

A Communication From the Chief Legal Officers
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June 18, 2007

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Endorsement Guides Review, Project No. P034520

Dear Sir/Madame:

We write as state Attorneys General (“the Attorneys General”) regarding the Federal Trade Commission’s review of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”), 16 C.F.R. part 255. In particular, the Attorneys General would like to comment on the benefits that the Guides have provided to consumers and suggest ways that those benefits might be enhanced.

1. There is a continuing need for the Guides. The Commission’s request for public comments seeks input on the costs, benefits, and regulatory impact of the Guides, among other questions. In the view of the Attorneys General, it is useful to have FTC standards on the use of endorsements in advertising, provided that states are not preempted from enacting their own more protective measures.

Endorsements are commonly used in connection with print advertisements and television infomercials. In both settings, there is a significant potential for consumers to assume that the person who appears on the page or screen and claims a positive result from the advertised product or service is in fact describing what he or she achieved, and what the majority of the public can typically expect to achieve. This potential concerns state Attorneys General when the endorsement advertising does not match the results that most consumers can expect to experience.

The FTC’s Guides attempt to deter a form of deception by clarifying that an endorsement that reflects the experience of an individual or group on a key attribute of a product or service “will be interpreted as representing that the endorser’s experience is representative of what consumers will

generally achieve.”^{*} As further stated in the General Considerations that preface the Guides, “Endorsements . . . may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser.”[†] That prohibition is beneficial to consumers and should continue in effect.

Attorneys General have used the Guides to protect consumers from deceptive advertising. For example, the Guides were helpful in a case involving a Florida company called Proven Methods Seminars, doing business as National Grants Conferences (“NGC”), which runs seminars in the United States at which it claims to offer consumers a way of obtaining government grants or loans. At the seminars, NGC used consumer endorsements to sell “program” materials for nearly \$1,000 a set. Yet, NGC lacked substantiation for its claims and failed to disclose either what the generally expected performance would be or that the endorsers’ experience was atypical, as required by the Guides.[‡] In large measure because of the Guides, the State achieved a result giving NGC’s customers an opportunity to request and receive a full refund.

2. The Guides should be strengthened by eliminating the current disclaimer options.

The FTC’s request for public comments describes two consumer perception studies that contain significant findings on the inefficacy of the disclaimers permitted by the Guides where an endorser’s claimed outcome from using a product or service is not typical.[§] These studies underscore the power of endorsements to persuade, even when the advertiser makes the disclosures required by the Guides.

Both studies support the view that endorsements convey the message that the reader/viewer, as well as a substantial percentage of others who use the product or service, will achieve results similar to those depicted in the endorsement, regardless of the disclaimers. The studies also demonstrate that disclaimers—even when worded in the most direct way (“You are not likely to have

1. 16 C.F.R. § 255.2. However, as discussed later in this letter, the Guides permit non-substantiated endorsements if accompanied by one of two specified disclaimers: “[U]nless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser’s experience to what consumers may generally expect to achieve.”

2. 16 C.F.R. § 255.1.

‡. *See State of Vermont v. Proven Methods Seminars, LLC, et al.*, No. 38-1-06 (Washington Superior Court), resolved by Stipulation of Settlement and Consent Decree dated Dec. 19, 2006.

§. *See Manoj Hastak & Michael B. Mazis, The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement* (report submitted to FTC, Sept. 30, 2003) and Manoj Hastak & Michael B. Mazis, *Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements* (report submitted to FTC, Sept. 22, 2004).

similar results.”)—are of limited effectiveness.

The Commission is urged to take these findings into account in reviewing the Guides, and to revise the Guides accordingly. Based on the studies’ findings, the most direct, and likely most effective, approach to reducing deceptive endorsements would be to *require that endorsements actually reflect the typical experience* of users of the advertised product or service. If an endorsement does not reflect that typical experience, it can be expected to mislead a significant percentage of the public, regardless of the presence of disclaimers, and it should be prohibited.

Some may suggest that instead of requiring that any endorsement actually reflect the typical experience of users of the advertised product or service, the Commission should instead restrict the two current disclaimer options in 16 C.F.R. § 255.2(a) to a single option—namely, a requirement that unless the results depicted by an endorser are typical of those experienced by all users of a product or service (and unless the advertiser possesses prior reasonable substantiation of the claims asserted in the advertisement), the endorsement must clearly and conspicuously state the typical result that users can expect to experience. But as is clear from the cited studies, such a requirement would not eliminate consumer deception. Thus, the Attorneys General believe that the Commission should not adopt this approach but should rather apply a typicality requirement to endorsements.

Finally, the Attorneys General encourage the Commission to add a new provision to the Guides. When an advertiser is relying on a study in an endorsement advertisement to lend support or substantiation to the claims made in the advertisement and the seller of the advertised product has paid, or provided other support, for the study, whether in whole or in part, the advertiser should be required to clearly and conspicuously disclose this fact in the advertisement and in close proximity to the claim. Although 16 C.F.R. § 255.5 requires the disclosure of a “connection between the endorser and the seller of an advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience),” Example 1 under § 255.5 specifies that an advertiser’s payment of expenses to the entity that conducted a touted study need not be disclosed in the advertisement. The seller’s funding of a study may affect the weight or credibility of the endorsement, however, despite Guides 3 and 4, and such funding is a material factor for consumers to consider in deciding the weight or credibility to give the endorsement.

The FTC now has an opportunity to improve upon a source of guidance for law enforcement that has been helpful in the past but has nonetheless left open the potential for significant consumer misunderstanding. The Guides Concerning the Use of Endorsements and Testimonials in Advertising should be kept in force and should not be interpreted to preempt state advertising laws. They should also be made more rigorous, so that when a consumer reads or views an advertisement touting another person’s successful result with a product or service, the consumer can reasonably expect to have the same experience.

Thank you for your consideration of these comments.

Sincerely,

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* Of the states listed, Hawaii is not represented by its Attorney General. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For the sake of simplicity, the entire group will be referred to as the "Attorneys General," and such designation as it pertains to Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.

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