

FTC Closes Window on “Up-To” Claims

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Diligent readers of the FTC’s studies, complaints and orders might have predicted this press release:²

FTC Warns Replacement Window Marketers to Review Marketing Materials; Energy Savings Claims Must Be Backed by Scientific Evidence

The Federal Trade Commission warned 14 window manufacturers and one window glass manufacturer that they may be making unsupported energy savings claims for replacement windows. ...

Each letter states that the FTC reviewed the company’s website and found claims similar to those challenged in administrative complaints the FTC filed earlier this year against five companies. Those companies agreed to orders barring them from making exaggerated and unsupported claims about their windows’ energy efficiency and how much money consumers could save on their energy or heating and cooling bills by having them installed.

The warning letters highlight claims that consumers will save more than 30 percent on their energy or heating and cooling bills by installing replacement windows. The letters state that the FTC has made no determination whether the companies are violating the law, but urge the recipients to review their marketing materials with the following in mind:

Energy-savings claims must be backed by scientific evidence.

Be specific about the type of savings consumers can expect.

Avoid deception when making “up-to” claims. ...

Manufacturers may be liable for misleading or unsubstantiated claims made to dealers or retailers, in addition to claims made directly to consumers.

The warning letters cited earlier actions and a Commission consumer-perception study³ that concluded “up to” means that all or almost all consumers would get the claimed performance. The announcement of that study included this description of the results:

¹ William MacLeod, Co-chair of the Competition practice at Kelley Drye & Warren, is a former Bureau Director at the Federal Trade Commission.

² See <http://www.ftc.gov/opa/2012/08/windows.shtm>, Release, August 29, 2012.

³ See, *FTC Report: Effects of a Bristol Windows Advertisement with an 'Up To' Savings Claim on Consumer Take-Away and Beliefs*, available at <http://www.ftc.gov/os/2012/06/120629bristolwindowsreport.pdf>.

[W]hen marketers use the phrase “up to” in claims about their products, many consumers are likely to believe that they will achieve the maximum “up to” results. The study describes what a test group of consumers thought about ads for replacement home windows that purportedly would provide “up to 47%” savings in energy costs.

The consumers reportedly did not take away the impression from the claim of “up to” that the advertised performance would range from some lower level up to the higher level.

The Commission here may have illustrated a good reason to be cautious about extrinsic evidence. Consumer research also has the capacity to mislead. When a copy test suggests that consumers do not have the ability to understand words that were probably among the first they learned to read – like “up to” – the more plausible explanation is that the consumer research was flawed. The Commission relied on flawed research to make a similar mistake in its guidelines for endorsements and testimonials, which advised advertisers to avoid using endorsers’ claims if those claims were not typical of what consumers could expect. For a description of how research can lead to erroneous conclusions, see the attached comment to the final draft of the “Guides Concerning Use of Endorsements and Testimonials in Advertising,” now issued at 16 C.F.R. § 255.2.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of)	
)	
Guides Concerning the Use of Endorsements)	Commission File No. P034520
and Testimonials in Advertising; Request)	
for Comments)	
)	

**COMMENTS OF KELLEY DRYE & WARREN ON
THE COMMISSION’S GUIDES CONCERNING THE USE OF ENDORSEMENTS
AND TESTIMONIALS IN ADVERTISING**

Kelley Drye & Warren LLP (“Kelley Drye”) respectfully files these comments pursuant to the Federal Trade Commission’s (“FTC” or “Commission”) November 28, 2008 request for public comments regarding its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”).⁴ These comments are submitted on behalf of clients who advertise a wide variety of goods and services and who use endorsement and testimonials as part of their advertising campaigns for their products.

I. Executive Summary

For many decades, the Guides have provided advertisers with clear direction regarding the use of non-misleading statements from third-parties in advertisements.⁵ Advertisers have followed the Commission’s lead and used compliant testimonials in tens of thousands of advertisements and, in turn, generations of consumers have become accustomed to the ads and developed a sophisticated understanding of expected results. For those advertisers who have failed to comply with the Commission’s endorsement standards and misled consumers, the Commission has stepped in and used the existing regulatory framework to bring actions. In many of those cases, the Commission reinforced the Guides’ requirements by entering orders that require “results not typical” or similar disclosures.⁶

Consumers benefit from truthful endorsements and testimonials. Celebrities and real people can break through clutter and catch viewers’ attention. The information that viewers obtain is understandable, helpful to them, and relevant to their purchase decision. An historical overview of the use of endorsements and testimonials also demonstrates that consumers appreciate this type of advertising. It also shows that consumers understand that the

⁴ See *Request for public comments*, 73 Fed. Reg. 72374 (Nov. 28, 2008); *Extension of deadline for submission of comments*, 74 Fed. Reg. 5810 (Feb. 2, 2009).

