



The FTC Revised Endorsement and Testimonial Guides—Advertisers of Dietary Supplements, Be Aware!

by Frederick R. Ball and Elinor Hart

On December 1, 2009, the Federal Trade Commission's (FTC's) Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (Revised Guides) became effective, marking a significant expansion of the FTC's regulatory and enforcement authority under Section 5 of the Federal Trade Commission Act (FTCA).¹ Clarifying and enhancing the regulation of consumer, expert and celebrity endorsements and or testimonials, the Revised Guides create more stringent requirements for disclosure of typicality and material connections. Advertisements for dietary supplements are especially vulnerable to enforcement action through the Revised Guides—the FTC has recently discussed a need

for improved regulation of dietary supplements as the recession has led consumers to seek healthcare through the use of supplements.² Activity in the last year has confirmed this suspicion—the FTC and its sister agencies, including the National Advertising Division of the Better Business Bureau (NAD) and the Council for Responsible Nutrition (CRN), have initiated several investigatory actions into the use of blogging and testimonials, signaling to advertisers the FTC's ardent intent to use the Revised Guides as a basis for enhanced enforcement and regulation. Recently, POM Wonderful LLC challenged the FTC's implementation of these Revised Guides.³ Shortly after POM filed its complaint, the FTC filed an administrative



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complaint against POM and others alleging that POM is engaging in false and deceptive advertising.⁴

The Revised Guides: The Guiding Light for Expanded FTC Enforcement

Although the Revised Guides are only “advisory in nature,” the FTC is an administrative agency inured with the authority to enforce Section 5 of the FTCA. The Revised Guides serve as the FTC’s official interpretation of that section and provide the basis for the FTC’s regulatory and enforcement authority.⁵ Congruent with the FTCA’s prohibition against unfair or deceptive acts in or affecting commerce, the theme behind the Revised Guides is enhanced transparency in all advertising media.

Specifically, the Revised Guides generally address two of the FTC’s growing advertising concerns: the disclosure of conflicts of interest by users of social media and blogs⁶ and the use of consumer endorsements and testimonials to establish the typical efficacy of dietary supplements.⁷ The Revised Guides do not actually amend the applicable law or regulations, merely providing updated interpretations.⁸ Nonetheless, the expansion of the Endorsement Guides’ applicability means FTC will use the changes as a basis for heightened enforcement.

Blogging and Social Media: Disclosure of Material Connections

Prior to the 2009 revisions, the FTC Endorsement Guides were last updated in 1980, far in advance of the advent of social media. Through the Revised Guides, the FTC sought to address concerns about the transparency of endorsements made through social media. The FTC suggests that conflicts of interest may be less obvious in social media

than in mainstream media outlets, and therefore that there is an enhanced need to clarify disclosure requirements.⁹ To the extent that manufacturers of dietary supplements provide free products or payment to consumers to review and use their product,¹⁰ the Revised Guides will impact that practice and may require revision to existing relationships.

As with the pre-revision Endorsement Guides, an endorsement subject to regulation is “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”

Under the examples published in the Revised Guides, blogs and other statements made through social media may now be considered endorsements if the blogger or speaker is, for example, writing a review of a dietary supplement or suggesting that his or her readers purchase a dietary supplement.¹¹

If a blog or statement through social media is an endorsement, any material connection that exists between the blogger and advertiser must be disclosed. For the purposes of identification and disclosure of these material connections, testimonials and endorsements are treated as one in the same under the Endorsement Guides, and each is subject to the same restrictions.¹²

The Revised Guides describe that a “material connection” exists whenever an endorser receives a gift—either cash, in-kind payment or any free product—in exchange for the blog. The examples included in the Revised Guides describe bloggers who join network marketing programs through which they receive free product or individual bloggers to whom advertisers send a product for testing and review. If this occurs, the connection must be clearly and conspicu-

ously disclosed on the website,¹³ though the FTC has noted that it can include casual statements such as “Company X sent me this product to review.”¹⁴ Nonetheless, so long as a “significant minority” of consumers is misled about the connection between a blogger or social media-user and an advertiser, the advertising will be considered deceptive without disclosure of the “material connection.”¹⁵ In this same vein, advertisers must now also disclose when they pay for or contribute to research studies cited in the advertisement.¹⁶

