

**FEDERAL TRADE COMMISSION  
16 C.F.R. Part 255**

**Guides Concerning the Use of  
Endorsements and Testimonials in Advertising**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed changes to Guides. Request for public comments.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) is seeking public comment on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).

**DATES:** Written comments must be received by January 30, 2009.

**ADDRESSES:** Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to “Endorsement Guides Review, Project No. P034520” to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding -- including on the publicly accessible FTC website, at <http://www.ftc.gov/os/publiccomments.shtm> -- and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual’s Social Security Number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .,” as provided in

Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR

4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c).<sup>1</sup>

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink:

<https://secure.commentworks.com/ftc-endorsements> (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink <https://secure.commentworks.com/ftc-endorsements>. If this Notice appears at <https://www.regulations.gov/search/index.jsp>, you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the “Endorsement Guides Review, Project No. P034520” reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex S), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because

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<sup>1</sup> FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (“FTC Act”) and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at

<http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

**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 CURRENT GUIDES**
- II. HISTORY OF THE GUIDES**
- III. DISCUSSION OF COMMENTS RECEIVED IN RESPONSE TO REGULATORY REVIEW NOTICE**
- IV. SECTION-BY-SECTION DESCRIPTION OF PROPOSED AMENDMENTS**
- V. PROPOSED REVISED ENDORSEMENT AND TESTIMONIAL GUIDES**
- VI. INVITATION TO COMMENT**

### **I. OVERVIEW OF THE CURRENT GUIDES**

The Guides, 16 C.F.R. Part 255, are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act. Although the Guides interpret laws administered by the Commission, and thus are advisory in nature, proceedings to enforce the requirements of law as explained in the Guides can be brought under the FTC Act. In any such proceeding, the Commission would have the burden of proving that a particular use of an endorsement or testimonial was deceptive.

The Guides define both endorsements and testimonials broadly to mean any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. 16 C.F.R. §§ 255.0(a) and (b). The Guides state that endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. 16 C.F.R. § 255.1(a). Furthermore, endorsements may not contain any

representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. *Id.*

The Guides advise that an advertisement employing a consumer endorsement on a central or key attribute of a product will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve. 16 C.F.R. § 255.2(a). If an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should clearly and conspicuously disclose either what the generally expected performance would be in the depicted circumstances or the limited applicability of the endorser's experience to what consumers may generally expect to achieve. *Id.*

The Guides define an expert endorser as someone who, as a result of experience, study, or training, possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. 16 C.F.R. § 255.0(d). An expert endorser's qualifications must, in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. 16 C.F.R. § 255.3(a). Moreover, an expert endorsement must be supported by an actual exercise of expertise and the expert's evaluation of the product must have been at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. 16 C.F.R. § 255.3(b).

Among other things, the Guides also state that:

- (1) Advertisements presenting endorsements by what are represented to be "actual consumers" should utilize actual consumers, or clearly and conspicuously disclose that the persons are not actual consumers. 16 C.F.R. § 255.2(b).
- (2) An organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. 16 C.F.R. § 255.4.

(3) When there is 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. 16 C.F.R. § 255.5.

## **II. HISTORY OF THE GUIDES**

In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 Fed. Reg. 25548 (1972). Extensive comment was received from interested parties. On May 21, 1975, the Commission promulgated three sections of the 1972 proposal as final guidelines (16 C.F.R. §§ 255.0, 255.3, and 255.4) and republished three others, in modified form, for additional public comment. 40 Fed. Reg. 22127 (1975); 40 Fed. Reg. 22146 (1975). Public comment was received on the three re-proposed guidelines, as well as on one of the final guidelines. On January 18, 1980, the Commission promulgated three new sections as final guidelines (16 C.F.R. §§ 255.1, 255.2, and 255.5) and modified one example to one of the final guidelines adopted in May 1975 (16 C.F.R. § 255.0 Example 4). 45 Fed. Reg. 3870 (1980).

In January 2007, as part of its ongoing regulatory review process, the Commission published a Federal Register notice seeking comment on the overall costs, benefits, and regulatory and economic impact of its Guides Concerning the Use of Endorsements and Testimonials in Advertising. 72 Fed. Reg. 2214 (Jan. 18, 2007). The Commission simultaneously put on the public record and requested comment on two reports on consumer research regarding the messages conveyed by consumer endorsements, as well as several other endorsement-related issues, including the use of so-called “disclaimers of typicality”

accompanying testimonials that do not represent experiences consumers will generally achieve with the advertised product.<sup>2</sup> The first report, “The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement” (“the Endorsement Booklet Study”), was 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” (“the Second Endorsement Study”), 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. Those reports are discussed in Part IV, below.

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<sup>2</sup> The reports are available on the Commission’s website, [www.ftc.gov/opa/2007/01/fyi0707.shtm](http://www.ftc.gov/opa/2007/01/fyi0707.shtm), or from the Commission’s Public Reference Office, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

The Commission received 22 comments in response to its regulatory review notice.<sup>3</sup> Having considered those comments, as well as the staff’s consumer research, and its own extensive consumer protection experience, the Commission now proposes various amendments to the Guides and invites comments on these proposed changes.

### **III. DISCUSSION OF COMMENTS RECEIVED IN RESPONSE TO REGULATORY REVIEW NOTICE**

A number of the comments specifically praised the current Guides for striking an appropriate balance between protecting consumers and allowing advertisers to communicate creatively and effectively to potential customers.<sup>4</sup> Several others also noted that the Guides are beneficial and should be retained;<sup>5</sup> one commenter stated that Guides were needed even more

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<sup>3</sup> Brittany Adams (“Adams”); American Association of Advertising Agencies/American Advertising Federation (“AAAA/AAF”); American Herbal Products Association (“AHPA”); Association of National Advertisers (“ANA”); Attorneys General of 33 States and Territories and Hawaii Office of Consumer Protection (“Attorneys General”); Stephen Calkins (“Calkins”); Center for Obesity Research and Education (“CORE”); Council of Better Business Bureaus, Inc. (“CBBB”); Electronic Retailing Association/Council for Responsible Nutrition (“ERA/CRN”); FreedomWorks; Jenny Craig, Inc. (“Jenny Craig”); Kelly Drye Collier Shannon (“Kelley Drye”); National Association of Consumer Agency Administrators (“NACAA”); Natural Products Association (“NPA”); NutriSystem, Inc. (“NutriSystem”); James Petkun (“Petkun”); Product Partners, LLC (“Product Partners”); Richard Pu (“Pu”); Jay Satz, Ph.D. (Vice President of Program and Product Development, NutriSystem, Inc.) (“Satz”); Senator Arlen Specter (“Specter”); Washington Legal Foundation (“WLF”); and Word of Mouth Marketing Association (“WOMMA”). With the exception of certain confidential materials submitted by NutriSystem, the comments are available online at <http://www.ftc.gov/os/comments/endorsementguides/index.shtm>.

<sup>4</sup> ANA, at 2, 6; AAAA/AAF, at 2; Specter, at 1; ERA/CRN, at 5-6.

<sup>5</sup> Petkun, at 1; NACAA, at 1; Attorneys General, at 1; Jenny Craig, at 1; AHPA, at 3-5.

today than when they were originally issued.<sup>6</sup> One comment suggested that the current Guides are more restrictive than necessary to protect consumers.<sup>7</sup>

Most of the comments submitted in response to the January 2007 Federal Register notice, however, responded to specific questions the Commission posed concerning the provisions of the current Guides that address (1) the use of consumer endorsements reflecting experiences exceeding those that consumers can generally expect to achieve with the advertised product, or (2) the disclosure of material connections between advertisers and endorsers. Those comments are discussed in Part IV, below, in the context of the specific Guide provisions to which they relate.

In addition, a few comments addressed other issues. For example, several noted that advertisers have started using some new technologies to reach consumers in recent years.<sup>8</sup> Two suggested that the Commission consider whether the Guides should be revised to deal with new types of advertising (*e.g.*, to include examples using email or the Internet).<sup>9</sup> Another noted that unlike the case with traditional media, the marketer is not in complete control of the message when certain of these new technologies are used; for example, in word-of-mouth marketing, the marketer may initially share information with one consumer, but subsequent exchanges between

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<sup>6</sup> CBBB, at 2.

<sup>7</sup> Kelley Drye, at 2.

<sup>8</sup> Petkun, at 1-2; AHPA, at 6; WOMMA, at 4. *See also* Jenny Craig, at 1 (suggesting that the Commission focus its review of the Guides on how to contemporize them in light of new technologies and marketing practices).

<sup>9</sup> AHPA, at 6-7; Jenny Craig, at 1.

that consumer and others are outside the marketer's control.<sup>10</sup> This commenter pointed out that the current Guides have one standard for both traditional advertising and non-traditional (unmeasured) marketing, despite "the vastly different levels of control that can be exercised by marketers using embedded advertising versus word of mouth and non-traditional (unmeasured) media."<sup>11</sup>

The Commission agrees that it would be useful to illustrate the application of the Guides' long-established principles to new media. Although these fields are still evolving, the Commission is proposing to include in the Guides several new examples that address the issues of advertiser and endorser liability and disclosure of material connections in various high-tech contexts.<sup>12</sup>

#### **IV. SECTION-BY-SECTION DISCUSSION OF PROPOSED REVISIONS TO GUIDES, COMMENTS RECEIVED IN RESPONSE TO JANUARY 2007 FEDERAL REGISTER NOTICE, AND REQUESTS FOR ADDITIONAL COMMENT**

The Commission has concluded that the Guides should be retained, but that a number of revisions are appropriate. Many of the proposed changes are simply clarifications or additional examples of the principles embodied in the existing Guides. Others enunciate basic principles that are not expressly set forth in the current Guides, but have been established in Commission enforcement actions. Several represent substantive changes from the current Guides, based upon

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<sup>10</sup> WOMMA, at 5.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> One comment said that the Guides should provide for a private cause of action and recovery of attorneys' fees, so that the private bar would have an incentive to bring legal actions on behalf of consumers injured by noncompliant advertisers. *Pu*, at 1. As noted above, the Guides merely provide insight into how the Commission interprets existing laws, and do not, in and of themselves, create substantive law.

increased knowledge of how consumers view endorsements and taking into consideration the comments submitted in response to the January 2007 Regulatory Review notice.

The Commission seeks comments on these proposed revisions, which are discussed below by Section.<sup>13</sup>

**A. Section 255.0 – Definitions**

The Guides currently begin with a definitions section, which the Commission proposes to expand to include an introductory subsection explaining the purpose of the Guides. This new Section 255.0(a) would note that the Guides are administrative interpretations of laws enforced by the Commission and provide the basis for voluntary compliance with the law by advertisers and endorsers.<sup>14</sup> It would also indicate that, although the Guides set forth the general principles that the Commission will apply in examining endorsements, the question of whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue. Other Commission guides begin with similar statements.<sup>15</sup>

Current Section 255.0(b) defines an endorsement as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The Commission proposes revising that section to clarify

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<sup>13</sup> The Commission also intends to make a number of non-substantive changes to improve syntax or to update examples to reflect changes that have occurred over the past twenty-five years. For instance, in Example 2 to Section 255.1, the “executive secretary” is being changed to an “administrative assistant” and the product in question is being updated from an “electric typewriter” to a “computer keyboard.” Such changes are not discussed below.

<sup>14</sup> Subsection (a), (c), and (d) of the current Guides would be redesignated as subsections (c), (d) and (e), respectively.

