



FTC Guides Concerning Use of Endorsements and Testimonials in Advertising

16 CFR § 255

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Background

- The current Guides have not been revised since 1980, when they were issued.
- In 2007, Commission initiated review of the Guides.
- In November 2008, proposed revisions to the Guides were published for comment.
- Comment period ended in March 2009.
- Final Guides were issued on October 5, 2009.
- Effective Date: December 1, 2009



What are Guides?

- Administrative interpretations intended to provide the basis for voluntary compliance with the law by advertisers and endorsers.
- There are no fines for violating the Guides.
- Practices inconsistent with the Guides may result in corrective action under the FTC Act by the Commission.
- Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.



What is an Endorsement?

- An endorsement means any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a person or organization other than the sponsoring advertiser.
- Statements are perceived to represent the personal views of the speaker.
- The views expressed by the endorser may be identical to those of the sponsoring advertiser.
- Endorsement can include: verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.
- It doesn't matter if the endorser is reading from a script.



But these are not endorsements

- Fictional dramatization of a real life situation
- Statements by an identified company spokesperson



General Rules for Endorsements

- An endorsement must reflect the honest opinions, findings, beliefs, or experience of the endorser.
- An endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.
- 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.
- Endorsers also may be liable for false or misleading statements made in the course of their endorsements.



General Rules for Endorsements

- An endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product.
- An advertiser may use an endorsement only so long as it has good reason to believe that the endorser continues to subscribe to the views presented.
- When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given and may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.



Fake testimonials

- "To be successful, we really need to have a couple of testimonials. Even with the disclaimers we will need to provide, testimonials are still the most effective way to prompt a viewer to call... They should talk about how the [our] type product made all the difference in the world and how they struggled for years before finding you and your formulation. We all know they didn't take our brand, but the questions I will feed them will enable them to talk about [hormone] control being the key.... I'm comfortable with pushing the envelope a bit by bringing in three testimonials who really haven't taken our brand, but have a . . . history as long as we are using this show for a short period of time and then re-shooting a second edition."



Consumer Endorsements

- 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.



Consumer Endorsements: Substantiation

- 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.



Consumer Endorsements: Primary Changes

- 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 or service in actual, albeit variable, conditions of use.



Consumer Endorsements: Results Not Typical – 1980 Guides

- Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either [A] clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or [B] clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve.



Consumer Endorsement Change II

- Revised Guides eliminate the second safe harbor [results not typical]
- Ads containing testimonials are treated the same as other advertising – based on net impression



"I LOST 32 LBS. IN 9 DAYS!"

**MIRACLE
DIET
PILL**



**53 LBS
GONE!**



**CASE # 279
DEBBIE HOLLOWAY**

**"My Dress Size Went
From a Size 16 To Only
a Size 7"**

**MEDICAL V N
O M**

Doctor Recommended Fat-Burning Program

**Burns Away More Body Fat
Each Day Than 12 Hours
Of Non-Stop Exercise!**

ONLY \$9.95
Choice Diet Products
**MegaLoss
1000**

UNC's Unconditional Guarantee

"ThermoSlim wants you to succeed. We know you'll lose all the weight you want to, rapidly and without difficulty, diets or exercise. That we promise. But if you are unhappy with ThermoSlim for any reason, return the empty bottles (we'd like you to use the entire supply for every chance of success) within 90 days with proof of payment. We'll refund the full product price"

* * *



"I saw the commercial for ThermoSlim on television and even though I was skeptical, the money-back guarantee convinced me to give ThermoSlim a try. I'm sure glad I did. Within a week I started seeing results. After one month I had lost 30 pounds and everyone started asking me what I was doing. I told them about ThermoSlim and referred them to this Web Site. And now here I am showing my "Before & After" photos.

"I lost over 100 pounds taking ThermoSlim and I've gone from a size 24 to a size 6. I love it! Before trying ThermoSlim, I had tried everything to lose weight and nothing worked. With ThermoSlim I did not feel nervous or jittery, just full of energy and not as hungry. Taking ThermoSlim has changed my life, as you can clearly see from my photos. Thank you, ThermoSlim."