While the Endorsement Guides have always required disclosure of any material connection that might materially affect the weight or credibility of the endorsement, the more expansive description of “material connection” under the Revised Guides broadens the FTC’s jurisdiction to enforce disclosure in and transparency of purported advertising. The FTC has attempted to make clear that enforcement actions will not be taken against individual bloggers; rather, the FTC is concerned with the advertisers that encourage and perpetuate social media endorsements without requiring participants to disclose the material connection.

Though the FTC has noted that there are no fines for violating the Revised Guides,¹⁷ this is somewhat inaccurate given that behavior that is inconsistent with the Revised Guides can serve as the basis for corrective action under the FTCA.¹⁸ Certainly, then, any advertiser or blogger, especially those reviewing dietary supplements, risks exposure to FTC enforcement for failing to disclose material connections.

Consumer Testimonials and Endorsements

Dietary supplements currently play a large role in the consumer healthcare market; recent statistics demonstrate

a six percent annual growth rate and annual sales in excess of \$25 billion.¹⁹ Furthermore, advertisers of dietary supplements frequently rely on consumer testimonials and endorsements due to the tremendous costs associated with research.²⁰ Advertisers of dietary supplements must therefore be uniquely sensitive to the Revised Guides' amendments on the use of consumer testimonials and endorsements, and are uniquely vulnerable to the FTC's revamped efforts in enforcement.

When an advertiser uses a consumer testimonial or product endorsement as evidence of the efficacy of a product, the consumer's testimonial or endorsement is considered a "claim" under the Revised Guides. If the testimonial or endorsement is used in this way, the advertiser must have adequate substantiation for the claim, including competent and reliable scientific evidence where appropriate. Under the previous Endorsement Guides, an advertiser could employ testimonials or endorsements demonstrating extraordinary outcomes and so long as the advertiser utilized a disclaimer stating that "these results are not typical," the advertisement was generally not considered deceptive.

Research performed by the FTC, however, indicated that these disclaimers were ineffective at alerting consumers to the typical results of a product. Accordingly, the Revised Guides were specifically drafted to address this concern and alleviate it by prohibiting the "safe harbor" disclaimer that certain results expressed in testimonials are "not typical."

The Revised Guides also create a presumption that a testimonial or endorsement relating the experience of the consumer will likely be interpreted as representative of the generally expected results of a product. Accordingly, when

an advertiser uses a consumer endorsement or testimonial that relates that consumer's experience, the advertiser must now either have adequate substantiation that the endorser's experience is typical, or a clear and conspicuous disclosure of the typical results of the product or service.²¹ Especially given the size of the dietary supplement market and the increased utilization of dietary supplements, the imposition of these requirements dramatically expands the FTC's enforcement jurisdiction.

FTC Enforcement Actions under the Revised Guides

The FTC recently completed its first formal investigation under the Revised Guides, targeting clothing manufacturer Ann Taylor LOFT for its alleged failure to disclose gifts given to bloggers. According to the FTC letter to Ann Taylor, Ann Taylor LOFT provided gifts to bloggers at a Summer 2010 collection preview event.²²

Though a sign was posted at the event directing bloggers to disclose gifts if they posted comments about the event, the FTC expressed concern that several attending bloggers had failed to disclose the gifts. The FTC ultimately elected not to recommend enforcement action, but it is apparent from the letter that Ann Taylor's cooperation with the FTC precipitated its decision, rather than any substantive determination as to the propriety of Ann Taylor's actions.²³

Bloggers have subsequently noted that the Ann Taylor investigation demonstrates the FTC's intent to "[keep] an eye out for blatant offers to bloggers and other social media users in exchange for coverage."²⁴ Similarly, this investigation demonstrates the FTC's intent to go after advertisers, rather than individual bloggers, though bloggers and users of social media must still be cognizant of the regulations in order to avoid inad-

vertent participation in an improper marketing scheme.

