
Assessing the Impact on Radio and Television Stations of the Federal Trade Commission's Recently Revised Guidance on Endorsements and Testimonials

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On December 1, 2009, the FTC's newly-revised Guides on Endorsements and Testimonials will become effective. Broadcasters, including their on-air talent, need to know when a claim is an endorsement/testimonial, what on-air disclosures may be required, and what their obligations are to ensure that claims are truthful and not misleading. These endorsement/testimonial-related issues can arise in a variety of contexts, including when station personnel voice commercials, prepare copy for advertisers, engage in banter regarding a product or service, serve as a spokesperson for an advertiser, or provide content to their station websites.

Background

The Federal Trade Commission ("FTC") enforces certain federal laws promoting competition, including federal consumer protection laws prohibiting unfair and deceptive business practices. In that capacity, the FTC routinely investigates advertising to ensure that it is truthful and not deceptive. The FTC also publishes Guides which provide insight into the FTC's enforcement approach with respect to specific advertising practices. Broadcasters as a group have not traditionally encountered extensive direct regulation by the FTC because the FTC has most often focused on the advertiser, not the media disseminating the advertising message. However, broadcasters are subject to the FTC's jurisdiction, particularly when they or their employees are involved in the production and/or dissemination of endorsements for products or services. We previously provided our clients with an analysis of the FTC's recent revisions to its Guides on Endorsements and Testimonials.¹ This Advisory focuses more specifically on broadcasters' airing

¹ See Client Alert, *FTC Updates Guidance on Endorsements and Testimonials in Advertising* (October 15, 2009).

of endorsement material produced by third parties, endorsement material produced by the station, and endorsements featuring the station's own employees. For purposes of this Advisory, the terms "Endorsements" and "Testimonials" are treated as synonymous, since the FTC does not draw a distinction between them.

Endorsements and testimonials, especially by those well-known in a community, are recognized as having the potential to influence consumer perceptions of advertised products and services. The FTC's research concludes that the fact an endorser has received compensation for his or her statements or has a material relationship with the advertiser can affect the value consumers place on such an endorsement. Given the potential persuasiveness of endorsements, the FTC's regulations seek to assure that (1) the public is aware that the speaker is being compensated for the messages s/he is conveying about a product or service, and (2) the endorsement accurately reflects the characteristics of the product or service, including the generally expected result that the consumer will experience when using the product or service in the manner depicted. To achieve these goals, the FTC's Guides concerning endorsements assign specific disclosure requirements, as well as liability for the content of endorsements, to both the advertiser and the endorser. Broadcasters must be aware that if they receive compensation to directly convey positive messages about an advertiser's product or service, depending on the context, they may be considered endorsers and be liable under the FTC's regulations.²

The FTC's primary goal in revising the Guides, which were adopted in 1980, was to include examples that demonstrate how the FTC's established policies and practices apply to new media, such as blogs and other social media, which are increasingly influencing consumers' purchasing decisions. Nevertheless, many in the advertising community feel that the revisions go further, effectively establishing new standards of conduct under the existing law. In addition, many in the online community feel that the Guides unfairly establish standards for new media such as "bloggers" that are different from those for traditional media such as broadcasters. In stating their case, they draw comparisons between their activities and the practices of traditional media, noting that the Guides suggest a possibly higher standard for bloggers. The Federal Communications Commission ("FCC") has its own regulations regarding sponsorship identification and has raised concerns as to whether its regulations should be tightened to assure that the public is made aware when parties pay for broadcast content in an effort to influence the public. Thus, from both an FCC and FTC perspective, broadcasters are well advised to be proactive in complying with these governmental mandates.

What Constitutes An Endorsement

The FTC defines an endorsement as:

Any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) 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.³

² The FCC has long enforced its sponsorship identification rule requiring that whenever consideration is given in exchange for the broadcast of material, an over-the-air announcement be made stating that fact and identifying the sponsor. See Advisory, *Paying the Piper: Avoiding Payola/Plugola Violations and Minimizing Liability* (August 2009). The FCC has also been actively examining whether its sponsorship identification rule adequately achieves this public notification goal, particularly with regard to program material provided by third parties. Broadcasters must therefore be mindful of the changing state of the law at both the FCC and FTC when making an endorsement.

³ 16 C.F.R. § 255.0(b) 2009.

This definition is little changed from the one that has been in place since 1980. The revision to the Guides makes clear that “the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser.”⁴ This focus on the audience’s perception is important for broadcasters because advertisers increasingly seek to integrate their messages more seamlessly into programming, rather than relying on pre-produced “spot” commercials. Some of these efforts may lead the public to conclude that a message delivered by an identifiable station employee is a statement of the employee’s true experience and beliefs about a product, when he or she may simply be reading advertising copy verbatim.

