



Federal Trade Commission

ENDORSEMENTS AND TESTIMONIALS GUIDES

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I am pleased to be here today to discuss the Commission's recent activities regarding the Guides for the Use of Endorsements and Testimonials in Advertising, more commonly known as the "Endorsement Guides."² First issued in 1975 and 1980,³ these Guides generally require that endorsements reflect the honest opinion of the endorser and not contain representations that

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Beth Delaney, for her assistance in preparing these remarks.

² 16 C.F.R. § 255.0 (2009).

³ In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 Fed. Reg. 25548 (1972). Extensive comment was received from interested parties. On May 21, 1975, the Commission promulgated three sections of the 1972 proposal as final guidelines (16 C.F.R. §§ 255.0, 255.3, and 255.4) and republished three others, in modified form, for additional public comment. 40 Fed. Reg. 22127 (1975); 40 Fed. Reg. 22146 (1975). Public comment was received on the three re-proposed guidelines, as well as on one of the final guidelines. On January 18, 1980, the Commission promulgated three new sections as final guidelines (16 C.F.R. §§ 255.1, 255.2, and 255.5) and modified one example to one of the final guidelines adopted in May 1975 (16 C.F.R. § 255.0 Example 4). 45 Fed. Reg. 3870 (1980).

would be deceptive if made by the advertiser.⁴ Ongoing scrutiny of the Commission’s Guides helps ensure that consumers will be protected in a changing marketplace. At the same time, it also offers industry an opportunity to help shape this guidance, and once made final, provides industry with certainty for its advertising endeavors. To that end, the Commission sought public comment on the Endorsement Guides in January 2007 as part of its ongoing regulatory review process⁵ and received 22 comments in response. In November 2008, the Commission proposed various amendments to Guides, again sought public comment,⁶ and has received 15 more comments. Staff is currently reviewing these comments and finalizing the Guides.

Today I would like to discuss some of the proposed revisions that I find particularly noteworthy, and to offer some of my thoughts on the changing advertising landscape. My remarks today focus on the questions that are raised in my mind, and my intent is to share some of these with you. One of the first substantive revisions that I will mention appears in the “General Considerations” portion of the Guides.⁷ The Commission has proposed that a new subsection (d) be added to explicitly recognize two principles that our law enforcement activities

⁴ 16 C.F.R. § 255.0. Industry guides, such as the Endorsement Guides, are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission can take action under the FTC Act, however, if a particular use of a testimonial or endorsement is inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice at issue was unfair or deceptive.

⁵ 72 Fed. Reg. 2214 (Jan. 18, 2007).

⁶ 73 Fed. Reg. 72374 (Nov. 28, 2008). The most recent comment period closed on March 2, 2009.

⁷ 16 C.F.R. § 255.1.

have already made clear. The first principle is that 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.⁸ The second principle is that endorsers may also be subject to liability for their statements.⁹ The Commission has also proposed three new examples to illustrate these principles.¹⁰

It is always the case that the endorsement must “reflect the honest opinions, findings, beliefs, or experience of the endorser.”¹¹ The question becomes, in the case of false or misleading representations, when is the endorser liable, when is the advertiser liable and when are both liable? The Commission has received much feedback on this proposed clarification of liability, in particular, on new proposed Example 5 under Section 255.1 of the Guides. That Example describes a scenario under which an advertiser hires a blogger to test out and then review a new body lotion. The advertiser does not make any specific claims about the lotion’s ability to cure skin conditions, and the blogger doesn’t ask the advertiser whether there is any substantiation for such a claim. Yet, in the online review, the blogger writes that the lotion cures eczema and recommends the product for that condition.

Under the facts set forth in new Example 5, both the advertiser and blogger would be

⁸ 73 Fed. Reg. at 72377, 72391.

⁹ *Id.*

¹⁰ *Id.* at 72391-92.

¹¹ 16 C.F.R. § 255.1.

subject to liability for false or unsubstantiated statements made by the blogger's endorsement.¹² In response, some commenters have expressed a concern about holding advertisers liable for endorsements made through new and emerging methods such as blogging, viral marketing, and street teams. Commenters point out the difficulty that advertisers might have in controlling and policing advertising and content created by third parties. As noted by some of these commenters, historically, advertisers have had complete control over the endorser's advertising message in media such as television, radio and print. With media such as blogs and online message boards, advertisers are said to be unable to exert the same amount of control over the message disseminated by the endorser and face challenges in policing media that is subject to constant updating.

Another issue which the Commission has been urged to consider when evaluating when the advertiser should be held liable for the statements of the endorser is the extent of the relationship between the advertiser and the "endorser." In some cases, an endorser may be a paid spokesperson; in other cases, there may be a compensated contractual obligation to promote the product in specific ways and in specific venues; and in still other cases, the advertiser may just provide free products with the hope that activity will result in favorable product reviews. I expect that the final version of the revised Guides will provide enough guidance on how to evaluate these variations.

