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Before the

FEDERAL TRADE COMMISSION

IN THE MATTER OF ENDORSEMENT GUIDES REVIEW

Project No: PO34520

COMMENTS OF THE PROMOTION MARKETING ASSOCIATION, INC.

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I. Introduction

The Promotion Marketing Association, Inc. (the "PMA") welcomes this opportunity to submit comments to the Federal Trade Commission ("Commission" or "FTC") in response to its Notice of Proposed Changes ("Proposed Changes") to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Guides") (73 Fed. Reg. 72,373 (Nov. 28, 2008)).

The PMA is the premier non-profit organization and resource for research, education and collaboration for marketing professionals representing the more than one trillion dollar integrated marketing industry. Founded in 1911, its members include Fortune 500 companies, top marketing agencies, retailers, and leading consumer goods and services companies representing thousands of brands worldwide. Championing the highest standards of excellence in promotion, marketing, and advertising, the PMA serves as the representative voice for its over 400 members, many of whom regularly employ endorsements and testimonials when promoting their businesses and products.

Due to the depth of its experience in this area, the PMA is able to provide the Commission with meaningful insights into the real-world impact of its Proposed Changes to the Guides. At the outset, on behalf of our members, we commend the Commission's diligent efforts to update and improve its guidance to advertisers and marketers. In their current form, the Guides provide clear and easy to apply standards for many different types of testimonials and endorsements. Many of the Proposed Changes, however, create substantial ambiguity and will have unintended adverse effects on advertisers' ability to use endorsements. Moreover, the Proposed Changes will cause more consumer confusion than they cure.

The PMA is particularly concerned that eliminating the current safe harbor for typicality disclaimers will make it difficult, if not impossible, for many advertisers to use informative consumer testimonials because product results are dependent on a constellation of factors that cannot be quantified into an accurate general experience disclosure statement. In fact, in many instances, such a disclosure would likely be fraught with so many variables and comparative complexities that it would lead to greater confusion or even deception. PMA is also concerned that certain new examples in the Proposed Changes will create ambiguity and uncertainty regarding key issues, such as what constitutes an endorsement, what types of material connections will trigger the required attendant disclosures, and the circumstances under which celebrities will incur liability for false representations. Finally, the application of the Guides to blogging and other types of "word-of-mouth" marketing is premature and requires much more study.

While the PMA supports the Commission's efforts to ensure that consumers are not deceived by advertising, the evidence in the record does not indicate that such deception is occasioned by advertising that adequately complies with the current Guides. Thus, the adoption of changes to the Guides that would radically alter the landscape of endorsement advertising, create uncertainty, and negatively impact nascent arenas of marketing is neither warranted nor appropriate at this time. Rather, as detailed in the following comments, the PMA suggests a more measured and narrowly tailored approach.

As fully explained below, the Proposed Changes include certain unclear and unsupported provisions that will create confusion among advertisers and, in turn, consumers. In addition, some of the Proposed Changes will prevent advertisers and third parties from providing valuable information to consumers. The PMA has focused on the following key areas that it believes are

likely to create confusion and ambiguity for marketers and consumers alike, as well as negative consequences for the entire marketing industry: (1) eliminating the "typicality disclaimer" safe harbor; (2) the proposed changes regarding the liability and obligations of celebrity endorsers; (3) the proposed changes regarding the scope and disclosure of material connections; and (4) the 11th hour decision to include blogs and similar and other non-traditional media formats within the ambit of the Guides.

II. The FTC's Safe Harbor for Typicality Disclaimers Should Be Retained

Section 255.2(a) currently provides that if an advertiser does not have adequate substantiation that the experience described by an endorser is representative of what consumers will generally achieve, the advertiser can either (1) clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or (2) disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve. The second option, the so-called "disclaimer of typicality," has been widely used by legitimate marketers and has been a particularly effective and informational tool for consumers and marketers alike with respect to products, programs or services where the results to be achieved are highly variable and dependent on individualized factors. Proposed Section 255.2(b) would eliminate the disclaimer of typicality as a safe harbor and would require that where the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement clearly and conspicuously disclose the generally expected performance in the depicted circumstances. Further, the advertiser must possess and rely upon adequate substantiation for that representation.

