

Ed F. Glynn, Jr.

T 202.344-4805
F 202.344.8300
efglynn@Venable.com

March 2, 2009

Via electronic filing: <http://secure.commentworks.com/ftc-endorsements>

Mr. Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-135 (Annex S)
Washington, D.C. 20580

Re: Endorsement Guides Review, Project No. P034520

Please find attached the joint submission of the following associations prepared by Venable LLP.

American Association of Advertising Agencies
American Advertising Federation
Council for Responsible Nutrition
Direct Marketing Association
Direct Selling Association
Electronic Retailing Association
Interactive Advertising Bureau
Promotion Marketing Association
U.S. Chamber of Commerce

Sincerely,

Edward F. Glynn, Jr.
Venable LLP
575 7th Street, NW
Washington, DC 20004
(202) 344-4805

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Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: “Endorsement Guides Review, Project No. P034520”

Dear Secretary Clark:

The undersigned parties hereby submit to the Federal Trade Commission (“Commission” or “FTC”) these comments regarding the Commission’s proposed amendments to the *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (“Guides”), codified at 16 C.F.R. Part 255. The proposed amendments are contained in a notice published in the *Federal Register* on November 28, 2008 (“Notice”).¹ We are concerned that the proposed revised Guides would discourage legitimate advertising practices and generate considerable uncertainty among marketers as to what the Commission believes Section 5 requires.

Part I of these comments defines the issue and also addresses the considerable hardship that many advertisers will experience if required to disclose “generally expected results” in advertisements featuring testimonials that may not be typical. In addition, Part I discusses the limitations of the FTC-sponsored studies that form the basis for the proposed new standards and addresses the First Amendment implications of prohibiting truthful and documented testimonials unless they are accompanied by disclosures of generally expected results when it may be essentially impossible to ascertain what those results are to the Commission’s satisfaction. Part II of our comments discusses the need for more clarity in the proposed revisions to the Guides that concern “material connection” issues.

I. THE PROPOSED RULES CONCERNING TESTIMONIALS WOULD SIGNIFICANTLY RESTRICT LEGITIMATE ADVERTISING PRACTICES AND LEAD TO UNCERTAINTY AMONG ADVERTISERS.

A. Compliance with the Proposed Disclosure Requirement for Testimonials That May Not Be Typical Would be Impracticable or Difficult for Advertisers to Achieve Under Certain Circumstances.

Some products do not lend themselves to a conventional performance study yielding results that can be reliably generalized to the general consuming public because the performance

¹ 73 Fed. Reg. 72374 (2008).

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of such products depends largely on the manner in which consumers use the product – whether they use the product regularly, whether they use it as directed, and so on.

For example, determining the “generally expected results” of an aerobic exercise device or regimen can be very difficult for advertisers because the extent of those benefits will vary widely depending on individual factors beyond the advertiser’s control. It is accepted that aerobic exercise can produce significant benefits, but the particular results that an individual consumer will achieve with an aerobic exerciser or exercise regimen depends on how often the consumer exercises, how long his or her exercise sessions are, and whether he or she exercises at the appropriate intensity level. A researcher may be able to control the conduct of study subjects, but there is no way to be sure how real consumers will use an exercise device or regimen when no one is monitoring them.

Thus, marketers who want to use clearly accurate and documented testimonials from successful customers may not be able to do so if they are required to disclose the generally expected results achieved by consumers. Such disclosures constitute claims requiring substantiation, and it may not be feasible to generate typicality data that would meet the Commission’s strict standards for the substantiation of such claims. There may be no real doubt that the product is effective for consumers generally,² and there may be no real doubt that the individual testimonials used in the advertisement are truthful. Yet, the advertiser would not be able to use such testimonials safely unless it could substantiate what the “typical” consumer would achieve.

