[Billing Code: 6750-01S]

FEDERAL TRADE COMMISSION
16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Notice of adoption of revised Guides.

EFFECTIVE DATE: December 1, 2009.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") is adopting revised Guides Concerning the Use of Endorsements and Testimonials in Advertising ("the Guides"). The revised Guides include additional changes not incorporated in the proposed revisions published for public comment in November 2008. See 73 FR 72374 (Nov. 28, 2008).

FOR FURTHER INFORMATION CONTACT: Shira Modell, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C., 20580; (202) 326-3116.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. OVERVIEW OF THE COMMISSION'S REVIEW OF THE GUIDES

The Commission began a review of the Guides pursuant to the agency's ongoing regulatory review of all current rules and guides. In January 2007, the Commission published a Federal Register notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides. 72 FR 2214 (Jan. 18, 2007). The Commission also requested comment on consumer research it commissioned regarding the messages conveyed by consumer endorsements and on several other specific issues, the most significant of which was the use of so-called "disclaimers of typicality" accompanying testimonials that do not represent experiences that consumers can generally achieve with the advertised product or service. Specifically, the Commission asked about the potential effect on advertisers and consumers if the Guides required clear and conspicuous disclosure of the generally expected performance whenever the testimonial is not generally representative of what consumers can expect. Twenty-two comments were filed in response to this notice.

In November 2008, the Commission published a Federal Register notice, 73 FR 72374 (Nov. 28, 2008), that discussed the comments it had received in 2007, proposed certain revisions to the Guides, and requested comment on those revisions. Seventeen comments were filed.[1]

---

[1] Comments were submitted by the American Association of Advertising Agencies ("AAAA"), the American Advertising Federation ("AAF"), the Council for Responsible Nutrition ("CRN"), the Direct Marketing Association ("DMA"), the Direct Selling Association ("DSA"), the Electronic Retailing Association ("ERA"), the Interactive Advertising Bureau, Inc. ("IAB"), the Promotion Marketing Association, Inc. ("PMA"), the U.S. Chamber of Commerce ("C of C"), the Association of National Advertisers ("ANA"), the Public Relations Society of America ("PRSA"), Higher Power Marketing ("HPM"), the Natural Products Association ("NPA"), the National Association of Realtors ("NAR"), the Word of Mouth Marketing Association ("WOMMA"), BzzAgent, Inc. ("BzzAgent"), the Personal Care Products Council ("PCPC), Kelley Drye & Warren, LLP, Monyei-Hinson, and Heath-McLeod. In some cases, a comment was submitted by more than one party. Citations to these joint comments identify the individual commenters (*e.g.*, AAAA/AAF). In addition, several commenters signed on to more

(continued...)

After reviewing those comments, the Commission is now making additional changes to the Guides, and adopting the resulting revised Guides as final.[2]

II. REVIEW OF COMMENTS ON PROPOSED REVISIONS TO THE GUIDES

Nearly all of the comments received by the Commission took issue with, or raised questions about, one or more of the changes included in the proposed revised Guides.[3] Several argued that there was no need for the Guides to be revised at all, and that the 1980 Guides, combined with continued industry self-regulation and the Commission's case-by-case law enforcement, would adequately balance the needs of advertisers and the interest of consumer protection.[4] As discussed below, others argued that the evidence in the record did not support the proposed changes,[5] that the proposed revisions to the Guides could have a negative affect on emerging media channels and impede the ability of businesses to communicate with consumers

---

[1] (...continued)
than one comment.

[2] The Guides represent administrative interpretations concerning the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. They are advisory in nature, and intended to give guidance to the public in conducting its affairs in conformity with Section 5.

[3] The exceptions were the comments filed by Monyei-Hinson (calling for stringent regulation of endorsements and new media, and specific rules regarding holding celebrities accountable and disclosing celebrity pay); and Heath-McLeod (agreeing overall with the proposed changes but calling for, among other things, minimum standards for the size and clarity of disclosures).

[4] AAAA/AAF, at 8, 10, 18; PRSA, at 2; ANA, at 2; DMA, at 3 (stating that the current approach should be continued "[u]ntil there is a demonstrated market failure across all media channels").

[5] PMA, at 3; DMA, at 3 (stating that there is an "insufficient basis to support a conclusion that the current regulatory and market safeguards inadequately protect consumers").

through legitimate testimonials and endorsements,[6] and that the Commission should look to industry to address any problems in the marketplace and, where appropriate, to revise existing self-regulatory frameworks to address the evolving concerns posed by emerging digital advertising channels.[7] As discussed below, the application of the Guides to new media and the Commission's proposed elimination of the "safe harbor" afforded by the 1980 Guides to non-typical testimonials accompanied by disclaimers of typicality were issues addressed in a number of the comments.

A. Analysis of Comments Concerning What Communications Should Be Considered "Endorsements" Under § Section 255.0 of the Guides

1. General Issues

As proposed by the Commission in its November 2008 Federal Register notice, Section 255.0(b) of the Guides would state in part that:

> [A]n endorsement means 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.

One commenter stated that defining endorsements based on a subjective measure of consumer understanding – that is, by the sole criterion of whether consumers are likely to believe the statement reflects the views of the endorser, rather than that of advertiser – creates inherent uncertainty.[8]

---

[6] DMA, at 1.

[7] IAB, at 3.

[8] PRSA, at 3.

The Guides have always defined "endorsements" by focusing on the message consumers take from the speech at issue.[9] Indeed, this focus on consumer takeaway is completely consistent with the approach the Commission uses to determine whether a practice is deceptive, and thus in violation of the FTC Act.[10] Accordingly, the Commission concludes that no additional changes to the proposed revised definition of "endorsement" are warranted.

2. New Media – Consumer-Generated Content as an "Endorsement" Within the Meaning of the Guides

The Commission's November 2008 proposal included several examples applying various Guide provisions to new forms of consumer-generated media, such as the use of blogs in word of mouth marketing campaigns, and several commenters focused specifically on these examples.[11] Some of the comments questioned whether statements in certain of these new media qualify as "endorsements" under the Guides, given, among other things, the advertiser's limited control over the messages disseminated to the public.[12] Other commenters argued that it was premature for the Commission to apply the Guides to these new media without the opportunity for further

[9] The proposed revised definition reflects only one change from the definition adopted in 1980: the addition of the phrase "even if the views expressed by that party are identical to those of the sponsoring advertiser."

[10] FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174, 175 (1984) (citation omitted) (hereafter "Deception Policy Statement") (stating that in determining whether a representation, omission, or practice is deceptive, "we examine the practice from the perspective of a consumer acting reasonably in the circumstances").

[11] WOMMA defines "word of mouth marketing" as "Giving people a reason to talk about your products and services, and making it easier for that conversation to take place. It is the art and science of building active, mutually beneficial consumer-to-consumer and consumer-to-marketer communications." http://womma.org/womm101 (last visited Oct. 1, 2009).

[12] *E.g.,* BzzAgent, at 4-5.

discussion about these media and guidance on the scope of the liability that the Guides would create for advertisers,[13] with some suggesting that the future growth of these new media would be adversely affected if they were subject to the Guides because advertisers would be deterred from using them.[14] These commenters opined that the Commission should, instead, defer to industry self-regulation, as it has done in the past when industry has proven itself capable of protecting consumers.[15]

One commenter observed that the proposed Guides could leave the impression that any blog that speaks positively about a product would necessarily be covered by the Guides, and thus by Section 5, and that such an outcome would be wrong for a blog:

> that functions similarly to traditional media . . . if (1) the blog provides content that is editorially independent of any sponsor or marketer of a product or service, and (2) there is no material connection with the marketer of a product or service that is discussed in the blog that would call into question the editorial independence of the blog.[16]

---

[13] ERA/CRN, at 33; PMA, at 17 (citing the "near-endless" variety of possible relationships between bloggers and the companies about whose products they blog); *see also* DMA, at 4-5 (stating that the Commission should not apply the same principles "addressing narrow concerns associated with endorsements made through a print medium to dynamic channels such as the Internet"; rather than apply the Guides to these new media, the Commission should address the issue by means of case-by-case law enforcement actions under the 1980 Guides, so it can give appropriate consideration to the unique characteristics of this particular medium of communication).

[14] IAB, at 3 ("If the Commission were to adopt guidelines addressing new media without a sufficient understanding of how such new technologies are being harnessed or may be used in the future, the Commission might risk dissuading the development of novel means of advertising that effectively serve the interests of consumers in ways not yet imagined."); AAAA/AAF, at 17 ("[R]egulating these developing media too soon may have a chilling effect on blogs and other forms of viral marketing, as bloggers and other viral marketers will be discouraged from publishing content for fear of being held liable for any potentially misleading claim."); DMA, at 5 (noting a potential "chilling effect on the use of the Internet as a communication channel").

[15] *E.g.*, IAB, at 3; C of C, at 5 (the industry has already successfully self-regulated).

[16] PCPC, at 1-2 (asserting that "a magazine article or newspaper article that reviews a (continued...)

Two commenters with particular interest in word of mouth marketing also addressed the application of the Guides to these new consumer-generated media. One noted the distinction between blogs that are just personal communication spaces, and those that are essentially commercial communication spaces, asserting that although an "advertising message" is intended by the latter – making it subject to the Guides – no such message is intended by the former and the Guides should not apply.[17]

Similarly, the other commenter noted that the Guides should not "inadvertently regulate everyday word-of-mouth communications among actual consumers regardless of whether such communications take place in person, via e-mail or in new mediums such as blogs or social networking Web sites."[18] This commenter stated that even if consumers participate in advertising sampling programs, their online comments about a particular product should not be considered commercial speech and these consumers should not be deemed "endorsers" when they are free to say whatever they want about the product (or not say anything at all) without the advertiser having any control over their statements.[19] By extension, this commenter contended

---

[16] (...continued)
product is not an 'endorsement' for purposes of advertising law, so too is a blog that performs this same function," and that receipt by the blogger of a free product sample for review purposes does not change this analysis, "provided that the product itself does not have such a high value that would make its receipt material *(e.g.,* a car), since the resulting editorial content – good or bad – is not controlled by the marketer"); *see also* IAB, at 4 (stating that bloggers, like movie critics, are provided free product because the marketer wants unbiased feedback).

