

How The Federal Trade Commission Can Destroy Your Online Business

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Introduction - Goodbye To The Wild West

Government excels at taxation and regulation. Both will be used in the coming years to tame and control Internet business.

The tax issue is for another day.

This book focuses on how the U.S. Federal Trade Commission (FTC) is taking steps to regulate Internet marketers like you into what the government considers is acceptable behavior.

Given a choice between The Matrix and Deadwood, the government will choose The Matrix every time.

Whether or not this is "fair" or "good" is irrelevant. It is your reality.

On April 5, 2006, the FTC proposed a new Business Opportunity Rule. In 44 pages, the FTC made it clear that it is heading towards regulating Internet businesses like brick-and-mortar ventures.

Because of the hostile public response, particularly among MLM/network marketing organizations, this proposal has temporarily been shelved while the FTC considers less draconian measures.

It may be years before a final FTC rule is issued but it will come.

Gazing into the crystal ball, one sees Internet businesses becoming as heavily regulated as franchises, the securities industry, and banking.

What does this mean to you?

The FTC already has the power to shut down businesses for violating existing law.

Take an hour to read this book to become acquainted with the FTC and how it works.

After you've read it, consult with your legal counsel and take whatever steps are needed to ensure that you're in full compliance with consumer protection laws.

1. What Is The Federal Trade Commission?

The FTC is a large government agency that employs investigators, attorneys, and administrative law judges. It is headed by five Commissioners who serve 7-year terms after being nominated by the President and confirmed by the U.S. Senate.

By judicial precedent (prior court decisions), statutes, and regulations, the FTC's authority to act on behalf of consumers against you is extremely broad. Responsible for enforcement and administrative duties under 46 statutes, here are a few of the major laws that the FTC relies upon.

- Federal Trade Commission Act
- Consumer Leasing Act
- Electronic Funds Transfer Act
- Equal Credit Opportunity Act
- Fair Credit Billing Act
- Fair Credit Reporting Act
- Fair Debt Collection Practices Act

- [Magnuson-Moss Warranty Act](#)
- [Truth in Lending Act](#)
- [CAN-SPAM Act](#)

2. Bureau of Consumer Protection.

Most Internet marketing cases are handled by the the FTC's Bureau of Consumer Protection (BCP). The BCP deals with consumer issues involving unfair, deceptive, and fraudulent business practices.

There are seven regional FTC offices. The BCP works with each regional office to conduct investigations and to file lawsuits (more on this later).

The five BCP divisions most relevant to Internet marketing are:

- 1) Advertising Practices
- 2) Marketing Practices
- 3) Financial Practices
- 4) Privacy and Identity Protection
- 5) International
- 6) Enforcement.

If you're doing business in the United States using the Internet, chances are the FTC has a legal basis for regulating what you do.

All it takes is a complaint by a consumer, a consumers' rights organization, or even a

competitor, and suddenly the FTC is investigating your business to see if you have broken the law.

Here's a recent example of an FTC action against Internet marketing practices. In November 2006, a [company agreed](#) to pay \$50,717 to settle FTC claims that it violated the CAN-SPAM Act.

The company had sent out e-mail messages to consumers using an autoresponder. Unfortunately, spam-filtering software prevented the company from receiving opt-out/unsubscribe messages and the e-mails kept coming.

Because this had continued for more than 10 business days after the recipients asked the company to stop sending e-mails, the company violated the CAN-SPAM Act.

3. Investigations.

The FTC uses three primary tactics to investigate your Internet marketing efforts: (1) Undercover Operations; (2) Civil Investigative Demands; and (3) Informal Inquiries.

Undercover Operations

Also known as a "sting," an FTC undercover operation typically involves its employees posing as customers and buying your products and/or services offered via the Internet.

Unlike your normal customer, the purpose of the undercover operative isn't to obtain what you sell. It is to decide if you've broken the law. How you conduct business in these particular transactions will likely determine whether or not the FTC decides to pursue a case against you.