This Proposed Change is problematic for several reasons: first, and foremost, the proposed amendment to Section 255.2 raises serious First Amendment concerns because there are less restrictive means available to achieve the Commission's goal of preventing consumer

deception. Indeed, the history of FTC Enforcement in this area demonstrates that the current Guides are more than adequate to provide the Commission with the tools necessary to curb deceptive and misleading testimonials without imposing undue, and in some cases, impossible burdens on the industry. Second, it will likely create greater confusion (and possibly deception) and the proposed "generally expected result" disclosure will be impracticable if not impossible to apply to a variety of products and services. Finally, FTC relies on heavily flawed data to support this sweeping change and will impose substantial burdens on many marketers.

A. The Proposed Changes Violate the First Amendment

In the Proposed Changes, the Commission dismisses free speech concerns raised in the comments filed in response to the January 2007 notice. The Commission asserts that the Proposed Changes would withstand a First Amendment challenge under the Supreme Court's *Central Hudson*[1] test for commercial speech. We respectfully disagree.

The proposal to replace the safe harbor provided for use of typicality disclaimers in the current Guides with a disclosure of "generally expected results" in the Proposed Changes upsets the balance between the government's legitimate need to protect its citizenry from deception and the free speech enjoyed by advertisers and other commercial entities. Under the *Central Hudson* test, the government interest must not only be substantial, but the regulation at issue must directly advance the asserted governmental interest in a manner that is no more extensive than necessary.[2] The FTC's Proposed Changes fail because they are more extensive than necessary. As stated above, the FTC could effectively achieve its goal of reducing consumer deception by simply requiring that the current typicality disclaimer be displayed with more prominence.

[1] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).
[2] *Id.* at 564.

The District of Columbia Circuit Court of Appeals relied on *Central Hudson* when it held that "disclaimers are constitutionally preferable to outright suppression" in *Pearson v. Shalala*. [3] Like the Proposed Changes, *Pearson* involved a federal agency's concern that inclusion of a disclaimer would be insufficient to negate the potentially misleading nature of a claim.[4] Plaintiffs challenged the constitutionality of the Food and Drug Administration's ("FDA") regulatory framework, which precluded the use of health claims made on dietary supplements unless the claims met the "significant scientific agreement" standard, even if the health claims were accompanied by qualifying disclaimers.[5] The court rejected the FDA's argument that the health claims at issue should be suppressed.[6] Instead, the court suggested that the FDA's concerns regarding the accuracy of the claims could be accommodated by adding a prominent disclaimer such as "the evidence is inconclusive because . . ."[7]

We urge the FTC to follow the court's guidance in *Pearson* with regards to all of the Proposed Changes, but particularly as applied to the Proposed Changes relating to non-typical testimonials. The Proposed Changes will effectively suppress many such testimonials where it is not possible, or untenable to include a disclosure of the "generally expected results." We respectfully submit that the FTC reconsider proposed Section 255.2(b) of the Guides, and that the Commission address its concerns regarding non-typical endorsements by requiring increased prominence of the typicality disclaimer rather than suppressing truthful advertisements.

B. The Proposed Changes are Not Workable and Will Result in Consumer Confusion

[3] 164 F.3d 650, 657 (D.C. Cir. 1999).
[4] *Id.* at 653.
[5] *Id.*
[6] *Id.* at 658.
[7] *Id.*

The results provided by many types of products and services cannot be measured and directly compared to other products claiming the same results. For example, "weight loss products" may include diet plans, food substitution programs, exercise equipment, and oral supplements, or products that consist of a combination of two or more of the foregoing elements. All such products are intended to promote weight loss, but each performs its function differently and their outcomes may be legitimately measured in different ways. We believe that providing consumers with information that allows them to compare outcomes for different products a laudable goal, but the disclosure of "typical" results is not possible in many cases, and such disclosure may itself be deceptive.

