Before the
FEDERAL TRADE COMMISSION
Washington, DC

IN THE MATTER OF
ENDORSEMENT GUIDES REVIEW
Project No. P034520

COMMENTS OF
Electronic Retailing Association
and
Council for Responsible Nutrition

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INTRODUCTION

On November 28, 2008, the Federal Trade Commission ("Commission" or "FTC") published in the Federal Register, 73 Fed. Reg. 72374, a Notice of – and request for comment on – proposed changes ("Notice") to its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides"), codified at 16 C.F.R. Part 255. These Guides, although not formal FTC Rules, constitute one of the most important statements of policy by the FTC in the field of advertising in general. The Guides are responsible for the ubiquitous "Your Experience May Vary" disclaimer seen at the bottom of television and other advertising, as well as the rules governing the payment of compensation to endorsers and testimonials, the documenting of testimonial claims and many other related policies. The changes proposed by the Commission are significant and, if carried out, will have a substantial effect on the creation of new advertising which will run after the effective date of the amended Guides.

> Based upon the staff's empirical research and its law enforcement experience, the Commission believes that disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective, and therefore that the Guides' current safe harbor for such disclaimers should be eliminated.

73 Fed. Reg. 72387.

Instead of allowing a disclaimer, the Commission will now require that when an advertiser does not have substantiation for the claim that the endorser's experience is typical (and advertisers of new products rarely do, especially where success depends on the manner and frequency with which consumers use a product), the Commission will require that "the advertiser should clearly and conspicuously disclose the generally expected performance in the depicted circumstances." *Id.* The Commission is seeking

comment on whether there are product categories for which this requirement would prevent advertisers from using endorsements even though the advertiser believes that the endorser's experiences are, or likely are, generally representative. *Id.* In a footnote to amended Section 255.2(d), the Commission notes that it has tested the communication of advertisements containing a clearly and prominently disclosed disclaimer of either "Results Not Typical" and another disclaimer and neither effectively communicated the limited nature of the representation. 73 Fed. Reg. 72392 n.106. In the footnote, the Commission states that it cannot rule out the possibility that a stronger disclaimer of typicality could be effective in the context of a particular advertisement, and notes that it would have the burden of proof in a law enforcement action, but also notes that an advertiser with reliable empirical testing demonstrating that the net impression of the advertisement includes knowledge of the disclaimer will avoid the risk of initiation of such an action in the first place. *Id.* This is cold comfort to most advertisers.

The FTC's decision that, in general, it will disallow typicality disclaimers is based in part on its enforcement experience. The FTC observes that "disclosures are often buried in fine print footnotes or flashed as video superscripts too quickly for consumers to read them" and that they consist merely of "Results Not Typical" or "Results May Vary" or similar statements that do little to inform consumers how rare or extreme the featured results are. *Id.* at 72379. This conclusion is also based on two staff studies that were published as part of the January 2007 request for comments. These two studies were vigorously criticized by many of the commenters, and with special force by Professor Thomas Maronick on behalf of the Electronic Retailing Association and the Council for Responsible Nutrition. Doctor Maronick described in detail how the studies

were seriously flawed, *Id.* at 72384, but the Commission's response is, essentially, that the studies may not be perfect but "the results of the staff's studies do provide useful empirical evidence concerning the message that testimonials convey to consumers and the effects of various types of disclaimers on the communication of efficacy and typicality claims." *Id.* at 72385.

The Commission is aware of the hardship of requiring disclosure of "generally representative results." Indeed, a number of comments highlighted the particular problems that marketers of direct response exercise and diet products would face. *Id.* at 72381. The Commission responded that it recognized that a revision of Section 255.2(b) of the Guides calling for arguably non-typical testimonials to be accompanied by disclosure of the results consumers generally achieve with the advertised product would increase costs for those advertisers who have not previously tracked consumers' experiences with their products, and could present an impediment to the use of such testimonials by certain advertisers. *Id.*

