

FTC Revised Guidelines on Endorsements & Testimonials The Rules Have Changed – Ignorance Is Not Bliss

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Not long ago, I received this request for advice.

We had a question about product placement ~ the agency is asking for placement inside of programming or banter conversation instead of purchasing a live endorsed :30 or :60. Our belief is that we would need any DJ endorsement on a log with record of cost, payment, etc. Am I correct on that? I know the agency is trying to think outside the box, and I don't want to send a message back to them that other radio stations are not sending.

Kudos to the agency and the advertiser for thinking outside the box at a time when traditional advertiser supported programming is being challenged as the standard model in a multi-channel programming world for both video and audio. Agencies are looking for new ways to convey advertising messages, such as with product placements.

FCC Regulation

Good thinking too by the sales manager for asking the right questions! She was on her game, but only got half the question. Trained to think about FCC regulation, the GSM correctly recognized that the requested "banter" would be considered an advertisement, and that any "paid for" discussion of a product requires proper sponsor identification according to FCC rules. The discussion would have to include the required language "paid for" or sponsored by," unless it was clear, somehow, from simply mentioning the name of the product that the discussion was a sponsored, paid-for advertisement. But, that seems unlikely given the nature of the request.

FTC Regulation

But that's only half the regulatory story today. As I recently warned in this column, the Federal Trade Commission (FTC) is increasingly a must-watch agency for broadcasters. In this case, knowledge of the FTC's new regulations on endorsements and testimonials is critical. The FTC's final guidelines for endorsements and testimonials became effective on December 1. They are important to broadcasters on many levels. Broadcasters must have an understanding of how they apply to paid-for spot advertising, of course. But they also apply to conversational banter among talk show hosts or with their guests and to endorsement engagements of station personalities. Therefore, they directly affect station policies regarding airtime activities and supplemental activities of its personnel. The guidelines also apply to station internet sites, blogs and other internet activities of station staff. As a result it is now necessary for stations to establish policies for any internet activities of the licensee as well of its employees.

While the guidelines are intended to apply principally to the advertiser, GSMs must make sure that the sales team and anyone writing copy knows and understands the guidelines and FTC rules. What may seem like a great idea can cause great harm and liability to an advertiser and its celebrity spokesperson and poison the station's relationship.

Here are some basics:

- **Consumer Testimonials of Typical Experience:** Any ad that features a consumer who characterizes his or her product experience as “typical” when that is not the case must also disclose the results a typical consumer can actually expect to achieve. This is a change. The previous guides provided a safe harbor for testimonial descriptions of “usual results” with a simple disclaimer that the results were not “typical.”
- **Disclosure of Material Connections:** Any “material connection” (e.g. payments or free products) between the endorsers and the advertiser must be disclosed. A statement by a program host or announcer, *or the post of a blogger* about a product where cash or in-kind consideration is received to review the product will be considered an endorsement requiring a disclosure of the material connection with the seller of the product or service, regardless of the nature of the review. Therefore, the further answer to the question at the start of this column is that the payment must be disclosed and a proper sponsorship ID made for the “banter” conversation.
- **Sponsored Research Connections:** References to research conducted by a research organization that was sponsored by the advertiser must disclose the connection between the advertiser and the research organization. So writing copy for an advertiser that touts the results of any research requires knowledge of the source material and its funding. Of course, a paid endorsement – like any other advertisement – is considered deceptive if it makes false or misleading claims.
- **Celebrity Endorsements:** The previous guidelines did not explicitly make endorsers equally liable with advertisers under the FTC Act for statements they made in an endorsement. It is now clear, however, that both advertisers *and endorsers* may be liable for false or unsubstantiated claims made in an endorsement – or for failure to disclose material connections between the advertiser and endorser. Under this principle, the DJ who “banters” about the product, presumably in a “good light,” would most likely be considered an endorser and any false or unsubstantiated claims could cause the DJ employee, and the station employer to become liable.
- **Other Appearances: Talk Shows & Social Media:** The revised FTC rules also make it clear that celebrities, or anyone who makes an endorsement in an advertisement, have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media. Endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser and may not convey anything that would be deceptive if made directly by the advertiser or in a scripted advertisement.
- **Extended Flights – Duty of Continued Validity:** Expert or celebrity statements may only be used where the advertiser has good reason to believe that the celebrity or endorser continues to subscribe to the views presented. Thus, any extended flight of ads imposes a duty to review the endorsement with the endorser on a periodic basis to assure that his or her views have not changed. Any change or alteration in the product would

also require reconfirmation by the endorser that his or her views have not changed and that they are based on actual experience with the product or service.

- **Actual Expertise:** Statements of experts must be supported by the actual exercise of their expertise in evaluating product features or characteristics relevant to their area of expertise and include an actual examination or testing of the product or service.

“New Media” Included

Stations that have begun to emphasize their website, or station or personality blogs as new sources of branding, awareness or non-traditional revenue, are forewarned that these new regulations apply to those media as well. The rules define an endorsement as

. . . 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 experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

Conclusion

This article only scratches the surface of the FTC's new endorsements and testimonials guidelines. The actual document is replete with examples that illuminate many of the nuances in the rules. Accepting advertising or writing copy that can in any way be construed to contain an expert opinion or endorsement, or that features a celebrity or station personality, should be thoroughly evaluated under the FTC guidelines. Every GSM should decide now who will have this responsibility for their station or group of stations. Absent a station employee becoming expert in applying the new guides, station counsel should be consulted.