[17] WOMMA, at 6.

[18] BzzAgent, at 1; *see also id.* at 4-5 (FTC should "distinguish between honest word of mouth shared among *actual consumers* from marketing messages spread by controlled *consumer endorsers*"; consumers who participate in BzzAgent network marketing program are the former).

[19] BzzAgent, at 6-8 (if mere provision of samples to honest reviewers is considered proxy for control, reviewers would inadvertently qualify as endorsers, even though their views are their own, not those of the company that provided the free product).

that neither the advertiser nor the publisher should be liable for any false or unsubstantiated statements made by these consumer reviewers.[20]

The comments correctly point out that the recent development of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered "endorsements" within the meaning of the Guides and those that are not. The Commission disagrees, however, with those who suggest that there is not yet an adequate basis to provide guidance in this area. As set forth below, after considering the observations provided by various commenters, the Commission is setting forth a construct for analyzing whether or not consumer-generated content falls within the definition of an endorsement in Section 255.0(b) of the Guides. The Commission will, of course, consider each use of these new media on a case-by-case basis for purposes of law enforcement, as it does with all advertising.

The Commission does not believe that all uses of new consumer-generated media to discuss product attributes or consumer experiences should be deemed "endorsements" within the meaning of the Guides. Rather, in analyzing statements made via these new media, the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message." In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker's statement is an "endorsement" that is part of an overall marketing campaign? The facts and

---

[20] *Id.* at 6-8 (noting that modern companies that distribute product samples to facilitate honest word of mouth communications are analogous to distributor who offers free samples to grocery shoppers, that participants in these network marketing program are analogous to supermarket shoppers who try the free sample and perhaps tell their friends about it, and that neither of these scenarios should be encompassed by the Guides).

circumstances that will determine the answer to this question are extremely varied and cannot be fully enumerated here, but would include: whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received. An advertiser's lack of control over the specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an "endorsement" within the meaning of the Guides. Again, the issue is whether the consumer-generated statement can be considered "sponsored."

Thus, a consumer who purchases a product with his or her own money and praises it on a personal blog or on an electronic message board will not be deemed to be providing an endorsement.[21] In contrast, postings by a blogger who is paid to speak about an advertiser's product will be covered by the Guides, regardless of whether the blogger is paid directly by the marketer itself or by a third party on behalf of the marketer.

Although other situations between these two ends of the spectrum will depend on the specific facts present, the Commission believes that certain fact patterns are sufficiently clear cut

---

[21] Even if that consumer receives a single, unsolicited item from one manufacturer and writes positively about it on a personal blog or on a public message board, the review is not likely to be deemed an endorsement, given the absence of a course of dealing with that advertiser (or others) that would suggest that the consumer is disseminating a "sponsored" advertising message.

This is not to say that use of a personal blog means that the statements made therein would necessarily be deemed outside the scope of the Guides; the Commission would have to consider the rest of the indicia set forth above to determine if the speaker was essentially "sponsored" by the advertiser.

to be addressed here. For example, a blogger could receive merchandise from a marketer with a request to review it, but with no compensation paid other than the value of the product itself. In this situation, whether or not any positive statement the blogger posts would be deemed an "endorsement" within the meaning of the Guides would depend on, among other things, the value of that product, and on whether the blogger routinely receives such requests. If that blogger frequently receives products from manufacturers because he or she is known to have wide readership within a particular demographic group that is the manufacturers' target market, the blogger's statements are likely to be deemed to be "endorsements," as are postings by participants in network marketing programs. Similarly, consumers who join word of mouth marketing programs that periodically provide them products to review publicly (as opposed to simply giving feedback to the advertiser) will also likely be viewed as giving sponsored messages.[22]

Finally, the Commission disagrees with those who suggest that including in the Guides examples based on these new media would interfere with the vibrancy of these new forms of communication, or that the Commission should, instead, defer to industry self-regulation. Whether or not the Guides include examples based on these new media does not affect the potential liability of those who use these media to market their products and services. The Guides merely elucidate the Commission's interpretation of Section 5, but do not expand (or limit) its application to various forms of marketing. Furthermore, the Commission notes that

[22] The fact that the participants technically might be free not to say anything about any particular product they receive through the program does not change the Commission's view that positive statements would be deemed to be endorsements. The underlying purpose of these word of mouth marketing programs is to generate positive discussion about the advertiser's products.

spending on these new social media is projected to increase,[23] and the commenters who expressed concerns about the future of these new media if the Guides were applied to them did not submit any evidence supporting their concerns. Moreover, to the extent that consumers' willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a beneficial, not detrimental, effect. And although industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed,[24] self-regulation works best when it is backed up by a strong law enforcement presence. Thus, for example, the National Advertising Division of the Council of Better Business Bureaus will refer matters to the Commission when advertisers refuse to participate in, or do not abide by the decisions of, NAD's self-regulatory review and dispute resolution process. The Commission believes that guidance as to the types of consumer-generated content that will be considered "endorsements" within the meaning of the Guides, and as to the responsibilities of the parties involved, informs both advertisers and endorsers of their attendant responsibilities in ensuring that advertising is truthful and non-misleading, and reduces potential misunderstanding of their obligations under Section 5 of the FTC Act.[25]

---

[23] According to WOMMA, $1.35 billion was spent on social media marketing in 2007, and that figure is expected to reach $3.7 billion by 2011. http://www.ft.com/cms/s/0/9a58f44c-1fae-11de-a1df-00144feabdc0.html (last visited Oct. 1, 2009).

[24] Indeed, some industry groups have made established codes of ethics that are very much in line with the approach taken in the Guides. For example, WOMMA attached to its comment a copy of the Word of Mouth Marketing Ethics Code of Conduct.

[25] The examples involving new media included in the revised Guides are based on

(continued...)

3. New Example

The Commission is adding a new Example 8 to Section 255.0 to provide additional guidance about application of the factors set forth in Part II.A.2 above to statements made in consumer-generated media. This example posits three different fact patterns in which a consumer writes a positive blog review about a new product she has tried. In the first hypothetical, her statement is not deemed to be an endorsement within the meaning of the Guides because of the lack of any relationship whatsoever between the speaker and the manufacturer. In the second hypothetical, a coupon for a free trial of the new product is generated by the store's computer, based on her purchases; again, given the absence of a relationship between the speaker and the manufacturer or other factors supporting the conclusion that she is acting on behalf of the manufacturer (*i.e.,* that her statement is "sponsored"), her review would not be deemed to be an endorsement. In the third fact pattern, however, there is an ongoing relationship between the consumer and a network marketing program, and economic gain by the consumer based on the stream of products, thereby making the blog posting an endorsement within the meaning of the Guides.

4. Other Issues

Another commenter asked the Commission to address several questions. First, would a product review written by an employee of an organization to inform the organization's members about the availability, qualities, and features of particular products and services of interest to

---

[25] (...continued)
specific fact patterns that lend themselves to relatively clear answers. The Commission recognizes that many other hypotheticals could be posited that would be far more difficult to answer; those will have to be considered on a case-by-case basis.

them be an endorsement by the organization within the meaning of the Guides?[26] Second, assuming such a review would not be covered by the Guides, would the use of that review (or of quotations from it), in an advertisement disseminated by the seller of that product create "endorser" liability for the organization if the organization did not consent to or otherwise participate in the seller's use of the product review?[27]

The answer to the first question is that such a review published in the organization's own journal would not be considered an endorsement because the Commission would not consider the review to be an advertisement, and there is no sponsoring advertiser. However, if that review was used in an ad disseminated by the manufacturer of a product that received a favorable review, the organization's statements would become an "endorsement" within the meaning of Section 255.0(d). (See Section 255.0, Example 1.) Nonetheless, assuming that the organization did not know about the manufacturer's plan to use that review and did not receive any compensation for its use, the organization would not be liable for its use, even if the review did not comply with the Guide provisions concerning endorsements by organizations. (See Section 255.4.)

B. Section 255.1 – General Considerations

Although no commenters addressed the General Considerations section of the Guides, the Commission is making two additional revisions to Section 255.1. First, a proposed cross-reference to Example 3 in Section 255.3 (endorsements by experts) is being deleted from Section 255.1(a). Second, a cross-reference to the Guide provisions in Section 255.3 that set forth the standards that expert endorsers must meet is being added to new Example 3 in Section 255.1.

---

[26] NAR, at 1.

[27] *Id.* at 1-2.

C. Comments Concerning the Liability of Endorsers and Advertisers for Endorsements Disseminated Through New Media

Several comments questioned whether the advertiser should be liable for statements made by endorsers who use new media. One suggested that the advertiser should be liable for comments of an "endorser" only if the advertiser had the ability to control the consumer's statements.[28] Thus, if consumers are free to say what they wish about the product – or, if they choose, to say nothing about it – the advertiser should not face potential liability.[29]

Several comments specifically expressed concern about proposed new Example 5 to Section 255.1, with some concerned that the example suggests that bloggers potentially would be liable under Section 5 for simply giving their honest appraisal of a product and how it affected them personally.[30] Commenters also focused on the fact that the advertiser could be liable for statements made by the blogger.[31]

The Commission recognizes that because the advertiser does not disseminate the endorsements made using these new consumer-generated media, it does not have complete control over the contents of those statements. Nonetheless, if the advertiser initiated the process that led to these endorsements being made – *e.g.,* by providing products to well-known bloggers

---

[28] Bzz Agent, at 4-5; *see also* IAB, at 4 (stating that making marketers liable for "actions of third parties over whom they exercise uncertain control" could lead to unintended consequences).