⁵ 16 C.F.R. § 255.

⁶ See, e.g., *Fitness Test, Inc.*, 128 F.T.C. 91, 134 (1999); *Dean Distributors Inc.*, 123 F.T.C. 1596, 1688 (1997).

endorsements are meant to illustrate results that, while atypical, are achievable under certain circumstances. Consumers also understand that endorsers frequently receive monetary compensation for appearing in the commercials.

In short, the current regulatory regime regarding endorsements and testimonials is not broken.

The Commission's November 2008 notice of proposed changes and request for public comment announces proposed widespread changes to the Guides including, among other things, (1) clear and conspicuous disclosure of generally expected results whenever a testimonial is not representative of what consumers can generally achieve with the advertised product and (2) additional disclosure requirements regarding material connections between advertisers and scientific endorsers.⁷ If adopted, the Commission's proposed revisions would be more restrictive than the policy the Commission has followed for many years. No longer could an advertiser present a favorable outcome while qualifying it with a disclaimer such as "Results Not Typical." Instead, the Commission would regard an advertisement as deceptive if it did not provide the "typical" results, even if it conveyed to the consumer that the results of the testimonial were not typical. In short, time-tested advertising that has effectively communicated claims about a wide variety of products and services is in peril.

The Commission's proposed revisions are rooted in two sets of consumer research that were made public in a January 2007 request for public comments regarding the Guides.⁸ Many comments filed in response pointed out that the Commission's surveys suffered fatal flaws in design and methodology.⁹ For example, comments noted that the Commission surveys used small, non-random samples, poorly-worded questionnaires, and introduced other bias with mock products that may have eroded consumers' confidence in the overall advertising.¹⁰ Comments filed by Kelley Drye in June 2007 specifically objected to the research because the Commission's quantitative surveys fell short of considering the complexity of consumers' understanding of testimonials.

In an effort to obtain a better understanding of consumers' take away from testimonial advertising, and in response to the Commission's request for additional research on the issue, Kelley Drye submitted a focus group study that established the following:

- Consumers understand that testimonials are frequently "best case" scenarios and are limited to the experiences of that particular user.

⁷ 73 Fed. Reg. 72374 (Nov. 28, 2008).

⁸ 72 Fed. Reg. 2214, 2215-16 (Jan. 18, 2007).

⁹ 73 Fed. Reg. 72374, 72383 (Nov. 28, 2008). The authors also highlight limitations with the Commission's surveys that may prohibit their generalizability. See, e.g., Hastak and Mazis, *The Effect of Consumer Testimonials and Disclosures on Ad Communication for a Dietary Supplement* at 9 (Sept. 30, 2003). These limitations are discussed more fully in section II of these comments.

¹⁰ 73 Fed. Reg. 72374, 72383 (Nov. 28, 2008).

- Consumers comprehend that numerous personal factors impact results.
- Consumers understand simple disclosures with regard to testimonials.
- Consumers expect that endorsers are paid by advertisers.
- Consumers may have been confused by the products used in the Commission’s research.¹¹

Kelley Drye’s comments concluded with a recommendation that the Commission conduct additional qualitative research to account for individual characteristics and observations and to determine whether consumers actually believe that testimonial advertisements make objective claims to them personally.

The Commission summarily dismissed Kelley Drye’s qualitative research, noting that “the process by which consumers view (and discuss) advertising in a focus group is very different from how they ordinarily experience it” and “general impressions gained from focus group discussions are not as informative as a well-designed copy test involving hundreds of consumers.”¹² The Commission apparently failed to consider the circumstances under which qualitative research is more informative than quantitative research. Experts have long recognized that qualitative research can reveal unexpected interpretations of the stimulus, unanticipated difficulty understanding questions, or other insights into attitudes and reactions than quantitative research allows.¹³ Focus group research is often conducted to help researchers identify meaningful and constructive approaches to designing quantitative studies.¹⁴ In fact, the Commission has frequently relied upon focus group research.¹⁵

Had it properly been considered, the qualitative research Kelley Drye conducted would have warned the Commission of several flaws in the approach of its quantitative research. For example:

¹¹ *Comments of Kelley Drye Collier Shannon on the Commission’s Guides Concerning the use of Endorsements and Testimonials in Advertising* (June 18, 2007).

¹² 73 Fed. Reg. 72374, 72384 (Nov. 28, 2008).