In the discussion below, we demonstrate in Part I why requiring disclosures by advertisers of "generally expected results" – backed up by the level of substantiation generally required of any other material claim – will work substantial hardship on many advertisers for many products. Indeed, some advertisers and marketers of new products will find it impossible to comply with this new standard, requiring that they forbear using truthful testimonials or face the threat of enforcement action by the Commission. In Part II, we demonstrate that the two studies on which the Commission bases its finding that such a disclosure is needed are fundamentally flawed, internally inconsistent and, in some cases, recognized as weak even by their authors. In Part III, we discuss the impropriety

of relying on two studies of particular print ads to develop federal advertising policy in all advertisements containing testimonials in whatever form of media, including television, radio and the internet, none of which were the subject of any test ads. In Part IV, we briefly review the impact that requiring advertisers to accompany facially truthful testimonial statements with disclosures of information that may be unknowable can trench on settled First Amendment principles. And in Part V, we discuss the undesirability of establishing principles that go far beyond the existing Guides through parachuting into the Guides four new examples – examples 6, 7, 8 and 9 to proposed 16 C.F.R. § 255.5 – without the opportunity for discussion and further guidance on the scope of the liability that these new rules would create.

I. THE PROPOSED NEW RULES ON CONSUMER TESTIMONIALS RISK CREATING HARDSHIP AND CONFUSION IN THE ADVERTISING COMMUNITY WITHOUT SUFFICIENT DEMONSTRATION THAT THE EXISTING RULES ARE FLAWED.

In the Notice, the Commission states that it recognizes that a revision of the Guides "calling for non-typical testimonials to be accompanied by disclosure of the results consumers generally achieve with the advertised product would increase costs for those advertisers who have not previously tracked consumers' experience with their products, and could present an impediment to the use of such testimonials by certain advertisers." *Id.* at 72381. The Commission continues, however, that commenters may be overestimating those costs, and in "the vast majority of cases – particularly those for legitimate products and programs whose efficacy has already been demonstrated by competent and reliable scientific evidence – that information is likely to be present." *Id.* The Commission continues by stating its belief that "for most products, it is possible to

devise a methodologically sound means of determining the generally expected results." *Id.*

The basis for the Commission's confidence in these propositions is not stated. Perhaps the Commission has in mind the experience of automotive fuel economy results required to be posted on the windows of new automobiles stating the purported average highway and city fuel economy results of each vehicle. Such numbers are derived from scientific/engineering analysis and may or may not represent the actual results to be achieved by any particular driver. By analogy, there will be products that, because of their inherent capabilities, allow consumers to obtain a particular result within a specified period of time.

But that tells one little or nothing about the average results that consumers can expect when those results derive from the frequency, intensity and commitment with which consumers employ the product in question. A good example is a treadmill, a product utilized by many consumers for weight loss purposes. The substantiation for claims that a treadmill will allow a user to boost caloric expenditure is relatively well understood. How much the caloric expenditure will be boosted in the case of any consumer depends on such facts as the weight and sex of the consumer, as well as such variables as the frequency, length of time, and intensity with which the consumer uses the treadmill. But even that is not sufficient to address questions of typical weight loss experience since such weight loss requires a net deficit between caloric consumption and expenditure. Consequently, "disclosure of the results consumers generally achieve with the advertised product," *Id.* at 72381 – if the "generally expected results" were to be presented with the level of substantiation the Commission typically requires for material

claims – would require communication after the sale with such consumers in an effort to obtain a statistically sufficient number of responses which would (hopefully) be truthful and accurate. This dilemma will confront any advertiser who is selling a product the success of which depends on the commitment, enthusiasm or experience of the purchaser, and may put such a marketer to the Hobson's choice of abstaining from using a truthful testimonial on a subject for which information about typical results is unobtainable – or facing a challenge by the Commission.

The proposed "generally expected results" disclosure requirement also raises special concerns for companies who engage in direct sales through live on-air presentations, such as the live TV shopping channels. These presentations often incorporate live testimonials, including call-in testimonials from customers who have previously purchased and used the product involved. This is an important element of the presentation to viewers and a well-established practice over many years for these companies.

