

FTC Endorsement Guidelines Impact MLM/Direct Selling

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Every step you take, I'll be watching you...Sting, The Police

For better or worse, mlm/network marketing/direct selling companies and their distributors will be impacted by recently adopted FTC Guidelines that impact distributor endorsements and testimonials in online ads, blogs, social networking and other media.

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 became 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 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 of the new FTC Guidelines.

What's a MLM/Direct Selling Company to Do?

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 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.

It is expected that companies and their compliance departments will develop their own unique approaches to dealing with the new rules, ranging from adoption of new policies, guidelines, education, monitoring and enforcement. **Tune in to www.mlmlegal.com for ongoing updates and analysis.**

Links to Resources posted at www.mlmlegal.com

[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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