

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of)	
)	Project No. PO34520
Endorsement Guides Review)	
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**COMMENTS OF BZZAGENT, INC., ON THE PROPOSED CHANGES
TO THE COMMISSION'S GUIDES CONCERNING THE USE OF
ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING**

BzzAgent, Inc. (“BzzAgent”), is pleased to file these comments pursuant to the Federal Trade Commission’s (“FTC” or “Commission”) request for public comments concerning the proposed changes to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”).¹ BzzAgent applauds the Commission’s efforts to expand the protections available to consumers when endorsements and testimonials are employed in advertisements. At the same time, BzzAgent proposes that the scope of the Guides be clarified so they do not inadvertently regulate everyday word-of-mouth communications among actual consumers regardless of whether such communications take place in person, via e-mail or in new mediums such as blogs or social networking Web sites.

I. Background of BzzAgent, Inc.

In 2001, BzzAgent founder and CEO Dave Balter had a vision to create a technology-enabled community that would allow people to experience new products and services, share their honest opinions about them with people they knew, and report on those activities and opinions so marketers could directly see the results—good, bad or neutral. This community would be

¹ 16 C.F.R. Part 255.

something entirely new, bringing consumers and marketers together to report and analyze honest, candid and naturally-occurring word of mouth (online and offline). As of December 2008, BzzAgent had 500,000 participants in its community, growing by 2,000-4,000 per week. BzzAgent, which has 80 employees, has run over 500 programs for more than 250 customers (representing a sizable fraction of the Fortune 500).

II. The Changing Nature of Endorsers and Consumers

A. New paradigms

Until recent years, advertisers using endorsements or testimonials (referred to hereinafter as “endorsements”) to promote their products decided which endorsement to use in an ad. Whether they featured a celebrity endorsement, such as a well-known sports star, or a patron at a restaurant, or a cash-compensated “street team,” the advertiser was in control over (i) which endorsements to use in their ads (and which ones not to use) and (ii) the content of those endorsements. Because such endorsements were controlled and effectively adopted by the advertiser, it was appropriate that the advertiser be held responsible for their content. Thus, revised language in the proposed Guides holding traditional advertisers liable for the content of such endorsements continues to make sense: “Advertisers are subject to liability for false or unsubstantiated statements made through endorsements.” Section 255.1(c).

We are now at a new and critical moment in how marketers are beginning to engage with consumers, specifically because control in many cases is shifting into consumers’ hands. With consumers having a greater share of voice as a result of opinion-sharing media such as blogs, social networks and online review sites and further accelerated by the interest and ability for consumers to ‘tune out’ traditional messages, marketers have sought to engage naturally

occurring consumer discussions more and more, by creating programs that engage consumers directly.

This new paradigm has created a variety of fresh models, including BzzAgent's, which focus on the consumer voice directly and the fact that the marketer must acknowledge that control has in many cases shifted to the hands of the consumer.² These newer models often require education of advertiser clients who are not used to relinquishing control to actual consumers. BzzAgent has occasionally been compelled to decline projects where advertisers could not accept the necessity for this lack of control over its participants' communications.

But more and more advertisers—seeing the example of successful models such as BzzAgent—are becoming comfortable with the reality that honest, uncontrolled speech between actual consumers is ultimately the most effective kind of word of mouth. BzzAgent in particular offers advertisers a lens through which these advertisers can see what is happening in the “real world,” while offering consumers the opportunity to have their opinions heard by advertisers following consumers' exposure to actual product samples as part of a BzzAgent campaign.

The effectiveness of BzzAgent's model relies on consumer participants having the freedom to form and articulate either positive, negative or neutral opinions (or no opinion at all), and their participation in future BzzAgent programs does not require that comments shared about products (or reported back to the company) be in any way positive. As such, participants in BzzAgent programs are not controlled by BzzAgent to the end of acting as, effectively, an extension of the advertiser—but rather they are acting on their own initiative and will to speak

² This new form of honest, consumer-to-consumer communication should be distinguished from situations where advertisers hire shills to pose as actual consumers who are, in fact, controlled by advertisers to deliver a specific positive message on behalf of advertisers. In that case, we wholeheartedly support the Commission's vigorous prosecution of such false advertising and shills under the FTC Act's prohibition against deceptive advertising.

their minds (or to say nothing at all) regarding their honest, candid opinions about products sampled through BzzAgent campaigns.

