

February 25, 2010

New Rules for Testimonials/ Endorsements & Advance Consent Marketing



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The Power of Direct: Relevance. Responsibility. Results

Today's Speakers

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Senior Vice President, Corporate & Social Responsibility, DMA

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Senior Vice President, Government Affairs, DMA

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Attorney, Venable, LLP

Session Outline

1. New Rules for Testimonials/Endorsements

- FTC Guides: Background
- FTC Guides: Deep Dive (Typical Results, Material Connections, Social Media & New Channels, Examples)
- DMA Guidelines for Testimonials/Endorsements
- Questions & Answers

2. New Rules for Advance Consent Marketing & Negative Option Programs

- Recent Developments at the State & Federal Levels
- DMA Guidelines
- Questions & Answers

3. Conclusion

FTC Guides: Background

Jerry Cerasale
SVP, Government Affairs, DMA

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What are the FTC's *Guides for Endorsements & Testimonials*?

- Purpose of the *Guides*: The Commission designed the *Guides Concerning the Use of Endorsements and Testimonials in Advertising* to assist businesses in conforming their endorsements and testimonial advertising practices to comply with Section 5 of the FTC Act.
- History of the *Guides*:
 - The *Guides* have been in effect since the 1970s and have not changed since 1980.
 - While not formal FTC rules, the *Guides* reflect the Commission's policy on the use of testimonials in advertising.

What are the FTC *Guides*? (continued)

- Scope of the *Guides*:
 - The *Guides* affect all testimonials delivered through all channels.
 - The revised *Guides* provide examples to illustrate the application of the *Guides* to new media.

When & Why Did the FTC Revise the *Guides*?

■ Revisions to *Guides*:

- The Commission released its revised *Guides* on October 5, 2009.
- The new *Guides* are effective as of December 1, 2009.

■ Why:

- Normal review
- Complaints
 - Weight loss
 - Free-to-pay conversions
- New Media “paid ads”
 - Blogs
 - Reviews

Are the FTC *Guides* Legally Binding?

- Technically, No
- Reflect FTC's views on the matter
- FTC may use in a §5 case
 - Basis for a consent agreement
 - Rulemaking by consent agreements



FTC Guides: Deep Dive

Michael Signorelli
Attorney, Venable, LLP

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Material Connections & Endorsers

- **What constitutes an endorsement under the new Guides?**
 - An endorsement means 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.
 - 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.
- **What is a material connection?**
 - A connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.
- **What are the rules for celebrity endorsers?**

Typical Results: What Are the New Rules for Disclaimers?

- “Results Not Typical”
 - Prior to the revision, the *Guides* provided a "safe harbor" that allowed advertisers to use testimonials that reported specific successful experiences with an advertised product or service as long as the advertiser included a disclaimer such as "Results not typical."

- “Generally Expected Results”
 - Under the revised *Guides*, advertisements that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect in the depicted circumstances.

Impact of *Guides* on New Media Channels (blogs, message boards, and street teams)

- Both advertisers and endorsers are potentially liable for statements disseminated through new media channels;
- The endorser is responsible for disclosing a material connections with an advertiser;
- Advertisers have a responsibility to advise endorsers of their disclosure obligations; and
- Advertisers should monitor an endorser's statements to ensure they comply with the Guides and take corrective actions if they are not.

Concerns with Application of the *Guides* to New Media

- The revised *Guides* impose liability on advertisers for the actions of third parties over whom they exercise uncertain control.
- The revised *Guides* impose liability for false or unsubstantiated statements made through a blogger's endorsements.

Concerns with Application of the *Guides* to New Media (cont.)

