



October 27, 2009

FTC Issues New Advertising Guidance on Endorsements and Social Media

Addresses non-representative product use testimonials, advertiser liability for statements of employees, bloggers, and other endorsers, and disclosure of material relationships underlying endorsements and study results used in advertising

For more information, contact:

Christina M. Markus
(202) 626-2926
cmarkus@kslaw.com

Kelly N. Reeves
(202) 661-7850
kreeves@kslaw.com

Elaine H. Tseng
(415) 318-1240
etseng@kslaw.com

Lara K. Eilhardt
(202) 626-9250
leilhardt@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006-2706
Tel: (202) 737-0500
Fax: (202) 626-3737

King & Spalding
San Francisco, CA
Four Embarcadero Center
Suite 3500
San Francisco, CA 94111
Tel: (415) 318-1200
Fax: (415) 318-1300

www.kslaw.com

For the first time in 30 years, the Federal Trade Commission (FTC) has revised its “Guides Concerning the Use of Endorsements and Testimonials in Advertising.” The revised Guides, which apply to advertisers including companies marketing nonprescription drugs or medical devices, address public comments the FTC received in response to revisions it proposed in January 2007 and November 2008. While the revised Guides are advisory and not actual law, they represent the FTC’s principles for advertising that uses or consists of testimonials, including statements of third party bloggers or employees in social media, and celebrity endorsements in talk show interviews and other formats the FTC considers nontraditional advertising. Additionally, even though not directly applicable to advertising for prescription pharmaceuticals, companies marketing such products should take note of the revised Guides, as they are likely to be of relevance as the Food and Drug Administration pursues its publicly announced intent to develop policy on companies’ responsibility for product communications made by third parties on the Internet and in social media.¹

Principles Applicable to Pharmaceutical and Medical Device Companies

The FTC’s revised Guides reflect new approaches to the agency’s regulation of testimonials (e.g., patient stories) that may not be representative of general user experience; new conditions under which advertisers may be deemed responsible for statements made by product users or celebrity endorsers in social media, broadcast

¹ See 74 Fed. Reg. 48083 (September 21, 2009). FDA is accepting public comments on this and other promotional issues, which can be provided in writing to FDA Docket No. FDA-2009-N-0441, or at a public hearing FDA will convene on November 12-13, 2009.



FDA & Life Sciences Practice Group

interviews, or other non-traditional advertising; and new expectations for activities to be taken by companies to avoid liability for the statements of product endorsers. The revised Guides also provide recommendations regarding companies' responsibility for product representations made by employees in online media and the promotional use of data from third-party studies supported by the company. Among other things, the revised Guides specify the following:

- ***Patient or user testimonials should reflect or be accompanied by a description of generally expected user experience.*** Advertisements that describe one or more user's/users' experience with a product will likely be interpreted as representing a typical user's experience. If not typical, the advertiser should clearly disclose the generally expected experience; the FTC will no longer recognize a "safe harbor" for testimonials accompanied by a "results not typical"-type disclaimer.
- ***Companies face potential liability for the content of certain third-party product endorsements, even if the company does not have complete control over the content of the endorsements.*** A company (as well as an endorser) may be imputed with responsibility for false, misleading, or unsubstantiated product representations made by a third-party endorser, including in new media (e.g., a blog or online discussion board), if the company "initiated the process that led to the[] [product] endorsements being made...." A company's responsibility will be determined case by case, considering factors such as whether the company has directly or indirectly compensated the endorser; whether the product endorsed has been provided to the endorser for free; the terms of any agreement, and the length of any relationship, between the advertiser and the endorser; the previous receipt of product or services by the endorser from the same or similar advertisers; the likelihood of the endorser's future receipt of product or services; and the value of items or services received.
- ***Companies should implement controls to minimize the risk of liability for third-party statements.*** Companies should establish policies and procedures to assure that "material connections" with endorsers, including bloggers or celebrity endorsers, are disclosed by such parties when those connections would not otherwise be expected or apparent, and to monitor endorsers' activities for compliance. Companies should also make efforts to advise and train third parties whose activities may be imputed to the company regarding appropriate and inappropriate product representations.
- ***Companies should establish appropriate policies regarding activities by employees that may be regarded as product promotion.*** For example, company policies should address communications by employees in online message boards or other new media and should require that employees disclose their relationship to the company when posting about company products.
- ***Companies should disclose support provided to third parties that conduct research subsequently reported by the company in product advertising.*** In a reversal of previously existing FTC policy, the Guides as revised now recommend that such support be disclosed because, "Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project."



FDA & Life Sciences Practice Group

Examples for Pharmaceutical and Medical Device Companies

As revised, the FTC Guides include the examples below, which illustrate how the FTC's rules may affect drug and device companies.

(1) Section 255.1 “General considerations”: Advertisers *and* endorsers are subject to liability for false or unsubstantiated statements made through endorsements or for failing to disclose material connections between the parties.

- **Example 3:** An ad for an acne treatment features a dermatologist who claims that the product is “clinically proven” to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicated flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement.

(2) Section 255.3 “Expert endorsements”: Whenever an advertisement represents that the endorser is an expert on the advertising message, the endorser must in fact possess the expertise and qualifications that are claimed. For medical product companies that use physicians to advertise a product, the FTC gave the following examples:

- **Example 2:** An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., a person with a Ph. D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser’s expertise.
- **Example 6:** A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because these materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product’s safety and efficacy.

(3) Section 255.5 “Disclosure of material connections”: Endorsers must clearly disclose any connection between the endorser and the advertiser that may materially affect the weight or credibility of the endorsement, and which the consumer audience would not reasonably expect.

- **Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A later advertisement by the drug company mentions the



FDA & Life Sciences Practice Group

research results as “findings” of that research organization. Although the research was designed and conducted by the outside organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment to the research organization should be disclosed in this advertisement.

- **Example 3:** During an appearance by a well-known professional tennis player on a television talk show, she attributes improvements in her game to improved vision resulting from having laser vision correction surgery at a specific clinic. The athlete does not disclose that she has a contractual relationship with the clinic, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Thus, a clear and conspicuous disclosure should be made that the athlete has been engaged as a clinic spokesperson. Disclosure of the player’s engagement should similarly be made if the player touts the results of her surgery on a social networking site. Furthermore, if consumers are likely to take away that the player’s experience was typical of others undergoing the same procedure at the clinic, the advertiser must have substantiation for that claim.
- **Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

The revised FTC Guides are published at 16 C.F.R. 255 and take effect December 1, 2009.

Please contact us if you have questions concerning the FTC’s updated Guides, or the use of social media, consumer or celebrity endorsements, or other advertising methods.

King & Spalding is an international law firm with more than 800 lawyers in Abu Dhabi, Atlanta, Austin, Charlotte, Dubai, Frankfurt, Houston, London, New York, Paris, Riyadh (affiliated office), San Francisco, Silicon Valley and Washington, D.C. The firm represents half of the Fortune 100 and in a Corporate Counsel survey in September 2007 was among the top firms representing Fortune 250 companies. For additional information, visit www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.