

SPECIAL REPORT

"How to Comply with the New FTC Compensation Disclosure Guidelines..."

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Please note that this is not legal advice.

Consult your Internet business lawyer to address specific legal issues.

1. Introduction

The Federal Trade Commission's ("FTC") revised *Guides Concerning the Use of Endorsements and Testimonials in Advertising* change the federal guidelines for the use of testimonials and endorsements (in advertising in the United States) for the first time since 1980. The main goal appears to be to assure that endorsements reflect the endorser's honest opinion. In the revised Guides, the FTC defines an "endorsement" as an advertising message of any type that consumers are likely to perceive as representing the opinion of someone other than the sponsoring advertiser. This would appear to include Internet marketing affiliates who promote products or services of the principal seller. Endorsements fall into three main categories: consumer endorsements, expert endorsements, and endorsements by organizations.

In general, endorsements must reflect the endorser's honest opinions or experience. If a representation would be deceptive if the advertiser made it directly, then it also would be deemed deceptive if an endorser stated it. An endorsement message need not be phrased in the endorser's exact words, unless the advertisement states that it is, but the endorsement may not be presented out of context or distort the endorser's opinion or experience. An advertiser may use a celebrity or expert endorsement if the advertiser has good reason to believe that the endorsement represents the endorser's current view. If an ad represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of the product at the time the endorsement was given. The endorsement ad may continue to run

as long as the advertiser has good reason to believe that the endorser continues to be a bona fide user of the product.

The media for regulated advertising messages is extended to include consumer-generated media, such as blogs and tweets. Of course, many uses of new consumer-generated media do not involve endorsements. The FTC's stated position is to consider usage of new media on a case-by-case basis in determining whether the speaker is acting on behalf of the advertiser. In the online world, this relationship goes to the heart of the affiliate arrangement.

Effective as of December 1, 2009, items in the revised Guides include:

- The requirement that advertisements showing testimonials by consumers of the advertised item must disclose the results that “consumers can generally expect” from the advertised item. “Results not typical” types of disclaimers no longer are sufficient to protect advertisers from charges of deception. In addition to changes to the consumer testimonial Guidelines, the FTC addressed a small number of issues concerning expert endorsements and endorsements by organizations.
- Strengthening the existing requirement that advertisers disclose “material connections” between the advertiser and endorsers or pitchmen shown in the advertising. This extends to bloggers and word-of-mouth marketers who have material connections to, or receive compensation from, the advertiser. It also covers advertising that cites findings by an organization whose research is funded by the advertiser. Compensated endorsements that are deceptive are treated as any deceptive advertising.

- Alignment of the guides with FTC case decisions with respect to liability for endorsers who make deceptive or unsubstantiated claims in their endorsements. This does not introduce new liability for endorsers, but rather clarifies and adds exposure of the FTC's official position on liability for false endorsements. It also publicizes the existing rule that celebrities have a duty to disclose their relationships with advertisers when making endorsements in non-advertising venues, such as on talk shows or in social media.

These items clarify some questions, and perhaps open others concerning the information or steps needed to satisfy the Guides. One notable unchanged item is that the FTC's enforcement will continue to be complaint-based. That is, the FTC will not, and probably does not have the personnel or the budget to, actively search for violations. In most cases, the FTC will not act until the body of complaints justifies intervention.

2. The "Generally Expected Results" Guideline

The main purpose of this requirement appears to be to treat testimonial-based ads the same as non-testimonial ads for purposes of truthfulness. The previous 1980 Guides allowed a "safe harbor" that permitted an advertisement to state unusual results that users might get from a product or service as long as the ad also contained a "results may vary" sort of disclaimer. That format became commonplace in ads. For example, ads for fitness or weight loss programs or products might have shown a user claiming that she/he 'lost 6 inches off her/his waist in six weeks.' A normal disclaimer footnote might have stated that 'individual results may vary' or 'results not typical.'

Under the revised Guides, ads may use the ‘results not typical’ sort of disclaimer language, but that disclaimer will not insulate advertisers against charges that an ad is deceptive. Now, ads must use results that are representative of what consumers of the product or service generally can expect in actual use under the conditions shown in the ad. This raises some interesting questions for particular types of ads. As a practical matter, advertisers using testimonials probably will have to pay closer attention to describing the conditions that correspond to the stated results.

The revised Guides contain a new provision stating that:

If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.

The FTC states that this new language applies to an ad only if that ad, taken as a whole, does not convey an unsubstantiated/misleading message of typical results for the advertised item. Advertisers who use testimonials and who do not have sufficient performance information to allow the disclosure of generally expected results are advised to rely on general endorsements (“the best product I’ve ever used”) or to avoid a claim of typical results.

According to the revised Guides, the FTC gauges deception by the claims that consumers perceive in an ad. As such, the FTC will continue to evaluate each ad on its own merits to determine whether an ad is deceptive. This is one of the examples that the FTC provides for the ‘expected results’ Guideline:

An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140

pounds.” The advertisement accurately describes the woman’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

If the ad features the same pictures but the testimonialist simply says, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).

So-called “business opportunity” programs or products potentially present different issues. Results from business opportunities that do not rise to the level of franchise offerings (which fall under their own category of FTC requirements) tend to depend on a wide variety of behavioral factors, market conditions, local competition, sales and/or management expertise, etc. Perhaps more difficult is the problem of convincing business opportunity users to disclose their true results, and possibly even to measure the results objectively. (Objective measurement likewise is a

problem in weight loss, fitness items, and nutritional items used in non-clinical settings.) It may be that some vendors have audited results for the business opportunity plans that they sell. That condition possibly exists mainly in older or larger and more profitable programs. Another possibility is that the idea of disclosing the circumstances under which users achieve the asserted results possibly could limit the sales potential. For example, circumstances where each user of the promoted program is the only user of that program in population centers of greater than 5 million people would reduce the program's market potential considerably.