B. Liability in the world of de-controlled advertising models

BzzAgent believes that the spirit and intent of the Guides, applied to new mediums and methods such as those described above, should hold the advertiser liable for comments of an “endorser” only to the extent that the form and content of such consumer comments are not honest and self-directed by a consumer who is free to speak his or her mind. In order for liability to be imposed upon an advertiser for a consumer endorser’s statements, there must be a lack of such freedom (evidenced by the intent and ability of an advertiser to control the form and content of such statements).

Imposing liability without such requisite control would not further the intended goals of the regulations and could have the unintended consequence of impeding—or even preventing—the development of consumer-friendly mechanisms for dissemination of honest, unfiltered word of mouth (in traditional offline settings as well as in emerging sectors such as social media). It would be unfair and unrealistic for any advertiser to accept the risk of being held liable for statements made by consumers that they do not script, from whom they do not require endorsement and certainly cannot control.

C. Distinction between consumer endorsers and actual consumers

In finalizing the Guides, we encourage the Commission to distinguish between honest word of mouth shared among *actual consumers* from marketing messages spread by controlled *consumer endorsers*. The Guides should regulate consumer endorsers—without inadvertently regulating the activities of ordinary consumers who share their honest opinions regarding

products or services they have sampled (even though possibly in the context of an advertising program, e.g., when product samples are distributed in the aisles of grocery stores).

Consumer endorsers are controlled by marketers to deliver a positive message of endorsement on a marketer's behalf. As a result, *consumer endorsers* are essentially extensions of the marketer, making regulation of their activities and messages consistent with the FTC's goal of insuring that advertising is truthful, substantiated and transparent.

Actual consumers, on the other hand, are not extensions of the marketer—they are not controlled or required to deliver an endorsement or positive message (or, in some cases, any message at all). Emerging mediums (such as BzzAgent) are now engaging and empowering *actual consumers* in modern advertising contexts to facilitate not endorsements but rather honest, candid word of mouth.

We hope the Guides will draw an effective distinction between advertising programs that leverage *consumer endorsers* (who are controlled to offer positive messages as extensions of the marketer) from programs where power and content is left in the hands of *actual consumers* (who are not controlled and who share—or are silent regarding—their honest opinions whether positive, negative or neutral).

III. Unintended Consequences, Complications and Constitutional Issues

If the distinction outlined above (contrasting *consumer endorsers* from *actual consumers*) is not clarified in the proposed Guides, there is a risk that the Guides could apply to a variety of unintended circumstances, none of which would serve the Commission's goals of policing advertising to avoid consumer deception. Following is a brief discussion of two of those potentially unintended situations—with subsequent discussion of the challenges and

complications regarding disclosure of what may be less-than-material connections between advertiser and endorser.

A. Media reviews

It is a standard practice of book publishers, music companies, consumer electronics manufacturers and others to provide free samples of their products to reviewers, whether it is The New York Times Book Review, cnet.com or blogs. In this context, there is no question that the company provides the product to such reviewers with the hope—but not the prerequisite or control to insure—that the review will be positive.

But if advertising sampling programs are not excluded from the Guides, and if mere provision of such samples to honest, independent reviewers is considered a proxy for control, there is a risk that such book, music or computer reviewers would inadvertently qualify as “endorsers” under the technical definition of the Guides, despite the fact that such reviewers’ views are their own and not those of the company that provided the free product for review³

Under the Guides, this could mean the advertiser and/or publication could be held liable for false or unsubstantiated statements subsequently made in the context of such reviews. Yet there are strong First Amendment grounds for protecting the unpaid, uncontrolled media reviewer from liability for expressing their independent views. The Supreme Court’s *Central Hudson* analysis should be inapplicable because this is not commercial speech—it is the very type of speech and press that the First Amendment is designed to protect. It is simply unimaginable that reviewers who have not been hired to promote a product should run the risk of liability for expression of their unscripted opinions.

³ Similarly, BzzAgent members are *consumer reviewers* whose views are their own and who should also not be covered by the Guides.