<sup>15</sup> *See, e.g.*, Guides for Private Vocational and Distance Education Schools, 16 C.F.R. § 254.0(b); Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1.

that in determining whether statements in an ad constitute an endorsement, it does not matter whether the statements made by an endorser are identical to or different than those made by the sponsoring advertiser. Similarly, the Commission proposes a minor modification of Example 4 (deleting from the penultimate sentence the reference to the views of the sponsoring advertiser) to make it clear that the only relevant criterion in determining whether a statement is an endorsement is whether consumers believe it reflects the endorser's views.

Example 1 to Section 255.0 currently provides one example of an endorsement and also illustrates the principle that an endorsement may not be presented out of context or reworded so as to distort the endorser's opinion. The Commission proposes to add a cross-reference to Section 255.1(b), which states this principle explicitly.

The Commission proposes adding a new Example 6 to Section 255.0, 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. Specifically, the new example 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.

The Commission also proposes adding a new Example 7 to Section 255.0, to illustrate that well-known persons can appear in advertising without being deemed endorsers.

#### **B. Section 255.1 – General Considerations**

Section 255.1 sets forth principles that apply to endorsements generally (*e.g.*, endorsements must reflect the honest opinions or experience of the endorser, and may not convey any representation that would be deceptive if made directly by the advertiser). The Commission proposes one significant revision to this section of the Guides, the addition of a new Section 255.1(d) explicitly recognizing two principles that the Commission's law enforcement

activities have already made clear. The first is that 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. The second is that endorsers may also be subject to liability for their statements. The Commission has brought law enforcement actions against both expert endorsers and well-known personalities (*i.e.*, celebrities) who have acted as endorsers. *E.g.*, *FTC v. National Urological Group, Inc.*, No. 04-CV-3294-CAP, 2008 U.S. Dist. LEXIS 44145, at \*24-25 (N.D. Ga. June 4, 2008) (order granting FTC’s motion for summary judgment finds expert liable for deceptive endorsement); *Snore Formula, Inc.*, 136 F.T.C. 214 (2003) (consent order); *James L. McElhaney, M.D.*, 116 F.T.C. 1137 (1993) (consent order); *Leroy Gordon Cooper, Jr.*, 94 F.T.C. 674 (1979) (consent order); and *Cooga Mooga, Inc.*, 92 F.T.C. 310 (1978) (consent order). Two new examples illustrate situations in which the Commission could impose liability on expert and celebrity endorsers; both of these examples note that the advertiser is also liable for misrepresentations made through the endorsement. A third new example illustrates the potential liability of advertisers who use bloggers to promote their products and of the bloggers themselves.

The Commission also proposes two minor revisions to Section 255.1(a). First, to make it clear that the Guides cover the communication of both express and implied representations, the phrase “may not convey any express or implied representation” is being added to the second sentence of that provision (which currently states that endorsements may not contain any representations that would be deceptive if made directly by the advertiser). Second, an additional cross-reference is being added at the end of revised Section 255.1(a). Currently, the only cross-reference is to an example in Section 255.3, in which an endorsement by an expert testing organization is used to illustrate the principle that “a valid endorsement may constitute all

or part of an advertiser’s substantiation.” As revised, the cross-references would refer to Sections 255.2(a) and (b) regarding the substantiation of claims conveyed by consumer endorsements, discussed below, as well as to Section 255.3.

**C. Section 255.2 – Consumer Endorsements**

Section 255.2 of the Guides provides guidance specific to the use of consumer endorsements, commonly referred to as testimonials. The Commission proposes to add a new Section 255.2(a) to articulate several fundamental principles that are not expressly set forth in the current Guides, to modify the existing Section 255.2(a), and to delete the existing Section 255.2(c).

1. New Section 255.2(a)

The Commission’s proposed new Section 255.2(a) would state that an advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as a representation that the product or service is effective for the purpose represented in the endorsement. Consumer endorsements convey not only that the advertised product or service worked for the consumers depicted in the advertisement, but also that it will work for others. This is the natural implication of an advertiser’s use of a consumer endorsement, and this view is supported by the consumer research conducted for the Commission. Specifically, in the Endorsement Booklet Study, between 50.0% and 75.0% of the respondents who were exposed to a promotional booklet with testimonials touting the advertised supplement’s use for breathing problems, low energy, and pain said that the booklet claimed or implied that the product was effective for reducing breathing problems, increasing energy levels, and relieving chronic or persistent pain. (*See* Table 2b of the Endorsement Booklet Study.)

New Section 255.2(a) also states that an advertiser who uses consumer endorsements must possess and rely upon adequate substantiation to support efficacy claims made through endorsements, just as the advertiser would be required to do if it had made the representation directly.<sup>16</sup> It also notes that consumer endorsements themselves do not constitute competent and reliable scientific evidence; anecdotal evidence about the individual experience of consumers is not sufficient to substantiate claims requiring scientific evidence.<sup>17</sup> Even if those experiences are genuine, they may be attributable to a placebo effect or other factors unrelated to the advertised product or service.<sup>18</sup>

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<sup>16</sup> New Section 255.2(a) thus elaborates on the general principle in current Section 255.1, which states that endorsements may not contain representations that would be deceptive if made directly by the advertiser.

An advertiser must have a “reasonable basis” for efficacy claims. The Commission articulated its policy with respect to advertising substantiation in the *FTC Policy Statement Regarding Advertising Substantiation*, 48 Fed. Reg. 10,471 (1984), reprinted in *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). The Commission’s determination of what constitutes a reasonable basis for objective product claims is determined by weighing a number of factors, including: (1) the type and specificity of the claim; (2) the type of product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the ease and cost of developing substantiation for the claim; and (6) the level of substantiation experts in the field believe is reasonable. *Thompson Medical*, 104 F.T.C. at 839-40; *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

<sup>17</sup> *FTC v. QT, Inc.*, No. 07-1662, 2008 U.S. App. LEXIS 33, at \*6-7 (7<sup>th</sup> Cir. Jan. 3, 2008) (testimonials “are not a form of proof”); *Removatron Int’l Corp.*, 111 F.T.C. 206, 302 (1988), *aff’d*, *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989).

<sup>18</sup> *See FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995) (consumer satisfaction surveys and studies demonstrating the placebo effect are insufficient to meet “competent and reliable scientific evidence” standard); *QT*, 2008 U.S. App. LEXIS 33, at \*6-7 (“A person who experiences a reduction in pain after donning the bracelet may have enjoyed the same reduction without it.”).

2. Renumbered Section 255.2(b)

Current Section 255.2(a), which would be renumbered Section 255.2(b), presently provides that an advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the 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. The newly available empirical evidence (as well as the Commission's findings in several litigated cases<sup>19</sup>) supports the Guides' position that consumers interpret advertisements containing endorsements as representing that the results achieved by the endorsers are generally representative of what new users can expect. In the Endorsement Booklet Study, between 41.2% and 70.5% of respondents indicated that the dietary supplement in question would reduce breathing problems, increase energy levels, and relieve pain in at least half of the people who try it. (See Table 3b of the Endorsement Booklet Study.)

In the Second Endorsement Study, ads featuring individuals who claimed certain specifically quantified benefits from having used the advertised weight loss program, cholesterol lowering supplement, or business opportunity (e.g., "I am earning an extra \$2,200 a month") conveyed to between 31.23% and 57.81% of respondents that at least half of new users would

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<sup>19</sup> *Brake Guard Prods., Inc.*, 125 F.T.C. 138, 244 (1998) (testimonials used in advertising for aftermarket braking device claimed that reduced stopping distances and wheel lockup "were typically experienced by consumers"); *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 173 (1984) (testimonials touting fuel economy benefits achieved from automotive engine attachment conveyed that these experiences were typical); *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 872-73 (1977) (testimonials from consumers who had lost substantial amounts of weight conveyed the message that extraordinarily large weight losses were typical or ordinary), *modified sub nom.*, *Porter Dietsch, Inc. v. FTC*, 605 F.2d 294 (7<sup>th</sup> Cir. 1979) (sustaining Commission's findings that representations made in advertising were false, but modifying portions of remedial order).

achieve results similar to the endorsers featured in the advertisements. (See Tables 2a and 5a of the Second Endorsement Study).<sup>20</sup> For example, 32.69% of consumers exposed to an ad in which endorsers claimed to have lost between 48 and 72 pounds thought the ad conveyed that at least half of new users would lose at least 48 pounds. (See Table 2a of the Second Endorsement Study.)

Nevertheless, the Commission believes that certain advertisements employing testimonials may not convey that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service. For example, if an advertisement for a casino features a \$100,000 slot machine winner, consumers likely understand from the nature of gambling that the winner's experience is not generally representative of those who use the casino's slot machines. The Commission therefore proposes to qualify the currently unequivocal language of renumbered Section 255.2(b) to state that "an advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will *likely* 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" (emphasis added).

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<sup>20</sup> As discussed below, several commenters criticized various aspects of the two staff research reports that the Commission placed on the public record in January 2007. One asserted that the data contained in those reports did not account for "yeasaying," the tendency of some consumers to answer questions affirmatively, regardless of what an ad actually said. In fact, both surveys did have test conditions that accounted for yeasaying and prior beliefs, and the results of those conditions were included in the staff's reports. However, in the interest of greater clarity, the Commission is placing on the public record in connection with the Second Endorsement Study new Tables 1a, 2a, 4a, and 5a, which expressly account for the responses obtained for these conditions by adjusting the data obtained from the other test cells.

As currently written, renumbered Section 255.2(b) also provides that in the event an advertiser does not have adequate substantiation that the experience described by the endorser is representative of what consumers will generally achieve, the advertiser can either: (1) clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances, or (2) disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve, *i.e.*, that the depicted results are not representative. The Commission has long been concerned about potential deception arising from the use of the second category of disclosures, which are often referred to as "disclaimers of typicality."

In its 1975 Federal Register notice promulgating several sections of the Guides in final form and republishing several others (including this section) for comment, the Commission stated that consumers view endorsements about product performance as conveying a typicality claim under the depicted circumstances and that if the represented performance was not typical, the ad should clearly and conspicuously disclose what the typical or ordinary performance would be in the depicted circumstances. 40 Fed. Reg. 22146, 22147 (May 21, 1975). Five years later, when it adopted current Section 255.2(a), the Commission stated that it strongly favored consumer endorsements depicting typical experiences but recognized that endorsements depicting non-typical experiences might not be deceptive if they were accompanied by adequate disclosures. 45 Fed. Reg. 3870, 3871 (Jan. 18, 1980). The Commission went on to say that "[g]enerally, a disclaimer alone probably will not be considered sufficient to dispel the representation that the experience is typical, but . . . the Commission is not prepared to hold that in every instance a bare disclaimer would be inadequate . . . ." *Id.* Accordingly, although reliance on a disclaimer would not be a *per se* violation of Section 5 of the FTC Act, the net effect of an endorsement with a disclaimer would be "studied to determine if the ad has the

capacity to deceive.” *Id.* However, notwithstanding its concern about advertisers attempting to use disclosures to disclaim typicality messages conveyed by consumer endorsements, the Commission ultimately decided to provide a safe harbor for such disclaimers.

Since that time, the Commission has brought a number of enforcement actions against marketers for deceptive advertising containing consumer endorsements. Many of these endorsements have been accompanied by statements that purport to inform consumers that the experiences of the featured endorsers are not representative of what consumers can expect. The disclosures are often buried in fine print footnotes or flashed as video superscripts too quickly for consumers to read them. Not only are the disclosures far from clear and conspicuous, but usually they merely say “results not typical” or “results may vary” or similar statements that do little to inform consumers how rare or extreme the featured results are.

