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WILL ENDORSEMENTS DISAPPEAR FROM ADVERTISING?
SIGNIFICANT CHANGES TO FTC GUIDES CONCERNING THE USE OF
ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

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On October 5, 2009, the Federal Trade Commission (“FTC”) announced the final revision of the “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (“Guides”), which took effect on December 1, 2009. These Guides, found at 16 CFR Part 255, provide guidance to advertisers and endorsers. The Guides were first published in 1972, and this is their first revision since 1980.

The expressed intent of the FTC is to better protect the consumer by requiring disclaimers and informative content in connection with endorsements and testimonials (hereinafter “endorsements”), so that there is no deception, express or implied, of the consumer. Per the FTC Policy Statement on Deception, “we examine the practice from the perspective of a consumer acting reasonably in the circumstances.”

The most significant changes are:

- (a) The elimination of the “safe harbor,” whereby endorsements of products or services, which were true but not typical, were permitted to be used so long as there was a disclaimer, such as “results not typical”;
- (b) The Guides and their examples address the use of endorsements in blogs and other social media;
- (c) Increased requirements with respect to “disclosure of material connections” and the relationship between the advertiser and the endorser;
- (d) Greater responsibility of the advertiser for the statements of the endorser and potential liability of the endorser.

The end of the “safe harbor”

Section 255.2 Consumer Endorsements now provides that if an endorsement relates the experience of one or more endorsers on a “central or key attribute of the product or service,” the FTC assumes that it will be interpreted by consumers to be an example of what consumers will generally achieve. If this is not the case, “the endorsement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances.” Further, any endorsements by consumers must “possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence.”

Thus, any endorsements citing favorable but atypical results will require a detailed disclaimer setting forth typical results and further, the advertiser must possess reliable empirical testing. The disclaimer may very well negate the positive effect of the initial endorsements and the requirement of conducting empirical research places an expensive burden on the advertiser.

Blogs and Social Media—A New Frontier

Advertisers have astutely started using blogs and other social media allowing them to reach vast audiences and tailor the message to groups with specific interests and demographics. While, theoretically, advertisers have no control over what bloggers write, the new Guides do place certain obligations on the advertiser and the blogger.

Blogs and any type of social media are subject to the same historic requirement that advertising be accurate

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and not deceptive. Further, as stated in Section 255.5 of the Guides, Disclosure of Material Connections, “when there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement... such connection must be fully disclosed.” In the case of bloggers, they must disclose any payment or receipt of free samples, or other products or privileges received. Example Seven under Section 255.5 clearly explains application of this principle to a blog. The advertiser also has a responsibility to advise the blogger that the connection must be disclosed and further, “should have procedures in place to try to monitor his [the blogger’s] postings for compliance.”

Material Connections and Relationships

As noted above, Section 255.5 requires a disclosure of material connections, whether it be payments, the provision of free products or services, or other benefits.

Relationships may not always include compensation to the endorser. For example, an employee posting an endorsement on a blog or other social media such as Twitter or Facebook must disclose their relationship to the advertiser.

A consumer will understand that a celebrity giving an endorsement in an advertisement is being paid. However, the Guides make the distinction that if a celebrity makes an endorsement while being interviewed on a talk show or in a similar situation, a disclaimer is required as the consumer would not assume that the celebrity is being paid for an endorsement in such a setting.

Responsibilities of the Advertiser and the Endorser

Section 255.1 General Considerations has added the following subparagraph: “(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. [See Section 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.”

While the requirements of disclosure and transparency for the consumer have always been applied to traditional media, the application to social media, such as blogs, creates a difficult job for the advertiser who is required not only to explain the rules to the blogger, but also to monitor and take such steps as are necessary to halt practices which are not in compliance with the Guides.

In addition, the advertiser now has greater responsibilities with respect to disclaimers, and in controlling celebrities and expert endorsers.

The endorser has a greater responsibility to ascertain that its endorsements are accurate and reflect the endorser’s personal experience.

Conclusion

Based upon the perception of the FTC that existing Guides do not properly protect the consumer and that current disclaimers are insufficient, the restrictions on advertiser and endorser conduct have been significantly increased in the new Guides.

In particular, there are now expanded disclaimers when endorsements are “not typical,” as well as a requirement that any such endorsements be backed by empirical evidence. The latter requirement is likely to be a costly process for the advertiser and may have a chilling effect on the use of endorsements.

The underlying requirement that the consumer not be misled has not changed. However, the manner in which the FTC interprets this principle has resulted in stricter requirements of the advertiser and the endorser. This will have a significant effect on the future use and content of endorsements in advertising. ♦

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This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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