¹³ ROBERT GROVES, ET AL., *SURVEY METHODOLOGY* (John Wiley & Sons, Inc. 2004); JANET BILLSON, *THE POWER OF FOCUS GROUPS, A TRAINING MANUAL FOR SOCIAL AND POLICY RESEARCH* (Skywood Press 2000); RICHARD KRUEGER, & MARY CASEY, *FOCUS GROUPS: A PRACTICAL GUIDE FOR APPLIED RESEARCH* (Sage Publications 2000).

¹⁴ *See, e.g.*, PHILIP KOTLER, *MARKETING MANAGEMENT: ANALYSIS, PLANNING, IMPLEMENTATION, AND CONTROL* 135 (Valeria Ashton ed., Prentice-Hall 1994) (1967) (“Focus-group research is a useful exploratory step to take before designing a large-scale survey. It yields insights into consumer perceptions, attitudes, and satisfaction that help define the issues to be researched more formally. Consumer-goods companies have been using focus groups for many years, and an increasing number of newspapers, law firms, hospitals, and public-service organization are discovering their value.”)

¹⁵ The FTC has used focus groups in a variety of subject areas including identity theft, mortgages, and the Electronic Software Rating Board. *See* 73 Fed. Reg. 65855 (Nov. 5, 2008); 70 Fed. Reg. 820 (Jan. 5, 2005); 70 Fed. Reg. 56703 (Sept. 28, 2005).

- The Commission would have realized that at least some consumers found the ads to be unrealistic on their face, given the language and the production quality. The quantitative research thus measured attitudes toward ads that some viewers probably never thought were real.
- The Commission would have realized that consumers understand that many factors feed into their personal expectations of results. The group revealed that many factors, including compliance with the program and will power, dictate the scope of results. The Commission's surveys did not ask questions that permitted consumers to discuss or relate their true perception of the endorsement.
- The Commission would have realized that consumers were reciting what they thought mattered to them, what experience they themselves would have, not conjecture on the opinion of all consumers, which is what the Commission's questions required.

Given the observations of the focus group, it is surprising that the Commission has decided that no additional research, qualitative or quantitative, is required to support widespread revisions to the Guides.

In an effort to encourage further discussion on whether the current Guides are effective and whether additional research would be useful, Kelley Drye again has engaged an independent, third-party research company to survey consumers regarding their understanding of testimonials and expected results. Following the Commission's lead and suggestion, this research was a quantitative survey of 500 consumers regarding their perception of weight loss and money-making program testimonial advertisements. The new research unequivocally confirms the findings of the focus group research and provides further evidence that the current Guides are effective.

The new consumer research shows that consumers in large numbers understand endorsements and testimonials exactly as the members of the focus groups explained:

- A substantial majority of consumers expect their results to differ from the featured consumer's or endorser's results.
- A small minority of respondents initially responded that their own results with products advertised via testimonials would approximate those of an endorser. However, when examined more closely, many of these consumers reveal that their answers were not unthinking agreements with the claims, but interpretations based on other factors independent of them.
- Virtually all consumers believe that a variety of factors influence the success a person has achieving results using a product or service advertised using testimonials and endorsements.

A significant amount of consumers are skeptical about weight loss and money-making advertisements, regardless of endorsements, and additional disclosures designed to encourage skepticism would therefore add little or no value. This new survey responds to the Commission's

only critique of the focus group research and provides additional evidence that consumers benefit from and understand testimonial and endorsement advertising. The research also indicates that additional disclosures would not be helpful and likely harmful. The current Guides and the Commission's regulatory oversight are adequate to protect and inform consumers.

The numerous shortcomings in the Commission's surveys, the many comments the Commission has received, and the two consumer surveys sponsored by Kelley Drye undermine the rationale for revisions to the Guide. The Commission cannot dismiss and ignore the findings of the independent studies while at the same time justifying broad reliance on its own studies, particularly in light of the methodological shortcomings of its own research and the conflicting conclusions reached in competing surveys. Kelley Drye urges the Commission to leave the current guidelines intact. Should the Commission decide to proceed with any revisions, it should conduct additional research to determine consumers' full understanding of testimonials and endorsements before making changes that could disserve advertisers and consumers alike.

II. Problems With The Commission's Research

The studies relied upon by the Commission to justify broad revisions to the Guides are flawed in many respects. The survey instrument and the advertisements used do not support broad policy conclusions. Additional research that addresses these limitations is necessary in order to produce reliable results.

A. The Commission's surveys failed to ask questions bearing on the material claim that consumers' perceive and make assumptions central to ascertaining the consumers' perceptions.

