WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D. C. 20036
202 588-0302
www.wlf.org

ORIGINAL

June 18, 2007

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

Re: **Endorsement Guides Review, Project No. P034520**
Guides Concerning Use of Endorsements and Testimonials in Advertising

Dear Commissioners:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit comments to the Federal Trade Commission (FTC) in connection with the FTC's on-going review of current regulations and guides, and in particular the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Guides"). WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF promotes free-market policies through litigation, administrative proceedings, publications, and advocacy before state and federal government agencies, including the FTC.

As set forth below, WLF urges the FTC not to make any significant changes to the Guides, which WLF believes provide adequate guidance regarding the requirements of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, as they apply to use of endorsements and testimonials in advertising. In particular, nothing in the two cited studies commissioned by the FTC suggest a need for significant changes. Indeed, WLF respectfully suggests that the studies have little relevance to the issue at hand because they focus on what consumers' remember about an advertisement they have previously read, rather that on what the advertisement actually says. The First Amendment flatly bars any effort by the FTC to regulate factually accurate advertising based on the possibility that consumers might later mis-remember what the advertisement said or might respond in ways that some would deem inappropriate.

WLF also urges the FTC not to make changes to Section 255.5 of the Guides; Section 255.5 states that an advertiser need not disclose the payment of compensation to well-known personalities. In a 2003 petition Commercial Alert urged the FTC to create an exception to Section 255.5 to cover situations in which consumers might not assume that the well-known personality is being compensated for his or her endorsement. The FTC has requested comments regarding consumer expectations regarding compensation paid to celebrities who speak favorably about a product outside the context of an advertisement. WLF believes that,

in the absence of evidence from Commercial Alert that this alleged practice is widespread, it makes no sense for the FTC to begin regulation in this area. Regardless whether there might be situations in which consumers do not expect that celebrities have received compensation for their endorsements, the field is too fraught with First Amendment concerns and potential factual ambiguities to justify an FTC decision to begin regulating in an area in which no *bona fide* problem has been identified.

I. Interests of WLF.

The Washington Legal Foundation is a public interest law and policy center with members and supporters in all 50 States. WLF regularly appears before federal and State courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has devoted substantial resources over the years to promoting the free speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of Food and Drug Administration (FDA) restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman,* 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331 (D.C. Cir. 2000). WLF recently filed suit against the federal Centers for Medicare and Medicaid Services, raising a First Amendment challenge to CMS restrictions on truthful speech by health care providers. *Washington Legal Found. v. Leavitt*, No. 06-1490 (D.D.C., filed Aug. 24, 2006).

WLF also regularly appears in federal court and before the FTC in matters involving the FTC's regulation of "unfair or deceptive acts" under the FTC Act. *See, e.g., Trans Union LLC v. FTC*, 536 U.S. 915 (2002); *WLF Comments to the FTC Concerning Commercial Alert Petition on Word-of-Mouth ("Buzz") Marketing* (Feb. 2, 2006).

WLF believes that over the years the FTC has done a good job of balancing the need to regulate potentially deceptive use of endorsements and testimonials in advertising with the need to respect the First Amendment rights of advertisers. WLF is concerned that the FTC not upset that balance by focusing too much on the arguably inappropriate actions that some consumers might take in response to truthful advertising.

II. Background.

The FTC has issued a number of Guides designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of Section 5 of the FTC Act, 15 U.S.C. § 45. *See* 16 C.F.R. §§ 255.0 through 255.5. The

Guides define both endorsements and testimonials broadly to include 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 contain a clear and conspicuous disclosure. *Id.*

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. The Guides advise that because consumers will ordinarily expect that endorsers who are well-known personalities (*i.e.*, celebrities) or experts will be compensated for their endorsements, an advertiser need not disclose the payment of compensation to such endorser. *Id.*

WLF believes that the Guides strike a proper balance between the need to regulate potentially deceptive use of endorsements and testimonials in advertising and the need to respect the First Amendment rights of advertisers. WLF also believes that the Guides do a good job of communicating to advertisers what is expected of them.

III. The Two Reports on the Effects on Consumers of Testimonials

The FTC has asked for comments on two reports it commissioned on the effects on consumers of the use of "consumer testimonials" in certain types of advertising. *See* Manoj Hastak and Michael B. Mazis, *The Effect of Consumer Testimonials and Disclosure on Ad Communication for a Dietary Supplement* (Sept. 30, 2003); Manoj Hastak and Michael B. Mazis, *Effect of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements* (Sept. 22, 2004). The two reports are referred to hereinafter as the First Endorsement Study and the Second Endorsement Study, respectively.