Civil Investigative Demands

A Civil Investigative Demand (CID) is like a subpoena on steroids. Unlike a sting operation, the FTC is letting you know that you're being targeted for investigation.

If you receive a CID, it may require you to answer written questions, produce a lot of

documents, create written reports, and/or testify. To fight a CID, you have to go to federal court.

Informal Inquiries

The only thing "informal" about these types of communications with the FTC is that the requests are polite...but you're still under the gun. Whether meeting face-to-face or talking by telephone, the FTC is in fact investigating you. If you refuse to cooperate, expect a CID to issue demanding you turn over the same documents, etc. that were "informally" requested.

4. Trials From Hell.

If the FTC decides to pursue a case against you, the two common routes are a lawsuit in a federal district court or an administrative trial within the agency. Each has its pros and cons, but the FTC seems to prefer going the district court route because there are some powerful legal remedies it can obtain.

Let's examine both types of cases so you understand what you're facing if either occurs.

Administrative Cases

If there is an unusual legal issue or some type of precedent that the FTC wants to set, it will likely go after you in a trial before an administrative law judge (ALJ).

Why?

Because the ALJ is actually issuing an agency decision by applying the FTC's own practice rules. It is a stacked deck in favor of the FTC.

Remember that the FTC considers itself a watchdog whose purpose is to protect the public. Whether you've done anything wrong or

not, there is an unspoken presumption of misconduct once the FTC decides to investigate you.

What's even worse is that any appeal of the agency decision is reviewed by a federal circuit court of appeals in a way that heavily defers to the findings of fact made by the ALJ during your administrative trial.

In short, the FTC writes rules, an agency judge makes factual findings as to whether you broke the rules, and the appellate court leans in favor of finding that the ALJ made the right decision.

U.S. District Court Cases

On the plus side, cases brought by the FTC against you in federal district court have a greater chance of impartiality. The federal judge is independent of the agency and the lawsuit will be handled as one of many types of cases this judge hears. His livelihood doesn't depend upon the FTC.

That being said, the FTC likes to bring suits in federal district courts because of the powerful court orders it can obtain if you are found to have violated the law.

These remedies may include:

- Obtaining an injunction or a restraining order against you.
- Monetary judgments against you, including orders to make restitution or disgorge your profits.
- Having your assets frozen or seized.
- Appointing a receiver to control your assets.
- Requiring you to change your advertising and even publicly retract prior advertising.

All it takes is a preliminary injunction or a temporary restraining order, and suddenly you're out of business until you can convince the judge otherwise. Try paying for a lawyer to do that if your assets have been frozen in the process.

5. Consent Orders.

Dealing with an FTC investigation or lawsuit can be a lengthy and expensive event for you. Few businesses can afford to fight.

In addition to the legal fees, there are the lost opportunity costs. Every moment you spend dealing with a government investigation or lawsuit is one less that you can spend on growing your business.

The FTC knows this...and now you do too.

Many business owners find that it is less damaging to settle with the FTC than to fight regardless of the merits.

Although FTC investigations are usually non-public, it is a different story for trials and consent orders. If you and the FTC decide to settle, a proposed consent order with the settlement terms is published for public comment. After 30 days, the FTC can make it a final settlement.

If you subsequently violate the consent order, the FTC can go to court to enforce it.

The good news is that you don't have to admit liability in a consent order.

Unfortunately, it doesn't end there.

6. The Spin Can Kill Your Business.

The FTC is skilled at public relations and "protecting consumers" is a newsworthy event. This means that a trial or a consent order isn't the end of your ordeal.

Instead, a press release will be issued and perhaps a press conference held that will spin what happened in a very favorable light for the FTC at your expense.

Your legal counsel can sometimes mitigate the damages but that depends in part on whether the FTC is using you to send a warning to others in your industry. Your public relations consultant can counter-spin the media but some of the mud thrown your way will probably stick.