Though the FTC's first enforcement activity sought compliance with the "material connection" revisions of the Revised Guides, advertisers and suppliers should not interpret this to mean that the FTC is more concerned with blogging than consumer endorsements. The FTC still has its fingers on the pulse of the advertising industry through its relationships with several agencies.

These agencies, including the NAD and the CRN,²⁵ have established relationships²⁶ with the FTC and through those relationships they exercise substantial authority. The CRN frequently files challenges with the NAD related to advertising of dietary supplements, and the NAD engages in a form of alternative dispute resolution between the advertiser, experts, scientists and other involved parties. Though the NAD cannot take legal action against a supplier or manufacturer, its procedures nonetheless have a bite; the NAD frequently refers cases it views as problematic to the FTC, and the FTC generally gives such cases high priority.²⁷

Since the publication of the Revised Guides, the behavior of the NAD and CRN indicates their concerted interest in enforcing the consumer endorsement provisions of the Revised Guides. The NAD²⁸ has cited the Revised Guides in several administrative inquiries into advertisers of dietary supplements this year, relying heavily on the deletion of the "results not typical" savings clause. At the behest of the CRN, the NAD has also initiated investigations into advertisers' claims relying on consumer endorsements, and has repeatedly relied on the Revised Guides to establish a basis for review.²⁹ For example, in *Health King Enterprise*, the NAD noted the CRN's complaint, partially based on the Revised

Guides, that the advertisements at issue no longer complied with the deletion of the “results not typical” disclaimer.³⁰ The NAD found that because there was no evidence that the product at issue had any effect on the condition described in the testimonial, it was “necessary and proper” for the advertiser to permanently discontinue the testimonial.³¹

Additional NAD investigatory actions into dietary supplement advertiser’s claims have also noted a concern with a lack of sufficient evidence to support the testimonials used by the advertiser.³² The Revised Guides are being implemented throughout the dietary supplement advertising industry, as the NAD relies on them in rendering its decisions.³³ Particularly given that NAD decisions often delineate permissible and FTC-compliant forms of advertising,³⁴ it is especially important for dietary supplement advertisers to monitor the NAD’s interpretations of the Revised Guides and referrals to the FTC.

Criticisms of the Revised Guides

Unsurprisingly, the publication and enforcement of the Revised Guides has garnered significant criticism from both the blogging and dietary supplement industries. These critics generally disclaim the Revised Guides on the basis of their restrictions of First Amendment rights and their discrimination towards social media.

For example, criticism has surrounded the fact that the Revised Guides focus on enhancing disclosure of material connections in social media and blogs, rather than mainstream media such as newspapers.³⁵ Though the FTC has indicated the broad application of the Revised Guides,³⁶ existing FTC enforcement actions suggest the contrary—there are no doubt ample examples of advertisers giving newspaper employees or other mainstream promoters “perks,” yet the FTC has focused much

of its public statements on the Revised Guides, as well as its enforcement, on blogging and social media.

In that same vein, there have been long-standing concerns that areas of FTC enforcement weaken the First Amendment rights of the speakers. These concerns are now heightened due to the burdens imposed by the Revised Guides on bloggers’, social media users’ and consumers’ ability to have their statements of efficacy disseminated through dietary supplement advertising. Criticisms surround the fact that blogging and other social media outlets are not commercial speech, and therefore are entitled to receive “full First Amendment protection” rather than the reduced protection frequently given to commercial speech.³⁷

For example, the Harvard Law Review recently published a piece criticizing the Revised Guides and calling them unconstitutional on the basis that they impose an undue burden on the expression of non-commercial speech and are unfair to bloggers by requiring a higher standard of disclosure than with other media outlets.³⁸ Though the FTC believes that its enforcement of the Revised Guides will not implicate First Amendment considerations,³⁹ this remains to be seen. As FTC enforcement of the Revised Guides inevitably increases, challenges to enforcement will facilitate disposition of the constitutionality of the Revised Guides.