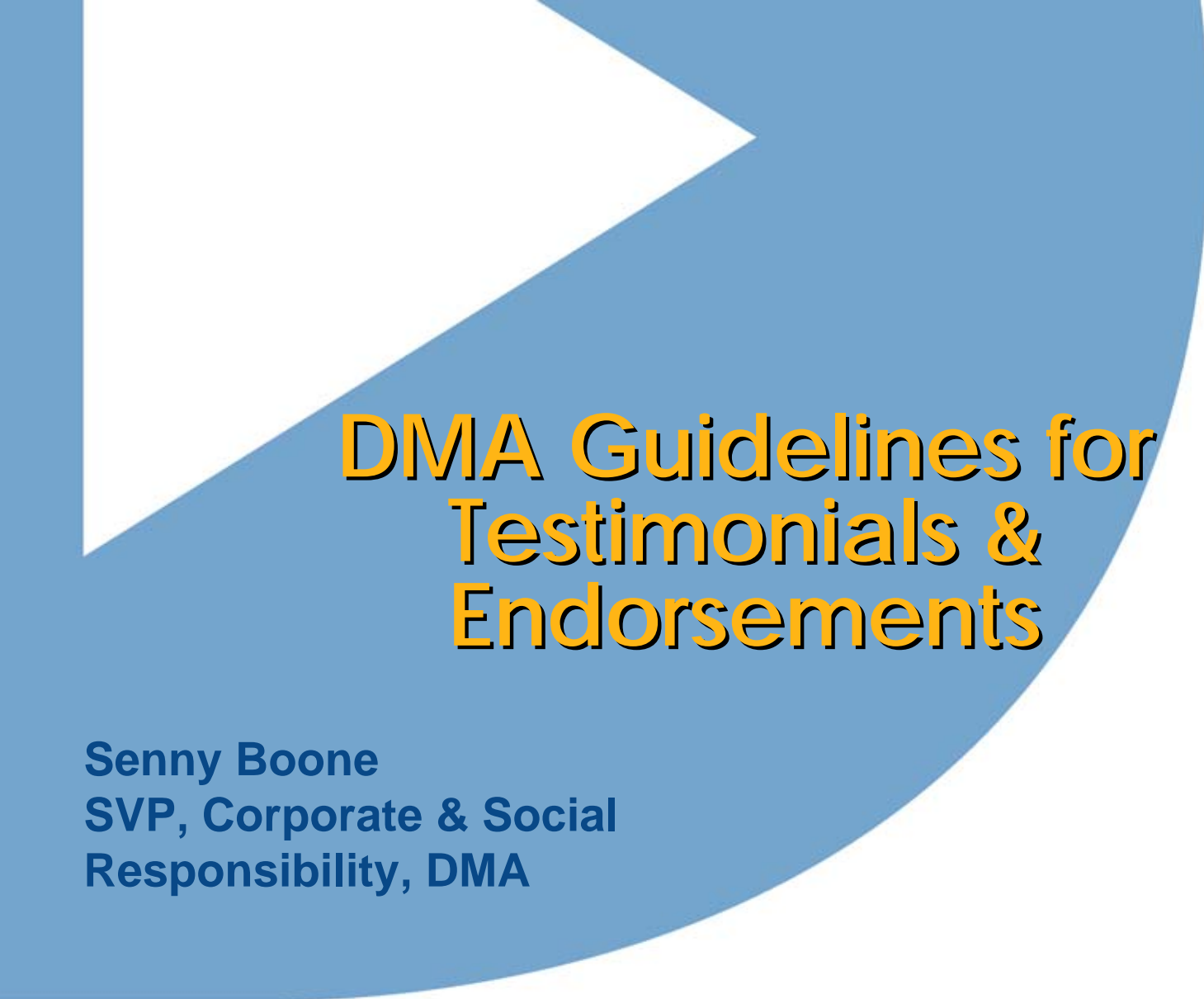
- The revised *Guides* require advertisers to undertake burdensome due diligence and policing obligations.
- The revised *Guides* provide little guidance as to the steps an advertiser should take to ensure blogger's comply with their obligations

Revised *Guides*: Additional Examples

- Section 255.0
 - Example 8 – When a statement is deemed sponsored
- Section 255.1
 - Example 5 – Both the advertiser and blogger are liable for unsubstantiated claims
- Section 255.5
 - Ex. 7 – Failure to disclose a material connection with a blogger
 - Ex. 8 – Policing online message boards
 - Ex. 9 – Tracking street teams

Other Media????

