New Rules: Endorsements & Testimonials in Marketing

> "I made $250,000 in the first month using this product! You can too!"*
>
> *Results not typical.

Those were the days–the days when a marketer could use an actual quote from a real person that has used your product as a marketing endorsement or testimonial to capture the aspirations of your potential customers. As of December 1, 2009, those days are gone.

Maybe that's a good thing for many consumers, because some marketers have been slimy with their marketing efforts. However, it's safe to say that most marketers are honest and sincerely offer products and services designed to help their clients feel better or make money. Both will definitely be affected by the new Guidelines released by the Federal Trade Commission (FTC) which take effect December 1st.

Before going into details, it's important to understand that the mission of the FTC is to protect consumers from fraudulent business practices. In the marketing context, you get in trouble if the FTC decides your advertisement is "deceptive." That's a noble goal, and a task that is becoming increasingly complex as marketing techniques evolve–especially on the internet. Realize too, that the processes required to change administrative and other governmental rules take so much time that it will be impossible for rules to keep up and address every specific scenario that creative marketers can implement. Accordingly, the FTC's approach must be relatively vague in some situations – providing guidance, but not "how-to" instruction. Considering that the Guidelines Concerning the Use of Endorsements and Testimonials in Advertising had not been updated since 1980, it's about time there was a review.

The review process began back in January 2007 when the FTC published a notice seeking input on the Guides. Many national marketing and advertising associations responded with formal comments, which were reviewed by the commission. In November 2008, the FTC published proposed revisions for the Guides and requested comments on the proposal, again receiving formal feedback from major Advertising and Marketing associations. On October 5, 2009, the FTC has published the final Guideline revisions that become effective in December.

There are 16 new rule sections and 36 hypothetical examples illustrating the application of the rules. I'm not going to discuss everything, but I'll hit some of the new rules that I think will affect the most people–the rules dealing with "Generally Expected Performance" and disclosure of connection between advertisers and sponsored testimonials and endorsements.

OVERVIEW

The Guides represent administrative interpretations concerning the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The goal is to keep marketers honest, which might seem like an easy task – how about "tell the truth, the whole truth, and nothing but the truth" – but it's not that easy because we all have different ideas of what constitutes the whole truth in various situations, and in some marketing situations, it's literally impossible to know the whole truth or which truth to communicate when more than one truth is possible.

What? More than one "truth"? Impossible!

NEW ISSUE #1: "Generally Expected Performance"

Let me tell you a story. Say you offer a product that helps people develop a marketing strategy for the internet. One person vigorously applies the system to a great product, makes $250,000 in the first month, and sends you a testimonial praising your genius. That's the truth – for that person. Another person buys your product, and does a half-hearted implementation on a lame product idea and makes $250. That's the truth too, but this person doesn't bother to tell you the results or share their implementation strategy. As a marketer, what do you communicate to potential customers?

Under the old rules, you could happily post the wonderful testimonial from the wildly successful (but true) customer and capture the aspirations of your potential customers. All you had to do was post a clear and conspicuous disclaimer saying that the successful customer's results were not typical. This "results not typical" "safe harbor" is being removed.

New Rule: the Guides require clear and conspicuous disclosure of the generally expected performance whenever the testimonial is not generally representative of what consumers can expect. Here's the text of one of the revised Guidelines that will present some new challenges to marketers.

255.2 Consumer endorsements.

> (b) An advertisement containing an endorsement relating the experience of one or more consumers on a **central or key attribute** of the product or service will likely **be interpreted as representing 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.** Therefore, an advertiser should **possess and rely upon adequate substantiation** for this representation. **If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances**, and the advertiser ***must*** possess and rely on adequate substantiation for that representation.
>
> (emphasis added)

Uh-oh.

In the example above, you know that your best TRUE, HONEST, and documented testimonial from the guy who made $250K in the first month is not anywhere near typical. That's what makes it so great. Typical results don't SELL.

Additionally, you have no idea what really IS typical. Your product may have just been released and not many people even HAVE results yet, much less results they've shared with you. And, you know that some people are better at implementing your product than others. Now what are you going to do?

You can't just use the "results not typical" disclaimer. That's been expressly ruled out. And, the FTC says that if you use the quote without anything else, it will be interpreted as a statement of what's typical. You can't go there. Finally, it says that if you use one of these atypical (aspirational) testimonials you have to "clearly and conspicuously disclose the generally expected performance in the depicted circumstances" and that you "MUST (emphasis added) possess and rely on adequate substantiation" for whatever you disclose as "generally expected." This goes beyond just telling the truth to being transparent in your advertising.