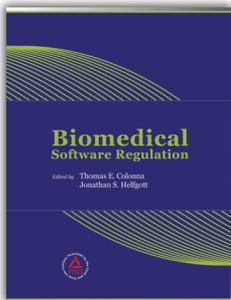
Impact & Conclusion

Given the FTC’s statements that it anticipates enhanced regulation of dietary supplements, advertisers of dietary supplements can expect increased enforcement of the Revised Guides by the FTC and its sister agencies. Similarly, given that advertisers of dietary supplements rely more heavily on consumer testimonials than other industries, they are particularly vulnerable to the new substan-

tiation of typicality requirements and the requirement of disclosure of all material connections, including the receipt of free product. Advertisers of dietary supplements that employ consumers to review their dietary supplements must therefore remain cognizant of the new disclosure standards and must concurrently ensure that usage of consumer reviews, even if unpaid, comports with the revised substantiation requirements. ▲

- 1 Federal Trade Commission Act, 15 U.S.C. §§ 41 – 58 (2006).
- 2 Press Release, Fed. Trade Comm’n, FTC Submits Statement to Congress on Deceptive Marketing of Dietary Supplements: Agency Describes Enforcement and Education Activities (May 26, 2010), <http://www.ftc.gov/opa/2010/05/supplement.shtm>.
- 3 See *POM Wonderful LLC v. FTC*, No. 10-cv-01539, (D.C. D.C. filed Sept. 13, 2010).
- 4 See *In re POM Wonderful LLC, et al.*, No. 0823122 (Federal Trade Commission filed Sept. 24, 2010).
- 5 Recent Regulation, *Internet Law—Advertising and Consumer Protection—FTC Extends Endorsement and Testimonial Guides to Cover Bloggers*, 123 HARV. L. REV. 1540, 1540 – 41 (2010) [hereinafter *Recent Regulation*].
- 6 See FED. TRADE COMM’N, FTC FACTS FOR BUSINESS: THE FTC’S REVISED ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING 2, June 2010, available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus71.pdf> [hereinafter *FACTS FOR BUSINESS*].
- 7 The proposed revisions to the Revised Guides originally only included changes to the requirements for consumer testimonials of dietary supplements. *Recent Regulation*, *supra* note 3, at 1541; Press Release, Fed. Trade Comm’n, FTC Submits Statement to Congress on Deceptive Marketing of Dietary Supplements: Agency Describes Enforcement and Education Activities (May 26, 2010), <http://www.ftc.gov/opa/2010/05/supplement.shtm>.
- 8 Interview with David Vladeck, Director, Fed. Trade Comm’n Bureau of Consumer Protection 6 (Apr. 2010), available at www.antitrustsource.com.
- 9 Carl Settlemyer, Fed. Trade Comm’n, Revealing Connections – An FTC Perspective on Endorsements and Testimonials, Online Behavioral Advertising, and Other Advertising Issues, Mar. 30, 2010, available at <http://www.bos.frb.org/consumer/conf/ncpw/2010/Settlemyer.pdf> [hereinafter *FTC Perspective*].
- 10 16 C.F.R. § 255.0(b).
- 11 See 16 C.F.R. §§ 255.0, ex. 8; 255.1, ex. 5; 255.5, ex. 7, 8.
- 12 16 C.F.R. § 255.0(c).
- 13 Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), www.ftc.gov/opa/2009/10/endorstest.htm.
- 14 FTC Perspective, *supra* note 7.
- 15 See *FACTS FOR BUSINESS*, *supra* note 4, at 2.
- 16 16 C.F.R. § 255.5, ex. 1.
- 17 FTC Perspective, *supra* note 7.
- 18 *Id.*