Obligations When Making An Endorsement

Where an advertising message gives the impression that it reflects what the station employee personally believes or has experienced, rather than simply what the advertiser believes or has experienced, the endorser, the station employing the endorser, and the advertiser have an obligation to ensure that the public is aware of their relationship. They also have a duty to ensure that the message conveyed is accurate and that the claims made by the endorser can be substantiated.

Disclosure

Whenever an endorsement is made in a context in which the public will not likely assume that consideration has been paid for the endorsement, a disclosure must be made to advise the public of that fact. The FTC recognizes that in certain circumstances, some persons are so famous (a “celebrity”) that the public would naturally assume in traditional advertising contexts that the celebrity is being paid to give the endorsement and therefore no disclosure of that fact is necessary. However, if a celebrity’s endorsement occurs outside the context of a traditional advertisement, disclosure may very well be required. Note that in either case, an endorsement has occurred. The only difference is whether the endorser’s connection with the advertiser needs to be specifically disclosed.

To illustrate this situation, the FTC Guides provide the example of a celebrity who, during an interview on a television talk show program, discusses a recent surgical experience s/he has undergone. She makes positive statements about the experience and mentions the doctor/facility by name. The FTC states that the audience would likely assume that the celebrity received compensation for those statements if they were delivered in the context of a traditional commercial spot. However, because the statements occurred in the context of a talk show interview, a disclosure must be made.

The “celebrity” scenario poses a potential dilemma for stations. If their on-air personalities are viewed as “celebrities,” then no separate disclosure of their relationship to an advertiser need be made when they endorse an advertiser’s product or service on-air. However, as seen below, as an endorser, the on-air personality and the station employer have an obligation to make reasonable inquiry into the accuracy of the content of the endorsement and be satisfied that the claims are substantiated.

Keep in mind that the FCC’s sponsorship identification rule already requires that disclosure be made when material being broadcast has been paid for or sponsored unless the sponsored nature of the content is obvious. The FCC’s rule, however, does not extend to online or social media activities of on-air personalities. Here, the FTC believes that the likelihood that the public will not be aware of a relationship between a celebrity and an advertiser is greater and therefore requires disclosure. Thus, as broadcasters work with advertisers to develop innovative multi-platform advertising campaigns, they should consider whether the

⁴ 74 Fed. Reg. 53124, 53126 (October 15, 2009).

listening/viewing audience will be able to recognize when the station or personality has received payment or something of value to convey the message, and craft appropriate disclosures.

Accuracy

The advertiser is always liable for the accuracy of the information conveyed in its messages. Where a speaker endorses a product or service, s/he is also liable for the accuracy of the message conveyed.

In the context of an endorsement, the requirement of accuracy applies at two levels. First, the message must accurately convey the endorser's experience with a product or service. An endorser may not claim to use a product that s/he does not use, or to have achieved a result s/he has not achieved. For example, an endorser may not say that s/he lost a certain amount of weight using a product if s/he did not use the product or lose the stated amount of weight.

Second, the message must only convey information that can be substantiated. An advertiser may not make an advertising claim that it cannot support, and the advertiser will be held liable for inaccurate or misleading claims it makes. Importantly for broadcasters, a station employee endorser, and thus the station, will also be held liable for inaccurate or misleading claims that s/he makes on the advertiser's behalf. Thus, if the endorser or the station knows that a claim is incorrect, the employee may not repeat that claim in advertising. In the example the FTC gives, a celebrity is present during the taping of an infomercial for a roasting bag which is represented to reduce the time to cook a whole chicken to 30 minutes. The celebrity sees that the chickens used in the infomercial do not cook in the advertised time. The celebrity may not simply read the script provided and repeat the claim that s/he now knows to be inaccurate.

With respect to product representations that are not readily observable by the endorser, such as the savings that can be expected by switching to a particular brand of car insurance, the endorser must make "reasonable inquiries" of the advertiser as to the basis of the claim. If the endorser could be considered an "expert" with regard to the product being endorsed, the accuracy element requires that the person in fact be an expert with respect to that product and that the expert make reasonable inquiries into the claims being made in the advertisement. While the FTC does not provide guidance as to what it would deem a "reasonable" inquiry, it does note that such an endorsement cannot rely solely on letters from satisfied customers.

A very important aspect of the substantiation element contained in the revised Guides is that any claims the endorser makes about his or her experience with a product must either reflect the typical experience a consumer would expect to have using the product, or include a disclosure of what a typical consumer's experience would be. For example, if an on-air personality is paid to use a particular diet product and loses an atypical amount of weight using the product, s/he must include information about the amount of weight loss that would be typical when s/he is describing the experience of using the product. Similarly, if the personality received personal exercise training or started an extreme exercise regime at the same time as s/he began using the diet product, that "unique circumstances" fact must also be disclosed. The prior practice of simply including the disclaimer "Results Not Typical" is no longer acceptable as a safe harbor.