For weight loss products, medical products, and other similar products and services, typical results are not objectively measurable because the outcomes are subject to multiple variables. For weight loss, consumer results may depend on individual factors (such as weight loss goals, physical characteristics, body type, prescription medications, age, starting weight, and metabolism), as well as on the weight loss method chosen and a multitude of extraneous factors. All of these variables are critical to the success of any effort to lose weight or improve one's health or medical condition, yet these variables operate completely independent of the effectiveness of any product or service used by the consumer. Similarly, results will vary for health care or medical products based on individual factors, such as dosage, severity of condition, unrelated health conditions, diet, or age. It is simply impossible to capture adequate substantiation for the "typical consumer" experience because when it comes to weight loss or health care, there is no such thing as a typical consumer.

In addition, the efficacy of a product such as a weight loss program will depend on how closely the consumer adheres to the program. Does the "typical" or "average" consumer include

all consumers who signed up for a program or only those who follow the program's protocol? Some companies may only include consumers who follow their program perfectly in their studies. Such studies would likely exaggerate the actual effectiveness of the program. This disadvantages conscientious advertisers. A company that uses studies of a more representative sample of its customers, regardless of the customer's compliance with the program, will always appear to be less effective, which may give consumers the misleading impression that some "quick fix" solutions will result in greater and more sustainable weight loss.

The Proposed Changes are even more problematic when applied to comparative advertisements that use consumer testimonials. Accordingly, any attempt to draw direct comparisons between products and services that cannot be directly compared will result in confusion, and even deception, for consumers. For example, an advertisement for a weight loss pill may state that it is typical to lose 10 pounds in the first week. An ad for a food replacement program may state that it is typical to lose 10 pounds in 30 days, and still another weight loss program ad may state that it is typical to lose 50 pounds this year. Assuming all of these statements can be substantiated in some way, the products are not directly comparable. For each product or service the method of compliance with the program, the sustainability of the weight loss, and even the effects on the consumer's body are all undisclosed material factors in the claims. There is simply no way to craft a disclaimer that would result in apples to apples comparisons.

Because there is no "typical" or "average" consumer and there are so many variables impacting weight loss or medical conditions, a typicality disclaimer is in fact the best way to properly disclose the limited applicability of testimonial results. "Results Not Typical" disclaimers can and do work, when clear and conspicuous, placed prominently and in proximity

to the endorsement, and designed to call attention to the importance of the information. The success of these principles is time-proven, as demonstrated by the FTC's long and exemplary record of enforcement in this area. Like all disclaimers, the true test of effectiveness for typicality disclaimers should be focused on whether consumers can read and understand them.

The FTC has noted in its enforcement actions that "disclosures are often buried in fine print footnotes or flashed as video subscripts too quickly for consumers to read them." Thus to the extent that the FTC believes past reliance on the typicality disclaimer has not been effective, we submit that the proper focus now should be on the prominence of the disclosures rather than on their content. By forcing advertisers to disclose data which will inherently result in apples to oranges comparisons, the FTC's proposals are likely to create more rather than less confusion.

C. The Proposed Changes Rely on Flawed Data to Change a Guideline That Is Working in Its Current Form

The current Guides provide proper explanations of how advertisers must ensure that statements of endorsements do not mislead consumers. However, the Proposed Changes would deem a wide range of truthful and non-misleading communication prohibited advertising. The Proposed Changes would also create great confusion among advertisers who will not know how to proceed. These radical changes have been presented without evidence that the Proposed Changes are necessary, or that they will help to meet the ultimate goal of ensuring clear and truthful advertising and marketing materials.

