

FTC Updates Guidance on Endorsements and Testimonials in Advertising

by Michael P. Heuga

On October 5, 2009, the Federal Trade Commission announced that it finalized the update to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”), which have been in effect in their current form since 1980.¹ The evolving practice of companies marketing their goods and services through bloggers and other “new media” received special attention.

The FTC’s changes now make explicit that the principles in the Guides apply to a company’s marketing of its products or services through third parties using “new media,” such as blogs and social networks, and that both advertisers and their “sponsored” endorsers have responsibility for the content of such endorsements as well as for disclosure of commercial links that consumers would not expect to exist between the advertiser and the endorser (such as payments or free products in exchange for a blog post containing a positive product review). The update also includes a couple of changes to the old rules, including the elimination of the safe harbor originally authorized under the 1980 Guides for ads with unrepresentative consumer testimonials—in most such ads now, including a disclaimer such as “results not typical” or “results may vary” will no longer be sufficient.

Background

The FTC has significant influence in establishing the “rules of the road” for commercial advertising, and in this role has issued various instructive guidelines and policy statements over the years. The Guides have been a critical component of these advertising rules, given the frequency with which consumer testimonials and expert and celebrity endorsements are used by advertisers in their marketing efforts.

The Guides describe the requirements for any advertising that includes a statement by a third party which “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.”² The Guides apply to advertising published directly by a company which restates a third-

¹ See 16 C.F.R. Part 255. The revised Guides formally take effect on December 1, 2009.

² 16 C.F.R. § 255.0(b).

party endorsement of that company's products or services, as well as to commercial speech concerning a company's products or services published directly by the third party who is "sponsored" by the company.

Third-Party Blogging and Other "New Media" Marketing

When the Guides were originally issued, most endorsements were disseminated by advertisers through traditional media such as radio and television commercials, billboards, and print ads, and not by the endorsers themselves. But in the age of the Internet, companies now have many opportunities also to have their products and services marketed on the company's behalf by third parties through blogs and other new media techniques. As a result, it is now much more common than in the past for endorsements to be published directly by endorsers. The FTC was partially driven to update the Guides in order to clarify that the old rules continue to apply in these evolving contexts.

Specifically, the updated Guides make the following clarifications in this area:

- A blogger with a "material connection" to an advertiser—i.e., a commercial link that consumers would not expect to exist between the advertiser and the blogger—is subject to the Guides.³
- Any claim made by such blogger will be attributable to the advertiser, and must be substantiated. Just as a company may not make false or misleading statements about its products or services directly, the company may not make such statements indirectly through a "sponsored" blogger.
- Any material connection between the advertiser and the blogger must be "clearly and conspicuously" disclosed, whether that connection is a payment, free samples of the advertiser's products or services, or some other benefit conferred on the blogger.
- Audience expectation is the key for determining whether the connection between the company and the blogger is "material." That is, a blog by the president of a company discussing the company's products would not be subject to these requirements because most people would expect that the company had given the president material support for the blog. Conversely, a blog by a college student containing reviews of video games would involve a "material connection" necessitating disclosure by the student if any of the video game manufacturers whose products he reviewed had given him free samples of their games or otherwise compensated him for his reviews, since readers of his blog are unlikely to expect that he received such benefits.
- The advertiser has an affirmative duty to advise the blogger, at the time the advertiser provides the free sample or other benefit, that the blogger should disclose that connection in positive reviews of the advertiser's products or services.
- The advertiser also has a duty to have procedures in place to try to monitor the blogger's postings for compliance with the disclosure requirement, and to take steps to halt any deceptive representations made by the blogger.
- Finally, both the advertiser and the blogger are subject to liability if the blogger fails to make the necessary disclosure or disseminates deceptive commercial statements. However, the FTC notes in the

³ Although we summarize these clarifications as applied to a "sponsored" blogger, the principles apply as well to any "sponsored" endorser who publishes an endorsement herself.

commentary to the Guides that as with traditional media, its law enforcement activities will continue to focus on advertisers, not their endorsers.

Consumer Testimonials and Sponsored Research—The FTC Changes Course

Consumer Testimonials. Under the 1980 Guides, advertising that contained a consumer testimonial which did not reflect what consumers could generally expect (e.g., “I used the product for four weeks and lost 50 pounds!”) could correct any misimpression with a “results not typical” type of disclaimer. Although many advertisers that rely on consumer testimonials have grown accustomed to this safe harbor over the years, it is no longer available under the revised Guides. Instead, when utilizing a testimonial that is not representative of what consumers can expect to experience, the advertiser must also clearly and conspicuously disclose the “generally expected performance in the depicted circumstances” for the product.⁴ For example, in an ad for a home insulation product with a testimonial touting that the customer saved \$100 per month on his utility bills, if most customers in fact would save one-third of that amount, the ad would need to include a clear and conspicuous disclosure along the lines of “the average homeowner saves \$33 per month.”

Sponsored Research. Under the 1980 Guides, advertising that referred to the findings of an outside research organization which conducted research sponsored by the advertiser was not required to disclose that connection. The FTC has changed its position on this scenario as well, in light of its conclusion that the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the research. The revised Guides now require that an advertiser’s payment of a research organization’s expenses be disclosed in any subsequent advertising touting the findings of such research.⁵

A Few Notes About Celebrity Endorsements

The 1980 Guides did not explicitly state that endorsers, as well as advertisers, could be liable for statements they make in an endorsement. As noted above, the revised Guides now provide that endorsers may also be liable for such statements.⁶ Outside of the evolving new media marketing contexts, this clarification is most relevant to celebrities hired simply to “read the script.” Although it may cause some anxiety for celebrities who do endorsements, the new language was intended simply to capture principles that the FTC’s law enforcement activities over the years had already established.

That is, the celebrity should ensure in advance that she does not say something that does not reflect her honest opinions, findings, beliefs, or experiences. Although the celebrity is not expected to become an expert on the product or industry being endorsed, the FTC notes in its commentary to the revised Guides that the celebrity (or her legal representative) may have an obligation to make “reasonable inquiries” of the advertiser that there is an adequate basis for assertions that the script asks the celebrity to make. This obligation applies in particular when the celebrity should realize that the claim she is being asked to make is “exceptional” (e.g., “this product causes you to lose 10 pounds in 7 days!”). Moreover, the revised Guides also clarify that an endorsement by a celebrity in a traditional ad, where viewers would expect

⁴ See 16 C.F.R. § 255.2(b). The FTC did leave open the possibility that “a strong disclaimer of typicality could be effective in the context of a particular advertisement.” But the FTC strongly suggested that any advertiser electing this approach possess “reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive.” See *id.*, footnote 1. This is a burdensome undertaking.

⁵ See 16 C.F.R. § 255.5, Example 1.

⁶ See 16 C.F.R. § 255.1(d).

that the celebrity is being paid, continues not to require disclosure of such payment, but when a celebrity endorses a company's product outside of the traditional media context (such as on a talk show or through social media), just like in the context of marketing through third-party blogs and other new media discussed above, the FTC's position is that the celebrity's connection to the advertiser would likely not be expected by the audience and thus should be disclosed.⁷

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author of this alert.

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⁷ See 16 C.F.R. § 255.5, Example 3.

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