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On Notice: Continued Use of Endorsements

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Continuing our series on the FTC's Notice of Penalty Offenses Concerning Endorsements, this post considers the FTC's statement that it is unlawful under Section 5 of the FTC Act ***"for an advertiser to continue to advertise an endorsement unless the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the endorsement."***

In support, the FTC cited *Nat'l Dynamics Corp.*, 82 F.T.C. 488 (1973), an almost 40 year old case in which the FTC found that by publicizing undated testimonial letters written 5 to 10 years in the past, the advertiser "created the impression, contrary to fact, that they were recent statements of persons contemporaneously using [the advertiser's product] and that the statements represented the contemporaneous opinions of the authors." The FTC rejected the advertiser's defense that it had no notice that the endorsers were no longer using the product and no longer endorsed it until relatively recently, finding that it was the advertiser's "duty to ensure that the testimonials they publish reflect facts and opinions existent at the time of publication and circulation." The FTC thus ordered the advertiser to cease and desist from using, publishing, or referring to any testimonial or endorsement unless it had "good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained."

The language of the FTC's recent notice mirrors that of the Endorsement Guides, which state that: "An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented." 16 C.F.R. § 255.1(b). However, the notice appears to go a step further in applying this requiring to ***any*** endorsement, not just those by experts or celebrities.

The Endorsement Guides clarify that advertisers can satisfy this requirement by "securing the endorser's views at reasonable intervals." 16 C.F.R. § 255.1(b). Reasonableness in this context is determined by factors like:

- New information on the performance or effectiveness of the product,
- A material alteration in the product,
- Changes in the performance of competitors' products, and
- The advertiser's contract commitments.

Id. For example, if a building contractor states that he uses the advertiser's paint because of its quick drying properties and durability, but the advertiser subsequently reformulates its paint, the advertiser must contact the contractor to determine whether he or she would continue to subscribe to the views presented previously before continuing to use that contractor's endorsement. *See* 16 C.F.R. § 255.1, Example 1.

NAD has applied this principle to advertisers' touting of ratings and reviews from independent third-party organizations. For example, in *American Dental Supply, LLC (White Brilliance Tooth Whitening System)*, NAD Case #4183 (May 2004), Good Housekeeping Magazine challenged the advertiser's use of the claim "Good Housekeeping Magazine – 'Best Results Overall'". Four years prior, in 2000, Good Housekeeping had in fact evaluated the advertiser's product together with other tooth whitening products, and concluded that the advertiser's product offered the "best results overall." However, in bringing this challenge, Good Housekeeping made clear it no longer subscribed to its evaluation that was conducted back in 2000. Citing the Endorsement Guides and the fact that the marketplace of tooth whitening products had significantly changed since that time, and the use instructions on the product had also changed in the interim, NAD recommended the advertiser discontinue this claim attributed to Good Housekeeping.

Advertisers who use or reference endorsements and testimonials from individuals or third-party organizations, whether they are affiliated with the advertiser or independent, should periodically contact their endorsers to ensure they continue to subscribe to the advertised views. In particular, they should do so any time there is a material change in the advertised product or, where the endorsement concerns competitive products, where there is a change in those competitive products or the competitive market.

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