[29] Bzz Agent, at 4-5.

[30] WOMMA, at 9; ANA, at 6.

[31] ANA, at 6 (stating that advertiser would be liable for blogger's statements and failure to disclose material connections); DMA, at 4-5 (stating that advertiser would be liable for statements made by blogger over whom it has no control); PMA, at 17 (stating that example appears to create liability for any company that sells a product that is reviewed by a blogger).

or to endorsers enrolled in word of mouth marketing programs – it potentially is liable for misleading statements made by those consumers.

Imposing liability in these circumstances hinges on the determination that the advertiser chose to sponsor the consumer-generated content such that it has established an endorser-sponsor relationship. It is foreseeable that an endorser may exaggerate the benefits of a free product or fail to disclose a material relationship where one exists. In employing this means of marketing, the advertiser has assumed the risk that an endorser may fail to disclose a material connection or misrepresent a product, and the potential liability that accompanies that risk. The Commission, however, in the exercise of its prosecutorial discretion, would consider the advertiser's efforts to advise these endorsers of their responsibilities and to monitor their online behavior in determining what action, if any, would be warranted.

New Example 5 should not be read to suggest that an advertiser is liable for any statement about its product made by any blogger, regardless of whether there is any relationship between the two. However, when the advertiser hires a blog advertising agency for the purpose of promoting its products – as posited by the specific facts set forth in this example – the Commission believes it is reasonable to hold the advertiser responsible for communicating approved claims to the service (which, in turn, would be responsible for communicating those claims to the blogger).

The commenters expressing concern that the blogger in new Example 5 potentially could be liable for giving her honest opinion of the product (that it cures eczema) and discussing her personal experience with it appear to have misread the example. The blogger did not either give her opinion about subjective product characteristics (*e.g.,* that she liked the fragrance) or relate her own experience with it (the example does not say that she had eczema). Rather, she made a

blanket claim that the product "cures" eczema without having any substantiation for that claim. The Commission is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

D. Comments Addressing Celebrity Endorsements

The 1980 Guides did not explicitly state that endorsers, as well as advertisers, could be liable under the FTC Act for statements they make in an endorsement. To make that potential liability more apparent to those who might be considering making an endorsement (and to those counseling prospective endorsers), the Commission's proposed revised Guides included new language in Section 255.1(d) stating that "Endorsers . . . may be liable for statements made in the course of their endorsements." The Commission's proposal also included several new examples featuring celebrities and experts. (*See, e.g.,* Section 255.0, Example 6; Section 255.1, Examples 3 and 4.)

One comment asserted that proposed new Example 6 in Section 255.0[32] suggests that any recognizable figure who speaks about the attributes of a product or service would be considered an endorser, even if the celebrity's statements are clearly scripted and do not contain an expression of personal belief.[33] This commenter also asserted that "under this new standard, when coupled with the proposed changes to endorser liability, a celebrity with a well-known voice who provides a scripted voice-over is just as liable for an advertisement's message as a

---

[32] In that example, an infomercial for a home fitness system is hosted by a well-known entertainer. The entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. The example states that even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

[33] PMA, at 12.

celebrity who promotes a product with direct statements of endorsement, such as "I use product X every day. It works for me."[34]

Two commenters stated that the proposed revisions to the Guides could unfairly expose celebrities to liability for advertising claims that they lack the knowledge to verify or the authority to change; indeed, they noted, celebrities who attempted to deviate from the script they are given might be subject to legal action for breach of contract.[35] Because the proposed revised Guides provide little guidance about when celebrities would be liable for their endorsements, according to these commenters, celebrities might become concerned about potential liability; and if so, they could be deterred from endorsing products, thereby depriving advertisers of a long-standing and valuable advertising technique.[36]

Specifically, the commenters pointed out that celebrities are under contract to read the script that is provided to them, and do not have control over the content of the final ad, including how their endorsements will appear; nor do they possess the expertise needed to assess whether a particular claim violates the FTC Act.[37] The proposed Guide revisions, they asserted, could be interpreted as imposing an obligation on celebrity endorsers to ensure that claims made by the advertiser and communicated by the celebrities are independently verified and properly substantiated – thereby requiring celebrities to educate themselves not only on the product at issue, but also on the relevant industry and competition.[38] One comment opined that absent

---

[34] *Id.*

[35] AAAA/AAF, at 11; PMA, at 13.

[36] AAAA/AAF, at 11; PMA, at 12.

[37] AAAA/AAF, at 11-13; PMA, at 13.

[38] AAAA/AAF, at 11-12; *see also* PMA, at 11.

knowledge and control, celebrity liability based solely on participation in an ad would be contrary to existing case law.[39] Another stated that it was not necessary to include a celebrity liability provision in the Guides, but to the extent that the FTC determined that such a guide is necessary, a narrowly tailored provision enumerating the circumstances under which a celebrity may be held liable would accomplish the Commission's goals without creating an unnecessary chilling effect.[40]

The commenters also asked the Commission to reconsider new Example 4 to revised Section 255.l[41] because "it could unfairly expose celebrities to liability for claims beyond his/her expertise or control."[42] They pointed out not only does the celebrity have no control over the final version of the roasting bag infomercial, but even during filming there could be activities of which the celebrity was unaware and thus for which he or she should not be held liable.[43]

The addition of new Section 255.1(d) and the new examples featuring celebrities does not create new liability for celebrities,[44] but serves merely to let them (and their advisors) know

---

[39] AAAA/AAF, at 13.

[40] PMA, at 13.

[41] In that example, a well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the roasting bag and places the bag in one oven. He then takes a bag from a second oven, removes what appears to be a perfectly cooked chicken, tastes it, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need.

[42] AAAA/AAF, at 13-14; *see also* PMA, at 14.

[43] AAAA/AAF, at 13-14; PMA, at 14 (stating that a celebrity cannot keep up with every element of production on infomercial set or know how final product will be edited).

[44] As the Commission noted in its November 2008 Federal Register notice, law

(continued...)

about the potential liability associated with their endorsement activities. Indeed, as the Commission noted when it proposed Section 255.1(d), this new provision merely "explicitly recognizes two principles that the Commission's law enforcement activities have already made clear," one of which is "that endorsers may also be subject to liability for their statements." 73 FR at 72377.

Nor should Example 6 to Section 255.0 be read to suggest that every appearance by a well-known personality will be deemed an endorsement. As the Commission previously noted, this example was added "to illustrate that the determination of whether a speaker's statement is an endorsement depends solely on whether consumers believe that it represents the endorser's own view." *Id.* Example 6 does not expand the scope of potential endorser liability but merely "clarifies that whether the person making the statement is speaking from a script, or giving the endorsement in his or her words, is irrelevant to the determination." *Id.* In this example, the celebrity's statement that the home fitness system being advertised "is the most effective and easy-to-use home exercise machine that she has ever tried" would clearly be understood by consumers as an expression of personal belief. Moreover, new Example 7 to Section 255.0 presents a situation in which well-known persons who appear in advertising are <u>not</u> deemed to be endorsers.

The Commission is not persuaded that a celebrity endorser's contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations

---

[44] (...continued)
enforcement actions have been brought against well-known personalities (*i.e.*, celebrities) who have acted as endorsers. 73 Fed Reg. at 72377 (citing *Cooga Mooga, Inc.*, 92 F.T.C. 310 (1978) (consent order)).

made in the course of that endorsement.[45] The celebrity has decided to earn money by providing an endorsement. With that opportunity comes the responsibility for the celebrity or his or her legal representative to ensure in advance that the celebrity does not say something that does not "reflect [his or her] honest opinions, findings, beliefs, or experience." *See* 16 CFR 255.1(a). Furthermore, because celebrity endorsers are liable for what they say, not for the rest of the advertisement, their lack of control over the final version of a commercial does not warrant the immunity sought by the commenters. Nor are they required to become experts on the product or the industry, although they may have an obligation to make reasonable inquiries of the advertiser that there is an adequate basis for assertions that the script has them making.

The Commission believes that the commenters misread *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004). The Ninth Circuit noted that it had previously held that direct participation in the acts in question or authority to control them was sufficient to hold an individual liable for injunctive relief, although more was required to hold that person liable for restitution. *Id.* at 900. The only issue before the court was restitution because, as the court noted, the Stipulated Final Order entered by the district court "apparently applies to the Garvey defendants and provides the FTC all of the injunctive relief it could get against [them] . . . . [A]ll the FTC stands to gain from the Garvey defendants here is restitution; the issue of injunctive relief is moot." *Id.* at 900 n.10. Although the court ultimately concluded, contrary to the Commission's view, that the "substantiation [Garvey] had was sufficient – at least for someone in [his] position" to avoid liability for restitution, *id.* at 902 (footnote omitted), that decision was based solely on the facts of that case and does not foreclose "participant" liability for celebrities.

---

[45] *Cf. FTC v. Publishing Clearing House, Inc.*, 106 F.3d 407 (9th Cir. 1997) (affirming liability for restitution of telephone solicitor who read facially deceptive script "word for word").

Finally, it should be noted that proposed new Example 4 sets forth a specific set of facts in which the celebrity is liable only for statements that he personally made that were clearly contrary to what he observed with his own eyes, not for things out of his control. That is not to say that a celebrity who participates in the making of a claim that he or she should realize is exceptional – *e.g.*, this product causes you to lose 10 pounds in 7 days – is excused from making reasonable inquiries as to the advertiser's basis for those claims, but Example 4 posits very different circumstances. Accordingly, the Commission has concluded that no additional changes should be made to proposed new Example 4.

