

Endorsing and Testimonials: The FTC's Not-So-Friendly Reminder

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Advertising regulation is a vast area of law that applies across numerous industries. Marketing and advertising have evolved extensively over the past decade with the rise of social media and influencers as prominent parts of large companies' advertising campaigns. As paid advertising and sponsorships on social media increase, it is important that companies keep advertising endorsement rules in mind.

The agency charged with promulgating and enforcing such regulations is the Federal Trade Commission ("FTC"), with the primary purpose of protecting consumers from deceptive and misleading practices. Where misleading advertising is a general prohibition applicable to all industries, the FTC specifically scrutinizes advertising claims that relate to consumers' health and money above advertising claims made by other industries.^[1] Examples of industries or products that affect consumers' health and money generally include claims concerning food, cosmetics, over-the-counter drugs, dietary supplements, tobacco, and alcohol.^[2] The FTC even goes as far to monitor and publish reports surrounding the advertising practices used in the marketing of alcohol beverages and tobacco.^[3]

When a violation has occurred, the FTC will file an action "in federal court seeking immediate and permanent orders to stop scams, prevent fraudsters from perpetrating scams in the future, freeze their assets, and get compensation for victims."^[4] Often, however, the FTC will issue warning letters to companies that have the potential to violate advertising law and put said companies on notice that the FTC is watching.

During the FTC's most recent issuance of letters, large companies such as alcohol manufacturers, luxury goods companies, name brand clothing retailers, cosmetics, and many other companies were put on notice of varying advertising laws.^[5] The communication salvo was sent to over 700 companies in varying industries, using the a FTC template letter and specifically addressing the use of endorsements and testimonials.^[6]

Through its template letter, the FTC states that being on the receiving end of such letter does not per se indicate that the receiving organization has violated any rules, nor that the organization is being

singled out.^[7] In fact, the letter operates to notify these companies that the FTC will be scrutinizing endorsement and testimonial practices in greater detail as time goes on. Bringing such unlawful practices to the companies' attention will also aid the FTC with any future enforcement actions by ensuring the companies are aware of the rules concerning endorsements.^[8] In the most recent letter, the FTC directed companies to several resources to provide context and further clarify what is and is not allowed in endorsements.

One of these resources is the "Guides Concerning the Use of Endorsements and Testimonials in Advertising" ("Guides"), which state that an "endorsement means any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."^[9] The endorser in an advertisement may be an individual, group, or institution and the endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.^[10] Endorsements are further prohibited from conveying any express or implied representation that would be deceptive if made directly by the advertiser.^[11] Additionally, the endorser must be a bona fide user of the product when the endorsement was made if the advertisement represents that the endorser is a user.^[12]

Furthermore, advertisers are subject to liability for false or unsubstantiated statements made through their endorsements. For example, a statement on a blog where an influencer selects and voices an opinion of a particular product on her own accord will not trigger FTC guidelines because the influencer is not being compensated to discuss the product. However, an influencer that is compensated (or otherwise included within a marketing scheme) would be subject to the guidelines, extending as far as any comments made about the product being attributable to the advertiser.^[13] Endorsers also may be liable for statements made in the course of their endorsements, in addition to the advertiser who hired the endorser.

Importantly, advertisers and endorsers are required to fully disclose any connection that might materially affect the weight or credibility of the endorsement.^[14] However, determining whether a connection materially affects the weight or credibility of an endorsement can be difficult to ascertain. Luckily, the Guides provide examples to help guide companies on whether a connection needs to be disclosed. Generally, if an advertisement does not represent the endorser as an expert and the endorser is not well known to the public, the advertiser must disclose any compensation paid to the endorser. Compensation may include a payment for services, promise of payment for future sales, or even mere knowledge that a favorable endorsement of the product would provide some benefit to the advertiser. This benefit could be as simple as appearing on television or posting on social media.

For celebrities, the emphasis on disclosure is predicated on whether the advertiser's audience will understand that the celebrity received a payment for the endorsement. For example, the Guides state that if a celebrity endorses a food product using only points of taste and preference, a disclosure is likely not needed because the audience would expect that the celebrity was compensated. However, the Guides also point out that if the medium would not lend itself to a viewer knowing that there was a material connection, it needs to be disclosed. The Guides indicate that an athlete endorsing a medical procedure during an interview or speaking positively of the procedure on social media are examples of where the advertising nature of the endorsement need to be disclosed because the viewers may not reasonably expect there to be a connection given the medium.

Similar logic applies in a scenario where an advertiser gives a product to an individual whose trade is regularly reviewing similar types of products; by reviewing the product in exchange for receiving the product free of charge, the individual becomes an endorser and the receipt of the free product must

be disclosed. If the fact that the product was received free of charge is not disclosed, regular viewers of the individual's reviews may not expect that the product was given for free and are unlikely to think of how this would impact a positive review. The FTC interprets such conduct as the advertiser and/or endorser as trying to conceal the fact that the endorser is being paid or otherwise received a free product, thereby amounting to misleading or false advertising. Of course, the advertiser would prefer the audience believe that the endorser is discussing the product at his or her own free will; however, the FTC does not allow this.

Overall, there are many considerations for large companies as they engage in advertising through new platforms and endorsers. Companies need to be careful and ensure disclosure of any relationship or financial arrangement with its endorser.

^[1] 15 U.S.C. §§ 41-58, as amended (otherwise known as the “Federal Trade Commission Act”)

^[2] Federal Trade Commission, *Truth In Advertising*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising>.

^[3] *Id.*

^[4] *Id.*

^[5] See Federal Trade Commission, *Latest FTC Notice of Penalty Offenses tells 700+ national advertisers that deceptive endorsements can lead to financial penalties*, available at <https://www.ftc.gov/news-events/blogs/business-blog/2021/10/latest-ftc-notice-penalty-offenses-tells-700-national>.

^[6] The FTC treats endorsements and testimonials identically in the context of enforcement. 16 C.F.R. § 255.0(c); See Federal Trade Commission, *List of October 2021 Recipients of the FTC's Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials*, available at <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/list-recipients-endorsement-notice.pdf>

^[7] <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning->

^[8] 15 U.S. Code § 45 (m) (B) (2)

^[9] 16 C.F.R. § 255.0(b). For example, “[a] television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement. 16 C.F.R. § 255.0 (Example 5).

^[10] 16 C.F.R. § 255.1(a)

^[11] *See id.*

^[12] 16 C.F.R. § 255.1(c)

^[13] 16 C.F.R. § 255.0(b). (Example 8).

^[14] 16 C.F.R. § 255.5

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