The existing disclosure requirement in the current Guides is adequate. Whether use of a typicality disclaimer is appropriate and sufficient must be considered and determined within an advertisement's context, including the nature of the claims made and/or testimonials employed, and the prominence with which the disclaimer is presented. Where an advertisement does not use the disclosure properly, or if consumers are misled, the FTC's enforcement authority remains

the proper and appropriate remedy. Further, the FTC could consider less restrictive alternatives such as requiring that typicality disclaimers are featured more prominently.

As noted in many of the comments filed in response to the FTC's January 8, 2007 *Federal Register* notice relating to the Guides, the two studies commissioned by the FTC to test the efficacy of the typicality disclaimer are flawed and do not provide proper support for the Proposed Changes. The FTC has acknowledged the limitations of the two studies[8] (the "Studies") but continues to articulate their findings as a basis for eliminating the typicality disclaimer safe harbor. The Studies' numerous flaws include utilization of a limited number of hypothetical advertisements (which did not accurately represent testimonial advertisements) and only a few hypothetical disclosures, and small sample sizes that are not demographically representative. Rather than focus on the Studies' flaws which have been addressed in-depth in previous comments, we refer the FTC to the comments previously filed by the Electronic Retailing Association ("ERA") and the Council for Responsible Nutrition ("CRN") prepared by Professor Thomas J. Maronick, which include a detailed analysis of the Studies' design and methodology limitations. Based on Doctor Maronick's past experience as the Director of the Bureau of Consumer Protection's Office of Impact Evaluation and expertise in consumer survey research, we believe his analysis should be given significant weight.

Assuming arguendo that the Studies are not flawed, their application to the entire universe of advertising is still unsupportable. The Studies were based on a small sample of participants who are not representative of a general consumer demographic. Both Studies tested

[8] We acknowledge "the staff's research did not attempt to determine what message consumers take away from testimonials and disclaimers on all media and for all products." FTC's Notice of Proposed Changes at 36. Further, in its commentary the FTC cites various cases that stand for the proposition that flawed studies can still be probative. 73 Fed. Reg. 72,385 n.77. However, we note that probative value of flawed studies as they apply to a single enforcement action is not relatable to the probative value of flawed studies when applied to the entire field of advertising.

only print media advertising of, by and large, single product categories. In light of the acknowledged flaws and limited application of the Studies, we urge the FTC to reconsider its reliance on them. While the PMA acknowledges the value of FTC's enforcement experience, a sweeping change of this nature should not be implemented in the absence of immutable evidence of deception.

D. The Proposed Changes Will Create a Substantial Economic Burden for Many Companies

Even where it is possible to gather typicality data, the required "generally expected results" disclosure will require advertisers to expend a great deal of time and resources gathering such data. The FTC has posited that advertisers who have conducted studies necessary to substantiate the efficacy of their products will likely have such data readily available. However, this is not necessarily the case. The type and degree of data and studies necessary to satisfy the FTC's stringent substantiation standards for quantitative claims in the health, weight loss, and safety areas may involve very different methodologies and protocols from those conducted to support the general efficacy of such products.

More significantly, requiring disclosure of generally expected results will create a significant hardship for small businesses that may not have the resources to conduct comprehensive studies and will thus place these companies at a severe competitive disadvantage. This mandatory disclosure requirement will also make it virtually impossible for new companies to use testimonials as they will not yet have a pool of customers from whom generally expected results can be culled. The FTC's proposed change will thus have the unintended effect of creating a landscape that favors large institutional companies over smaller, entrepreneurial, and innovative competitors.

III. The Proposed Changes Do Not Provide a Clear or Workable Standard for What Constitutes an Endorsement

The Guides define an endorsement as any advertising message that consumers are likely to believe reflects the opinions or beliefs of someone other than the advertiser. Even under the existing Guides, advertisers have always struggled to identify the line distinguishing a spokesperson from an endorser. A number of the examples in the Proposed Guides blur this distinction even further.

