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BEST BUSINESS PRACTICES OF THE MOST SUCCESSFUL INFO-MARKETERS AROUND THE WORLD

FTC Issues New Rules

**Significant
Changes to
What You
Are Allowed
to Say**



FTC Publishes New Guidelines for Testimonials and Endorsements

The FTC has tightened the rules regarding endorsements, testimonials and offers made by affiliates. Learn the rules, and when in doubt, consult an attorney.

by Robert Skrob

A key component of any marketing campaign is proof. As a marketer, you need to prove that your product delivers the benefits you say it can deliver. Oftentimes your customers who have used your products can provide testimonials for you to use in your marketing to show potential customers that your systems work.

The Federal Trade Commission has changed in several important ways its compliance guides that delineate its interpretation of the rules related to testimonials.

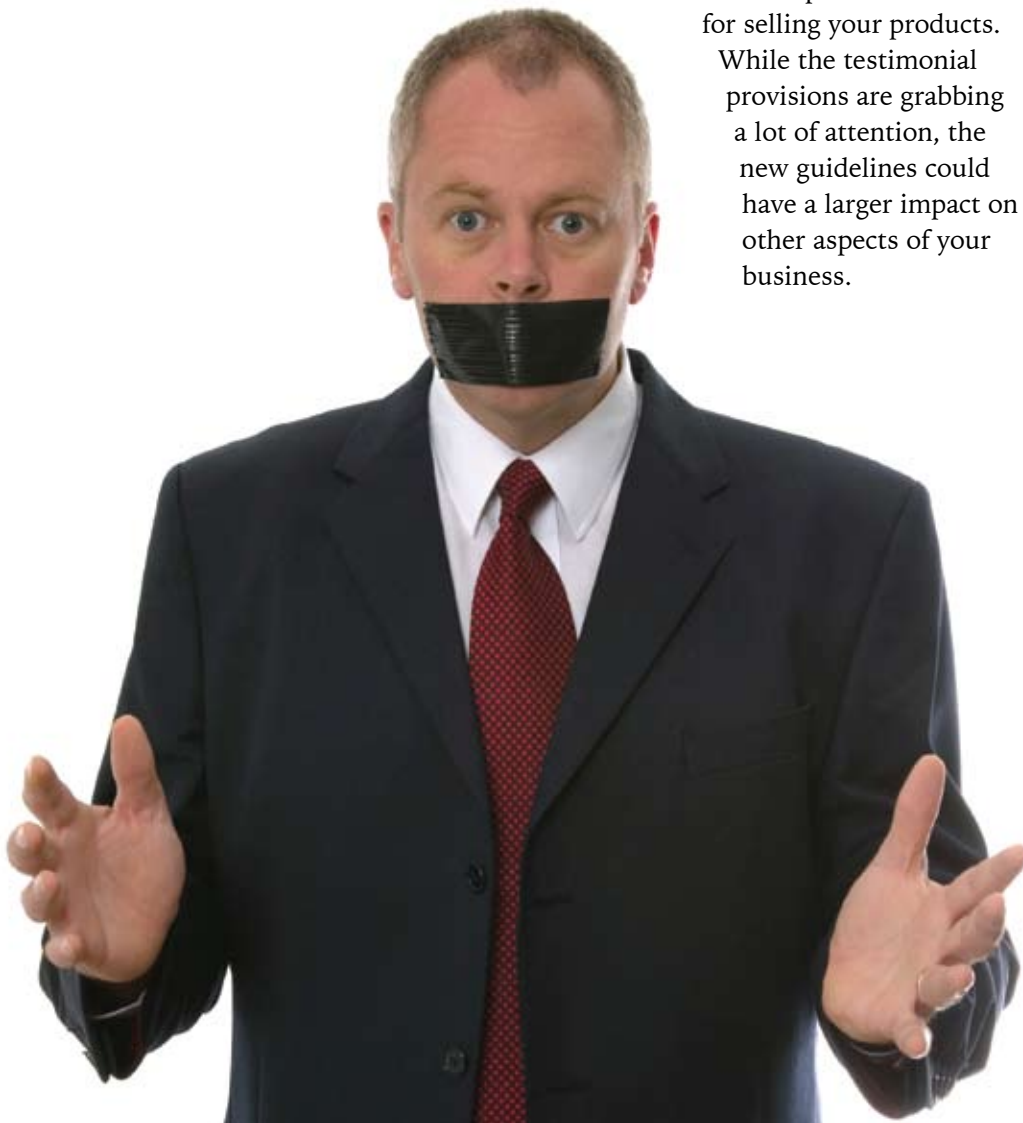
The scope of these revised guidelines is much broader than only testimonials. In fact, the new interpretations can also impact the way you present endorsed joint venture offers as well as your relationship with affiliates for selling your products. While the testimonial provisions are grabbing a lot of attention, the new guidelines could have a larger impact on other aspects of your business.

