

Advert Claim Substantiation Handbook V.A

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A. Introduction

In October 2009, the Federal Trade Commission (FTC) released revisions to the Guides Concerning the Use of Endorsements and Testimonials in Advertising. ⁿ¹

These revisions were the result of a more than two-year review process closely watched by industry. Since that time, the FTC has renewed its focus on these issues, and there has been an increase in endorsement-related enforcement. Although they do not have the force of law, the FTC Endorsement Guides have long been an important tool for advertisers. They provide specific guidance from the FTC about the FTC's view of the manner in which endorsements and testimonials may be used in advertising without violating the FTC Act and other similar laws.

The revisions to the FTC Endorsement Guides provide guidance on a variety of important topics, including the use of endorsements by celebrities and the use of endorsements and testimonials that promote extraordinary product performance. The revisions also contain what some say are controversial changes governing the use of endorsements and testimonials in social media, such as word-of-mouth marketing and blogging. This chapter includes a general description of the FTC Endorsement Guides, highlights key revisions to the Guides, and reviews examples of enforcement-both real and hypothetical.

In brief, an advertiser cannot use a consumer's testimonial to make an otherwise unsubstantiated claim. The consumer's comments about a product and his or her experience and results with the product must be independently substantiated. Any testimonial must first be truthful, and then any material connection between the advertiser and the testimonialist must be disclosed. If the customer providing the testimonial has experienced atypical results, the advertiser must disclose the average expected results, as the prior safe harbor of disclosing "results not typical" has been rescinded. Difficult issues facing marketers after the revisions to the FTC Endorsement Guides include how to measure typicality, how to disclose a material connection through vehicles such as Twitter with character limitations, and what sorts of connections will be deemed material.

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ⁿ¹ . FED. TRADE COMM'N, GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING (*FTC Endorsement Guides*), 16 C.F.R. § 255 available at <http://www.ecfr.gov/cgi-bin/text-idx?SID=de10601c673ac6ac7500291dbfecca38&mc=true&node=pt16.1.255&rgn=div5>. See also *The FTC's Endorsement Guides: What People are Asking* (May 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

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B. The FTC Endorsement Guides

The FTC Endorsement Guides set forth the FTC's views on the use of consumer, celebrity, expert, and organizational endorsements in advertising. The FTC Endorsement Guides-like other FTC guides-do not have the force of law. ⁿ²

Rather, they are "interpretive of laws administered by the Commission, and thus are advisory in nature." ⁿ³ In June 2010, the FTC released FAQs, which provided further guidance on FTC's interpretation of the FTC Endorsement Guides, and updated these FAQs in May 2015. ⁿ⁴

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ⁿ² . [FTC v. Garvey, 383 F. 3d 891 \(9th Cir. 2004\)](#).

ⁿ³ . **40 Fed. Reg. 22127, 22128 (May 21, 1975)**.

ⁿ⁴ . *The FTC's Endorsement Guides: What People are Asking* (May 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

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1. Definition

An endorsement is "any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."ⁿ⁵

The Guides provide the following examples to illustrate this definition:

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ⁿ⁵ . *FTC Endorsement Guides* § 255.0(b).

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a.Celebrity Infomercial

An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine, and states that it is the most effective and easy to use home exercise machine that she has ever tried. Even if she is reading from a script, the statement would be an endorsement because consumers are likely to believe it reflects the entertainer's personal reviews. ⁿ⁶

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ⁿ⁶ . *FTC Endorsement Guides* § 255.0, Example 6.

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b.Context determines if the celebrity is an endorser

A television commercial features celebrities, a comedian and a baseball player, engaging in light-hearted banter about products that they intend to buy for each other. The comedian says that she will buy the ballplayer a Brand X high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. In this situation, they are not likely to be deemed endorsers, because consumers will realize that they are not expressing their own sincerely held views. ⁿ⁷

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ⁿ⁷ . *FTC Endorsement Guides* § 255.0, Example 7.