However, the proposed disclosure requirement is likely to effectively eliminate the ability of a live TV shopping channel from taking testimonial calls for a substantial number of products because of the unworkability of the proposed requirement. Disclosing generally expected results is unworkable in circumstances where the substantiation that is being relied upon by the live TV shopping channel may be based on different time frames or different conditions than those expressed by the individual consumer providing the testimonial. A change in regulatory approach of this magnitude affecting a well-established practice that is popular with and informative for consumers

should not be made without further study and the opportunity for the industry to consult further with the Commission.

As previously mentioned, the Commission admits that the proposed disclosure requirement "might impede the ability of newly established companies to use testimonials" but concludes that "such an outcome would not necessarily be inappropriate" since businesses "are entitled to compete based on truthful, non-misleading advertising claims, but they are not entitled to use techniques that mislead consumers." *Id.* at 72382. This notion may be unexceptionable, but certainly requires sturdy evidence in support of the proposition that a truthful statement by a testimonial will necessarily "mislead" consumers in the absence of a disclosure of what may be inherently unknowable by the advertiser. This requirement is essentially a ban on the use of specific testimonials, even if truthful. Consequently, a closer examination of the Commission's basis for this conclusion is required.

The Commission advances two bases for its conclusion. The first is easily disposed of and relates to the assertion that the Commission has brought a number of enforcement actions against marketers for deceptive advertising containing consumer endorsements and that many of these endorsements have been accompanied by statements purportedly informing consumers that the experiences of the featured endorsers are not representative of what consumers can expect. *Id.* at 72379. The problem, according to the Commission, is that the "disclosures are often buried in fine print footnotes or flashed as video superscripts too quickly for consumers to read them." *Id*. But, surely, illegible disclaimers, although perhaps a familiar problem to the Commission, are also a problem easily remedied. The disclosures should be clear,

prominent and legible and if they are not, they should be treated as if there is no disclaimer at all. Moreover, since the new policy proposed by the Commission also involves a disclosure – albeit one of generally expected results as opposed to a disclaimer of typicality – the same issue of illegibility which attaches to the disclaimer issue will be present in the new requirement of expected results. There is, in short, no logical connection between a concern over legibility of a disclaimer and the requirement that the content of the disclaimer be changed to something which, in many cases, will be unknowable. Consequently, we turn to the two studies, discussed at length by the Commission in the Notice, on which the purported rationale for the change must basically rest.

II. THE TWO FLAWED STUDIES FAIL TO SUPPORT THE COMMISSION'S PROPOSED SWEEPING CHANGES TO THE ENDORSEMENT GUIDES.

Almost 30 years ago, the Commission chose to provide a "safe harbor" to advertisers who employ truthful endorsements reflecting the experiences of one or more consumers on a central attribute of a product or service as long as they "clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve." 16 C.F.R. § 255.2 (2008). The Commission now proposes to reverse course and eliminate that safe harbor. This change of direction is based entirely on the results of two studies it paid to have conducted.[1]

[1] It appears that neither the FTC staff nor the authors of these studies performed a thorough literature search or otherwise attempted to determine whether the literature on testimonials and endorsements was consistent with the results of these studies. As the Commission said in *Dietary Supplements: An Advertising Guide for Industry*, "Studies cannot be evaluated in isolation. The surrounding context of the scientific evidence is just as important as the internal validity of individual studies. Advertisers should consider all relevant research relating to the claimed benefit of their supplement and should not focus only

The Commission routinely insists that advertising claims be substantiated by two (or more) studies that have been conducted and evaluated in an objective manner using procedures generally accepted as yielding accurate and reliable results. It is ironic that the two studies that have been put forth by the Commission as providing an empirical basis for the proposed new Section 255.2(b) would not meet the standards that have been applied to advertising substantiation by the Commission.[2] In addition, even if the methodology and analysis utilized in these studies were not seriously flawed, they are far too narrow in scope to be extrapolated to all advertising in all media. Nor do these studies support the Commission's proposed solution to the alleged problem here – that is, the disclosure of the generally expected performance of a product or service in the depicted circumstances.[3]

The validity of these studies as support for the Commission's proposed revisions to Section 255.2 was questioned by several of the commenters who responded to the Commission's January 18, 2007 *Federal Register* notice concerning the Guides. In particular, Professor Thomas J. Maronick prepared a detailed critique of the two studies, which was filed as part of the comments of the Electronic Retailing Association ("ERA")

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on research that supports the effect, while discounting research that does not." FTC, *Dietary Supplements: An Advertising Guide for Industry* 14 (1998).

