

# FTC Guidelines on Endorsements and Testimonials - Analysis

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For MLM, Direct Selling, Network Marketing, Party Plan

This article addresses issues relating to the Federal Trade Commission's recent issuance of new FTC administrative Guidelines pertaining to endorsements and testimonials, relied upon by consumers, in the course of marketing various products or services. On October 5, 2009, the Federal Trade Commission published a notice that it is adopting revised Guides Concerning the Use of Endorsements and Testimonials in Advertising. The revised Guide basically updates the earlier Guide with particular attention to the use of endorsements, and testimonials on blogs, in word-of-mouth advertising campaigns and on new media platforms, and becomes effective December 1, 2009.

The new "Guide" will impact direct selling, network marketing, MLM and party plan companies, but there is overlap from previous FTC enforcement. The Guide does not change the duties of the company in ads that make earnings claims or product claims. If earnings claims are made, the FTC has long ago contended that such claims were deceptive unless accompanied by average earnings disclosures. If product performance claims were made, the FTC demanded that the company be able to substantiate the claims and to disclose expected typical results of consumers of the product or service.

The new "guide" rules are applicable to claims by celebrity endorsers, distributors, users or, in the less frequent occasion of product performance claims by a consumer who has some type of affiliation with the company. As to earnings claims, the FTC has long contended that any distributor earnings claims, testimonials or hypothetical projections be accompanied by references to average earnings disclosures prepared by the company. Many leading companies already [www.mlmlegal.com](http://www.mlmlegal.com) comply in this regard. The new rules, however, now add a new responsibility to distributor claims about product performance. If a distributor makes a claim about a personal experience or other expected performance experience from the product or service, in any type of media, including social networking media, the distributor is now obliged to disclose his or her connection with the company and to also disclose information that fairly represents the expected performance results for the typical consumer. The previous "safe harbor," of merely disclosing that "Typical Results May Vary," has been removed by the new FTC Guide and replaced by a requirement of disclosure of "expected results for the typical consumer," a much more onerous burden on the endorser, giver of the testimonial or company that is promoted. This FTC demand is similar to its existing policy regarding earnings claims. And, as to liability, both the individual endorser or individual providing the testimonial and the company are liable for failure to provide

disclosure of connection and typical results expectations. Above and beyond actual compliance with the new "guide" rules, companies, to avoid liability, will face a new challenge of monitoring a sales force with potential hundreds of thousands or millions of independent distributors as those distributors make product performance claims in various media.

Since the new "guide" rules will impact virtually all product and service marketing activity in the U.S., it is likely that years will pass before regulatory actions and cases will give clear guidance to enforcement policy and interpretation [www.mlmllegal.com](http://www.mlmllegal.com) of the new FTC Guidelines.

With respect to the FTC Guidelines, several observations are on point with respect to the impact on direct selling, network marketing, MLM and party plans programs:

1. It is important to note that the Guidelines are neither laws, regulations, administrative rulings, legislative or court authority, nor do they have the force of law. The Guidelines are just that, i.e., guidelines that represent the FTC's administrative interpretation that asserts the FTC's position with respect to advertiser compliance with the FTC Act. The FTC recognizes that it will have the burden of proving deceptive activity in any law enforcement action.

The FTC makes this point clear in its own words and news release of October 5, 2009 regarding the updated Guides:

*The Guides are administrative interpretations of the law intended to help advertisers comply with the Federal Trade Commission Act; they are not binding law themselves. In any law enforcement action challenging the allegedly deceptive use of testimonials or endorsements, the Commission would have the burden of proving that the challenged conduct violates the FTC Act.*

2. Although the Guides may seem more appropriate in the conventional advertising context of television, radio, print or internet media that is organized and sponsored by a central company advertiser, the Guide rules, if and when applied to individual direct selling distributor testimonials, in the course of individual distributor promotion, are potentially quite troubling and over burdensome to direct selling companies. Disclosure of connection or relationship with the direct selling company is not an issue. However, the requirement of posting companion "typical results surveys" in many or most instances is overkill that cannot possibly monitor product testimonials by millions of independent distributors.
  - A. The assumption that the average reasonable consumer will be unduly swayed to buy product by an individual distributor, providing an honest testimonial that he or she "lost 10 pounds in a month" on

company products or "saved \$10 on their home heating bill or telephone bill," does not accord sufficient respect to the intelligence and market decision making of the average reasonable consumer. The potential influence of one distributor's experience, posted on a social networking site, such as Facebook, is likely overrated. It has long been recognized that the reference to a pastry as a Danish is not understood by the average reasonable consumer as a product imported from Denmark. The stronger case can be made for the influence of a famous celebrity. As the administrative enforcement case law develops, hopefully some distinction can be made between the product testimonial of a [www.mlmlegal.com](http://www.mlmlegal.com) distributor and the testimonial or endorsement of a celebrity. In addition, perhaps distinctions may develop as to the extent of such testimonials, i.e. "I lost 10 pounds in a month" vs. "I lost 10 pounds in a day."