The results of the staff’s Endorsement Booklet Study and the Second Endorsement Study further confirm that the concerns expressed by the Commission in 1980 about advertisers attempting to use disclosures to disclaim typicality messages conveyed by consumer endorsements were well-founded. In the Endorsement Booklet Study, despite the presence of strongly worded, highly prominent disclaimers of typicality, between 44.1% and 70.5% of respondents indicated that the dietary supplement in question would reduce breathing problems, increase energy levels, and relieve pain in at least half of the people who try it. (*See* Table 3b of the Endorsement Booklet Study).

In the Second Endorsement Study, consumer testimonials communicated to a substantial number of respondents that the results claimed by the testimonialists were generally representative of the results that other consumers could expect. Even with the disclosures “Results not typical” and “These testimonials are based on the experiences of a few people. You

are not likely to have similar results,” between 22.58% and 50.75% of respondents thought that at least half of new users would achieve results similar to those experienced by the endorsers featured in the advertisements. (*See* Tables 2 and 5 of the Second Endorsement Study.)<sup>21</sup>

By contrast, the disclosure of actual expected results significantly reduced the communication that the experiences depicted are generally representative. (*See* Table 2 of the Second Endorsement Study.) This was particularly true when there was a large difference between the amounts claimed by the testimonialists and the disclosed actual expected results. Of the consumers exposed to an ad in which endorsers claimed to have lost between 48 and 72 pounds – but which clearly disclosed that the average user loses 10 pounds – only 3.23% thought the ad conveyed that at least half of new users would lose at least 48 pounds. This figure is almost identical to the 3.13% who – after seeing an ad with no numbers – thought that the average user would lose at least 48 pounds.

In light of these studies and its own history of law enforcement challenges to misleading testimonials, the Commission asked in January 2007 for comment on: (1) the potential effects on advertisers and consumers if the Guides called for clear and conspicuous disclosure of generally expected results whenever the testimonial is not generally representative of what

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<sup>21</sup> The 22.58% figure is the percentage of respondents who, after seeing testimonialists tout 48-72 pound losses in an ad with the “Experiences of a few” disclaimer, said that at least half of new users would lose at least 48 pounds. (*See* Table 2.) The 50.75% figure is the percentage who, after seeing testimonialists say their cholesterol dropped 30-90 points, said that at least half of new users of the dietary supplement would experience drops of at least 30 points, despite a “Results not typical” disclaimer. (*See* Table 5.) Subtracting from these figures the results of their respective “no numbers” conditions (3.13% and 0%) – in which consumers saw ads featuring multiple testimonials that touted the product but did not provide any numerical statement of the results achieved by the testimonialists – yields adjusted figures of 19.45% and 50.75%. As noted below, these “no numbers” conditions capture the effects of both yeasaying and prior beliefs.

consumers can generally achieve with the advertised product – *i.e.*, if disclosing the limited applicability of the depicted results no longer provided a “safe harbor” for the use of testimonials relating non-typical experiences; and (2) what information, other than what is required to substantiate an efficacy or performance claim, would be required for an advertiser to determine generally expected results, and how difficult it would be for advertisers to make this determination. Most of the comments the Commission received focused specifically on these issues.

a. Comments supporting revision of the Guides’ provisions concerning the disclaimer of typicality

Several comments stated that advertisers should not be able to use nonrepresentative testimonials and merely accompany them with disclaimers stating that those results were not typical.<sup>22</sup> One said that the current Guides invite weight-loss testimonials that advertisers know to be false and deceptive, simply by pairing the claim with a “results not typical” disclaimer.<sup>23</sup>

Two other commenters stated that the Guides should require that endorsements reflect typical consumer experience.<sup>24</sup> One of them opined that even requiring that atypical testimonials include disclosure of typical results would not eliminate deception.<sup>25</sup> The other stated that if the Guides do continue to permit the use of nonrepresentative testimonials, the disclaimer of typicality should appear through the entire testimonial *and* be accompanied by disclosure of

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<sup>22</sup> Calkins, at 1; CBBB, at 2-3; Adams, at 1.

<sup>23</sup> Calkins, at 1.

<sup>24</sup> NACAA, at 2; Attorneys General, at 3.

<sup>25</sup> Attorneys General, at 3.

typical results.<sup>26</sup> Another commenter stated that consumer testimonials should be accompanied by a clear and conspicuous disclosure describing the typical results obtained, or at least that the Guides should ensure that the “results not typical” disclosure actually changes the net impression of the advertisement.<sup>27</sup>

- b. Comments opposing revision of the Guide provisions concerning the disclaimer of typicality

Other commenters stated that the Guides should continue to allow nonrepresentative testimonials to be accompanied by disclaimers of typicality, and should not require disclosure of generally expected results. Virtually all of the comments urging the Commission to retain Section 255.2(a) of the Guides in its current form made one or more of the following arguments:

- i. “Aspirational” testimonials serve an important purpose, and both advertisers and consumers would be adversely affected if disclosure of generally expected results were required.
  - (a) “Aspirational” testimonials motivate consumers without misleading them.

Several of the commenters asserted that in the weight-loss field, “aspirational” or “inspirational” testimonials that truthfully relate the experiences of consumers who have successfully lost weight using the advertised product or program are important advertising tools.<sup>28</sup> Even though those testimonials might not reflect what consumers typically experience

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<sup>26</sup> NACAA, at 2.

<sup>27</sup> CBBB, at 3 (noting that the BBBs receive thousands of complaints against companies that rely heavily on the use of nonrepresentative consumer testimonials, and that, in the BBB’s experience, consumers frequently believe they will achieve similar results despite the presence of “results not typical” disclaimers).

<sup>28</sup> Product Partners, at 2-3, 5; Jenny Craig, at 2; CORE, at 3; NutriSystem, at 26.

with that particular product or program, they remind customers of their own fitness goals and motivate them to try to achieve similar results by starting responsible weight loss programs.<sup>29</sup>

According to two commenters who stressed the importance of “aspirational” testimonials in weight-loss advertising, consumers understand that the weight loss achieved by the testimonialist does not necessarily reflect the experience they will have using the product or program.<sup>30</sup> As one put it, the “variables that affect the rate and extent to which a person can lose weight are so varied and well-known to the viewer . . . that it is difficult to believe that consumers are not capable of understanding that their result may be different from those that are shown in advertising depending on multiple factors, but that success nonetheless, is absolutely achievable.”<sup>31</sup> Thus, a 150-pound person who sees a testimonial from a woman who lost 100 pounds knows she will not lose 100 pounds but that she could lose 20-30 pounds; conversely, a 400 pound person who sees the same ad “could equally see that there is hope for them to lose over 200 pounds.”<sup>32</sup>

The Commission agrees that “aspirational” testimonials are commonly used in the marketing of weight-loss products and programs, and that they may induce consumers to purchase or enroll in these products or programs.<sup>33</sup> However, the fact that a testimonial is

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<sup>29</sup> Product Partners, at 2, 5; Jenny Craig, at 2; CORE, at 3.

<sup>30</sup> Product Partners, at 3; Jenny Craig, at 2. However, neither Product Partners nor Jenny Craig provided quantitative evidence supporting their view that consumers are not misled by “aspirational” testimonials.

<sup>31</sup> Product Partners, at 3.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> For a discussion of consumer testimonials and disclaimers in the context of weight-  
(continued...)

truthful or is being used to promote a product or program that advocates responsible lifestyle changes (*i.e.*, reduced caloric intake and increased caloric expenditure) does not necessarily prevent it from conveying a misleading message to consumers. If consumers are deciding to purchase a product or enroll in a program based on advertising that conveys to them that they are likely to achieve results similar to the testimonialists, and the advertiser lacks substantiation for that representation, then those consumers are being misled.

Moreover, as the Commission has stated, “An interpretation [of an advertisement] may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive.”<sup>34</sup> As with all advertising, the fundamental question to be answered is whether, taken in its entirety,<sup>35</sup> an advertisement that uses testimonials is likely to

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<sup>33</sup> (...continued)

loss advertising, *see Weight-Loss Advertising: An Analysis of Current Trends, A Federal Trade Commission Staff Report* (Sept. 2002) (available at [www.ftc.gov/bcp/reports/weightloss.pdf](http://www.ftc.gov/bcp/reports/weightloss.pdf)). The staff’s report highlights the troubling use of consumer testimonials claiming extreme weight loss in weight-loss advertising, a particular concern given the apparent prevalence of weight-loss fraud.

In October 2007, the Commission issued a report on consumer fraud in the United States. The survey found that more consumers were victims of fraudulent weight-loss products than of any of the other specific frauds covered by the survey. For purposes of the study, weight-loss products included nonprescription drugs, dietary supplements, skin patches, creams, wraps, or earrings that were promoted as making it easy for consumers to lose a substantial amount of weight or allowing them to lose weight without diet or exercise. Federal Trade Commission, *Consumer Fraud in the United States: The Second FTC Survey* at 15, S-1 (Oct. 2007 staff report) (available at [www.ftc.gov/opa/2007/10/fraud.pdf](http://www.ftc.gov/opa/2007/10/fraud.pdf)).

<sup>34</sup> FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174, 177 n.20 (1984) (citation omitted) (hereafter “Deception Policy Statement”).

<sup>35</sup> “[I]n advertising the Commission will examine ‘the entire mosaic, rather than each tile separately.’” *Id.* at 179 (quoting *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963)).

convey to reasonable consumers a message that is false or for which the advertiser does not have substantiation. The substantiation requirements for advertisements that convey performance claims are the same, whether the claim is made with or without the use of testimonials.

Advertisers cannot use testimonials to convey claims they could not make through other means.

- (b) Requiring disclosure of the results consumers generally achieve with the advertised product or program would impose a substantial burden on advertisers.

Several commenters stated that determining generally representative results would be very difficult for certain advertisers. According to some commenters, in the weight-loss field, for example, determining generally representative results would necessitate computations across a diverse customer base (men, women, young, old, obese, and non-obese), a difficult and costly endeavor that would require ongoing monitoring of customers' progress and frequent updating of calculations.<sup>36</sup> One commenter stated that it was impossible for an advertiser whose weight-loss program promoted both exercise and diet to know what is typical.<sup>37</sup> Another stated that when the effectiveness of the products depends on variables associated with individual use, typicality either cannot be shown or shown only with great difficulty so that advertisers in these businesses would not be able to use testimonials, even though advertisers in other fields would be able to continue doing so.<sup>38</sup>

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<sup>36</sup> NutriSystem, at 26-27; CORE, at 3 (noting that there is no "average" consumer); Satz at 2, 11; Kelley Drye, at 17 (practical result of such a requirement would be de facto prohibition on use of testimonials).

<sup>37</sup> Product Partners, at 5.

<sup>38</sup> ERA/CRN, at 10 and 12 (marketers of dietary supplements would face substantial hurdles in substantiating typicality of health or safety claims made by consumer testimonials).

One commenter suggested that a disclosure requirement would incorrectly assume that all types of claims can be measured by generally expected results, even though preference claims or personal experience claims for certain products – such as video games, movies, and restaurants – are not susceptible to such measurements.<sup>39</sup> If the Guides called for non-representative testimonials to be accompanied by disclosure of generally expected results, these advertisers would have to have studies showing the likeability of their products before they could use endorsements; as a result, many would stop using testimonials.<sup>40</sup> This commenter also opined that such a change would mean that advertisements using testimonials would be subject to stricter substantiation requirements than advertisements making the same claim without the use of testimonials.<sup>41</sup>

Several commenters also suggested that requiring disclosure of generally expected results could create competitive disadvantages for certain businesses, thereby upsetting the level playing field that exists under the current Guides for, among others, new businesses attempting to compete with established enterprises.<sup>42</sup> Others stated that the burden of any new disclosure

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<sup>39</sup> AAAA/AAF, at 11.

