

ADVERTISING, MARKETING & PROMOTIONS

>> ALERT

FTC PUBLISHES FINAL GUIDES GOVERNING ENDORSEMENTS AND TESTIMONIALS

On October 5th, the Federal Trade Commission (FTC) announced that it has approved final revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides). The revised Guides represent the most sweeping changes in almost thirty years to testimonial advertising and will likely affect the industry's use of testimonials and endorsements.

TYPICALITY DISCLAIMERS

Under the revised Guides, advertisements that feature a consumer and convey his/her experience with a product or service as typical, when that is not the case, will be required to clearly disclose the results that consumers can generally expect to receive from the advertised product or service (e.g., "Generally expected results: 6 lbs"). Accordingly, advertisers will no longer be able to rely upon general typicality disclaimers (i.e., "Results not typical" or "Results may vary") in consumer testimonials if an advertiser does not have substantiation that the endorser's experience is representative of what consumers can generally expect to achieve with the advertised product or service.*

BLOGS AND OTHER FORMS OF CONSUMER-GENERATED MEDIA

The FTC has long held that "material connections" (e.g., payments or free products that the consumer would not expect) between advertisers and endorsers must be disclosed. Whether messages conveyed by bloggers or other "word of mouth" marketers are "endorsements" will be decided by the FTC on a case-by-case basis. The fundamental question is whether, when viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statements can be considered "sponsored" by the advertiser and, therefore, an "advertising message."

While the FTC acknowledged the facts and circumstances that will determine the answer are extremely varied, they would include:

- >> whether the speaker is compensated by the advertiser or its agency
- >> whether the product or service in question was provided for free by the advertiser
- >> the term of any agreement

THE BOTTOM LINE

Advertisers should be proactive in their response to the revised Guides by establishing policies and procedures that respond to the FTC's changes, particularly with respect to new media, such as blogs and other consumer-generated media.

- >> the length of relationship
- >> the previous receipt of products or services
- >> the value of the items and services received.

For example, a consumer who purchases a product with his or her own money and praises it on a personal blog or an electronic message board will not be providing an endorsement. By contrast, postings by a blogger who is paid to speak about an advertiser's product will be covered by the Guides, regardless of whether the blogger is paid directly by the

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*In a footnote, the FTC stated that it could not rule out the possibility that a strong disclaimer of typicality could be effective in the context of the advertisement. However, it would be incumbent on the advertiser to possess reliable, empirical testing demonstrating that the net impression of the advertisement with the disclaimer is non-deceptive.

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advertiser itself or by a third party on behalf of the advertiser.

While these two examples likely represent the far ends of the spectrum, the FTC provided another example where the issue is more ambiguous. According to the FTC, if a blogger receives merchandise from an advertiser with a request to review it, but is not paid any compensation other than the value of the product itself, whether or not any positive statement the blogger posts would be deemed an “endorsement” would depend on, among other things, the value of the product and whether the blogger routinely receives such requests.

Before taking action against an advertiser for a blogger’s failure to disclose a “material connection,” the FTC acknowledged that it would consider the advertiser’s efforts to advise the blogger of his/her responsibility to disclose the relationship and to monitor the blogger’s online behavior.

SOCIAL MEDIA PARTICIPATION

Under the revised Guides, an employee who promotes his/her employer’s products or services on an online message board should clearly and conspicuously disclose his/her employment relationship to readers of the message board because knowledge

of the employee’s employment would likely affect the weight or credibility of the employee’s endorsement.

To the extent an advertiser has not done so already, the FTC is encouraging advertisers to institute policies and procedures concerning employee “social media participation,” as the FTC would consider the existence of such policies when determining whether to take adverse action against an employer for the actions of its employee.

CELEBRITY ENDORSEMENTS

The revised Guides make clear that both advertisers and celebrity endorsers may be held liable for false and unsubstantiated claims made in an endorsement.

The revised Guides would also require that a celebrity touting a product or service outside of traditional advertising, such as in talk shows, interviews, or social media, must disclose his/her relationship with the advertiser if such relationship is not readily apparent to the audience. The FTC provided the example of a well-known tennis player who appears on a television talk show and touts the success of her recent laser vision correction surgery at a clinic identified by name but does not disclose that she has a contractual relationship with

the clinic. Absent such a disclosure, this endorsement would likely be considered deceptive and could subject the advertiser and celebrity to liability.

SPONSORSHIP OF CLINICAL TRIALS

If an advertisement refers to the findings of a research organization that conducted research sponsored by the advertiser, the advertiser’s relationship with the research organization should be disclosed in the advertisement.

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