



October 7, 2009



Webinar

New FTC Endorsement/Testimonial Guides: Business No Longer Typical For Brands And Bloggers

This week, the Federal Trade Commission released its long-awaited revisions to its Endorsement and Testimonial Guides (the “Guides”). The Guides were last updated in 1980, and the revised Guides will go into effect on December 1, 2009. We are pleased to present two useful tools to help you understand the new rules and what they mean.

First, there are at least three significant changes to the Guides, some of which will impact the use of testimonials and endorsements in all media and some of which are specifically targeted at the growing use of blogging, viral marketing and other social media platforms. We discuss them in detail below.

Next, clients and friends of Manatt are invited to attend an informational webinar hosted by the Word of Mouth Marketing Association. It's tomorrow, so please be sure to register ASAP. Manatt partner and WOMMA's General Counsel Tony DiResta, and WOMMA's President Elect, Paul Rand, will be on hand to explain the Guides and answer your questions.

When: Thursday, Oct. 8, 2009

Time: 9am PST | 11 AM CST | 12pm EST

To register, click [here](#).

The FTC's New Guides Governing the Use of Endorsements and Testimonials

This week, the Federal Trade Commission (FTC) released its long-awaited revisions to its Testimonial and Endorsement Guides (the “Guides”). The Guides were last updated in 1980, and the revised Guides will go into effect on December 1, 2009.



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October 27, 2009

There are at least three significant changes to the Guides, some of which will impact the use of testimonials and endorsements in all media and some of which are specifically targeted at the growing use of blogging, viral marketing and other social media platforms.

First, the FTC has eliminated an important “safe harbor” that for years has allowed advertisers to present consumer testimonials touting specific results achieved with the use of a product or service even if those results were not representative of the results consumers could generally expect to achieve as long as the advertiser included a so-called typicality disclaimer such as “Results not typical” and “Individual Results May Vary.” Under the revised Guides, consumer testimonials reporting specific results achieved with the use of a product or service will “likely” be interpreted to mean that the consumer’s experience is representative of what consumers can generally expect to achieve with the use of the product or service. Accordingly, the advertiser must either be able to substantiate that the endorser’s experience is representative of the generally expected performance in the depicted circumstances or the advertiser must disclose the results that consumers can generally expect to achieve under the circumstances depicted. For example, if an advertisement features a testimonial by a consumer who simply claims to have lost 50 pounds in six months, the FTC believes the ad is likely to convey that this experience is representative of what consumers will generally achieve. Accordingly, unless the advertiser can substantiate that consumers can generally expect to lose 50 pounds in six months, the advertisement would have to disclose what consumers can generally expect to lose in the depicted circumstances, e.g., “most women lose at least 15 pounds in six months.”

Although the elimination of the safe harbor for typicality disclaimers is a major change, the FTC has noted in its commentary accompanying the Guides that, as with all advertising, advertisements featuring testimonials and endorsements will continue to be viewed on a “net impression” basis, and if the advertisement when viewed as a whole does not convey a misleading message of typicality, then a disclaimer may not be necessary. For example, if the testimonial itself is presented in such a manner as to make clear that the results depicted were achieved under extraordinary circumstances, or if the advertisement otherwise makes clear that the testimonials are not typical, disclosure of the generally expected results may not be necessary. Thus, as the FTC has noted, the Guides “do not prescribe a uniform one-size-fits-all approach and all advertising featuring testimonials and endorsements will need to be evaluated on a case by case basis.”

The second significant change is particularly aimed at the growing use of consumer-generated media by advertisers and marketers to promote their products and services. The FTC has made it clear that the Guides in certain circumstances can apply to new “consumer-generated” media, even though the advertiser does not necessarily have control over the content of what is being said. While the FTC Guides have always required that any “material connections” between advertisers and endorsers be disclosed, the FTC has now made clear that a material connection is not limited to payment of money or compensation but that, in certain circumstances, simply providing free product samples to bloggers or the consumers who are part of a social marketing network may constitute a material connection that must be disclosed.

American Conference
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November 18-20, 2009
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Marketing Association Summit
Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

Paris Hotel
Las Vegas, NV

Significantly, advertisers as well as the endorsers themselves (which include bloggers or other agents of the messaging) can be held liable for the failure to disclose material connections between the advertiser and the endorser. The FTC notes that because unlike traditional media, in the world of consumer-generated content, it is the endorser rather than the advertiser that is disseminating the endorsement; and, therefore, the endorser is the party primarily responsible for disclosing the material connections with the advertiser. The FTC cautions, however, that “advertisers who sponsor these endorsers (either by providing free products – directly or through a middleman – or otherwise) in order to generate a positive word of mouth and spur sales should establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of those endorsers.”

In response to a request for a clarification by the Word of Mouth Marketing Association, the FTC notes that not all communications touting a particular product or service constitutes an “endorsement” that requires any disclosures. Rather, it is only “sponsored speech” that is covered by the Guides.

Finally, although the FTC has in the past brought enforcement actions against celebrity endorsers, the Guides now expressly provide that both advertisers and celebrity endorsers may be liable for false or unsubstantiated claims made in the endorsements, or for failure to disclose material connections between the advertiser and endorser. Furthermore, the Guides now state that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside of the context of traditional ads, such as on talk shows or in social media platforms.

While the Guides will certainly not stem the growing tide of consumer-generated media or eliminate the use of consumer endorsements by advertisers, compliance with the Guides will present new challenges for marketers across all media. Manatt attorneys were substantially involved in working with the FTC during the comment period and authored several comments to the Commission on behalf of trade associations, such as the Promotion Marketing Association, the Association of National Advertisers, and the Word of Mouth Marketing Association, and we would be happy to share our insights with you as you begin navigating this new landscape.

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