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Definition

c. Bloggers can be endorsers

A consumer who regularly purchases a particular brand of dog food decides to purchase a new, more expensive brand made by the same manufacturer. She then writes about it on her blog. In this situation, she's not an endorser. If the supermarket, which tracks her purchases, gives her a free trial of the new brand, she's still not an endorser. But, if she joins a network marketing program and receives a free bag of dog food so that she can write a review, then her review would be considered an endorsement. ⁿ⁸

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ⁿ⁸ . *FTC Endorsement Guides* § 255.0, Example 8.

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2. Truth in Endorsements

Endorsements must be truthful and non-deceptive, and must also be substantiated by the advertiser. According to the Guides, endorsements should reflect the "honest opinions, findings, beliefs or experience of the endorser."ⁿ⁹

Endorsements may also not include representations that are deceptive or that cannot be substantiated by the advertiser.ⁿ¹⁰

Both advertisers and endorsers may be liable for false or unsubstantiated statements made through endorsements.ⁿ¹¹ For example, in *FTC v. Dalbey*,ⁿ¹² the FTC and the Colorado Attorney General brought charges against the company behind the program "Winning in the Cash Flow Business" as well as one of the consumers who provided a testimonial that appeared in advertising for the program. The FTC alleged that the consumer made false claims about the amount of money she earned by participating in the program. The consumer agreed to an order settling the charges against her. Significantly, this was the FTC's first order against a consumer charged with making misrepresentations in a testimonial.

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ⁿ⁹ . *FTC Endorsement Guides* § 255.1(a); [FTC v. Garvey, 383 F.3d 891 \(9th Cir. 2004\)](#) (noting that truth element of the endorser liability test was not at issue where celebrity asserted that all of his statements regarding the product were "statements of his actual beliefs and experiences.").

ⁿ¹⁰ . *FTC Endorsement Guides* § 255.1(a) see also [Temporary Restraining Order, FTC v. Central Coast Nutraceuticals, No. 10C4931, 2011 WL 2135208 \(N.D. Ill. 2011\)](#) (enjoining company from falsely claiming that celebrities such as Oprah Winfrey and Rachael Ray endorsed its AcaiPure product); Wachovia Bank, NAD/CARU Case No. 4658 (Apr. 2007) (endorsement should reflect the experience that consumers can typically expect).

ⁿ¹¹ . *FTC Endorsement Guides* § 255.1(d).

ⁿ¹² . Stipulated Final Order for Permanent Injunction and Other Equitable Relief as to Defendant Marsha Kellogg, *FTC v. Dalbey*, No. 11-cv-01396-CMA-KLM (D. Colo. June 6, 2011).

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3. Disclosure of Material Connections

Any connection between the endorser and the advertiser that "might materially affect the weight or credibility of the endorsement" (in other words, a relationship not reasonably expected by the audience), should be fully disclosed.
ⁿ¹³

The FTC Endorsement Guides include various examples to give guidance on when a connection between an advertiser and an endorser must be disclosed, including:

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ⁿ¹³ . *FTC Endorsement Guides* § 255.5.

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a.Studies Funded by Advertiser

If an advertiser commissions research on a product by an outside organization, even if the project is controlled by the organization, "the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project." Therefore, the funding should be disclosed. ⁿ¹⁴

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ⁿ¹⁴ . *FTC Endorsement Guides* § 255.5, Example 1.

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b.Celebrity vs. Expert Compensation

Compensation to a celebrity for an endorsement, regardless of whether the payments are in the form of an up-front cash payment or royalties based on sales, ordinarily do not need to be disclosed, because such compensation is likely to be expected by viewers. ⁿ¹⁵

However, advertisers should disclose payments made to expert endorsers. ⁿ¹⁶

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ⁿ¹⁵ . *FTC Endorsement Guides* § 255.5, Example 2.

ⁿ¹⁶ . *FTC Endorsement Guides* § 255.5, Example 4.

