

**Well Folks...They've Done It Again!
But Do The FTC's New Rules
Affect YOU?**



Just Another Rant About the FTC ... with Some Opinionated Suggestions!
Brought to you by Len Thurmond Creator and Owner of [AutoWebLaw Pro](#)



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A Report On the FTC's New Updated Guides Concerning the Use of Endorsements and Testimonials in Advertising

As you no doubt have heard by now, the FTC recently released their new updated Guides Concerning the Use of Endorsements and Testimonials in Advertising. And it is causing quite a stir amongst the Internet Marketing community.

And as such, I felt I needed to chime in on this subject and give my opinion for anyone who might be interested in what I had to say.

There are a number of interesting issues that will affect our livelihoods in the future, some more than others, and in this report I have tried to both calm the masses about the ones that I feel are not a big deal, and encourage them to pay close attention to the ones that I feel could have a VERY big impact on our industry as a whole.

I believe that, for the most part, the FTC's new updated rules and regulations in 16 CFR Part 255 - Guides Concerning the Use of Endorsements and Testimonials in Advertising ([which you can get in whole here](#)), are a GOOD thing.

Their purpose seems to be one of trying to protect the public from the many scams and misleading advertising practices that are all over the Internet Advertising Industry today. And if they can pull it off in the manner they are hoping for, it WILL clean up the net quite a bit and get rid of a LOT of Scams and Snake Oil Salesmen.

However, the structuring of these new updated regulations are ambiguous at best, and so vague in part, as to leave it open totally to interpretation...NOT hard and fast rules.

And unfortunately, as usual, it is solely the FTC's interpretation that decides the validity of any and all cases they decide to prosecute.

And while you would always have your day in court and could certainly fight them if you feel they interpreted your situation wrong, it will STILL be a VERY expensive

exercise. One that no matter how well off you might be...NOBODY needs!

Their criteria seems to fall into two main areas that would affect us as Internet Marketers, those being

1. the need to disclose any affiliation we might have with the products or services we are promoting and/or endorsing...and
2. what they feel is the further need to clean up the testimonials that are being used in advertising through ALL media formats.

As to the first criteria...

They want us to "Clearly and Conspicuously" make the readers aware of any connection we might have with the products owner. This includes (but is not limited to) getting paid if a sale occurs.

It also includes disclosing that you received a complimentary promotional copy of the products you are promoting, if that be the case.

Now to me, these restrictions and regulations are just plain SILLY! I personally do not see how it can or will make the consumer's experience any better, or how it could or should affect their final decision on whether or not to make the purchase.

I mean really, this has been a tried and proven means of getting reviews in the advertising industry for centuries. Does anyone REALLY believe that professional reviewers actually pay out of their pocket for every item or service they review?

Does anyone really believe that the columnist that reviews Movies or dinner clubs, ACTUALLY pays to get into those places so that he can write a review?

And even if there ARE some people who are so naive as to believe this is true, they are in such a minority that it begs the question..."Is it right to impose these types of laws on the rest of us to protect such a small group from themselves?"

Not in my opinion! No...the important fact (and the ONLY one that the FTC SHOULD be concerned with) is that the review of the product at hand is an HONEST one and NOT one that was paid for through Gratis!

Personally, I think the only thing this silly regulation will accomplish is to piss of the idiots out there that refuse to buy anything from a person (other than the owner) who they feel might benefit from the sale! And if you have been in this industry for any time at all, you KNOW that, as unfortunate and silly as it may seem, there ARE people out there that will do just that!

Why? Who knows?

Maybe they feel some sort of misplaced loyalty to the owners and creators of products and feel that no one else should prosper from their money. Or maybe they're just kids grown up, that used to pull wings off of flies or deface public property, just for fun!

But sadly, they DO exist.

Fortunately, they are in small numbers now and I don't see it as a big problem to our promotions, so all in all, although I don't see how it is supposed to help anyone, I don't think it will hurt much either.

Basically, it's just another in a long line of government regulations that are just a pain in the ass. Something that we have to do to stay legal, that will just take up a little more of our time to satisfy their need to control us.

But, since it is also not that difficult to deal with, I guess it's not a big deal, and I have now included a form in [AutoWeblaw](#) that should appease the Powers that be on this issue.

But they have bigger fish to fry, and these issues will not be so easily dismissed or dealt with!

The second criteria that this report deals with, is the new regulations concerning Endorsements and Testimonials. And it is a bit more serious and harder to comply with than the first one.

There are a lot of concerns about these changes in the Internet Marketing Community...And rightfully so!

Since the 1980's the FTC has been concerned about the validity of testimonials in advertising, and if you think about it, they are right to do so. And through the years they have tried to make sure that the testimonials we use in our advertising campaigns are truthful and can be substantiated.

