

# FTC Guidelines on Endorsements and Testimonials- Regulation of Advertising

[www.mlmlegal.com](http://www.mlmlegal.com)

© Jeffrey Babener

For MLM, Direct Selling, Network Marketing, Party Plan

## I. FTC REGULATION OF ADVERTISING.

Under Section 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).

It has long been held by the FTC and courts that an advertisement is deceptive where the advertisement contains objective or factual claims and the advertiser does not have a reasonable basis for making the claims. Pfizer, Inc., 81 F.T.C. 23 (1972). This is referred to as the doctrine of "substantiation."

## II. LEVEL OF PROOF.

In order to avoid a deceptive advertising claim, an advertiser, before it runs an ad, must have a "reasonable basis" for the claims made in the advertisement. A "reasonable basis" means objective evidence that supports the claim made, and the kind of evidence depends on the claim. At the very least, the advertiser must have the level of substantiation expressly claimed in an ad. However, the substantiation requirement applies not only to express claims, but also to [www.mlmlegal.com](http://www.mlmlegal.com) implied claims, whether, direct or indirect. In other words, it is a violation of the FTC Act to make health claims or other claims directly in promotional material, or indirectly through claims that could be implied as a result of the product name, the website name, website metatags, or any other means, without adequate scientific support.

If the advertising claim suggests a level of support, it is obvious that the advertiser must have evidence of that support. For example, if a marketer claims that "four out of five doctors prefer" product x, then the marketer must have reliable survey evidence

showing such a result.

Where a claim is not specific, the FTC will look at a number of factors in reviewing substantiating evidence to determine whether there is a reasonable basis for the claim including: 1) The type of claim; 2) The product involved; 3) The consequences of a false claim and the benefits of a truthful claim; 4) The cost of developing substantiation and 5) The level of substantiation experts would believe is reasonable. Pfizer, Inc., 81 F.T.C. 21 (1972).

The FTC pays the closest attention to, and requires a relatively high level of substantiation for advertisements that make claims about health or safety. What this means for the marketer is that if health and safety claims are made, the marketer should have "competent and reliable scientific evidence" in the form of scientific analysis and often clinical trials.

In one case, the FTC defined acceptable scientific evidence as "tests, analyses, research, studies, or other evidence based [www.mlmllegal.com](http://www.mlmllegal.com) upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Brakeguard Products, Inc., 125 F.T.C. 138 (1998).

Other cases have stated that the tests and studies relied upon must employ the appropriate methodology, addressing specific claims. Such tests have been referred to as "adequate and well-controlled clinical testing," and in one drug case, the FTC required two clinical trials. See, Schering Corp., 118 F.T.C. 1030 (1994); Removetron Int'l Corp., 111 F.T.C. 206 (1988); Thompson Medical Co., 104 F.T.C. 648 (1984), Aff'd 791 F.2d 189 (D.C. Cir. 1986), Cert. Denied, 479 U.S. 1086 (1987).

Therefore, it is difficult to set out exactly what substantiation is needed. However, if you are making specific claims as to performance, giving numbers representing performance levels, the company should have scientific tests demonstrating those performance levels. If you do not have tests showing those results, or the tests are not performed by entities the FTC would consider reputable and competent, the company could be a target of an FTC enforcement action.

### **III. LIABILITY.**

Obviously, a company is responsible for all claims, whether express or implied that are conveyed by any marketing materials. The FTC does not need to prove that consumers are actually deceived by the ad, and the company's good faith is irrelevant. See, Sears, Roebuck & Co., 95 F.T.C. 406 (1980), Aff'd 676 F. 2d 385 (9th Cir. 1982); Orkin Exterminating Co. v. FTC, 849 F. 2d 1354 (11th Cir. 1988), Cert. Denied, 488 U.S. 1041 (1989).

Further, the FTC may seek to hold corporate officers liable for violations of the FTC Act,

where the officer "owned, dominated and managed" the company, and if it is necessary to name the officer to provide adequate effectiveness to the order. FTC v. Standard Education Society, 302 U.S. 112 (1937). Individual [www.mlmllegal.com](http://www.mlmllegal.com) liability can be found where the officer "personally participated in or controlled..." the acts or practices, and the FTC does not need to show that the corporate officer intended to defraud consumers. Rent A Color, Inc., 103 F.T.C. 400 (1984), FTC v. Affordable Media, 179 F. 3d 1228 (9th Cir. 1999).

In the case of a § 5 violation, the basic administrative remedy is a cease and desist order which can be narrow or very broad to prevent future deception. Courts may order redress or disgorgement of profits and FTC consent orders often require the same.

---

*Links to Resources:*

**FTC Guidelines Endorsements and Testimonials: Detailed Analysis**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC%20GuidelinesAnalysis.html>

**FTC News Release on Endorsements and Testimonials**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC%20GuidelinesNewsRelease.html>

**FTC Complete Guidelines Release**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC Complete Guidelines Endorsements Testimonials.pdf>

**FTC Short Version Guidelines Release**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC Short Version Guidelines.pdf>

**FTC Examples of Material Connection**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC%20GuidelinesMaterialConnections.html>

**FTC Regulation of Advertising**

<http://mlmllegal.com/FTC%20Guidelines%20Testimonials/FTC%20GuidelinesRegulationofAdvertising.html>

**MLM Legal**

*On any given day you can catch Jeffrey Babener, editor of [www.mlmllegal.com](http://www.mlmllegal.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*