Until the revised Guides have gone through some enforcement cycles, the conservative approach would be to either use audited (or auditable) income results or to avoid income claims entirely.

3. The "Material Connection Disclosure" Guideline

Another change to the Guidelines addresses disclosure of "material connections" between advertisers and their endorsers. Generally speaking, a relationship between the endorser and the advertiser is a material connection if the endorser receives something of value from the advertiser in connection with the endorsement. If the advertiser/marketer gives the endorser money, in-kind compensation, or free products/services, or if a connection between the endorser and seller materially affects the endorsement's credibility, the parties are likely to be regarded as materially connected. For example, participants in network marketing programs are likely to be deemed to have material connections that warrant disclosure. The rationale for informing consumers that an endorsement is sponsored is to disclose

the sponsorship relationship so as to enable the consumer to evaluate the endorsement's weight.

This revision is designed to account for consumer-generated media. Previously, the duty to disclose material endorser-advertiser connections fell to the advertiser because it was the advertiser who disseminated the endorsements—usually through television, radio, and print media. Now, consumer-generated media allow the endorser to disseminate the endorsement. Because material connections must be disclosed in the ad, whichever party disseminate the endorsement—the advertiser or the endorser—is responsible for providing the disclosure. The simple message is that, if an advertiser or its agent sponsors an endorsement in any way, the relationship must be disclosed. This would appear to apply to Internet marketing affiliates who promote products or services of the principal seller. Until the principles in the revised Guidelines are tested in real use, the prudent approach would be for affiliates to disclose that they receive compensation for sales of items that they promote for the principal seller.

This FTC statement elaborates on the material connection concept:

An advertiser's lack of control over the specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an "endorsement" within the meaning of the Guides. Again, the issue is whether the consumer-generated statement can be considered "sponsored."

Thus, a consumer who purchases a product with his or her own money and praises it on a personal blog or on an electronic message board will not be deemed to be providing an endorsement. In contrast, postings by a blogger who is paid to speak about an advertiser's product will be covered by the Guides, regardless of whether the blogger is paid directly by the marketer itself or by a third party on behalf of the marketer.

Although other situations between these two ends of the spectrum will depend on the specific facts present, the Commission believes that certain fact patterns are sufficiently clear cut to be addressed here. For example, a blogger could receive merchandise from a marketer with a request to review it, but with no compensation paid other than the value of the product itself. In this situation, whether or not any positive statement the blogger posts would be deemed an “endorsement” within the meaning of the Guides would depend on, among other things, the value of that product, and on whether the blogger routinely receives such requests. If that blogger frequently receives products from manufacturers because he or she is known to have wide readership within a particular demographic group that is the manufacturers’ target market, the blogger’s statements are likely to be deemed to be “endorsements,” as are postings by participants in network marketing programs. Similarly, consumers who join word of mouth marketing programs that periodically provide them products to review publicly (as opposed to simply giving feedback to the advertiser) will also likely be viewed as giving sponsored messages.

The FTC provides these examples of the application of this Guide to the blog context:

A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the

change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

4. The "Liability of Endorsers" Guideline

The revised Guidelines provide that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections with the endorsers. Endorsers also may be liable for statements made in the course of their endorsements. In the blog context, the FTC suggests that advertisers train their bloggers that blog statements must be truthful and substantiated. In addition, the advertiser should monitor bloggers who are paid to promote the advertiser's products. The FTC provides these example blog scenarios:

A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need.

A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition.

The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.

5. Conclusion

The revised *Guides Concerning the Use of Endorsements and Testimonials in Advertising* are aimed at ensuring that endorsement and testimonial advertising adhere to the same standards of honesty that apply to ordinary advertising. The best way to avoid entanglement with the FTC is to comply by avoiding unsubstantiated or deceptive claims. Monitoring affiliates and other operatives in the endless Worldwide Web can be a tall order. The FTC's suggestion that ". . . *advertisers train their bloggers that blog statements must be truthful and substantiated . . . the advertiser should monitor bloggers who are paid to promote the advertiser's products. . . .*" implies that there might be allowance for good faith compliance efforts. As such, comprehensive agreements between advertiser and subsequent users and between principals and affiliates make a great deal of sense.

Enforcement cases tend to be very fact-specific, which often makes it difficult to extrapolate to other cases. When in doubt, consult legal counsel.

Your Next Step

If you can afford to pay an Internet lawyer to review your website and draft customized legal documents to comply with the FTC new guidelines, you should do so.

If you cannot, and are looking for some protection, here are two options.

Option #1: Invest in the new *Affiliate Compensation Disclosure Package*. The package was created by me based on the new FTC guidelines. It includes a *Compensation Disclosure* legal form that you can upload to your site and link to the same way you link to your website's Privacy Policy and Terms of Use. The package also includes an *Affiliate Status Disclosure* banner image that you can insert on your web pages and link to the *Compensation Disclosure* legal document on your site.

You get the entire package for just \$97 by [clicking here right now](#).

Option #2: Receive the exact same *Affiliate Compensation Disclosure Package* for free as a bonus when you get the *Website Legal Forms Generator* software.

How is Option #2 possible? I own the software too and want you to be rewarded for using it to create your website Privacy Policy, Terms of Use, and five other important website legal documents. You'll want to [click this link](#) to take advantage of this limited time offer.