- 19 Fed. Trade Comm'n, Prepared Statement on Deceptive Marketing of Dietary Supplements: FTC Enforcement Activities before Special Committee on Aging, United States Senate, 2 (May 26, 2010).
- 20 See, e.g., Elec. Retailing Ass'n & Council for Responsible Nutrition, Comments in the Matter of Endorsement Guides Review before the Federal Trade Comm'n, 3 (2009).
- 21 16 C.F.R. § 255.0(b); David C. Vladeck, Director, Fed. Trade Comm'n Bureau of Consumer Protection, Remarks at the Council for Responsible Nutrition Annual Symposium for the Dietary Supplement Industry (Oct. 22, 2009); FTC Perspective, *supra* note 7.
- 22 Letter from Mary K. Engle, Associate Director, Fed. Trade Comm'n to Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom LLP o/b/o Ann Taylor LOFT (Apr. 20, 2010).
- 23 See *id.* (noting that decision not to pursue enforcement is not a determination that a violation did or did not occur).
- 24 Posting of Paul W. Mussell, Esq. to Duets Blog: Creativity and the Law, Retailer Ann Taylor Dodges FTC's First Endorsement Enforcement Bullet (May, 18, 2010), <http://www.duetsblog.com/2010/05/articles/guest-bloggers/retailer-ann-taylor-dodges-ftcs-first-endorsement-enforcement-bullet/>.
- 25 The CRN recently extended its agreement with the NAD through 2014.
- 26 The NAD's relationship with the FTC and FDA is established through a liaison agreement from 1971.
- John E. Villafranco & Andrew B. Lustigman, *Regulation of Dietary Supplement Advertising: Current Claims of Interest to the Federal Trade Commission, Food and Drug Administration and National Advertising Division*, 62 FOOD & DRUG L.J. 709, 709 (2007) [hereinafter *Regulation of Dietary Supplement Advertising*].
- 27 *Id.* at 709.
- 28 The National Advertising Division of the Better Business Bureau is an administrative agency that facilitates an alternative form of hybrid alternative dispute resolution, often between in-house counsel, marketers and advertisers, research and development, and outside consultants. The goal of the arbitration is to determine whether a particular claim is substantiated, and the NAD facilitates arbitration only with respect to advertisements that are national in distribution. See Nat'l Adver. Div., About NAD, <http://www.nadreview.org/AboutNAD.aspx> (last accessed Aug. 2, 2010). Complaints may be brought on behalf of individuals, companies, or competitors. Cooperation with the NAD is essential—the NAD works closely with the FTC, and will often refer unresolved cases for further inquiry by the FTC.
- 29 See, e.g., Health King Enterprise & Balanceceuticals Group, Inc., No. 5162, at 3 (Nat'l Adver. Div. Apr. 12, 2010) (noting CRN's citation to the Revised Guides in support of its argument that the advertiser's "results not typical" statement is no longer a sufficient safe harbor).
- 30 See, e.g., *id.*
- 31 See, e.g., *id.* at 13.
- 32 See, e.g., Press Release, Nat'l Adver. Div., NAD Recommends Metabolic Research Modify, Discontinue Claims for 'Stemulite' (Mar. 3, 2010) (recommending that advertiser discontinue testimonials on the basis that there was insufficient evidence to support the testimonials claiming improvements); Press Release, Nat'l Adver. Div., NAD Recommends Artis Marketing Discontinue Wide Range of Claims for 'SlimForce 7' Dietary Supplement (Feb. 16, 2010) (recommending that advertiser discontinue testimonials claiming that a consumer can lose weight regardless of diet and exercise).
- 33 See, e.g., Health King Enterprise & Balanceceuticals Group, Inc., No. 5162, at 3 (Nat'l Adver. Div. Apr. 12, 2010).
- 34 *Regulation of Dietary Supplement Advertising*, *supra* note 24, at 710.
- 35 See, e.g., Posting of Paul W. Mussell, Esq. to Duets Blog: Creativity and the Law, Retailer Ann Taylor Dodges FTC's First Endorsement Enforcement Bullet (May 18, 2010), <http://www.duetsblog.com/2010/05/articles/guest-bloggers/retailer-ann-taylor-dodges-ftcs-first-endorsement-enforcement-bullet/>.
- 36 The FTC Facts for Business 2010 guide specifically notes that the Revised Guides apply "across the board." See FACTS FOR BUSINESS, *supra* note 4, at 3.
- 37 *Recent Regulation*, *supra* note 3, at 1540.
- 38 *Id.* at 1543.
- 39 See FACTS FOR BUSINESS, *supra* note 4, at 3.



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