



Advertising and Promotions Law

ALERT

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FTC Proposes Changes to Its Endorsements and Testimonials Guides; Hawaii Amends Charitable Solicitation Law

The FTC is seeking comments until January 30, 2009, on proposed changes to its Guides Concerning the Use of Endorsements and Testimonials. The Guides, although advisory in nature, set forth the principles the FTC will follow in reviewing endorsements and testimonials and provide examples for advertisers.

Perhaps the most significant change proposed by the FTC relates to disclosures in consumer endorsements about atypical results. The current Guides allow advertisers to use truthful testimonials, even if the testimonial does not generally represent what consumers can expect when using the advertised product, if the advertiser (1) clearly and conspicuously discloses what the generally expected performance would be, or (2) discloses the limited applicability of the endorser's experience to what consumers may generally expect to achieve (called "disclaimers of atypicality").

According to the FTC, disclaimers of atypicality in consumer endorsements have provided a safe harbor to advertisers allowing them to avoid the general requirement that they be able to substantiate all material claims conveyed by their advertising. The FTC's proposed revision would eliminate this safe harbor and would require advertisers to substantiate and disclose the representative, rather than atypical, performance of the product or service.

The FTC's proposal is as follows:

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised

product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) 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 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.

The FTC did note, however, that not all testimonials will necessarily need disclosures about representative results. Testimonials for certain products - such as movies, games,

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or restaurants - are usually based on a consumer's subjective opinion while other testimonials make objective, quantifiable claims (such as pounds lost or money saved). Advertisements using inherently subjective testimonials are less likely to convey typicality messages and, thus, may not trigger the need for additional disclosures, unless there is a financial relationship between the endorser and the advertiser.

The FTC is proposing to make clear in the Guides that advertisers can be held liable for any false or unsubstantiated statements made by endorsers or for not disclosing any material connections between themselves and the endorsers. In addition, the proposed revisions would provide that endorsers, including expert endorsers and celebrities, may be held liable for their statements.

The FTC also addressed new media platforms such as blogs and word-of-mouth marketing, indicating that the agency is paying attention to these kinds of advertising campaigns. Regarding blogs, the FTC's proposed guidance states that if an advertiser requests that a blogger try a new product and write a review, the advertiser is subject to liability for false or unsubstantiated statements made through the blogger's endorsement. In addition, the blogger is subject to liability for representations made in the course of her endorsement, and the blogger is liable if she fails to disclose clearly and conspicuously that she is being paid for her services. The FTC suggested that the advertiser provide guidance and training for its bloggers concerning the need to ensure that statements bloggers make are truthful and substantiated. And the FTC suggests that the advertiser 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.

Regarding word-of-mouth marketing, the FTC stated that if an advertiser provides free products or other incentives (such as points that can be redeemed for prizes) to individuals every time they mention the advertiser's products or services to their friends, these incentives should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

Hawaii Amends Charitable Solicitation Law

Most states regulate charitable organizations and promotions conducted by a for-profit company (called a commercial co-venturer) with or on behalf of a charitable organization. Hawaii recently amended its charitable solicitation statute to require, among other things, that charitable organizations register and file annual financial reports with the state. In addition, commercial co-venturers must file with the Attorney General's Office a copy of written consent from the charitable organization whose name will be used during the charitable sales promotion. The commercial co-venturer must file the written consent no less than ten days prior to the commencement of the promotion and the written consent must be signed by both the commercial co-venturer and the charitable organization and include the following:

1. The goods or services to be offered to the public;
2. The geographic area where, and the starting and final date when, the offering is to be made;
3. The manner in which the name of the charitable organization is to be used, including any representation to be made to the public as to the amount or per cent per unit of goods or services purchased or used that is to benefit the charitable organization;
4. A provision for a final accounting on a per unit basis to be given by the commercial co-venturer to the charitable organization and the date when it is to be made; and
5. The date when and the manner in which the benefit is to be conferred on the charitable organization.

Charitable sales promotion is defined in the statute as an advertising or sales campaign, conducted by a commercial co-venturer, that represents that the purchase or use of goods or services offered by the commercial co-venturer will benefit, in whole or in part, a charitable organization or charitable purpose.

Commercial co-venturer is defined in the statute as a person who, for profit, is regularly and primarily engaged in trade or commerce other than in connection with soliciting for charitable organizations or charitable purposes, and who conducts charitable sales promotions.

Hawaii's amended law is part of a trend among the states of paying more attention to cause-related marketing and, with this new law, Hawaii is joining several other states in

requiring the for-profit entity (the commercial co-venturer) to register or otherwise take steps to notify the state of the relationship and the promotional activity.

For more information on the content of this alert, please contact a member of Loeb & Loeb's Advertising and Promotions Group.

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