The Notice states that the “Commission does recognize that a revision of renumbered Section 255.2(b) calling for non-typical testimonials to be accompanied by disclosure of the results consumers generally achieve with the advertised product would increase costs for those advertisers who have not previously tracked consumers’ experiences with their products, and could present an impediment to the use of such testimonials by certain advertisers.”³ So, the Commission admits that the proposed revised Guides will at the least increase costs and could pose a barrier to the use of consumer testimonials, which is a well-established advertising practice. The imposition of such a barrier is certainly not warranted based on the limited and flawed studies on which the Commission relies. And it is not warranted just because the typicality disclaimers used by some advertisers fail to meet the “clear and conspicuous” standard. If a marketer fails to meet this standard, the Commission can initiate an enforcement action, as it has in numerous instances.

² If a marketer uses testimonials to advertise a product that doesn’t work – for example, a bogus weight-loss supplement or hair-growth product – the Commission can attack that advertising as false or unsubstantiated. Attacking the testimonials in such ads as atypical is an example of going for a capillary instead of going for the jugular.

³ 73 Fed. Reg. 72381 (2008).

B. The Two Studies Relied on by the Commission Are Flawed and Too Narrow in Scope to Support Section 255.2(b) of the Proposed Revised Guides.

The Commission's proposal to revise its Guides on consumer testimonials is based largely on two consumer perception studies. As noted by several parties who commented on the Commission's January 18, 2007 *Federal Register* notice regarding the Guides, the studies have a number of significant deficiencies and do not provide a sufficient empirical basis for the proposed revision to Section 255.2.

Among these commenters was Professor Thomas J. Maronick, former director of the FTC Bureau of Consumer Protection's Office of Impact Evaluation, whose analysis of the studies was included in the comments submitted by the Electronic Retailing Association and the Council for Responsible Nutrition. His comments regarding the two consumer perception studies cited and discussed in detail numerous flaws in the studies that undermine their reliability – flaws that we believe would be serious enough to result in rejection of studies with similar flaws if they were submitted to the Commission as substantiation for advertising claims.

The Commission essentially concedes in the Notice that these studies are flawed,⁴ but argues that flawed studies are good enough to support its proposed revision to Section 255.2 of the Guides. But we believe that the impact of that proposed revision is far too great for the Commission to rely on flawed studies. The situation here is very different from that in the cases cited by the FTC in support of its argument that consumer research does not have to be flawless to be reasonably reliable and probative, each of which involved *one* product advertised by *one* advertiser; moreover, in each of those cited cases there was additional evidence for the Commission to consider. Here, the Commission is proposing a radical change that would have broad, general applicability to a wide variety of advertising and advertisers without other research to support that change. Therefore, we urge the Commission to carefully consider the criticism of these studies presented by Professor Maronick and other commenters.

In addition, the two consumer perception studies were narrow in scope relative to the far-reaching nature of the proposed new rule on disclosures of generally expected results. Each study tested a few similar variations of one type of print advertisement. But advertisements come in many different forms and utilize various media. Recognizing this diversity, the

⁴ The authors of the first of the FTC studies – the “Endorsement Booklet Study” – themselves admitted a number of shortcomings in that study: “While this study provides potentially useful findings, several characteristics of the study may limit its generalizability. First, the sample consisted of only 200 dietary supplement users, with about 35 respondents per treatment group. Therefore, there may be differences among the groups that were not statistically significant because of the small sample size. Second, due to the nature of the product, 80% of the respondents were 60 years of age or older. Younger audiences may process testimonials and disclosures differently. Third, these results are based on a single product, i.e., a dietary supplement. The use of testimonials in the advertising for other products may yield different results. Finally, the study booklet contained a relatively large number of testimonials (18). Advertisements containing fewer testimonials may produce findings different than those observed in this study.”

