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The Association of National Advertisers (“ANA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) for public comments on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”). *See Notice of proposed changes to Guides. Request for public comments.* 73 Fed. Reg. 72374 (Fed. Trade Comm’n Nov. 28, 2008) (“Comment Request”).

The Commission has favored and encouraged self-regulation in the testimonial and endorsements area. By changing the Guides in fundamental ways and inserting assumptions about the way certain marketing practices work, the Commission is not effectively supporting self-regulation and could undermine its efforts. For these reasons, ANA respectfully urges the Commission (1) to refrain from eliminating the explicit option of clearly and conspicuously disclaiming typicality; and (2) to refrain from adding several of its new examples, particularly section 255.5 Examples 7-9, which are unnecessary and confusing attempts to “modernize” the Guides and usurp the role of self-regulation in this area.

I

THE CURRENT GUIDES STRIKE THE RIGHT BALANCE BETWEEN COMPETING INTERESTS AND ARE EFFECTIVELY USED IN ENFORCEMENT AGAINST DECEPTIVE ADVERTISING

The current Guides provide useful and meaningful criteria for compliance evaluation. They appropriately reflect the core values concerning deception and unfairness. The current Guides attempt to strike an appropriate balance between (1) a governmental interest in protecting consumers from receiving deceptive information when making their commercial decisions; (2) the advertiser's interest in communicating as effectively as possible useful information about their products and services; and (3) the burden of conducting appropriate pre-publication studies to address the substantiation of certain claims. As ANA described in its 2007 Comment to the Endorsement Guides Review Project ("2007 ANA Comment"), the effectiveness of the current Guides and their core principles was demonstrated by the staff opinion dated December 7, 2006, responding to the Petition by Commercial Alert, which requested investigations into companies that engage in "buzz marketing." See Comment of the Association of National Advertisers, <http://www.ftc.gov/os/comments/endorsementguides/527492-00016.pdf> (last visited Feb. 27, 2009). In concluding that specific guidelines for "buzz marketing" were not necessary, the Commission staff made reference to the Guides and stated that the determinations for law enforcement actions will be made on a case-by-case basis.

As set forth in the 2007 ANA Comment, the Commission has aggressively pursued enforcement actions pertaining to endorsements and testimonials, and the framework for the Guides has been the basis for the determination of Section 5 violations in this area. The 2007 ANA Comment provided a detailed index of enforcement actions brought by the FTC, state attorneys general, private parties (through litigation under the Lanham Act), and the National Advertising Division ("NAD"), each using the framework of the Guides to challenge effectively the potentially deceptive use of testimonials and endorsements. The Commission in its Comment Request has provided no adequate indication why these multiple layers of regulatory and self-regulatory enforcement that already exist to carry out the goals of the Guides are inadequate and require this proposed change. The Guides – and their criteria forming the basis for deception analysis – have been utilized by the Commission in enforcement actions and staff opinion letters, state enforcement actions, private parties in Lanham Act litigation, and self-regulatory proceedings at the NAD. ANA strongly believes that the Guides strike an appropriate balance between the governmental and business interests presented. Therefore, we respectfully submit that structural changes to the Guides are not warranted.

II

THE FTC SHOULD NOT CAST DOUBT ON THE OPTION OF CLEARLY AND CONSPICUOUSLY DISCLAIMING TYPICALITY IN TRUTHFUL ENDORSEMENTS

The analysis contained in "The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement" ("the Endorsement Booklet Study") and "Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements" ("the Second Endorsement Study") (collectively, "the FTC Endorsement Studies") cannot be extrapolated to apply to the many diverse industry sectors that utilize testimonials and endorsements as a marketing practice, and

they cannot be generalized to address consumer perceptions of the many forms of testimonials and endorsements used in a wide variety of media. Therefore, the ANA concludes that these studies fail to provide a sufficiently adequate evidentiary basis for a finding of deception or unfairness in connection with the current Guides, and they do not justify any amendments to the current Guides.

As ANA pointed out in its 2007 Comments, the Endorsement Booklet Study consisted of a respondent universe in which 80% of the respondents were 60 years of age or older. The authors of that study acknowledged the limitations of their study which, in their view “may limit its generalizability.” In addition to the skewed demographic mix, these limitations included the following flaws: (1) The sample consisted of only 200 dietary supplement users; (2) the results were based on a single product, a dietary supplement; and (3) the study booklet contained a relatively large number of testimonials, namely 18.

In the Second Endorsement Study, the study consisted of 1,624 interviews in 12 geographic markets. 582 interviews were conducted for the weight loss program, 522 interviews were conducted for the dietary supplement, and 520 interviews were conducted for the business opportunity (a vending machine business).