Questionnaires used in the Commission's studies fail to account for consumers' individual experiences, and consequently fail to determine the material claims perceived by consumers. For example, in its first study, the Commission asked respondents to "think about *all the people* who might try Vitamin O," and ends the question with, "will Vitamin O reduce [a problem] for all, almost all, most, about half, some, very few, or none *of the people who try it.*" (emphasis added).¹⁶ This question asks consumers to conjecture about other consumers rather than explain what the claim tells them about themselves. In order to determine the material claim that the respondent personally perceives, the survey questions should have asked the consumers what the ads told them about their own experiences.

Another flaw found in the Commission's survey instruments is a failure to consider the respondents' expectations if they did not follow the product's instructions for use. For example, the weight loss claims are presumably based on the endorser complying with the program. Virtually all respondents would probably state that "sticking with the program" would affect the weight loss they would experience. But the Commission's survey does not capture respondents' beliefs about compliance. It forces them to say that people will lose X pounds, without asking them whether they expect people to comply.

¹⁶ Hastak and Mazis, *Questionnaire A Dietary Supplement Study*, available at <http://www.ftc.gov/reports/endorsements/study1/materials/QuestionnaireA.pdf>

The questions used in the surveys do not elicit reasonable interpretations relevant to consumers. Instead, the survey asks them to opine on claims that may be immaterial. As described below, surveys sponsored by Kelley Drye are effective at identifying interpretations that matter. Those are far different from those the Commission's studies found.

B. The products in the advertisements used by the Commission were, on their face, suspicious and unreliable.

Numerous comments received by the Commission noted that the products used in the testimonial advertisements for the Commission's surveys were the kind that the Commission has warned consumers to be suspicious about—*i.e.*, touting “secret ingredients” and promising “amazing results”—rather than more moderated and scientifically supported testimonials.¹⁷ In evaluating the efficacy of disclosures, the Commission should take into account that the depictions and accompanying testimonials of this type of product would evoke that skepticism. But such skepticism does more than introduce a measurable bias in the consumers' answers about the claims' validity. Their skepticism questions whether consumers heeded the claims at all.

The focus group research submitted by Kelley Drye supports the notion that consumers were skeptical of the advertisements used. As stated in the comments accompanying that research, the Commission's survey did not reflect the consumers' suspicions.¹⁸ There is no basis for drawing a conclusion that disclosures failed when consumers did not believe that the underlying product was real in the first place. This proposition is further supported by quantitative research submitted with these comments (and discussed more in-depth below). In short, respondents in the quantitative research who expressed general skepticism about the products at-issue were more likely to draw conclusions based on their own preconceptions, independent of an endorsement or disclosure.

C. The studies cannot be generalized to address consumer perceptions of the many forms of testimonials and endorsements used in a wide variety of today's media.

As a result of new media, the way in which consumers receive information today has grown exponentially, including e-mail, pop-ups, viral marketing, blogs, consumer generated content; and mixed media campaigns. Both Commission studies used a mall-intercept design where respondents were exposed to print materials, and the Commission acknowledged that the studies did *not* attempt to determine what messages consumers take away from testimonials and

¹⁷ For example, one commenter noted that these products are precisely the type of products the Commission warns consumers about in its 2003 “Red Flags” guide. Likewise, as appropriately noted by another commenter, the weight loss products did not represent a properly formatted label per the Dietary Supplements Health and Education Act (DSHEA).

¹⁸ See part III.A.4. *infra* of these comments.

disclaimers in all media and for all products.¹⁹ The Commission's interest in illustrating the application of the Guides' long-established principles to new media would have been better served by utilizing some of the new media in one of its studies.

The study Kelley Drye submits with these comments is broader in scope, asking respondents to recall weight-loss advertisements that they have seen in the past. Given the variety of available media today, the advertisements recalled by respondents in the Kelley Drye study contain a variety of media more representative of current advertising.

III. Overview of Qualitative and Quantitative Consumer Research

Kelley Drye sponsored two rounds of consumer research. The first round consisted of a series of focus group interviews designed to assess consumers' understanding of testimonial advertising. A copy of the focus group research report, *Testimonial Advertising Focus Group Research*, was included with Kelley Drye's June 2007 comments on the Guides. In February 2009, Kelley Drye sponsored another round of research. This survey was a quantitative analysis of the opinions of 500 American adult consumers designed to test the conclusions of the focus group research and provide additional evidence that the current Guides are effective. A copy of this research report, *Testimonial Advertising Research*, is included with these comments. Below is an overview of both rounds of research and the conclusions reached in each.

A. Focus group research illustrates that the current Guides are effective and the Commission research failed to ascertain consumer understanding of testimonial advertising.

In June 2007, experts at StrategyOne conducted two focus group interviews. Members of the focus groups were provided one of two testimonial advertisements regarding the weight-loss program, "Weight Guard". Participants were asked to assess initial exposure to the ad, testimonial motives, effect of disclaimers, and prior exposure and experience with testimonial advertisements, first by writing and then by discussing their assessments. The results were compiled by StrategyOne and the following conclusions were reached.