Advertiser's Responsibilities

The Guides recognize that advertisers do not have full control over the statements of endorsers. Nevertheless, because the advertiser chooses to use this method of advertising, the FTC assigns responsibility to the advertiser, as well as to the endorser. The Guides state that advertisers should take steps to maintain control over the advertising message by providing the endorser with accurate and substantiated infor-

mation to say about the product, monitor the endorser's statements, and correct any erroneous messages as soon as possible.

Illustrative Examples for the Broadcaster

Spots

Example 1: A radio on-air personality states that a music countdown will resume after a commercial break, then plays a pre-recorded advertising message provided by the advertiser and voiced by someone other than the on-air personality. In this instance, it is clear that the statements made during the commercial break are those of the advertiser, not the on-air personality or station ownership/management. As a result, there is no endorsement by the station and no genuine potential for station liability, unless the station believes or has reason to know that the claims made are false or misleading.

Example 2: A radio on-air personality states that a music countdown will resume after a commercial break, then "live-reads" a scripted advertising message provided by the advertiser which makes positive claims about the gasoline mileage and performance of a particular automobile available at the advertiser's dealership. The announcer does not state or imply that s/he has personally seen or driven the car or that the views/opinions are his/hers. Again, this is during a commercial break, and the on-air personality will likely be perceived as only speaking in the place of the advertiser, not on the basis of his/her own beliefs and experiences. As a result, there is no endorsement and no genuine potential for station liability unless the station believes or has reason to know that the claims made are false or misleading.

Example 3: A radio on-air personality states that a music countdown will resume after a commercial break, then "live-reads" in a folksy way a scripted advertising message provided by the advertiser regarding the speed of relief from coughing provided by the advertiser's cough drop medication. In this case, given that the on-air personality uses his or her voice and it would not be unusual that the person would use the advertised product, there is an increased possibility that the audience would perceive such statements to reflect the on-air personality's own opinion or experience with the product, rather than the assertion of the advertiser. This example demonstrates the care that should be taken in drafting the content of advertising copy, as well as in carefully circumscribing "ad lib" comments by on-air personalities, to avoid the perception of an endorsement unless that is what is intended. In this particular example, while it may indeed be an endorsement, the fact that the announcement is occurring during an identified commercial break and the on-air personality is a local "celebrity" would support the position that specific disclosure of the advertiser relationship is unnecessary. However, keep in mind if treated as an endorsement, the endorser would have to undertake reasonable inquiry to verify any factual statements made.

Example 4: A radio on-air personality states that a music countdown will resume after a commercial break, then "live-reads" a scripted advertising message that the station's sales staff has drafted. Assuming the copy makes clear that the on-air personality is speaking in the place of the advertiser, not on the basis of his/her own beliefs and experiences, there is no endorsement. Note that this result is no different from the results in Examples 2 and 3, each of which depend on the exact language used in the spot. However, because the station staff has drafted the advertising copy, the station may have increased exposure to liability for false and misleading advertising. Accordingly, even though the on-air personality is not providing his/her endorsement, stations involved in drafting copy when producing a spot need to satisfy themselves that the claims made have been substantiated.

Editorial Content

Example 5: A station reporter conducts a test of whether certain brand-name compact fluorescent light bulbs provide the energy and cost savings advertised, and thereafter reports on the test on-air, advising the audience that the light bulbs are an excellent energy and cost saving product.

This example is an “exception” to the normal definition of an endorsement. Where employees of traditional media, in the course of their assigned work, conduct and report such product reviews, the FTC does not consider them to be endorsing a product. The FTC also recognizes that with regard to traditional media, advertisers will routinely provide free or reduced price books and movies to reviewers, or sample products to consumer reporters. Accordingly, where the product used in the report was provided for free, and it is customary for the reporter to receive such free products without any particular obligation to review them or make positive public statements about them, there is no endorsement. The reporter does not have to disclose whether the product tested was purchased or received free of charge, and does not have to determine whether the experience with the product was typical. In this context, however, reporters frequently disclose whether they purchased the products themselves or received the products for free to help establish their independence and objectivity with their audience. Note that a blogger in the same circumstances would have to disclose the receipt of the free products or other relationship to the advertiser. This is one of the reasons bloggers assert that they are subject to a different standard than traditional media under the new Guides.

Note that even in traditional media, if a station receives compensation to air the reporter’s story and to portray the product in a positive light, then a disclosure is required and the reporter/station will be accountable for the accuracy of the material aired.

