



How to effectively and legally tout consumer preferences in your company's marketing



The Endorsement Guides and ASTM Guide can ensure that consumer feedback does not disproportionately increase liability. **BY JOHN E. VILLAFRANCO AND RAQIYYAH R. PIPPINS**

Facebook. Twitter. Blog posts. Focus groups. Feedback from these sources often inspires highly effective advertising campaigns. As companies increasingly consider integrating messaging from social media and qualitative data sources into marketing campaigns, it is important to ensure that the consumer-based content used in advertising is consistent with applicable advertising standards. Failure to adhere to these standards could lead to consumer class actions, Lanham Act litigation, and inquiries from the Food & Drug Administration (FDA), Federal Trade Commission (FTC) or National Advertising Division of the Better Business Bureau (NAD).

As a general rule, advertisers are responsible for customer opinion shared through marketing channels under the advertiser's control, including simple statements regarding what a consumer "preferred." Social media introduces a new twist on a company's responsibility for consumer statements, because consumers now have the capacity to add content to company sponsored pages without review by the advertiser. An advertiser's level of engagement with consumer-generated content can make the company liable for the consumer-generated comment.

For example, in December 2012, the FDA sent a warning letter to a company for "liking" a comment placed by a consumer on the company Facebook page. In this case, the consumer comment described the consumer's success with the company's product for a drug use for which the company

had not received FDA approval. The letter cited "liking" the comment as an example of the company promoting the product for an unapproved drug use in violation of the Food, Drug, & Cosmetic Act. FTC guidance also contemplates advertiser responsibility for third party content in social media but notes that the Commission will use its prosecutorial discretion and consider, among other things, the actions taken by advertisers to monitor third party content added to company-sponsored mediums.

Prior to using consumer commentary as a part of a marketing strategy, there are two important guidance documents that companies should keep in mind: The FTC's "Guides Concerning Endorsements and Testimonials in Advertising" (Endorsement Guides) and the ASTM International "Standard Guide for Sensory Claim Substantiation" (ASTM Guide). Companies also are encouraged to proactively monitor company-sponsored social media outlets to remove or address unsupported product claims, in order to avoid the appearance that the company implicitly adopts statements that it knows are not supported.

The FTC's Endorsement Guides address the FTC's application of Section 5 of the FTC Act to the use of endorsements and testimonials in advertising and provide the basis for voluntary compliance with the law by advertisers. The Commission believes that consumers are vulnerable to messages purported to be objective opinions of actual product users, and the Endorsement Guides

are intended to establish standards for ensuring that testimonials in advertising are truthful and non-misleading. A central premise of the Endorsement Guides is that a consumer cannot say something about a product that the advertiser would not be permitted to say on its own. The Endorsement Guides provide the following recommendations to mitigate the risk of consumer deception:

- **Disclose any material connections between the company and the product user.** Often companies may provide a blogger or consumer a sample product or other compensation in exchange for the person providing his or her opinion of the company's products or services. The FTC Endorsement Guides require that any material connection between the product user providing the testimonial and the company be disclosed in any marketing materials referencing the testimonial of the product user. While this may not seem controversial, what constitutes a material connection may be broader than what most people think. For example, even intangible benefits, such as a chance to win a prize, could necessitate disclosures. Thus, prior to referencing a consumer's experience, incentives provided to the consumer should be considered to determine whether a disclosure is required.
- **Disclose when actors are included to represent consumers.** A company may want to use real consumer feedback collected

from a survey or social media in advertising but prefer to use an actor or actress to portray the consumer in advertisements. Under the Guidelines, advertisements that represent directly or by implication that they include “actual consumers” should utilize actual consumers in both the audio and video or clearly and conspicuously disclose that the person in the advertisements are not actual consumers.

- **Disclose the typical consumer experience.** A consumer may have exceptional results using a product or sincerely consider a product to be superior to a competitor product. Before referencing this consumer’s experience in advertising, care must also be taken to confirm whether the consumer’s experience reflects what the typical consumer is likely to experience using the product. The Endorsement Guides require that any testimonial touting the personal experience of a consumer either reflect the typical experience of the average product user, or be qualified to disclose the typical experience or results that can be expected by the average consumer. Confirming the typical results that can be expected with a product is closely related to the second guidance document that should be considered before referencing consumer experiences in advertising, the ASTM International “Standard Guide for Sensory Claim Substantiation.”

The ASTM International “Standard Guide for Sensory Claim Substantiation” provides tips for substantiating most sensory claims in advertising, including consumer preference claims (e.g., “our product tastes better than X product” or “our product is preferred over Y product”). The ASTM Guide has been endorsed by the FTC and NAD and reinforces the legal principle that there are objective ways to measure consumer opinion about product attributes. As noted in the ASTM Guide, qualitative research, such as focus groups, are not considered to be acceptable forms of claim support because experts in the field do not believe the results of qualitative research can be projected to a larger population of consumers. In the alternative, the ASTM Guide provides a helpful

objective metric for determining the typical results that are likely to be experienced by consumers using a product by outlining several parameters for developing questionnaires that can be relied upon for advertising. Important recommendations discussed in the ASTM Guide include the following:

- **Ensure the sample population matches the intended product users.** The sample population should match the audience to whom the claim is directed with special attention to demographics and geographic location.
- **Ensure competitor products tested are of equal quality (including shelf-life) to the manufacturer’s product to which they are being compared.** The ASTM Guide instructs companies on how to appropriately select and handle competitor products to ensure the treatment of the products does not undermine the results of the consumer preference testing.
- **Ensure the questions or ranking scale does not bias the results.** The ASTM Guide discusses the pros and cons of various interviewing techniques and the types of questions that should be used based on the claim the advertiser would like to support. For example, the ASTM Guide notes that, when attempting to measure consumer acceptance of a product, a nine-point hedonic scale is traditionally used because it is reliable, valid, and of practical use. Hedonic sales measure the degree of liking of the level of an individual attribute in a product and, when there is a large enough difference in the mean ratings on a hedonic acceptance scale, a preference can be inferred.
- **Monitor the question design.** The ASTM Guide outlines important considerations for the questionnaire design including the format, components, and ordering. For example, the question order can greatly limit the weight given to the results of a survey. The ASTM Guide recommends that, where a survey is intended to assess consumer preference, the questions addressing the general or overall impression of a product come very early

in a survey because, “in general, questions asked first are assumed to be more free of influence or biases that may affect questions appearing later.”

Each of the aforementioned survey elements can affect whether the “typical consumer experience” described by a company in advertising is considered to be truthful, non-misleading, and substantiated by a court, the FTC, or NAD.

One of the safest uses of consumer opinion is feedback obtained from an adequately and well-controlled survey. An example is provided in the FTC Endorsement Guides, which discusses an ad touting consumers experience with certain cake mixes:

An advertisement presents the results of a poll of consumers who have used the advertiser’s cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser’s cake mix.

The ASTM Guide can be a helpful asset in designing a poll or survey of the type contemplated by this FTC hypothetical, to assess and (eventually) tout consumer preferences for nearly any consumer product. Sharing existing customer feedback is an effective marketing tool for obtaining new customers. The Endorsement Guides and ASTM Guide are helpful tools for ensuring that consumer feedback is used in a manner that does not disproportionately increase liability for the company.

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