1. *Consumers understand that results are limited to the experiences of the endorser.*

The focus group respondents understood, based on their experience with testimonial advertisements, that most endorsers express a "best case scenario" and that results are atypical since they are based on the endorsers' individual experiences. Many of the respondents indicated that their assessments were based on their past experiences with testimonial advertising and a general skepticism regarding endorsement ads.

¹⁹ 73 Fed. Reg. 72374, 72383 (Nov. 28, 2008).

2. *Current disclaimers, such as “results not typical,” are adequate and additional or enhanced disclosures would be confusing.*

Focus group participants were asked to review and evaluate the same three disclosures used in the Commission’s studies: “Results not typical,” “The average Weight Guard user loses about 10 pounds in three months,” and “These testimonials are based on the experiences of a few people. You are not likely to have similar results.”

Because consumers already understand endorsement claims, it is not surprising that most agreed that the “results not typical” disclosure was familiar and understandable. The other disclosures, while providing additional information, frequently confused consumers. None of the respondents commented that the more robust disclosures were any more effective than the more simple disclosure. In fact, the longest and most detailed disclosure was the least liked of the three by consumers in the groups.

3. *Consumers have pre-conceived expectations about endorsers and their experiences.*

Members of the focus groups noted that well-known endorsers were more reliable because respondents could track the endorsers’ progress over time. Alternatively, the groups found less famous endorsers less reliable and compelling because results were unverifiable. Consumers also illustrated a sophisticated knowledge of endorsed advertising in that they recognized that endorsers receive compensation or benefit for appearing in ads, all without the aid of a disclosure.

4. *Consumers were confused by the advertised product.*

Many of the focus group members indicated that they were confused by the Weight Guard product used in the research.²⁰ Specifically, respondents were unclear whether the product was a dietary supplement, liquid diet, or some other type of product. The inability to understand what the product was or what it did tainted their reactions to the advertisements as a whole and responses regarding the testimonials specifically. This confusion raises questions about the reliability of the Commission’s quantitative research.

The focus group research establishes that consumers are generally sophisticated, sensitized, and understand testimonial advertising. Consumers also understand that testimonials are generally “best case” scenarios and that their personal results may be different depending upon a number of factors. For these reasons, respondents in the groups indicated that additional or more detailed disclosures would not provide additional benefits and, in fact, many indicated that disclosures such as “results not typical” may not be needed because that is already understood. As such, Kelley Drye requested that the Commission conduct additional research to further explore consumers’ understanding of testimonials and to determine whether consumers would benefit from additional disclosures.

The Commission declined to take up the invitation to conduct additional research. Rather, the Commission noted the following:

²⁰ The same ad copy was used in both the Commission study and the Kelley Drye study.

The Commission notes that the process by which consumers view (and discuss) advertising in a focus group is very different from how they ordinarily experience it. Focus groups are very dependent on group dynamics, and one or two participants can dominate the discussion and even influence other participants. Accordingly, the Commission believes that general impressions gained from focus group discussions are not as informative as a well-designed copy test involving hundreds of consumers.

As an initial matter, and putting aside for a moment the weight given to the focus group research, the Commission does not deny that the qualitative research does give rise to, at a minimum, general impressions regarding consumers' understanding. In fact, the research cited by the Commission for the proposition that focus group participants may influence one another states that "the focus group can guide and 'focus' further research."²¹ Beyond this objection, and as discussed earlier, focus groups are widely accepted as useful in obtaining consumers' impressions regarding advertisements.²² More importantly, focus groups can alert researchers to potential mistakes that could render quantitative research unreliable.

B. Quantitative research supports the qualitative focus group analysis and provides additional evidence that the current Guides are effective.

In an effort to test the conclusions reached in the focus group research, Kelley Drye commissioned a second round of research, a nationally representative quantitative study of consumers' understanding of endorsements and testimonials. As expected, the findings give support to the qualitative study and provide further evidence that the Commission's research does not support the widespread changes proposed for the policy.

1. Research Methodology

StrategyOne conducted a quantitative research project on February 16 and 17, 2009. The telephone-based surveys consisted of 500 adult respondents over the age of 18. Participants were selected using a random-digit-dialing sampling methodology (excluding business and institutional telephone exchanges). This methodology yields a nationally-representative sample of the domestic adult population.

Survey participants were randomly split into two groups. Members of the first group (282 respondents) were asked a series of closed and open-ended questions regarding endorsements and testimonials in weight loss program commercials. The remaining 218 respondents were asked questions regarding testimonials in money-making program advertisements.