What you have done by accident may make you look like Scrooge preying upon the poor, the sick, and the elderly by the time you read the stories online or in a newspaper.

If restitution or other monetary payments are required as part of the settlement, that amount may be inflated in the press coverage.

This can cause a "blood in the water" reaction.

7. Blood In The Water - State Laws Attack.

In addition to the federal consumer protection laws enforced by the FTC, you have to be concerned with similar laws in each state where you do business.

Like sharks detecting blood in the water, a high publicity FTC court judgment or settlement attracts people who like to sue for violations of state consumer protection laws. You may even be investigated by a state attorney general's consumer protection office.

If you are perceived to have deep pockets (a lot of money), chances are one or more consumer lawsuits will be filed in state courts.

Let's use the [Texas Deceptive Trade Practices Act](#) (DTPA) as an example of why consumer suits under state laws are so attractive.

In some circumstances, a successful DTPA consumer plaintiff can get the following in court:

- Economic damages, including repair or replacement costs
- Damages for mental anguish, pain, and suffering
- Punitive damages that may be up to three times actual damages
- An injunction that stops you from selling the product or service
- Restitution
- Attorney fees

After being hit by the FTC, it doesn't take many of these state consumer protection lawsuits to bankrupt a business.

8. The Two Deadly Internet Marketing Sins.

Few things you can do raise red flags with the FTC like (a) unfair, deceptive, or fraudulent advertising and (b) predatory payment practices.

Unfair, Deceptive or Fraudulent Advertising

This type of advertising includes making unsupported claims about your product or service, and misleading endorsements and testimonials.

Unsubstantiated Claims.

Health and diet products are particular targets of both the FTC and the U.S. Food and Drug Administration (FDA). In fact, the [FTC announced](#) on January 4, 2007, that it had nailed four weight loss companies (Xenadrine EFX, CortiSlim, TrimSpa, and One-A-Day WeightSmart) for making unsubstantiated claims about their products.

"You won't find weight loss in a bottle of pills that claims it has the latest scientific breakthrough or miracle ingredient," said FTC Chairman Deborah Platt Majoras. *"Paying for fad science is a good way to lose cash, not pounds."*

It is easy to understand that you don't make claims that your product causes weight loss unless you have scientific proof to back it up.

Even if you would never lie, your affiliate marketers can paint a bulls-eye on your forehead by making false claims on your behalf.

The FTC doesn't want false "miracle" cures being sold. It doesn't care whether or not you are personally making the misrepresentations. The goal is to protect the consumer. If it takes shutting you down to prevent your affiliates from lying to the public, then so be it.

Endorsements And Testimonials.

Misleading testimonials and endorsements are another way to land in hot water. If the results of using your product or service are not typical, you need to clearly disclose this to the consumer.

Two common areas targeted by the FTC are diet industry and get-rich-quick claims.

For dieting, let's take a look at the FTC's recent settlement with Xenadrine EFX. It *"prohibits misrepresentations of the actual*

experience of any user or endorser and requires clear and prominent disclosure of any relationship that would materially affect the weight or credibility given to a user testimonial or endorsement."

In plain English, this means don't mislead the public.

Buzz Marketing.

A type of endorsement or testimonial that can land your Internet business into hot water is known as buzz marketing.

Trying to create a buzz marketing online campaign is fine. The dangerous turf involves situations where the person giving you a testimonial or endorsement is being compensated for creating the buzz.

The FTC began to crack down on this "word of mouth" advertising in a [December 2006 staff advisory opinion](#).

Referring to this opinion, Mary K. Engle at the FTC stated that "if you're being paid, you should disclose that."

What the FTC is essentially doing is applying the existing restrictions on paid endorsements and testimonials (such as those by celebrities and actors) to your Internet marketing campaigns.

This creates a gray area for your affiliate marketers. In particular, this issue affects websites and e-mails to lists that provide product reviews or endorsements without disclosing that the affiliate will get paid every time a consumer clicks through the affiliate link and buys the product or service.