<sup>40</sup> *Id.* at 11-12 (also noting that new requirements might cause other advertisers to stop using testimonials, too). *See also* ANA, at 10 (advertisers would not be able to use testimonials to make claims about products that rely on subjective variables, because they would not be able to adequately determine typical experience); AHPA, at 10-11 (some advertisers might cease using endorsements if unable or unwilling to afford the cost of measuring generally expected performance).

<sup>41</sup> AAF/AAAA, at 12.

<sup>42</sup> ERA/CRN, at 9-12 (new advertisers would be placed on unequal footing with established competitors because they would have to establish baseline results before they would be able to determine typicality; also, advertisers who have evidence of a product's efficacy but not of typicality would not be able to use testimonials, even though a competitor who has

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requirements would, ironically, fall on marketers of responsible weight loss programs (those complying with government recommendations of decreased caloric intake and increased physical activity) because they would expend resources to comply with the requirements, while marketers of pills and supplements with no scientific support would ignore those requirements or manipulate their data to produce fictitious averages.<sup>43</sup>

At the outset, the Commission notes that such a change in the Guides would not mean that advertising using testimonials would be subject to stricter legal standards than other advertising – to the contrary, it would merely eliminate a safe harbor that has allowed advertisers to avoid the general requirement that they be able to substantiate all material claims conveyed by their advertising to reasonable consumers.

The Commission does recognize that a revision of renumbered Section 255.2(b) calling for non-typical testimonials to be accompanied by disclosure of the results consumers generally achieve with the advertised product would increase costs for those advertisers who have not previously tracked consumers’ experiences with their products, and could present an impediment to the use of such testimonials by certain advertisers. The commenters, however, may be overestimating those costs. In the vast majority of cases – particularly those for legitimate

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<sup>42</sup> (...continued)  
typicality substantiation could). *See also* AHPA, at 10-11 (requiring disclosure of generally expected results would increase costs for advertisers who do not already have substantiation for claims made in endorsements; as a result, it might reduce use of endorsements if advertisers are unwilling or unable to pay the cost of measuring generally expected results).

<sup>43</sup> NutriSystem, at 27-28; Freedomworks, at 2-3 (“one-size-fits-all disclaimer” would create significant burdens for legitimate advertisers who would abide by the Guides, while unscrupulous operators would disregard them); Satz, at 10 (advertisers who are already making unsubstantiated weight-loss claims will not comply with Guide provisions calling for disclosure of additional information).

products and programs whose efficacy has already been demonstrated by competent and reliable scientific evidence – that information is likely to be present.

The Commission also believes that, for most products, it is possible to devise a methodologically sound means of determining the generally expected results.<sup>44</sup> Moreover, other alternatives may be available. For example, an advertiser may use testimonials from a defined subset of users for which it *can* determine the typical results.<sup>45</sup> Or, given the Commission’s proposal to revise the Guides so that they no longer provide unequivocally that testimonials will convey typicality claims, the advertiser could write its ad in such a way that consumers would not take away the message that they can expect to achieve the same results as the testimonialist.<sup>46</sup>

Moreover, the Commission does not assume that the use of testimonials necessarily gives rise to typicality messages, and thus to a need for disclosures, regardless of the nature of the product. Advertisements that use testimonials to promote products for which consumers’ reactions are inherently subjective and their endorsements thus merely statements of personal opinion (*e.g.*, restaurants or games) are less likely to convey typicality messages than ads using

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<sup>44</sup> As noted below, the Commission is specifically seeking comment on whether there are product categories for which such a change in the Guides would prevent advertisers from using endorsements in advertising even though the advertiser believes that the endorsers’ experiences are or likely are generally representative of what consumers can expect to achieve with the product.

<sup>45</sup> For example, an advertisement depicting the atypical results of women who used a program for a year could clearly and conspicuously disclose the average results of women who remained in the program for a year.

<sup>46</sup> The Commission is proposing to include such an example in the revised Guides. *See* Section 255.2, Example 4, below.

testimonials to make objective, quantifiable claims (*e.g.*, pounds lost, money saved).<sup>47</sup> Indeed, Section 255.2(a) of the Guides speaks of “what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use.”<sup>48</sup> The concept of using a product to achieve certain results implies a factual scenario very different from testimonials expressing opinions about a particular book or movie. Accordingly, unless an advertisement made a claim such as “preferred 2-1 over the best-selling video game,” the advertiser would not need a likeability study before using endorsements in which consumers stated how much they enjoyed the game.<sup>49</sup>

Although requiring disclosure of generally expected results might impede the ability of newly established companies to use testimonials, such an outcome would not necessarily be inappropriate. Businesses are entitled to compete based on truthful, nonmisleading advertising claims, but they are not entitled to use techniques that mislead consumers. If a company does not have adequate substantiation for an ad that said “you will lose 20 pounds in 10 weeks using our product,” it cannot have a testimonialist convey the same message in an advertisement that merely includes a small disclaimer that says “results not typical.” Until such time as it has an

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<sup>47</sup> See Deception Policy Statement, 103 F.T.C. at 181 (“Certain practices . . . are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.”) (footnote omitted).

<sup>48</sup> When the Commission first proposed Section 255.2 in 1975, it noted that Section 255.2(a) “recites the general principle that endorsements reflecting the experience of an individual consumer will be interpreted as representing the typical *performance* of the product under like circumstances.” 40 Fed. Reg. at 22147 (emphasis added).

<sup>49</sup> If there were a financial or other relationship between the advertiser and the endorser that would affect the credibility of the endorsement, that relationship would have to be disclosed under Section 255.5 of the Guides.

adequate data to determine what results consumers can expect from its product, a company might have to tout other aspects of its program (e.g., that it provides easy-to-follow menus with inexpensive, low-calorie, pre-made food). Moreover, it is likely that in most instances, the evidence substantiating the efficacy claim will provide sufficiently meaningful information to establish the parameters of the generally expected results. The Commission is also mindful that marketers of unproven, “miracle in a bottle” weight-loss products might either ignore revised Guides or fabricate exaggerated data for use in disclosures accompanying their testimonials, thereby putting marketers of legitimate weight-loss programs at a competitive disadvantage. Advertising by these marketers would likely attract the Commission’s attention, however, prompting enforcement actions to enjoin these practices. Moreover, as a matter of policy, this argument could not justify allowing a safe harbor for claims the Commission had determined were deceptive. If consumers are being misled by the widespread use of inadequately qualified, non-typical testimonials, the fact that some scofflaws will continue trying to defraud consumers does not outweigh the considerations in favor of revising the Guides.

- (c) Even if advertisers could determine the results consumers generally achieve with the advertised product or program, disclosing those results would confuse consumers.

Several commenters asserted that even if advertisers of weight-loss programs attempted to comply with a new requirement to disclose generally expected results, disclosure of the resulting “average” weight loss results would not only be confusing to consumers – because of the amount of information advertisers would have to provide in order to enable them to interpret

those averages – but could also discourage them from even starting a weight-loss program that might be the first step to a healthier lifestyle.<sup>50</sup>

The commenters did not submit any empirical evidence supporting their contentions that disclosure of generally expected results would be confusing to consumers, and would even deter them from starting a new weight loss program. Absent such evidence, the Commission doubts that disclosure of average weight-loss results – whether presented separately by gender or simply as a single figure<sup>51</sup> – would be less confusing to consumers than the information they currently receive: data from statistical outliers with no indication as to what most consumers achieve.<sup>52</sup> It may also be that insofar as the current Guides provide no incentive for a company to track and analyze consumers’ success (or lack thereof) with its product or program, they actually decrease the amount of useful information that could be made available to consumers.

Turning to the commenters’ contention that such a change in the Guides would discourage consumers from even attempting to lose weight, the Commission notes two points. First, no commenters submitted empirical evidence that “aspirational” testimonials actually

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<sup>50</sup> CORE, at 3-4 (averages are inherently misleading; consumers may be discouraged from doing anything about their weight); Satz, at 10-11 (averages would be misleading and discouraging); Product Partners, at 4 (a consumer who needed to lose 75 pounds might not bother starting a weight-loss program if ads for that program disclosed that the average consumer lost only 30 pounds). *See also* NutriSystem, at 26-27 (averages would not be useful because consumers’ needs and objectives are so disparate); CORE, at 3 (companies would have to interpret so much data to accurately interpret averages that FTC’s efforts to make claims easy to understand would be undermined); Jenny Craig, at 2 (consumers will be deluged with confusing data of limited utility).

<sup>51</sup> For example, a disclosure might state “the average man loses 2 pounds per week on our program; the average woman loses 1 pound per week” or “the average person loses between 1 and 2 pounds per week.”

<sup>52</sup> The Commission notes in this regard that consumers did not appear to be confused by disclosure of average weight loss results in the Second Endorsement Study.

benefit consumers. Indeed, it seems just as likely that consumers induced into buying a weight-loss product or enrolling in a program based on what are, in effect, statistical outliers, may be more easily frustrated by their lack of comparable success – and give up sooner – than consumers who have realistic expectations based on accurate information. Second, although the commenters simply assume that advertising using non-typical testimonials would not be “aspirational” if the ads disclosed the generally expected results, there is no apparent reason why consumers might not think they can do better than the average. For example, an advertisement that features highly successful testimonialists but discloses the results consumers generally achieve could provide positive motivation to consumers by conveying to them that they can expect to lose about 30 pounds on that program over six months, but that if they are conscientious and stay on the program longer than the average consumer, they might even lose 75 pounds – like the testimonialist.

- ii. Rather than change the Guides, the FTC should continue bringing law enforcement actions to stop deceptive advertising using testimonials. Alternatively, the FTC should exempt advertisers of proven weight-loss products and programs from having to disclose generally expected results when they use nonrepresentative testimonials.

A number of commenters stated that the Commission has successfully used post-market law enforcement actions to address deceptive advertising, and should continue to do so, rather than revise the Guides to impose disclosure requirements that affect all advertisers and may chill dissemination of helpful information.<sup>53</sup> One specifically noted that in the last five years, the FTC

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<sup>53</sup> Product Partners, at 2; Jenny Craig, at 2-3; ERA/CRN, at 6-7; AAF/AAAA, at 5-8 (noting also enforcement of the principles embodied in the Guides by the States and by private litigants, as well as industry self-regulatory programs, and suggesting that revision of the Guides would require self-regulatory entities to revise their own standards); ANA, at 7 (noting

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has created an enforcement climate (including its identification of “Red Flag” claims and issuance in January 2007 of four cases challenging allegedly deceptive weight-loss claims) that should provide a powerful deterrent against deceptive weight-loss advertising.<sup>54</sup> Another urged the Commission to continue using its Red Flags guide and other means to pursue deceptive weight-loss advertising, rather than change the Guides.<sup>55</sup> One noted that the Commission has filed comments with the FDA stressing both the value of commercial speech that gives consumers access to useful information and the advantages of the Commission’s post-market law enforcement approach over the use of pre-market regulation of commercial speech.<sup>56</sup>

Several of these commenters also asserted that there are important differences between weight-loss products and programs that are based on recognized principles of reduced calorie consumption and increased energy expenditure, on the one hand, and unsubstantiated “miracle in a bottle” products that are not based on science, on the other, and that if the Commission does decide to revise Section 255.2(a) (notwithstanding their arguments to the contrary), it should

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<sup>53</sup> (...continued)  
enforcement actions by FTC and other authorities challenging deceptive testimonials); CORE, at 4-5; Satz, at 8-10. *See also* Specter, at 2; Freedomworks, at 1-3; NutriSystem at 15, 29 (urging Commission not to subject marketers of weight-loss products and programs to additional disclosure requirements).