- Critics
- Reviewers
- Consumer Testers



DMA Guidelines for Testimonials & Endorsements

Senny Boone
SVP, Corporate & Social
Responsibility, DMA

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New DMA Guidelines for Testimonials/Endorsements

- Consistent with new FTC *Guides*.
- Approved by DMA Board in January 2010.
- Enforcement is in effect.
- Review the Guidelines at www.dmaresponsibility.org/Guidelines/

New DMA Guidelines for Testimonials/Endorsements

- Advertising/marketing message consumers believe reflect experience of someone other than sponsor
- Channel neutral-blogs, social media target
- Authorized, accurate
- Clear, conspicuous disclosures of material connection & expected results
- Prior and adequate substantiation

New DMA Guidelines for Testimonials/Endorsements

- Can be verbal, demos, depictions, signatures, seals of organizations...
- Enforcement process/committee review
- Review the Guidelines at www.dmaresponsibility.org/Guidelines/



Questions & Answers

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Advance Consent Marketing & Negative Option: New Rules & Expectations

Michael Signorelli
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Advance Consent Marketing & Negative Options

- **Advance Consent Marketing**

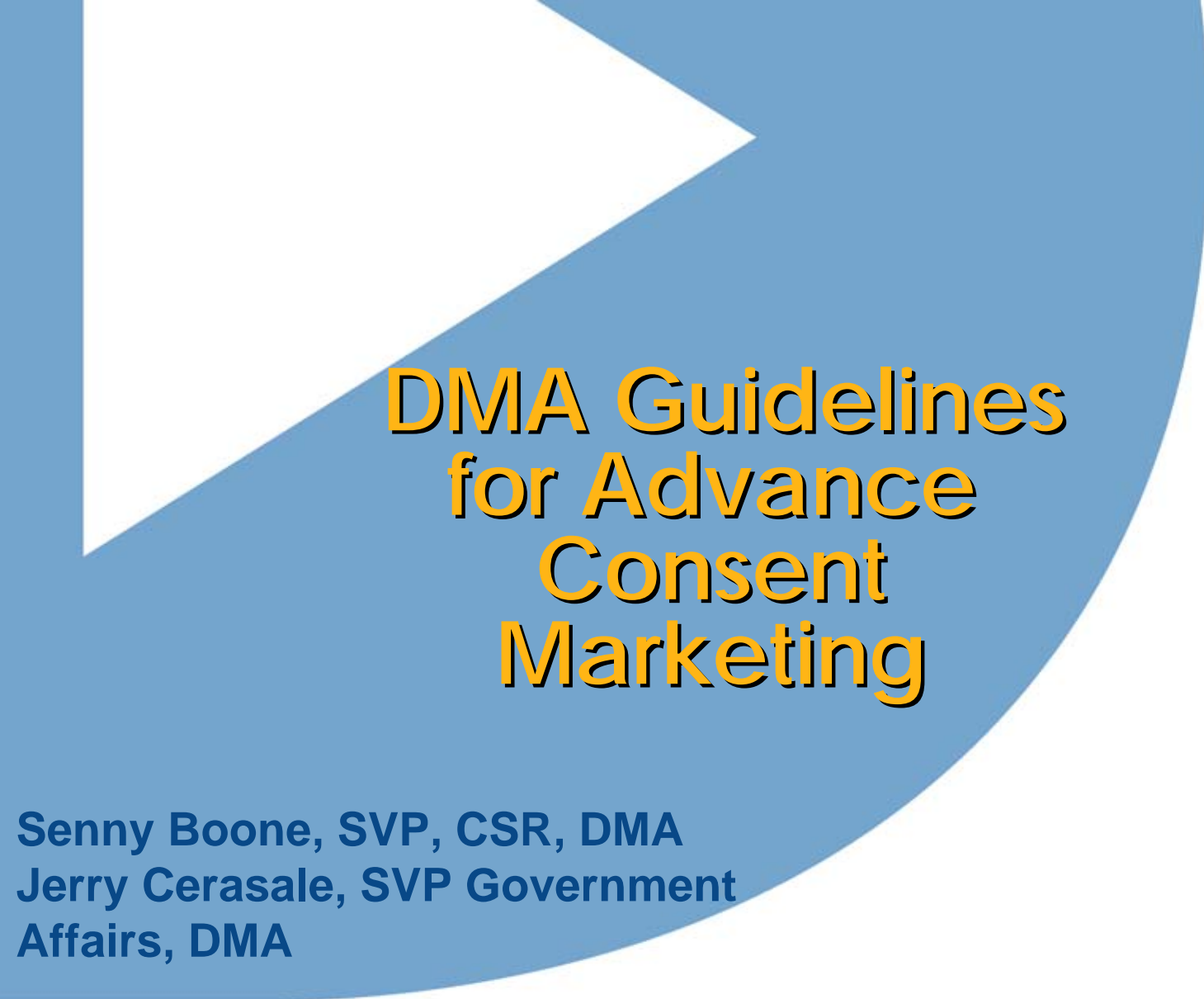
- marketing plans where the consumer gives consent to receive and pay for goods or services in the future on a continuing or periodic basis, unless and until the consumer cancels the plan.

