

FTC Proposes Significant Changes To Its Endorsement And Testimonials Guides

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The Federal Trade Commission ("FTC") has proposed several major changes to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Guides"). If adopted, these policy proposals, which represent some of the most sweeping changes in advertising law in almost thirty years, would drastically alter the way in which companies can market their products and services.

Background

The FTC issued the Guides in 1972 and last revised them in 1980 to help companies conform their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act, which prohibits unfair or deceptive practices. The Guides, although advisory in nature, outline the general principles that the FTC uses when it evaluates whether an endorsement or testimonial is deceptive and provide examples of how the FTC would apply those principles. The Guides are codified at 16 C.F.R. § 255.

The Guides broadly define both "endorsements" and "testimonials" to mean "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 message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."¹ Section 255.1 of the Guides sets forth the general principles that apply to all endorsements and testimonials, including that endorsements must "always reflect the honest opinions, findings, beliefs, or experience of the endorser . . . [and] may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser."

The Proposed Changes

In proposing these latest revisions to the Guides, the FTC considered comments it received in response to its January 2007 notice concerning the overall costs, benefits, and regulatory and economic impact of the Guides. The proposed revisions address a number of key issues, the most significant of which are discussed below.

1. General Considerations - A new subsection to Section 255.1 of the Guides would explicitly state that (i) marketers are subject to liability for false or unsubstantiated statements made through endorsements or for failing to disclose material connections between themselves

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and their endorsers, and (ii) endorsers, including experts and celebrities, may also be subject to personal liability for their own statements in an endorsement.

2. Consumer Endorsements - The FTC proposes to revise Section 255.2 of the Guides concerning consumer testimonials in a number of material ways. First, the proposed revisions state that (i) an advertiser who uses consumer testimonials must possess and rely upon adequate substantiation to support any claims made in the endorsement, and (ii) because consumer endorsements do not constitute competent and reliable scientific evidence, they cannot be used to substantiate claims requiring such evidence. Second, the revised Guides stipulate that testimonials that describe atypical consumer experiences should be accompanied by a "clear and conspicuous disclosure" of the typical results consumers can generally expect to achieve from the advertised product or program. If the FTC adopts and enforces this proposed change, advertisers will no longer be able to simply rely upon perfunctory disclaimers such as "results not typical" or "results may vary" in customer testimonials depicting atypical results. The Commission did note, however, that companies could avoid an FTC enforcement action in such cases if they employ a "strong disclaimer" and have valid empirical testing demonstrating that the net impression of its advertisement is not deceptive.

3. Expert Endorsements - The Commission proposes adding two new examples to Section 255.3 of the Guides, which provides guidance on expert endorsements, modifying two of the examples in the current section, and deleting another example. The purposes of these proposed changes are to (i) illustrate the principle that an expert endorser must actually possess the level of expertise that the advertisement implies he or she has, (ii) clarify that if an expert endorser is not a bona fide independent testing organization (e.g., if it was established and operated by the advertiser), the endorsement is inherently deceptive, and (iii) provide an example of a situation in which an expert's endorsement is not supported by an adequate exercise of professional diligence in determining whether there is adequate evidence to support the expert's conclusions about the product's safety and efficacy.

4. Disclosure of Material Connections - Section 255.5 of the Guides requires that "when there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience)

such connection must be fully disclosed." After evaluating multiple public comments regarding this section of the Guides, the Commission concluded that requiring advertisers to disclose material connections with their endorsers is appropriate and should be retained. The FTC has, however, proposed several important changes to clarify this section.

First, with respect to celebrity endorsers, the Commission seeks to clarify that royalty payments made to actors for each product sold need not be disclosed. Second, the FTC is still seeking public comment as to whether disclosure should be required when an expert has a significant financial interest in sales of the product that he or she is evaluating, such as an ownership interest in the company or compensation linked to product sales. The reasoning behind requiring disclosure is that knowledge of such financial arrangements between an expert and an advertiser could affect consumer purchasing decisions.

Third, in response to a 2003 petition from the consumer advocacy group Commercial Alert, the Commission has proposed to include new examples to clarify when celebrities need to disclose that they are paid endorsers. The general principle of the Guides is that the viewing public ordinarily expects well-known celebrities to be compensated for endorsing a product, and, as such, disclosure is not required to prevent consumers from being misled. However, as noted by Commercial Alert in its petition, celebrities are often paid to "tout" products on talk shows, radio programs, and during interviews, and it is not readily apparent to the audience that such comments are not genuine discussions but paid endorsements. The FTC has concluded that in such cases the celebrity's statements constitute endorsements and must be disclosed.

To illustrate this point, the FTC has proposed adding the following hypothetical as Example 3 to Section 255.5 of the Guides:

During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers would not expect that a celebrity discussing a medical procedure in a television

interview to be paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

The FTC distinguishes this hypothetical with a second example in which the celebrity appears during an interview wearing clothes bearing the design of a company with which she has an endorsement contract. During the interview, the celebrity does not mention the company or discuss the clothes. Because she is not making any representation about the clothes or the company, no disclosure of the endorsement contract would be required.

Fourth, the Commission is proposing adding another new hypothetical to Section 255.5 as Example 6. Example 6 addresses the situation where "extras" who wish to work in commercials are recruited to use a product in order to give endorsements in exchange for compensation and exposure. The FTC has concluded that because the consuming public would not expect that these extras are actually actors paid to use the product, failure to disclose such a financial arrangement would be deceptive.

Finally, the FTC has proposed to add three additional hypotheticals to Section 255.5. Each example applies the Commission's general principle that material connections between the endorser and the advertiser should be disclosed to several new forms of marketing, namely blogs, discussion boards, and "street teams." For example, if a blogger receives a free game system and then posts a favorable review of it on his blog, he should clearly and conspicuously disclose that he received the gaming system free of charge. If an employee of an MP3 manufacturer posts positive comments about his company's device on a message board, he should clearly and conspicuously disclose his relationship to the company. If members of a "street team" are compensated for talking about a product with their friends, they should disclose this fact.

Conclusion

Given the prevalence of these advertising practices and the number and scope of the proposed substantive changes to the Guides, it is likely that most companies' marketing campaigns will be affected. Companies seeking to stay ahead of the regulatory curve are well-advised to stay abreast of these proposed changes, formulate a strategy to address the changes that are ultimately adopted, and vet their proposed approach with experienced counsel.

¹ 16 C.F.R. §§ 255.0(a) and (b).