As currently proposed, the Guides would hold the endorser and advertiser liable for

¹² *Id.* at 72392.

misrepresentations made in the skin lotion example I just discussed. In that example, the endorser was specifically “engaged” to promote the product. In comparison, in the “disclosure of material connections” section 255.5 of the Guides, there are proposed examples relating to the use of “new media,” where the relationship between the advertiser and the “endorser” may not be so strong, and where more of the responsibility – for example, the duty to disclose a material connection – seems to lie with the “endorser.” These new proposed examples apply the general principle that material connections between the advertiser and endorser should be disclosed to several new forms of marketing – namely, blogs, discussion boards, and “street teams.”¹³

In proposed Example 7, for example, a gaming blogger is given a free gaming system by a manufacturer and asked to write a review of the product. The Guides caution the blogger to clearly and conspicuously disclose the receipt of the free system because readers of the blog are unlikely to expect that the blogger has received the system free of charge in exchange for the review, and given the value of the system, this would likely materially affect the credibility readers attach to the review.¹⁴ This Example is pretty clear cut. However, I believe the Commission would need more facts to determine whether the receipt of the free game system alone, without a request for a review, would trigger a disclosure, or whether the receipt of something less valuable, such as a free game, would trigger a disclosure. In addition, this example doesn’t delineate the responsibilities of the advertiser. I believe the Commission also would need more facts to determine whether the advertiser would be responsible for taking steps

¹³ *Id.* at 72395.

¹⁴ 73 Fed. Reg. at 72395.

to ensure that the blogger disclosed the material connection, or whether the advertiser would be liable for any misrepresentations made in the blogger's review.

Likewise, proposed Example 9 of the "Material Connections" section also provides some guidance about liability in the context of a relationship between advertiser and endorser. In that example, a young man participates in a "street team" program under which he recommends products to his friends in exchange for points which he can then redeem to get prizes. The Guides take the position that these incentives would likely materially affect the weight or credibility of his endorsements, and that he must clearly and conspicuously disclose them. The Guides go on to note that the advertiser should also take steps to ensure that the disclosures are being made. It seems to me that the obligations of the advertiser in this Example are a little bit more stringent than those in game blogger example (Example 7).

It seems possible to me that these two Examples depict different factual scenarios with regard to compensation, control and expectations. In the latter example, the advertiser and the street team member have an ongoing relationship and it makes sense to me to require the advertiser to do more in that particular context, especially with regard to disclosing a material connection. Again, I think more information would be needed in order to determine whether the advertiser could be subject to liability for the street team member's misrepresentations about the product, such as information about the nature of the relationship between the advertiser and the "street team" participant, the value of the latter's incentives, and consumer expectations.

Let me posit one more example to illustrate how different facts regarding advertiser and

consumer expectations may affect the analysis of when disclosures are necessary and who is liable when they are not provided. Suppose a diaper manufacturer sends a year’s supply of free diapers to a mom who has an online blog about baby products. Would readers of the blog reasonably expect this connection? Would knowledge of this freebie materially affect the weight they would give to the blogger’s touting of the diapers? What did the manufacturer expect from the blogger when it provided the free diapers? Imagine a scenario where the manufacturer also provided free diapers to other mothers. What if that mother tells the parent next door about how great the diapers are over the clothesline? Is a disclosure necessary in that context? How do we differentiate that latter situation from the one where another recipient of free diapers instead “blogs” the same message? Is it just the breadth of the dissemination that matters? Is it the intent of the manufacturer? Or does liability turn upon what the recipient of the “message” expects? These are some of the issues that I imagine staff will be grappling with as they review the comments submitted and finalize the Guides.

The proposed revisions to the “disclosure of material connections”¹⁵ section of the Guides also touch upon celebrity endorsements. As discussed in the Federal Register notice, the Commission believes that when celebrities are paid spokespersons, their endorsements are commercial messages, regardless of whether they are disseminated in a traditional advertising context – such as a television or magazine ad – or elsewhere. As a general matter, if a celebrity endorsement were to occur in a traditional advertising context, the Guides provide that disclosure of a material connection would **not** be necessary because the reasonable consumer

¹⁵ 16 C.F.R. § 255.5.

would assume a material connection and therefore a disclosure would not affect the weight or credibility of the endorsement.¹⁶ In the context of a nontraditional venue – such as a talk show or a magazine interview – the Commission believes that there would be no reason for consumers to expect that an “endorsement” of a product is anything more than a spontaneous mention by a celebrity who has no apparent connection with the product’s marketer.¹⁷

To address the issue celebrity endorsements in “nontraditional venues,” the Commission has proposed a new example to this section making it clear that consumers would not expect a celebrity endorsing a product during a routine interview to be paid for doing so, and that knowledge of such a financial interest would likely affect the weight or credibility consumers give to the celebrity’s “endorsement.”¹⁸ In order to avoid the possibility of deception, the revised guides provide that the celebrity’s financial connection to the advertiser should be disclosed.