As ANA further explained in its 2007 submission, the studies – primarily dealing with dietary supplements and with a targeted vulnerable population – cannot be extrapolated to apply to the many diverse industry sectors that utilize testimonials and endorsements as a marketing practice, and they cannot be generalized to address consumer perceptions of the many forms of testimonials and endorsements used in a wide variety of media. In fact, the Commission admits that “the staff’s research did not attempt to determine what message consumers take away from testimonials and disclaimers on all media and for all products.” *See* Comment Request at 72383.

Many other commentators also have identified flaws in the FTC’s Endorsement Studies. Presently in the record is a critique conducted by Thomas Maronick, Ph.D. In that critique, Dr. Maronick points out that the FTC Endorsement Studies suffer from serious flaws that could easily have affected the results. *See* Comment Request at 72384. The American Herbal Products Association pointed out that there was insufficient certainty of statistical significance of the results on the record. *See* Comment Request at 72383. Kelley Drye Collier Shannon explained that the FTC Endorsement Studies were insensitive to the complexity of consumer perception and understanding of testimonials, and presented its own focus group study that demonstrated convincingly that consumers tend to understand the meaning of “results not typical.” *See* Comment Request, at 72383-72384. In the Comment Request, the Commission conceded in several instances that the FTC Endorsement Studies could have been better, but nevertheless found that the FTC Endorsement Studies, despite their potential flaws have some probative value.

The Commission states in footnote 106, referenced in proposed section 255.2(b), that it “cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement.” *See* Comment Request at 72392 n.106. However, the FTC severely undermines the option to disclaim typicality in the Guides themselves based on the FTC Endorsement Studies and puts the traditional case-by-case analytic approach into significant doubt, thereby ensuring higher costs and very likely a stifling of truthful speech about products and services.

Based on the FTC Endorsement Studies, the FTC states that the disclaimers “Results not typical” or the stronger statement “These testimonials are based on the experience of a few people and you are not likely to have similar results” (emphasis added) are likely to be inadequate to qualify a non-typical testimonial. *Id.* Thus, the Commission presents a scenario in which it believes that an advertising claim consisting of a truthful statement, disseminated to reasonable consumers, combined with a clear and conspicuous disclosure that the results depicted may not be typical probably will not work. The FTC’s analysis then goes substantially further: Even a disclosure that the results are based on just a few people will not work. The Commission subsequently carries this analysis to a further extreme suggesting that even a disclosure that “you” – the reasonable person – will not be likely to achieve the depicted results will not work. What is left besides disclosure of quantitative data as to what is typical? Advertisers will be left wondering whether any disclaimer of typicality could possibly work.

Thus, the Commission, based on its admittedly limited and flawed studies, forces speech or imposes significant costs on truthful speech resulting in a “chilling effect.” The Commission’s argument against a constitutional infirmity has two elements. First, the FTC asserts that as revised the Guides recognize that not every testimonial will convey a typicality claim. However, as explained above, the FTC believes that the strong, pointed disclosure described in footnote 106 of the Comment Request would not communicate an effective qualification to the reasonable person. An advertiser is left without any guidance as to what type of disclaimer would work and is invited to either engage in costly research or to run the substantial risk that a strong disclaimer is inadequate in the context of an enforcement action. We do not believe that the FTC’s data are sufficient to support such a conclusion and this approach does not alleviate the chilling effect on truthful speech.

Second, the FTC maintains that a strong disclaimer of typicality could still be effective as long as the advertiser describes the variety of conditions and contexts under which the endorser achieved the atypical results. *See id.* at 72386-72387. The Commission argues that this will result in “more speech” and thus should not violate the Constitution. But, as discussed above, the FTC Endorsement Studies and the Commission’s reliance thereon make it unreasonable for marketers to proceed with a disclaimer of typicality, no matter how strong, simple, or direct. The Commission, without any discernible support for its assertion, suggests that detailed disclosure of unique conditions leading to the depicted results will be more easily understood than simply stating that the results shown are not typical or will not be likely to occur for “you.” (The Commission is silent on how an advertiser is likely to have the space to include all of the potentially relevant conditions when a testimonial is made in an ad sent to a mobile phone or on Flickr, where the number of characters one can use in a post is extremely limited.)

Finally, if the FTC proceeds with what may be interpreted as a departure from the “reasonable person” standard, should U.S. industry now fear that disclaimers beyond the testimonials and endorsements area do not work? Will the FTC invalidate every advertisement with a disclaimer on the basis of two admittedly flawed studies that suggest that consumers might disregard a clear and conspicuous disclosure? The ANA respectfully suggests that throwing disclaimers of typicality into question in this manner opens up a serious debate as to whether disclaimers are effective at all. Thus, there could be a wider constitutional problem if the Commission plans to eliminate an indefinite amount of truthful speech on the basis of two flawed studies.

