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June 18, 2007

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

RE: Comments on Project Number PO34520

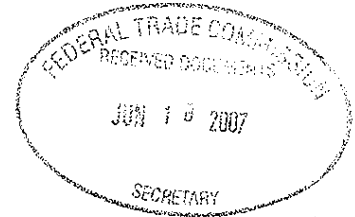
Dear Sir/Madam:

Enclosed please find the American Herbal Products Association
comments on the Endorsement Guides Review – Project Number PO34520.

Sincerely,

Anthony L. Young

Enclosure



BEFORE
THE UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMENTS OF THE

AMERICAN HERBAL PRODUCTS ASSOCIATION

ON THE

FEDERAL TRADE COMMISSION'S

Endorsement Guides Review
Project Number PO34520

June 18, 2007

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA is comprised of domestic and foreign companies doing business as growers, processors, manufacturers and marketers of herbs and herbal products. AHPA serves its members by promoting the responsible commerce of products that contain herbs.

Background

In a *Federal Register* notice published on January 18, 2007 the Federal Trade Commission (FTC) requested comment on the overall costs, benefits, and regulatory and economic impact of its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides), as part of its systematic review of all current regulations and guides. The agency noted that the Guides that are the subject of this review process were promulgated as final guidelines between 1975 and 1980 in the various parts of 16 CFR 255, and stated that the Guides are designed to assist businesses and others in conforming their endorsement and testimonial advertising (hereinafter "endorsements" or "endorsement advertising") practices to the requirements of Section 5 of the FTC Act. The January 18 notice also provided descriptions of the specific issues addressed in the various parts of 16 CFR 255.

In its January 18 notice, FTC also released consumer research it commissioned regarding the messages conveyed by consumer endorsements and requested comment on this research. This research consists of reports of two studies. The first is titled, "The Effect of Consumer Testimonials and Disclosures of Ad Communication for a Dietary Supplement" (the Endorsement Booklet Study), and reports the results of a consumer survey, conducted in the course of a law enforcement investigation, that examined the communication effects of a promotional booklet for a dietary supplement. The survey was designed to examine whether consumer endorsements by themselves communicate product efficacy and typicality, and whether any of several prominent disclosures qualify the claims conveyed by the advertisements. The second report, "Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements" (the Second Endorsement Study), reports the results of a consumer survey examining the messages conveyed to consumers by one-page print advertisements containing consumer endorsements for a weight loss program, a cholesterol-lowering dietary supplement, or a business opportunity. The second study was designed to explore these advertisements' communication of product efficacy and typicality.

FTC also posed two questions related to the existing requirement for advertisers to disclose connections between themselves and their endorsers that might materially affect the weight or credibility of an endorsement, and any extrinsic evidence regarding consumer expectations about celebrity endorsements made during an interview.

AHPA and its members have an interest in how the advertisement of herbal products is regulated and therefore on any and all guidance promulgated by FTC. In addition, some of AHPA's members use endorsements in their advertising. AHPA therefore has an interest in the issues addressed in FTC's January 18 *Federal Register* notice.

Summary of comments

Commercial speech in the form of advertising that is not false or misleading is protected by the Constitution's First Amendment. An advertiser's use of truthful and nonmisleading endorsements in advertising is similarly protected. FTC has long provided guidance, in the form of the Guides in 16 CFR 255, as to how endorsement advertising practices can conform to the requirements of Section 5 of the FTC Act. For example, the Guides discuss when disclosures should be included in such advertising to cure ads that might otherwise be misleading.

It is AHPA's view, as expressed below, that there is a continuing need for the Guides that are the subject of these comments. AHPA views the Guides as useful tools for advertisers for conforming endorsement advertising to Section 5 of the FTC Act, and notes that it may be useful to consider whether the Guides should be revised to address new channels of advertising, for instance by adding examples that are specific to Internet and email advertising. AHPA also notes that any revisions to the Guides must be undertaken in a manner that balances First Amendment protections of commercial speech and compliance with the FTC Act.

While acknowledging a limitation in its expertise in the area of consumer surveys, AHPA has also offered some comments on the two studies identified by FTC in its January 18 notice. A primary emphasis of AHPA's comments is to express concern as to whether these studies were sufficiently powered to draw statistically meaningful conclusions. AHPA has specifically requested that FTC submit these studies to a review process by qualified experts to determine whether the studies or the authors' conclusions have any usefulness in the review of the Guides that is the subject of the January 18 notice. AHPA has also acknowledges that it is not aware of any other such research or information; that this lack of awareness should not be taken to imply that

there is no other such research or information; and that FTC is encouraged to engage in whatever review is appropriate to identify and evaluate any additional relevant research or information.

In response to FTC's questions as to the effects of a requirement related to disclosure of generally expected performance with certain endorsement advertisements, AHPA has opined that higher costs would likely to be incurred by advertisers and their customers, and that the use of endorsement advertising might be reduced.

