Federal Trade Commission Announces Proposed Changes to its Guides Concerning Endorsements or Testimonials in Ads

On November 28, 2008, the FTC published a Federal Register Notice announcing its proposed changes to these Guides. The deadline for public comments is January 30, 2009.

The most significant change proposed is the one covering consumer endorsements. Under the present Guides, whenever the advertiser did not have substantiation for the claim that the consumer endorser's experience is typical, the advertiser was allowed a "safe harbor" if it used a disclaimer regarding the limited applicability of the endorser's experience to what consumers may generally expect to achieve, such as "results not typical."

Under the proposed revised Guides, however, advertisers could no longer present consumer endorsements that represent atypical results by using an "actual results may vary" or similar disclaimer. Instead, whenever an advertiser does not have substantiation for the claim that the endorser's experience is typical [in other words, any endorsement presenting atypical results], the advertiser now must clearly and conspicuously disclose the results consumers can generally expect to achieve from the advertised product.

The proposed revised Guides also make clear that advertisers must have substantiation for claims made by endorsers and that advertisers are liable for these claims. Additionally, the endorsers may also be liable if they know the claims they are making are untrue or not substantiated. The Guides also make clear that advertisers are liable for claims made by bloggers if the advertiser uses bloggers to promote their products, and must disclose compensation paid to bloggers for their statements.

The proposed revised Guides review and expand upon when advertisers must make disclosures regarding compensation paid to celebrity and expert endorsers. The new Guides narrow the broad exemption for disclosure of such material connections between advertisers and celebrity and expert endorsers. The FTC now may require advertisers to disclose financial ties for celebrities' use in nontraditional advertising situations [such as talk show appearances], and for expert endorsements. The Notice seeks comment on whether consumers' knowledge of such connections would affect their assessment of the celebrity's or expert's credibility.

We strongly recommend, if the Guidelines are revised as proposed, that our members review their websites and advertising and promotional materials for any materials that may contain consumers' atypical results such as letters and emails. If you find you have these you will have to decide whether to remove them or insert a clear conspicuous disclosure of generally expected results.

By Tom Cohn and Sharon Blinkoff of Venable LLP, New York. Tom recently joined Venable after serving over 17 years with the Federal Trade Commission, where he was Chief Counsel for its Northeast Region.

Cosmetic Companies Should Register with FDA's VCRP

There are several important reasons why every company should participate in FDA's Voluntary Cosmetic Registration Program, according to an article written by ICMAD Board member David Steinberg. "One of the best defenses against new regulations, such as the recently passed California Law, is to show that cosmetic companies actively participate in the voluntary programs managed by the FDA. This shows that self-regulation works." If the process were to become mandatory, it could take a long time before a product could be marketed. Under this voluntary program, the FDA acknowledges a registration in two weeks.

"Another reason to register is that the CIR panel of the Personal Care Products Council (formerly CTFA) uses this data to determine its priority list." If there is insufficient data presented by industry to support a safe conclusion, "the ingredient may be in serious jeopardy." When an insufficient data finding is made by CIR, it attempts to contact all known users and it gets the information from FDA registrations.

Also, the EU requires that all ingredients used in cosmetics sold in the region be on its inventory list and it uses FDA's VCRP report to check ingredient usage.

"Another benefit of registering is that the FDA adds registered companies to a pipeline to receive important information if safety issues arise using an ingredient. Finally, for over-the-counter (OTC) drugs required to carry 'Drug Facts' labels, one way to show an inspector that a drug is really a cosmetic/drug is to present a VCRP receipt from the FDA."

FDA representative Don Havery gave a presentation on the VCRP at ICMAD's FDA Workshop last May in New York City. For a copy of his PowerPoint presentation, please contact the ICMAD office at 1-800-334-2623 or email info@icmad.org.