Commission has for many years evaluated advertisements on a case-by-case basis, considering the contents and context of the particular advertisement taken as a whole.⁵

The Commission refrains from generalizing its evaluation of particular advertisements to other ads, as doing so may lead to unreasonable assumptions about ads that differ from each other in material ways. Similarly, fashioning broad regulatory advertising policies based on two studies of very limited scope can lead to standards that do not account for the significant differences among different kinds of advertisements. Print advertisements are unavoidably different in material ways from television advertisements or Internet websites, and even ads in a single medium are necessarily different in material ways from one another. An analysis of the very similar print ads tested in the two consumer perception studies sponsored by the Commission do not yield a reasonable basis upon which to establish all-encompassing, stringent rules for all advertisements featuring testimonials. Rather, each advertisement containing a testimonial should be analyzed as all advertisements are analyzed – on its own merit and in the context of the particular ad.

C. The Restriction on the Use of Certain Typicality Disclaimers – Which May Essentially Ban the Use of Such Disclaimers – Raises Significant First Amendment Concerns.

The proposed revised Guides raise First Amendment issues, as the revised Guides would disallow the use of typicality disclaimers to qualify possibly non-typical testimonials regardless of whether the disclaimers are readily and accurately understood by reasonable consumers. As the District of Columbia Circuit Court of Appeals stated in *Pearson v. Shalala*, “disclaimers are constitutionally preferable to outright suppression.”⁶ Proposed Section 255.2(b) regarding generally expected results effectively prohibits non-typical testimonials – even truthful testimonials – if the testimonial is qualified only by a typicality disclaimer. We urge the Commission to reconsider imposing a requirement that suppresses facially truthful speech even when such speech is accompanied by qualifying typicality disclaimers that meet the traditional “clear and conspicuous” standard.

II. THE PROPOSED NEW RULES REGARDING DISCLOSURE OF CERTAIN CONNECTIONS BETWEEN ENDORSERS AND MARKETERS ARE UNCLEAR.

The Commission proposes several changes to section 255.5 of the Guides, which currently requires that marketers disclose any connections between the endorser and the marketer which may materially affect the weight or credibility of the endorsement.⁷ Of greatest

⁵ FTC Deception Policy Statement; *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963); *Am. Home Prods.*, 695 F.2d 681, 688 (3d Cir. 1982); see also *In re Pfizer Inc.*, 81 F.T.C. 23, 58 (1972).

⁶ 164 F.3d 650, 657 (D.C. Cir. 1999).

⁷ 16 C.F.R. § 255.5.

significance, the Commission is proposing to add new Examples 7, 8, and 9 to Section 255.5. 73 Fed. Reg. at 72390, 72395, which are intended to illustrate that marketers must disclose certain connections with persons who provide endorsements through new forms of media, including blogs, online discussion boards, and “street teams.” 73 Fed. Reg. at 72390. The proposed examples, which were not in the original *Guides Concerning the Use of Endorsements and Testimonials in Advertising: Request for Comments*, published in January of 2007,⁸ but were instead added to the November, 2008 Notice,⁹ raise significant issues regarding the scope of advertiser liability for third party activity in the context of new media and word-of-mouth marketing. While the three examples focus specifically on blogs, message boards and street teams, they leave many questions unanswered as to advertiser liability for third party conduct in the new media context; there are many more forms of “word-of-mouth” and other types of new media marketing that are left unaddressed, and even the specific examples offered are, as discussed below, in many respects ambiguous as to the nature and extent of marketer liability for third-party conduct in the context illustrated. Moreover, the FTC appears to be treating online conduct differently than its “offline” counterpart. What is clear is that the FTC should not address the issue of the proper way to regulate word-of-mouth marketing and endorsements in the new media context without giving the implications of such regulation full consideration, particularly where the industry has already acted – successfully – to self-regulate using vehicles such as the Word of Mouth Marketing Association’s Ethics Code and Principles for Ethical Contact by Marketers and the Blog Council.

The proposed examples raise particular concerns regarding the liability of marketers for conduct by agents and independent parties where such conduct is beyond the marketer’s control or outside the scope of the marketer’s relationship with the third party. The new examples also raise issues regarding the reasonableness of requiring a marketer to prevent any party with whom it has a connection from making statements promoting the marketer’s products without disclosing the connection.