[2] For example, the same two individuals (who have been hired many times in the past by FTC staff to do research to support FTC litigation efforts) performed both studies. In the past, the Commission has required advertisers to have substantiation in the form of "at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols *and are conducted by different persons, independently of each other*." *Thompson Medical Co., Inc.,* 104 F.T.C. 648, 844 (1984) (emphasis added).

[3] As the Commission and its staff have noted time and time again, claims that do not match the substantiation – no matter how valid the substantiation may be – are not substantiated. As we will discuss below, the findings of the Hastak-Mazis studies do not support the particular "safe harbor" provision contained in proposed 255.2(b). In fact, the first study did not even attempt to test the effects of the disclosure of what the generally expected performance of a product would be, and provides no support whatsoever for this proposed Guides revision.

and the Council for Responsible Nutrition ("CRN"). As the Director of BCP's Office of Impact Evaluation for over 16 years, Professor Maronick was the FTC's in-house expert on consumer survey research, and designed and/or implemented over 300 consumer surveys. Obviously, his criticisms of these studies should be given considerable weight.[4]

The FTC's Notice generally dismisses Professor Maronick's comments (as well as the criticisms based on the focus groups findings). But after attempting to rebut the criticisms of the two studies presented by Professor Maronick, the Commission concedes that the studies are flawed. To support its argument that flawed studies are good enough to support the proposed revision to Section 255.2 of the Guides, the Commission cites its 1991 decision in *Kraft, Inc.*,[5] which stated that a consumer survey conducted by the FTC staff in that case "was not without its flaws" but that, "on balance, the results were of some probative value." 114 F.T.C. 40, 126 n.13 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992). The footnote in the Notice citing *Kraft, Inc.* also quotes from the Commission's 2005 decision in *Telebrands Corp.*,[6] which acknowledged that a staff-administered copy

[4] Professor Maronick was not the only commenter who questioned these studies. For example, another commenter submitted a report from a well-respected research firm that asked two focus groups to review the mock weight-loss advertisements that were the subject of the second FTC study. The report presenting the results of those focus groups also calls into question the reasoning behind the Commission's proposed Section 255.2(b). The focus group members were quite skeptical of the more dramatic weight-loss testimonials in the hypothetical advertisements. They didn't expect advertisers to feature typical customers in their advertising and didn't jump to the conclusion that they could expect to lose as much weight as the hypothetical testimonials said they lost. The Commission brushed off the focus group findings, observing that "the process by which consumers view (and discuss) advertising in a focus group is very different from how they ordinarily experience it." 73 Fed. Reg. 72384. Of course, the methodology followed in the Hastak-Mazis studies relied upon by the Commission bore little resemblance to the process by which consumers ordinarily view advertising – and the mock advertisements themselves bore little resemblance to actual advertisements. In addition, the Commission stated that "[f]ocus groups are very dependent on group dynamics, and one or two participants can dominate the discussion and even influence other participants," but cited no evidence that the focus groups in question had such dominant participants. *Id.* Despite these criticisms of focus groups, the Commission and other government agencies (including the FDA) often conduct and rely on focus group research.

[5] 73 Fed. Reg. 72385 n.77.

[6] *Id.*

test may have been flawed, but stated that "copy tests do not have to be flawless to be reasonably reliable and probative." 140 F.T.C. 278, 324 n.45 (2005).