E. Comments Addressing Revisions to Section 255.2 of the Guides – Use of Testimonials Reflecting Non-typical Consumer Experiences

Many of the comments submitted in response to the November 2008 Federal Register notice criticized the proposed changes to the provisions of Section 255.2 that address the use of testimonials that do not reflect the results consumers can generally expect to achieve using the advertised product or service.

The 1980 Guides said that a testimonial relating a consumer's experience with respect to a key attribute of the advertised product or service:

> will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve.

As revised per the November 2008 Federal Register notice, Section 255.2 would state that an ad featuring consumer testimonials will likely convey that the testimonialists' experiences are

representative of what consumers can generally expect from the product or service in actual, albeit variable, circumstances, and that:

> If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.

73 FR at 72392 (footnote omitted). Thus, the proposed revisions would eliminate the safe harbor that the 1980 Guides extended to non-typical testimonials accompanied by "results not typical" disclaimers, and require advertisers to meet the same substantiation requirements that would apply if they made that performance claim directly, rather than through the means of a testimonial.

The comments argued that the Commission does not have an adequate basis for changing the Guides in this manner; that the change would impermissibly chill truthful speech in violation of the First Amendment; and that it would simultaneously limit the use of testimonials – to the detriment of both advertisers and consumers – and impose substantial burdens on those who continue to use them. For the most part, these arguments repeat criticisms made in response to the January 2007 Federal Register notice, and thus have already been considered by the Commission.

1. Comments Arguing That the Proposed Revisions to Section 255.2 Are Unwarranted and Not Supported by Reliable Evidence

Several commenters argued that the Commission lacks an adequate basis for its proposed change to Section 255.2 because the staff's two consumer research reports[46] are flawed and/or

[46] The first report, "The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement" (hereafter "Endorsement Booklet Study"), was (continued...)

too limited in scope to warrant application to the entire advertising universe.[47] Others asserted that there is little evidence consumers are deceived by testimonials. According to these comments, consumers understand that aspirational testimonials are reflective of specific consumers' circumstances,[48] and many of the respondents in the Commission's studies who took away messages of typicality from the endorsements tested in those studies did not actually believe them, so the testimonials were not deceptive.[49] One commenter submitted the results of new consumer survey research purporting to show that changes to Section 255.2 are not needed because most consumers expect their results to differ from the featured consumer's or endorser's results, and that almost all believe that a number of factors influence the results that ordinary consumers have when using products advertised using testimonials.[50]

---

[46] (...continued)
designed to examine whether consumer endorsements communicate product efficacy and typicality, and whether any of several prominent disclosures qualify or limit the claims conveyed by the ads. The second report, "Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements," was designed to explore the communication of product efficacy and typicality by advertisements containing testimonials of individuals who claimed to have achieved specific (that is, numerically quantified) results with the advertised product or system.

[47] AAAA/AAF/CRN/DMA/DSA/ERA/IAB/PMA/C of C, at 3-4 (hereafter "C of C"); AAAA/AAF, at 6-7; PMA, at 10-11; ANA, at 2-3; ERA/CRN, at 3-4, 25 (stating that it is improper to rely on two studies of print ads to develop federal policy for all advertisements containing testimonials in any type of media, including media that were not tested in these studies).

[48] AAAA/AAF, at 6-7.

[49] ERA/CRN, at 17-20; *see also* PRSA, at 3 (questioning premise that consumers would naturally assume that endorsement represents typical results).

[50] Kelley Drye, at 9.

Two commenters noted that whether a particular disclaimer of typicality is sufficient is a determination that must be made based on the facts of the particular advertisement.[51] One argued that there was no logical connection between the Commission's concern about the legibility of disclaimers and the proposed changes to Section 255.2, and that the appropriate remedy is requiring bigger, clearer disclaimers.[52]

The staff's two consumer research reports were put on the public record in January 2007, and comments criticizing those reports were considered by the Commission when it issued the November 2008 Federal Register notice. The Commission concluded that:

> After reviewing the staff's consumer research reports (including the new tables), as well as all of the issues raised by the commenters, the Commission believes that the results of the staff's studies do provide useful empirical evidence concerning the messages that testimonials convey to consumers and the effects of various types of disclaimers on the communication of efficacy and typicality claims.

73 FR at 72385 (footnote omitted). The current comments, including the newly submitted consumer research, do not persuade the Commission that its previous conclusion was incorrect.[53]

---

[51] ERA/CRN, at 21-22; C of C, at 4 (stating that each ad containing a testimonial should be analyzed on its own merits); *see also* ANA, at 3 (stating that revisions would put the Commission's traditional case-by-case law enforcement approach into doubt).

[52] ERA/CRN, at 8.

[53] Although Kelley Drye's survey does suggest some baseline level of scepticism about testimonials, several other points about this research should be noted. First, the survey used a probability sample to recruit participants. As a result, even though participants were asked whether they would expect to do better than, the same as, or worse than individuals who gave testimonials for weight-loss or money-making programs, the survey did not screen them to determine whether they were actually interested in losing weight or in joining a money-making program. (For example, 10% of the participants who said they would lose less weight than the testimonialist explained that they were not very overweight.) Consumers who were potentially interested in such programs might have given different responses.

Second, because it was conducted by telephone, the survey asked about testimonials in

(continued...)

The Commission agrees that each ad must be evaluated on its own merits to determine whether it is misleading. The proposed revisions to Section 255.2 would not change that fundamental tenet of the Commission's approach to law enforcement. Nor would they prohibit the use of disclaimers of typicality.[54] The proposed revisions would eliminate the safe harbor for "results not typical" and similar disclaimers that developed following the issuance of the 1980 Guides, thereby putting advertisers who use testimonials on the same legal footing as those who convey the same claims to consumers directly (that is, without testimonials).

The Commission disagrees, however, with those who contend that, rather than proceed with the proposed changes to Section 255.2 and eliminate that safe harbor, it should simply require larger, clearer disclaimers.[55] Even disclaimers substantially larger than those that are

---

[53] (...continued)
the abstract, rather than showing participants ads containing testimonials and actually assessing the messages conveyed by those ads. Consumers may bring pre-existing beliefs to the ads they encounter, but the relevant issue for determining whether an ad is deceptive under Section 5 is what claims they take away from those ads.

Third, even without the persuasive power of an actual testimonial, 31% of those who were asked about testimonials for weight loss programs and 24% of those who were asked about testimonials for money-making programs said they would do as well or better than the testimonialist.

Finally, the questions that purport to address whether consumers believe a variety of factors influence the results consumers have when using products advertised by testimonials were very leading. For example, one question was "I am now going to read you a statement, please tell me if you personally agree or disagree with that statement: when using a weight-loss program, the results people experience are influenced by a variety of factors, including how closely a person follows the program, a person's own metabolism, and other factors." StrategyOne, *Testimonial Advertising Research*, at 9 (2009) (attached to Kelley Drye comment).

[54] See 73 FR at 72392 n.106.

[55] The 1980 Guides did not specify the size of, or language to be used in, disclaimers of typicality, calling instead for them to be "clear and conspicuous." The Commission frequently adopts such a performance standard for disclosures, because it recognizes that giving advertisers (continued...)

typically used by advertisers would likely not be effective. Specifically, despite the presence of strongly worded, highly prominent disclaimers of typicality, between 44.1% and 70.5% of respondents in the Endorsement Booklet Study indicated that the dietary supplement in question would reduce breathing problems, increase energy levels, or relieve pain in at least half of the people who try it. Nor would mandating larger disclaimers comport with the Commission's longstanding preference for testimonials that either reflect generally expected results or are accompanied by clear and conspicuous disclosures of what the generally expected performance would be in the depicted circumstances. *See* 73 FR at 72379 (reviewing the history of Section 255.2).

2. Argument that the proposed revisions to Section 255.2 will chill truthful speech in contravention of First Amendment

Several commenters argued that the proposed changes to the Guides would deter advertisers from using truthful testimonials – either because they would be unable to generate adequate substantiation that those testimonials reflected the results consumers could generally expect or because they would be unwilling to risk a challenge by the Commission.[56] Either way, they contend, the advertiser's First Amendment rights will be infringed. One commenter making this argument noted that it might be virtually impossible for an advertiser to determine generally expected results to the FTC's satisfaction *a priori*. Another contended that as revised, the

[55] (...continued)
flexibility to meet the specific needs of their particular message is often preferable to attempting to mandate specific language, font, and other requirements applicable across-the-board to all ads. Advertisers thus have always been free under the Guides to make their disclaimers as large and clear as they deemed appropriate to convey the necessary information to consumers.

[56] C of C, at 2; *see also* HPM, at 1 (stating that Commission would be preventing truthful speech); ERA/CRN, at 4, 6 (stating that advertisers would have "to accompany facially truthful testimonial statements with disclosures of information that may be unknowable").

Guides would either be forcing speech or imposing significant costs on truthful speech (that is, the cost of research to test the effectiveness of a disclaimer), resulting either way in a chilling effect.[57] One asserted that the proposed change raises First Amendment concerns because there are less restrictive means available to achieve Commission's goal of preventing deception – *i.e.*, requiring that the current typicality disclaimer be displayed more prominently.[58]

Finally, other commenters suggested that, notwithstanding the Commission's statement in the revised Guides that it could not rule out the possibility that a disclaimer of typicality would not be deceptive, 73 FR at 72392 n.106, marketers would not, as a practical matter, be able to proceed with such a disclaimer, regardless of how clear and conspicuous it was.[59] Thus, according to the commenters, by suppressing the use of disclaimers of typicality, the revised Guides would have the effect of chilling commercial speech.[60]

The Commission has previously addressed arguments that its proposed elimination of the safe harbor afforded by the 1980 Guides to non-typical testimonials accompanied by disclaimers of typicality contravened the First Amendment. 73 FR at 72385-87. None of the arguments raised in this new round of comments changes the Commission's conclusion that its proposed change to the Guides withstands Constitutional scrutiny. However, the Commission believes that the following points warrant reiteration.

