

FTC Adopts Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising

On October 5, 2009, the Federal Trade Commission approved final revisions to its “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (the “Guides”). The Guides concern endorsements and testimonials by consumers, experts, organizations and celebrities, and also provide for disclosure of connections between advertisers and endorsers. The new guidelines, which go into effect December 1, 2009, are designed to adapt to the new media landscape where blogs and social media sites have become recognized destinations for consumers looking to obtain information about products and services. These amendments are the first revision in 29 years. Although the Guides are not regulations, they represent the FTC’s interpretation of laws enforced by the FTC, especially Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” Advertisers that follow the Guides will likely avoid successful attack; advertisers that ignore the Guides do so at peril of legal challenge, not only by the FTC, but also by the many state and local governments and watchdog groups that give great weight to FTC guidance.

One significant change under the revised Guides affects testimonials that do not reflect typical experience with a product or service. Advertisements that portray a consumer’s experience with a product or service as typical, when that is not the case, are now required to clearly and affirmatively disclose the results that consumers can “generally expect.” Unlike the old Guides, if a testimonial features atypical results, it is not sufficient under the new Guides merely to include a disclaimer such as “results not typical.” The revised Guides pointedly abandon this safe harbor. Thus, advertisers using testimonials must now meet the same substantiation requirements that would apply if they made the performance claim directly. Indeed, the Commission strongly disagreed with a proposal to allow the disclaimers if they were clearer and larger: “Even disclaimers substantially larger than those that are typically used by advertisers would likely not be effective. ... Nor would mandating larger disclaimers comport with the Commission’s longstanding preference for testimonials that either reflect generally expected results or are accompanied by clear and conspicuous disclosures of what the generally expected performance would be in the depicted circumstances.” The examples addressing “consumer endorsements” make clear that even a disclaimer such as “Notice: These testimonials do not prove our product works. You should not expect to have similar results” is insufficient when testimonials do not depict the typical experience of consumers. The new Guides require the advertiser to have adequate substantiation that consumers will typically achieve results similar to those depicted in the testimonials — or disclose the disparity if they do not. This follows the line of case law and market research which holds that disclaimers are often not effective and may promote confusion because consumers do not notice the negative statements in a disclaimer. *See e.g., Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1316 (2d Cir. 1987)

(disclaimer's proponent has "heavy burden" to "come forward with evidence sufficient to demonstrate" that a disclaimer "would significantly reduce the likelihood of consumer confusion"); Jacoby & Raskoff, "Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble than they are Worth?" 76 *Trademark Rept.* 35 (1986).

The revised Guides also contain significant restrictions relating to the use of bloggers and celebrities in advertising campaigns. The new guidelines reflect the FTC's concern about marketing campaigns that appear to be "improvised" but are actually carefully choreographed campaigns. They include new examples to illustrate the long-standing FTC position that requires disclosure of material connections (such as payments or free products) between advertisers and endorsers. The new Guides address endorsements by bloggers or other "word-of-mouth" marketers, noting that advertisers sometimes create blogs that give a false aura of objectivity, distribute undisclosed free products to bloggers for their review and offer undisclosed payments to bloggers for endorsements. The new guidelines hold that bloggers must disclose gifts and payments from advertisers. The revised Guides also make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media Web sites.

The revised Guides also specify that if a company advertises the findings of a research organization that conducted company-sponsored research, the advertisement must disclose the relationship between the advertiser and the research organization. The example provided in the new Guides concerns a hypothetical pharmaceutical company that commissions research on its product by an outside organization. In the example, the pharmaceutical company determines the overall subject of the research and pays a substantial share of the expenses of the research product, while the outside research organization determines the study protocol and conducts the study. Even though the design and conduct of the research project are controlled by the outside research organization, the FTC holds that "the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project." Therefore, if the advertiser elects to advertise the findings of the research, it must disclose its payment of expenses to the research organization.

In publishing the new Guides, the Commission expressed concern that a published draft of the Guides had left the erroneous impression that a medical doctor or comparably qualified expert "could properly make performance claims for a cholesterol-lowering drug based solely on consumer letters and the results of a study using an animal model." The new Guides make clear that the doctor's endorsement in the example would likely be deemed deceptive "because those materials are not what others with the same level of expertise would consider adequate to support those claims." In other words, the FTC will find expert endorsements deceptive if the basis for the "expert's" opinion is evidence that would not generally be accepted as adequate by "others with the same degree of expertise" — junk science is therefore unacceptable.

Finally, the revised Guides clearly state that both advertisers as well as endorsers may be liable for false or unsubstantiated claims made in an endorsement — or for failure to disclose material connections between the advertiser and endorsers.

The new Guides will undoubtedly complicate use of the time-honored consumer endorsement, since testimonials must now reflect typical experience, or be balanced with information that discloses the typical experience. All of this assumes that the advertiser knows or can readily determine the results that consumers can “generally expect” from using their products or services. Since disclaimers that “results may vary” now offer no protection against legal challenge, advertisers will likely have to shelve testimonials for quantifiable “results” claims until they can compile sufficient data to confirm the “typical experience.” The Guides may also put an end to advertising campaigns conducted through bloggers unless and until advertisers can find a way to rein in bloggers’ exaggerated claims. The cost of policing these claims may outweigh any benefit they offer. All of this argues for aggressive review whenever testimonials or endorsements are used in advertising.

Chicago Office
+1.312.583.2300

Los Angeles Office
+1.310.788.1000

Frankfurt Office
+49.69.25494.0

New York Office
+1.212.836.8000

London Office
+44.20.7105.0500

Shanghai Office
+86.21.2208.3600

Washington, DC Office
+1.202.682.3500

West Palm Beach Office
+1.561.802.3230

Copyright ©2009 by Kaye Scholer LLP. All Rights Reserved. This publication is intended as a general guide only. It does not contain a general legal analysis or constitute an opinion of Kaye Scholer LLP or any member of the firm on the legal issues described. It is recommended that readers not rely on this general guide but that professional advice be sought in connection with individual matters. References herein to “Kaye Scholer LLP & Affiliates,” “Kaye Scholer,” “Kaye Scholer LLP,” “the firm” and terms of similar import refer to Kaye Scholer LLP and its affiliates operating in various jurisdictions.