Regulatory review

In the matter of its review of the regulations promulgated in 16 CFR 255, FTC posed a series of questions. These questions are copied below along with AHPA's responses.

(1) Is there a continuing need for the Guides?

- Yes. AHPA believes that the Guides serve a useful purpose in providing guidance to advertisers, including advertisers of herbal products, to assist in conforming their endorsement advertising practices to the requirements of Section 5 of the FTC Act. The Guides also assist advertisers in understanding how FTC will interpret, apply and enforce these regulations.

(a) What benefits have the Guides provided to consumers?

- AHPA is not aware of any direct benefits that the Guides have provided to consumers. Even if the Guides did not exist advertisers would be required to conform their endorsement advertising practices to the requirements of Section 5 of the FTC Act. Nevertheless, to the degree that the Guides have assisted companies in providing truthful and nonmisleading advertising messages to consumers, the Guides can be seen as having provided indirect benefits to consumers.

(b) Have the Guides imposed costs on consumers?

- AHPA is not aware of any direct costs imposed on consumers by the Guides. Since the FTC Act already requires advertisers to conform their endorsement advertising practices to the requirements of Section 5, whatever costs associated with such conformity that may be passed on to consumers should not increase due to the existence of the Guides. In fact, as noted in response to question (3) below, it can be argued that the Guides may reduce costs to businesses that use them. It can therefore be further argued that the Guides

reduce costs to consumers, since businesses can be expected to pass on increased costs to consumers.

(2) What changes, if any, should be made to the Guides to increase their benefits to consumers?

- AHPA is not aware of any specific changes that should be made to the Guides to increase their benefits to consumers.

(a) How would these changes affect the cost the Guides impose on businesses and others following their suggestions?

- Not applicable in view of the above response to (2).

(b) How would these changes affect the benefits to consumers?

- Not applicable in view of the above response to (2).

(3) What significant burdens or costs, including costs of compliance, have the Guides imposed on businesses and others following their suggestions?

- *The Guides do not impose any statutory or regulatory burdens on businesses that are not already imposed by the FTC Act. AHPA therefore believes that the Guides do not impose any significant burdens or costs on businesses which follow their suggestions. Indeed, the Guides may reduce costs to businesses by providing specific guidance on the uses of endorsements in advertising. Such guidance may assist companies in avoiding expenses associated with engaging legal counsel or otherwise determining how to comply with Section 5 of the FTC Act, and/or with revising endorsement advertising after it comes to be identified by FTC as noncompliant.*

(a) Have the Guides provided benefits to those following their suggestions? If so, what benefits?

- *AHPA believes that the Guides provide benefits to advertisers that use endorsements in their advertising. The Guides assist these advertisers, as they were designed to do, to conform their endorsement advertising practices to the requirements of Section 5 of the FTC Act.*

(4) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on those following their suggestions? How would these changes affect the benefits provided by the Guides?

- As stated in the above response to (3), AHPA does not believe that the Guides impose any statutory or regulatory burdens on businesses which follow their suggestions that are not already imposed by the FTC Act, or that the Guides impose any significant burdens or costs on businesses which follow their suggestions. AHPA therefore does not believe that any changes should be made to the Guides to reduce the burdens and costs imposed on those following their suggestions.

(5) Do the Guides overlap or conflict with other federal, state, or local laws or regulations?

- AHPA is not aware of any area in which the Guides currently overlap or conflict with other federal, state, or local laws or regulations. At the same time, there exist First Amendment constitutional protections to commercial speech, such that truthful endorsements may be used in advertising. The FTC Act requires that advertising be both truthful and nonmisleading, and the Guides accordingly point out how disclosures may be used to assure that the use of endorsements are not misleading. Any revision to the Guides, should such occur, must be undertaken in a manner that continues to balance constitutional protections to commercial speech and compliance with the FTC Act.

(6) Since the Guides were issued, what effects, if any, have changes in relevant technology, such as email and the Internet, or economic conditions had on the Guides?

- Significant changes have occurred in communication technology since the Guides were issued in 1975 and 1980, such that the Internet and email now provide channels for advertising that were unknown and probably not envisioned at that time. Changes in economic conditions have also occurred during this time.

In one regard, AHPA does not believe that these changes have had any effect of the Guides. The FTC Act requires that advertisers conform their endorsement advertising practices to the requirements of Section 5, regardless of advertising medium or economic conditions and the Guides continue to assist advertisers in meeting these requirements.

It may be useful, however, to consider whether the Guides should be revised to address these new channels of advertising, and in particular by adding

examples that are specific to Internet and email advertising. AHPA notes that, although most of the examples currently found in Guides are for advertisements generally, several are specific to television advertisements.