Because these promotions are arguably biased by monetary compensation, you should inform readers that the opinions expressed are not independent and that a relationship exists between the affiliate and the vendor.

For detailed information, check out **Appendix B** to this book - the *FTC Guides Concerning Use Of Endorsements And Testimonials In Advertising*.

Predatory Payment Practices

Like other businesses, Internet marketers get into trouble when their payment terms aren't idiot-proof. When in doubt, assume your consumer has a fourth grade education and barely understands how to order and pay for a meal at a fast food restaurant.

If your buyer thinks, mistakenly or not, that he paid too much for your value combo, he suddenly becomes smart enough to file a complaint with the FTC.

To be sure, there are unfair, deceptive, and fraudulent online payment practices, but commonly complaints arise because of buyer's remorse (second thoughts about what was just purchased) or because the buyer didn't fully understand the transaction.

Here are some typical payment complaints to the FTC.

- Goods or services were purchased via the Internet but were not delivered as promised.
- Vendor refused to honor a money-back guarantee.

- Multiple credit card billings were made for a single item.
- Hidden fees were built into the sale.
- Subscription services couldn't be canceled and the automated billing continued.

FTC inquiries into your financial dealings can include issuing a CID for your bank records. For example, BlueHippo Funding, LLC provides credit for purchases of computers and other equipment. On December 13, 2005, the [FTC denied](#) BlueHippo's request to exclude its bank records from examination in an investigation.

In another case, on November 21, 2006, the [FTC obtained a court order](#) against a group selling Internet Service Provider (ISP) and web design services. The order permanently barred the defendants from making misrepresentations when selling, prohibited the defendants from billing consumers without first obtaining their consent - which they must record - and provided strict rules they must

follow to ensure that consumers the defendants call were protected from fraud and deception. Finally, the order established a program through which defrauded consumers could obtain refunds.

Don't let your business be subjected to an FTC investigation or lawsuit because of alleged financial misconduct.

Communicate. Communicate. Communicate. Excellent customer service should resolve most buyer's remorse issues and full disclosure of payment terms and conditions, including any limitations on money-back guarantees, will go a long way to taking care of other dissatisfied customers.

Final Thoughts

By now you should have some idea as to how the FTC can and will affect your business in the coming years.

It is okay to be a marketing rebel...and I know how it cuts against the grain for many to conform to increasing regulation.

You may choose to ignore the law and be one of the "lucky" ones who doesn't get caught.

For peace of mind and long-term financial prosperity, I encourage you to comply with consumer protection laws in your Internet marketing practices.

Have your attorney conduct an FTC compliance review of your business. This simple step may save you the wrath of the FTC in an investigation and in court.

Wishing you a happy new year and beyond.

-Mike

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Appendix A: FTC Research Resources

Because of the complexity, most business owners retain lawyers to handle any FTC matters that arise.

However, if you are a do-it-yourself entrepreneur, here are some FTC research resources:

1. Overview of FTC Authority

<http://www.ftc.gov/ogc/brfovrw.htm>

2. Business Information For Consumers

<http://www.ftc.gov/ftc/businessinfo/consumer.htm>

3. FTC Sections of the Code of Federal Regulations

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3ad5b48a02eb1707974872e00175bbb5&c=ecfr&tpl=/ecfrbrowse/Title16/16cfrv1_02.tpl

4. Order Free Copies of FTC Publications

<http://www.ftc.gov/bcp/online/pubs/bulkorder.htm>

5. Current and Past FTC Formal Actions

<http://www.ftc.gov/ftc/formal.htm>

6. Quarterly Litigation Status Report
<http://www.ftc.gov/ogc/status/status.pdf>

7. Search FTC Website
<http://search.ftc.gov/query.html?qt=&col=hsr&col=news&col=full>

8. FTC Advisory Opinions.
<http://www.ftc.gov/os/closings/publicltrs.htm>

Appendix B

FTC GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

| | |
|-----------|-------------------------------------|
| Sec.255.0 | Definitions. |
| 255.1 | General considerations. |
| 255.2 | Consumer endorsements |
| 255.3 | Expert endorsements. |
| 255.4 | Endorsements by organizations. |
| 255.5 | Disclosure of material connections. |

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41 - 58.