- B. The Guide would seemingly impose liability on the direct selling company for the promotional testimonials of its independent contractor distributors. In an industry where direct selling companies utilize a network of millions of "amateur" home-based independent contractor distributors, the task of monitoring all media, including social networking and blogs, becomes a virtually impossible task and burden. Although it is understandable that the company should play a responsible role in enforcing the ultimate adjudicated rules and standards, imposing liability in this context, at least prior to an adjudication that renders a clear defining standard, seems quite unfair.
- C. Direct selling, network marketing, MLM and party plan companies, faced with the new Guides, which have not yet been interpreted and ruled upon in court or administrative adjudication proceedings, will need to explore their own compliance responsive action ranging from "wait and see" to aggressive adoption of rules, training, monitoring and enforcement. On a spectrum of action, the following may be under consideration by companies, which must make their own policy risk decisions:
  - 1. Since the Guides are just that, i.e., guides, a company may wish to monitor the regulatory dialogue, enforcement action and litigation in this area to understand the specific impact on instances involving direct selling distributor testimonials. Presumably, evolving case decisions will be based on "case by case" facts, and expected standards will develop for fact sensitive scenarios. For instance, **and hopefully**, the burden of disclosure in a corporate sponsor

advertisement featuring a well-known celebrity may be deemed to be much more stringent than an isolated testimonial of performance use by an independent home-based business direct selling distributor at a blog site or social networking site. At the very least, the company would advise distributors, when making testimonials about product experience, to disclose their company affiliation, to be honest in their statements and to speak about product performance experience in a more general satisfaction manner than specifics that imply claims. An additional paragraph to policies might provide:

**A distributor that provides a product experience testimonial, in any medium should use care to disclose affiliation with the company, be honest in their testimonial personal experience, assert that they are not claiming that their experience is the typical results experience of potential consumers.**

Moving along the spectrum from "do nothing" to "be honest" would be a policy decision to an aggressive compliance policy paragraph, that must be, at the very least, considered among the choices of policy risk decision making, even if viewed as an unattractive alternative:

**A distributor shall not provide a specific product experience testimonial, in any medium, unless the distributor discloses affiliation with the company, is honest and sincere in the specific product experience testimonial and unless the distributor discloses "typical product results expectations data and information for consumers" as researched and published by the company.**

The FTC News Release dated [www.mlmllegal.com](http://www.mlmllegal.com) October 5, 2009 is a succinct summary of new FTC rule and its intended effect:

FTC News Release  
<http://www.ftc.gov/opa/2009/10/endortest.shtm>  
For Release: 10/05/2009

**FTC Publishes Final Guides Governing Endorsements, Testimonials**

## Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements

The Federal Trade Commission today announced that it has approved final revisions to the guidance it gives to advertisers on how to keep their endorsement and testimonial ads in line with the FTC Act.

The notice incorporates several changes to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, which address endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers. The Guides were last updated in 1980.

Under the revised Guides, advertisements [www.mlmllegal.com](http://www.mlmllegal.com) that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect. In contrast to the 1980 version of the Guides – which allowed advertisers to describe unusual results in a testimonial as long as they included a disclaimer such as “results not typical” – the revised Guides no longer contain this safe harbor.

The revised Guides also add new examples to illustrate the long standing principle that “material connections” (sometimes payments or free products) between advertisers and endorsers – connections that consumers would not expect – must be disclosed. These examples address what constitutes an endorsement when the message is conveyed by bloggers or other “word-of-mouth” marketers. The revised Guides specify that while decisions will be reached on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Thus, bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service. Likewise, if a company refers in an advertisement to the findings of a research organization that conducted research sponsored by the company, the advertisement must disclose the connection between the advertiser and the research organization. And a paid endorsement – like any other advertisement – is deceptive if it makes false or misleading claims.