We differ with the Commission's decision that these admittedly flawed studies are a sufficient empirical basis for proposed Section 255.2(b). Reliance on flawed studies in proposing a disclosure requirement of such magnitude is inappropriate. The cases cited in footnote 77 of the Notice involved specific products and advertisements, whereas the proposed expected results disclosure requirement would apply to an entire broad category of advertising. A rule of such sweeping scope should not be rooted in flawed consumer studies of limited applicability.

Rather than reiterating Professor Maronick's criticisms here, we refer the Commission to the original ERA/CRN submission, which included detailed comments on various methodological and analytical shortcomings of the Hastak-Mazis studies. We believe those comments are persuasive, and we urge the Commission to give them more serious consideration before making a final decision in this proceeding.

As we have said elsewhere, the most fundamental problem with the Commission's proposal is that the FTC studies involved a very limited number of hypothetical print ads (which do not closely resemble actual advertisements that contain consumer testimonials) and a few hypothetical typicality disclaimers. Even if those studies were not flawed, their results should not and cannot be extrapolated to apply generally to all advertisements for all products in all media that contain testimonials and typicality disclaimers.[7] The scope of the studies is far too limited to support the

[7] The Commission's extrapolation of results relating to a certain type of print advertising featuring testimonials to all advertisements containing testimonials in all media is no more valid than applying the results of a study of broccoli to all vegetables, and is contrary to settled principles of advertising law. See discussion in Part III below.

proposed revision of Section 255.2 of the Guides, which would have the practical effect of banning a very broad and significant category of consumer advertising.

But there are other reasons why the findings of the two studies – especially the "Second Endorsement Study" (which we will hereinafter refer to as "Study 2") – are not congruent with proposed Section 255.2(b). The studies simply do not provide support for the broad shift in law enforcement policy that the proposed revisions to the Guides augur.

The "Endorsement Booklet Study"

The last paragraph of the "Endorsement Booklet Study" – which we will call "Study 1" -- reads as follows:

> While this study provides potentially useful findings, several characteristics of the study may limit its generalizability. First, the sample consisted of only 200 dietary supplement users, with about 35 respondents per treatment group. Therefore, there may be differences among the groups that were not statistically significant because of the small sample size. Second, due to the nature of the product, 80% of the respondents were 60 years of age or older. Younger audiences may process testimonials and disclosures differently. Third, these results are based on a single product, i.e., a dietary supplement. The use of testimonials in the advertising for other products may yield different results. Finally, the study booklet contained a relatively large number of testimonials (18). Advertisements containing fewer testimonials may produce findings different than those observed in this study.

Given these frank admissions concerning Study 1 by its own authors, there can be no dispute that its probative value is severely limited. If a study submitted in an FTC proceeding for the purpose of substantiating an advertising claim contained such language, the Commission would give it very short shrift.

Professor Maronick identified other flaws in this study. For example, after reviewing a mock advertising brochure consisting wholly of testimonials, subjects were

asked whether six statements were made in or implied by that brochure. Three of the six statements related to physical conditions (breathing problems, energy levels, and chronic pain) that were mentioned repeatedly by the testimonials. The other three were "decoy" statements concerning problems (thyroid problems, hair loss, dry skin) that were not mentioned by any of the mock testimonials. An average of 28% of the subjects said that the brochures did say or imply something about the decoy conditions even though they clearly did not. In addition, almost as many subjects (27%) did not know whether the brochures said or implied anything about the decoy conditions. In other words, fewer than half of the subjects were able to correctly answer this simple question – they could not accurately distinguish three conditions that were repeatedly mentioned in the mock testimonials from three other conditions that were never mentioned (expressly or by implication).

It appears that the authors did not deflate the numbers in the Study 1 tables to account for the rather extreme level of "yea-saying" demonstrated by the responses to the "decoy" questions. The authors did adjust for the "yea-saying" behavior exhibited by those who were shown a brochure containing only general endorsements that mentioned no specific health conditions (*e.g.*, breathing problems) but nonetheless reported that the brochure did make or imply claims about one or more of those conditions. However, the Study 1 report does not discuss the responses to the "decoy" questions, nor are its tables adjusted for the "decoy" errors.