The Guides should therefore distinguish between (a) the sort of product or service sampling that underlies both new and traditional forms of publishing and reviews, in which there is no prior agreement about what the publisher or review will say, from (b) dissemination of samples which are provided as compensation for a positive review in a *quid pro quo* relationship, especially if hidden, leading to a transfer of control of the resulting message from reviewer to advertiser and transforming so-called “free” speech into “commercial” speech appropriately subject to regulation under the Guides.

B. Free sample/tell-a-friend promotions

It is a common commercial practice to offer free product samples to consumers—often with the encouragement, explicit or implicit—to “tell a friend” about the product. In this context, new era companies such as BzzAgent which distribute product samples to facilitate honest word of mouth are analogous to the distributor of the free samples, and BzzAgent’s participant volunteers are analogous to the supermarket shopper who tries (and maybe speaks about) the product—whatever they may think of it.

In this case, neither the BzzAgent participant nor the grocery shopper receiving the free sample in the supermarket has been paid; both are free to say nothing after trying the product or recommend it to their friends or tell their friends it was terrible and recommend that their friends avoid the product. Indeed, maintaining control would undermine the core goal of supporting consumers’ right to offer their own honest opinions about a product or service, which is key to BzzAgent’s service model.

While the supermarket distributor (or BzzAgent) should be responsible for the contents of materials, brochures, signs or other statements made to consumers regarding such product

samples, such distributors (or BzzAgent) should not be held liable for what actual consumers (or, in the BzzAgent universe, its volunteer participants) say about the product after receipt. In fact, in most cases, advertiser distributors of sample products will not know what is said and in all cases will not be able to control it.

While providing free samples in supermarkets or on street corners (or mailing them to participants as BzzAgent does) can be an effective way of having consumers try and communicate with others about products, few if any advertisers would continue the practice if potentially liable for those consumers' comments which are beyond advertisers' knowledge and control.

Unless the Guides are clarified, such *actual consumers* receiving this type of product sample might be found to fit the definition of “endorser” as they are expressing their own views with the encouragement and support (but not the control) of an advertiser—a new twist on the traditional regulatory context that requires careful consideration to avoid such unintended consequences.

C. Challenges and questions regarding disclosure

As indicated above, BzzAgent strongly supports the requirement in the Guides that material connections between an advertiser and endorser be disclosed. This has its clearest application to endorser disclosures of payment received for their endorsement, as that fact would be material to consumers in evaluating statements made by the endorser (e.g., companies that hire “street teams” pretending to be actual consumers should disclose that they are in fact participating in advertising messaging and commercial speech).

It is less clear, however, that provision of product samples to consumers who are free to say whatever they please about the sample (e.g., after receiving a product in a supermarket aisle) need be disclosed as material to evaluating that person's opinion. The relevant fact is the speaker's honest opinion (good, bad or neutral)—not necessarily the source of the sample; dissemination of the sample itself should not be deemed an element of control converting that honest speaker to an unwitting ally in advertising messaging, thereby transforming that person's honest opinion into an element of commercial speech when no such control is present.

Even if disclosure of receipt of free samples is required, in the world of blogs and word of mouth marketing, what duty should advertisers have regarding tracking and enforcing such disclosures, with what associated liability?⁴ Example 9 to Section 255.5 states that “the advertiser should take steps to ensure that these disclosures are being made.” In the case of *actual consumers* who may make statements following receipt of free product samples—on blogs, via e-mail or over the backyard fence—the advertiser is not in control of the consumer (nor should it be).

Even in the case of *consumer endorsers*—where there is a *de facto* nexus of control between advertiser and consumer—advertisers can only take reasonable steps, including instructing consumer endorsers what type of disclosure to make, letting them know it is

⁴ There is some ambiguity as to whether content liability and disclosure obligations under the proposed Guides are coextensive (i.e., does content liability inure to any relationship containing an obligation to disclose any element of that relationship). BzzAgent urges the Commission to clarify that these are separate considerations: content liability should turn on factors such as compensation and control, whereas disclosure should reflect information needed by consumers in order to evaluate the true independence of statements made by other consumers. In particular, providing a free product or sample alone should not impose liability on an advertiser for resulting consumer statements even if the recipient of the product or sample is required to make a disclosure of the source of such sample.

expected, and, if the advertiser learns that disclosures are not being made, removing such consumer endorsers from future programs.⁵

It would be helpful for the Guides to distinguish between these two differing circumstances, spelling out advertisers' obligations (and disassociating them from resulting liability) to negate any concern that advertisers will be held strictly liable for any consumer failure to make disclosures.