Both studies asked volunteers to read hypothetical advertisements containing consumer testimonials and then to provide written answers to questions regarding what they recalled

about the advertisements. The responses to both studies suggested that the volunteers were likely to conclude, after reading the testimonials, that the products were effective for the uses discussed in the testimonials (efficacy) and that the results achieved by the endorsers were representative of what consumers generally achieve from use of the product (typicality). The responses suggested that those conclusions were not significantly affected by the inclusion of prominent disclaimers regarding efficacy and typicality. Lengthier disclaimers had no effect and may even have led volunteers to conclude that the products were more effective than when volunteers were shown more concise disclaimers. One significant exception to this pattern was disclosed in the Second Endorsement Study: when volunteers were shown a hypothetical advertisement for a weight loss program that included a disclaimer stating the actual weight loss of the "average" program participant, a majority responded to a question about expected efficacy by referencing that average figure rather than the significantly higher weight-loss figures cited in individual consumer testimonials.

IV. First Amendment Considerations.

The First Amendment comprehensively safeguards freedom of speech. U.S. Const. amend. I. In determining the degree of protection accorded, however, the Supreme Court has drawn a distinction between "commercial speech" and other forms of protected speech. *E.g., Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978). Noncommercial speech (pure speech) that expresses ideas, communicates information or opinions, or disseminates views or positions is extended protection of the highest order. In contrast, commercial speech is extended less, but certainly not insubstantial, protection than expressions that are noncommercial in nature. *E.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-63 (1980). For purposes of First Amendment analysis, "commercial speech" is identified as communication that principally "proposes a commercial transaction." *E.g., Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) [hereinafter "*Board of Trustees of SUNY*"] (quoting *Virginia State Board of Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). The communication relates "solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.[1]

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[1] The FTC should not make the mistake of assuming that any statements regarding a product should be deemed "commercial" speech simply because they are the utterances of a commercial entity or someone who has been compensated by the entity. The fact that a speaker has an "economic motivation" for speaking is not by itself sufficient to classify the speech as "commercial." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983). Indeed, in one of its most famous First Amendment decisions, the Supreme Court granted full

The First Amendment "protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561. The government is empowered to prohibit commercial speech that is false or misleading; however, in order to be entirely prohibited, the subject communication must be either inherently misleading or actually misleading, as opposed to only potentially misleading. *See Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 109-110 (1990); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 640 n. 9 (1985); *In re R.M.J.*, 455 U.S. 191, 202-03 (1982). Information that is only potentially misleading may not be completely banned if the information can be presented in a manner that is not deceptive. *See Peel*, 496 U.S. at 100; *In re R.M.J.*, 455 U.S. at 203. Commercial speech that is not misleading also may be regulated; however, interference must be in proportion to the governmental interest served, and may be regulated only to the extent that such regulation furthers a substantial interest. *See In re R.M.J.*, 455 U.S. at 203-04.

The Supreme Court set forth a four-part test for determining permissible regulation of commercial speech in *Central Hudson*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The test is no less applicable in assessing the constitutionality of restrictions on speech in the context of products commonly marketed through use of testimonials than in other contexts, so long as the product being marketed is lawful; there are no exceptions to the First Amendment based on the nature of the product being sold. *E.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513-14 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

First Amendment protection to a paid newspaper advertisement soliciting donation of funds. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Any efforts by individuals or firms to speak out on issues of public importance – such as speech on issues related to the risks and benefits of specific products, not uttered for the purpose of inducing a specific sales transaction – are fully protected by the First Amendment and thus are largely off-limits to government regulation.

While restrictions imposed under the *Central Hudson* test need not be the least severe needed to meet the regulatory objective, the means chosen must be "narrowly tailored." *Board of Trustees of SUNY*, 492 U.S. at 477-478; *In re R.M.J.*, 455 U.S. at 203. In order to be "narrowly tailored," restrictions on commercial speech must be aimed at eliminating false or misleading communication "without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward v. Rock Against Racism,* 491 U.S. 781, 800 n. 7 (1989). The Supreme Court expressly directed that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

The Supreme Court further has indicated that in choosing between a highly paternalistic regulatory approach and one that fosters open communication, regulators must choose the latter because "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy*, 425 U.S. at 770. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Thompson v. Western States Medical Center,* 535 U.S. 357, 375 (2002) (quoting *44 Liquormart,* 517 U.S. at 503). "The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting). This being the case, requirements for disclosure, disclaimer, or explanation are highly favored over regulations that entirely would prohibit commercial speech. *See Zauderer*, 471 U.S. at 650-51; *In re R.M.J.*, 455 U.S. at 203.

