

Federal Trade Commission Addresses Frequently Asked Questions About the Revised Endorsement Guides

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June 25, 2010

In October 2009, the Federal Trade Commission (“FTC”) introduced a revised version of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”). Key changes to the Guides include: (1) clarifying that the Guides apply to all advertising messages presented as the opinion or findings of a party other than the advertiser, regardless of the media that is used to disseminate the advertising message (e.g., blog, newspaper, infomercial, “word of mouth” marketing, talk show appearance); (2) elaborating on the types of situations involving new media (e.g., blogs, social networks) where the FTC will likely consider statements to be “advertising messages” sponsored by the advertiser; and (3) recommending that non-typical testimonials be accompanied by a clear and conspicuous disclosure of generally expected results. ^[1]

On June 23, 2010, the FTC Bureau of Consumer Protection’s Division of Consumer and Business Education posted “The FTC’s Revised Endorsement Guides: What People Are Asking” (the “FAQs”), to help businesses and consumers better understand the FTC’s revisions to the Guides. The FTC’s FAQs address various questions the FTC has received since the revised Guides were introduced in October, including questions about when the revised Guides apply to endorsements in new media, how disclosures regarding a sponsored relationship or typical consumer results should be made, and how the Guides apply to affiliate and network marketing. [The FAQs are available on the FTC’s website.](#)

Neither the revised Guides nor the FAQs are rules or regulations, yet they are instructive, and businesses should pay close attention to how the Guides may apply to their advertising. While the Guides and FAQs do not provide requirements that businesses must follow, they do provide helpful insight on how the Commission likely would interpret the FTC Act’s prohibition of unfair or deceptive acts or practices as applied in certain situations. Conversely, following the recommendations by the FTC in this material will not automatically preclude a determination by the FTC that a business has violated the law.

When do the Guides apply, particularly in the context of new media?

The FAQs reiterate that the Guides apply to reviews of all products “that are made on behalf of a sponsoring advertiser,” including situations where bloggers and others using new media receive free products or other perks with the understanding that the he or she will review or promote the advertiser’s products. The Guides suggest that if there is a connection between the endorser and the marketer of the product that would affect how consumers evaluate the endorsement, such as the endorser receiving free products or services, that connection should be disclosed. According to the FAQs, advertisers and endorsers should always err on the side of transparency and disclose a

sponsored relationship. For example, the FAQs indicate that:

- Even if the value of the free product or service is minimal or the product is returned to the advertiser after review, endorsers should reveal the receipt or use of the free product to their audience, particularly if the endorser has an ongoing relationship with a marketer. But, if a store gives out free products or free samples to all its customers, a subsequent blog posting about the product would not be covered by the Guides.
- Each new endorsement made about a product or service that was originally provided for free without a disclosure about the sponsored relationship could be considered deceptive, even if the free product was provided at a much earlier occasion.
- A disclosure should be made every time a celebrity spokesperson endorses a product, unless consumers understand the celebrity is being paid to endorse the product. Nonetheless, because determining whether consumers are “aware of a relationship could be tricky in many cases” a disclosure is recommended. For example, the FAQs suggest that a celebrity athlete spokesperson who sends messages on Twitter about a product he’s paid to endorse should disclose his connection with the sponsoring advertiser every time the athlete tweets about the product as long as “a significant number” of readers are not aware of the relationship.

How should the disclosure be made?

The FAQs addressing how a disclosure should be made focus on how to effectively communicate the relationship to consumers, rather than on uniform language or elements that should be found in a disclosure. For example, the FTC notes that a single disclosure on a blogger’s homepage that “many of the products I discuss on this site are provided to me free by their manufacturer,” may not be adequate to alert consumers about the sponsorship relationship because consumers could read individual reviews or sections of the blog site without ever visiting the home page.

Instead, the FTC recommends that disclosure information should be clearly and conspicuously provided as part of the endorsement message itself to minimize the risk that consumers will miss the disclosure. Requiring consumers to follow a link to find disclosure information or burying disclosure information on an “About Us” or “General Information” webpage would not be sufficient. Even when using media with limited disclosure space, such as Twitter, the FTC indicates that a sponsorship relationship should be disclosed within the endorsement message in some manner. According to the FTC, the disclosure could be as simple as using the hashtag “#paid ad” in the tweet, but nonetheless a disclosure alerting consumers to the presence of a relationship between the endorser and sponsoring advertiser should be present.

How do the Guides apply to affiliate or network marketing?

In response to questions regarding affiliate and network marketing, the FTC reaffirms the responsibilities that advertisers and marketers have to train and monitor endorsers’ compliance with advertising and other applicable laws. While the FTC notes that the scope of a training and monitoring program “depends on the risk that deceptive practices by network participants could cause consumer harm,” the FAQs provide “core elements every program should include.” These elements involve:

- Explaining to endorsers what can and cannot be said about a product, in light of an advertiser’s responsibility for substantiating objective product claims;

- Creating a reasonable monitoring program to determine what endorses are saying about a product and ensuring that the statements comply with applicable laws; and
- Implementing follow-up procedures if the advertiser discovers questionable practices.

How can result-specific testimonials be used?

Finally, the FAQs address the Guides' recommendations regarding consumer testimonials that claim specific results. The revised Guides indicate that testimonials claiming specific results will be viewed by the FTC as describing an experience that other consumers can typically expect to achieve. According to the revised Guides, this interpretation is not adequately qualified by statements disclaiming the testimonial results, such as "Results not typical" or "Individual results may vary." Rather the FAQs clarify that advertisers must (1) "have adequate proof to back up the claim that the results shown in the ad are typical" or (2) "clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad."

To help businesses apply this principle, the FAQs direct advertisers and marketers to the Guides' numerous examples, as well as provide new ones. For example, an advertisement that contains a testimonial statement that consumer X "lost 50 pounds in 6 months using product Y" conveys that consumer X's experience is typical of what consumers will achieve by using the advertised product. If the advertiser cannot provide adequate substantiation that the results claimed by consumer X are typical, the advertisement should clearly and conspicuously disclose the typical results (e.g., "Most woman who use product Y for 6 months will lose at least 15 pounds").

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The attorneys in Kelley Drye & Warren's [Advertising and Marketing practice group](#) have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

For more information about this Client Advisory, please contact:

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^[1] More information regarding specific elements of the FTC's revised Guides can be found in Kelley Drye and Warren's October 15, 2009 Client Advisory [available here](#).