Celebrity endorsers also are addressed in the revised Guides. While the 1980 Guides did not explicitly state that endorsers as well as advertisers could be liable under the FTC Act for statements they make in an endorsement, the revised Guides reflect Commission case law and clearly state that both advertisers and endorsers may be liable for false or unsubstantiated claims made in an endorsement – or for failure to disclose material connections between the advertiser and endorsers. The revised Guides also make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.

The Guides are administrative interpretations of the law intended to help advertisers comply with the Federal Trade Commission Act; they are not binding law themselves. In any law enforcement action challenging the allegedly deceptive use of testimonials or endorsements, the Commission would have the burden of proving that the challenged conduct violates the FTC Act.

The Commission vote approving issuance of the Federal Register notice detailing the changes was 4-0. The notice will be published in the Federal Register shortly, and is available now on the FTC's Web site as a link to this press release.

### I. FTC REGULATION OF ENDORSEMENTS.

Under § 5 of the Federal Trade Commission Act, the Commission has broad authority to prohibit "unfair or deceptive acts or practices" in interstate commerce. 15 U.S.C. § 45. This is the statute that gives the FTC authority to regulate deceptive advertisements. An advertisement is considered deceptive if it contains a misrepresentation or an omission that is likely to mislead consumers who are acting reasonable under the circumstances, and the consumers are injured through the deception. Deceptive claims must be material to the consumer's decision to buy, but the FTC does not need to prove actual injuries. Deception Policy Statement, appended to Cliffdale Associates, Inc. 103 F.T.C. 110, 174 (1984). We have attached a general Memorandum regarding the FTC's regulation of marketing claims to this Memorandum for more detail on still relevant

general requirements.

## **II. GENERAL PRINCIPLES**

It has long been held by the FTC and courts that an advertisement is deceptive and violates § 5 where the advertisement contains false or deceptive endorsements or testimonials. See *In the Matter of Numex Corp.*, 116 F.T.C. 1078 (1993). In 1980, the FTC issued the Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255. The FTC believed that consumers would often give added weight to the opinions of "expert" or celebrity endorsers in making product decisions, and, therefore, product endorsements must be nondeceptive. Generally, the FTC interpretations stated that endorsements could not contain representations made by third parties which would be deceptive, or claims that the advertiser does not have a reasonable basis for making, if the advertiser made the claim directly.

Pursuant to the Guides, advertisers must possess reliable evidence to support any underlying claims conveyed to consumers by the endorsements, as the endorsements are not themselves substantiation for advertising claims. If an endorser claims to be a user of the product, the endorser must in fact be a bona fide user of the product. Endorsements may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an expert's or celebrity's endorsement only so long [www.mlmllegal.com](http://www.mlmllegal.com) as it has reason to believe that the endorser continues to subscribe to the views presented. In addition, any "material connection" between the endorser and the advertiser that might materially affect the credibility of the endorsement must be disclosed where it isn't obvious the endorser was paid. 16 C.F.R. § 255.1.

All of these general principles that formed the earlier Guide are still in effect. What has changed is basically the recognition that disclosure of relationships is important to a consumer's decision-making process, and that disclosure is required in new internet media, as well as communication through traditional media outlets.

### **Expert Endorsers.**

An expert must be truly qualified as such, and an expert endorsement must be supported by examination or testing of the product at least as extensive as reasonable experts in the field generally agree would be needed to support the conclusions presented in the endorsement. 16 C.F.R. § 255.3(b). Basically, the expert must be real, an expert in the relevant field, and any claims made must be based on the expert's factually substantiated opinion.

### **Consumer Endorsers.**

Advertising using testimonials by consumers will generally be interpreted to convey that the endorser's experience is representative of what consumers will typically achieve with the product in actual use. 16 C.F.R. § 255.2(a). If this is not the case, the advertiser

must (1) clearly disclose the limited applicability of the endorser's experience to what consumers may expect to achieve or (2) must disclose what the generally expected performance would be in the circumstances shown. Consumer endorsements may not contain claims that the advertiser cannot substantiate if the advertiser were to make them directly.

### **Celebrity Endorsers.**

Celebrity endorsers who claim to use the product endorsed must actually be a user of the product, and the endorsement must reflect the "honest opinions, findings, beliefs, or experience" of the celebrity. This is a requirement of all endorsements. Advertisers must substantiate not only the accuracy of the celebrity's claims, but also any underlying claims of product efficacy conveyed to consumers through the endorsement. 16 C.F.R. § 255.1(a).