V. The Two Studies Do Not Support Imposition of Additional Restrictions on the First Amendment Rights of Advertisers to Use Consumer Testimonials

As the preceding discussion makes clear, the relevant consideration in determining the constitutionality of commercial speech restrictions is whether the language of an advertisement is actually or potentially misleading. Whether language is actually or potentially misleading is an issue that can be determined objectively based on the actual language used.

In the great majority of cases, there is a consensus among language experts regarding the commonly understood meaning of phrases or individual words. For example, if one person calls another individual a "moron" during the course of a political debate, it is commonly understood that the speaker has uttered a non-actionable statement of his low opinion of his opponent's political beliefs, and the speaker would be entitled to dismissal (on

First Amendment grounds) of a subsequent libel action, even if the plaintiff alleged (and honestly believed, as did all his friends) that use of the word "moron" falsely implied that he was mentally retarded.

There may be cases in which the meaning actually conveyed by words or phrases is not altogether clear on first reading. In those instances, consumer surveys may be appropriate in determining the meaning conveyed. If the great majority of consumers ascribe to a phrase a meaning that renders the phrase false, then it is fair to say that the phrase is at least potentially misleading – even if the speaker intended the phrase to convey a meaning that is entirely truthful. In order to determine whether a phrase is conveying that false meaning, it is necessary to discern how consumers actually interpret *the phrase in question*; it is not enough, for example, to quiz consumers about their attitude toward a product after having read an advertisement about the product. Such a quiz may reflect faulty memories or may reflect a consumer's pre-existing belief (*e.g.*, a pre-existing belief that there exists a "magic" weight-loss program that will enable the consumer to lose 100 pounds, even though every program previously tried by the consumer has failed to achieve that goal).

The distinction WLF is attempting to make is well illustrated by the First Endorsement Study. According to the study, a significant percentage of volunteers who read a dietary supplement advertisement believed that the ad made specific claims regarding the virtue of the dietary supplement in addressing breathing problems (*e.g.*, asthma), fatigue and low energy, and chronic pain (*e.g.*, arthritis) – even though the ad contained no such claims. Such a finding obviously cannot be viewed as evidence that the advertisement actually made those claims, because they were not made. Rather, that finding well illustrates that consumers are prone to misuse of the information contained in an advertisement, regardless of how accurate the information actually is. Under those circumstances, the First Amendment would prohibit the FTC from attempting to ban or regulate the advertisement in question on the grounds that the advertisement is "potentially misleading." An advertisement that, based on an objective reading, does not specifically claim an attribute cannot be faulted if some consumers are prone to believe that the product nonetheless possesses the attribute after reading the ad.

Both the First Endorsement Study and the Second Endorsement Study seem to point to the conclusion that, with respect to use of consumer testimonials for certain types of products, it may not be possible to write a disclaimer that will prevent the testimonials (even if 100% accurate) from being mischaracterized in the minds of many consumers who read the ads. The studies allege that both long and short disclaimers are routinely ignored by readers, even when boxed, highlighted, and printed in a larger font – and that longer, more complete disclaimers are the most likely to be ignored. WLF has not done any consumer surveys of its own and thus is not in a position to test the results reported by the two studies. Nonetheless, WLF

cannot stress too strongly the impropriety of concluding, based on the study results, that additional restrictions on use of consumer testimonials in advertising are warranted.

Some might argue as follows: if no type of disclaimer is sufficient to prevent consumers from reading into consumer testimonials stronger efficacy and typicality claims than are warranted by the evidence, then perhaps there is a need to ban altogether advertisements containing certain types of consumer testimonials. But, as was indicated by the preceding discussion of First Amendment protections for commercial speech, any paternalistic government effort to protect consumers from themselves is constitutionally prohibited.[2] The sole government justification for such restrictions is that the general public can't handle the truth, that some individuals will use that truthful information to take actions that the government deems to be contrary to those individuals' best interests. Courts have repeatedly rejected the notion that the government may suppress truthful speech in an effort to protect consumers from the consequences of that speech. The First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503.

This principle has been recognized repeatedly in cases involving restrictions on information about tobacco products, *e.g., Lorillard*, 533 U.S. at 562-64; *id.* at 586-90 (Thomas, J., concurring in part and concurring in the judgment); as well as other consumer products. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976), the State of Virginia argued that a ban on advertising prescription drug prices was justified by the fear "that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers." The Supreme Court disagreed, holding that:

> Virginia is free to require whatever professional standards it wishes of its pharmacists . . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering . . . . [T]he justifications

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[2] Such efforts may also be barred by the FTC Act itself. Section 5(n) of the Act provides that the FTC may not find an act or practice "unfair" unless it is likely to cause "substantial injury" to consumers which is "not reasonably avoidable by consumers themselves." 15 U.S.C. § 45(n). When an advertiser provides a disclaimer that clearly informs a reasonable consumer that the average program participant does not achieve the same results as those achieved by participants providing a testimonial, the logical conclusion is that any injury to the consumer caused by her overestimating the program's efficacy is "reasonably avoidable" by the consumer herself.

> Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

Id. at 770.

Similarly, the court in *Washington Legal Found. v. Friedman* rejected paternalism as a valid basis for restricting the dissemination of truthful information about drugs and medical devices, holding that "[t]o the extent that the FDA is endeavoring to keep information from physicians out of concern that they will misuse that information, the regulation is wholly and completely insupportable." 13 F. Supp.2d at 69. "If there is one fixed principle in the commercial speech arena," the court observed, "it is that 'a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.'" *Id.* at 69-70 (quoting *44 Liquormart*, 517 U.S. at 497).

More recently, the Supreme Court's *Western States* decision rejected the theory that an interest in "protecting" consumers from truthful information could justify its suppression. There, the Court addressed the argument (put forward by the dissent) that a federal law's ban on advertising compounded drugs could be sustained by an interest in preventing patients who do not need compounded drugs from seeking them, holding that:

> Even if . . . [the Food and Drug Administration Modernization Act's] speech-related restrictions were motivated by a fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions. . . . [This concern] amounts to a fear that people would make bad decisions if given truthful information about compounded drugs. . . . *We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.*

Western States, 535 U.S. at 375 (emphasis added).

In sum, the First Amendment permits the FTC to insist on the use of the most effective, reasonable disclaimers in connection with consumer testimonials.[3] But it may do no

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[3] For example, the Second Endorsement Study would support requiring that weight loss advertisements employing consumer testimonials prominently display information

more than insist that the advertisement not include false statements and that it include disclaimers sufficient to ensure that the advertisement is not potentially misleading in any objective sense. But the First Amendment prohibits the FTC from attempting to ban consumer testimonials in advertising simply because consumers may mis-remember what is in the ad or may make bad decisions based on hearing truthful information.

VI. There Is No Reason to Amend Section 255.5 of the Guides to Begin Requiring the Disclosure of Compensation to Well-Known Personalities

WLF has done no research regarding whether there are some situations in which consumers might not assume that a well-known personality is being compensated when he or she "endorses" a product. Nonetheless, in the absence of any evidence from Commercial Alert or others that there exists a widespread practice of compensating celebrities who speak favorably about a product outside the context of an advertisement, there is no justification for the FTC to initiate regulation in this area.

To begin with, the area is fraught with potential factual ambiguities. For example, celebrities will often appear in public wearing clothing and fashion accessories readily identifiable with a specific manufacturer. While consumers readily recognize that some such appearances are compensated (*e.g.*, an actress wearing a designer dress to the Academy Awards, an NBA professional basketball player wearing New Balance athletic shoes), such appearances present virtually limitless permutations, and it would be far too difficult to attempt to discern which situations would give rise to expectations of compensation and which would not.

Moreover, outside the context of advertising, any expression by celebrities is far more likely to constitute noncommercial speech – and thus is entitled to significantly increased levels of First Amendment protection. Furthermore, outside of the context of advertising, it may be next to impossible to decide objectively whether a celebrity has been compensated for a particular statement. A celebrity may be on retainer by Nike, for example, yet may decide to say (without any specific promise of compensation) good things about Nike's overseas labor practices while on a television talk show. If the celebrity really believes that Nike's overseas labor practices are commendable and can substantiate his statements, what possible First

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regarding the weight loss of the "average" program participant – assuming that such a statistic can readily be computed. Both studies suggest that shorter disclaimers are more likely to be read then longer disclaimers, so the FTC should be wary of requiring too lengthy disclaimers.

Amendment basis could there be for the FTC to require disclosure of the retainer agreement? A celebrity does not lose his or her right to speak freely on public issues (without being compelled against his will to disclose additional information) simply because a company has provided compensation that is not directly tied to the celebrity's statements. In sum, the field is too fraught with First Amendment concerns and potential factual ambiguities to justify an FTC decision to begin regulating in an area in which no *bona fide* problem has been identified.

CONCLUSION

The Washington Legal Foundation respectfully requests that the FTC not make any significant changes to the Guides, which WLF believes provide adequate guidance regarding the requirements of Section 5 of the FTC Act as they apply to use of endorsements and testimonials in advertising.

Respectfully submitted,

Daniel J. Popeo
General Counsel

Richard A. Samp
Chief Counsel