First, although the literal words of an individual testimonial may be truthful, those words cannot be viewed in isolation. It is well established that "an ad may be amenable to more than

---

[57] ANA, at 1, 4.

[58] PMA, at 5.

[59] ANA, at 3-4 (citing FTC's reliance on the staff's studies); ERA/CRN, at 28, 30 (stating that an advertiser would face difficulty in proving that its disclaimer was not deceptive).

[60] ERA/CRN, at 28.

one reasonable interpretation." *Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *see, e.g.*, *Kraft, Inc.,* 114 F.T.C. 40, 120-21 n.8 (1991); *Thompson Medical Co.*, 104 F.T.C. 648, 787 n.7 (1984). Moreover, "[w]here an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible." *Telebrands Corp.*, 140 F.T.C. at 290; *see, e.g., Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977). A secondary message understood by reasonable consumers is actionable if deceptive, even though the primary message is accurate. *Deception Policy Statement*, 103 F.T.C. at 178 n.21; *see National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

The critical question for determining whether an ad is deceptive under Section 5 of the FTC Act – for all advertising, whether or not testimonials are involved – is what is the net impression consumers take away from the ad as a whole. The revised language in Section 255.2 would come into play only if a truthful testimonial: (1) conveys to consumers that the testimonialist's results are "representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use"; and (2) the advertiser does not have adequate substantiation for that claim. In other words, the Guides call for a disclosure only if the ad is misleading (and thus not protected by the First Amendment[61]) without a disclosure. On the other hand, if the advertisement, taken as a whole, does not convey an unsubstantiated, and thus misleading, message of typicality, no disclosure is necessary.

---

[61] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980) (commercial speech that concerns unlawful activity or is misleading is not entitled to constitutional protection and may be freely regulated).

Second, as noted above, the revised Guides would not prohibit the use of disclaimers of typicality. Although the Commission is, admittedly, skeptical that most disclaimers of typicality will be effective in preventing deception, Section 255.2 does not rule out the possibility that a clear, conspicuous, and informative disclaimer could accomplish this goal. *See* 16 CFR 255.2 n.1 (noting also that this does not affect the Commission's burden of proof in litigation). An advertiser unable to disclose what consumers can generally expect from its product could conduct consumer research to determine whether its ad is misleading.

For the foregoing reasons, the Commission concludes that the revisions to Section 255.2 will not impermissibly chill truthful speech in violation of the First Amendment.

3. The Proposed Revisions to Section 255.2 Are Impractical and Burdensome

A number of commenters asserted that the Commission's revisions to Section 255.2(b) will be impractical for advertisers to implement, and that the net effect will be detrimental both to consumers and to new businesses that have not had enough sales to generate adequate substantiation.[62] To the extent that some of these arguments echo those already made in comments submitted in response to the Commission's January 2007 Federal Register notice, the Commission has already considered them once, but does so now again.

One commenter criticized the Commission's proposed revision of the sentence in the 1980 Guides that stated that testimonials about the performance of the advertised product "will" convey typicality claims; as revised, that phrase would state that they "will . . . likely" convey

[62] *E.g.,* DMA, at 2 (stating that revisions would be a potential barrier to new businesses, or to introduction of new products); PRSA, at 5-6 (stating that removing safe harbor will work against consumers' best interests because requiring research to determine "typical results" could end up depriving them of important information).

such claims.[63] In the view of this commenter, the new language will impose a burden on advertisers by making them responsible for determining how testimonials will be interpreted. As a result, many may decide to include generally representative disclaimers that are not actually necessary, thereby entailing expensive research costs to generate the needed data.

The revision in question would recognize that, depending on how a testimonial is crafted and used in a particular ad, it might not convey a typicality claim; thus, the comment correctly points out that advertisers who use testimonials will be responsible for knowing what messages consumers take away from their ads. But advertisers already bear this responsibility. Moreover, the revision actually makes the Guides less restrictive, by allowing for the possibility that a testimonial will not convey a typicality claim, and thus not require any further qualification.

Most of the commenters who addressed the proposed changes to Section 255.2, however, asserted that those changes are problematic because many advertisers – especially those in weight loss and health-related industries – would not be able to determine what the generally expected performance would be in the depicted circumstances, and thus would no longer be able to use aspirational testimonials. Specifically, they contend, determining generally expected results is impractical or extremely difficult for products whose results differ depending on the individual physiology of participants and their commitment to the program.[64] The hardship imposed by eliminating the use of disclaimers of typicality would be especially great, according to the commenters, for those small businesses and new companies that will not have sufficiently

---

[63] AAAA/AAF, at 4-5.

[64] *E.g.,* C of C, at 3; AAAA/AAF, at 9; ERA/CRN, at 5-6; *see also* NPA, at 1-2.

large pools of customers from whom generally expected results can be culled, and thus they will not be able to use testimonials.[65]

Other commenters raised questions about the nature and scope of the study that would satisfy the Commission for purposes of determining what results consumers can generally expect from the advertised product, including whether results from controlled studies could be used.[66] Two comments asserted that any disclosure that attempted to explain all the factors that could affect the results consumers could generally expect from the advertised product could itself be deceptive.[67] In the end, the commenters contend, advertisers would either incur substantial costs trying to create substantiation that will meet the Commission's approval or cease using truthful,

---

[65] PMA, at 11; ERA/CRN, at 3 (stating that requiring disclosure of "generally expected results" supported by the level of substantiation generally required of any other material claim "will work substantial hardship on many advertisers for many products," especially advertisers of new products).

[66] NPA, at 2 (stating that the Commission's assertion in the November 2008 Federal Register notice that marketers would be able to design reliable studies of product efficacy did not appear to be based on anything other than optimism, and did not address whether data from controlled studies – that might differ from consumers' experiences in non-controlled settings – would be acceptable); PMA, at 7-8 (questioning whether the "typical consumer" includes everyone who signed up or only those who finished program); C of C, at 2 (stating that there is "no way to be sure how real consumers will use an exercise device when no one is monitoring them"; "it may not be feasible to generate typicality data that would meet the Commission's strict standards for the substantiation of such claims"); ERA/CRN, at 4-5 (stating that the FTC does not explain the basis for its confidence that methodologically sound means of determining generally expected results can be devised for most products; scientific tests may show nothing about average results consumers can expect when results derive from frequency, intensity and commitment with which consumers use the product in question); *see also* AAAA/AAF, at 8 (stating that the determinations required by the Guides would likely require costly studies).

[67] PRSA, at 6 (stating that disclosure would be confusing because of the amount of information advertisers would have to provide); PMA, at 3.

aspirational testimonials.[68] Based on these considerations, the commenters maintain that the FTC should continue to allow disclaimers of typicality.[69]

At the outset, the Commission notes that some of the comments misread the proposed revisions to Section 255.2 as requiring them to determine with precision what "the typical consumer" would achieve with the product.[70] This is not what the Commission intends.

Advertisers are not required to identify a "typical consumer" of their product and then determine what result that consumer achieved. Rather, the required disclosure in this circumstance is "the *generally expected* performance in the *depicted circumstances*." Thus, advertisers are provided some reasonable leeway to make this disclosure. For example, the term "generally expected results" is used rather than "average" in order to convey that this disclosure would not have to be based on an exact mathematical average of users of the product, such as might be developed from a valid survey of actual users. For example, substantiation for a "generally expected results" disclosure could be extrapolated from valid, well-controlled clinical

---

[68] ERA/CRN, at 6 (stating that the Commission would be setting up a Hobson's choice for marketers: abstain from using truthful testimonials because information about typical results is unobtainable, or risk FTC action); ANA, at 1 (stating that "advertisers fearing FTC enforcement proceedings may be forced to incur substantial costs trying to create quantitative support for the typicality of a testimonial statement or to refrain from providing truthful information to consumers"); NPA, at 2 (stating that the fact that consumers' habits vary widely "creates confusion about what constitutes a typical consumer in the first place").

[69] *E.g.,* PMA, at 8 (stating that "Because there is no 'typical' or 'average' consumer and there are so many variables impacting weight loss or medical conditions, a typicality disclaimer is in fact the best way to properly disclose the limited applicability of testimonial results.").

[70] C of C, at 2 (stating that "There may be no real doubt that the product is effective for consumers generally, 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." (footnote omitted)); PMA, at 7 (stating that it is impossible to capture substantiation for the "'typical consumer' experience" because there is no such thing as a typical consumer when it comes to weight loss or health care); *see also* PRSA, at 5-6 (noting the difficulty in determining "typical results").

studies of patients matching the profile of the persons in the ad, even though consumers' real world results are not likely to match exactly the results in the clinical study.[71] In some instances, advertisers may rely on generally accepted scientific principles (*e.g.,* the average individual needs a net calorie deficit of 3,500 calories to lose 1 pound) to determine generally expected results.

