

Special Report

How to Comply with the New FTC Guides Re: Use of Endorsements and Testimonials in Advertising

Section 5 of the FTC Act (15 U.S.C. 45)
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By

Marjorie Jobe, J.D.
www.marjoriejobe.com
Business Law Rebel on Facebook

**BLOGGERS, AFFILIATES AND NETWORK MARKETERS SHOULD KNOW AND
FOLLOW THESE GUIDES TO AVOID POTENTIAL LIABILITY**

WHO IS COVERED:

1. Bloggers, Internet Affiliate Marketers, Users of Facebook, Twitter and Social Media, Television, Print, and Radio Advertisers

WHAT IS COVERED:

1. Endorsements and Testimonials of any product, service, company or industry.
2. Both endorsements and testimonials are defined 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, even if the views expressed by that party are identical to those of the sponsoring advertiser.

BLOG EXAMPLE: [Straight out of the Guidelines]

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

GENERAL GUIDES:

1. Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.

2. The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement 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.

3. When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.

4. 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 [see § 255.5].

5. Endorsers also may be liable for statements made in the course of their endorsements.

CRITICAL GUIDE EXAMPLE:

“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.”

GUIDES ON CONSUMER ENDORSEMENTS:[Straight out of the Guidelines]

1. “An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. 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.”

Critical Warning: Be wary of using “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” The commission states that these are not effective, but does not rule out that a stronger disclaimer of typicality could be effective in the context of a particular advertisement.

2. “Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.”

EXPERT ENDORSEMENTS:

1. Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

2. Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.

DISCLOSURE OF MATERIAL CONNECTIONS:

1. “Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.”

2. If an expert, blogger, writer, speaker or other individual comments on, endorses or relates a personal experience with a product or service promoting it or advocating it on a talk show, blog, social media or networking site like Twitter or Facebook, and receives any form of compensation for talking about the product or service, disclosure of the relationship is required.

3. If a blogger or social network marketer receives a free product or service and is asked to write about it, a disclosure is required that the product or service was received for free. The manufacturer or service provider must advise the blogger that the disclosure is required and monitor the postings.

CRITICAL EXAMPLE:

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.

To learn more: See Notice at <http://www.ftc.gov/opa/2009/10/endortest.shtm>.
 See Guides at <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

SUMMARY OF THESE NEW GUIDES EFFECTS:

In a nutshell – these new rules are no big deal for honest and ethical business people. The primary goal of the new guides is to ensure that endorsements and testimonials truly are the honest opinion of the endorser. Additionally, the FTC intends that consumers are given information that reveals any financial connection between products and services and the people who promote them with testimonials and endorsements. This is the right thing to do anyway and honorable marketers already provide such ethical disclosures.

These guides and the FTC Act now clearly apply to bloggers, internet marketing affiliates and social media and network marketers. If you reach the buying public in any manner with your message for profit or gain in any form, you are covered.

The FTC proclaims that it will determine coverage on a case by case basis, since a steadfast hard line rule would be almost impossible to draw that would cover all scenarios, especially as new consumer generated or viewed media develop. The FTC will measure deception by what a consumer will perceive from the ad.

If an advertiser or promoter does not have verifiable data that demonstrates the typical results a consumer might experience, then the testimonial or endorsement should be restricted to a general endorsement specific to the endorser, something along the lines of *“this is the best product I've ever used.”*

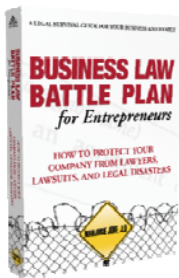
In regards to internet affiliates, the advertisers or product and service providers who contract with the affiliates should address these matters of disclosures in their agreements. The task of monitoring bloggers and social media users could prove impossible, but a good faith attempt at compliance will go a long way toward protecting against enforcement risk and liability.

Be conservative and fully disclose every relationship until such time as some enforcement cases make their way through the legal cycle. Consult competent legal counsel for specific advice and analysis regarding your particular situation.

If you have eBooks that have affiliate links in them, you need to include affiliate disclosures in the eBook.

ENFORCEMENT FACTS:

- FTC takes consumer and competitor complaints on line or by telephone.
- FTC reports to over 1700 civil and criminal law enforcement agencies
- Penalties include \$10,000 fine for each violation
- Criminal conviction and imprisonment for false statements in investigation
- THIS IS A GATEWAY LAW: An investigation will likely lead to charges of violating other competition or consumer related laws.



Marjorie Jobe, Attorney and Author of *Business Law Battle Plan for Entrepreneurs: How to Protect Your Company From Lawyers, Lawsuits and Legal Disasters*

**This Special Report is not legal advice. It is educational and informative only. You must consult your own internet business lawyer to address your specific legal issues with specially tailored legal advice.*