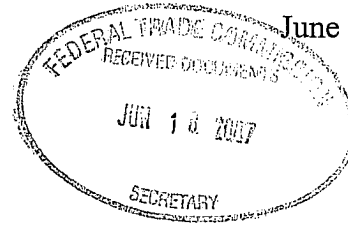




June 18, 2007

The Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue
Washington, D.C. 20580



RE: Endorsement Guides Review, Project No. P034520

Dear Ladies and Gentlemen:

On behalf of FreedomWorks, a non-profit public policy think tank and grassroots organization, please accept the attached comments in response to your recent Endorsement Guides Review. As the former House Majority Leader, and current chairman of FreedomWorks, I am a strong believer in First Amendment protections, and I hope you will find the enclosed comments helpful as you undertake the review of your Guides concerning testimonial advertising.

In addition to being an interested commenter, I am also a satisfied customer of NutriSystem, one of the companies that would be harmed by new mandates on testimonials. About six months ago I gave up smoking, and, like many others, I began to gain weight. When I saw former quarterback Dan Marino in an advertisement telling me he lost over twenty pounds using the NutriSystem meal replacement program, I thought I would give it a try. I was under no illusions that it would be as easy for me to lose twenty pounds as it was for Dan Marino. It just so happens, though, I have lost 23 pounds in three months, and I hope it will continue!

Far from misleading me, the testimonial showed me that dramatic results were possible, even some of the time, and that motivated me to give the diet a chance. I am glad I did.

I appreciate your consideration of the enclosed comments.

Sincerely,

Dick Arney
Chairman, FreedomWorks

Submitted to:

**The Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue
Washington, D.C. 20580**

via e-mail: www.regulations.gov

**Written Comments on "Endorsement Guides Review," Project no. P034520
as published in 72 FR 13051
Tuesday, March 20, 2007**

**Submitted by:
Dick Armey**

**On behalf of
FreedomWorks
June 18, 2007**

FreedomWorks Comment Re: Endorsement Guides Review, Project no. P034520

FreedomWorks appreciates the FTC's request for public comment on its Guides Concerning the Use of Endorsements and Testimonials in Advertising, Endorsement Guides Review, Project No. P034520.

Founded in 1984, FreedomWorks has nearly 850,000 grassroots activists nationwide. FreedomWorks believes that individual liberty and the freedom to compete increase consumer choices and provide individuals with the greatest control over what they purchase. We advocate for fewer regulations, taxes, and tariffs to promote economic freedom and reduce unnecessary costs for companies and consumers.

We applaud the FTC's history of striving to protect the free speech rights of advertisers while preventing deceptive content. However, we fear that a uniform disclosure mandate for certain advertisements would undermine First Amendment protections for commercial speech while creating significant regulatory burdens and diminishing economic freedom.

FreedomWorks supports broad and robust protection of the Bill of Rights, and in particular, the First Amendment.¹ If implemented, the disclaimer requirement would create an unacceptable burden on the exercise of free speech. Personal endorsements and

¹ Dick Armey, *Protect Free Speech for All Americans*, FreedomWorks, May 24, 2005; Richard W. Rahn, *Rewards of Economic Freedom: Which freedoms are the most important?*, FreedomWorks, October 17, 2005; Press Release, FreedomWorks, FreedomWorks Salutes Representatives Stand for Free Political Speech (April 6, 2006)(on file with author); Press Release, FreedomWorks, Congress Continues Assault on Freedom of Speech (November 7, 2005)(on file with author).

testimonials are an effective and essential tool in advertising legitimate and helpful products. A critical part of the FTC mission is promoting the dissemination of helpful information for consumers. Endorsements and testimonials are among the most preferred means of disseminating this information to consumers through constitutionally protected commercial speech. If the FTC were to adopt the uniform disclosure statement for testimonial advertising, it would create an overly broad restriction on legitimate advertising, as the proposal contains no procedure for exempting good faith advertisers of beneficial products from an unnecessary pre-market mandate.

