

FTC Finalizes New Rules Governing Testimonials

For the first time in thirty years, the Federal Trade Commission has revised its guidelines for the use of testimonials and endorsements in advertising. The revised guidelines make several important changes to the existing testimonial rules.

- First, when a testimonial references an atypical result or best case scenario, the revised guides require advertisers to disclose what results consumers generally can expect.
- Second, the revised guides set standards for testimonials on the Internet and in nontraditional media. Advertisers may be liable for false or unsubstantiated claims posted by "sponsored" bloggers.
- Third, the guides clarify that celebrity endorsers may be personally liable for false or unsubstantiated claims asserted in their testimonials. In addition, celebrities must disclose their material connections to the advertiser when promoting a product in media that is not obviously a paid endorsement.

The FTC's new testimonial guidelines become effective on December 1, 2009.

Testimonials Promoting Atypical Results

Until now, FTC's testimonial rules have included a "safe harbor" provision that allowed advertisers to insulate themselves from liability by accompanying rosy testimonials with a "results not typical" disclaimer. Over the years this safe harbor provision gave rise to a host of perceived abuses. Consumers became accustomed to ads featuring dramatic testimonials – "I lost 50 pounds in 6 months!" – with small-print "results not typical" disclaimers.

FTC's new testimonial guides eliminate this "safe harbor" provision. Now, advertisers must be prepared to substantiate that the results touted in a testimonial are similar to what consumers typically can expect. If a testimonial only represents a best case scenario, the ad also must disclose what consumers generally can expect.

FTC stopped just short of mandating that advertisers always include such a disclosure. Rather, a disclosure is necessary only when – in the absence of a disclosure – the testimonial would create a false expectation of what consumers generally can expect. The onus, however, will be on advertisers to demonstrate through consumer surveys or other evidence that any unqualified testimonials will not be misunderstood.

New Media and User-Generated Content

The new testimonial rules set limits on advertisers' abilities to use bloggers and buzz marketing to promote their products. According to the guides, any "sponsored" messages about its products – whether generated by the advertiser or not – must be true and substantiated. Advertisers thus may be liable for Internet postings by sponsored bloggers or buzz marketers.

The circumstances in which user-generated comments will be considered "sponsored" messages are not clear cut. In comments accompanying the guides, the FTC listed a number of factors it may consider including:

- Whether the speaker is compensated by the advertiser or its agent;
- Whether the product or service in question was provided for free by the advertiser;

- The terms of any agreement;
- The length of the relationship;
- The previous receipt of products or services from the same or similar advertisers;
- The likelihood of future receipt of such products or services;
- The value of the items or services received.

This case-by-case approach creates some uncertainty, but one thing is clear: Advertisers who actively encourage or pay for user-generated commentary about its products should exercise caution. Statements made by sponsored bloggers – even statements the advertiser ultimately may not control – cannot misstate the products' features or capabilities. Moreover, when an advertiser discovers that a blogger has made a misrepresentation, the advertiser should immediately take steps to halt further publication.

The guides impose duties on bloggers as well. Bloggers, too, may be liable for their false or unsubstantiated claims. In addition, bloggers are obligated to disclose when they have been paid or otherwise rewarded for their reviews or commentary.

Celebrity Endorsements

The revised guides clarify the rules governing celebrity endorsements. Advertisers have always been required to ensure that paid celebrities' opinions about their products are true and genuinely held. FTC has now made clear that those obligations are shared by the celebrities as well. Celebrities will be liable for false and misleading claims made in their endorsements and, therefore, must take reasonable steps to ensure that the advertiser can substantiate their statements.

The FTC also has refined the rules governing when celebrities must disclose that they have been compensated for their endorsement. Historically celebrities have not been required to disclose such material connections because consumers generally presume that celebrities are paid to appear in advertisements. But the revised guides recognize that there may be contexts in which a celebrity offers an endorsement – for example, on a talk show or on their own website – and consumers could fail to appreciate that the celebrity has been compensated. In these contexts, FTC will now require celebrities to disclose their financial relationships to the advertiser. ♦

For more information or a copy of FTC's revised "Guides Concerning the Use of Endorsements and Testimonials in Advertising," please contact one of the following attorneys:

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