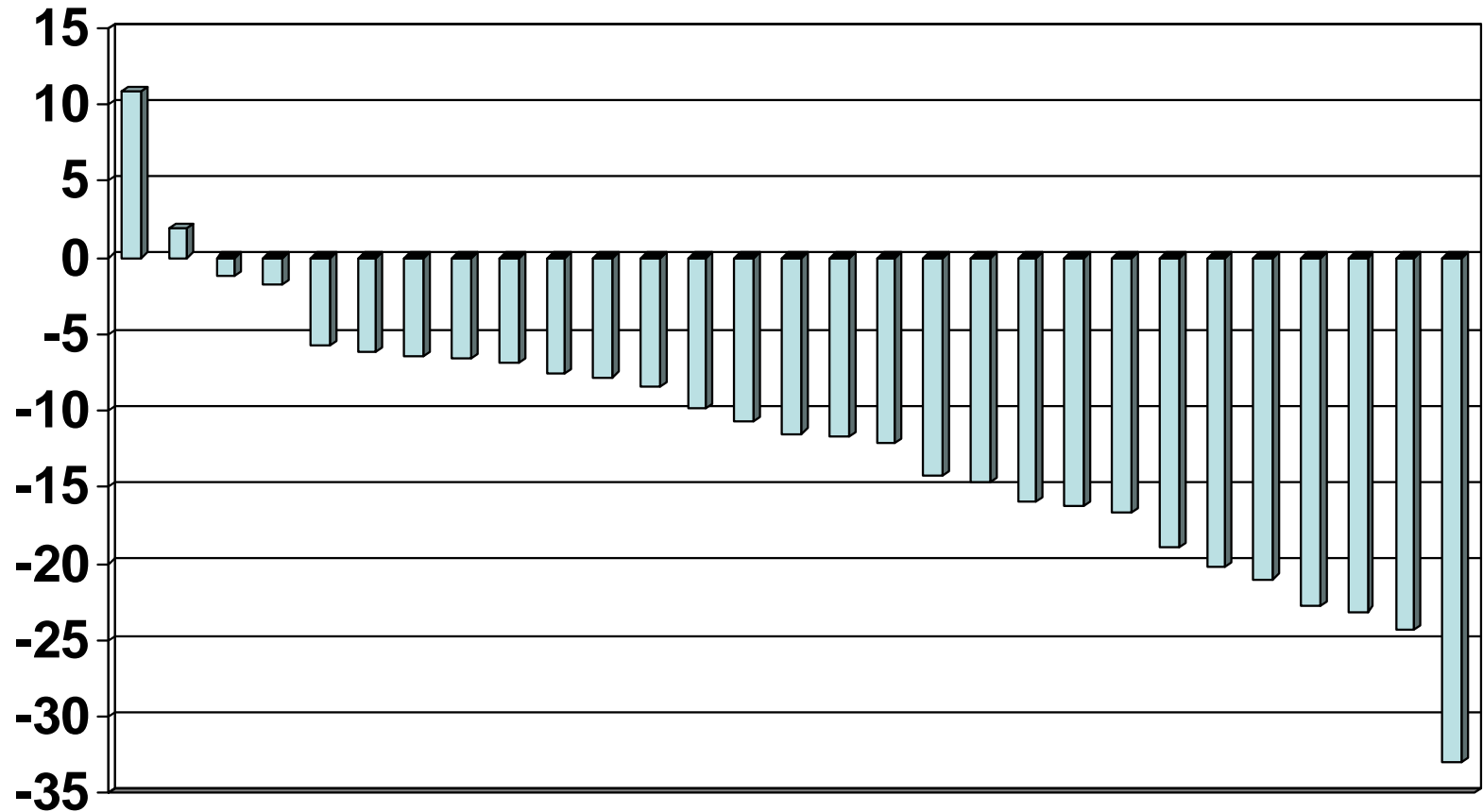


Claims

- Advertisements convey multiple messages
- It's the net impression . . .
- What are the messages:
 - Causes weight loss
 - Causes as much as 100 pounds of weight loss and as much as 30 pounds of weight loss in 30 days
 - Users can generally expect to loss 100 pounds of weight and as much as 30 pounds in 30 days
 - Users typically lose really substantial amounts of weight, including as much as 30 pounds in 30 days and a 100 pounds total