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Disclosure of Material Connections

c.Context of Celebrity Endorsement

If an athlete appears on a television talk show or writes on a social networking site, and endorses a product, the endorsement will be deceptive if there has not been clear and conspicuous disclosure that the athlete is a spokesperson for the product. No disclosure, however, is required if the celebrity is just wearing branded clothing for an athletic wear company, since no representation is being made about the clothes. ⁿ¹⁷

The FTC FAQs note that even if a celebrity is a well-known spokesperson for a product, the celebrity should still disclose the connection when posting content related to the product if there are a significant number of readers who are not aware of the connection. ⁿ¹⁸

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ⁿ¹⁷ . *FTC Endorsement Guides* § 255.5, Example 3.

ⁿ¹⁸ . *See supra* note 4.

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Disclosure of Material Connections

d.Free Goods Provided to Bloggers

As it has done in the past, a manufacturer sends a video game system to a college student who has a reputation as a video game expert and who maintains a blog about gaming. The manufacturer asks him to write a review. The blogger should disclose that he received the system for free. In addition, the manufacturer "should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance." ⁿ¹⁹

The FTC made a distinction between providing free goods to reviewers where it would be expected, for example providing books to a newspaper book reviewer or sending videos to film critics to review. In its FAQs, the FTC also notes that even if an individual's Facebook page identifies his or her affiliation with a company, the individual should still disclose the connection when posting about the company's products. ⁿ²⁰ The FTC believes material connections can be forged without a significant monetary payment or free goods, including an opportunity to appear on television ⁿ²¹ or an opportunity to enter a contest with a significant prize. ⁿ²²

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ⁿ¹⁹ . *FTC Endorsement Guides* § 255.5, Example 7. Regarding disclosures, the FTC FAQs note that a single disclosure on a home page that says that products on the site may be provided for free, or a button that says "disclosure," is not sufficient disclosure to inform readers about the connection. On Twitter, disclosures such as "#paid ad," "#paid," or "#ad" may be sufficient. See *supra* note 4.

ⁿ²⁰ . See *supra* note 4.

ⁿ²¹ . *FTC Endorsement Guides* § 255.5, Example 5.

ⁿ²² . Letter from FTC to Christie Grymes Thompson, Esq. Re: Cole Haan, FTC File No. 142-3041 (Mar. 20, 2014, available at https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf). Cf. The Scotts Company, LLC (Ortho Home Defense, Ortho Bug-B-Gon, Ortho Weed-B-Gon), Report # 5880, NAD/CARU Case Report (Oct. 2015) (finding product reviews generated by consumers' participation in a sweepstakes competition needed to be labeled as such).

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C. Enforcement

Regulators and other plaintiffs often initiate actions when advertisers and endorsers fail to disclose material connections. For example, in *New York v. Lifestyle Lift*, the advertiser settled a claim by the New York Attorney General's Office that its employees posed as consumers and posted fake positive reviews to the web. ⁿ²³

Additionally, in 2005, Sony Pictures Entertainment Inc. settled a highly publicized class action suit alleging the company used its own employees in its advertising to praise its movies, without disclosing that they were employees. ⁿ²⁴ Additional examples include the following:

Skechers: In 2012, Skechers paid \$ 40 million to settle FTC charges that it deceived consumers with ads for its Shape-Ups Toning Shoes. Shape-Ups ads included an endorsement from a chiropractor who recommended the product based on the results of an "independent" clinical study that tested the shoes' benefits compared to those provided by regular fitness shoes. The FTC alleged that this study did not produce the results claimed in the ad, that Skechers failed to disclose that the chiropractor is married to a Skechers marketing executive, and that Skechers paid the doctor to conduct the study. ⁿ²⁵

Spokeo: In 2012, the FTC settled allegations against databroker Spokeo, Inc., finding that Spokeo deceptively posted endorsements of their service on news and technology websites and blogs, portraying the endorsements as independent when they had been created by Spokeo's own employees. ⁿ²⁶

