

## FDA WARNING LETTERS TARGET INTERNET TESTIMONIALS

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Truth in advertising is important in all media, old (e.g., television and magazines) and new (e.g., blogs or social media). Whether they are in the form of a company statement or a consumer opinion, all statements that appear in company-sponsored advertisements must be true and not likely to deceive the reasonable consumer. If you have reason to believe that a testimonial is not true, do not use it—no matter how flattering it is.

To avoid regulatory scrutiny, companies should diligently monitor and scrub their websites and social media accounts to ensure that consumer reviews and testimonials do not convert their over-the-counter (OTC) cosmetics or nutritional supplements into drugs in the eyes of the Food and Drug Administration (FDA). Warning Letters issued by FDA, including one issued earlier this month, illustrate the type of consumer testimonials FDA believes convert products from OTC into non-approved drugs.

On January 4, 2016, FDA issued a Warning Letter to Tibetan Herbal Balance, Inc. for, among other things, unapproved new drug violations arising from personal testimonials on the company's website recommending or describing use of the company's products for the cure, mitigation, treatment, or prevention of disease. Examples cited by FDA include:

- “Wanted to let you know that I recently started taking your Liver Assist. My doctor had said that he thought I may have been exposed to hepatitis and that my liver proteins were totally out of whack. I took the Liver Assist for 2 months and had my test re-run and my liver function was 100% normal. Thank you for a great product.”
- “My son with COPD was greatly improved with your Lung Support, no longer on OXYGEN. Thank you.”
- “I just wanted to let you know that your product is great! I ordered the Respibalance and I have not needed my inhalers now for the past month. I am able to sleep great and no longer wheeze all night!”
- “I had to tell you this. I suggested your Asthma pills for my 10 year old nephew who had been having horrible asthma attacks. My sister tried many things, but there were side effects and nothing worked well. I found this online and told her to try it, and that was about a year ago. Since he finished the bottle, he hasn't had an asthma attack! THANK YOU!!!”

This is not the first time FDA has issued Warning Letters based on consumer testimonials. Past Warning Letters have challenged the following testimonials found on company websites:

- “[Supplement] may treat cancer better than Chemo.”
- “My grandmother had a horrible case of shingles. Nothing the doctor gave her worked even after months of treatment. I brought down some [skin care product] for her to use and 7 to 10 days later it was completely healed.”
- “I had been burned by very hot coolant from my cars radiator after I opened the radiator cap. The physicians at the hospital thought I would need skin transplants but I started using [skin care product] four days after the burn and had complete healing.”
- “Had a patch of psoriasis on the side of one eye for years. Dermatologists gave me medicines for years without success. Four nights of the [skin care product] cleared the psoriasis.”
- “[Skin care product] cleared up the eczema on my hands in three days.”

Testimonials are an effective and important tool for businesses. The Federal Trade Commission (FTC) defines testimonials broadly to mean “any advertising message...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.” Testimonials can be extremely persuasive to consumers and thus have received increased scrutiny by state and federal regulators. The regulation of testimonials and other types of advertising is primarily within the FTC’s purview, but FDA may also become involved when the claims relate to health and safety, such as testimonials about dietary supplements or medical devices.

The FTC has issued a number of Guides Concerning the Use of Endorsements and Testimonials in Advertising for businesses to use in evaluating testimonials and endorsements. The Guides are not formal regulations, but the FTC uses them to educate the public about its current thinking about the law. Although compliance with the guidelines does not guarantee protection from prosecution, if advertisers fail to follow the Guides, the FTC may decide to investigate whether their practices are unfair or deceptive under the FTC Act. The FTC revised its Guides in October 2009 to address advertising under modern marketing techniques that did not exist when the Guides were originally published in 1975 and updated in 1980, such as blogging and word-of-mouth on social media. The Guides state that marketers using any of these techniques are subject to the same truth in advertising laws as any other form of advertising.

The FTC Act requires, and the Guides advise, that testimonials must “reflect the honest opinions, findings, beliefs, or experiences of the endorser” and, when specific results are claimed, the testimonial must reflect a “typical consumer experience.” A testimonial cannot make an express or implied representation that would be deceptive if the same representation were made directly by the advertiser. The FTC can impose liability on both the advertiser and the endorser for such deceptive representations. That means that testimonials on a company’s website or other media under its ownership or control, such as Facebook pages and Twitter accounts, must be objectively true, not misleading, and the company must have adequate substantiation for all non-subjective product claims. Any material connection between the endorser and advertiser must also be clearly and conspicuously disclosed.

A material connection between the endorser and advertiser requiring disclosure occurs whenever an incentive is given to obtain the testimonial, such as the payment of monetary compensation or providing a free product or the opportunity to appear on television. In the case of ordinary consumers, companies must disclose if any compensation is paid for the testimonial. Additional disclosure requirements apply to endorsements made by celebrities or expert endorsers.

In a May 2015 update to a Q&A on “What People Are Asking” about the Guides, the FTC confirmed that advertisers who use networks of bloggers or other social media influencers to promote their products or who post consumer testimonials on their websites are responsible for substantiating product claims, clearly and conspicuously disclosing the generally expected performance in the circumstances shown in the ad, and disclosing that typical results may vary.

While it can be tempting to post flattering testimonials on your company’s website, it is important to remember that the FTC and FDA hold companies accountable for such testimonials as if they were any other type of advertising. Companies should take extra care to evaluate testimonials and ensure that any connections between the company and the person submitting the testimonial are properly disclosed.

#### ADDITIONAL INFORMATION

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