Proposed Example 7 involves a college student who earned a reputation as a video game expert and maintains a blog about video games. A company provides the blogger with a free copy of its video game system and asks him to write about the system on his blog. The blogger tests the system and writes a favorable review. The example states that the blogger should disclose that he received the system for free because this fact would materially affect the credibility of the review.

Proposed Example 8 involves an employee of a music playback device manufacturer posting messages touting his employer’s product on an online message board devoted to new music download technology. According to the example, the employee should disclose his relationship to the manufacturer because knowledge of the relationship would materially affect consumers’ assessment of his credibility.

⁸ 72 Fed. Reg. 2214

⁹ 73 Fed. Reg. 72395 (Nov. 28, 2008)

In the proposed Example 9, a person joins a marketer's "street team" which promotes the marketer's product. Every time the person talks to his friends about the product, he receives points that can be redeemed for prizes. The example states that these incentives should be disclosed because they materially affect the credibility of the street team member's endorsements.

With respect to proposed Example 7, it is a longstanding and common practice among marketers to provide free products or services – including items of high value – to experts or professional critics who, in turn, give reviews of the products and services. If the blogger who has become a video game expert must disclose that he received the video game system for free, then is every critic required to disclose that a reviewed item was provided for free? Reviewers in traditional media do not have to disclose this information; reviewers in nontraditional media platforms such as blogs, online discussion boards, and street teams should not be treated any differently. Product and service reviews benefit consumers, and expert critics would not be able to review as many products and services as they do if they had to pay for them. Thus, businesses have customarily provided complimentary products and services to critics so they can test them and provide their opinions regarding the products or services, whether good or bad. Many consumers expect that critics have received a reviewed item for free, or they generally assume that an independent, expert reviewer is providing his or her honest opinions regardless of whether the reviewer purchased the item or received it at no cost. For these reasons, we request that the Commission reevaluate Example 7 to determine whether it is warranted and if it needs to be revised to eliminate any undue discrepancies in the treatment of reviews in "new media" channels and those in traditional media channels.

Further, it would be impracticable for marketers to ensure that "material" connection disclosures accompany endorsements made through online discussion boards, "street teams," or similar channels, as required under the proposed Examples 8 and 9. It is virtually impossible for marketers to make certain that employees and other individuals compensated by the marketer disclose their connections to the marketer when making favorable statements about the marketer's products through blogs and other new media. Marketers cannot completely control what employees say on online discussion boards, or what street team members say to their friends. It is unclear what steps marketers would be required to take – at a minimum – to prevent persons with a "material" connection to the marketer from making positive statements about the marketer's products without disclosing the material connection. The extent to which marketers would be held responsible for the independent actions of such individuals is also unclear. We request that the Commission reconsider the proposed Examples 8 and 9 because of the uncertainty as to the exact nature of the standards illustrated by the examples.

CONCLUSION

The Commission's Guides concerning the use of endorsements and testimonials in advertisements have remained consistent for many years. The proposed changes to the Guides would represent a drastic change in the Commission's policy that would result in uncertainty and increased costs for marketers, and impede the use of even truthful consumer testimonials. We

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are concerned that the Commission is basing such a radical change on consumer research of limited scope and reliability.

We are also concerned that the proposed amendments regarding the disclosure of “material” connections in the context of “new media,” such as blogs and online discussion boards, also create uncertainty as to what exactly are the requirements for marketers.

For these reasons, we request that the Commission gather additional empirical evidence and reevaluate the proposed changes to the Guides before making a final decision. We stand willing to assist the Commission and its staff in this reevaluation. Please contact the following at Venable LLP with any questions: Jeffrey D. Knowles (202) 344-4860; Edward F. Glynn, Jr. (202) 344-4805; Stuart Ingis (202) 344-4613.

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