<sup>54</sup> NutriSystem, at 17-19. The staff’s 2003 “Red Flags” guide identified seven common weight-loss claims made for products available over-the-counter (including nonprescription drugs, dietary supplements, creams, wraps, devices, and patches) that were scientifically infeasible at that time, and that remain scientifically infeasible. The guide is an educational brochure intended to assist the media in identifying deceptive weight-loss claims prior to publication.

<sup>55</sup> Jenny Craig, at 2.

<sup>56</sup> NutriSystem, at 8-9, 11-16 and Exhibit A.

distinguish between the two.<sup>57</sup> According to these commenters, weight-loss programs based on reduced caloric intake and increased energy expenditure present no risk to consumers, nor does advertising for these programs that contains truthful testimonials.<sup>58</sup> Accordingly, these commenters urge, if the Commission does revise the Guides to require disclosure of typical results, it should exempt efficacious meal replacement programs that conform to government recommendations for responsible weight loss.<sup>59</sup>

Contrary to the views expressed by several commenters, revising the Guides to state that non-typical testimonials should be accompanied by clear and conspicuous disclosure of generally expected results would not represent a departure from the agency's traditional use of post-market law enforcement actions. As noted above, the Guides merely set forth the general principles that the Commission will apply in examining endorsements within the confines of its traditional Section 5 authority; they do not provide an independent source of legal authority. Thus, even if the Commission were to revise the Guides with respect to the use of non-typical testimonials 255.2(a), it would continue to enforce Section 5 by means of post-market law enforcement actions, with the question in each case being whether a particular advertisement conveyed a false or unsubstantiated message to consumers in violation of Section 5. Nor is there any reason to expect that the Red Flags guides would not continue to be used in evaluating cases for investigation and enforcement action.

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<sup>57</sup> Satz, at 2-3 (the real problem is deceptive testimonials by purveyors of fad diet pills and supplements); CORE at 2; NutriSystem, at 30-31.

<sup>58</sup> CORE, at 4; NutriSystem, at 28-31; Satz, at 9.

<sup>59</sup> Satz, at 3; NutriSystem, at 30-31 (FTC should exempt advertisers who do not make "Red Flag" claims from disclosure requirements); Specter, at 2 (if Guides are revised, FTC should avoid placing burdensome restrictions on useful products); Satz, at 12.

Finally, it would not be appropriate to exempt the marketers of certain kinds of weight-loss products and programs from Section 255.2(a) of the Guides. As noted above, the purpose of the Guides is to assist businesses in conforming their advertising to the requirements of Section 5 of the FTC Act. Consumers can be deceived by an advertisement even for a “legitimate” weight-loss program, if the ad conveys that the testimonialist’s experience is representative of what consumers can generally expect, and the advertiser cannot substantiate that claim.

- iii. The Commission’s consumer survey evidence does not provide a reliable basis for such a change in the Guides.

A number of commenters asserted that the staff’s two consumer research reports do not provide a reliable basis for the potential revision about which the Commission inquired. Some comments simply raised concerns about specific elements of the design or analysis of the studies; one provided a report summarizing the proceedings of two focus groups it had sponsored; and another included two reports by a marketing professor raising a number of issues concerning the studies.

Specifically, some of the commenters suggested that the design of the studies (*e.g.*, testing only four print ads, three of which were for dietary supplements or weight-loss programs) and the demographic breakdown of the consumers who participated (80% of the respondents in the first study were over age 60) was such that their results cannot be extrapolated to other media or products.<sup>60</sup> Others questioned the statistical power of the studies, and asked the Commission to submit them to outside experts for review to determine whether they have utility in the

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<sup>60</sup> ANA, at 8; AAAA/AAF, at 12-15.

Commission’s review of the Guides;<sup>61</sup> suggested that the studies did not discern what the language contained in the ads actually conveyed to consumers, but only what consumers remembered after having previously read the ads;<sup>62</sup> or suggested that the claims used in both 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, and that somewhat older respondents in the Endorsement Booklet Study might not have access to information on the Internet that can help consumers in choosing healthcare products.<sup>63</sup>

The Commission acknowledges that the staff’s research did not attempt to determine what messages consumers take away from testimonials and disclaimers in all media and for all products. The Commission is not aware of any reason to expect that the results would be different with other media or products, however; nor did the commenters provide any empirical evidence supporting that proposition.<sup>64</sup> Furthermore, with respect to the statistical power of the Endorsement Booklet Study, it is correct that the treatment cells used in that study were smaller than those used in the Second Endorsement Study. However, the communication of typicality was so high in all of the cells in the Endorsement Booklet Study that it is reasonable to conclude that the disclaimers were having no practical effect. Similarly, although the respondents in the

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<sup>61</sup> AHPA, at 7-10.

<sup>62</sup> WLF, at 1, 7.

<sup>63</sup> NPA, at 2-3.

<sup>64</sup> Indeed, insofar as consumers are able to control how long they view a print ad – unlike, for example, a television commercial – there is some reason to believe they would be more likely to notice and read “results not typical” disclaimers in print ads than in other media.

Endorsement Booklet Study were somewhat older than the average population (because of the intended audience for the advertising at issue in the law enforcement investigation that prompted this research), the results are consistent with those seen in the Second Endorsement study and thus support those conclusions.

According to the commenter that sponsored its own focus groups, the FTC's studies do not adequately illustrate the complexity of consumer perception and understanding of testimonials.<sup>65</sup> In contrast, this commenter stated, the focus groups showed that consumers understand that testimonials relate individual experiences of satisfied customers (often, "best case" results), are inherently skeptical of testimonial-based advertising, and do not expect that they would get the same results as the testimonialists.<sup>66</sup> This commenter further said that the focus group discussions showed that, given consumers' understanding of the limited applicability of testimonials, nothing more than a "results not typical" disclaimer is needed.<sup>67</sup>

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.<sup>68</sup> Focus groups are very dependent on group dynamics, and one or two participants can dominate the

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<sup>65</sup> Kelley Drye, at 2, 15-16.

<sup>66</sup> *Id.* at 7-10. A majority of the focus group members also expressed the belief that consumer testimonialists generally receive some compensation for their endorsement, even though the Guides presume otherwise (*i.e.*, the Guides require disclosure of compensation when it is paid). *Id.* at 13-14.

<sup>67</sup> *Id.* at 10-13.

<sup>68</sup> Here, the focus group participants reviewed the ad they were given, wrote their reactions, thoughts, and questions down on a pad, and then engaged in a lengthy, guided discussion with the focus group moderator. StrategyOne, *Testimonial Advertising Focus Group Research*, at 16-17 (attached to Kelley Drye comment).

discussion and even influence other participants.<sup>69</sup> 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.

Finally, the issues raised by marketing professor Thomas Maronick, Ph.D., on behalf of ERA/CRN<sup>70</sup> included: (1) whether the questions used to qualify respondents for participation in the study (“screener questions”) sensitized them to the issues in the study, thereby potentially affecting their responses; (2) whether the age distribution of the respondents in the Second Endorsement Study suggests that the marketing firm did not follow instructions; (3) whether the instructions given to respondents when they were shown the ads used in the test caused them to read the ads more carefully than they ordinarily would have, thereby increasing the probability of seeing the performance claims; (4) that the statistics reported in the studies were not offset for “yeasaying” (*i.e.*, the tendency for some consumers to answer affirmatively to a question even when the ad contained no information related to the question); and (5) that if the consumers who answered “about half” to a question probing the communication of typicality were counted as not regarding the testimonial claims as typical, there would not be a statistically significant difference between the proportion of consumers who took a typicality claim and those who did

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<sup>69</sup> See *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 835 n.82 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (“Because focus group studies are conducted with very few respondents obtained through nonprobability samples, and because the interviews are conducted in an unstructured group format, it is difficult to draw generalizable conclusions from them. Indeed it is not unusual to obtain conflicting results from focus groups.”). See also A.B. Blankenship & George Edward Breen, *State of the Art Marketing Research* 227 (1993) (“[F]ocus group findings and ideas are not projectable. It would be a mistake to assume that what two or three focus groups say is true of all similar people in the market. The focus group can guide and ‘focus’ further research, but that is all it can do.”).

<sup>70</sup> ERA/CRN, at 14-15 and Appendices 2 and 3 (submitting reports of Thomas J. Maronick, Ph.D.). See also *Product Partners*, at 5 (agreeing with Dr. Maronick’s reports).

not for the business opportunity and dietary supplement advertisements.<sup>71</sup> Based on these reports, this commenter asserted, the studies cannot be relied on to measure what messages consumers take from the ads tested or the effectiveness of disclosures.<sup>72</sup>

With respect to Dr. Maronick's first concern, the Commission notes that screening is a universal and necessary part of copy test research, because it is important to test consumers who might potentially buy such a product or service. Although it might have been desirable to have included in the Second Endorsement Study "clutter" questions asking consumers about product categories other than those that were the subject of the advertisements used in the research, there is no reason to believe that the short advance warning of the general product category led to biased interpretations of testimonial claims.

Second, the fact that respondents' ages were not evenly distributed across the spectrum in the Second Endorsement Study actually shows that the individuals conducting the screening were following instructions: they had been instructed to obtain specific percentages of respondents in the 18-44 years and 45+ groups for each of the product categories in the study.<sup>73</sup>

Third, consumer surveys vary in terms of how many times respondents are allowed to view the ad in question, and what the interviewers say to them when they show them the ads. Sometimes, consumers are shown an ad only once and instructed to look at it as they would in a magazine or newspaper. Consumers often see advertisements more than once, however, in the real world. In the Second Endorsement Study, consumers were told to read the advertisement

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<sup>71</sup> ERA/CRN, at Attachments 2 and 3.

<sup>72</sup> *Id.* at 14.

<sup>73</sup> *See* Second Endorsement Study, at 4 (separate age and gender quotas established for each of the three products).

“carefully,” and then, after only being asked the name of the product being advertised, were shown the ad a second time, told to look at it carefully, and then asked additional questions after the ad had been removed from view. To the extent these procedures might have caused respondents to study the ad more carefully than they ordinarily would, and thus increased the probability of taking away messages of efficacy and typicality, they should also have increased the probability that respondents would see the tested disclaimers. Accordingly, the procedure used in this study actually confirms the data showing that most of the disclaimers did not have an appreciable impact on consumer take-away.