In other cases, the advertiser may be able to limit the scope of the disclosure by limiting the circumstances depicted in the advertisement. For example, if all of the testimonials used in an advertisement are clearly identified as persons who have been members of a weight loss clinic for at least one year, the disclosure can be based on performance data from that group.[72] In any event, the disclosure of generally expected results should clearly identify the group from which the data were obtained.[73]

The Commission recognizes that differences in physiology and commitment will affect the results that individual consumers will get from a particular weight loss or fitness product or program. The proposed revisions to Section 255.2 do not prescribe a uniform one-size-fits-all disclaimer, however, and an advertiser could take these factors into consideration in crafting a

---

[71] If such studies are adequate to reasonably substantiate the efficacy claim of the product for the target audience of the ad, there is no reason why they could not reasonably be relied on to substantiate a "generally expected results" disclosure, provided that the data generated by the studies are relevant to the subjects of the ad at issue and the disclosure is not otherwise misleading. For example, it would be problematic to extrapolate from a study using obese young men to an ad using testimonials from older overweight women.

[72] The disclosure should also describe the source of the data.

[73] As well as identifying the group for whom those data are relevant, the disclosure should set forth other information that would be meaningful in assessing the study's results, such as the duration of the study. For example, in an ad showing formerly overweight men, a disclosure might state "in an 8-week clinical study, men who were at least 30 pounds overweight lost an average of 2 pounds per week."

disclosure. With meaningful disclosures, consumers not only would have a realistic sense of what they can expect from a product or service, but could also take away the message that if they dedicate themselves as much as the testimonialist did, they might achieve even more.[74]

Nevertheless, as the Commission recognized in the November 2008 Federal Register notice, 73 FR at 72382, some advertisers may not have the information available to them to be able to disclose the generally expected performance of their product or service to consumers. In these cases, advertisers using testimonials need either to exercise care not to convey a typicality claim, or to rely on statements of general endorsement of the product, *e.g.,* "I've tried many products and this was the best."[75]

Disclosing the results consumers can generally expect from the advertised product under the circumstances depicted in the ad will entail costs associated with the data collection and analysis. Those costs, however, are no different from what the advertiser would incur if it made the same performance claim directly, rather than though a testimonial, and there is no reason why the substantiation requirements should differ between the two forms of advertising if the message conveyed to consumers is the same. Nor is there any reason why a new company that might not yet have data showing how well its product performs should be allowed to convey a

---

[74] Even truthful consumer testimonials provide only marginally useful information to consumers. In general, it is impossible for consumers to verify the reported experiences. Indeed, even the testimonialist may incorrectly attribute the performance benefit to the product. The additional disclosures will, on the whole, provide more useful information to consumers than the ritualistic "results not typical" disclaimers, even if they are not without some flaws.

[75] If the advertiser does not yet have sufficient information as to the results consumer can generally expect to achieve with its product, it can still use general testimonials – *i.e.,* testimonials that do not make specific performance claims – provided the net takeaway of the ad is not misleading. For example, a testimonialist might praise the taste of a company's reduced calorie foods, or the fact that a particular exercise video was the "best ever."

performance claim through testimonials that it would not be able to substantiate if it made that claim directly.

The effect of the revision at issue is to treat ads that use testimonials the same as all other ads. Section 5 of the FTC Act requires advertisers to have substantiation for the messages that consumers reasonably take from their ads, which means they must first know what messages consumers take away from those ads. The Commission sees no reason why an advertiser should be exempt from those basic obligations simply because it chooses to communicate its claims through the use of testimonials; yet, that is precisely the effect of the safe harbor afforded by the 1980 Guides. Accordingly, the Commission concludes that the safe harbor for non-typical testimonials accompanied by disclaimers of typicality should be eliminated, and the revisions to Section 255.2 of the Guides that were proposed in the November 2008 Federal Register notice should be adopted in final form without further revision, except for the addition of the phrase "or service" in Section 255.2(b) and the revisions to news Example 4 and 7 discussed below.

4. Revisions to Examples 4 and 7 in Section 255.2

The Commission is modifying and expanding a new example proposed in November 2008 in which a testimonialist touts the results she achieved using a product called WeightAway under an extreme regimen (exercising 6 hours daily and eating nothing but raw vegetables). Two new fact patterns added to the example demonstrate how the description of the circumstances under which a testimonialist achieved her results can determine the information that should be disclosed in the advertisement.

Thus, when the ad just features "before" and "after" pictures with the caption "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot

generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* "most women who use WeightAway for 6 months lose at least 15 pounds"). Similarly, if the testimonialist in an ad with those two pictures simply says, "I lost 50 pounds with WeightAway" without any mention of how long it took to achieve those results, and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* "most women who use WeightAway lose 15 pounds").

In November 2008, the Commission also proposed a new Example 7 to Section 255.2, in which theater patrons express their views about a movie they have just seen. The example stated that the advertiser "does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie, because this advertisement is not likely to convey a typicality message." The Commission is revising this example to explain that the reason no typicality message would be conveyed is that the patrons' statements would be understood to be the subjective personal opinions of only three people.

F. Section 255.3 – Expert Endorsements

Although no comments addressed this particular example, the Commission has decided to revise proposed new Example 6 to Section 255.3 because it could erroneously be read to suggest that a medical doctor or comparably qualified expert could properly make performance claims for a cholesterol-lowering drug based solely on consumer letters and the results of a study using an animal model. As revised, the example states that the doctor's endorsement would likely be deceptive because those materials are not what others with the same level of expertise would consider adequate to support those claims.

G. Comments Addressing Section 255.4 of the Guides – Endorsements by Organizations

Although the Commission's November 2008 Federal Register notice did not propose any changes to Section 255.4 of the Guides, one commenter asked a question about that provision, which states that "an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization" (emphasis added).[76] Specifically, the commenter requested confirmation that action by an organization's governing body, such as its Board of Directors, is not the kind of "collective judgment" required, and that "an objective evaluation by a qualified and competent organization staff person, or group of staff members, is sufficient."[77]

The Commission agrees that an organization's governing body need not necessarily participate in the process; however, the decision of a single staff person might not be sufficient to ensure that the process reflects the organization's "collective judgment" and certainly might not be "generally free of the sort of subjective factors that vary from individual to individual." 16 C.F.R § 255.4.

The organization should have a process in place to ensure that its endorsements reflect the "collective judgment of the organization." For example, the organization's management could adopt specific procedures and standards to be applied in the review process, including, for example, clear statements concerning the qualification of the individual(s) conducting the review,[78] the criteria against which products are to be judged, and any other requirements or

---

[76] NAR, at 2.

[77] *Id.*

[78] Because of the specialized nature of some of the products that this organization might (continued...)

prohibitions management deems appropriate (*e.g.,* prohibitions against staff members reviewing products in which they have a financial interest).

The Commission is also deleting an unnecessary cross-reference to Section 255.3 that previously appeared at the end of the example to Section 255.4.

H. Comments Addressing Revisions to Section 255.5 of the Guides – Disclosure of Material Connections Between Advertisers and Endorsers

The comments filed in response to the November 2008 Federal Register notice raise a number of issues concerning the disclosure of material connections between advertisers and endorsers: (1) whether, in the case of new, consumer-generated media, the disclosure obligation falls upon the advertiser or the endorser, and to the extent that the disclosure obligation falls on the endorser, whether the advertiser is potentially liable if the endorser fails to make that disclosure; (2) whether simply receiving a product, without any accompanying monetary payment, triggers a disclosure obligation; and (3) the potential implications of the Commission's proposed new Example 3 concerning celebrity endorsements in nontraditional media, and proposed new Examples 7-9, in which the obligation to disclose material connections is applied to endorsements made through certain new media.

1. Obligation to Disclose Material Connections in Endorsements Conveyed Through New Consumer-Generated Media

When the Commission adopted the Guides in 1980, endorsements were disseminated by advertisers – not by the endorsers themselves – through such traditional media as television

---

[78] (...continued)
review, readers of its membership publication might view it as having expertise in these products. In that case, the organization would have to use an expert (who could be a staff member), or "standards previously adopted by the organization and suitable for judging the relative merits of such products." 16 CFR 255.4.

commercials and print advertisements. With such media, the duty to disclose material connections between the advertiser and the endorser naturally fell on the advertiser.

The recent creation of consumer-generated media means that in many instances, endorsements are now disseminated by the endorser, rather than by the sponsoring advertiser. In these contexts, the Commission believes that the endorser is the party primarily responsible for disclosing material connections with the advertiser. However, advertisers who sponsor these endorsers (either by providing free products – directly or through a middleman – or otherwise) in order to generate positive word of mouth and spur sales should establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of those endorsers.[79]

The Commission notes in this regard that the Word of Mouth Marketing Association's ("WOMMA") code of ethics says that word of mouth advocates should disclose their relationship with marketers in their communications with other consumers; and that marketers should effectively monitor disclosure of their word of mouth advocates.[80] The WOMMA Code also requires advocates to disclose the source of product samples or incentives received from marketers.[81]

---

[79] The Commission's view that these endorsers have an obligation to disclose material connections with their sponsoring advertisers should not be seen as reflecting a desire on the part of the Commission either to deter consumers from sharing their views about products they like with others or as an indication the Commission intends to target consumer endorsers who use these new forms of consumer-generated media. As with traditional media, the Commission's law enforcement activities will continue to focus on advertisers.

[80] WOMMA, at 7.

[81] *Id.* at 8.

The development of these new media has, however, highlighted the need for additional revisions to Section 255.5, to clarify that one factor in determining whether the connection between an advertiser and its endorsers should be disclosed is the type of vehicle being used to disseminate that endorsement – specifically, whether or not the nature of that medium is such that consumers are likely to recognize the statement as an advertisement (that is, as sponsored speech). Thus, although disclosure of compensation may not be required when a celebrity or expert appears in a conventional television advertisement, endorsements by these individuals in other media might warrant such disclosure.

