

Endorsements and Testimonials in Advertising: FTC Request for Comments

EXECUTIVE SUMMARY

On January 16, 2007, the Federal Trade Commission (“FTC”) issued a request for public comments on the overall cost, benefits, and regulatory and economic impact of compliance with its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”). In conjunction with the request, the FTC has also released two consumer research studies that focus on messages conveyed by consumer testimonials.

As part of its periodic rules and guidance review, the FTC seeks comments on the validity and application of the commissioned consumer research studies, as well as what changes, if any, should be made to the Guides in an effort to increase their benefits to consumers. Industry members and other interested parties are requested to submit data on cost of compliance and regulatory burden issues, as well as input on parallel or contradicting state and federal legislative measures.

TWO STUDIES

The two studies commissioned by FTC evaluated consumer perception of messages communicated by testimonials for dietary supplements. Both studies measured consumer perception of product efficacy and result typicality based on accompanying testimonials and various types of disclaimers. Within

the study context, product efficacy was defined as consumers’ expectation that the product will work as described in the testimonials. Result typicality was defined as the expectation that the testimonialists’ experiences are representative of what consumers will generally achieve with the advertised product.

FIRST STUDY. In the first study, which measured consumer perception of testimonials for a general dietary supplement, the authors concluded that the use of multiple testimonials effectively communicated product efficacy. Testimonials also gave consumers the impression that the product will be effective for half, most, or all of the people that use it. Importantly, the first study determined that even prominent disclosures are ineffective for qualifying efficacy and result typicality claims.

SECOND STUDY. The second study measured consumer perception of testimonials for weight loss and cholesterol support dietary supplements. After surveying participants, the authors concluded that a substantial percentage of consumers believed that testimonials convey strong product efficacy messages, and that 50 percent or more users would achieve results similar to those portrayed by the testimonialists. As a result of these conclusions, the FTC seeks comments on study design, validity, limitations, and implications for future revision of the Guides.

In addition, the FTC is requesting extrinsic evidence regarding consumer expectations about celebrity endorsements made during interviews for purposes of revising the existing guidance on disclosure of material connections (§ 255.5). In particular, the Commission is considering whether changes to the Guides are needed to address the practice of compensation paid to celebrities who speak favorably about particular products while being interviewed on talk shows or other media.

WHAT THIS MEANS FOR BUSINESSES

Based upon the questions asked by the Commission and the two studies it sponsored, it appears that the Commission is considering amending the Guides to eliminate the ability of an advertiser to use an atypical testimonial without conveying the generally expected performance a consumer can expect from that product or service. Such a proposal would dramatically impact an advertiser’s ability to create a message based upon the best case results while using a disclaimer such as “Results Not Typical.” Because revision to the current Guides has the potential to materially alter all endorsement-based marketing practices, interested parties should strongly consider submitting comments with regard to the issues raised.

REQUEST FOR COMMENTS

Written comments must be submitted to the FTC by March 19, 2007.

FOR MORE INFORMATION

For more information about this Client Advisory, please contact:

PARTNERS

- Kerrie L. Campbell.....kcampbell@kelleydrye.com
- David J. Ervin.....dervin@kelleydrye.com
- D. Reed Freeman, Jr.....rfreeman@kelleydrye.com
- Thomas E. Gilbertsen.....tgilbertsen@kelleydrye.com
- Joel E. Hewer.....jhewer@kelleydrye.com
- William C. MacLeod.....wmacleod@kelleydrye.com
- Lewis Rose.....lrose@kelleydrye.com
- John E. Villafranco.....jvillafranco@kelleydrye.com
- Ivan J. Wasserman.....iwasserman@kelleydrye.com

ASSOCIATES

- Christie L. Grymes.....cgrymes@kelleydrye.com
- Mikhia E. Hawkins.....mhawkins@kelleydrye.com
- Lee Istrail.....lustrail@kelleydrye.com
- Stacey C. Kalamaras.....skalamaras@kelleydrye.com
- Jeffrey A. Kauffman.....jkauffman@kelleydrye.com
- Jason Levine.....jlevine@kelleydrye.com
- Gonzalo E. Mon.....gmon@kelleydrye.com
- Rielle C. Montague.....rmontague@kelleydrye.com
- Iva Smith.....ismith@kelleydrye.com
- Svetlana N. Walker.....swalker@kelleydrye.com
- Alysa Zeltzer.....azeltzer@kelleydrye.com

INDEPENDENT CONSULTANTS

- Elisa Nemiroff.....enemiroff@kelleydrye.com
- Julie O’Neill.....joneill@kelleydrye.com

LAW CLERK

- Jennifer Ngai.....jngai@kelleydrye.com