

FTC Issues New Advertising Guidance on Celebrity Endorsements



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Celebrity endorsers beware! Under the revised Guides Concerning the Use of Testimonials and Endorsements in Advertising (the “Guides”), if you shoot a scripted commercial which requires you to say that an advertiser’s skin care product is clinically proven to work, you can be found personally liable if that statement is unsubstantiated or is likely to mislead consumers. Advertisers take caution as well - if your sponsored endorser twitters about how much they love your beverage products or shopping at your store, then you can be found liable if the tweet fails to disclose his or her connection with you, even if you did not authorize or initiate the statement.

The revised Guides, which go into effect on December 1, 2009, are the FTC’s interpretation of the Federal Trade Commission Act, which prohibits false, unfair or deceptive advertising. The revisions to the Guides expand the liability risks for celebrity endorsers. Most significantly, the FTC clarified that celebrity endorsers are not exempt from enforcement in any way. Rather, celebrities as well as advertisers are liable for making statements regarding an advertiser’s products or services that are false, unsubstantiated or not representative of their personal views. Consequently, both celebrities and advertisers should scrutinize their sponsorship or endorsement agreements to ensure compliance with the FTC rules and to properly allocate the risk of noncompliance.

The revisions to the Guides also make clear that it is irrelevant whether a celebrity’s representations are in his or her own words or read from a script. In its commentary to the revisions, the FTC stated: “The Commission is not persuaded that a celebrity endorser’s contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations made in the course of that endorsement.” To protect themselves against liability in this situation, celebrity endorsers should contractually obligate the advertiser to provide the celebrity with a copy of any scripts well in advance of the scheduled taping, documentation to substantiate any claims made in the endorsement, and a right of refusal if the celebrity believes that any claims are false or misleading or do not comport with his or her views.

Celebrity endorsers will need a reasonable advance period of time to consider the representations made in a script, especially in the context of advertising that touts the effectiveness or performance of products. The FTC does not expect an endorser, regardless of his or her fame or background, to become an expert on the product or in the industry that is being endorsed. However, the Guides advise endorsers to make reasonable inquiries of the advertiser to insure that there is an adequate basis for assertions made in the script, and it is appropriate for endorsers to demand the time to do so.

The parties should also anticipate that circumstances may change during the term of a sponsorship agreement. For example, the specifications for the advertiser's product may change or the competition may catch up with the advertiser in terms of product performance. The sponsorship agreement should require the advertiser to advise the celebrity of any changes in the advertiser's products or services that might affect the accuracy of any previous statements, and, upon the request of the celebrity, to discontinue the use of any prior endorsement that becomes misleading or inaccurate. Similarly, the celebrity should be required to notify the advertiser of any changes in his or her opinions or experiences concerning the advertiser or the product.

The FTC revisions also strengthen and expand the disclosure requirements for endorsements by requiring endorsers to disclose material connections between themselves and advertisers when the connection is not readily apparent. The disclosure requirements now apply to statements made by celebrity endorsers in social networking and non-traditional advertising forums such as Twitter or Facebook, or on talks shows or in blogs. If a celebrity endorser makes a statement about an advertiser or product in these new media contexts, the celebrity must disclose his or her financial interest in the promoted advertiser or product if the audience would not reasonably expect such a connection. For example, if a celebrity becomes a "fan" of a company on Facebook or tweets about using a product and the celebrity is sponsored by the manufacturer of the product, the celebrity must disclose the fact that he or she is being sponsored for making the endorsement. As a result of these new disclosure obligations, the confidentiality clause in a sponsorship or endorsement agreement should expressly clarify that it does not restrict the parties from making these necessary disclosures.

Finally, in connection with the revised Guides, the FTC warns that advertisers who enter into endorsement agreements should establish procedures to assist endorsers in making necessary disclosures and reasonable inquiries as to whether representations about products or services are fair, truthful and not misleading. Out of an abundance of caution, celebrity endorsers should go further and contractually obligate an advertiser to put such procedures into place. If an advertiser is unwilling to assume that responsibility, the sponsorship agreement should at least require the advertiser to make specific representations and warranties about the accuracy and substantiation of any scripted material or statements provided by the advertiser for an endorsement and the advertiser's full compliance with the Guides. Likewise, advertisers should require celebrity endorsers to make certain representations and warranties of their own, such as: the celebrity uses the advertiser's products; any statement made by the celebrity about the advertiser or its products will reflect the celebrity's honest opinions, findings, beliefs or experiences; and statements made by the celebrity endorser outside of traditional advertising forums will comply with the Guides. Each party should also be required to indemnify the other against costs or losses resulting from its own breaches of any representations and warranties.

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