The FTC commissioned studies

As noted at the outset of these comments, FTC's January 18 notice identified consumer research in the form of two studies that the agency commissioned regarding the messages conveyed by consumer endorsements and requested comment on this research. As already noted, the Endorsement Booklet Study was described by FTC as reporting the results of a consumer survey that examined the communication effects of a promotional booklet for a dietary supplement, and was designed to examine whether consumer endorsements by themselves communicate product efficacy and typicality and whether any of several prominent disclosures qualify the claims conveyed by the advertisements. This study used a mall-intercept design with a study sample consisting of just 200 dietary supplement users, eighty percent of whom were older than 60 years of age and consisting of between 29 and 34 persons in each of six groups.

According to FTC's January 18 notice, the authors concluded that the study suggests "that multiple testimonials about a product effectively communicate efficacy claims, *i.e.*, that the product works for the uses discussed in the testimonials. Testimonials also appear to communicate that the product will work for all, most, or about half of the people who use it. Finally, the study suggests that prominent disclosures in ads containing multiple testimonials may be ineffective in limiting the communication of efficacy and typicality claims. This study used disclosures that were more prominent and stronger than the disclosures typically used in ads containing testimonials."

AHPA does not purport to have expertise in the art of conducting consumer surveys or in statistical analysis of such surveys. Nevertheless, AHPA has significant concerns about the study's design and the authors' conclusions.

AHPA requests that FTC determine and communicate in any follow-up to the January 18 notice whether the small size of the study provided sufficient "power" to draw statistically meaningful conclusions, and whether the fact that the authors identified only one statistically significant difference in responses between the various groups is an indication that the study was, in fact, not sufficiently powered. In addressing this matter, AHPA requests that the Commission comment on whether it would consider

the use of a study of this size by an advertiser to constitute competent and reliable scientific evidence to substantiate an advertising claim.

AHPA also notes that the authors recorded that one in six (17.6%) of the group identified as the "no booklet" group "recalled" a breathing, energy, or pain claim, even though no such specific claim was made in the advertising materials that this group was shown. The authors hypothesized, "These respondents may associate improved energy with the consumption of any dietary supplement." However, if this hypothesis were true, it should have been equally true for each other group and it is not apparent that the authors attempted to factor this hypothetical association into their analysis. AHPA therefore requests that FTC determine and communicate whether the authors should have revised their calculations in any manner to account for the fact that one in six of the subjects in the identified group recalled something they had not actually heard, or whether this fact is in and of itself an indication of a serious flaw in the study.

As expressed above, AHPA does not have sufficient expertise in the area of consumer surveys, and so also requests that FTC submit this study and all associated raw data to a review process by qualified experts to determine whether the study or the authors' conclusions have any usefulness in the review of the Guides that is the subject of the January 18 notice.

The Second Endorsement Study was described by FTC as reporting the results of a consumer survey examining the messages conveyed to consumers by one-page print advertisements containing consumer endorsements for a weight loss program, a cholesterol-lowering dietary supplement, or a business opportunity. A more accurate description of the study is that it reports the results of three separate but related consumer surveys, each of which was administered to between 520 and 582 individuals consisting of between 62 and 68 persons in each of eight (for the dietary supplement ad and for the business opportunity ad) or nine (for the weight loss ad) groups.

According to FTC's January 18 notice, the authors of this study drew several conclusions, including that the endorsements tested in the three surveys communicated product efficacy and typicality to a substantial percentage of consumers. In addition, FTC noted that the authors also concluded that two tested disclosures ("results not typical" and "experiences of a few") "in most cases failed to significantly reduce the communication of efficacy," while a disclosure which stated how much weight the average user loses in three months, tested on the advertisement

for the weight loss program, "did significantly reduce such communication in most cases."

As noted in the above discussion of the Endorsement Booklet Study, AHPA does not purport to have expertise in the art of conducting consumer surveys or in statistical analysis of such surveys. AHPA has, however, again identified significant concerns about this second study's design and these authors' conclusions.

AHPA requests that FTC determine and communicate in any follow-up to the January 18 notice whether the small sizes of these three surveys provided sufficient "power" to draw statistically meaningful conclusions, and whether the fact that the authors identify very few statistically significant differences in responses between the various groups is an indication that the study was, in fact, not sufficiently powered. In addressing this matter, AHPA requests that the Commission comment on whether it would consider the use of a study of this size by an advertiser to constitute competent and reliable scientific evidence to substantiate an advertising claim.

The authors of this study also noted, in reporting on the impact of disclosures in one of the ads for the weight loss program, that the "results not typical" and "experiences of a few" disclosures did not significantly reduce the proportion of respondents to whom the ad communicated that the advertised product would enable new users to achieve results similar to those portrayed by the testimonialists, but the authors also acknowledged in a footnote that "differences between treatment conditions may not have achieved statistical significance because of [the] modest cell sizes." If the authors' speculation as articulated in this footnote is not accurate, however, then it is possible that the absence of statistically significant differences is not a mathematical consideration, but could instead be due to other factors, including the possibility that there would not have been such differences even in larger cell sizes.

