



Feedback



“I Love This Product!” - Using Endorsements and Testimonials to Promote Products

By Justin J. Prochnow

The use of testimonials and endorsements is one of the most compelling methods to advertise food, beverage and dietary supplement products. Nothing says “buy me” more than a ringing endorsement from a current user of the product. While the use of testimonials and endorsements is by no means a new advertising concept, the avenues for conveying them have expanded in recent years. Through the use of the Internet and social media, as well as the traditional media of television, radio and print, companies have

more ways than ever to reach consumers. However, while new platforms abound for companies to promote products, advertising must still operate within the confines of the applicable laws and regulations. As state and federal regulators work to broaden their enforcement, it is important for companies to recognize some of the key principals that apply to the advertising of products through the use of endorsements and testimonials.

Federal Regulation of Endorsements and Testimonials Used in Advertising

The responsibility for monitoring and regulating claims made to promote food, beverages, and dietary supplements rests primarily with two federal agencies: the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC). The FDA has primary responsibility for claims made on the labeling of products, which includes the label on the immediate container of products, as well as the packaging, inserts and



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other promotional materials distributed with the product. Meanwhile, the FTC has primary responsibility for advertising claims, including print and broadcast ads, infomercials, catalogs, radio spots and similar direct marketing materials. Many forms of media meet the criteria of both labeling and advertising and while the FDA take primary jurisdiction pursuant to a 1971 Memorandum of Understanding between the FDA and the FTC¹, companies should be prepared to have both agencies scrutinizing claims.

Truthful, Not Misleading and Substantiated

The FTC's regulation of advertising centers around the fundamental principles set forth in the FTC Act and the Truth in Advertising Laws, namely that each material claim made in advertising must be truthful, not deceptive, and backed by adequate substantiation.² The requirement that claims must be truthful and not misleading is fundamental to all advertising; for this reason, acts of intentional deception usually carry the biggest risk of action from the FTC and potentially criminal prosecution by the Department of Justice.

The FTC has brought a number of enforcement actions alleging schemes of deceptive advertising to promote and sell food, beverage and supplement products. In April of 2011, the FTC filed complaints against ten different affiliate marketing operations promoting acai-berry supplements for weight-loss through allegedly fraudulent websites designed to appear like legitimate news sites.³ As part of the schemes, the defendants allegedly created fictitious consumer testimonials and posted bogus positive reviews.

Of course, the other fundamental principle of FTC regulation which has received much attention recently is the requirement for adequate substantiation

for any material claim. This holds true for personal testimonials and endorsements in the same way that it is true for non-testimonial claims. It is not enough that a personal experience testimonial represents the honest opinion of a consumer or expert; such statements must be supported by adequate substantiation, which, for health claims means "competent and reliable scientific evidence." An action against an online marketer of dietary supplements was brought by the FTC in October 2010 for what the FTC deemed to be baseless claims that the supplements would treat and prevent diabetes. Setting aside the issue that such claims are not legally permissible for dietary supplement products, the FTC alleged that this marketer's claims about treating, reducing or eliminating diabetes were either false or simply not supported by scientific evidence.

The FTC Guides

The FTC provides guidance regarding its likely enforcement of endorsements and testimonials through the "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (FTC Guides).⁴ The FTC Guides are not law, but a reflection of the FTC's administrative interpretation of the law. That being said, they provide specific guidance as to how the FTC is likely to apply the FTC Act to endorsements and testimonials used in advertising. The FTC Guides were revised in 2009 and they address, in detail, various aspects of endorsements and testimonials such as the need to disclose material connections and the inferences that testimonials are representative of the typical consumer.

Adopting Testimonials and Endorsements

One application of the FTC Act to endorsements and testimonials of which

companies should remain keenly aware is that each statement made in the form of a consumer testimonial or an expert endorsement about a product that is used in labeling or advertising is deemed by the FTC, and likewise the FDA, to be a claim attributable to the company promoting the product.⁵ In short, a company using an endorsement or testimonial to tout a product is adopting the statements made in the endorsement or testimonial as its own. Additionally, since the claims are attributable to the company, the company must have adequate substantiation to back up the claims as well.

Since endorsements and testimonials used in advertising are attributable to the company using the claims, this means that, from an FDA perspective, claims should not be made through a consumer testimonial or an endorsement if a company could not make the claim itself; essentially, such claims must be permissible for the type of product that is being promoted. For food, beverage and supplement companies, this means that a company may not use a testimonial or endorsement that expressly or implicitly claims that a product will help diagnose, treat, cure or prevent a disease.

The FDA has issued numerous warning letters regarding the improper use of testimonials and endorsement to make disease claims. The FDA has issued numerous warning letters to companies using endorsements and testimonials containing disease claims on company websites and in other labeling and advertising. In 2014, the FDA took a greater interest in claims made on social media, issuing, among others, a warning letter to a company for "liking" various disease claims posted by consumers endorsing the

product⁶ and a warning letter to a company for the endorsements of its affiliates and distributors on Facebook, Twitter and Pinterest.⁷

Material Connections Must Be Disclosed

In furtherance of the basic principle that endorsement and testimonial statements must not be misleading, material connections between an endorser and the company must be disclosed.⁸ A material connection is one that “might materially affect the weight or credibility of the endorsement.”⁹ This means personal, financial or similar connections that are not evident or which consumers would not reasonably expect should be disclosed to allow consumers to make an informed decision.

