading environmental marketing claims are expected to rise in 2010. With the political climate favoring green products and alternative fuels, consumers and industry will increase their purchase of “green,” or environmentally-friendly products. The courts and government regulators will be ever more vigilant and active in 2010 in enforcing the laws against deceptive or misleading green advertising and marketing claims.



Advertisers will need to make a careful review of new packaging, Internet advertising and traditional advertising campaigns to avoid making overstated or unsubstantiated environmental benefit claims of a product, package, service or technology.

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In 2010, we expect the Federal Trade Commission to issue new Guides for Environmental Marketing. The new Guides will likely apply to all forms of marketing for products and services: advertisements, labels, package inserts, promotional materials, words, symbols, logos, product brand names, and marketing through digital or electronic media, such as the Internet or email, as well as blogs and social media such as Facebook and Twitter.

The new FTC Guides will apply to any green claims, express or implied, to environmental benefits. Examples of green claims requiring adequate prior scientific evidence of substantiation are: “Reduces Greenhouses Gases by One-Half,” “Less Pollution than Its Class,” “Uses Less Electricity,” and “90% Recycled Content.”

Industries most likely to be affected by court and governmental scrutiny for environmental claims are energy, chemical, automotive, housing, as well as power, packaging, waste management and pesticide.

Manage this heightened advertising and marketing risk by educating your advertising and marketing staffs and advertising agencies to avoid overstated or unsubstantiated claims to environmental benefit. Also, develop policies and standards for advertising or marketing pieces that involve claims to the environmental benefits of a product, packaging, service or technology. Finally, you need to develop standards for meeting the legal requirements of scientific evidence that provides adequate substantiation of environmental claims.

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