Both groups of survey participants were first asked a closed-ended question regarding their personal expectations compared to the endorsers' results (Questions 1A and 1B). For example, the weight loss survey participants were asked the following:

²¹ 73 Fed. Reg. 72374, 72384 note 69 (Nov. 28, 2008).

²² See *supra* notes 10-12 and accompanying text.

When you see an advertisement that shows how much weight a celebrity or an individual lost using a weight loss program, if you used the program, would you expect that you would...[REVERSE ROTATE RESPONSES]

(a) lose more weight than the person in the ad

(b) lose as much weight as the person in the ad

(c) lose less weight than the person in the ad

The closed-ended question was followed by open-ended questions designed to solicit the reason for the closed-ended response (Questions 2A and 2B).

What makes you feel that you would lose [MORE/AS MUCH/LESS] weight than the person in the ad using that program?

As described below, respondents provided a variety of factors that affect their expected results.

Respondents were then asked a second closed-ended question (Questions 3A and 3B). This question sought respondents' opinions regarding factors beyond the endorsement that influenced expectations.

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. [REVERSE ROTATE RESPONSES]

(a) Strongly agree

(b) Somewhat agree

(c) Somewhat disagree

(d) Strongly disagree

The closed-ended question was followed by an open-ended question to probe the respondents' answers (Questions 4A and 4B).

What makes you say that you [AGREE/DISAGREE] with that statement?

In the second cell of the survey, consumers answered similar questions about testimonial claims for a money-making opportunity.

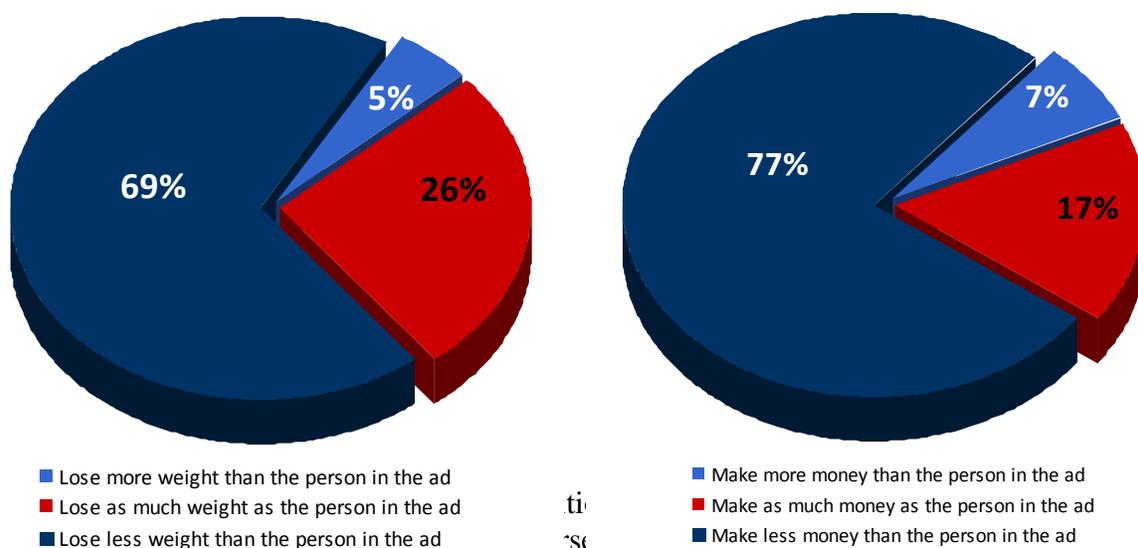
In this quantitative survey, none of the Commission's concerns regarding focus groups were present (*e.g.*, no group dynamics, no individuals dominating conversation and forming opinions for others). Nonetheless, the conclusions were strikingly similar to those expressed in the focus groups.

2. Survey Results

The results of the second round of research complement the focus group findings that revisions to the Guides are unwarranted.

a. Most consumers expect that their results would differ from the endorsers' results.

Questions 1A and 1B asked respondents about their expectations in light of an endorser's claims. With regard to the weight loss program, seventy-four percent stated that they would lose more or less weight than the endorser (sixty-nine percent less and five percent more). An even higher majority, eighty-four percent, stated that they would make more or less money than the testimonial claims (seventy-seven percent less and seven percent more). These rates, particularly with regard to those respondents who expect to lose less/make less than the endorsers, indicate that consumers on a large scale understand that endorsements present results that are "best case" and atypical.



provide additional proof that consumers have a sophisticated understanding of testimonial advertising and that additional disclosures would not likely benefit them. Of particular interest are the responses provided by respondents who indicated that they would experience results "the same as" the endorser. The open-ended responses provided by these respondents illustrate that they have a wide spectrum of expectations beyond the endorsers' claims and that the results they expect depend on a multitude of factors.

