Proskauer

FTC Guides Governing Endorsements

December 2, 2009

On December 1, 2009, the Federal Trade Commission ("FTC") implemented changes to its *Guides Concerning the Use of Endorsements and Testimonials in Advertising* ("Guides"). The revised Guides, which were last updated in 1980, contain material changes and clarifications to the FTC's positions concerning statements featured in product endorsements and consumer testimonials (particularly with respect to atypical results) and disclosure of material connections between advertisers and endorsers. These changes and clarifications also are applicable to non-traditional advertising, including through social media.

What Constitutes an Endorsement?

Section 5 of the Federal Trade Commission Act (the "FTC Act"), 5 U.S.C. §45(a), prohibits the use of "unfair or deceptive acts or practices in or affecting commerce." The Guides are the FTC's administrative interpretations of the FTC Act and are intended to guide advertisers in complying with that statute. The Guides are not binding law themselves, but are important to understand in order to avoid or minimize the risk of FTC enforcement actions.

Under the revised Guides:

> an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

The revised Guides provide that the FTC intends to treat celebrity endorsements and consumer testimonials identically in the context of its enforcement of the FTC Act. To that end, we use the phrases "endorsement" and "testimonial" interchangeably in this Alert. The revised Guides also make clear that the FTC may consider statements by bloggers to be endorsements where, for example, the blogger receives for free the product about which he or she is blogging (§255.0, example 8).

Furthermore, the revised Guides "clarify" the FTC's position that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, and that endorsers also may be liable for statements made in the course of their endorsements. For example, where an advertiser provides a blogger with a skin cream product sample and the blogger makes an unsubstantiated claim regarding the product's effectiveness in curing eczema, both the advertiser and the blogger may be subject to liability (§255.1, example 5). The Guides recommend that such an advertiser provide "guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated" and "monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered."

Consumer Testimonials

Under the revised Guides, an advertiser must possess and rely upon "adequate substantiation, including, when appropriate, competent and reliable scientific evidence" to support "endorsements by one or more consumers about the performance of an advertised product or service." The revised Guides contemplate applying the same standard to consumer testimonials as are applied to statements made directly by the advertiser.

Additionally, with respect to a consumer testimonial relating to "a central or key attribute of the product or service," the revised Guides eliminate what sometimes previously has been referred to as the "Results Not Typical" safe harbor for consumer testimonials. Under the 1980 Guides, advertisers were permitted to describe unusual results in consumer endorsements as long as they included a disclaimer such as "results not typical." Under the revised Guides:

> 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 Guides note, however, that the FTC:

cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the [FTC] would have the burden of proof in a law enforcement action, the [FTC] notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

The Guides provide several examples illustrating the FTC's position regarding consumer endorsements that describe atypical results. For example, if a consumer endorsement for a diet drink describes an atypical amount of weight lost as a result of the endorser's use of the product (e.g., 50 pounds), the advertiser must disclose what results consumers typically achieve (e.g., "most women lose 15 pounds"), and the advertiser must have adequate substantiation for the "typical" results. If the same endorsement describes atypical results stemming from a set of "truly remarkable circumstances" (e.g., a consumer loses 110 pounds from a combination of the diet drink, a diet of only raw vegetables, and six hours of exercise per day), the advertiser must alert consumers to these circumstances and must have substantiation for any performance claims conveyed by the endorsement (e.g., that the diet drink is an effective weight loss product) (§255.2, example 4).

Disclosure of "Material Connections" Between Advertiser and Endorser

The revised Guides do not change the FTC's long-standing position that "material connections" between advertisers and endorsers that might materially affect the weight or credibility of the endorsement (*i.e.*, consumers would not expect the connection) must be disclosed. These material connections may include direct payment or free products. The revised Guides do, however, include a number of new examples that demonstrate the FTC's intended application of this position, particularly with respect to non-traditional advertising channels.

For example, a celebrity may have a contractual relationship with an advertiser pursuant to which the celebrity is paid for speaking publicly about a particular product. If the celebrity is interviewed on a talk show and the celebrity describes her experience with the product, the Guides suggest that the celebrity should clearly and conspicuously disclose that she is a spokesperson for the product (§ 255.5, example 3).

Alternatively, an advertiser may provide a well-known independent blogger with a particular product for free and ask that he review it on his blog. Under the revised Guides, the FTC's position is that the blogger should clearly and conspicuously disclose that he received the product for free, the advertiser should advise the blogger that the connection should be disclosed, and the advertiser should have procedures in place for monitoring the blogger's compliance (§255.5, example 7). Similarly, where an advertiser engages someone to promote its product on an online message board or to friends or family as a member of a "street team," the Guides instruct that the online poster or "street team" member should disclose his or her connection with the advertiser (§ 255.5, examples 8 and 9).

The revised Guides also state that, with respect to research an advertiser commissions an outside organization to perform, the advertiser's payment of expenses to the research organization should be disclosed in any advertisement mentioning the results of the research (§255.5, example 7). This is true even where the advertiser has no control over the design and conduct of the research project.

General Principles

The revised Guides retain a number of general considerations contained in the 1980 Guides that an advertiser should think about before publishing an endorsement:

- Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser, and may not convey any express or implied representation that would be deceptive if made directly by the advertiser.
- 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. Note that the FTC's position is that this may represent an affirmative obligation on the part of the advertiser to secure the endorser's views at reasonable intervals where, for example, there is a material alteration to the endorsed product.
- An endorsement representing that the endorser actually uses the endorsed product may only be published so long as the endorser was a bona fide user of the product at the time the endorsement was given. The advertiser may continue to run the advertisement only as long as it has good reason to believe that the endorser remains a bona fide user of the product.
- When an advertisement represents that an endorser is an expert with respect to the endorsed message, the endorser's qualifications must in fact give the endorser expertise in the subject matter of the endorsement. For example, "if the endorser is referred to as a 'doctor,' the advertisement must make clear the nature and limits of the endorser's expertise."