

LEGAL UPDATE

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FTC GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Earlier this October, the Federal Trade Commission (the “FTC”) released its final Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”). The Guides revise the FTC’s initial guidelines published in 1980, providing advertisers and spokespeople with insight on how to keep their endorsement and testimonial advertisements in compliance with the FTC Act, particularly in light of new issues posed by the emergence of non-traditional consumer-generated media. The Guides become effective on December 1, 2009.

I. Endorsements Under the Guides

A. What constitutes an “endorsement”?

The Guides define an endorsement as “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.” The key aspect of the definition is what message consumers take away from the speech at issue.

Although, as with all advertising, the FTC will consider each use of new media on a case-by-case basis for purposes of compliance with the law, the Guides set forth a construct for analyzing whether or not consumer-generated content falls within the definition of an endorsement. For example, the FTC specifically states in its Review of Comments on Proposed Revisions to the Guides (the “Comments”) that not all uses of new consumer-generated media to discuss product attributes or consumer experiences (e.g., blogs) should be

deemed “endorsements” within the meaning of the Guides. Instead, the FTC states that the fundamental question when examining a statement is whether, viewed objectively, the relationship between the speaker and the advertiser is such that the statement is sponsored, and consequently an advertising message. *“In other words,” the FTC states in the Comments, “in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an “endorsement” that is part of an overall marketing campaign?”* Facts that the FTC will consider when assessing whether a statement constitutes an endorsement include, but are not limited to: whether the speaker was compensated by the advertiser or its agent; if the product or service that was the subject of the statement was given to the speaker for free; if there is an agreement between the advertiser and the speaker and the terms of that agreement; the length of the relationship; and, the value of the items or service received by the speaker. The dispositive issue is whether the consumer-generated statement can be considered sponsored – an advertiser’s lack of control over the statement in question made via the new forms of consumer-generated media does not in and of itself disqualify the statement from being an endorsement under the Guides.

Included in Section 255.0 of the Guides is new Example 8 to elucidate how statements made on new consumer-generated media, here a personal blog, may qualify as endorsements under the Guides.

“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 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 his program, her positive review would be considered an endorsement under the Guides.”

As explained in the Comments, in the first two hypotheticals there is a lack of any relationship between the speaker and the dog food manufacturer, and no other factors exist that support the conclusion that the consumer is acting on behalf of the manufacturer. As a result, the postings in the first two hypotheticals are not considered endorsements under the Guides. In the third hypothetical, an ongoing relationship exists between the blogger and a network marketing program, and the blogger received an economic gain from the stream of products she receives. The blog posting is thus considered an endorsement under the Guides.

B. Contents of Endorsements – General Considerations and Impact of New Media

As detailed in Section 255.1 of the Guides, endorsements must reflect the honest opinions, findings, beliefs or experiences of the endorser. Furthermore, advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their

endorsers. Endorsers may also be liable for statements made during the course of their endorsements.

The FTC recognizes in the Comments that advertisers do not have complete control of endorsements made using new consumer-generated media because the advertiser does not disseminate these endorsements itself. However, the Comments clearly state that “if the advertiser initiated the process that led to the endorsements being made – e.g., by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs- it potentially is liable for misleading statements made by those consumers.”

The FTC included new Example 5 to Section 255.1 of the Guides to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the blogger's endorsement.

“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 service*¹(emphasis added).

¹ An endorser's responsibility to make such disclosure is discussed in greater detail in Section IV below.

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.”

II. Celebrity Endorsements Under the Guides

The Guides are revised to include language that specifically states that endorsers may be liable for statements they make in the course of their endorsements. The FTC states in the Comments that the addition of the new language and the new examples highlighting celebrity endorsers does not create any new liability for celebrities, but serves to emphasize to celebrities and their counselors that liability may be associated with celebrities’ endorsement activities. New Example 6 to Section 255.0 is included to demonstrate when a celebrity’s statement may be considered an endorsement under the Guides.

“Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. ***Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer’s views***” (emphasis added).

The FTC points out in the Comments that new Example 6 should not be read to suggest that every appearance by a celebrity constitutes an endorsement; rather new Example 6 was added to show that the determination of whether a speaker’s statement is an endorsement depends solely on whether the consumers believe that it represents the endorser’s own view – whether the person making the statement is speaking from a script, or giving

the endorsement in his or her words, is irrelevant to the determination².

Celebrity endorsers are not required to become experts on the product or industry they endorse, but they may have an obligation to make reasonable inquiries of the advertiser to ascertain that there is an adequate basis for assertions that the script has them making. New Example 4 to Section 255.1 was added to the Guides to emphasize this point.

“Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. ***A significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement***” (emphasis added).