- For both groups, over twenty-five percent of the verbatim responses illustrate that consumers understand that the endorsements are a "best case" scenario and, with certain external factors in place, respondents too could achieve the "best case" results. Responses of this type include the following: *As long as you go by the program, you should lose as much; If you do it correctly to the max it would work; The program is a vehicle to get there but exercise is still necessary.*
- Approximately twenty percent of respondents across both groups point to personal characteristics that differentiate themselves from the "typical" consumer and enable them to meet the atypical "best case" results of the endorser. These responses include the following: *I have good metabolism; I would take into*

consideration the height and weight of the other person in comparison to me; I'm motivated; I am as smart as they are; It depends on the program and how well it works and how much time I invest in it.

- Approximately ten percent of consumers who expected the “same results” indicated that they have a preconceived general skepticism about weight loss and money-making programs. It unlikely that these consumers had any faith in the claim even though they answered “the same.” Examples of these types of responses include the following: *Just because a celebrity advertised something does not mean everybody can do it; Don't believe in it; They are exaggerating their earnings.*
- Approximately twenty-five percent of respondents from both groups provided an open-ended response that validates their “same as” results closed-ended response. However, all of these respondents later provided responses to Questions 3A and 3B that illustrates that they do, in fact, believe other factors impact results.

Approximately twenty percent of respondents in the subset of respondents from both groups that provided a response indicating “same as” results either provided no response to the open-ended question or responded, “don't know.” While we can draw no definitive conclusions regarding the subjective understanding of these consumers based on this question alone, cross-tab analysis indicates that over three-quarters later responded that they agree that other factors influence results in response to Questions 3A and 3B.

In sum, fewer than six percent of the respondents who expected “same results” did not provide a conflicting or qualifying verbatim (importantly, this group is likely overly broad because these respondents provided no response to the 2A/2B open-ended question). Given that this group represents slightly more than one percent all respondents, a clear conclusion is that consumers understand that endorsements are atypical and, frequently, “best case” scenarios.

b. An overwhelming majority of consumers agree that the results experienced with weight loss or money-making products are influenced by a variety of factors.

When asked whether a variety of factors influence expected results (Questions 3A and 3B), both groups resoundingly responded that they agree – ninety-three percent of the weight loss group and eighty-one percent of the money-making group. These responses strongly illustrate that consumers understand that endorser results are atypical and that many factors are at play.

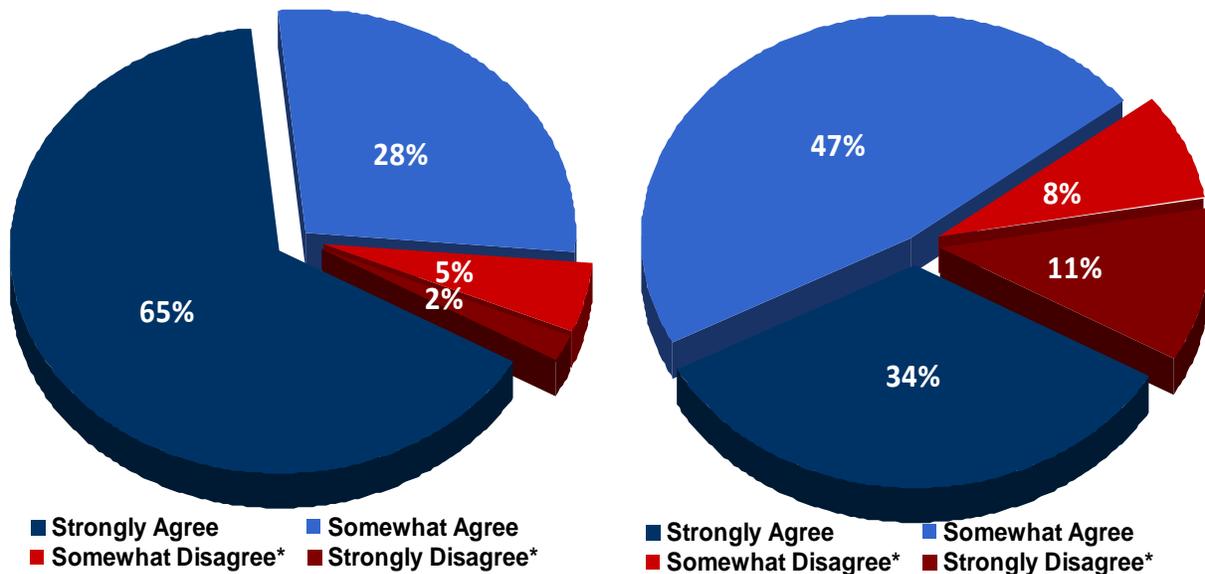
Surprisingly, numerous verbatim responses from respondents who disagreed with the statement provide additional support for the proposition that consumers understand that many factors influence results. Others provided responses that raise questions about their “I disagree” response.