Hyundai: In 2011, the FTC closed its investigation of Hyundai Motor America for alleged violation of Section 5 of the FTC Act in connection with a blogging campaign conducted to spark interest in Hyundai's Super Bowl XLV ads. The inquiry focused on whether bloggers were given gift certificates as an incentive to comment on or post links to the ads, and if they were explicitly told not to disclose this information in violation of the FTC Endorsement Guides. In its closing letter, the FTC stated that a gift to a blogger for posting specific content promoting an advertiser's products or services is likely to constitute a material connection. The FTC cited several reasons for its decision to end the investigation, including that Hyundai did not appear to know in advance about the use of gift certificates as incentives, a relatively small number of bloggers received the certificates (some of whom disclosed this information), an individual working for the media firm hired to conduct the campaign was responsible for the gift

ⁿ²³ . Press Release, N.Y. Attorney General, Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise that Flooded Internet with False Positive Reviews (June 14, 2009), available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet>. The New York Attorney General continues to be quite active in this area, announcing four such cases in February 2016. Press Release, NY Attorney General, A.G. Schneiderman Announces Settlement with Machinima and Three Other Companies for False Endorsement (Feb. 11, 2016), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-machinima-and-three-other-companies-false>.

ⁿ²⁴ . Press Release, Conn. Attorney General, State Reaches Settlement with Sony Pictures Regarding Deceptive Advertising, (Mar. 12, 2002).

ⁿ²⁵ . *FTC v. Skechers U.S.A., Inc.*, No. 12-cv-01214-JG (N.D. Ohio July 12, 2012) (Stipulated Final Judgment, Order for Permanent Injunction and Other Equitable Relief).

ⁿ²⁶ . Consent Decree and Order for Civil Penalties, Injunction and Other Relief, *United States v. Spokeo, Inc.*, No. 12-cv-05001-MMM-SH (C.D. Cal. June 19, 2012).

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certificates, and the media firm promptly took action to address the issue upon learning of the alleged misconduct.ⁿ²⁷

Acai Berry Weight Loss Products: In April 2011, the FTC sued ten operators of allegedly fake news websites. The FTC charged that the websites, which marketed acai berry weight loss products, were designed to appear as if they belonged to legitimate news-gathering organizations, but in reality the sites were simply advertisements in disguise.ⁿ²⁸ The Illinois Attorney General brought a similar action against a Chicago area marketer.ⁿ²⁹

Legacy Learning Systems: In March 2011, the FTC announced that Legacy Learning Systems Inc. and its owner would settle FTC charges that they deceptively advertised products through online affiliate marketers who falsely posed as independent reviewers. According to the FTC, Legacy Learning advertised a series of guitar-lesson DVDs using an online affiliate program, through which it recruited affiliates to promote its courses through endorsements in articles, blog posts, and other online editorial material that appeared close to hyperlinks to Legacy's website. The FTC alleged that, in exchange for their endorsements, these affiliates received substantial commissions on the sale of products resulting from referrals. The FTC claimed that these online endorsements were deceptive because Legacy Learning and its owner represented that they reflected the views of "independent" reviewers, when in fact they were written by affiliates without clearly disclosing that they were paid for every sale they generated.ⁿ³⁰

Reverb Communications: In August 2010, the FTC reached a settlement with public relations agency Reverb Communications. The FTC had alleged that Reverb engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews on iTunes, and not disclosing that the reviews came from paid employees working on behalf of the developers.ⁿ³¹

Ann Taylor: In April 2010, the FTC announced that it had investigated allegations that Ann Taylor provided gifts to bloggers who the company expected would post blog content about the company's LOFT division. The FTC's inquiry focused on gifts provided during previews of LOFT's Summer 2010 collection. In its letter closing the investigation, the FTC said that it was "concerned that bloggers who attended a preview on January 26, 2010 failed to disclose that they received gifts for posting blog content about this event."ⁿ³²

Machinima: In September 2015 the FTC settled with a YouTube multi-channel network over failures to properly disclose material connections between the video game maker of Xbox One and people with popular YouTube channels featuring video game play.ⁿ³³

ⁿ²⁷ . Closing Letter, Hyundai Motor America, FTC File No. 112-3110 (July 23, 2013), available at <http://www.ftc.gov/os/closings/111116hyundaimotorletter.pdf>.