I find this proposed revision interesting. Its genesis stems from a reported trend of celebrities touting things like prescription medications during talk show interviews,¹⁹ as opposed to televised commercials or print advertising, where consumers would reasonably expect that the celebrity was compensated. With respect to this development, I think two things are at work

¹⁶ 16 C.F.R. § 255.5 and Example 2.

¹⁷ 73 Fed. Reg. at 72389.

¹⁸ *Id.*

¹⁹ 73 Fed. Reg. at 72389.

here. First, consider the context of where the “endorsement” was given. When a celebrity touts a product during an interview, a consumer might reasonably expect that the celebrity is merely discussing his or her own personal, uncompensated experience. Because that is not the case, a disclosure is necessary.²⁰

The second factor that I think affects consumer expectations – thereby requiring disclosure of a material connection – is the “express” nature of the communication or the “endorsement” in the nontraditional context. For example, consider a scenario where a celebrity appears on the Oprah Winfrey show attired in a Chanel suit or an Adidas track suit, and the celebrity is a paid spokesperson for the clothing designer or manufacturer. In that case, no claims are made by the celebrity and there is no “endorsement” as defined by the Guides.²¹ The celebrity is merely wearing the clothing. New Example 5 of the proposed revisions to the Guides illustrate that no disclosure of a material connection is warranted in that case.²²

Imagine, on the other hand, that Oprah engages the celebrity in a discussion about the clothing and the celebrity then begins to tout certain attributes of the clothing or perhaps, of the

²⁰ 73 Fed. Reg. at 72394.

²¹ The Guides currently define endorsement as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature or likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.” 16 C.F.R. § 255.0 (b). The proposed revisions would add the following clause to the end of the definition, “even if the views expressed by that party are identical to those of the sponsoring advertiser.” 73 Fed. Reg. at 72390.

²² 73 Fed. Reg. at 72394.

manufacturer itself. In the latter case, I would consider the celebrity to be making claims about the product and engaging in an “advertising message.” The disclosure of a material connection would then be necessary.

That isn’t to say that an endorsement always requires the celebrity to *say* something about the product – the Guides define an endorsement as “any advertising message,” including verbal statements or demonstrations. To make clear that the Guides cover the communication of both express and implied representations, the Commission is proposing to revise language in the General Considerations section to provide that endorsements “may not convey any express or implied representation” that would be deceptive if made directly by the advertiser.²³

These concepts are illustrated in current and proposed examples. For example, the Guides point out that a television commercial for a particular brand of golf balls that *shows* a prominent and well-recognized golf pro practicing numerous drives off the tee would constitute an endorsement even though no verbal statement is made.²⁴ However, the proposed addition of two new examples to that section of the Guides fleshes out the definition of endorsement. Proposed Example 7 notes that a well-known comedian and a well-known baseball player appearing in a television ad for a housewares commercial and bantering about various products they plan to buy for each other would not likely be deemed an endorsement. The Guides point out that consumers would likely realize that the joking banter between the comedian and

²³ *Id.* at 72377 and 72391.

²⁴ 16 C.F.R. § 255.0, Example 5.

baseball player isn't an expression of their own views.²⁵ However, proposed Example 6 illustrates different conduct that would constitute an endorsement. In that example, an entertainer appears in an infomercial for a home fitness system and demonstrates the machine and states that it is the most effective home exercise machine she has ever tried. The Guides note that even if the entertainer is reading from a script, consumers would likely believe it reflects the entertainer's views.²⁶

The last topic I would like to cover is another of the proposed revisions that has gotten much attention and press – the proposed elimination of the safe harbor for the use of “results not typical” disclaimers accompanying consumer endorsements that describe experiences exceeding what consumers can generally achieve with the advertised product. As currently written, the Guides advise that an ad using a consumer endorsement on a central or key attribute of the product **will be interpreted** as representing that the endorser's experience is representative of what consumers will generally achieve.²⁷ If the advertiser doesn't have adequate substantiation that the endorser's experience is representative, the Guides currently advise that the ad should clearly and conspicuously disclose **either** what the generally expected performance would be in the depicted circumstances or the limited applicability of the endorser's experience – for example, the commonly used “results not typical.”²⁸

²⁵ 73 Fed. Reg. at 72391.

²⁶ *Id.*

²⁷ 16 C.F.R. at 255.2(a).

²⁸ *Id.*

The proposed revisions to the Guides suggest two changes to this construct. First, the revised language would provide that testimonials reflecting consumer experience on a key attribute of a product **will likely** be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve in actual conditions of use. When testimonials do convey that message, and the advertiser does not possess adequate substantiation, the proposed revisions provide that the advertiser should clearly and conspicuously disclose the **generally expected performance** in the depicted circumstances. A short hand version of the thinking behind this proposal is, if an advertiser can’t substantiate the claim, “use our product for 60 days and lose 30 pounds,” it should not be able to convey the same message by means of a testimonial accompanied by a “your results may vary” disclaimer. The advertiser can still use an endorsement that depicts unusual results – if true – but now would also have to disclose what consumers could actually generally expect to achieve themselves.