§255.0 Definitions.

- (a) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.
- (b) For purposes of this part, an endorsement means 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) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.
- (c) For purposes of this part, the term product includes any product, service, company or industry.

(d) For purposes of this part, an expert is an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement since it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor or exhibitor. Therefore, any alteration in or quotation from the text of the review which does not fairly reflect its substance would be a violation of the standards set by this part.

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. Such an advertisement would not be an endorsement.

Example 4: A manufacturer of automobile tires hires a well known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesman or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he/she actually believed in what he/she was saying and had personal knowledge sufficient to form that

belief. Hence they would think that the advertising message reflects the driver's personal views as well as those of the sponsoring advertiser. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for golf balls shows a prominent and well-recognized professional golfer hitting the golf balls. This would be an endorsement by the golfer even though he makes no verbal statement in the advertisement.

[40 FR 22128, May 21, 1975, as amended at 45 FR 3872, Jan. 18, 1980]

§255.1 General considerations.

(a) Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, they may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser. [See Example 2 to Guide 3 (§255.3) illustrating that a valid endorsement may constitute all or part of an advertiser's substantiation.]

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may neither be presented out of context nor reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only as long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) In particular, where the advertisement represents that the endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as he has good reason to believe that the endorser remains a bona fide user of the product. [See §255.1(b) regarding the "good reason to believe" requirement.]

Guide 1, Example 1: A building contractor states in an advertisement that he specifies the advertiser's exterior house paint because of its remarkable quick drying properties and its durability. This endorsement must comply with the pertinent requirements of Guide 3. Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked electric typewriters. An announcer says "We asked Mrs. X, an executive secretary for over ten years, to try these five unmarked typewriters and tell us which one she liked best."

The advertisement portrays the secretary typing on each machine, and then picking the advertiser's brand. The announcer asks her why, and Mrs. X gives her reasons. Assuming that consumers would perceive this presentation as a "blind" test, this endorsement would probably not represent that Mrs. X actually uses the advertiser's machines in her work. In addition, the endorsement may also be required to meet the standards of Guide 3 on Expert Endorsements.

[Guide 1]
[45 FR 3872, Jan. 18, 1980]

§255.2 Consumer endorsements.

(a) An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

The Commission's position regarding the acceptance of disclaimers or disclosures is described in the preamble to these Guides published in the Federal Register on January 18, 1980.

(b) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers, in both the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

(c) Claims concerning the efficacy of any drug or device as defined in the Federal Trade Commission Act, 15 U.S.C. 55, shall not be made in lay endorsements unless (1) the advertiser has adequate scientific substantiation for such claims and (2) the claims are not inconsistent with any determination that has been made by the Food and Drug Administration with respect to the drug or device that is the subject of the claim.

Guide 2, Example 1: An advertisement presents the endorsement of an owner of one of the advertiser's television sets. The consumer states that she has needed to take the set to the shop for repairs only one time during her 2-year period of ownership and the costs of servicing the set to date have been under \$10.00. Unless the advertiser possesses and relied upon adequate substantiation for the implied claim that such performance reflects that which a significant proportion of consumers would be likely to experience, the advertiser should include a disclosure that either states clearly and conspicuously what the generally expectable performance would be or clearly and conspicuously informs consumers that the performance experienced by the endorser is not what they should expect to experience. The mere disclosure that "not all consumers will get this result" is insufficient because it can imply that while all consumers cannot expect the advertised results, a substantial number can expect them. [See the cross reference in Guide 2(a) regarding the acceptability of disclaimers or disclosures.]