Before we begin, a few caveats: This article is informational only. It is not legal advice. If you have questions, please seek out the advice of an attorney; there are several listed in the printed IMA Buyer's Guide as well as online at MyInfoMarketingForum.com. Last year, when these changes were proposed, I received several questions about them. Please understand that I am not licensed to answer your questions about complying with the law, especially when you send me examples or scenarios. Please don't get frustrated when I answer your question with a referral to an attorney. I'm required by law to refer you to attorneys.

Next, it's important to understand what these new guidelines really mean. Staff attorneys at the FTC create compliance guides that provide business owners like you and me with their interpretations of the laws. These guides are not laws. If those attorneys were going to prosecute you, they would have to prove that whatever you did was unfair and deceptive. These guides do provide you with details about what these attorneys look for when they consider which businesses to prosecute and which to leave alone.

These new guidelines touch on several areas of your business: testimonials; joint ventures; and your affiliate programs.

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Key Terms

Testimonial

Comments made by a consumer about a product, service or individual that are used as a tool to convince prospects to buy.

FTC Guidelines

Interpretations of U.S. law by attorneys at the FTC in an attempt to provide businesses with additional information to aid compliance.

Endorsement

A recommendation by an expert, celebrity or trusted advisor to buy a product or service.

Typical Customer Experience

The FTC's term for what the average customer experiences with your product or service as determined from studying results or research.

Disclaimers

1) Useful ways of educating prospective customers; or
2) Statements that flag the FTC that you may be doing something you know risks breaking the law.

Legal Advice

Something only an attorney is licensed to provide and something Robert can go to jail for attempting to provide even when he is just trying to be helpful.

Deadline

When Robert has to stop typing so the newsletter can be printed and shipped on time.



Experience Testimonials

The vast majority of the testimonials you and I receive are experience testimonials.

Here are a couple of examples of experience testimonials: "I love Robert Skrob's articles. They are so informative, and his words flow off the paper like fine wine. If you are on the fence about whether or not to join, do yourself a favor and jump in. You'll be glad you did." Or, "I just met with Robert Skrob, and it was a life-transforming experience for me. He replaced my confusion and frustration with clarity, and then he outlined a roadmap of exactly how to reach my goals along with a list of key vendors to help me get it done more quickly. I recommend Robert's coaching." (These testimonials were made up for illustrative purposes only; my writing is more comparable to Bud Light than fine wine.)

While these testimonials are complimentary, they don't provide quantifiable proof that I'm delivering actual results. Instead, they show that customers are sometimes happy with the products and services I provide.

The FTC's revised guidelines have no impact on these types of testimonials. You can use experience testimonials in the same ways you have been using them.

Outcome Testimonials

As we jump into outcome testimonials, let's build a scenario as our example:

If your information products help widget manufacturers increase their profits through more sales or by decreasing expenses, you'd like to prove that fact. So, you work with three or four widget manufacturers to generate terrific results, and three of them give you

testimonials of increased monthly profits of \$20,000.00, \$22,000.00 and \$42,000.00. You begin marketing your product.

You find that customers who buy your information and apply it can generate a monthly profit increase between \$15,000.00 and \$25,000.00, and some generate two or three times that. However, over 80 percent of your buyers never apply the information you provide. Their results are zero because they don't do anything with the information they purchase from you. So, when you calculate the average of your "typical customers," you have to average the 20 percent of customers who implemented and got \$15,000.00 to \$25,000.00 with the 80 percent who did nothing. That comes out to about \$4,000.00.