Banter

Example 6: A local eye surgeon performs, free of charge or at a discount, a vision enhancement procedure on a station’s play-by-play sports announcer on the condition that the announcer make positive on-air mentions of the improvement in his/her eyesight. The doctor also purchases a number of traditional 30-second commercials from the station. During a lull in a game caused by an on-field dispute between a team coach and referees regarding a penalty call, the on-air announcer makes animated statements regarding the penalty and attributes his/her confidence in those conclusions to the vision enhancement procedure performed by the eye surgeon.

The announcer’s statements about the vision enhancement procedure are an endorsement. Especially since they occur outside a typical advertising spot, the play-by-play announcer must disclose to the public that s/he has received the free/discounted vision enhancement procedure whenever s/he makes positive statements about the experience, doctor, or improvement in vision. In addition, the announcer is liable for the content of the endorsement. The endorsement must (a) reflect the announcer’s true experience, (b) be accurate and substantiated, and (c) if the announcer’s experience is not typical, provide information about the results a consumer could reasonably expect.

The doctor/advertiser must provide the announcer with correct information about the effectiveness of the procedure to convey to the public, and is required to monitor the announcer’s statements to be sure that s/he in fact conveys both the disclosure and accurate information. Because the station’s employee is making the endorsement in his/her employee capacity, the station has an independent obligation to ensure proper disclosure and accuracy by the announcer.

Remote Broadcasts

Example 7: A station enters an agreement with a local restaurant owner and station advertiser to broadcast remotely from the grand opening of a new location of the restaurant. During the remote broadcast, the on-air personality repeatedly states that s/he is broadcasting from the new restaurant location and urges listeners to come to the restaurant to receive a free appetizer at the grand opening. The on-air personality states that s/he believes that the free appetizer is the best appetizer s/he has ever tasted. The on-air personality also interviews diners as they leave who state that the free appetizers are large and delicious. One of the diners leaving is the station's dining out/entertainment reporter who states that the restaurant has found a way to make food that is both delicious and under 500 calories per serving.

In this case, it is reasonably likely that the public would recognize that the restaurant and station have a material relationship and disclosure of that fact would then not be necessary. The on-air personality's statements regarding the free appetizer are an endorsement and must accurately reflect that s/he ate and liked the product, although the statement that it is "the best" is likely to be seen as mere puffery. The interviews with other diners leaving the restaurant are also puffery. The station's dining out/entertainment reporter, however, is likely to be regarded as an expert in the area of restaurant food. Therefore, any statements of fact made by the reporter, such as the restaurant's use of under 500 calories per serving portions would require the reporter to confirm that those under 500 calories per serving portions are indeed under 500 calories and that such portions are the rule, not the exception.

Social Media

Example 8: The station encourages its on-air personalities to maintain pages on social media platforms such as Facebook and to send messages via Twitter to increase their popularity and on-air following. A station personality sends a "tweet" to his/her Twitter followers stating that s/he has just eaten a delicious meal at a certain restaurant.

The social media context is one of the main focuses of the FTC's revision to its Guides because the FTC is concerned that the public will not be able to recognize when information distributed in this manner is in fact an advertising message. Accordingly, if the on-air personality or station has agreed to make such positive statements in exchange for consideration, then a disclosure regarding that relationship must be made. Again, the personality's statement must fairly reflect his or her experience, i.e., that the food was enjoyable. Any other factual claims, such as the calorie content mentioned in Example 7 above, must also be substantiated. The advertiser must also monitor the mentions that are made regarding the restaurant to ensure that the disclosure and accuracy requirements are met. Note that in the context of a social medium that significantly limits the number of characters each message may contain, it may be difficult to provide the requisite disclosure. This should be taken into account before engaging in such a campaign.

Example 9: The station introduces a new program and host. The program debuts to low listener/viewership. Station personnel producing the program post comments on their personal blogs and social media pages commenting on the interesting, insightful, clever, and relevant discussions they have heard on the program and encouraging all their friends to tune in for the next episode of the program. This is an endorsement.

Station personnel have a material relationship with the program they are endorsing. They cannot pose as disinterested members of the listening/viewing public in order to generate interest in the program. They must disclose their relationship to the station.

These last two examples demonstrate the difficulty in separating employees' work and personal lives. Stations increasingly need to adopt social media policies and educate employees regarding their use to address these types of situations.

Conclusion

Whether stations or their employees are making endorsements will be judged from the consumer's perspective and depends on the precise language of the message and the circumstances in which it is presented. As the above discussion indicates, these are complex legal waters to navigate. Broadcasters should consult legal counsel in creating appropriate policies and practices to minimize liability, as well as in promptly addressing incidents where an endorsement may create liability.

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

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