Trouble. (Unless you sell market research services. These rules just might buy a few boats for the owners of market research companies.)

Now you have only a few options

1. Don't use the great testimonial.

2. Figure out what the "Generally Expected Performance" actually is through investing in market research after the sale.
3. Risk it.

Very few marketers worth their salt are going to let such a great testimonial go unused without a fight – it's just too good. So, let's face the fact that there are really only two realistic options – market research, and risking it.

Market research costs money. Sometimes a lot of money, and I'll bet prices for this kind of work are going to increase greatly in the near term as everyone rushes out to get the data to back up the claims of "Generally Expected Performance." Market research can also take a lot of time initially, slowing your product development cycles. Finally, if you're going to do this, it'll need to be an on-going system so you can keep your performance data up-to-date. Pricey, but if you want to stay clear of the guidelines you're going to have to make the investment.

Many people simply won't be able to afford the cost of the research to back up the claims of generally expected performance, which will have a major chilling effect on new product and service offerings – or at least a major shift toward fewer aspirational testimonials in advertising. Personally, I think this is a bad thing for everyone because we all want to be the HONEST aspirational example and most people understand that there are a lot of variables that go into success. Setting the goal at a dumbed-down level of expected performance is not good for anyone because people need high aspirational goals to achieve high successes.

So, back to what to do if you really can't even measure a generally expected performance metric. In our example, the product is a system for helping customers implement an online strategy. It's going to be tough to figure out the metric to share as generally expected. Is it $/month, % increase in business, or something completely different? The Guidelines do not specify, but they do give several examples, but most rely on quantitative data, not qualitative. If you can't afford to get the data, then you only have the options of not using the testimonial, or risking it.

So, what's at risk?

I'm a lawyer, so I'll never tell anyone to do anything other than do everything they can to be in full compliance with applicable law. With that said, if the FTC decides to prosecute you for deceptive advertising, you could be fined, and those fines could be hefty, but they're not going to come without warning. First, according to Richard Cleland, assistant director, division of advertising practices at the FTC, the FTC will generally contact you and give you a chance to stop using the ad in question or bring the ad into compliance before initiating stronger actions. (See: **http://tinyurl.com/ydjfabb)** Consider that a warning track. Then if you continue use, you could find yourself on the receiving end of FTC litigation and possible fines for thousands of dollars.

What should you do?

First, if you CAN get the research done – do so. That research should only make your product claims more credible, and having the research will allow you to use truthful, although not generally expected, testimonials for your product safely. Second, if you CAN'T get the research done or the variables are just too diverse to get credible numbers (talk to your market research guru about that), then you might still want to use that ad, but do a very comprehensive explanation to potential clients that the testimonial you used is only one example of someone who implemented the program in a specific way. You can't stop there though, because that's just the same as "results not typical" – it seems like you would have to go a lot further and give some discussion about those variables and really let people know that their results are going to be dependent on how THEY use the product.

If done correctly, I think the explanation of generally expected performance, or why there really isn't a generally expected performance could be an incredible sales tool, and it could give you a chance to share your product guarantee and refund policy information. After all, if your goal is to help people through your products, you want to help them succeed.

In the example of the online-business advice product, the maker of the product could use the testimonial of the guy who made $250K in the first month as a spring-board to the discussion of what really made this work for him, then give an example of someone else where the product didn't work as well (with the less-successful person's permission of course) and detail what the unsuccessful person might have done to see better results, turning the table on the buyer and saying none of these results are typical, there are no generally expected performance metrics because every user of this product is in a completely different environment, and that the sky is the limit on the success any particular buyer of the product might see. Then go on to solicit case studies so that the advertiser can build an understanding of the results people are seeing in order to give people an even better idea of how the product is implemented successfully.

The FTC has made it very clear that each situation is evaluated on a case-by-case situation in the context of deceptive advertising. While it's understandable that people do not trust a governmental agency to be reasonable in their interpretations, having a logically defensible position of disclosure and transparency in an attempt to follow the guidelines as closely as possible in a given situation makes sense.

That's not all folks. The revised Guidelines don't stop there.

In addition to the issues around generally expected performance disclosure requirements, the new Guidelines also require people who are "sponsored" by the marketer and are endorsing the marketer's products (consumers, experts, bloggers, celebrities) to disclose the nature of the relationship. Again, transparency becomes the key.

New Rule: You have to be transparent about your relationship with people providing endorsements or testimonials.