- Of the respondents who stated that they disagree that other factors influence results, almost a third of the weight loss program and 10 percent of the money-making program respondents provided verbatims to the contrary and illustrate that they do account for other factors when forming results expectations. Relevant responses

include the following: *Depends on the individual; People lose weight too fast and gain it right back; A lot of people are big by choice – they are just lazy; How well do they follow the program and the economy; You have to have the will.*

- A quarter of the weight loss program respondents saying “I disagree” indicated that they are generally skeptical of this type of program. A large majority (almost two-thirds) of the money-making program respondents who disagreed indicated a (generally strong) skepticism of the type of program. These verbatim responses bring into question the initial response that they disagree that other factors influence results. In fact, if further research were conducted, these consumers would likely take the position that results cannot be achieved, regardless of any possible factors. Responses of this nature include the following: *Don’t believe in a bunch of bologna; Lots of contradictions; It does not work; These ads are nonsense.*
- Of the respondents who stated that they disagree that other factors influence results, one-third of the weight loss program and one-fifth of the money-making program respondents either provided no response to the open-ended question or responded, “don’t know.” When cross-tabbed against their response to Questions 1A/2A, we determined that the majority stated that they expect more/less results than the endorser (not “same results”). This is indicative of a consumer who understands endorsements and that other factors impact results.

Of the respondents who stated that they disagree with the statement that other factors influence expected results, fewer than ten percent of the total of weight loss and money-making program respondents provided a verbatim that is not inconsistent with their response. Interestingly, most of them (e.g., four of the six respondents in this category) supplied answers to Questions 1A/1B and 2A/2B indicating that they believed that their experiences would be more/less than the endorsers’ results and reported general skepticism about the programs or “don’t know” why the results would be different.



***Virtually all the respondents who disagreed – i.e. expected “the same” results claimed in advertisements – gave conflicting open-ended explanations.**

In the end, over ninety-nine percent of respondents agreed that other factors influence results or provided additional information that establishes that belief. Fewer than one percent indicated that they (1) disagree that other factors impact results, (2) provided no additional information to make any further determination, and (3) responded that they expect the same results as an endorser. These responses buttresses the focus group findings that consumers in large numbers do not believe that results featured in testimonials mean that they will achieve the same results when using the advertised product. Simply stated, consumers understand that many factors influence results and additional disclosures would have no added benefit.

c. The leading factor that respondents volunteer for why they understand that endorsers' results are atypical is that they are skeptical of the effectiveness of weight loss and money-making programs, regardless of whether a testimonial is provided.

As discussed earlier, large groups of respondents indicated skepticism about the effectiveness of weight loss and money-making programs, regardless of whether a testimonial is provided. This skepticism is particularly pronounced for the overwhelming majority of consumers who clearly and unequivocally understood that results are atypical and that their experience would likely be different (*e.g.*, lose more or less weight, earn more or less money). For example, over half of the respondents in the cell that discussed money-making ads, and who said they would make less than the endorser, provided verbatim responses indicating deep skepticism – for example, indicating that the advertisements were pitching scams or pyramid schemes.

These responses are powerful evidence for the proposition that was first validated by the results of the earlier focus group study – additional disclosures will have no impact on consumer understanding and perception of testimonial advertising. Consumers are sophisticated and skeptical when they see endorsements and testimonials.

IV. Conclusion

The conclusions reached by the two rounds of qualitative and quantitative research conducted by Kelley Drye are consistent and reliable. Both sets of research illustrate that consumers (1) have experience with testimonial and endorsement advertisements, (2) have a sophisticated understanding of the advertisements, (3) understand that endorsements and testimonials are generally “best case” scenarios, and (4) would not benefit from additional disclosures. The research also clearly shows that consumers’ pre-existing familiarity with such products influences their perceptions.

Questions about the methodology used in the Commission’s surveys, as well as conclusions reached in Kelley Drye’s surveys, counsel against the proposed revisions. As such, we respectfully request that the Commission decline to revise the current Guides. The most effective approach against companies that deceive consumers is to focus enforcement on demonstrable deception. The Commission’s current guidelines are more than adequate to draw that line.

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We thank you for your consideration in this matter. We hope that the information contained in this comment will help the Commission as it seeks answers to the questions posed in its request for comments.

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