As noted above, the authors of Study 1 have acknowledged its several limitations. At best, it might have probative value with regard to one specific type of advertisement and one group of consumers. But the Commission should not overlook the other

problems that have been identified by Professor Maronick. Given its many flaws, Study 1 provides no basis for a proposal that is as broad in its scope as proposed Section 255.2(b). Putting these flaws aside, the mock advertisements tested in Study 1 did not include any ads containing a disclosure of the advertised product's generally expected performance.[8] As a result, Study 1 provides no support for the disclosure approach that the Commission has proposed.

The "Second Endorsement Study"

Section 255.2(a) of the current Guides allows advertisers who are not sure that their testimonials are representative of what consumers will generally achieve to either (1) "disclose what the generally expected performance would be" or (2) "disclose the limited applicability of the [testimonial's] experience to what consumers may generally expect to achieve." The proposed revised Section 255.2(b) retains the first of those "safe harbor" provisions but not the second – so advertisers may safely use truthful but possibly non-typical testimonials only if they disclose what results are typical.

[8] The Commission's January 18, 2007, *Federal Register* notice in this matter noted that Study 1 was "conducted in the course of a law enforcement investigation." 72 Fed. Reg. 2214, 2216 (Jan. 18, 2007). Perhaps that explains why Study 1's relevance to the Commission's proposal is at best oblique.

Given the admitted limitations of Study 1, the Commission is relying almost entirely on the results of the "Second Endorsement Study" – or "Study 2" – as supporting this revision (especially in the context of weight-loss advertising). In fact, Study 2 suffers from a number of fundamental flaws in its design and execution. In addition, there is a disconnect between the purported findings of Study 2 and the new disclosure approach in proposed Section 255.2(b). If Study 2 proves anything, it proves that the proposed solution to the alleged problem identified by the Commission fails to meet the standards to which the Commission holds advertisers.

To appreciate the problems with Study 2, you need to start at the very beginning. For the weight-loss part of Study 2, potential participants were screened so that only consumers who had used a weight-loss product, plan, or program in an attempt to lose weight within the last 12 months were used as study subjects.[9] We are at a loss to understand this very strict screening requirement. Many Americans are overweight – some by a few pounds, some by many pounds. It might make sense to exclude potential subjects who are not overweight and who consequently have no interest in weight-loss products or services (although many weight-loss products would be of potential use as weight-maintenance products as well), but there must be millions of overweight Americans who have not used a weight-loss product, plan, or program in the last 12 months but whom advertisers would view as potential customers. Excluding those people from the universe of potential study subjects seems arbitrary.

[9] It thus appears that people who had tried to lose weight through exercise – either alone or in conjunction with a self-designed diet (as opposed to a "name-brand' diet or weight-loss program) – would have been excluded from this study.

For the business opportunity part of the study, potential participants either had to currently operate or be interested in operating a small business. This screening criterion might well have excluded people who have and intend to keep working at a full-time job, but would like to make extra income – perhaps by selling products on eBay or Craigslist, or learning how to find a foreclosed home or other bargain real estate to rent or re-sell for a profit. Would such people respond positively to a question asking whether they currently operated or were interested in operating a small business – which might imply a full-time commitment – or would they say "no" and be excluded as a result? In addition, potential subjects were excluded if they were in the "accounting/financial services" field. This would appear to exclude consumers who worked for a bank in any capacity, or in the accounts receivable/accounts payable department of any business. It is far from clear why such individuals – who might have a different and somewhat more sophisticated response to earnings testimonials than the average person – would not be allowed to participate in this study.