III. Consumer Endorsements and Typicality Disclosures

² Because, in the scenario above, the entertainer’s statement constitutes an endorsement, it must comply with the Guides. However, as discussed in Section IV below, because an audience would reasonably expect an entertainer who appears on an infomercial to have material connections with the advertiser, a disclosure by the entertainer of her relationship with the advertiser under these circumstances is unlikely to be required under the Guides.

The Guides contain significant revisions regarding advertisements that include the testimonials of one or more consumers regarding the performance of an advertised product. An advertiser must obtain and have adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support consumer claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly. ***If the advertiser does not have substantiation that the consumer-endorser's experience is representative of what consumers will generally achieve through use of the advertised product, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstance. Disclosures such as "Results not typical" or "These testimonials are based on the experiences of a few people and you are not likely to have similar results" are no longer acceptable disclosures under the Guides because they do not adequately state the results that consumers will generally achieve.*** By eliminating the "results not typical" safe-harbor, advertisers who use testimonials are put on the same legal footing as those who convey the same claims directly to consumers, without the use of such testimonials. To achieve such equal footing, the Guides require a disclosure only if the advertisement, testimonial or not, is misleading without such disclosure. The standard for determining whether an advertisement is deceptive under the FTC Act, for all advertising, is what is the net impression consumers take away from the ad as a whole. Consequently, if the ad, taken as a whole, does not convey an unsubstantiated, and thus misleading, message of typicality, no disclosure is necessary.

Example 4 to Section 255.2 highlights the point that ***under the Guides, advertisers are required to disclose the generally expected performance in the depicted circumstances of their advertisements.***

"Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, 'Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.' The advertisement accurately describes the woman's experience, and such a result is within the

range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss). The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features 'before' and 'after' pictures of a woman who says 'I lost 50 pounds in 6 months with WeightAway,' the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., 'most women who use WeightAway for six months lose at least 15 pounds').

If the ad features the same pictures but the testimonialist simply says, 'I lost 50 pounds with WeightAway,' and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., 'most women who use WeightAway lose 15 pounds.')

IV. Disclosure of Material Connections Between Advertisers and Endorsers

A. Liability of Endorser and Advertiser

Due to the recent evolution of consumer-generated media, many endorsements are now disseminated directly by the endorser, rather than by the sponsoring advertiser as is the case in traditional forms of advertising such as television or print advertisements. ***Under the Guides, in instances where the endorser directly disseminates the endorsements to consumers, e.g., on a personal blog or via a status update on Twitter, the***

endorser is the party primarily responsible for disclosing material connections with the advertiser. As noted in the Comments, advertisers who sponsor these endorsers in order to generate positive word of mouth marketing should institute procedures designed to advise endorsers that disclosures are necessary and should also monitor the conduct of their endorsers.

B. Reasonable Expectation of the Audience

Under the Guides, when a connection between the endorser and the seller of the advertised product exists such that the weight or credibility of the endorsement may be affected, that is, when such connection is not reasonably expected by the audience, such connection must be fully disclosed. Consequently, although disclosure of compensation may not be required when a celebrity or expert appears in a conventional advertisement, endorsements by these individuals in other media, such as a personal blog or on Twitter or MySpace, may warrant disclosure.

There is no minimum monetary value of compensation received by the endorser to trigger the obligation to disclose his or her connection with the advertiser. If the speaker's statement constitutes an endorsement under the Guides, and knowledge of the speaker's receipt of money or free merchandise could affect the weight or credibility of his or her endorsement if the connection between the speaker and the advertiser is not reasonably expected by consumers, disclosure of the connection to the advertiser is mandated under the Guides.

Example 3 of Section 255.5 of the Guides was added to extrapolate on when disclosure of a material connection with the advertiser is required in order to comply with the FTC Act.

“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 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 endorsements. 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 (emphasis added).

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 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.”

C. Material Disclosures and New Media

Under the Guides, where a speaker’s consumer-generated endorsement appears in a medium that does not make his association with the advertiser apparent to consumers, disclosure of the material connection is mandated. Furthermore, although in this context the speaker has primary responsibility for disclosing his connection with the advertiser, the advertiser has an obligation to advise the speaker that he must make the disclosure. Example 7 to Section 255.5 highlights this point.

“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” (emphasis added).

V. Consequences of Non-Compliance

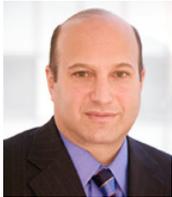
It has wrongly been reported that the penalty for non-compliance with the Guides is an \$11,000.00 fine for each act of non-compliance. Civil penalties come into play when the FTC’s Rules (which are codified into federal law) are violated. Unlike the FTC’s Rules, the Guides are administrative interpretations of what the FTC deems “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). The FTC assembles and publishes guidelines in order to provide advertisers and endorsers with references for self-regulation and the basis for voluntary compliance with the law.