An example of such a connection would be the fact that a doctor or other endorser is being paid for their endorsement. A simple statement such as “Dr. X is a paid endorser of Company Y” would likely satisfy the need for a disclosure. Another example would be an endorsement or testimonial made by a principal of the company selling the product; the identity of the endorser and the relationship to the company must be disclosed. It doesn’t mean that such an endorsement is necessarily deceptive, but such a relationship should be disclosed so that the consumer can weigh that relationship accordingly if he or she chooses to do so. This obligation to disclose material connections extends to online endorsements as well, such as bloggers who write reviews of products. If the blogger is compensated, given free products or presented with other incentives which might influence the blogger’s opinion, a disclosure should be made.

Endorser’s Experience Must Be Representative or Disclaimed

One aspect of testimonials and endorsements that has received some of the heaviest scrutiny from the FTC has been the topic of representative results. Usually the products which receive the most attention for using these types of testimonials are weight-loss products. Advertisements which contain an endorsement related to the personal experience of a consumer must either have adequate substantiation to show that the endorser’s experience is representative of what the average consumer can expect to achieve with the product, or the advertisement must include a disclosure which indicates what the generally expected results may be for the average consumer.¹⁰ The FTC has determined that statements such as “I lost 50 lbs and kept it off” have a likelihood to convey to the typical consumer that all consumers can expect such results. If a testimonial reflects results that could be considered typical for a consumer, a disclosure must be made which identifies what the actual expected results are for the typical consumer.

The current FTC Guides also reflect the 2009 changes with respect to the FTC’s treatment of the use of the phrase “results may vary.” The revisions effectively eliminated the “safe harbor” that the FTC previously extended to non-typical testimonials which provided a disclaimer such as “results not typical” or “individual results may vary.” The FTC Guides now provide that most disclaimers are ineffective when used in conjunction with testimonials that convey a likelihood that consumers will achieve similar results, and the FTC will not consider general disclaimers like “results not typical” or “individual

results may vary” to be legally sufficient.¹¹ This may lead advertisers who do not have the information available to disclose the generally expected performance of their product to either exercise greater care not to convey a typicality claim or to rely instead on statements of general endorsement of the product (“I’ve tried many products and this was the best.”) Of course, if a testimonial is such that a consumer is not likely to believe that he or she will achieve similar results, a disclosure about expected results is not necessary.

Responsibilities of Companies to Monitor Affiliate Endorsers

The FDA and the FTC have emphasized the need for companies to monitor the advertising of their products by employees, distributors, bloggers, associates, affiliates and others with a connection to the company. Both the FDA and the FTC has made it very clear that, not only does a company have a duty to be aware of statements made about its products by endorsers or other promoters of their products, but the company may be held responsible for such statements as well.

In March of 2011, the FTC announced the settlement of claims against a Nashville, Tennessee-based company selling guitar lessons on DVD.¹² The FTC alleged that the company deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers. In that case, the FTC identified a three-step process that companies should employ to effectively monitor affiliate marketing and advertising.

First, companies should educate distributors, marketers and other affiliates advertising products as to what may be legally said about the company’s products. Second, companies must employ

an effective monitoring program to review the advertising of affiliates. While it is unreasonable to think that a company can realistically monitor each and every statement made by an affiliate on a minute-by-minute basis, the company must have a reasonable monitoring system in place. Finally, the company must be prepared to take definitive action if it is discovered that an affiliate is making improper statements. If a company becomes aware of untruthful, misleading or impermissible claims made by anyone endorsing or representing the company or product, the company should take action to stop the statements from being made. Because of the company's potential liability with respect to governmental enforcement actions, government investigations and product liability claims, it is wise for companies to do their best to ensure that all of their representatives adhere to the applicable law.

In Conclusion

The preceding discussion is by no means a complete recitation of all of the considerations that should factor into the use of testimonials and endorsements to promote products. While the use of endorsements and testimonials seems like a facile way to market and sell products, such advertising is not given *carte blanche* to operate without constraint. Companies must understand the parameters for making such claims because, while the opportunities for conveying advertising to consumers are more varied and expansive than ever before, federal regulators are keeping a close eye on those new avenues to ensure consumers are not being deceived.

This article is issued for informational purposes only and is not intended to be construed or used as general legal advice. The opinions expressed are those of the author exclusively. ▲

1. *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA)*, MOU 225-71-8003.
2. 15 U.S.C. §§ 41-58.
3. "FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products," FTC Press Release (April 19, 2011) <http://www.ftc.gov/news-events/press-releases/2011/04/ftc-seeks-halt-10-operators-fake-news-sites-making-deceptive>.
4. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR Part 255.
5. 16 CFR 255.2(a).
6. Warning Letter to Zarbee's Inc. (June 27, 2014) <http://www.fda.gov/iceci/enforcementactions/warningletters/2014/ucm403255.htm>.
7. Warning Letter to Doterra International, LLC (September 22, 2014) <http://www.fda.gov/iceci/enforcementactions/warningletters/2014/ucm415809.htm>.
8. 16 CFR 255.5.
9. *Id.*
10. 16 CFR 255.2(b).
11. *Id.* at n.1.
12. *In re Legacy Learning Systems* (June 1, 2011).