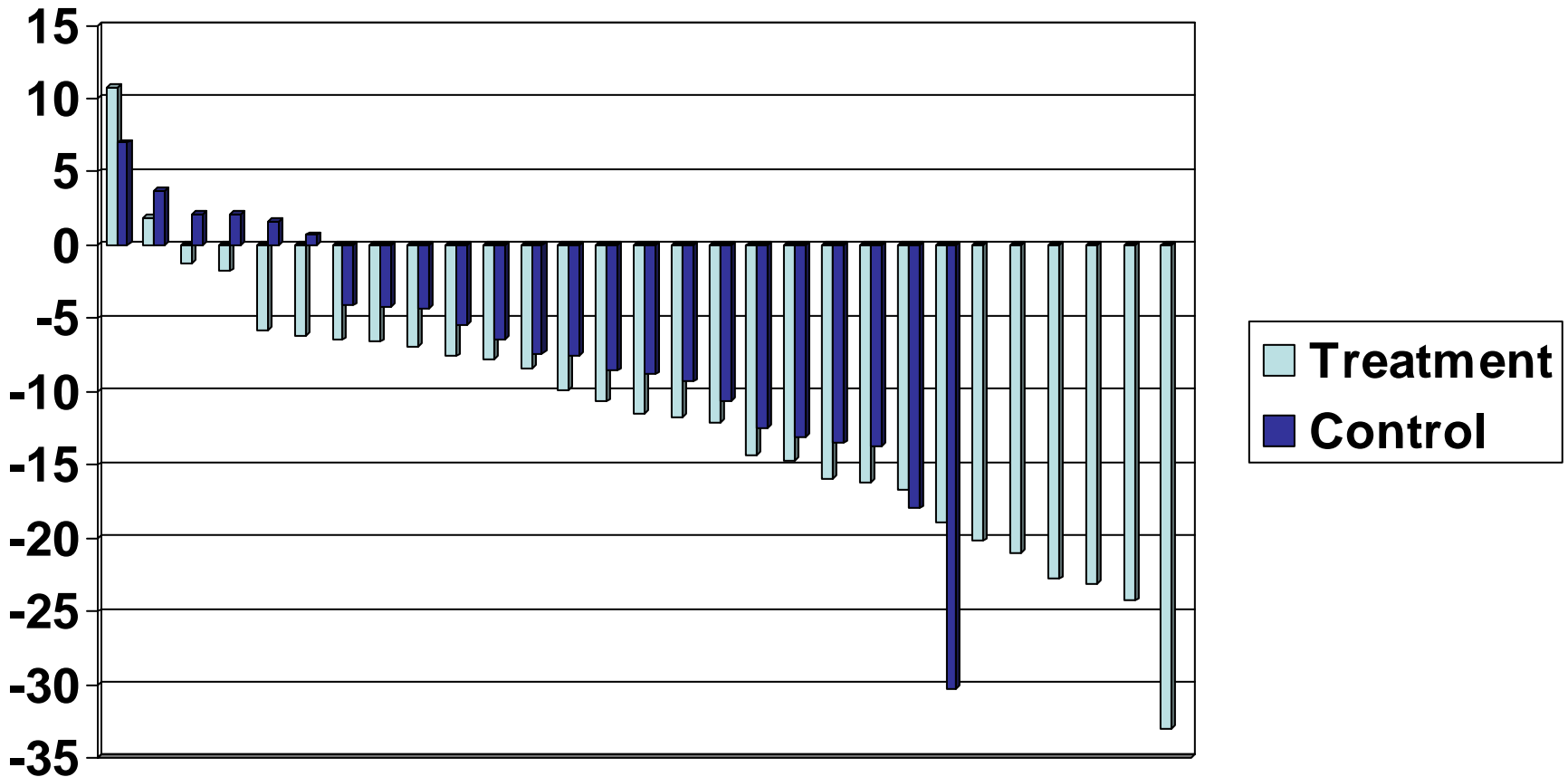


Treatment Group





Treatment with controls





Analysis

- 12 week study
- 1200 cal diet
- Treatment group lost an average of 11.8 lbs.
- Control group lost an average of 7.6 lbs.
- Average at week 5 for controls (-6); for treatment (-9.8)
- Average for this ingredient is two pounds per month greater than placebo over a period of 4 to 6 months.



