Natural Products ASSOCIATION™
Promoting Natural Products for Healthy Lifestyles
Formerly NNFA

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January 30, 2009

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580
Comments filed electronically on www regulations.gov

Re: Endorsement Guides Review, Project No. P034520

Dear Secretary Clark;

The Natural Products Association submits these comments in response to the Federal Trade Commission's (FTC) Endorsement Guides Review, Project P034520. The Natural Products Association was founded in 1936 to promote and protect the unique values and shared interests of retailers and suppliers of natural nutritional foods and natural products. The Natural Products Association is a non-profit 501 (c) (6) association whose mission is to unite a diverse membership, from the smallest health food store to the largest natural products supplier. We champion consumers' freedom of choice in our marketplace. We strengthen and safeguard retailers and suppliers. We build strong markets to fuel industry growth. We act together with uncompromising integrity, and we encourage all to reach ever higher standards of quality. We are the largest trade association in the Natural Products industry by numbers, representing over 10,000 members. Thank you very much for the opportunity to comment.

As a general comment we believe that where the Commission is looking towards stemming the use of language that may represent a first amendment challenge, it is important to reiterate our earlier comments along those lines[1] and although the case law lends credence to the Commission's traditional position that the mere truth of a statement does not render it misleading; neither the case law, nor common sense lend the same credence to the contention that a disclaimer is valueless simply on the basis that consumers disregard it.

As specific comment, the proposed section 255.2, regarding the typicality of product results would be a significant impediment to the use of testimonials to market weight-management products, especially programs that incorporate products but can be tailored to the needs of individual consumers. The new guide language makes explicit a two-prong requirement for testimonials:

1. *Results reported by testimonialists must fall within the range of results supported by proper substantiation, i.e., reliable and competent scientific evidence;*

2. *These results should be within the narrower range (as determined by the substantiation for the product) of generally expected results; if not within this narrower range, then the advertiser must disclaim and disclose*

[1] NPA 2007 Endorsement Review Project Comments to FTC:
http://www ftc.gov/os/comments/endorsementguides/527492-00024.pdf

the generally expected results (this may impact the more extreme weight loss testimonials being made - FTC advises weight loss should not exceed 2.2 pounds/week).

FTC has stated that it wishes to implement this change because its survey research showed that simple "*results not typical*" disclaimers did not change consumers' perception that results reported in testimonials were what most people could expect to achieve. FTC's research concentrated upon weight-loss and dietary supplement efficacy claims, and FTC has been particularly concerned about the use of testimonials reporting results on the statistical fringes of substantiated results.

Marketers of weight-loss systems and programs always have an uphill battle in substantiating the effects of their products. Consumers are likely to vary their eating, exercise, and other habits widely during the period when they undertake weight-loss programs. This creates confusion about what constitutes a typical consumer in the first place; it is extremely difficult in the normal consumer environment to attribute weight-loss results to any single factor. Second, controlled studies of the efficacy of products alone or products combined with services are probably not more than merely suggestive of typical consumers' practices--again, because of the variation in consumers' adherence to prescribed regimens outside a controlled clinical environment.

FTC has mentioned these problems in passing but has not addressed the substance of the comments. Instead, FTC has asserted that product makers would, despite these challenges be able to design reliable scientific studies of product (or service) efficacy. This assertion does not seem to be based upon anything other than optimism. It also does not answer the question whether studies so conducted would be of any use in identifying generally consumer results, for controlled, reliable studies may differ greatly from actual consumer experience in a non-clinical setting.

FTC has also discounted the issue of the cost and effort to do longitudinal studies of actual consumer results. The Agency assumes only that such data are available for "*legitimate products and programs whose efficacy has already been demonstrated by competent and reliable scientific evidence*". This is a tautology: substantiation will be available, as required by law, from companies that advertise products by means of substantiated claims.

With these factors in mind we ask that FTC clarify its position with respect to the use of limited, controlled studies to support testimonial claims made for a broader population. FTC must be able to answer in its guide whether the representation of data from limited, controlled studies as constituting the range of generally expected results for all consumers would be acceptable, and within what limits. Without this clarity what is presented in the guides has the potential to field a regulatory environment in which, for lack of a better comparison, the rules may be changed in the middle of the game.

Again we appreciate the opportunity to comment, and the Commission's continuing dedication in appropriately balancing consumer protection with industrial growth, especially given the current economic situation. We hope the comments are of utility to the Commission as they move forward with this important project.

Best regards,

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