I know what you're thinking. The FTC is wrong. Telling customers they can expect a \$4,000.00 return is deceptive. After all, your customers either generated more than \$15,000.00, or they generated nothing. The \$4,000.00 figure is arbitrary and inaccurate in every case.

Perhaps you are right, but the FTC's attorneys want your sales materials to give the reader an understanding of what the typical customer receives when he or she buys your product. And by typical, they mean the average of all buyers, including the majority who do nothing. It's important to understand that this has been the FTC's position since 1976. This isn't new and has always been the FTC's view of the world.

Let me explain the guidelines' change with an example:

Say you received a testimonial from your best customer that says, "I bought the product, and it saved me \$42,000.00!" Better still, you use that testimonial as the headline

The FTC's research shows that consumers ignore the disclaimer and believe they are reasonably able to achieve the results of the outlying positive testimonial.

of your sales letter and include a story about how this customer got \$42,000.00 when he purchased your product.

In the past, the FTC's guidelines allowed you to "balance" the testimonial with a disclaimer that noted, "Results not typical," "Actual outcomes vary" or "Results reflect buyers who implemented lessons, not typical of all buyers." The new guidelines eliminate the disclaimer option.

The FTC's research shows that consumers ignore the disclaimer and believe they are reasonably able to achieve the results of the outlying positive testimonial. In the commission's effort to protect the consumer, it is proposing requiring marketers to make their testimonials reflect only what the typical buyer will experience as a customer. If half of your customers do nothing, then that has to be computed into your average.

The FTC's attorneys are likely to believe your sales materials are deceptive unless they communicate what prospects are likely to achieve. And by likely to achieve, the FTC means what the average consumer achieves when you factor in the successful as well as those who do nothing with the information they purchase.

The FTC wants your overall sales message to reflect what a typical customer will experience as a result of investing in your information. If your testimonials show a lot of big numbers that don't reflect the experience of the typical buyer, you will be out of compliance, even if

those results are perfectly achievable.

To comply with the rules, you must provide detailed information on what typical customers achieve. For instance, you can include a table showing a sample of what representative customers generated as a result of investing in your product. Within that information you are free to explain that the majority of the people who generated no results also did nothing to implement the information they invested in.

As long as your overall sales message portrays what typical customers are likely to achieve, either through testimonials that provide background and context for the achievement or through some additional information about typical outcomes, then you are able to use your great success examples.

Editing Testimonials

In my research I came across an answer to a question I frequently receive: "May I edit a testimonial?" Yes. It's always a good idea to provide a copy of the testimonial as edited to your customer to review and sign to acknowledge approval. But even if you don't go through those steps, editing is O.K.

You aren't bound to the exact words of a testimonial. However, the testimonial must still express the sentiment of the writer. You cannot selectively edit the testimonial to change the overall meaning.

For instance, let's assume a customer of yours sends you a cancellation letter that says a nice thing or two about your program as

he is dropping out. If you use his positive comments as a testimonial, it's likely to be considered deceptive. The customer was providing you that compliment in the context of canceling the program. The overall impression the customer was giving was, "I don't want this." Therefore, you cannot edit his words to say your program is great.

As long as you keep the overall meaning of your customer's words, you may edit the testimonial.

Disclosures Through Website Disclaimers

Around 2000, enforcement actions against Internet retailers led to those long "terms of use" or "disclaimers" at the bottom of websites. Some marketers even force you to agree to a "terms of use" as part of the sign-up process.

So, the question is, can you put the details about the experiences of the typical customer within these disclaimers (linked to your sales page) and expect the FTC to consider your website to comply with its new guidelines? No way.

The entire point of the FTC's guidelines is that your sales message must present the typical customer's experience with your products and services. If you give customers a glowing description of a certain expectation and then within a "disclaimer" page explain that the expectation isn't what they most likely will experience, you can expect the FTC to accuse you of unfair and deceptive trade practices. This is

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exactly the type of thing the FTC is trying to do away with by eliminating the “results may vary” disclaimer from the previous guidelines. In several enforcement actions over the last year, the FTC has determined that the language in the “terms of use” or “disclaimers” page of a website does not adequately inform the customer if the rest of the site gives a different impression.