Conclusions

- This study does not substantiate generally efficacy claims (1200 k/cal diet) but that claim is substantiated by the literature in general
- Assuming no diet – study does not substantiate claim that users can lose 100 pounds or as much as 30 pounds in 30 days (latter claim is false)
- Users could only expect to lose a little over 10 lbs. in 30 days (with both diet and product)
- Users could not even expect to lose a substantial amount of weight in this range based on this study



What to do?

- You can't fix this ad, but suppose the testimonialist said 21 pounds in 3 months
- You could disclose: "Average expected weight loss using SuperSlim Tab is 2 pounds per month over 4-6 months."
- Using this study:
 - 1200 k/diet has to be clearly promoted as much or more than the pill.
 - Don't use a testimonialist claiming to lose more than 22 pounds.
 - Disclose: "In a 12 week clinical study in which all groups followed a 1200 calorie diet, subjects using the primary ingredient in SuperSlim Tab lost an average of 11.8 pounds compared to subjects using a placebo who lost 7.6 pounds."



Examples

- Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.
- The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, "Notice: These testimonials do not prove our product works. You should not expect to have similar results," the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.



Points to remember

- Testimonial convey efficacy claims.
- These efficacy claims require substantiation.
- Testimonials also likely convey that the endorser's experiences are representative of what new users can expect.
- Typicality claims also must be substantiated.
- Disclaimers generally don't work.



Examples

- **Example 2:** An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by \$100, \$125, and \$150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save \$100 or more. A disclosure such as, "Results not typical" or, "These testimonials are based on the experiences of a few people and you are not likely to have similar results" is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., "the average homeowner saves \$35 per month," "the typical family saves \$50 per month during cold months and \$20 per month in warm months," or "most families save 10% on their utility bills."



Points to remember

- Efficacy.
- Typicality – 20% is not typical.
- Disclosures like “Results not typical” and “These testimonials are based on the experiences of a few people and you are not likely to have similar results” are insufficient.
- What can consumers expect from your product or service?
- Disclosure of generally expected results in the depicted circumstances can be made in a variety of ways:
 - “the average homeowner saves \$35 per month,”
 - “the typical family saves \$50 per month during cold months and \$20 per month in warm months,”
 - “most families save 10% on their utility bills.”



Examples

- **Example 3:** An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (*i.e.*, a 120-point drop in serum cholesterol without any lifestyle changes).



Points to remember

- Advertiser must have substantiation for the capacity claim too.
- Disclosure does not cover all sins.



Examples

- **Example 4:** An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).



- If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).
- If the ad features the same pictures but the testimonialist simply says, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).



Points to remember

- Not every ad will convey a typicality claim -- limited and truly exceptional circumstances. (Jared Myth.)
- Where typicality is conveyed, clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).
- Depicted circumstances as described in the ad: (e.g., “most women who use WeightAway lose 15 pounds”).
- Disclaimers must be substantiated and may not be misleading.



Expert Endorsers; Endorsements by Organizations

- No major changes, but some new examples
- Disclose if expert (“doctor”) has no significant experience in the area
- Dropped the professional sports association’s endorsement of sports breakfast drink example
- Added example where expert had inadequate substantiation for cholesterol lowering claim



Celebrity Endorsers

- **Example 4:** A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. **The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.**



Material Connections

- Advertisers must disclose connections between themselves and their endorsers that might materially affect the weight or credibility of the endorsement.
- Under the proposed revisions, that burden may now fall on the endorser in certain situations.