### **Organizational Endorsers.**

Organizational endorsements must be representative of the opinion of the members of the organization. If an organization is made up of professionals [www.mlmlegal.com](http://www.mlmlegal.com) or experts, then they must have conducted the kind of tests or have the kind of experience that experts would recognize as a valid basis for giving an opinion.

## **III. NEW RULES**

### **General Principals.**

Under the revised Guides, advertisements that feature a consumer, conveying his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect. In the earlier version, advertisers were allowed to use unusual results in a testimonial as long as they included a disclaimer such as "results not typical." In the revised Guides, there is no longer a safe harbor for the statement "Not all consumers will get this result." This type of statement is no longer effective as a disclaimer that the endorser's claimed experience is representative of what a consumer will typically achieve. 16 C.F.R. § 255.2. If the advertisement suggests an endorser is an actual consumer, he or she must not be a paid actor, unless that fact is disclosed.

The earlier Guides did not contain a statement that endorsers could be liable under the FTC Act for statements they make in an endorsement, as well as advertisers, though FTC cases held this to be the state of the law. *Synchronal Corp.*, 116 F.T.C. 1189 (1993); The revised Guides reflect Commission case law and clearly state that both advertisers and endorsers may be liable for false or unsubstantiated claims made in an endorsement – or for failure to disclose material connections between the advertiser and endorsers. The revised Guides also make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the

context of traditional ads, such as on talk shows or in social media.

### **New Media.**

The FTC included Guide provisions regarding new forms of consumer-generated media, such as the use of blogs, word of mouth marketing campaigns or "sponsored conversations" through examples intended as guidance on whether or not such communications are endorsements requiring substantiation and disclosure. In general, social media posts are considered sponsored advertising messages and are regulated by the FTC if they meet certain conditions. The FTC will look at a number of factors in deciding whether or not there is a "material connection" between an advertiser and a person discussing its product and, therefore, a post should be considered an endorsement, including whether the poster: (1) is compensated (in cash or products) by the marketer or a third party; (2) has an ongoing relationship with the marketer; (3) participates in a word of mouth marketing program that provides products to review publicly; and (4) receives similar products or services regularly, or expects to in the future. 16 C.F.R. § 255.5. An example from § 255.0 of the revised Guides setting out what is or is not an endorsement demonstrates this:

**Example 8:** 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 [www.mlmllegal.com](http://www.mlmllegal.com) 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.

The FTC states "that in analyzing statements made via these new media, the fundamental question is whether, 'viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message."'" Notice of adoption of revised Guides. Federal Register: October 15, 2009 (Volume 74, Number 198). The FTC states that the factual situations that could give rise to an application of the endorsement rules are too varied to delineate. However, the Guide contains numerous examples intended to give some idea as to its parameters. The examples are instructive, and are attached at the end of this memorandum.

Where a person is an endorser covered by the rules, this fact should be disclosed prominently, as should the payment or promise of compensation prior to and in exchange for the endorsement.

As for the endorsements themselves, they are subject to the same rules regarding disclosure, substantiation and liability as were in place with traditional media endorsements. Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. The endorsement may not be presented out of context or reworded so as to distort the endorser's opinion. The endorser, if represented as a user of the product, must have been an actual user at the time of the endorsement.

Under the new rule, both advertisers and endorsers may be liable for statements made in the course of their endorsements that are false or [www.mlmllegal.com](http://www.mlmllegal.com) unsubstantiated, or for failing to disclose material connections between themselves and their endorsers. The following is an example from § 255.1 of the new rules regarding liability for the statements of bloggers:

**Example 5:** 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. [See § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also 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.

As may be seen here, if there is a material connection between a company and a person posting on a blog or other social media, the company is liable for the false and deceptive representations made by that person in the endorsement, even if unauthorized. A company would be well advised to ensure that its bloggers receive guidance and training concerning the need to ensure that any and all statements they make are truthful and substantiated. Further, any time there is a paid or other material connection between the company and a blogger or other participant in various forms of new social media, this should be prominently disclosed, as should the details of the

connection.