Your Compensated Endorsements

One of the most important parts of the new guidelines are the interpretations related to compensated endorsements.

For instance, there have been a lot of news reports lately about “mommy bloggers” and their followings. Companies are providing free products and many times compensation to these mommies to write about their products on their blogs. Under the FTC’s new interpretations, those mommies

must disclose the free products and/or the compensation to avoid being deceptive. But this isn’t just about cracking down on those sneaky mommies.

For years it has been popular to create a blog with a made-up personality to blog about weight loss, moneymaking or some similar topic and then to provide reviews or comments about products in exchange for compensation from the companies endorsed.

You see this a lot in the Internet marketing world. Several info-marketers have pages dedicated to them on so-called review sites. While these sites purport to provide visitors with an honest review of the info-marketer and his or her products, they actually turn the review into an opportunity to pitch products the reviewer wants to sell. Under the new guidelines, those compensated endorsements are considered deceptive unless the compensation is clearly disclosed because within

the context of a review, the typical consumer is not likely to expect the endorsement to be compensated. (Who knows when the FTC will get around to prosecuting these sites and shutting them down? For those of us that are the targets of these sites, it can’t be soon enough.)

These new guidelines also apply to you. Do you have monthly calls for your customers that feature experts offering products or services? Do you receive compensation for the products sold? Do you endorse those products? If so, you may need to disclose your financial interest to your customers. The FTC’s goal is for the consumers to understand that you may be making money on the sale when they hear your endorsement. If instead you’ve positioned yourself as a trusted expert and are endorsing the product, then you need to disclose the compensation so consumers understand that you have a stake in the sale. In speaker introductions

New FTC Guidelines Raise Concerns in Four Areas

- 1 Outcome Testimonials**
Your sales materials must reflect the overall customer experience with your products or services. Thus, your experience testimonials with remarkable results must include the context of how those results were achieved, or the testimonials must be “balanced” with information about the typical customer’s experience.
- 2 Endorsements You Make**
When you are endorsing products and getting paid for that endorsement through an affiliate commission or otherwise, the FTC expects you to disclose that you are being compensated for your endorsement.
- 3 Endorsements You Receive**
When your affiliates or joint venture partners endorse your products, the FTC can hold you responsible if your affiliates are not disclosing their compensation for their product endorsements.
- 4 Bulletin Board Posts**
The FTC’s position is that bulletin board posts presented as independent customers’ opinions should be from uncompensated endorsers. When those posts are actually compensated through an affiliate arrangement or by payment to an independent contractor or an employee, that compensation should be disclosed.

When you are providing endorsed testimonials and your customers are not likely to understand that your endorsement is compensated, the new guidelines require you to disclose it.

at seminars or through teleclasses, you may no longer provide “stealth” advertisements.

Again, this all depends on context. If you are processing the orders so customers see they are paying you for the orders, it’s probably fine. If your guest is processing orders and sending you a commission, you need to be aware of what your customer is likely to believe when you give your endorsement.

One approach is the old Remington razor commercial in which Victor Kiam had the famous line, “I liked the shaver so much, I bought the company.” You could say something like, “When I spoke with Mr. Smith and saw what he had, I jumped at the chance to joint venture to make his products available to my customers.” Again, this isn’t legal advice, but I must tell you that some attorneys will say that the term “joint venture” doesn’t go far enough in disclosing the compensation arrangement between you and your guest.

When you are providing endorsed testimonials and your customers are not likely to understand that your endorsement is compensated, the new guidelines require you to disclose it.

Endorsements of Your Products

One of the most troubling aspects of these new guidelines is when others give compensated endorsements about your products. Let’s pick on those mommy bloggers again.

Let’s say that a mommy blogger posts a glowing recommendation for your product. Then the mommy uses her affiliate link for your product within her endorsement. It’s possible she should have disclosed her financial stake when she made those positive comments, her bad. However, as the company that received the endorsement, you are just as liable as she is. Yes, policing every one of your affiliates may be impossible; however, the FTC may hold you responsible for their behavior anyway.