For instance, Example 6 in Section 255.0 suggests that any recognizable figure who speaks about the attributes of a product or service would be considered an endorser, even if the celebrity's statements are clearly scripted and do not contain an expression of personal belief. The Proposed Changes do not articulate any limitation on this broad principle. Thus, under this new standard, when coupled with the proposed changes to endorser liability, as discussed in further detail below, a celebrity with a well-known voice who provides a scripted voice-over is just as liable for an advertisement's message as a celebrity who promotes a product with direct statements of endorsement, such as "I use product X every day. It works for me." These Proposed Changes render the applicability of the Guides to specific activities uncertain, and, if adopted, will make it increasingly difficult for advertisers to engage celebrity talent on any terms.

IV. The Proposed Change to Section 255.1(d) Is Overly Broad and May Unfairly Subject Celebrities to Liability

The PMA acknowledges that celebrities may be held liable for knowingly engaging in misrepresentations in advertising. However, the proposed Guide in Section 255.1(d), does not reflect the standard by which such liability has been judicially imposed. In fact, the language, "endorsers may also be liable for the statements made in the course of their endorsements," is so broad as to infer strict liability. While we assume that this is not the intention of the FTC, there is no question that the Guide, as written could be so interpreted. If this proposed Guide is

implemented, it is likely that many celebrities will be deterred from endorsing products that they truly believe in rather than risk liability. As a result, advertisers may find themselves deprived of a very effective means of communicating their advertising messages to consumers.

Clearly, celebrities who endorse products may not do so with reckless disregard of the truth nor may they actively participate in deception. However, in most instances, celebrity endorsers are not active participants in the formulation of either advertisers' claims or the manner in which they are scripted in advertising copy. Celebrities do not typically possess the expertise or knowledge required to evaluate whether a claim may violate the FTC Act. Further, in most cases, they have no meaningful control over how their endorsements may appear in the final advertisement.

While there is legal precedent for the imposition of liability on celebrities for deceptive endorsements in some instances, it is not necessary to include a celebrity liability provision to the Guides. However, to the extent that the FTC determines that such a guide is necessary, PMA suggests that the specific guide reflect the standard of "participant" liability established in *FTC v. Garvey.*[9] In *Garvey*, the court declined to impose liability on a celebrity endorser who did not have actual knowledge of any material misrepresentations, was not recklessly indifferent to the truth or falsity of any representations made, and was not aware of a high probability that the representations were fraudulent. Further, the celebrity did not intentionally avoid the truth. A narrowly tailored guide enumerating the circumstances under which a celebrity may be held liable would accomplish the Commission's goals without creating an unnecessary chilling effect on the willingness of celebrities to render endorsements. This potential change is of particular concern to many PMA members who rely heavily on the use of celebrities in their advertising. In addition, many celebrities who attract positive attention to many issues and products will

[9] *FTC v. Garvey*, 2001 U.S. Dist. LEXIS 25060 (C.D. Cal. Nov. 7, 2001), *aff'd*, 383 F.3d 891 (9th Cir. 2004).

understandably avoid becoming involved with endorsements because of the heightened risk of liability that the Proposed Changes would create.

The PMA also believes that Example 4 in Section 255.1(d) does not reflect endorser liability as actually imposed by the courts. There are many variables in the example that are out of the control and beyond the knowledge of the celebrity appearing in the roasting bag infomercial. A hapless celebrity does not necessarily participate in deception merely by his or her presence at an infomercial shoot. As noted in other comments, including those of the American Association of Advertising Agencies and the American Advertising Federation, a celebrity endorser cannot possibly keep up with every element of production on an infomercial set nor does that celebrity have any way of knowing how the final product will be edited in post production. Accordingly, Example 4 should be revised to illustrate a celebrity's active participation in misrepresentation or deleted from the final version of the Guides.