Social media posts by distributors would probably be considered sponsored advertising messages and be regulated by the FTC under the Guide, in that the distributor is compensated, and/or has an ongoing relationship with the company. This creates a duty of disclosure on the part of the poster, and a duty to monitor and correct on the part of the company. As stated by the FTC, a marketer should ensure that all social media posters with a material connection have training and guidance as to proper disclosure, and "the need to ensure that statements they make are truthful and substantiated." It also appears that going forward, companies will need to make a good faith attempt to correct any deceptive statements.

At this time, it may be necessary for companies to devise a new rule in its Policies and Procedures dealing with endorsements and testimonials in general, and the use of social media in marketing. In addition, companies may wish to develop training and best practices programs as well as a protocol for monitoring and enforcement by the company compliance or distributor services department.

**Below for discussion and illustration purposes, only, are actual FTC Examples of Material Connection 16 C.F.R. § 255.5.**

**Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the "findings" of that research organization. Although the design and conduct of [www.mlmlegal.com](http://www.mlmlegal.com) the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

**Example 2:** A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

**Example 3:** During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game 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. She continues talking about the ease of the

procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship [www.mlmlegal.com](http://www.mlmlegal.com) with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

**Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

**Example 5:** An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his “spontaneous” opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein “steak.” This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained. Assume, in the alternative, that the

advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the “hidden camera” only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

**Example 6:** An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer’s staff reviews the profiles of individuals interested in working as “extras” in [www.mlmllegal.com](http://www.mlmllegal.com) commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer’s infomercial, they will receive a small payment. Viewers would not expect that these “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

**Example 7:** 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.

**Example 8:** An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

**Example 9:** A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular

advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They [www.mlmlegal.com](http://www.mlmlegal.com) should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

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#### *Links to Resources:*

[FTC Guidelines Endorsements and Testimonials: Detailed Analysis](#)

[FTC News Release on Endorsements and Testimonials](#)

[FTC Complete Guidelines Release](#)

[FTC Short Version Guidelines Release](#)

[FTC Examples of Material Connection](#)

[FTC Regulation of Advertising](#)

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*On any given day you can catch Jeffrey Babener, editor of [www.mlmlegal.com](http://www.mlmlegal.com), lecturing on Network Marketing at the University of Texas or the University of Illinois, addressing thousands of distributors in Los Angeles, Bangkok, Tokyo and Russia, or writing a new book on Network Marketing, an article for Entrepreneur Magazine or a chapter for a University textbook. Over two decades he has served as marketing and legal advisor to some of the world's largest direct selling companies, the likes of Avon, Nikken, Shaklee, Tupperware, Prepaid Legal, Longaberger, Melaleuca, Discovery Toys, Usana, Amazon Herb, NuSkin, Cell Tech, Sunrider.... and he has provided counsel to the most successful telecom network marketing companies...Excel, ACN, World Connect, ITI, Acceris, AOL Select and Network 2000. An active spokesperson for the industry, he has assisted in new legislation and served on the Lawyer's Council, Government Relations Committee and Internet Task Force of the Direct Selling Association (DSA) as well as serving as General Counsel for the Multilevel Marketing International Association. He is an MLM attorney supplier member of the DSA and has served as legal counsel and MLM consultant on MLM law issues for many DSA companies. He is author of multiple books, including, Network Marketing: What You Should Know, Network Marketer's Guide To Success, Tax Guide for MLM/Direct Sellers, Starting and Running the Successful MLM Company, The MLM Corporate Handbook and Window of Opportunity. He is author of countless articles on network marketing, many of which can be found at [www.mlmlegal.com](http://www.mlmlegal.com) where he is the editor. You will see his articles and interviews in such publications as Money, Atlantic Monthly, Success, Entrepreneur, Business Startups, Home Office Computing, Inc., Money Makers Monthly, etc. He has been chairman of numerous industry conference series, including, Starting and Running the Successful MLM Company, The MLM Entrepreneur Series and The MLM Masters series. He has served as the close advisor to scores of MLM Companies and their distributors, comprising millions of distributors and billions of dollars in sales. Mr. Babener is a graduate of the University of Southern California Law School, where he served as editor of the USC Law Review. After an appointment to be an advisor law clerk to a U.S. Federal Judge, he went on to*

*become a member of the California and Oregon State Bar, where he has also served as chairman of the Oregon State Bar Committee on Judicial Administration. He has exclusively practiced in the area of direct selling for over 20 years. A Regulatory Update for MLM, Direct Selling, Network Marketing, Direct Sales, Party Plan Independent Distributors and Companies*