Fourth, with respect to “yeasaying,” Dr. Maronick counted as “yeasayers” both consumers who replied that the ad said something when it did not, *and* respondents who said the ad did not say something when it in fact did. In fact, the latter category does not constitute bias, but merely reflects that some respondents did not see a component of the ad and accurately reported that fact.<sup>74</sup>

In addition, even though the data coming from questions that asked for numerical – as opposed to “yes” and “no” answers – should not have been subject to yeasaying, both studies

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<sup>74</sup> Dr. Maronick noted that some respondents in the Endorsement Booklet Study reported that they had not seen any disclaimers in the ads they had viewed, even though those ads had, in fact, contained disclaimers. ERA/CRN, at Appendix 2, p. 10. The Commission believes that whether or not these respondents subsequently reported having seen a disclosure is not relevant to the overall conclusions about the ads’ communication of efficacy and typicality. The respondents viewed the ads in realistic conditions: they were given a booklet containing the ads and allowed to take whatever amount of time they needed to read it before being asked any questions about the messages communicated by the booklet. That they did not report seeing disclaimers does not mean they did not actually see them; they simply may not have recognized them as such. More important, Dr. Maronick’s focus on these consumers overlooks the fact that despite the presence of highly prominent disclaimers, a sizeable percentage of respondents in the Endorsement Booklet Study took away messages of efficacy and typicality, and that the results of the Endorsement Booklet Study are consistent with those of the larger Second Endorsement Study.

included treatment cells that would capture the effects of both yeasaying and prior beliefs. In the Endorsement Booklet Study report, Tables 2b and 3b presented data that were adjusted using responses provided by a group that saw a letter touting the product but not mentioning any specific health conditions or diseases; these analyses showed that the effects of testimonials on efficacy and typicality assessments were strong even after accounting for yeasaying and prior beliefs. The Second Endorsement Study included ads featuring multiple testimonials that touted the product but did not provide any numerical statement of the results that had been achieved by the testimonialist. Tables 1, 2, 4, and 5 in the Second Endorsement Study show that the communication of efficacy and typicality in these “no numbers” test conditions was generally quite modest.<sup>75</sup> However, as noted above, the Commission is putting on the public record new Tables 1a, 2a, 4a, and 5a that present the results adjusted for the responses obtained in these “no numbers” conditions.

Finally, although Dr. Maronick calculates what the results would be for communication of typicality in the Second Endorsement Study if respondents who answered “about half” when asked how many new users could expect to achieve the results achieved by the testimonialists were tallied with those who said “some,” “very few,” or “none,” rather than with those who said “all” or “most,” he does not offer any reason why that approach would be more appropriate than the approach taken by the study authors. Indeed, in lay terms, “about half” is consistent with the concept of generally expected results, and thus respondents giving that answer were properly

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<sup>75</sup> In the case of the cholesterol and business opportunity ads that did not include numbers, the percentage of subjects who responded saying at least 30 points or \$1,200, was 1.54% and 4.69%, respectively, for Communication (Table 4) and 0% and 3.13%, respectively for typicality (Table 5). The percentages were somewhat higher for the weight-loss ad, ranging from 7.81% for typicality (Table 2) to 12.5% for communication (Table 1) at the 24 pound level.

grouped in the Second Endorsement Study. However, even adopting Dr. Maronick’s approach, there can be no question that a substantial percentage of the respondents in all three conditions took away the message that new users could generally expect to achieve results similar to those achieved by the testimonialists.<sup>76</sup>

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.<sup>77</sup>

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<sup>76</sup> See above note 34 and accompanying text (a practice is deceptive if a “significant minority” of reasonable consumers are misled) (quoting Deception Policy Statement).

<sup>77</sup> See *Kraft, Inc.*, 114 F.T.C. 40, 126 n.13 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992) (agreeing that the design of the questionnaire used in the staff’s consumer survey “was not without its flaws, and that alternative or additional means could have been used” to minimize yeasaying bias, but that, on balance, the results were of some probative value); *Telebrands Corp.*, 140 F.T.C. 278, 324 n.45 (2005) (“While the copy test may be flawed for its failure to excise from the control ad all of the elements that communicated the challenged claims, copy tests do not have to be flawless to be reasonably reliable and probative.”) (citing *Novartis Corp.*, 127 F.T.C. 580, 699 n.24 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000); *Stouffer Foods Corp.*, 118 F.T.C. 746, 807 (1994); *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975)).

- iv. Disallowing the use of non-typical testimonials accompanied by disclaimers of typicality would raise Constitutional issues.

Eight comments raised First Amendment concerns.<sup>78</sup> These comments argued that the revision about which the Commission inquired in its Federal Register Notice would not pass constitutional scrutiny, or at least, would raise grave First Amendment concerns.

The comments generally did not dispute that the Commission could appropriately restrict *deceptive* testimonials consistent with the First Amendment.<sup>79</sup> But they argued in favor of case-

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<sup>78</sup> WLF, NutriSystem, ERA/CRN, and ANA raised substantive constitutional objections, with NutriSystem attaching to its comment a legal opinion addressing the issue. Three comments cited general First Amendment concerns and urged the Commission to use caution in any revisions to the Guides. FreedomWorks, at 1-3; Specter, at 1-2; AHPA, at 6. One comment noted the constitutional concerns raised by another comment, and joined in that comment. Product Partners, at 3 (citing concerns raised by the joint ERA/CRN comment).

<sup>79</sup> The standard for analyzing First Amendment issues involving commercial speech such as advertising was set forth in *Central Hudson Gas & Elec. Corp v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). Under that standard, the first question is whether the speech at issue concerns unlawful activity or is misleading. If so, the speech is not entitled to constitutional protection and may be freely regulated. If the speech at issue concerns lawful activity or is not misleading, the government restriction is analyzed under the following test: (1) the government must assert a substantial interest in support of the restriction; (2) the government must demonstrate that the restriction directly advances the asserted government interest; and (3) the restriction must not be more extensive than necessary to serve that interest. *Id.*

The Supreme Court specifically noted in *Central Hudson* that the very nature of commercial speech permits government regulation, even though the First Amendment otherwise generally prohibits content-based regulation:

First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.”

*Id.* at 564 n.6 (citation omitted).

by-case analysis rather than broader across-the-board restrictions, and contended that consumers are adequately protected from potential deception by the current practices of: (1) requiring that the testimonialist's experience be truthful and substantiated, and (2) adding a simple disclaimer that the stated results are not typical.<sup>80</sup>

Some comments stated that government restrictions on commercial speech must not be more restrictive than necessary, and that requiring disclosure of generally expected results would go beyond the means necessary to achieve the FTC's interest in preventing deception.<sup>81</sup> Others asserted that a revision of the Guides calling for disclosure of typical results when testimonials reporting atypical experience are used would not advance a substantial government interest.<sup>82</sup> Some argued that such a change in the Guides would prohibit not just false or misleading

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<sup>80</sup> See, e.g., NutriSystem, at Exhibit A, p. 15; ERA/CRN, at 8; ANA, at 10.

<sup>81</sup> ERA/CRN at 8-9 (Commission already has all the tools it needs to prevent misleading testimonials; less restrictive alternative would be for the Commission to clarify what it means by "clear and conspicuous disclosures"); ANA, at 10 (change would burden advertisers who disseminate truthful and non-misleading testimonials, as well as those who transmit misleading information); NutriSystem, at Exhibit A, pp. 16-17, 20 (change inquired about in the Federal Register notice would be an overly broad and unduly burdensome pre-market restriction on commercial speech when applied to advertising for the meal replacement sector of the weight loss industry). See also Specter, at 1-2 (noting concerns expressed by others that disallowance of the disclaimer of typicality could "result in an overly broad suppression of speech because narrower regulations that achieve the FTC's goals are available"); Freedomworks, at 2 (FTC's proposed "standardized, mandatory disclaimer statement" is broader than necessary to prevent deception). But see WLF, at 7 (although the means chosen to regulate commercial speech must be narrowly tailored, it need not be the least severe means available to achieve the regulatory objective).

<sup>82</sup> ANA, at 10 (comprehensive regulation of endorsements that already exists means modification of Guides would not directly and materially advance a substantial government interest); ERA/CRN, at 8 (no legitimate government interest in requiring substantiation of typicality when the testimonial is truthful, because no risk that consumers will be deceived).

messages but would also chill truthful speech because some advertisers might be deterred from using truthful testimonials if they could be found liable for violating Section 5 of the FTC Act.<sup>83</sup>

The Commission agrees that non-deceptive commercial speech is entitled to First Amendment protection, as set forth in *Central Hudson*. A revision of the Guides calling for disclosure of generally expected results would comport with that standard, however, if such disclosure is necessary to eliminate a deceptive message of typicality conveyed by the advertiser's use of atypical consumer endorsements.<sup>84</sup>

As noted above, the Commission is proposing to revise renumbered Section 255.2(b) to provide that endorsements about product performance are *likely* to convey an implied claim that the stated results are typical under the depicted circumstances, thereby revisiting its 1980 conclusion that such endorsements *necessarily* convey such a claim. The Commission's extensive law enforcement experience with consumer testimonials since 1980,<sup>85</sup> its expertise in ad interpretation, and the staff's two consumer research studies would provide an ample basis for concluding that consumers are likely to interpret unqualified endorsements about product performance as representations of the results typically achieved. *See generally* *FTC v. Colgate Palmolive*, 380 U.S. 374, 391-92 (1964); *Kraft, Inc. v. FTC*, 970 F.2d 311, 319-20 (7th Cir. 1992); *Thompson Medical Co., Inc. v. F.T.C.*, 791 F.2d 189, 197 (D.C. Cir. 1986). Moreover, a representation of typicality is deceptive if the results related by the endorser are not what

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<sup>83</sup> ERA/CRN, at 7-8 (footnote omitted); ANA, at 10-11.

<sup>84</sup> *See* WLF, at 9 & n.3 (FTC can insist on use of the most effective, reasonable disclaimers, including disclosure of average participant in weight loss program, if such a statistic can be readily computed).

<sup>85</sup> That experience includes several administrative litigations. *See* note 19, above.

consumers can generally expect from use of the product or service, and deceptive speech is not protected by the First Amendment.<sup>86</sup> Indeed, the Supreme Court has repeatedly stated that the government can restrict, or even ban, such speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).<sup>87</sup> Thus, the Commission may appropriately restrict the use of consumer endorsements that convey the false or unsubstantiated message that the results experienced by the testimonialists are typical of those consumers can generally expect.

In such circumstances, providing a safe harbor for testimonials that are accompanied by a clear and conspicuous disclosure of the results generally achieved by consumers does not offend the First Amendment.<sup>88</sup> Likewise, failure to embrace a blanket safe harbor for the use of disclaimers such as “results not typical” in the context of Commission guidance where the available evidence suggests that such disclaimers are ineffective would not raise any significant First Amendment issues, particularly when the Guides recognize that not every testimonial will

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<sup>86</sup> Indeed, with one exception, the commenters do not argue that consumers are unlikely to take a misleading impression from endorsements stating atypical results. Instead, the focus appears to be the choice of remedy needed to cure the misleading impression.

<sup>87</sup> In *Zauderer*, the Supreme Court upheld a disciplinary ruling against an attorney who had disseminated an advertisement informing potential clients that certain cases were handled on a contingent-fee basis, and that “[i]f there is no recovery, no legal fees are owed by our clients,” but failing to disclose that those clients would, nonetheless, be liable for litigation “costs.” The Court noted that the State of Ohio had “not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they otherwise might be inclined to present.” 471 U.S. at 650. The Court then held that an advertiser’s rights were adequately protected as long as disclosure requirements were “reasonably related” to the State’s interest in preventing deception. *Id.* at 651 & n.14.

<sup>88</sup> See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (“the State may require commercial messages to ‘appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive’”) (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).

convey a typicality claim, *and*, as discussed below, also do not rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement.

Even if analyzed under the more rigorous three-part test set forth in *Central Hudson* for restrictions on speech involving lawful activity that is not misleading, a revision to the Guides providing a safe harbor only for disclosure of “generally expected results” when advertisers cannot substantiate that consumers can generally expect the result achieved by the testimonialist would pass First Amendment scrutiny.<sup>89</sup> First, the Commission’s interest in requiring this disclosure is to prevent deception. The Court repeatedly has held that preventing fraud and deception is a substantial state interest. *Edenfeld v. Fane*, 507 U.S. 761, 769 (1993) (“there is no question that [the government’s] interest in ensuring the accuracy of commercial information is substantial”); *Pearson v. Shalala*, 164 F.3d 650, 655-56 (D.C. Cir. 1999).