We will not reiterate all the criticisms of the Study 2 methodology and analysis we have previously presented to the Commission. Rather, we once again urge the Commission to take a close look at Professor Maronick's detailed comments on Study 2. Those comments – from a very well-qualified expert who spent many years administering the FTC's consumer research efforts – identified several different biases in the Study 2 research design that "are very likely to have influenced the results of the study."[10]

[10] Professor Maronick's comments identified what he believed were the most significant sources of bias, but there are additional problems with the Study 2 methodology. For example, the questionnaires used in Study 2 have flaws that likely biased the results of that study. All three questionnaires used in Study 2 asked what the mock advertisements suggested about the results that new users of the hypothetical products could expect – *e.g.*, the amount of weight that new "WeightGuard" users could expect to lose in 3 months. Questions 3c, 3d, and 3e of the three sample questionnaires asked whether "all," "almost all," "most," "about half," "some," "very few," or "none" of these new users would achieve those results. It appears that

Even if we were to overlook the methodological flaws of Study 2, it seems to us that certain of that study's findings have to be characterized as square pegs that do not fit into the round holes of proposed Section 255.2(b) and the future enforcement efforts that are likely to be based on it.

Can Consumers Really Be Deceived by Claims That They Don't Believe?

According to the Commission's *Policy Statement on Deception,* "[t]he third element of deception is materiality": "The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[11] Given that the Commission and other law-enforcement agencies have only limited resources, it makes little sense to expend those resources against advertisers whose advertising causes little or no injury.

After being asked what the ads they were shown "suggested," the Study 2 respondents were asked questions about their personal opinions concerning the advertised products. For example, the respondents who were shown the "WeightGuard" ads were asked what those ads suggested about the number of pounds that new users of the product

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the answers were always presented in that order – the first choice was always "all" and the last choice was always "none." The best practice here would have been to "reverse the scales" – that is, give half the respondents a questionnaire that presented the choices in reverse order (starting with "none" and ending with "all" rather than vice versa) – in order to control any bias resulting from a tendency to choose the first answer rather than a later answer.

In addition, offering respondents an odd number of answers to a multiple-choice question is not the best practice because respondents may pick the middle point on the scale as a way of hedging their bets when they don't have a strong opinion – an "about half" answer is a safe answer because a respondent who gives that answer can't really be wrong. This problem is exacerbated because the authors of the study have grouped the respondents who chose the middle answer ("about half") with those who said "all," "almost all," or "most," instead of with those who said "some," "very few," or "none."

[11] FTC Deception Policy Statement.

could expect to lose in 3 months. Those respondents were later asked the following question: "In your opinion, how many pounds, on average, would you expect new users of WeightGuard to lose in 3 months?" In other words, the subjects were first asked what they thought the ads suggested about the amount of weight new users would lose, and were later asked – in essence – if they believed what the ads suggested. Their answers indicate that many of the people who said that the ads suggested a particular result did not believe that the suggested result would actually be achieved.

According to Table 1 of Study 2, 60% of the people who were shown the "No disclosure" ad featuring 48- to 72-pound testimonials said the ad "suggested" a weight loss of at least 50 pounds, but according to Table 3, only 19% of the subjects who were shown the ad said it was their opinion that users would lose at least 50 pounds. And while 49% said the ad suggested a weight loss of at least 60 pounds, only 6% believed that users would lose that much weight. In other words, as the amount of suggested weight loss increased, the number of people who believed that new users would actually lose that much weight fell off sharply.

The results were similar for the mock "WeightGuard" ads with disclosures. For example, according to Table 1 of Study 2, 46% of the people who were shown the "Results not typical" ad featuring 48- to 72-pound testimonials said the ad "suggested" a weight loss of at least 50 pounds, but according to Table 3, only 20% of the subjects who were shown the ad said it was their opinion that users would lose at least 50 pounds. And while 32% thought the ad suggested a weight loss of at least 60 pounds, only 3% believed that users would lose that much weight.[12]

[12] As previously noted, 27% of those who saw the "Average 10 pounds" ad featuring 48- to 72-pound testimonials said the ad communicated that consumers who used the product would lose at least 20 pounds.

The same was true for the mock business opportunity ads. For example, according to Table 4 of Study 2, 66% of the people who were shown the "No disclosure" ad featuring $1200-$3600 testimonials said the ad "suggested" that new users of the product would earn at least $1600 per month, but according to Table 6, only 28% said that it was their opinion that they would earn at least $1600 per month. And while 52% said the ad suggested new users would earn at least $2400 per month, only 6% really believed that they would earn that much.

