

# United States Senate

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July 31, 2007

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FEDERAL TRADE COMMISSION  
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CONG. CORRES. BRANCH

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

Dear Mr. Clark:

I am writing to provide comments as they relate to the Federal Trade Commission's (FTC) review of its "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (Project No. P034520). The Guides are intended to strike a balance between the freedom of commercial speech and the reduction of deceptive advertising.

As your agency reviews the Guides to ensure that they continue to adequately protect consumers, it is important to consider Supreme Court jurisprudence that requires that restrictions on advertising be no more extensive than necessary to achieve the FTC's objectives in reducing deception. As a long-time member of the Senate Judiciary Committee, I understand the difficulty of tailoring a practical rule that balances the protection of the First Amendment and the protection of consumers.

The Supreme Court has held that regulations on commercial speech must not be "more extensive than is necessary to serve [a substantial governmental] interest." *Central Hudson v. Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447, U.S. 557, 566 (1980). The Court recently added that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002).

Some of my constituents have expressed concern that the potential revisions in your Request for Comments could result in an overly broad suppression of speech because narrower regulations that achieve the FTC's goals are available. For example, they argue that requiring an across-the-board "generally expected performance" disclaimer would ignore the broad differences in various industries and among sectors within industries. Such a disclaimer might be appropriate for some products or services, but would be misleading and difficult to formulate for others. Some constituents have suggested that making current disclaimers of atypicality more conspicuous would be a more fitting regulation, and that any revision to the Guides should be narrowly tailored. I am not in a position to evaluate the merits of these contentions, but I do

believe that the FTC should carefully consider whether requirements like the generally expected performance disclaimer are overly broad or impractical.

The FTC has always embraced a strong post-market enforcement system, which relies not on burdensome pre-market approvals, but instead on vigorous enforcement against individual companies. These procedures appear to allow for a narrow targeting of violations and strike the proper balance between reducing deception and protecting First Amendment rights. Should the FTC decide to revise its guidelines on the use of testimonial advertising, new restrictions should similarly be narrowly tailored to avoid placing burdensome restrictions on useful products, in order to sustain validation in the courts.

Consumers deserve to be protected from deceptive advertisements, but overly broad restrictions would do a disservice to consumers and truthful advertisers alike. As the FTC revises the Guides, I urge that it fashion rules that weed out deceptive practices that harm consumers while continuing to protect truthful advertising.

I appreciate the FTC's efforts to thoughtfully review the Guides on the basis of empirical evidence and public comment.

Sincerely,

Arlen Specter