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FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

The Federal Trade Commission today announced that it has approved final revisions to its *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (16 C.F.R. Part 255), which address endorsements by consumers, experts, organizations, and celebrities in advertising.

The most significant change to the revised guides is the deletion of the "safe harbor" that has long allowed advertisers to use testimonials who reported specific successful experiences with an advertised product or service as long as the advertiser included a disclaimer such as "Results not typical." Under the revised Guides, advertisements that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect.

Part 255.2(b) of the revised Guides (which have an effective date of December 1, 2009) reads as follows:

"An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service . . . will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. . . . 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."

In response to comments filed by Venable on behalf of the Electronic Retailing Association, the FTC acknowledged that the "critical question" for determining whether an ad is deceptive is always "what is the net impression consumers take away from the ad as a whole." Each advertisement containing testimonials must be examined individually to determine whether it makes an unsubstantiated typicality claim.

The FTC also said that it believes that it is "likely" that testimonials that present the specific experiences of a product user (e.g., the number of pounds or inches lost) will be viewed as claiming that those experiences are typical of what consumers will generally experience. However, the agency noted that the revised Guides do not prohibit the use of typicality disclaimers, and that Part 255.2(b) "does not rule out the possibility that a clear, conspicuous, and informative disclaimer could accomplish this goal."

The FTC responded to those who argued that disclosing what the typical consumer could expect to achieve is impractical or extremely difficult by explaining that advertisers are not required to identify a typical consumer and then determine "with precision" what he or she would achieve with the product. Rather, the advertiser must disclose "the generally expected performance" of the product "in the depicted circumstances."

According to the agency, this language provides "some reasonable leeway" to advertisers. "Generally expected results" was used rather than "average" in order to communicate that the disclosure would not have to be based on "an exact mathematical average of users of the product." In some cases, the advertiser might be able to rely on generally accepted scientific principles (e.g., the fact that the average person needs a net deficit of 3500 calories to lose one pound of weight) rather than a clinical study of its customers.

Or an advertiser might be able to limit the burden imposed by the disclosure requirement by identifying the specific population from whom the testimonials were chosen. For example, if the testimonials had followed a weight-loss program for at least a year, a disclosure of generally expected results for those who follow the program for at least that long would be sufficient (as long as it clearly states that it was based on the results achieved by long-term users, not all users). But while it would be possible to use the results of subjects in a valid clinical study as the basis for a "generally expected performance" disclosure (e.g., "In an 8-week clinical study, men who were at least 30 pounds overweight lost an average of 2 pounds per week"), the FTC would not necessarily be satisfied by a disclosure based on the results achieved by participants in a less formal "user group."

While it discussed our comments about the revised Guides at some length, it is clear that the FTC is still highly skeptical of advertising that contains consumer testimonials. According to the agency, "Even

truthful consumer testimonials provide only marginally useful information to consumers." While the FTC admits that obtaining the data necessary to support a "generally expected performance" disclosure "will entail costs associated with the data collection and analysis," it offers cold comfort to small businesses or new companies who can't handle that burden.

In the FTC's view, the old typicality disclaimer "safe harbor" that has been part of these Guides since 1980 allowed advertisers who utilized testimonials to be "exempt from those basic obligations" to which other advertisers have always been subject. If an advertiser uses testimonials in such a way as to trigger the "generally expected performance" disclosure requirement but doesn't have the data to meet that standard, it will have to be satisfied with using more general testimonials that don't mention specific consumer experiences. The FTC says that advertisers can use testimonials like "I've tried many products and this was the best." But bland testimonials like that are unlikely to be effective in today's competitive marketing environment. Most marketers will want to follow a different approach in order use testimonials effectively and still comply with the revised Guides.

In summary, the practical difficulties of disclosing the "generally expected performance" of consumers will be significant for many or most advertisers. While it may be possible for some marketers to generate the necessary data to support a carefully-drafted disclosure, it may be more productive for advertisers to focus on creating testimonial-driven advertising that avoids conveying a typicality claim in the first place. Properly utilized, traditional typicality disclaimers will still be helpful. But the days of being able to rely solely on "Results not typical" supers may be gone forever.

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