Now let’s pick on those review websites. Let’s say an affiliate of yours builds a website that purports to review each of your competitor’s products, and then the review turns into a recommendation of your product as the solution that will solve the reader’s problem. Nice recommendation. However, the owner of the review site should clearly disclose that he or she is receiving compensation for the endorsement of your product. And since you own the product he or she is endorsing and are paying him or her commissions, you are just as liable for the deception.

There are several things you can do to limit your liability for affiliates’ failure to disclose their compensation when they provide endorsements of your products:

Include a policy within your affiliate agreement that specifies your affiliates must disclose they are receiving compensation if they provide their endorsement unless consumers will clearly understand it

is an advertisement.

Respond to complaints or information you receive by warning affiliates and/or canceling the affiliate relationship if they are using deceptive strategies to sell your products.

Actively police affiliates by checking out what your affiliates are doing to send traffic to your site. Watch for traffic spikes from affiliates and review what they are doing to generate that traffic.

Posting Comments

The FTC’s guidance provides some insight into what its prosecutors are thinking about when they see marketers using social media, comment posts and blogs as marketing tools. It’s important to review the FTC’s guidelines as you consider your social media strategies.

Some companies pay people to go to message boards, chat rooms, product review boards and blogs to post positive comments about their products. The FTC’s guidelines show that it believes it is deceptive to position a paid posting as commentary from a customer. Likewise, encouraging your customers to make negative posts about your competitors or paying representatives to pose as disgruntled customers is also deceptive.

A popular money-making strategy on the social networking site Twitter is to post a bunch of free articles, resources and videos. Then, for every 5 to 10 free resources you post, you

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provide a resource where you receive an affiliate commission on the sale. The free information has a great pass-along impact that allows you to build a large number of “followers” in a relatively short time. Then the endorsement with the affiliate link gives you an opportunity to monetize your list. In considering whether those compensated endorsement posts are deceptive, the FTC attorney is going to consider whether or not the average follower will understand that some of your posts were compensated. The FTC believes it’s deceptive to make a compensated endorsement when the customer hearing or seeing the endorsement doesn’t understand that the endorsement is compensated.

Enforcement

These new rules go into effect Dec. 1, 2009, with per violation fines of up to \$11,000.00. It’s likely the FTC would consider it a violation each time you distribute to a customer a communication in violation with these guidelines. Thus, the potential liability multiplies quickly.

In 98 percent of all cases, the FTC or the attorney general will send you a letter requesting additional information from you if it suspects you may have run afoul of these guidelines. These “discussions” usually end in your agreeing to remove some testimonials and the matter is closed. However, even in these cases, you may be wise to hire an attorney experienced in FTC defense to prepare communications on your behalf. So, even these “minor” interactions can become costly.

In rare cases, the FTC may come after you with all of its might. This can begin with the agency putting a hold on all of your personal and business checking accounts. This is

done under the guise of “protecting the public” from your spending ill-gotten gains, but it also prevents you from hiring an attorney to defend yourself.

In all cases, if you can demonstrate that you acknowledge the law, have documentation for your testimonials and make efforts to comply, you’ll be viewed a lot better than if you tell the investigator that the FTC is an “unconstitutional harassment agency.”

Reality

There are many more details within the new FTC guidelines than I can cover here. For example, there is an entire section related to celebrity endorsements. Let me say this for the third time: If you are in doubt, consult an attorney. My goal in this article is to inform you about the issues you need to worry about and to put your mind at ease where possible.

When you do have to justify whether or not your marketing materials are deceptive, it will be to an overanxious prosecutor who is trying to decide whether or not he or she can use you as a case to further

his or her career. You will not get the benefit of the doubt or the benefit of logical arguments. However, acknowledging the guidelines and showing where you tried to comply with them will go a long way toward demonstrating compliance.

For years I have counseled clients facing meetings with bureaucrats with these simple statements: “They’ll either feel powerful because you have acknowledged their position and are working to follow their will, or they’ll feel powerful because they have imposed their will upon you by enforcing arbitrary decisions. Either way, they’ll leave your meeting feeling powerful.” The fastest path toward your goals is to acknowledge the new rules and put into place practices that demonstrate you are trying to comply. And, finally, one last time: If there are questions about particular sales letters or testimonials, ask for the advice of an attorney.

(Disclosure: I am not receiving compensation from any attorneys for recommending you consult with them.)

