

Use of Endorsements and Testimonials in Advertising: How It Applies to You

After nearly thirty years, the Federal Trade Commission (“FTC”) recently updated its **Guides Concerning the Use of Endorsements and Testimonials in Advertising** (the “Guides”)¹. The Guides, which are an attempt to prevent consumers from being deceived or misled, address endorsements and testimonials by celebrities, consumers, experts, and organizations. In addition to their application to conventional forms of advertising in traditional media, the new Guides extend to various types of communications in traditional and non-traditional media which have not generally been viewed as “advertising messages.” The Guides take effect on December 1, 2009.

How the Guides Apply to Celebrities, Bloggers and Consumers

The new Guides will have a direct impact on celebrities, bloggers and consumers who are either paid to mention products or services in traditional or non-traditional media formats (e.g., appearances on talk shows, blogging, word-of-mouth marketing, and other social media formats) or who receive the goods or services for free (even if the recipient is not paid a fee). The Guides treat testimonials and endorsements in the same way, and provide that both the advertiser and endorser may be held liable for false or unsubstantiated claims or for failing to disclose a “**material connection**” between the endorser and the advertiser. Similar to the old Guides, the new Guides require that the endorsement or testimonial “reflect the honest opinion, findings, beliefs or experiences of the endorser,” and, if the endorsement represents that the endorser uses the product, the endorser must actually be a user of the product at the time the endorsement is made.

More specifically, the new Guides state that celebrities, bloggers and others who are “**endorsers**” may be subject to liability for any false or unsubstantiated claims they make in any “**endorsement**.” Under the Guides, endorsers have two types of obligations. First, celebrities and experts will have to make inquiries into the product or service he/she is planning to endorse before making the endorsement to confirm that the representations made in the course of their endorsement are truthful and substantiated. Second, every endorser will have a duty to disclose any “**material connection**” he/she/it has with the advertiser when endorsing a product or service (including mentions of such product or service on talk shows and in social media platforms). This disclosure requirement extends to celebrities, bloggers (amateur or professional) and others who use social media forums such as Twitter, Facebook or MySpace to review or discuss products and services. “[T]he post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement.” Under these circumstances, bloggers, as endorsers, spread the message, and will be primarily responsible for disclosing such connections.

In some instances, the endorser will be deemed to be an “**expert**,” in which case he/she must be qualified to examine or test the product with respect to the endorsement message and must have evaluated the product features and characteristics prior to endorsing it. Whether an expert must disclose a “material connection” between himself/herself and the advertiser (including receipt of fees or free products) will depend upon the overall consumer impression created by the advertisement.

Celebrities, bloggers, and consumer reviewers should take note of these new Guides and review their policies and procedures for reviewing and endorsing products, substantiating the claims made in their endorsements, accepting free products, and disclosing relevant relationships.

¹ 16 C.F.R. Part 255.

The FTC's Definitions of "Endorsement," "Product," "Expert" and "Material Connections"

The Guides define 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." As previously noted, testimonials are treated as endorsements under the Guides. The "endorser" will be deemed to be "[t]he party whose opinions, beliefs, findings, or experience the message appears to reflect" and "may be individual, group, or institution." An "expert" shall be "an individual, group, or institution possessing, as a result of an experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire." The term "product" includes "a product, service, company or industry." "Material connections" between advertisers and endorsers of products include the endorser receiving a fee or freebies (e.g., product samples, gifts or points redeemable for products), either directly from an advertiser or from a third party on its behalf. Material connections must be disclosed, regardless of whether the review or other discussion of such product or service is positive or negative.

Advertisers' Liability

In addition to liability for traditional advertising, advertisers may also be held liable for false or misleading statements made by bloggers and others in consumer-generated media, even if the advertiser does not control the statements. Accordingly, advertisers are advised to monitor the content of, and provide guidance to, the bloggers who are being paid to promote their products or services (or who are being provided free goods) to ensure compliance with the Guides. Advertisers are expected to "take steps necessary to halt the continued publication of deceptive representations when they are discovered." It should be noted that "[a]n advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented" and are responsible for not distorting the endorser's opinion or experiences. Advertisers should also note that, under the new Guides, there is no longer a safe harbor for advertising that uses a disclaimer for non-typical testimonials (e.g., "results not typical").

The Guides and Research

The disclosure obligations under the revised Guides also apply to relationships between an advertiser and an outside entity that conducts research funded or commissioned by the advertiser, even if the research organization designs the research protocol. By way of example, payment of a research organization's expenses by a company who commissions a research project would need to be disclosed in an advertisement conveying or relying on the results of such research.

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