

6 Biggest Misconceptions About the FTC's New Guides Concerning the Use of Endorsements and Testimonials in Advertising

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Note to Chicken Little from Legal Department: "The sky is not falling! The sky is not falling!"

By now you have likely read, watched or listened to one of the approximately 5,756,234 news articles, Tweets, Facebook postings, YouTube videos and/or iTunes podcasts that have discussed the Federal Trade Commission's recently issued "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising". Unfortunately, it seems that many of the reporters who are doing the reporting may have only skimmed the 81-page document, or simply watched the recap on SNL's "Weekend Update". So, I decided to select some typical headlines and reveal the truth, allowing me to fulfill what my wife (and our therapist) calls my "inherent need to be right all the time even when I don't know what I am talking about" (obviously not applicable here).

1. "FTC Sets New Law For Bloggers"

Untrue! The FTC did not "pass a new law" or even "set new rules". All the FTC did was revise its "guidelines" to explain how it believes the federal false advertising laws should be interpreted, extending these existing guidelines to new media advertising. In truth, if the FTC ever brought a lawsuit against anyone for a violation of the guidelines, they still would have to prove to a court that the ad is deceptive or misleading.

2. "New Guidelines Could Cost Bloggers \$11,000 in Fines"

Wrong! Notwithstanding the fact this little ditty was repeated by the media over 58,000 times, it is not true. It is true that the FTC can fine a company up to \$11,000 for violation of certain of its rules, but the new endorsement guides aren't rules which fall within this category. Moreover, the FTC is much more likely to simply send a warning notice to bloggers or to require the signing of a consent order (which is kinda like a very serious promise not to do it again). Am I saying violating the law will never cost you? Of course not. But I'm willing to bet you won't see a flurry of \$11,000 checks being written by moms across America.

3. "Bloggers Must Always Disclose Freebies in Reviews"

Erroneous! First of all, you can relax, the FTC has not put a stop to the free glass of wine at the grocery store or coupon for the free dog food you get on your receipt at checkout. If anything, all the FTC has required is that a very limited group of people must disclose the receipt of free items when they are giving their opinion. What I'm saying is that not every freebie needs to be disclosed. Does it even mean that a blogger who receives a single unsolicited item from one manufacturer

has to disclose that she got the item for free in her review? The FTC says “probably not”, since the blogger doesn’t have any real working relationship with this or other advertisers. But can you set up shop as a blogger and continually receive free product without disclosing that your views may be influenced? Not advisable. Can you sign up to join a program where you get free stuff for spreading the word, but not tell your friends where you got the stuff? Magic 8-Ball says: “Don’t Count on It.”

4. “FTC Guidelines on Brands – You are Responsible for Disclosure”

Misleading! Yes, it is true that the FTC said that marketers are assuming some risk by sponsoring a blogger that they can’t control. But it doesn’t necessarily follow that the FTC is going to lock your company up and throw away the key in the event that one rouge blogger goes off the reservation. Instead, the FTC has stated that when determining liability they will consider an advertiser’s efforts to advise bloggers of their responsibilities and to attempt to monitor their activity and take action when they spot a problem. In fact, the FTC specifically stated that they aren’t aware of any instance where they took enforcement action against a company for the actions of a single person who violated established company policy. So provide training to bloggers, undertake monitoring and takedown where possible and then cross your fingers.

5. “New FTC Rules Screw Subway’s Jared”

Inaccurate! It is true that FTC’s new guidelines explain that it will no longer be enough to merely state “results not typical” when advertising claims of an atypical consumer (“Mary grew two cup sizes by taking our nutritional supplement* ...*Results not typical. Actual results vary”). But Jared will likely continue to make a nice living by holding up his “fat pants” and delighting us with tales of how he lost 240 pounds by taking long walks and eating the Cold Cut Combo (no mayo or cheese please), since the guidelines merely require that advertising which includes such claims also disclose the typical experience of consumers (“most Subway customers who eat the CCC and go for walks don’t lose 240 pounds, rather only 5 to 10”).

6. “The FTC’s Truth in Blogging Guidelines Are Truly Terrible”

Come on! You are a marketer, you have faced bigger challenges than this one. Yes, you may have to shift a plan here and there, or disclose a little bit more than you would like. But you figured out how to get people to drink whipped cream, hot fudge and caramel for breakfast, I’m sure that you can figure out how to make a few disclosures using only 140 characters.

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