Therefore, ANA respectfully submits that the FTC should not change the Guides in this regard. The FTC Endorsement Studies do not provide a strong enough basis to conclude that disclaimers of typicality are likely ineffective. Constitutional concerns make it essential that the Commission retain the language of the original section 255.2(a), along with its commitment to a case-by-case approach to truthful, non-typical testimonials accompanied by disclaimers with guidance that promotes clarity and prominence as set forth in the preamble to the Guides published on January 18, 1980. Clearly, if the FTC wants to move forward in this manner, it needs a much more substantial basis to do so than the record as it presently stands.

III

THE FTC SHOULD ENGAGE IN MORE ANALYSIS OF THE “NEW MEDIA” PLATFORMS BEFORE ADDING EXAMPLES THAT INCREASE UNCERTAINTY AND INTERFERE WITH SELF-REGULATORY ACTIVITY

A. INTRODUCTION

The FTC’s inclusion of examples such as the body lotion blog (§255.1 Example 4), the student blogger (§255.5 Example 7), the message board (§255.5 Example 8), and the “street team” program (§255.5 Example 9) demonstrates a desire to update the Guides and include a greater representation of modern methods of advertising. Updating language to avoid antiquated references to technology is unobjectionable; however, these revisions go much further than that and suggest generalized approaches to technologies that are complex, varied, and changing. More importantly, the proposed revisions provide a general principle for liability for communications made through endorsements and testimonials: “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. Endorsers also may be liable for statements made in the course of their endorsements.” § 255.1(d). ANA members could be exposed to substantial liability for statements made by bloggers or for truthful statements that do not disclose “material connections” even in situations where the advertiser exerts no control over the speaker.

The FTC has long recognized that self-regulation can be an important facilitator. The FTC has articulated a desire to help foster new forms of truthful advertising while at the same time restraining those who mislead consumers. As ANA explained in its 2007 Comment, self-regulatory bodies such as the NAD and Word-of-Mouth Marketing Association (“WOMMA”) have been active in the area of testimonials and endorsements. Other self-regulatory initiatives, such as the Electronic Retail Self-Regulatory Program (“ERSP”), also can play a central role in promoting truthful advertising using clear Guides. WOMMA, in particular, has specifically addressed the issue of word-of-mouth marketing and disclosure of material terms in that context. Its members are intimately aware of the technical and practical limitations of various media and the ways in which the FTC Guides should apply to those media. By introducing examples that raise more questions than they answer, the FTC creates increased uncertainty and is interfering with the development of flexible and organic self-regulatory approaches that are much more likely to work with the emerging technologies and media. Therefore, the FTC should not include these new examples at this time.

B. SECTION 255.1 – EXAMPLE 5

Example 5 describes a unique situation in which a third-party service offers sellers the opportunity to promote their products through blogs. Under the revised Guides, according to the Commission, if consumers believe that the blogger is expressing her personal views, then the comments would constitute an endorsement. In this example, the blogger would be subject to liability for the statements made by her endorsements even if she provides an honest appraisal of the product and its impact upon her. Requiring bloggers to request substantiation for their experience and to comprehend the meaning of that substantiation – separate and apart from providing an honest/transparent appraisal and opinion about their experience – potentially chills the speech. Bloggers might be afraid to state their opinions or experiences fearing that their enthusiasm might not be supported by some stringent scientific support that they do not understand. Moreover, under the revised Guides, the Commission is placing responsibility on the advertiser for communicating approved claims to the third-party blog matching service, who in turn would be responsible for communicating the approved claims to the blogger. It is not clear that the FTC has considered whether this is a practicable way of disseminating the multitude of blog messages that continue to increase almost exponentially throughout the blogosphere. Nor is it clear whether an advertiser could ensure a chain of communication to the blogger that would be reliable enough to avoid regulatory action if the blogger misinterpreted some data. The end result is uncertainty and possibly could cause advertisers to avoid this form of advertising to the detriment of the third-party blog matching agency (who would be out of business) and to the consumer who most likely would not receive the truthful speech from the blogger.

C. Section 255.5 – Disclosures of Material Connections

1. Example 7

In proposed § 255.5, Example 7, the FTC describes a college student who has set up a blog on video game hardware and software. This blogger has a following and readers value his opinions on these products. “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.” See Comment Request at 72395. The FTC goes on to conclude that it could be deceptive for the blogger to post a favorable review about the game system without disclosing that he received a free game system from the manufacturer. The Commission states that readers of the blog would be likely to discount the weight they place on his review if they discovered he had not actually gone out and purchased the system on his own.