Example 2: An advertiser presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the

difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers probably represents a promise to consumers that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 3: An advertisement purports to portray a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be disclosed.

[Guide 2]
[45 FR 3872, Jan. 18, 1980]

§255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give him the expertise that he is represented as possessing with respect to the endorsement.

(b) While the expert may, in endorsing a product, take into account factors not within his expertise (e.g., matters of taste or price), his endorsement must be supported by an actual exercise of his expertise in evaluating product features or characteristics with respect to which he is expert and which are both relevant to an ordinary consumer's use of or experience with the product and also are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. Where, and to the extent that, the advertisement implies that the endorsement was based upon a comparison such comparison must have been included in his evaluation; and as a result of such comparison, he must have concluded that, with respect to those features on

which he is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority.

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its very name, consumers would infer that the "American Institute of Science" is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. Even if the American Institute of Science is such a bona fide expert testing organization, as consumers would expect, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 3: A manufacturer of a non-prescription drug product represents that its product has been selected in preference to competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the choice of the manufacturer's product, convenience of packaging, is neither relevant nor available to consumers.

Example 4: The president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser in its business. Since the cleaning service's professional success depends largely upon the performance of the cleansers it uses, consumers would expect the service to

be expert with respect to judging cleansing ability, and not be satisfied using an inferior cleanser in its business when it knows of a better one available to it. Accordingly, the cleaning service's endorsement must at least conform to those consumer expectations. The service must, of course, actually use the endorsed cleanser. Additionally, on the basis of its expertise, it must have determined that the cleansing ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of competing products with which the service has had experience and which remain reasonably available to it. Since in this example, the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having to have performed side-by-side or scientific comparisons.

Example 5: An association of professional athletes states in an advertisement that it has "selected" a particular brand of beverages as its "official breakfast drink". As in Example 4, the association would be regarded as expert in the field of nutrition for purposes of this section, because consumers would expect it to rely upon the selection of nutritious foods as part of its business needs. Consequently, the association's endorsement must be based upon an expert evaluation of the nutritional value of the endorsed beverage. Furthermore, unlike Example 4, the use of the words "selected" and "official" in this endorsement imply that it was given only after direct comparisons had been performed among competing brands. Hence, the advertisement would be deceptive unless the association has in fact performed such comparisons between the endorsed brand and its leading competitors in terms of nutritional criteria, and the results of such comparisons conform to the net impression created by the advertisement.

[Guide 3]
[40 FR 22128, May 21, 1975]

§255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of

subjective factors which vary from individual to individual. Therefore an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under §255.3 of this part (Expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products.

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Since the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an expert evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the particular attributes of the advertised mattress in mind. (See also §255.3, Example 5.)

[Guide 4]
[40 FR 22128, May 21, 1975]

§255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.

Example 1: A drug company commissions research on its product by a well-known research organization. The drug company pays a substantial share of the expenses of the research project, but the test design is under the control of the research organization. A subsequent advertisement by the drug company mentions the research results as the "findings" of the well-known research organization. The advertiser's payment of expenses to the research organization need not be disclosed in this advertisement. Application of the standards set by Guides 3 and 4 provides sufficient assurance that the advertiser's payment will not affect the weight or credibility of the endorsement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must of course comply with §255.1; but even though the compensation paid the endorser is substantial, neither the fact nor the amount of compensation need be revealed.

Example 3: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak". This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

[Guide 5]

[45 FR 3873, Jan. 18, 1980]

About The Author



An Internet marketer who is also an attorney, Mike Young helps online businesses avoid legal pitfalls and protect their intellectual property rights. Admitted to practice law in Texas and Pennsylvania, he earned a Masters in International and Comparative Law degree from Georgetown University Law Center (1994) and a Juris Doctor degree from S.M.U. School of Law (1993). Attorney Young has created more than 11,300 legal documents relied upon by other legal professionals and online businesses daily throughout the United States.

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