

Consumer Law

ADVISORY

January 6, 2009

FTC Proposes Revisions To Guidelines for Advertising Endorsements

The Federal Trade Commission (“FTC”) has requested comment on amendments to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guides”). These Guides govern the use of consumer and expert endorsements and testimonials in advertising — including viral advertising occurring through blogs and other Internet-based endorsement programs. Although the Guides are not binding, they explain how the FTC interprets Section 5 of the FTC Act’s prohibition on unfair or deceptive acts or practices. Consequently, the FTC could bring a Section 5 enforcement action based on practices that are inconsistent with the Guides.

As background, the FTC has not changed its Guides since they were released in 1980. In January 2007, the Commission released two studies it had commissioned on testimonials and issued a broad invitation for comments on the continued importance and appropriateness of the Guides. Twenty-two comments were submitted. Based on this feedback, the Commission is now proposing extensive revisions to the 1980 Guides. The changes to the Guides include:

- declaring that both advertisers and endorsers are legally responsible for false or unsubstantiated statements made in endorsements, or failing to disclose material relationships;
- eliminating the safe harbor formerly provided by “results not typical” language in consumer testimonials;
- expanding the obligation of experts and celebrities to disclose certain contractual relationships (for instance, when speaking on talk shows); and
- suggesting potentially sweeping liability for advertisers who encourage blogging about and viral marketing of their products.

The Commission invites comments on the revised Guides by January 30, 2009. Below is a brief summary of the Commission’s proposed changes.

Definition of Endorsement: The Guides currently define an endorsement as an advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The FTC’s revised Guides would clarify that the only criterion relevant in determining whether a statement is an endorsement is whether consumers believe it reflects the endorser’s views. To illustrate this point, the FTC plans to include language and examples demonstrating that a statement may be an endorsement even if: (1) the statement is identical to statements made by the sponsoring advertiser or (2) the person making the statement is speaking from a script (as opposed to giving the endorsement in his or her own words).

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Endorser and Advertiser Liability: The revised Guides would specify that both endorsers and advertisers are liable for false or unsubstantiated statements made through the endorsement or for failing to disclose material connections between the endorser and the advertiser. Although it never mentions the case, we understand the revisions are, in part, a response to the Ninth Circuit's decision in *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004) (concluding that a celebrity endorser was not liable because statements were substantiated by his own experience).

Consumer Endorsements: The revised Guides would modify how advertisements involving consumer endorsements, also known as testimonials, are treated. Specifically, the Commission proposes to add a new provision specifying that a consumer endorser's statement about the performance of a product or service will be interpreted as a representation that the product or service also will be effective for other consumers. Anecdotal evidence about a consumer's individual experiences would be insufficient to substantiate claims requiring scientific evidence because the experiences may be attributable to a placebo effect or other factors unrelated to the advertised product or service.

The FTC also proposes to amend the Guides so that a statement reflecting the consumer endorser's experience concerning a key attribute of the product or service generally cannot be supported with a disclaimer of typicality (e.g., "Results Not Typical"). The FTC recognizes that disclaimers of typicality are sufficient in limited circumstances, like gambling advertisements, where the consumer likely understands from the nature of the product or service that the endorser's experience is not generally representative. However, in the majority of cases, the FTC indicates that the advertiser typically would need to possess and rely upon adequate substantiation to support the representations made by the consumer endorser. If the advertiser does not have substantiation that the endorser's experience is representative of what other consumers will generally achieve, then, according to the FTC, the advertiser should clearly and conspicuously disclose the generally expected performance of the product or service under the depicted circumstances and have adequate substantiation for that representation.

The FTC recognizes that this revision would increase costs for advertisers who previously have not documented consumers' experiences with their products or services. However, the FTC concludes that in most cases, competent and reliable scientific evidence will be available and that the change is necessary to avoid consumer deception.

In addition to the above, the FTC invites comments on some specific points around consumer endorsements, including:

- feedback on the product categories where a new requirement to disclose "generally expected performance" would prevent legitimate use of testimonials; and
- the wording of a proposed footnote that would let particularly strong disclaimers justify consumer testimonials.

Disclosing Material Connections with Celebrity and Expert Endorsers: The FTC's revisions would add new examples illustrating when a connection between the advertiser and a celebrity or expert endorser must be disclosed. According to the FTC, advertisers generally need not disclose that a celebrity or expert endorser was paid because consumers ordinarily will expect that these endorsers will be compensated for their endorsements. However, if a celebrity or expert endorser touts the performance of a product or service in an interview, the FTC notes that the relationship should be disclosed because there is no reason for consumers to suspect that the endorser has a relationship with the advertiser. In contrast, where a celebrity wears clothing bearing a company's

logo but does not mention the company or the clothes, no disclosure of the existence of an endorsement contract is necessary because the celebrity has made no representations about the clothes. The FTC invites comments on the example embodying these principles.

The FTC also seeks comment on an example that would require expert endorsers to disclose "a significant financial interest in sales of the product" (including through an ownership interest).

Applying the Guides To New Media: The FTC's revisions provide guidance on how endorsements appearing in new media, like blogs and message boards, would be treated. For example, where an "advertiser participates in a blog advertising service" and the blogger endorses the advertiser's product or service, both the blogger and the advertiser could be responsible for the claims made through the endorsement. Consequently, the FTC recommends that the advertiser train the blogger to avoid making deceptive statements and that the advertiser monitor the statements made in the blog. In addition, the FTC tentatively suggests that blogger endorsers, endorsers posting on discussion boards, and endorsers participating in "street team" programs (e.g., a program where prizes are awarded each time a team member talks to a friend about the advertiser's product) should disclose material relationships between the advertiser and the endorser. The FTC invites comment on these principles and corresponding examples.

Disclosure of Financing Scientific Research: The FTC reaffirmed its policy of not requiring disclosure in advertisements where a drug company uses findings from scientific research that the drug company funded provided that the design and conduct of the research project are controlled by the outside research organization. The FTC, however, is seeking comment on suggestions made by thirty-three state Attorneys General that this policy is inconsistent with other portions of the Guides.

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our consumer law practice group:

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