Typically, if the FTC becomes aware of an advertiser who may be engaging in unfair or deceptive acts or practices in or affecting commerce, the FTC may decide to launch an investigation and a subsequent enforcement action against the allegedly non-compliant advertiser. In some instances, the FTC will obtain a settlement order against the advertiser and will require the advertiser to compensate injured consumers. The FTC has, to date, taken no such action against any endorser, although the Guides indicate that in the future the FTC will regulate endorsers’ statements, particularly when made via consumer generated media.

The foregoing is intended to summarize the principal issues relating to the FTC’s final guidelines regarding the use of endorsements and testimonials in advertising, and does not constitute legal advice. We would be happy to furnish you with the complete text of the FTC’s final rules upon request or answer any questions you may have. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Brad Rose at (212) 326-0875, Howard Siegel at (212) 326-0100 or Melissa Tomkiel at (212) 326-0437.

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Brad D. Rose joined Pryor Cashman in 1989 as a corporate, securities and intellectual property litigator and has been a partner at the firm since January 1997. For the past decade, Brad has primarily specialized in the protection and enforcement of intellectual property rights in the nature of trademarks and copyrights. Brad is presently the lead partner in Pryor Cashman's Branding, Licensing and Enforcement Group. Brad's client roster includes: individuals and entities in the entertainment industry including recording artists, actors and actresses; fashion designers, apparel and beauty companies; as well as trademark licensors/licensees involved in a multitude of different consumer product and service businesses.

Brad's extensive expertise in formulating, implementing and executing trademark clearance, trademark prosecution, trademark licensing and overall brand protection strategies on a worldwide basis routinely involves worldwide trademark and copyright prosecutions; negotiating and drafting trademark licensing deals; civil and criminal prosecution of trademark infringers and counterfeiters; pursuing cybersquatters both in federal court and in ICAAN arbitration proceedings; prosecuting and defending copyright infringement actions; and negotiating and drafting a variety of sponsorship and endorsement deals for a variety of companies, celebrities and brand owners. Moreover, Brad is routinely recognized in national publications as one of the top five trademark filing attorneys in the United States Patent and Trademark Office.

Brad is a 1985 graduate of Hofstra University School of Law, where he was a member of the Law Review.

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Mr. Siegel has also been involved in a number of music publishing company sales and acquisitions, as well as having advised on a variety of transactions involving the sale and purchase of master recordings and other entertainment-related assets.

Mr. Siegel is the former Chair of the Section on Entertainment, Arts and Sports Law of the New York State Bar Association, former Chair of the New York State Bar Association Committee on the Music and Recording Industry, and an Associate Member of the National Academy of Recording Arts and Sciences.

Mr. Siegel is a frequent lecturer for the Practising Law Institute and currently serves as Co-Chair of PLI's Counseling Clients in the Entertainment Industry. He is also a speaker for the New York Law Journal Seminar Press and the Continuing Legal Education Seminars of the New York State Bar Association. Mr. Siegel served as judicial clerk at the New York State Court of Appeals from 1970 to 1972. He is an adjunct Professor of Law at Fordham Law School and a member of the Editorial Board of Entertainment Law and Finance and of Multimedia Web Strategist, as well as the Editor-in-Chief of the nationally distributed book Entertainment Law and author of several articles dealing with the entertainment, music and copyright practice.

In 2007, and again in 2008, Mr. Siegel was designated by The Hollywood Reporter as one of the top 100 "Power Lawyers" in the entertainment industry. He was also recognized as one of the "Super Lawyers" in 2008 – a ranking of the top 5% of all attorneys in the New York Metropolitan area.

Mr. Siegel is a member of the New York, Nevada and California Bars and a summa cum laude graduate of Syracuse University College of Law where he was Order of the Coif, Editor-in-Chief of the Syracuse Law Review (1970) and a member of the Moot Court Board (1969-70).



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Melissa's practice includes the representation of a variety of clients in the entertainment industry, including songwriters, recording artists and music publishers, as well as clients in the film financing and production businesses. She has also worked on matters for clients in a wide range of industries, including fashion, apparel, healthcare services, logistics, real estate and the restaurant industry.

Melissa is a 2006 graduate of St. John's University School of Law, where she was a St. Thomas More Scholar and Frontline Editor for the Journal of Legal Commentary. While in law school, Melissa was a judicial intern for Judge Denise Cote in the United States District Court for the Southern District of New York.

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