2. Does Receipt of a Product, Without Monetary Compensation, Constitute a Material Connection That Must Be Disclosed?

Several commenters asked whether an advertiser's provision of a free sample to a consumer in and of itself was a material connection that would have to be disclosed by that consumer and, if so, whether there was a monetary value associated with that item below which that obligation would not be triggered.[82] One commenter asserted that modern companies that distribute product samples to promote word of mouth are analogous to companies that distribute free samples in grocery stores.[83] That commenter further asserted that the Guides, as written, might cover both situations, even though neither distributor controls what is said about the products being distributed and the consumers are not compensated in either case.[84]

---

[82] BzzAgent, at 9 (stating that if consumers are under no obligation to say anything about the products they have received, the provision of those free samples might not be material to other consumers in evaluating that person's opinion); PCPC, at 2 (acknowledging that receipt of product with high value, such as a car, would be material).

[83] BzzAgent, at 7.

[84] *Id.* at 7-8.

The threshold issue is whether the speaker's statement qualifies as an "endorsement," under the Guides. If not, no disclosure need be made. However, if the statement does qualify as an "endorsement" under the construct set forth above for determining when statements in consumer-generated media will be deemed "sponsored" (see Section II.A.2 of this notice), disclosure of the connection between the speaker and the advertiser will likely be warranted regardless of the monetary value of the free product provided by the advertiser.[85] For example, an individual who regularly receives free samples of products for families with young children and discusses those products on his or her blog would likely have to disclose that he or she received for free the items being recommended. Although the monetary value of any particular product might not be exorbitant, knowledge of the blogger's receipt of a stream of free merchandise could affect the weight or credibility of his or her endorsement – the standard for disclosure in Section 255.5 – if that connection is not reasonably expected by readers of the blog. Similarly, receipt of a single high-priced item could also constitute a material connection between an advertiser and a "sponsored" endorser.

Participants in network marketing programs are also likely to be deemed to have material connections that warrant disclosure. The Commission disagrees with the assertion that modern network marketing programs are just updated versions of traditional supermarket sampling programs. The primary goal of those programs was to have the shopper who tasted the advertiser's product continue down the grocery store aisle and purchase the product. The primary goal of the new viral marketing programs is to have these individuals "spread the word" about the product, so that other consumers will buy it.

---

[85] If the blogger is actually paid by the advertiser or a third party acting on its behalf, disclosure certainly will be warranted.

The Commission recognizes that, as a practical matter, if a consumer's review of a product disseminated via one of these new forms of consumer-generated media qualifies as an "endorsement" under the construct articulated above, that consumer will likely also be deemed to have material connections with the sponsoring advertiser that should be disclosed. That outcome is simply a function of the fact that if the relationship between the advertiser and the speaker is such that the speaker's statement, viewed objectively, can be considered "sponsored," there inevitably exists a relationship that should be disclosed, and would not otherwise be apparent, because the endorsement is not contained in a traditional ad bearing the name of the advertiser.[86]

3. New Examples Applying Guide Principles Concerning Disclosure of Material Connection

a. New Example 3 – Celebrity Endorsements in Nontraditional Contexts

Several comments addressed proposed new Example 3, which applied the principles set forth in Section 255.5 to the situation in which a celebrity who has entered into a contract with a surgical clinic that calls for her to speak publicly about her own surgical experience praises that clinic during a television interview. The commenters stated that an advertiser cannot control what a celebrity says in a given interview, or whether the celebrity (or the interviewer) will make the necessary disclosure; therefore, they argue, the advertiser should not be liable either for misstatements made by the celebrity or for the failure of the relationship between the endorser

[86] Letter from Mary K. Engle, Associate Director for Advertising Practices, to Gary Ruskin, Commercial Alert, at 4 (Dec. 7, 2006) ("[I]n some word of mouth marketing contexts, it would appear that consumers may reasonably give more weight to statements that sponsored consumers make about their opinions or experiences with a product based on their assumed independence from the marketer," and that in those circumstances, "it would appear that the failure to disclose the relationship between the marketer and the consumer would be deceptive unless the relationship were otherwise clear from the context.") (footnote omitted).

and the advertiser to be disclosed.[87] One commenter also noted that the disclosure of the connection between the advertiser and the celebrity is unnecessary because "if most people understand that celebrities are paid for touting products in advertisements, it stands to reason they also understand the nature of a paid spokesperson's relationship with advertisers."[88] Commenters also noted that even if the celebrity disclosed his or her relationship with the advertiser, the show's producers could edit that disclosure out of the final version of the program that was ultimately aired. Imposing liability on the advertiser in such a situation, they contend, would be unfair.[89]

The Commission disagrees with the contention that disclosure in new Example 3 of the relationship between the celebrity and the clinic is unnecessary. Disclosure is appropriate because given the medium in which the celebrity praises the clinic – a talk show, not a conventional advertisement – consumers might not realize that the celebrity was a paid endorser, rather than just a satisfied customer.

The commenters are correct, however, that an advertiser does not have control over what a celebrity says in an interview. Nor can the advertiser prevent the producers of that program from editing out of the final version of the interview a disclosure that would have been sufficient to inform viewers of the celebrity's contractual relationship with the advertiser. However, if the advertiser has decided that it is advantageous to have the celebrity speak publicly about its

---

[87] PMA, at 15 (stating that celebrity may make statement that is unsubstantiated or unauthorized by contract).

[88] PMA, at 16; *see also* AAAA/AAF, at 14-15 (stating that it is inexplicable and unfair to impose a different disclosure requirement on celebrities in a non-traditional context than in traditional advertising context).

[89] PMA, at 15; AAAA/AAF, at 15-16.

product or service, the Commission believes that the advertiser has the concomitant responsibility to advise the celebrity in advance about what he or she should (and should not) say about that product or service, and about the need to disclose their relationship in the course of the interview.

Evidence that the advertiser did so would provide a strong argument for the exercise of the Commission's prosecutorial discretion in the event the celebrity failed to disclose his or her relationship with the advertiser or made unauthorized claims about the advertiser's product,[90] or if the celebrity properly disclosed the relationship but that disclosure was ultimately edited out of the program. Because the Commission considers each advertisement on a case-by-case basis, the particular facts of each situation would be considered in determining whether law enforcement action would be appropriate.

b. Examples 7-9 – New Media

Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.[91] Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission's prior commitment to address word of mouth marketing issues on a case-by-case basis.[92] Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the

---

[90] The celebrity, however, could still be liable for any misleading statements she made, or for her failure to disclose her relationship with the advertiser.

[91] DMA, at 5; ANA, at 6-8; C of C, at 4-6; AAA/AAF, at 16 (stating that it is unfair to put the burden of potential liability on bloggers and other viral marketers); ERA/CRN, at 36-38.

[92] ANA, at 2; ERA/ERN, at 33-34.

growth of these (and other) new media.[93] Two commenters said that industry self-regulation is sufficient.[94]

The Commission's inclusion of examples using these new media is not inconsistent with the staff's 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of "buzz marketing" were appropriate.[95] All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission could challenge the dissemination of deceptive representations made via these media regardless of whether the

---

[93] IAB, at 2 (stating that the FTC should not adopt them, in light of "the evolving nature of the marketing industry and the need for further inquiry"; "[e]stablishing new legal liabilities for marketers, publishers, and platform providers could restrict the supply of advertising revenue that is just beginning to flow into this nascent marketplace"); C of C, at 5 (stating that new Examples 7, 8, and 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."); ERA/CRN, at 33 (stating that more discussion of these issues is needed first); *see also* ANA, at 5 (stating that the examples increase uncertainty by raising more questions than they answer); PMA, at 19 (stating that the Commission should not adopt them); BzzAgent, at 11-12 (suggesting revisions); DMA, at 5 (stating that new media channels should be considered in separate proceeding that takes into account their unique characteristics); ERA/CRN, at 33, 35.

[94] AAAA/AAF, at 18 (citing WOMMA guidelines); ERA/CRN, at 34 (same); *see also* ANA, at 1, 5 (stating that the new examples interfere with self-regulation in this area).

[95] Letter from Mary K. Engle, Associate Director for Advertising Practices, to Gary Ruskin, Commercial Alert, at 5 (Dec. 7, 2006) (noting that petitioners define "buzz marketing" as that in which marketers compensate consumers for disseminating messages to other consumers, without disclosing the marketer's relationship with the consumer). Indeed, the references to the Guides in the staff's letter suggested that the Guides' principles are applicable to these new marketing tools.

Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.[96]

The Commission is not restating here all of the individual questions and criticisms raised by the commenters with respect to these three examples. As noted above, a marketer presumably would not have initiated the process that led to endorsements being made in these new media had it not concluded that a financial benefit would accrue from doing so. Therefore, it is responsible for taking the appropriate measures to prevent those endorsements from deceiving consumers. The Commission is revising Example 7, however, to clarify two points. First, the reason this endorser should disclose that he received the video game system for free – even though he is known as an expert in the video gaming community – is that his consumer-generated endorsement appears in a medium that does not make his association with the advertiser apparent to consumers. Second, as revised, Example 7 states more clearly that although the blogger has primary responsibility for disclosing that he received the video game system for free, the manufacturer has an obligation to advise the blogger at the time it provides the gaming system that he should make the disclosure in any positive reviews of the system. The manufacturer also should have procedures in place to attempt to monitor the blogger's statements about the system to ensure that the proper disclosures are being made and take appropriate steps if they are not (*e.g.,* cease providing free product to that individual).