And this to me is a perfectly acceptable form of doing business.

We SHOULD be held accountable to substantiate the claims made in our ads and sales pages. Anything less just takes us back to the "Magic Elixir" dark ages.

And really, it IS in our best interests to be honest anyway, as that sort of dishonesty only tends to create refunds and distrust from our customers.

But regardless of whether is it right or wrong, there have always been (and will probably always be) those who use the power of testimonials to dupe the public into buying their products.

And the FTC has had no choice but to continue to strengthen their laws to try and stop these shady practices.

And trust me, I am all for wiping out these types of advertising techniques that only serve to hurt us all, both advertiser AND consumer!

But as usual, the FTC has both gone too far, and yet not gone far enough!

They have now gone so far as to set the regulatory demands on testimonials so stringent as to render them either very difficult and expensive (if not impossible) to comply with, or once complied with, to render them virtually useless by negating the testimonial with the required disclaimer and statement of Typical Expectations.

We can no longer use testimonials from people who have achieved great success with our products without going into an explanation of how that was unusual and telling them what the typical person can hope to achieve.

Now this on the surface would not seem to be a big deal and in essence should be a good thing for the consumer. But when you are releasing a new product, the only way you have to judge what is NORMAL, is by your own testing and that of your peers testimonials!

It seems to me that at least at THAT point, those results would BE typical!

And if not...At what point do the averages of your total users BECOME the "Typical" user expectation?

Are we not allowed to post testimonials until we have had 50, 100, 1000 users report on THEIR individual results? Just what IS the magic number that they'll accept as "Typical"?

If your pre-release testers results are the same as (or close to) yours, wouldn't that be "TYPICAL"?

Not according to the FTC!

It would appear that Big Brother now wants us to either go to the expense of conducting extensive testing through "Tom, Dick and Harry" and be able to substantiate the results AND list them with the testimonials of those we are using in our advertising, just to be able to USE the truthful testimonials of those who got such good results that they felt they needed to share them with us!

Up until now, telling the public that "These Results Are NOT Typical" was enough to satisfy the FTC and I had no problem with that, since if the person reading the testimonial couldn't figure that out for themselves, they probably SHOULD be told...point blank!

But that is no longer good enough for the FTC!

NOW they want us to state what the Typical Results ARE! And if you don't have access to such data and/or cannot get it before the sales pages are written (as is usually the case) you can only use generic testimonials that in no way suggest what it is possible to do. Or alternately, use none at all!

To Quote the FTC...

"If the advertiser does not yet have sufficient information as to the results consumers can generally expect to achieve with its product, it can still use general testimonials – i.e., testimonials that do not make specific performance claims – provided the net takeaway of the ad is not misleading. For example, a testimonialist might praise the taste of a company's reduced calorie foods, or the fact that a particular exercise video was the "best ever."

The FTC further says...

"The critical question for determining whether an ad is deceptive under Section 5 of the FTC Act – for all advertising, whether or not testimonials are involved – is what is the net impression consumers take away from the ad as a whole. The revised language in Section 255.2 would come into play only if a truthful testimonial: (1) conveys to consumers that the testimonialist's results are "representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use"; and (2) the advertiser does not have adequate substantiation for that claim. In other words, the Guides call for a disclosure only if the ad is misleading (and thus not protected by the First Amendment⁶¹) without a disclosure."

All in all, what this means is that it all comes down to the FTC's opinion of your situation, and NOT any hard and fast rules. It is completely up to their discretionary interpretation as to whether or not they want to come after you.

SCARY! Isn't it?

And in some cases such as an actor who is performing in an Infomercial and reading from a prewritten script, you could very easily be hit with a Lawsuit for Breach of contract if you refused to read the script as is, in order to adhere to the FTC's new rules!

Case in point from the (FTC) 'Horse's Mouth'...

"To make that potential liability more apparent to those who might be considering making an endorsement (and to those counseling prospective endorsers), the Commission's proposed revised Guides included new language in Section 255.1(d) stating that "Endorsers . . . may be liable for statements made in the course of their endorsements." The Commission's proposal also included several new examples featuring celebrities and experts."

And the example the FTC gave is...

"An infomercial for a home fitness system is hosted by a well-known entertainer. 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. The example states that even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's

views."

One commenter from within the FTC report pointed out that *"celebrities are under contract to read the script that is provided to them, and do not have control over the content of the final ad, including how their endorsements will appear; nor do they possess the expertise needed to assess whether a particular claim violates the FTC Act."*

Two commenters stated that the proposed *"revisions to the Guides could unfairly expose celebrities to liability for advertising claims that they lack the knowledge to verify or the authority to change; indeed, they noted, celebrities who attempted to deviate from the script they are given might be subject to legal action for breach of contract."*

The proposed Guide revisions, they asserted, could be interpreted as imposing an obligation on celebrity endorsers to ensure that claims made by the advertiser and communicated by the celebrities are independently verified and properly substantiated – thereby requiring celebrities to educate themselves not only on the product at issue, but also on the relevant industry and competition."