IV. Recommended Guides Revisions

Most of the difficulties identified above could be avoided by clarifying the definition of “endorsement” to distinguish between *consumer endorsers* (who are essentially representing or advancing marketers' opinions under marketers' control) and *actual consumers* (who are representing their own opinions without marketers' control, albeit sometimes in the context of new advertising contexts such as honest word of mouth and sampling programs).

The key distinctions between *consumer endorsers* and *actual consumers* are (i) there is no *quid pro quo* for *actual consumers* to express a particular opinion (unlike *consumer endorsers*, who advance advertising messages under marketers' control), and therefore (ii) such *actual consumers*—though they may be engaging in word of mouth about commercial products—are not participating in “advertising messaging” (or commercial speech) as contemplated by the definition of consumer endorsers in the Guides.

Exclusion of such actual consumers from the liability provisions of the Guides could be accomplished in a number of non-mutually exclusive ways. Most simply (and perhaps most

⁵ Note that BzzAgent participants, though actual consumers (not consumer endorsers), are required by BzzAgent to disclose their participation in BzzAgent programs when discussing received product samples, not as a matter of law, but in furtherance of the company's honest, transparent business model.

critically, as a modification of the definition of “endorser” described above), Section 255.1(d) of the Guides could be modified to read: “Advertisers are subject to liability for false or unsubstantiated statements made through endorsements except **when advertisers do not control the contents of such communications, i.e., there shall be no liability for the statements of independent consumers freely expressing their own views.**” (Suggested change in bold.)

To clarify that actual consumers engaged in honest word of mouth would not—if so uncontrolled—be participating in regulated advertising messaging, the examples provided in the Guides could also be revised along the following lines:

1. Example 5 (Section. 255.1, p. 72392):
 - a) The example could be revised to state: “A skin care products advertiser **hires** a blog advertising service. The service matches up advertisers with bloggers who **are paid to will** promote the advertiser’s products on their personal blogs” (suggested changes in bold).
 - b) This would help clarify that the liability of the advertiser was based on the control they exerted over the endorser through payment (thereby distinguishing this “consumer endorser” engaging in commercial speech from an “actual consumer” sharing her honest opinion on a personal blog based on a product sample provided without compensation or requirement for positive review).
2. Example 7 (Section. 255.5, p. 72395): BzzAgent believes that as phrased, this example may cast an inadvertently wide net over both citizen bloggers (i.e., actual consumers who are voluntarily offering an honest review of a product, whatever its source) and paid bloggers (i.e., consumer endorsers whose message is effectively an extension of the advertiser’s message under the advertiser’s control for whom provision of a product sample is de facto payment for a positive review and should be disclosed as such). BzzAgent would urge the Commission to distinguish between the two scenarios in this and related examples.
3. Example 9 to Section 255.5 states that “the advertiser should take steps to ensure that these disclosures [of samples] are being made.” Per the discussion in section III(C) above, this example could be clarified to require disclosure by consumer endorsers of samples that evidence control

of advertising messaging in what is essentially commercial speech (distinguishing that disclosure of product samples is not required of actual consumers who are sharing their honest, non-controlled opinions outside of advertising messaging in what is therefore not commercial speech).

4. Regarding incentive points programs (e.g., as cited in draft example 9 to Section 255.5), BzzAgent urges the Commission in its examples to highlight that incentive point programs should require disclosure where designed to compensate participants for positively endorsing a product or service, rather than for other activities within a program that do not result in or reflect control over messaging (e.g., to acknowledge reports to advertisers regarding the nature of communications, whether positive, negative or neutral). Given the complication, nuance and variety of this sort of point program in various contexts, the Commission may wish to seek out further empirical evidence before including points-related programs as an example.

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We thank you for your consideration of our comments. We appreciate the challenge faced by the Commission to effectively police endorsements and testimonials without restricting the development of honest communications among consumers about products and services that are core to American commerce and daily life.

Respectfully submitted by:

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