Second, disclosure of generally expected results would directly and materially advance the government’s interest in preventing deception, by providing consumers additional factual information about the advertised product or service, and allowing them to assess the information accurately.<sup>90</sup> Again, the Commission’s established expertise in the area of deceptive consumer

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<sup>89</sup> It should be reiterated in this regard that the Guides are not an independent source of legal authority for the Commission; any law enforcement action would be based on a case-specific investigation. See Letter from Landis S. Plummer, Acting Secretary, to Jonathan W. Emord, Esq., at p. 2 (Apr. 1, 2004) (noting that Commission does not pre-review advertising, but might commence investigation after an advertisement has been disseminated to determine whether specific claims may be false or unsubstantiated) (available at [www.ftc.gov/os/2004/04/040420healthrulemaking.pdf](http://www.ftc.gov/os/2004/04/040420healthrulemaking.pdf)). Even if the FTC eliminated the safe harbor for disclosing the non-typicality of the endorser’s experience, it would have the burden in any subsequent law enforcement action of proving that the ad in question was deceptive.

<sup>90</sup> See *Pearson v Shalala*, 164 F.3d at 656-57 (finding that FDA’s prohibition of certain health claims “would appear to advance directly its interest in protecting against consumer fraud” but ultimately invalidating regulations because the government failed to show the ban on

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endorsements and the staff's two consumer research studies provide an adequate basis for the Commission's decision that inadequately qualified testimonials that convey, incorrectly, that the results experienced by the testimonialist are typical, are likely to mislead reasonable consumers, and that more detailed disclosure reduces the potential for deception. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 629 (1995); *Zauderer*, 471 U.S. at 652-53 (citing *FTC v. Colgate Palmolive*, 380 U.S. 374 (1964)). It bears repeating in this context that under Commission law, an advertisement can be capable of several reasonable interpretations, and if any one of them is misleading, the advertisement is deceptive in violation of Section 5. *See Deception Policy Statement*, 103 F.T.C. at 178.

And third, disclosure of "generally expected results" would not be more extensive than reasonably necessary to serve the government's interest in preventing deception.<sup>91</sup> The commenters do not contest that the Commission can require clear and conspicuous disclaimers to eliminate a deceptive impression of typicality. A disclaimer beyond "results not typical" can be justified by the studies that the Commission put on the public record in January 2007, which show that the simple disclosure is not adequate, while disclosure of average results greatly reduces the potential for deception. Moreover, the Guides would be calling for *more* speech, not less: they would not ban the use of atypical endorsements or even the use of "results not typical" disclaimers, but instead would advise advertisers who choose to use testimonials that convey a

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<sup>90</sup> (...continued)  
health claims met *Central Hudson's* "reasonable fit" requirement).

<sup>91</sup> The First Amendment does not require that the fit be the "least restrictive means" possible. Rather, the fit must be reasonable. *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989). *See also* WLF, at 7.

typicality message to include additional information to prevent a misleading impression.

Therefore, there is a reasonable fit.<sup>92</sup>

c. Proposed revisions to the Guides' provisions concerning disclaimers of typicality

Based upon the staff's empirical research and its law enforcement experience, the Commission believes that disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective, and therefore that the Guides' current safe harbor for such disclaimers should be eliminated. Accordingly, and having considered the comments submitted in response to the January 2007 Federal Register notice, the Commission now proposes to revise the renumbered Section 255.2(b) not only to provide that testimonials reflecting consumer experience on a key attribute of the product will *likely* 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, but also to provide that when testimonials do so convey, and the advertiser does not possess adequate substantiation for this representation, the advertiser should clearly and conspicuously disclose the generally expected performance in the depicted circumstances.

The Commission specifically seeks comment on whether there are product categories for which this requirement would prevent advertisers from using endorsements even though the

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<sup>92</sup> Some commenters suggest that a more detailed disclosure remedy would be overinclusive because not all consumers might be misled. Even if true, the restriction would still be sufficiently and reasonably tailored. *See Florida Bar*, 515 U.S. at 555 (rejecting argument that restriction against in-person solicitation was overinclusive insofar as it banned information even to citizens whose injuries were relatively minor or might keep consumers from learning about their legal rights at a time when others might be contacting them).

advertiser believes that the endorsers' experiences *are or likely are* generally representative. For any such product categories, the Commission seeks information concerning the costs and benefits to the advertiser, to competition, and to consumers of the inability to use such endorsements in advertisements, together with any supporting empirical data.

Finally, as noted above, notwithstanding the results of the staff's consumer research, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Therefore, the Commission also proposes adding a footnote to this subsection acknowledging this possibility. The footnote also notes that an advertiser employing a strong disclaimer will avoid the risk of FTC law enforcement action if it has valid empirical testing demonstrating that the net impression of its advertisement is non-deceptive. The Commission seeks comment on these proposed revisions.

3. Current Section 255.2(c)

The Commission proposes to eliminate Section 255.2(c) in the current Guides, which prohibits efficacy claims in consumer endorsements for drugs or devices unless the advertiser has adequate scientific substantiation for the claims and the claims are not inconsistent with any determination by the Food and Drug Administration concerning the drug or device. The Commission believes this section to be unnecessary. Revised Sections 255.2(a) and 255.2(b) effectively prohibit consumer endorsements for drugs or devices unless the advertiser has adequate scientific substantiation for any efficacy claims conveyed by the ads.

4. New Examples for Renumbered Section 255.2

The Commission is also proposing to add five new examples to Section 255.2. The first, new Example 1, involving consumer endorsements for a baldness treatment, illustrates that testimonials can convey an efficacy claim, even though the advertisement in which they appear

makes no other representations about the product.<sup>93</sup> The example also shows that the advertiser must have substantiation for that efficacy claim – in the case of a baldness cure, competent and reliable scientific evidence – and that the ad will likely communicate that the endorsers’ experiences are representative of what new users of the product can generally expect. New Example 1 also illustrates that an advertiser is unlikely to avoid liability under Section 5 simply by attempting to disclaim the typicality representations made through consumer endorsements. Specifically, new Example 1 provides that if the advertiser does not have adequate substantiation that new users typically will experience results similar to the spectacular results experienced by the testimonialists, the advertisement will be deceptive.

This example illustrates a long-standing principle that *pro forma* statements or disclaimers may not cure otherwise deceptive messages.<sup>94</sup> The Commission’s consumer research also supports this proposition. In the Endorsement Booklet Study, ads with prominent, strong disclosures still communicated efficacy claims to substantial percentages of consumers. Specifically, even with the disclosure used in Example 1 – “Notice: These testimonials do not prove our product works. You should not expect to have similar results.” – between 53.0% and 64.7% of the respondents took away the claim that the advertised supplement was effective for

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<sup>93</sup> The Commission is proposing to delete the existing Example 1 in Section 255.2 because it is inconsistent with the Commission’s proposed revisions to the Guides. The current Examples 2 and 3 would be renumbered as Examples 5 and 6 in the revised Guides. The Commission is also proposing a minor edit to the last sentence of renumbered Example 5: the phrase “probably represents a promise to consumers that this is the typical result” would be changed to “represents that this is the typical result. . .” The Commission believes that the use of poll results conveys a virtually express typicality claim.

<sup>94</sup> Deception Policy Statement, 103 F.T.C. at 180.

reducing breathing problems, increasing energy levels, and relieving chronic or persistent pain. (See Table 2b of the Endorsement Booklet Study.)

In new Example 2, endorsements are provided by three individuals who describe their monthly savings from using the advertised heat pump. The ad is interpreted as conveying that such savings represent what consumers who buy the company's heat pump can generally expect to experience, and, in this example, the advertiser does not have substantiation for this representation because fewer than 20% of purchasers will save even the smallest amount mentioned in the ad. As discussed above, the Commission's consumer research shows that consumers interpret testimonials to convey that about half of new consumers could expect the claimed results. Nonetheless, the Commission is not presently prepared to incorporate a specific numerical standard for "generally representative" that would apply to all endorsements for all products. Instead, new Example 2 clearly indicates that fewer than 20% is not generally representative.<sup>95</sup>

New Example 2 also clearly indicates that disclaimers 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" will be insufficient to prevent the ad from being deceptive. The example states that the ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation for that claim. Finally, new Example 2 illustrates several of the multiple ways such a disclosure could be phrased.

New Example 3 illustrates that use of the recommended disclosure does not obviate the need to have substantiation for the efficacy claims conveyed by the ad. In this example, an ad

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<sup>95</sup> Existing Example 1 appears to interpret "generally representative" as "a significant proportion," a phrase that is ambiguous and arguably could be a small percentage of consumers.

for a cholesterol-lowering product features an individual who claims to have reduced his serum cholesterol level by 120 points, without any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by 15% and the advertisement clearly and conspicuously discloses this fact. The example makes clear that the advertiser must have adequate substantiation that the product is capable of causing the specific results claimed by the endorser – a 120-point reduction in serum cholesterol without any lifestyle changes. Without that substantiation, the ad will be deceptive even with the disclosure of the generally expected results.

In new Example 4, the endorsement itself so clearly describes the limited and truly exceptional circumstances under which the endorser achieved the results claimed (six months of eating nothing but raw vegetables, six hours of vigorous exercise every day, and use of the advertised product enabled a 250-pound woman to lose 110 pounds), that the ad is unlikely to convey that consumers who use the advertised product under ordinary and typical circumstances should generally expect to achieve the results achieved by the endorser. Nonetheless, the advertiser must have substantiation for any performance claims conveyed by the endorsement (*e.g.*, that the advertised product causes substantial weight loss). Finally, the example illustrates that a vague reference to the extreme circumstances under which the depicted results were achieved (“together with diet and exercise”) will likely be insufficient to avoid communicating that the depicted results are representative.

New Example 7 illustrates another situation in which consumer endorsements will not trigger an obligation for the advertiser to determine whether the testimonialist’s experience is typical of what other consumers can expect. Consumers should realize that the positive reviews

given by three individuals exiting a movie theater are inherently subjective, and that they may not have the same reaction.

**D. Section 255.3 – Expert Endorsements**

Section 255.3 provides guidance with respect to expert endorsements. The Commission is proposing the addition of two new examples to this section, the modification of two examples in the current Guides, and the deletion of another.<sup>96</sup>

New Example 2 provides additional illustration of the principle that an expert endorser must possess the level of expertise that the ad implies he or she has. This illustration notes that if an endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement, the likely implication – given the nature of the product being advertised – is 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 (in this example the endorser has a doctorate in exercise physiology), the endorsement is likely deceptive. The example notes that a non-medical “doctor” 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 2 in the current Guides addresses an endorsement by an institution whose name implies that the entity is a bona fide independent testing organization with appropriate expertise.

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<sup>96</sup> Examples 2 to 4 in the current Guides would be renumbered as Examples 3 to 5. Example 5 in the current Guides would be deleted because the Commission believes it is anachronistic. Consumers today would be unlikely to view the association as an expert in the field of nutrition and would likely assume that the endorsement was based on compensation, rather than on an evaluation of the product’s nutritive value.

The current example (renumbered Example 3) assumes that such is the case. The Commission proposes to add a sentence to clarify that if the endorser is not such a bona fide independent testing organization (*e.g.*, if it was established and operated by the advertiser), the endorsement would be deceptive.