Changes of the magnitude contemplated by these Section 255.0 examples should be clearly set forth within the text of the Guides, and the industry must then be given the opportunity to comment on the principles set forth. Without a clear statement of the scope of the intended change, it is not possible for us to provide meaningful feedback to the FTC. We respectfully suggest that the FTC reformulate and clearly articulate the principles intended to be illustrated by these examples in substantive provisions of the Guides, and request comment on those specific principles. Without additional clarification of these concepts, the proposed revisions to the Guides will likely fail to achieve their stated purpose—to provide clear guidance to the industry on the use of endorsements.

V. The Imposition of Material Connection Disclosures, as Set Forth by Example in the Proposed Guides, Is Unnecessary, Impractical and Unworkable

Pursuant to its Guide at Section 255.5, "When there exists 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." As in the past, the Guides note by example that paid celebrity endorsements do not require a material connection disclosure, as such is the generally expected practice. However, in Example 3 in Section 255.5, the FTC indicates that it will seek to impose a material connection disclosure on celebrities who promote products in interviews and other non-traditional settings. Further, the proposed example suggests that to the extent the celebrity makes claims about a product in an interview, the advertiser must have substantiation for such claims.

The FTC's example is cause for great concern for several reasons. First and foremost, while advertisers may engage celebrities as spokespersons for their products, they do not and cannot always control what a celebrity might say in any given interview. Even in the confines of a carefully drafted spokesperson contract, there is no way that an advertiser can script a celebrity's every word. It is entirely conceivable that when giving an interview to the press or an on-air talk show host a celebrity may make an off-the-cuff statement about a product for which the advertiser does not have substantiation. Such a statement may not have been authorized by the celebrity's contract but, under Example 3 in Section 255.5, it appears that liability would attach to the advertiser and, possibly, the celebrity under Section 255.1(d) as currently proposed. It would be unfair and outside the intent of the FTC Act to take regulatory action based on unauthorized or unintentional misstatements of a celebrity endorser in a non-advertising setting, particularly when the statements and the setting in which they are made are totally out of the control of the advertiser.

Furthermore, the imposition of a material connection disclosure in such a setting is impractical and unnecessary. It is impractical because there is no way for the advertiser to ensure that a celebrity will have an opportunity to make the disclosure, that the celebrity will remember to make the disclosure, or that the disclosure will be included in the final version of the interview that appears in the media. The variables at play in an interview setting are just too unpredictable to guarantee that any disclosure, much less a timely, clear and conspicuous disclosure can be made. Further, if most people understand that celebrities are paid for touting products in advertisements, it stands to reason they also understand the nature of a paid spokesperson's relationship with advertisers.

The PMA understands that some forms of advertisement are produced in interview format and in some circumstances it is appropriate that disclosures be made regarding the commercial advertising nature of the program. However, when a celebrity appears on *Entertainment Tonight* or a late night talk show, we do not believe that the imposition of advertising-related restrictions is appropriate. We strongly urge the FTC to refrain from adopting these aspects of the proposed Guides at this time. To the extent that the Commission feels that the use of spokespersons in non-traditional media needs to be further examined, the PMA would be happy to engage in a dialogue or participate in any forum that the FTC may wish to hold on the topic.

VI. The Application of the Guides to Bloggers and Other Non-Traditional Media Is Premature and Unsupported by the Record

The Proposed Changes to the Guides seek to expand their applicability to new and evolving marketing techniques. We applaud the FTC's desire to prevent deceptive practices throughout all marketing media, including the use of blogs by advertisers to promote their products. We believe, however, that the proposed revisions to the Guides, rather than

safeguarding a level playing field for all who participate in this evolving sphere of marketing, will actually promote more confusion and less transparency in new forms of advertising.

As an initial matter, we note that blogging is an evolving form of communication and corporate messaging that has not yet been fully examined by the FTC. There is, in fact, a near-endless variety in the relationship that bloggers may have to a company's products or services which are the subject of a blog. A great many bloggers operate as journalists, with no loyalties or editorial oversight by the makers of the products they promote or review. Others may have a more direct relationship with specific manufacturers or industry representatives. Given the complexity of the possible relationships, and the undetermined scope of the use of blogs in marketing, any attempt by the FTC to regulate blogs at this time may be premature. The Proposed Changes to the Guides addressing this area illustrate this point.