AHPA also notes that although the study directs the reader to "see" each of three appendices (the actual ads; the screening questionnaire; and the survey questionnaires), none of these appendices is actually available in the document that is accessible at the link identified in FTC's January 18 notice. Examination of these appendices may have been useful in evaluating this report.

As expressed above, AHPA does not have sufficient expertise in the area of consumer surveys, and so requests that FTC also submit this second study and all associated raw data to a review process by qualified experts to determine whether the study or

the authors' conclusions have any usefulness in the review of the Guides that is the subject of the January 18 notice.

In its January 18 notice FTC posed a series of questions related to these two studies. In the first four of these questions, FTC asked what the implications and limitations are of these two studies with respect to certain described topics. In the absence of a better understanding as to whether these studies were sufficiently powered to provide statistically significant results, AHPA cannot opine as to the implications or limitations of the study with respect to any of the topics listed by FTC.

FTC also asked whether there is any other research or evidence that would be relevant to answering numerous questions posed by FTC regarding these studies. AHPA does not have expertise in research on how consumers respond to advertising and does not make a practice of tracking such research. In response to this and each other similar question, AHPA therefore notes that it is not aware of any other such research or information, and that this response should not be taken to imply that there is no other such research or information. AHPA believes, however, that FTC itself is more likely to have expertise in this area, and strongly encourages FTC to engage in whatever review is appropriate to identify and evaluate such research and information.

FTC's final questions in the matter of its two commissioned studies and AHPA's responses follow:

(9) *The current Guides allow advertisers to use testimonials that are not generally representative of what consumer can expect from the advertised product so long as the advertisers clearly and conspicuously disclose either (1) what the generally expected performance would be in the depicted circumstances, or (2) the limited applicability of the depicted results to what consumers can generally expect to receive, i.e., that the depicted results are not representative.*

(a) *What would be the effects on advertisers and consumers of requiring clear and conspicuous disclosure of the generally expected performance whenever the testimonial is not generally representative of what consumers can expect from the advertised product?*

- AHPA assumes that the effect of such a requirement on advertisers would include an increased cost in order to accurately determine the generally expected performance, at least in those instances where advertisers do not have adequate substantiation for the representations made in an endorsement

advertisement. For example, if an automobile manufacturer wished to advertise the longevity of its model through an endorsement advertisement of a consumer displaying the odometer of one of its cars at 210,000 miles, it would need to incur whatever expenses would be associated with tracking the longevity of all such models or a representative sample sufficiently large to accurately describe the longevity, in mileage, generally achieved with this model car. And any additional expenses incurred to determine generally expected performance should be expected to be passed on to consumers.

Another possible effect of requiring this envisioned disclosure is that there would be a significant reduction in the use of endorsement advertising, if advertisers were unwilling or unable to afford the cost of measuring the generally expected performance.

Notwithstanding the foregoing, AHPA does not take issue with the Commission's long standing policy that endorsement advertisements in and of themselves do not constitute substantiation. AHPA believes that advertisers must substantiate all claims made in advertising whether or not the envisioned change to the Guides occurs.

(b) 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? How difficult would it be for the advertiser to make this determination? Do the answers to these questions vary by product type and, if so, how?

- AHPA does not purport to have the expertise or resources to completely answer these questions. As noted above, however, AHPA assumes that an advertiser would need, at a minimum, adequate substantiation for the representations made in endorsement advertisements. AHPA believes that this answer is true for most if not all product types and that the cost of obtaining this information may vary significantly from one product type to another.

Material connections

In its January 18 notice FTC also discussed the requirement for advertisers to disclose connections between themselves and their endorsers that might materially affect the weight or credibility of an endorsement, and expressed its interest in any extrinsic evidence regarding consumer expectations about celebrity endorsements made during

an interview. The Commission posed two questions related to these matters, asking whether there is any research on consumer expectations regarding compensation paid to celebrities who speak favorably about particular products while being interviewed outside the context of an advertisement and, if so, what does that research show; and if knowledge that a celebrity endorsing a product during such an interview is being paid for doing so affects the weight or credibility consumers give to the celebrity's endorsement. AHPA does not have any knowledge or information that can contribute useful responses to these questions.

Conclusions

AHPA has expressed herein its view that the Guides found in 16 CFR 255 provide useful guidance for advertisers, including AHPA members and others who use endorsement advertising. Any revisions to the Guides must continue to balance the First Amendment's protection of commercial speech with advertisers' regulatory responsibilities and must continue to be subject to appropriate public review.

AHPA greatly appreciates the opportunity to provide these comments.

Respectfully submitted,

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