Material Connections: New Examples

- Expert endorsers – some compensation packages could require disclosure if not reasonably expected by the audience
- Celebrities
 - Outside the context of traditional advertising
 - Wearing clothes bearing company insignia does not require disclosure
- Sponsored research
 - “research conducted at Burns University proves”



Material Connections

- Example 6 (255.5): An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. **Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.**



Social

Media

Marketing



- Then: advertising disseminated by the advertiser or parties with the actual or apparent authority to disseminate the advertising on behalf of the advertiser.

**WHY IS HAAGEN-DAZS
FROZEN YOGURT
BETTER THAN YOUR
FIRST TRUE LOVE?**



**HÄAGEN-DAZS IS STILL
98% FAT FREE.**

Imagine pineapple Sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our exciting new frozen yogurt and sorbet combinations are 95% fat free. But they're still totally Häagen-Dazs.
What could be better?



HAAGEN-DAZS. IT'S BETTER THAN ANYTHING.



Now: C2C Marketing





Questions

- Who is now responsible?
- What are they responsible for?



Product Promotion by Consumers



- The FTC is not concerned with *genuine* consumer promotions or product reviews.
- These types of product promotion are not likely to present issues under Section 5 of the FTC Act, prohibiting unfair or deceptive acts or practices.



Product Promotion by Consumers



- The FTC does have concerns when consumers are speaking for marketers and that fact is not disclosed.



How do you tell the difference?

- **Example 8 (255.0):** A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.
- Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.
- Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.



What's an Endorsement?

- Is it editorial content or is it an advertisement?
- Positive statement produced in whole or part (or otherwise influenced) because of a benefit or expected benefit provided by the advertiser or its agent
- Some cases will not be clear



Relevant Factors

- Definitely
 - Explicit understanding
 - Cash payments
 - Additional perks
 - Network marketing programs
 - Network advertising agencies
 - Commissions
- Depends
 - Continuous free merchandise
 - Value of the product or service
 - Links to where the product can be purchased



Best Practices: Endorsers

- When in doubt, disclose freebies (no one ever died from disclosure and it will enhance your credibility)
- Make disclosures clear and prominent
- Others?



Best Practices: Advertisers

- Advise bloggers to disclose
- Reasonable monitoring program - based on risk
 - How often do I need to check?
- Others?



Objective statements must be substantiated

- **Example 5 (255.1):** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.]
- In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also 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.



Blogger Example

- Essentially a pay-for-blog service. Not functionally different than hiring an advertising service that disseminates the message – except that the advertiser isn't approving the ad before it goes out.
- In this example, the blogger had no substantiation for the representation that the lotion cures eczema.
- The advertiser is subject to liability for false or unsubstantiated statements made through the blogger's endorsement.
- The blogger also is subject to liability for misrepresentations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.
- The advertiser should ensure that the advertising service provides guidance and training to its bloggers.
- The advertiser should also 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.



Disclose unexpected connections

- **Example 3 (255.5)** . . . Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.



Free product

- **Example 7:** A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.



Free Products

Free products can be considered compensation.

May be fact specific: what is the expectation of a positive endorsement?

What is the connection between the advertiser and the endorser?



Astro-turffing

- **Example 8 (255.5):** An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.



Message Boards

- Employee relationship must be disclosed.
- Advertiser has a responsibility to have policies in place and train its employees regarding acceptable practices.



Word of Mouth Marketing

- **Example 9 (255.5):** A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member’s endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.



Street Team Example

- A marketing program to promote the advertisers' products.
- Something of value is being provided in exchange for promotion of the product.
- Disclosure is required, and the advertiser should take steps to ensure that these disclosures are being provided.



Summary

- Consumer have a right to know when they are being pitched a product – advertising must be identified as advertising.
- Disclose material connections.
- Policy and training will be essential.
- Misleading and unsubstantiated claims are still unlawful.
- Both advertisers and user disseminators being sponsored by the advertiser are potentially liable.
- Enforcement will focus primarily on advertisers.



For more information

- Watch www.ftc.gov for additional FAQs and business education
- Dot.Com Disclosures
- endorsements@ftc.gov



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