Section 255.1, Example 5 concludes that statements by an individual blogger create liability for the advertiser when the advertiser asks a blogger to review a product. The potential reach of this principle is staggering. The example appears to create liability for any company that sells a product that a blogger reviews, even when the company exerts no control over the message. If you take the example to its logical conclusion, advertisers would be liable for any public statements made by any individual, including journalists, public figures, and consumers, even though the advertiser exerted no control over the content of the message or how it was disseminated (or even *if* it was disseminated). Companies with a genuine desire to comply with the Guides will likely be forced to abandon soliciting product reviews by bloggers. Even then, this example suggests that the company may still face liability should a blogger take it upon him or her self to promote or review one of its products.

This example also fails to clarify what types of actions on the part of the advertiser may constitute payment for purposes of these Guides. For instance, does merely furnishing a sample of a product to a blogger so that he or she can evaluate the product constitute a payment? What role does the value of the product thus provided play in determining whether the endorser has been compensated? The example refers to a bottle of lotion as the promoted product. How might the analysis differ if the product were durable, such as clothing, jewelry or personal electronics? Advertisers cannot disclose material connections unless they first understand what connections are material and what constitutes a "paid endorser." Further, clear guidance on this issue is the only way to ensure uniformity of disclosures across marketers. What constitutes a material connection or a paid endorser must be clarified.

A further ambiguity evident in this example is whether or not the advertiser must receive benefit from the blogger's statements in order for the blog to be an endorsement. This example appears to create liability for the advertiser even when they receive no benefit from the blogger's statements. A blogger may review features or uses of a product which were never intended or contemplated by the advertiser, yet the proposed Guides would appear to make the advertiser liable for such statements.

As with celebrities, the Proposed Changes provide for a material connection disclosure where a product is provided to an individual who writes a blog in Section 255.5, Example 7. The example describes a situation where a company sends a copy of a video game to a college student who is known as an expert and writes a blog about video games. The company asks the blogger to write about the game system on his blog. The blogger then posts a favorable review. The FTC proposes that the blogger should disclose that he received the game for free. However, the company has no control over the blogger's statements or posts. Throughout all industries and

across all media, journalists and reviewers receive free products and services sent by companies with the hope that they may receive a review. A journalist's job is to keep the review objective—a blogger should be treated no differently. Sending a product to a blogger to review should convert that blogger into an "endorser." Companies have no control over the third-party reviews and cannot police bloggers to ensure that required disclosures are included in their reviews.

These unresolved issues highlight the overarching concern that a rush to regulate in an evolving area such as blog communications is likely to result in more confusion than clarity. Clearly, for liability to attach, the advertiser should have some control over the advertising message. The extent and form of that control is a subject ripe for further study and contemplation. Applying the proposed revisions to the Guides in this manner, however, will only stifle meaningful dialogue on how this new medium is and should be used to help educate consumers about products and services. Accordingly, we respectfully request that the FTC refrain from adopting Example 5 in Section 255.1, and Examples 7 through 9 in Section 255.5 at this time.

VII. Conclusion

The Proposed Changes will greatly expand the scope of what types of acts, statements and even non-verbal appearances constitute endorsement, causing confusion regarding what constitutes an endorsement. The Proposed Changes will inhibit advertisers' ability to use celebrities in any role, and will make companies responsible for third-party reviews over which they have no control. The sweeping changes regarding disclosures used for non-typical testimonials will make it impossible for advertisers of many products to provide truthful and useful information to consumers. While we have great respect for the FTC's intention of preventing deceptive and misleading advertising, we believe that the Proposed Changes create

substantial ambiguity and will have unintended adverse effects on advertisers' ability to use endorsements and even cause unintended consumer confusion. We respectfully urge the FTC to consider these and other comments submitted by the industry, and to revise the Proposed Changes accordingly.

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