And this is what the FTC had to say...

"The addition of new Section 255.1(d) and the new examples featuring celebrities does not create new liability for celebrities, but serves merely to let them (and their advisors) know about the potential liability associated with their endorsement activities. Indeed, as the Commission noted when it proposed Section 255.1(d), this new provision merely "explicitly recognizes two principles that the Commission's law enforcement activities have already made clear," one of which is "that endorsers may also be subject to liability for their statements."

"The Commission is not persuaded that a celebrity endorser's contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations made in the course of that endorsement. The celebrity has decided to earn money by providing an endorsement. With that opportunity comes the responsibility for the celebrity or his or her legal representative to ensure in advance that the celebrity does not say something that does not "reflect [his or her] honest opinions, findings, beliefs, or experience." See 16 CFR 255.1(a)."

"Furthermore, because celebrity endorsers are liable for what they say, not for the rest of the advertisement, their lack of control over the final version of a commercial does not warrant the immunity sought by the commenters. Nor are they required to become

experts on the product or the industry, although they may have an obligation to make reasonable inquiries of the advertiser that there is an adequate basis for assertions that the script has them making."

Excuse me! But aren't actors hired to... 'ACT', not to rewrite scripts! It now appears they are relegated to the responsibility of media police as well as Acting!

Throughout the years, the Absurdity and Ambiguity of the FTC's Rules and Regulations have never ceased to amaze me, and the MOST absurd fact of all has always been and evidently will always be, that violations of their "RULES" are completely at the discretion of the FTC investigators themselves! And these "Interpretations" are judged on a case by case basis at the whim of the FTC!

One of the most concerning revisions is about the wording of testimonials which states...

"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 circumstance, and the advertiser must possess and rely on adequate substantiation for that representation."

So...Really, all a testimonial can say for a product that is a new release and does not have enough testing to even KNOW what will be typically expected, is something like "I really like your product. I would recommend it to anyone who is doing Blah Blah Blah. I believe it will make their job a lot easier!"

Another revision is one that apparently limits the use of testimonials (even ones that can be substantiated or are generic in nature) by stating that if the testimonialist infers that the testimonialist uses the product, their testimonials can be used in the advertisement only for as long as the product owner believes that the testimonial giver is continuing to use the product.

Now HOW in hell are we supposed to know if the person who gave us a testimonial (even one like the one I wrote above) is continuing to use the product. And if not, would not their testimonial to the time of use still be valid even after they ceased to use it? Why is there a viability date on their true feeling at the time they were actively

using the product?

Are we now relegated to policing the net and checking in with our testimonial givers once a month to make sure they are still using 'XYZ' so we can take off their testimonial before we get into trouble? And how long AFTER they cease to use it do we have to remove it? What is someone DIES?

And yet another, even scarier revision, concerns the actions of others and how Big Brother is seemingly trying to make us responsible for their actions as well as our own!

This was copied directly from the FTCs report...

"Several comments questioned whether the advertiser should be liable for statements made by endorsers who use new media. One suggested that the advertiser should be liable for comments of an "endorser" only if the advertiser had the ability to control the consumer's statements. Thus, if consumers are free to say what they wish about the product – or, if they choose, to say nothing about it – the advertiser should not face potential liability.

Several comments specifically expressed concern about proposed new Example 5 to Section 255.1, with some concerned that the example suggests that bloggers potentially would be liable under Section 5 for simply giving their honest appraisal of a product and how it affected them personally. Commenters also focused on the fact that the advertiser could be liable for statements made by the blogger.

The Commission recognizes that because the advertiser does not disseminate the endorsements made using these new consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, if the advertiser initiated the process that led to these endorsements being made – e.g., by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it potentially is liable for misleading statements made by those consumers.

Imposing liability in these circumstances hinges on the determination that the advertiser chose to sponsor the consumer-generated content such that it has established an endorser sponsor relationship. It is foreseeable that an endorser may exaggerate the benefits of a free product or fail to disclose a material relationship where one exists. In employing this means of marketing, the advertiser has assumed the risk that an endorser may fail to disclose a material connection or misrepresent a product, and the potential liability that accompanies that risk. The Commission, however, in the exercise of its prosecutorial discretion, would consider the advertiser's efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.

This is example 5 given by the FTC and referred to in the previous quote...

"A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog.

Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition.

The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services.

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated.

The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered."

And what the FTC had to say about it...

"New Example 5 should not be read to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the two. However, when the advertiser hires a blog advertising agency for the purpose of promoting its products – as posited by the specific facts set forth in this example – the Commission believes it is reasonable to hold the advertiser responsible for communicating approved claims to the service (which, in turn, would be responsible for communicating those claims to the blogger).

The commenters expressing concern that the blogger in new Example 5 potentially could be liable for giving her honest opinion of the product (that it cures eczema) and discussing her personal experience with it appear to have misread the example. The blogger did not either give her opinion about subjective product characteristics (e.g., that she liked the fragrance) or relate her own experience with it (the example does not say that she had eczema). Rather, she made a blanket claim that the product "cures" eczema without having any substantiation for that claim.

The Commission is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement."

Scary stuff!

In conclusion, it would appear that in the present climate, the use of testimonials in our advertising campaigns has become more of a liability than an asset, as truthfully, most people don't pay much attention to them anyway, and at the very least consider them an advertising ploy from people with exceptional results!

And unfortunately there is no way to create forms or documents that can be used to comply with these new testimonial/endorsement rules as we have in the past, as each instance is different and requires specific attention.

So I for one will not be using any testimonials that make claims other than that the person likes the product and will recommend it others (or similar types of statements).

I do not feel it is safe or wise to "test the waters" by using specific claim type testimonials, as the disclaimers that are required to go with them would negate their effectiveness anyway. And, given their limited effectiveness, the burden of substantiation is probably in most cases, not worth the trouble.

And since these new rules are so ambiguous in the first place and leave so much to the imagination, and so many questions unanswered, I for one will refrain from crossing their path where possible, at least until they have gone through the wringer and been clarified a bit, by those who test them in a court of law!

I mean even cases of testimonials where a person says something like... "I've tried

dozens of other courses, but never could figure out how to succeed at ZXY, until I tried yours. And now, within minutes, I finally understand what I was missing"...

How could you substantiate a claim like that? How would you know if that is a "Typical Result"?

And if an expert marketer tries your product and has extremely good results with it, wouldn't that be considered typical results for someone of their expertise?

And what IS a typical result anyway? As is the case with MOST things, it has been proven that around 90% of all those who buy marketing courses, software, exercise programs, weight loss programs, or just about anything else you can think of, either don't use them properly, or at all, and therefore do NOT have the results talked about on the sales pages. So, would THIS be the 'typical user' they're talking about?

I'm afraid the new rules are just too open to scrutiny. And until they are clarified further, it might be better to stay away from the issues they bring up.

The good news is that there are far too few FTC employees to effectively "Police" the net. And they have openly suggested that they will continue to operate solely on a complaint basis, and only if the number of complaints is significant enough to warrant their time and tie up their resources to investigate them.

Also, even though they have released the fact that the fines could be as much as \$11,000 for infractions of their new guidelines, the FTC is now saying that the \$11,000 fine is not accurate, at least for the first violation. Fast company got some responses from Richard Cleland, assistant director, division of advertising practices at the FTC, who says in a recent interview...

"If people think that the FTC is going to issue them a citation for \$11,000 because they failed to disclose that they got a free box of Pampers, that's not true. That's not going to happen today, not ever."

"That \$11,000 fine is not true. Worst-case scenario, someone receives a warning, refuses to comply, followed by a serious product defect; we would institute a proceeding with a cease-and-desist order and mandate compliance with the law. To the extent that I have seen and heard, people are not objecting to the disclosure requirements but to the fear of penalty if they inadvertently make a mistake. That's the thing I don't think people need to be concerned about. There's no monetary penalty, in terms of the first violation, even in the worst case. Our approach is going to be educational, particularly with bloggers. We're focusing on the advertisers: What kind of education are you providing them, are you monitoring the bloggers and whether

what they're saying is true?"

So if you DO get flagged, be sure to comply with whatever they say, the FIRST time, and you should get away with just a slap on the wrist.

So, bottom line...Be honest, and keep your customers happy, and no one will complain!

And even better yet...You'll make a lot more money from repeat happy customers!

Marketing 101!

Here's to your continued success,



Len Thurmond

PS - I have recently updated AutoWebLaw with a number of new documents to be used with blogs, videos, eBooks, etc. As well as a COMPENSATION AND AFFILIATION AFFIDAVIT which addresses at least some of the issues in the FTC's new Rules and Regs

There are now over 70 documents available in the updated version of AutoWebLaw for you to use on all your sites, as often as you choose.

PPS - And as is always the case, [AutoWebLaw](#) is an online program which is updated online, So whenever you open your copy of AutoWebLaw, it is always up to date!

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