One commenter asked whether, if the blogger in Example 7 should disclose that he received the video game system for free, must every critic disclose that a reviewed item was

---

[96] The Commission's views as to the vibrancy of these new media and the importance of having law enforcement to support industry self-regulation are discussed in Part II.A.2 above.

provided for free?[97] According to the commenter, reviewers in traditional media do not have to disclose this information, and reviewers in nontraditional media platforms such as blogs, online discussion boards, and street teams should not be treated any differently.[98] This commenter also noted that given marketers' lack of control over "what employees say on online discussion boards, or what street team members say to their friends," it would be impracticable for them to ensure that material connections are disclosed in endorsements made using these media, and unclear what steps marketers would have to take to prevent endorsers from failing to disclose material connections with the marketer.[99]

The Commission acknowledges that bloggers may be subject to different disclosure requirements than reviewers in traditional media. In general, under usual circumstances, the Commission does not consider reviews published in traditional media (*i.e.,* where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages. Accordingly, such reviews are not "endorsements" within the meaning of the Guides.[100] Under these circumstances, the Commission believes, knowing whether the media entity that published the review paid for the item in question would not affect the weight consumers give to the reviewer's statements.[101] Of

---

[97] C of C, at 6.

[98] *Id.*

[99] *Id.*

[100] See Example 1 to Section 255.0 (movie review becomes an endorsement only when it is used by the motion picture studio in its own advertisement).

[101] The Commission's view would be the same if the employee worked for an Internet news website with independent editorial responsibility, rather than a traditional brick-and mortar

(continued...)

course, this view could be different if the reviewer were receiving a benefit directly from the manufacturer (or its agent).

In contrast, if a blogger's statement on his personal blog or elsewhere (*e.g.,* the site of an online retailer of electronic products) qualifies as an "endorsement" – *i.e.,* as a sponsored message – due to the blogger's relationship with the advertiser or the value of the merchandise he has received and has been asked to review by that advertiser, knowing these facts might affect the weight consumers give to his review.

With respect to Example 8, one commenter asserted that if the employer has instituted policies and practices concerning "social media participation" by its employees, and the employee fails to comply with such policies and practices, the employer should not be subject to liability.[102] The Commission agrees that the establishment of appropriate procedures would warrant consideration in its decision as to whether law enforcement action would be an appropriate use of agency resources given the facts set forth in Example 8. Indeed, although the Commission has brought law enforcement actions against companies whose failure to establish or maintain appropriate internal procedures resulted in consumer injury, it is not aware of any instance in which an enforcement action was brought against a company for the actions of a single "rogue" employee who violated established company policy that adequately covered the conduct in question.[103]

---

[101] (...continued)
periodical.

[102] WOMMA, at 9-10.

[103] *Cf. Eli Lilly*, 133 F.T.C. 763, 767 (2002) (consent order) (although the disclosure of consumers' personal information resulted from the actions of one employee, the Commission's complaint makes it clear that the underlying cause was "[Lilly's] failure to maintain or
(continued...)

The Commission does not believe, however, that it needs to spell out the procedures that companies should put in place to monitor compliance with the principles set forth in the Guides; these are appropriate subjects for advertisers to determine for themselves, because they have the best knowledge of their business practices, and thus of the processes that would best fulfill their responsibilities.

4. Example 1 (sponsorship of clinical trials)

In response to the Commission's January 2007 Federal Register notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides, 72 FR 2214 (Jan. 18, 2007), the Attorneys General of 33 States and Territories and Hawaii's Office of Consumer Protection (collectively, the "Attorneys General") suggested that a new provision be added stating that when an ad relies on a study that was sponsored by the advertiser itself, the ad should clearly disclose this information. 73 FR at 72390. The Attorneys General also pointed out that although the Guides require disclosure of material connections between endorsers and advertisers, Example 1 to Section 255.5 stated that an advertiser's payment of expenses to an outside entity that conducted a study subsequently touted by the advertiser as the findings of a research organization need not be disclosed, an outcome the Attorneys General thought was inconsistent with the general principles of Section 255.5.

Although the Commission did not propose substantive changes to Example 1 in November 2008, it now has reconsidered its previous conclusion that knowledge of the advertiser's sponsorship of the research would not materially affect the weight consumers would place on the reported results. Consumers reasonably can be more skeptical about research

---

[103] (...continued)
implement internal measures appropriate under the circumstances to protect sensitive consumer information.").

conducted by outside entities but funded by the advertiser than about studies that are both conducted and funded independently, because financial interest can create bias (intentional or unintentional) in the design of a study.[104] Accordingly, the Commission now is revising Example 1 to call for disclosure of the relationship between the advertiser and the research organization.

III. SECTION-BY-SECTION REVIEW OF ADDITIONAL CHANGES TO PROPOSED GUIDES PUBLISHED IN NOVEMBER 2008

A. Section 255.0

The Commission is adding the following new Example 8 to Section 255.0:

> **Example 8:** A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.
>
> Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new

---

[104] *See* John Abramson & Barbara Starfield, "The Effect of Conflict of Interest on Biomedical Research and Clinical Practice Guidelines: Can We Trust the Evidence in Evidence-Based Medicine?," J. Amer. Bd. Fam. Pract., Vol. 18 No. 5, 414-18 (Sept.-Oct. 2005); *see also* Cary P. Gross, Yale Univ. Sch. Med., "Conflict of Interest and Clinical Re$earch: Ethical and Regulatory Aspects of Clinical Research" (2009), http://www.bioethics.nih.gov/hsrc/slides/Gross%20NIH%20COI%202009%20draft%201.pdf (last visited Oct. 1, 2009).

brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

B. Section 255.1

The Commission is deleting from Section 255.1(a) the proposed cross-reference to the proposed new Example 3 in Section 255.3. The Commission is also revising the proposed new Example 3 in Section 255.1 by adding the following cross-reference: "[*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.]"

The Commission is revising the fifth and sixth sentences in proposed new Example 5 to clarify that the advertiser and the blogger both are subject to liability for misleading or unsubstantiated representations made in the course of the blogger's endorsement.

C. Section 255.2

The Commission is adding the phrase "or service" before the phrase "in actual, albeit variable, conditions of use" in the first sentence of Section 255.2(b).

The Commission also is replacing the proposed new Example 4 with the following:

> **Example 4:** An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, "Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the

end of six months, I had gone from 250 pounds to 140 pounds." The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features "before" and "after" pictures of a woman who says "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* "most women who use WeightAway for six months lose at least 15 pounds").

If the ad features the same pictures but the testimonialist simply says, "I lost 50 pounds with WeightAway," and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* "most women who use WeightAway lose 15 pounds").

The Commission is also revising the third sentence of the first paragraph of the proposed new Example 7 in Section 255.2 to read as follows: "The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message."

C. Section 255.3

In the second sentence of the proposed new Example 6, the Commission is revising the phrase "the endorsement would be deceptive assuming those materials are not" to "the endorsement would likely be deceptive because those materials are not. . . ."

D. Section 255.4

The Commission is deleting the cross-reference to Section 255.3 that previously appeared at the end of the example to Section 255.4.

E. Section 255.5

The Commission is revising Section 255.5 to make it clear that the duty to disclose material connections between advertisers and endorsers may depend on the particular medium used to disseminate that endorsement.

The Commission is revising the proposed new Example 3 by replacing the phrase "Consumers would not expect" with "Consumers might not realize," and by adding a new

hypothetical, in which the tennis player endorses the clinic via a posting on a social networking service.

The Commission is also revising the proposed new Example 7, first to clarify that in the case of endorsements disseminated via consumer-generated media, the relationship between the advertiser and the endorser may not be apparent, thereby requiring disclosure by experts that might not otherwise be necessary, and second to make the advertiser's obligations more apparent.

> **Example 7:** A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Finally, the Commission is revising the last two sentences of Example 1 to provide that an advertiser should disclose its payment of expenses to an outside entity that conducts a study subsequently touted by the advertiser: "Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement."

IV. REVISED ENDORSEMENT AND TESTIMONIAL GUIDES

List of Subjects in 16 CFR Part 255

Advertising, Consumer protection, Trade practices.

Accordingly, for the reasons set forth in the preamble, the Federal Trade Commission amends 16 CFR part 255 of the Code of Federal Regulations to read as follows:

Part 255 – Guides Concerning Use of Endorsements and Testimonials in Advertising

Sec. 255.0 Purpose and definitions.

255.1 General considerations.

255.2 Consumer endorsements.

255.3 Expert endorsements.

255.4 Endorsements by organizations.

255.5 Disclosure of material connections.

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41 - 58.

§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means 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. 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.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. [*See* § 255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One

comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably

softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [*See* §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with

the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [*See* § 255.1(b) regarding the "good reason to believe" requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [*see* § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

> **Example 1**: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's

endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement.

The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [*See* § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ **255.2 Consumer endorsements.**

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as

representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.[1]

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth

[1] The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, "Notice: These testimonials do not prove our product works. You should not expect to have similar results," the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, "Results not typical" or, "These testimonials are based on the experiences of a few people and you are not likely to have similar results" is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings

and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, "the average homeowner saves $35 per month," "the typical family saves $50 per month during cold months and $20 per month in warm months," or "most families save 10% on their utility bills."

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (*i.e.*, a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, "Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds." The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly

describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features "before" and "after" pictures of a woman who says "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.,* "most women who use WeightAway for six months lose at least 15 pounds").

If the ad features the same pictures but the testimonialist simply says, "I lost 50 pounds with WeightAway," and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.,* "most women who use WeightAway lose 15 pounds").

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 6: An advertisement purports to portray a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words "hidden camera" are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because

the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [*See* § 255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a

result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [*See* § 255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as "Doctor" during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical "doctor" (*e.g.*, an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as "doctor," the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its name, consumers would infer

that the "American Institute of Science" is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (*e.g.*, if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice – convenience of packaging – is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their

business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [*See* § 255.1(d) regarding the liability of endorsers.]

> **Example**: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

> **Example 1:** A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the "findings" of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project.

Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the

celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery – mentioning the clinic by name – on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

Example 4: An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the

best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak." This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge.

The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

By direction of the Commission.

Donald S. Clark
Secretary