ⁿ²⁸ . FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims about Acai Berry Weight Loss Products (July 23, 2013), available at <http://www.ftc.gov/opa/2011/04/fakenews.shtm>.

ⁿ²⁹ . Press Release, Ill. Attorney General, Madigan Sues Chicago Area Marketer for Acai Berry Diet Scams (July 23, 2013), available at http://www.ag.state.il.us/pressroom/2011_04/20110419.html.

ⁿ³⁰ . *In re* Legacy Learning Systems, Inc., FTC File No. 1023055 (Mar. 15, 2011), available at <http://www.ftc.gov/os/caselist/1023055/110315llsagree.pdf>.

ⁿ³¹ . *In re* Reverb Communications, Inc., FTC File No. 092-3199 (Aug. 26, 2010), available at <http://www.ftc.gov/os/caselist/0923199/100826reverbagree.pdf>.

ⁿ³² . Letter from FTC, to Kenneth A. Plevan, Esq., Re: AnnTaylor Stores Corp. (Apr. 20, 2010), available at <http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf>.

ⁿ³³ . *In re* Machinima, Inc., FTC File No. 142-3090 (Sept. 2, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150902machinimaorder.pdf> (proposed consent order).

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1. Consumer Endorsements

An advertisement employing consumer endorsements about the performance of an advertised product or service "will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement." ⁿ³⁴

Consumer endorsements also "will likely be interpreted as representing that 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 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. . . . " ⁿ³⁵

Significantly, the FTC has expressed the view that the widely used "results not typical" disclosures are not effective. The FTC did not rule out the possibility, however, that a strong disclaimer of typicality could be effective in the context of a particular advertisement. ⁿ³⁶ The FTC acknowledged, however, that subjective statements of opinion expressed by individual consumers are not likely to convey a typicality message. ⁿ³⁷

The NAD, as part of its routine monitoring of advertisements, observed that Nutrisystem, Inc. had created a Pinterest account. (Pinterest is a virtual "pinboard" where users share photographs). One Nutrisystem pinboard contained photos of Nutrisystem customers, highlighting their weight loss results (e.g., "Michael H. lost 125 lbs. on # Nutrisystem"; "Lisa M. lost 115 lbs. on # Nutrisystem."). Nutrisystem provided the typical results a consumer could expect to achieve using its program. But this disclosure appeared on the Nutrisystem website, not on the Pinterest pinboard.

NAD relied on Endorsement Guides Section 255.2(b) in holding (1) that the Nutrisystem weight loss pins constituted consumer testimonials; and (2) that each pin should have been accompanied by "a clear and conspicuous disclosure noting the typical results consumers can expect to achieve using the Nutrisystem weight loss program." ⁿ³⁸

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ⁿ³⁴ . *FTC Endorsement Guides* § 255.2(a).

ⁿ³⁵ . *FTC Endorsement Guides* § 255.2(b).

ⁿ³⁶ . *FTC Endorsement Guides* § 255.2(b), n.1.

ⁿ³⁷ . *FTC Endorsement Guides* § 255.2(b), Example 7.

ⁿ³⁸ . Nutrisystem, Inc., Report # 5479, NAD/CARU Case Reports (June 2012); see also Your Baby Can Read, LLC, Report # 5313, NAD/CARU Case Reports (Mar. 2011); Liquid HCG Diet, LLC, Report # 246, ERSP Case Reports (June 2010); Smart for Life Weight Management Centers, Report # 242, ERSP Case Reports (June 2010).

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2. Expert Endorsements

An expert's endorsement "must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer."ⁿ³⁹

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ⁿ³⁹ . *FTC Endorsement Guides* § 255.3(b).

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3. Organizational Endorsements

Endorsements by organizations are understood to represent the judgment of the organization, and must be reached by a process that ensures that the endorsement reflects the collective judgment of the organization. ⁿ⁴⁰

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ⁿ⁴⁰ . *FTC Endorsement Guides* § 255.4.