FreedomWorks recognizes that the FTC is charged with combating fraud and consumer protection violations. The FTC has historically accomplished this task through enforcement mechanisms. This approach both reduces costly regulatory burdens on legitimate advertising and prevents a chilling effect on the dissemination of helpful information. Freedom Works supports the FTC's longstanding preference for less restrictive, case-by-case enforcement mechanisms because they encourage a free and robust marketplace of ideas and information.

The FTC's proposed one-size-fits-all disclaimer requirement for testimonial advertisements would impose a new, and unjustified restriction that would create significant additional burdens for advertisers and part with the FTC's longstanding preference for minimally invasive enforcement of advertising regulations. The current approach allows enforcement flexibility, and encourages regulators to devote their resources to combating genuinely bad actors without creating unnecessary burdens on all advertisers. The FTC characterized its current mechanism as follows:

This comment sets out the FTC's enforcement approach, which reflects the principles set forth in the commercial free speech doctrine....The FTC requires that all claims be true, non-misleading, and substantiated at the time they are made. The FTC's post-market review of advertising claims and application of tailored remedies in advertising cases curb deception without overly restricting truthful commercial speech, thus promoting the goals embodied in the First Amendment....In practice, consumer protection agencies must often choose between the risk of banning commercial speech that may be true....The Commission recognizes, of course, that...[its rigorous substantiation] standards require vigorous enforcement when false and misleading advertising occurs. However, *available evidence suggests that the general benefits of an enforcement approach that encourages dissemination of truthful information, while vigorously attacking misleading claims when they occur, produces benefits for consumers.*²

Historically, the FTC protected the First Amendment rights of advertisers by creating risk-based pre-market restrictions calibrated to the particular nature of specific products and any special dangers presented by those products. A standardized, mandatory disclaimer statement would abandon this approach and establish a sweeping mandate that fails to account for past legal compliance of companies and the differences in the risks of

² FTC Response to FDA Request for Comment on First Amendment Issues at 2-4, Docket No. 02N-0209, September 13, 2002 (emphasis added).

individual products. This proposed pre-market mandate is a significantly broader requirement than is reasonably necessary to prevent deception.

This expansive approach fails to differentiate between the many legitimate advertisers who rely on customer testimonials to convey valuable information to the public, and the fraudulent advertisers who have shown a pervasive and flagrant disregard for the law. If the current post-market regulatory approach is not successfully deterring fraudulent advertisers, it is unlikely an “averaging” requirement would add any appreciable deterrent value. Mandatory disclaimer requirements are only likely to be respected by legitimate advertisers, which will give unscrupulous operators an advantage in attracting customers because their disrespect for the law will allow them to continue unencumbered by new FTC mandates.

Mandating the proposed disclaimer statement would create an additional burden on the exercise of constitutionally protected free speech by, requiring businesses to expend considerable resources aggregating data on “generally expected performance” in a specific period. This requirement creates a *de facto* tax on businesses for using their preferred method of advertising. Compiling meaningful data would be an expensive and time consuming process, and a significant burden on industry. Companies would be forced to pass these costs on to consumers. Furthermore, due to the diversity of products which would be subjected to uniform disclaimer mandates, data based on “averaging” may itself be misleading to consumers. Finally, “averaging” dilutes the beneficial motivational force of testimonial advertisements that the FTC itself acknowledges is an essential component of such advertising.

We recommend the FTC continue its vigorous enforcement of existing regulations or identify a less restrictive alternative to the sweeping, pre-market “averaging” mandate. This approach would protect the First Amendment rights of advertisers, promote the dissemination of helpful information for consumers, and minimize unnecessary burdens on legitimate industry. At a minimum, if the uniform disclosure mandate is enacted, it should be amended to provide a mechanism for exempting companies that act in good faith to provide consumers with helpful information.