> **255.1 Consumer endorsements.**
> (d) ***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 statements made in the course of their endorsements.***
>
> (emphasis added)

Uh-oh, again.

This rule is going to have a major impact on the affiliate marketing industry, because now, if you have affiliates, they could subject you to liability if THEY don't follow the rules. And if you ARE an affiliate, expert, or other person defined as being a "sponsored" endorsement or testimonial, you could face liability if you do not disclose the nature of your sponsored relationship, or if you say something deceptive in your endorsement, review, or testimonial.

Again, transparency is the key, and many people in the affiliate marketing industry are going to find transparency uncomfortable, because coming clean to the fact that you've been getting paid to say all those good things for the past few years on your blog might hurt the credibility you've been trying to build along the way. So, what do you do?

Marketers

As a marketer working with affiliates you need to take some steps. First, you need to communicate with all your existing affiliates that you expect them to be in full compliance with the new FTC Rules. They should also be informed that you reserve the right to drop them as an affiliate and/or withhold payment if you feel, at your complete discretion, that they are NOT in compliance with the new rules. These requirements should be spelled out in a new affiliate marketing agreement which includes having the affiliate indemnify you as the marketer if something they do or say results in any FTC or other legal action.

It would also be a good idea for you to have every affiliate complete an application (which someone on your staff actually reviews) letting you know you're dealing with the type of people you want to deal with, because having some vetting process in place may give you a better case to avoid FTC liability if one of your affiliates goes rogue and exposes you to liability. You have to account for the fact that if you end up getting fined by the FTC as the Advertiser because of something an affiliate did on their own, it's probably because the FTC has realized they'll never be able to collect the fine from the affiliate. And, even with the indemnity clause, if they don't have the money, you can't get it. So, do everything you can to show the FTC that you are a conscientious marketer doing everything you can possibly do to stay within the guidelines.

Oh, and don't worry that you'll be the Lone Ranger asking your affiliates to sign new affiliate agreements and complete applications. They'll be getting the request/requirement from everyone. Getting those applications completed and reviewed, then new affiliate agreements signed is going to take some time, but you should be well into this process by December 1st.

Before moving out of the context of Marketer, it's also important to know the new rules state that you can only use the endorsement of an expert or celebrity so long as you have good reason to believe the endorser continues to subscribe to the views presented and that you must secure the endorser's permission to keep using the testimonial at regular intervals – especially if you've made a change in your product, or even if your competitor's products have changed.

Affiliates, Reviewers, Testimonials, and Endorsers

If there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) – even in-kind compensation –then you must "fully" disclose the nature of the connection (§255.5). Again, this goes along with an unwritten theme of transparency in the advertising.

Additionally, what you say must reflect the "honest opinions, findings, beliefs, or experience of the endorser." And, the endorsement may not "convey any express or implied representation that would be deceptive if made by the advertiser." (§255.1(a)) This means that you can't just use some ad layout, brochure, copy, or a script they give you without checking it yourself. If you use their stuff, and it's found deceptive, then YOU are liable as much as they are.

So, as an affiliate, I would expect any affiliate agreement I sign to include an indemnification clause from the marketer saying they will cover me if any materials they provide are found to violate the FTC Guidelines. I would also require access to, and actually check, the data they are using to back up their statements of generally expected performance.

Action Items

There are a lot of articles like this one hitting the Web in response to these new Guidelines, many of which may not fit your situation, and many of which may simply be wrong. Therefore I strongly suggest that you read the new Guidelines for yourself. The publication found at http://www.ftc.gov/opa/2009/10/endortest.shtm is very simple to read and provides many examples that might answer your specific questions. After reading the Guidelines you'll want to talk to your legal and marketing teams to complete the following tasks.

1. Audit your testimonial-based advertising for compliance with the rules.
2. Make any adjustments to your existing advertising to bring existing materials into compliance.
3. Take action to define generally expected performance metrics.
4. Require affiliates to complete an application, then review and renew affiliate relationships with updated agreements.
5. Revise affiliate marketing agreements.
6. Disclose any connections you have with the sponsors of products you endorse.
7. Initiate procedures to regularly secure the permission to use testimonials and endorsements.
8. Do a Google search to make sure your name is not being associated with any products or services that might expose you to liability. If you find any sites, take active steps to get your name/testimonial removed if the use does not comply with the new Guidelines.

Kevin E. Houchin is a Creative Business Lawyer™ and author in Fort Collins, Colorado specializing in helping people reach their potential through creative business. He can be contacted through his website at www.HouchinLaw.com or @kevinhouchin on Twitter.