

Federal Trade Commission Proposes Sweeping Changes To Endorsement And Testimonial Guides

Requests Public Comments on Proposals By January 30, 2009

The Federal Trade Commission (FTC) is requesting public comments on its Guides Concerning the Use of Endorsements and Testimonials in Advertising. The Guides, issued in 1972 and last revised in 1980, are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of the FTC Act.

The proposed changes to the FTC's Endorsement and Testimonial Guides represent some of the most substantial changes to advertising law in the past 25 years. If adopted and enforced, this policy would prohibit many endorsements that are used today and would impose a policy more restrictive than either the 1972 or 1980 standards. The key changes are highlighted in this Advisory.

Consumer Testimonials

The FTC proposes to revise the Guides to state that non-typical testimonials should be accompanied by a clear and conspicuous disclosure of generally expected results. If adopted, this would mean that advertisers could no longer use atypical consumer testimonials with a "Results Not Typical" or similar disclaimer. Advertisers would also have to determine the results that consumers can generally expect, which is often difficult and expensive. Significantly, the Commission's discussion of this proposed change states that a strong disclaimer of typicality may avoid the risk of FTC law enforcement action only if the advertiser has valid empirical testing demonstrating that the net impression

of its advertisement is not deceptive. The Commission stated that it is not presently prepared to incorporate a specific numerical standard for "generally representative" that would apply to all endorsements for all products, stating only that fewer than 20 percent is not generally representative.

Expert Endorsements

The Commission proposes to amend the Guides to clarify that if an endorser is not a bona fide **independent** testing organization (e.g., it was established and operated by the advertiser), the endorsement would be deceptive.

Disclosure of Compensation

The Commission proposes to clarify the current Guides so that royalty payments to actors or celebrities for each product sold need not be disclosed. Experts are treated differently, however. The Commission believes that although consumers likely expect that an expert will be paid for the time he or she spends conducting the analysis necessary to render an expert opinion, there could be certain compensation arrangements, the knowledge of which would affect consumer purchasing decisions. For example, comment is requested about whether disclosure should be required of experts with significant financial interest in sales of the product (such as an ownership interest in the company or compensation based on product sales).

Celebrity Endorsements

The Commission has concluded that when celebrities are paid spokespersons, their endorsements are commercial messages, regardless of whether they are disseminated in a traditional advertising context (i.e., a television commercial or print ad) or elsewhere.

Accordingly, the Guides would be revised to contain new examples to address this issue. In the first example, a well-known professional tennis player appears on a television talk show. During the conversation, the host comments that the past few months have been the best of her career. She responds by attributing the improvement to the fact that she is seeing the ball better than she used to ever since having laser vision correction surgery at a clinic that she identifies by name. Because consumers do not expect that interviews with celebrities are anything more than a spontaneous mention of a product, the FTC is proposing to require the celebrity's financial connection to the advertiser to be disclosed during the interview. In the second example, a celebrity appears during an interview wearing clothes bearing the insignia of a company with which she has an endorsement contract but does not mention the company or the clothes. No disclosure would be required.

“Extras”

The FTC proposes to add a new example that would require advertisers to disclose that “extras” who work in commercials to give endorsements in exchange for compensation and exposure are actors who were asked to use the product so that they could appear in the commercial.

Blogs, Discussion Boards, and Street Teams

Finally, the FTC proposes to add new examples to apply the general principle that material connections between an endorser and the advertiser should be disclosed to several new forms of marketing: blogs, discussion boards, and “street teams.” The Commission proposes to amend the Guides to require advertisers to ensure that consumers understand that members of street team programs are compensated, for example, each time he or she talks to his or her friends about a particular product. Similar principles apply to blogs and discussion boards.

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As noted above, written comments are due by January 30, 2009. The Commission will evaluate those comments and will then publish final amendments to the Guides,

with an effective date expected later in 2009. Please contact a member of Kelley Drye’s Advertising Law Group if you have any questions about how these proposals may impact your advertising and marketing campaigns.

KELLEY DRYE & WARREN LLP

The attorneys in Kelley Drye & Warren’s Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

**For more information about this
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