This example gives rise to a number of concerns and will create substantial confusion in the marketplace.

- First, does this example communicate that all samples and all advance copies of products constitute a “material connection” between the seller and the speaker? Does this only apply if the samples are of a “significant” value? What would be the dollar level that would suggest that a blogger may be affected in their views by a free sample? Does the continuing course of dealing suggest that there is an implied *quid pro quo*, whereby the student’s supply of cool, new gadgets will evaporate if he writes a negative review?

- Second, how much emphasis should ANA members put on the fact that the manufacturer sought out the blogger in particular? Would it change the analysis if the manufacturer sent out new releases of a video game to 250 beta testers? What if those beta testers on their own decide to talk about the new release on their personal blogs or on other message boards or social networks? What if the manufacturer handed out free copies at a trade show booth at an annual software convention, and anyone attending the convention, including bloggers and members of the press, could obtain one? Would any sort of free merchandise taint any subsequent speech about the product and necessitate a disclosure that the speaker received the product for free?
- Third, at what point is it reasonable to assume that someone has received a sample for free? If a blogger has achieved as wide a following as the one in the example, why would the Commission believe that no one would believe that he was getting free samples from manufacturers? What about benchmark tests performed by independent organizations on computer hardware and software? Would the Commission believe that even in that case consumers would be surprised to discover that the company received products at no cost?
- Fourth, does the Commission's analysis change depending on who is hosting the blog site? What if the same college student is utilizing his Facebook page as a place where he posts reviews? What if the student posts his reviews on a blog operated by a commercial entity that accepts advertising from the manufacturer? What if the student posts his reviews on a blog operated by the manufacturer, itself? Does it matter whether the manufacturer-operated blog is monitored?

That marketing activity in the blogosphere grows almost every day is without doubt. What is doubtful is whether the FTC has appreciated fully the dynamic nature of this medium and its variety of incarnations. The line that divides a testimonial from merely a personal posting is not always very clear and is not even clear in Example 7. ANA recommends that the FTC omit this example until it has more fully researched the impact it might have on commerce. Clearly, adding this example at this point without much more data and analysis would be premature.

2. Examples 8 and 9

Section 255.5 Examples 8 and 9 read as follows:

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 signed 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.

In example 8, if the poster does not disclose the relationship to the manufacturer, the potential exists for the manufacturer to be held liable for the non-disclosure by its employee; but, if that is the intent, there is no discussion of what circumstances trigger such liability. If the employer, for example, has instituted policies and practices concerning “social media participation” by its employees, and the employee fails to comply with such policies and practices, would the employer be subject to liability? In example 9, where points are awarded to members of a “street team program,” the proposed revision provides that the sponsoring advertiser “should take steps to ensure that these disclosures are being provided.” Yet, there is no description of precisely what types of steps are contemplated to ensure compliance or would be considered adequate. Likewise, there is no discussion of the types of monitoring activities by the sponsoring advertiser that are necessary and sufficient.

Self-regulation would be the best solution. WOMMA’s ethical code encourages transparency in any word-of-mouth medium. To that end, WOMMA’s Ethics Code is consistent with the intent behind the proposed revisions to the Guides. If the FTC wishes to promote self-regulatory initiatives, it should encourage bodies such as WOMMA to continue its efforts and the FTC should use its enforcement authority where necessary. Furthermore, entities such as the NAD and ERSP look not only to the general principles set forth in the Guides but also to entities such as WOMMA and can take effective action to help shape the marketplace in accordance with those general principles and with flexibility to deal seamlessly with new forms of marketing media.

* * *

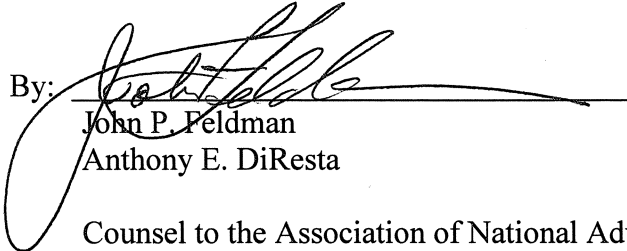
For the reasons set forth above, ANA urges the Commission to retain the existing option of using a clear and conspicuous disclaimer of typicality to qualify an otherwise true but atypical testimonial. ANA further recommends that the Commission not include the “new media” examples at this time because they are likely to create uncertainty and impinge on the efforts of self-regulatory bodies that are in a better position to address the application of general FTC principles to specific new media technologies.

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