- **Negative Option**

- offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

Recent Developments at the State & Federal Levels

- **Chairman Rockefeller's (D-WV) Investigation**
- **Senate Commerce Hearing**
- **FTC's Prenotification Negative Option Rule Review**
- **State AG Enforcement & Legislation**

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DMA Guidelines for Advance Consent Marketing

Senny Boone, SVP, CSR, DMA
**Jerry Cerasale, SVP Government
Affairs, DMA**

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DMA's Existing Guidelines for Advance Consent Marketing

- Impacts all media where consumer gives consent to get something on a continuing or periodic basis UNLESS he/she cancels the plan.
- Mail
- Telephone
- Online

DMA's Existing Guidelines for Advance Consent Marketing

- Informed consent obtained BEFORE bill or charge
- In telephone sales, consent must be demonstrated in writing or recording
- No obligation for a consumer to pay bills before a trial period expires
- Inform of RIGHT TO CANCEL in initial offer and in renewal reminders

DMA's Existing Guidelines for Advance Consent Marketing

- Renewal reminders should be sent at the frequency specified in the offer
- There should be a reasonable amount of time for the consumer to cancel between renewal notices
- You must promptly honor requests for refunds upon cancellation
- Major issue in State Legislatures

DMA's Existing Guidelines for Advance Consent Marketing

- Clearly and conspicuously disclose **material terms & conditions** (pricing, identity of marketer etc.,) before obtaining consumer's consent (see **DMA Guidelines Article 12**)
- In telephone sales where marketers use pre-acquired account information under "free-to-pay" conversion plan, marketer must:
 - Obtain last four digits of the account to be charged
 - Obtain informed consent for the charge
 - Audio record the entire transaction

DMA's Existing Guidelines for Advance Consent Marketing

- In telephone sales where marketer uses pre-acquired account info but no “free-to-pay” conversion plan:
 - Identify with specificity the account that will be charged, and
 - Obtain consent from the consumer to charge such account.
 - Applies to both marketers and their service providers.

Next Steps for Updating & Enforcing DMA Guidelines

- Ethics Policy Committee
- We will be reviewing current guidelines- looking at evolving channels and issues raised due to online transactions, working in conjunction with the government affairs team.
- Direct Comment
- Enforcement & Complaint Handling Process



Questions & Answers

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Conclusion

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