Example 3 in the current Guides discusses a hospital's endorsement of a non-prescription drug. In this example (which would be renumbered Example 4), the hospital has selected that particular product over its competitors because the manufacturer sells individually packaged doses to institutional users, although not to the general public. The Commission proposes to supplement the reasons currently given as to why this example is deceptive, to include the fact that the basis for the hospital's decision is not disclosed to consumers.

Example 4 in the current Guides suggests that if the president of a home cleaning company says that he or she uses a particular brand of cleanser in his or her business, this conveys that the individual believes that the advertised cleanser is at least as effective as other cleansers. The Commission has rewritten this example (renumbered as Example 5) to clarify why the endorser is considered an expert, and to indicate more clearly that the expert is comparing the cleanser to the product's leading competitors that the expert has tried and that the basis of this comparison is the cleanser's performance.

New Example 6 is intended to provide an example of an instance when an expert's endorsement is not supported by an adequate exercise of expertise. The example posits the situation where a medical doctor states that a drug will safely allow consumers to lower their cholesterol by 50 points after having reviewed only letters from satisfied consumers or the results of a rodent test. The example is premised on the assumption that these are not the types

of evidence that others with the same degree of expertise would consider adequate to support conclusions about the product's safety and efficacy.

**E. Section 255.4 – Endorsements by Organizations**

Section 255.4 provides guidance specific to the use of endorsements by organizations. The Commission is not proposing any substantive revisions to this section.

**F. Section 255.5 – Disclosure of Material Connections**

Section 255.5 of the current Guides states that advertisers must disclose connections between themselves and their endorsers that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience). It also indicates that consumers will ordinarily expect that endorsers who are well-known personalities (*i.e.*, celebrities) or experts will be compensated for their endorsements; therefore, unless the advertiser represents that a celebrity or expert endorser has given an endorsement without compensation, the advertiser need not disclose the payment of compensation to that endorser. The Guides make no distinction between an endorser who receives a flat fee for the endorsement and one who earns a royalty for each product sold after the ad containing the endorsement is disseminated.

The Commission believes that the requirement that advertisers disclose material connections with their endorsers is appropriate and should be retained. The Commission proposes to delete the second sentence of current Section 255.5, however, because it believes: (1) that consumers' expectations about celebrities and about experts may not be completely congruent; and (2) that even with respect to celebrities, knowledge of the individual's connections with the product's marketer may be material to consumers for endorsements made

in certain nontraditional contexts. In other words, the assumptions behind the across-the-board statement in the second sentence of current Section 255.5 no longer appear warranted.

With respect to celebrities, the Commission does not believe that it is relevant to consumers how or how much these individuals are compensated for their services in the context of conventional advertising. Accordingly, Example 2 is being revised to clarify that a royalty payment paid to an actor for each product sold need not be disclosed.

Unlike the case with celebrities, however, there could be situations in which the nature or amount of an expert's compensation might be relevant to consumers. Stated differently, although consumers likely expect that an expert will be paid for the time he or she spends conducting the analysis necessary to render an expert opinion, there could be certain compensation arrangements the knowledge of which would affect consumer purchase decisions.

Several Commission cases have specifically challenged an advertiser's failure to disclose an expert endorser's financial interest in promoting the sale of the advertised product,<sup>97</sup> and in new Example 4, these kinds of relationships are deemed likely to materially affect the weight that consumers give to a physician's endorsement of an anti-snoring product. The Commission specifically seeks comment on this example: if consumers know that an expert has a significant financial interest in sales of the product (such as an ownership interest in the company or compensation based on product sales), is this information likely to affect their assessments of the

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<sup>97</sup> See, e.g., *Med Gen, Inc.*, 134 F.T.C. 1 (2002) (consent agreement) (failing to disclose that an expert was an investor in the advertiser and may have a financial interest in promoting the sale of the advertised product); *Body Wise Int'l, Inc.*, 120 F.T.C. 704 (1995) (consent agreement) (failing to disclose that expert endorsers are Body Wise distributors and may have a financial interest in promoting the sale of the advertised product); *Numex Corp.*, 116 F.T.C. 1078 (1993) (consent agreement) (failing to disclose that expert endorsers indirectly owned stock in the advertiser, that they were to receive payments for each unit of the advertised product sold, and that one was an officer and director of the advertiser while the other was an officer).

expert's credibility? Are there also other financial compensation arrangements (*e.g.*, lump sum payments over a certain threshold) that would also be relevant to consumers' assessment of the expert's credibility?

The Commission further notes that even with respect to celebrities, distinctions would appear to arise between endorsements made in conventional advertising and those made in nontraditional contexts. In the latter context, as discussed below, disclosure may be necessary.

In its January 2007 Regulatory Review notice, the Commission referred to a 2003 petition from the consumer advocacy organization Commercial Alert, which suggested an exception to the principle that consumers will ordinarily expect that endorsers who are well-known personalities are compensated for their endorsements: when celebrities are paid for touting the performance of brand-name drugs on talk shows and other television programs, but do not mention on the air their financial ties to the drug's manufacturer. 72 Fed. Reg. at 2217. The Commission asked for any extrinsic evidence regarding consumer expectations about celebrity endorsements made during interviews, and specifically solicited written public comment on whether knowledge that a celebrity endorsing a product during such an interview is being paid for doing so would affect the weight or credibility consumers give to the celebrity's endorsement.

Two comments specifically addressed these issues, although neither submitted any extrinsic evidence about consumers' expectations. One noted that when a celebrity speaks favorably about his or her own use of a product in an interview, rather than in a conventional ad,

it seems even more sincere; consequently, if the celebrity's compensation is not disclosed, his or her opinion may be taken as even more legitimate.<sup>98</sup>

Another commenter suggested that absent evidence that celebrities were frequently endorsing products in contexts other than conventional advertising, the FTC should not address this practice in the Guides.<sup>99</sup> This commenter noted that celebrities often appear publicly wearing brand name clothing and suggested that it would be extremely difficult to distinguish those situations when consumers would expect them to be compensated from those when they would not. Furthermore, the commenter said, celebrities retain their right under the First Amendment to speak on public issues, and many of their public statements would likely be noncommercial speech.

A third comment suggested that the real problem with celebrity endorsements is the failure of advertisers to disclose the compensation celebrities receive when they endorse prescription drugs.<sup>100</sup> According to this commenter, because the Food and Drug Administration assumes that consumers understand celebrities are compensated for drug endorsements, the FTC does not challenge these endorsements even though prescription drugs – in the view of this commenter – pose more risks to consumer health than do dietary supplements.<sup>101</sup>

The Commission believes that when celebrities are paid spokespersons, their endorsements are commercial messages, regardless of whether they are disseminated in a

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<sup>98</sup> Adams, at 2.

<sup>99</sup> WLF, at 10.

<sup>100</sup> NPA, at 4.

<sup>101</sup> *Id.* at 4-5.

traditional advertising context – *i.e.*, a television commercial or print ad – or elsewhere. In the context of an interview, there is no reason for consumers to suspect that the endorsement is anything more than a spontaneous mention by a celebrity who has no apparent connection with the product’s marketer.

The Commission is proposing a new Example 3 to address this issue.<sup>102</sup> This example makes it clear that consumers would not expect a celebrity endorsing a product during a routine interview to be paid for doing so, and that knowledge of such a financial interest would likely affect the weight or credibility consumers give to the celebrity’s endorsement. In order to avoid the possibility of deception, the celebrity’s financial connection to the advertiser should be disclosed.

New Example 3 then goes on to distinguish this situation from one in which the celebrity appears during the interview wearing clothes bearing the insignia of a company with which she has an endorsement contract, but does not mention the company or discuss the clothes. No disclosure is required because she is not making any representation about the clothes. The Commission requests comment on both parts of new Example 3.

The Commission is also proposing the addition of several other new examples to Section 255.5. New Example 6 addresses the situation where “extras” who want to work in commercials are recruited to use a product in order to give endorsements in exchange for compensation and exposure. Viewers would not expect that “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. The example states that an advertisement that fails to disclose these facts is deceptive.

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<sup>102</sup> Example 3 in the current Guides would be renumbered as Example 5.

New Examples 7, 8, and 9 apply the general principle that material connections between the endorser and the advertiser should be disclosed to several new forms of marketing – blogs, discussion boards, and “street teams.” The Commission specifically seeks comment on these examples, with particular focus on the expectations held by consumers as to the relationships that exist between advertisers and endorsers in these new marketing contexts.

The Commission notes in this regard that WOMMA, a trade association whose members are engaged in word-of-mouth and other new types of marketing, stated in its comment that the relationship between endorsers and advertisers should not be concealed, and that the principles of transparency that form the basis of its code of ethics require, among other things, that endorsers not misrepresent their opinions or their identities (for example, by creating artificial entities to endorse products).<sup>103</sup> The Commission has long believed that industry self-regulatory codes play an important role in consumer protection, and that the development of ethical standards emphasizing transparency for marketers who engage in new forms of marketing is an important step to this end.

Finally, the Attorneys General suggested in their comment that the Commission add a new provision to the Guides providing that when an advertisement relies on a study that was sponsored by the advertiser itself, the advertisement should clearly disclose this information.<sup>104</sup> The Attorneys General note that although the Guides require the disclosure of material connections between endorsers and advertisers, current Example 1 under Section 255.5 specifies that an advertiser’s payment of expenses to the entity that conducted a touted study need not be

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<sup>103</sup> WOMMA, at 10.

<sup>104</sup> Attorneys General, at 3.

disclosed in the advertisement. The Attorneys General believe that the advertiser's funding of the study would, in fact, be a material factor for consumers to consider in deciding how much weight or credibility to give the endorsement.<sup>105</sup>

The Commission is not proposing to change Example 1 substantively at this time, but it is proposing certain modifications to provide additional factual background and to explain why disclosure of the funding for that test would not be required. The Commission seeks comment on these modifications, and on the suggestion made by the Attorneys General that there is a discrepancy between Section 255.5 of the Guides and current Example 1. The Commission also particularly seeks extrinsic evidence of consumer understanding concerning this issue.

## **V. PROPOSED REVISED ENDORSEMENT AND TESTIMONIAL GUIDES**

### FTC 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.

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<sup>105</sup> *Id.*

## **§ 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.

#### **§ 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. See also Example 3 to Guide 3 (§ 255.3) illustrating how a valid endorsement by an expert endorser may constitute all or part of an advertiser's substantiation, depending on the claim.]

(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.

**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 false or unsubstantiated statements made through the blogger's endorsement. The blogger also is subject to liability for 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 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.<sup>106</sup>

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<sup>106</sup> 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.

(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 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, only ate 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 does not convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances should generally expect to lose something in the vicinity of 110 pounds in six months. 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 says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, the advertisement would likely convey that her results were representative of what consumers can generally expect to lose with WeightAway.

**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 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 be deceptive assuming that 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.

(See also § 255.3, Example 5.)

#### **§ 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 the endorser 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 reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser. Additional guidance concerning endorsements by celebrities and experts 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. Where, as here, the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results would not likely be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization need not 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 would not expect that a celebrity discussing a medical procedure in a television interview to be 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 during that same appearance, 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. The readers of his blog are unlikely to expect 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 would likely 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.

**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.

## **VI. INVITATION TO COMMENT**

The Commission invites interested members of the public to submit written data, views, facts, and arguments addressing the issues raised by this Notice, including the proposed changes to the Guides. Such comments must be received by January 30, 2009, and must be filed in accordance with the instructions in the **ADDRESSES** section of this document.

### **List of Subjects in 16 C.F.R. § 255**

Advertising, Trade practices.

**Authority:** 15 U.S.C. 41-58.

By direction of the Commission.

Donald S. Clark  
Secretary