Again, the results were similar for the mock business opportunity ads with disclosures. For example, according to Table 4 of Study 2, 67% of the people who were shown the "Results not typical" ad featuring $1200-$3600 testimonials said the ad "suggested" that new users of the product would earn at least $1600 per month, but according to Table 6, only 14% of the subjects who were shown the ad said it was their opinion that new users would earn at least $1600 per month. And while 63% said the ad suggested new users would earn at least $2400 per month, only 8% really believed that they would earn that much.

Finally, the results were similar for the mock cholesterol supplement ads. For example, according to Table 4 of Study 2, 53% of the people who were shown the "No disclosure" ad featuring 30- to 90-point testimonials said the ad suggested that new users of the product could expect to lower their serum cholesterol levels by at least 60 points, but according to Table 6, only 3% said that they took away the message that they would actually lower their cholesterol by at least 60 points. And while 34% said the ad

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But according to Table 3 of Study 2, 42% said it was their opinion that consumers who used the product would lose at least 20 pounds. Assuming there is no typographical error here, this kind of anomalous result makes one wonder whether it is possible to make sense of Study 2's results.

suggested new users would lower their cholesterol by at least 80 points, none really believed that they would lower their cholesterol by that much.

Once again, the same was true for the mock cholesterol supplement ads with disclosures. For example, according to Table 4 of Study 2, 61% of the people who were shown the "Results not typical" ad featuring 30- to 90-point testimonials said the ad suggested that new users of the product could expect to lower their serum cholesterol levels by at least 60 points, but according to Table 6, only 19% said that it was their opinion that they would actually lower their cholesterol by at least 60 points. And while 34% said the ad suggested new users would lower their cholesterol by at least 80 points, none[13] really believed that they would lower their cholesterol by that much.

An advertising claim that you don't believe can't hurt you. If we take Study 2 at face value despite its many flaws, it demonstrates that many subjects simply rejected the allegedly deceptive claims "suggested" by the mocked-up test ads. And the greater the suggested exaggeration, the less likely the subjects were to swallow it.

As the Policy Statement on Deception states, the Commission "generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously."[14] Whether the testimonials in the mock advertisements tested in Study 2 are properly termed "puffing" or not, it appears that consumers generally take such testimonials with more than just a grain of salt. As a matter of policy, it makes more sense for the Commission to focus its attention on a case-

[13] Table 6 does not provide complete results, so it is not 100% clear that no one in this group believed that they would lower their cholesterol by at least 80 points. In any event, 10% or fewer of this group believed that.

[14] FTC Deception Policy Statement.

by-case basis on advertisements that fool consumers into wasting their money on weight-loss or other products that do not work. Pursuing ads that allegedly make "suggestions" that are not believed or acted on by consumers to their detriment is not a productive use of the Commission's enforcement resources – especially when (as discussed in the section above) the proposed solution offered by Section 255.2(b) appears to mislead many or most consumers.

III. EVEN IF THE TWO PRINT STUDIES WERE VALID, THEY DO NOT SUPPORT CONCLUSIONS ABOUT COMMUNICATIONS BY OTHER ADVERTISEMENTS IN OTHER MEDIA.

As discussed above, the Commission's proposed amendment regarding disclosures of the generally expected performance of an advertised product or service is based exclusively on two consumer perception studies that tested a small number of print advertisements. 73 Fed. Reg. 72374, 72376. Developing sweeping, bright-line rules for all advertisements in all media on the basis of two studies involving only print advertisements is contrary to longstanding FTC enforcement principles.

In determining the claims that advertisements convey, the FTC reviews each advertisement in its entirety and does so on a case-by-case basis.[15] Each advertisement is to be judged on its own merit and the elements of an ad are evaluated in the context of the whole advertisement. Accordingly, when reviewing an ad, the FTC examines "the entire mosaic, rather than each tile separately,"[16] meaning that each element of an advertisement is to be evaluated in the context of the entire ad, so as to determine the overall net impression of the advertisement:

[15] FTC Deception Policy Statement.

[16] *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

> The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole.[17]

The Commission reviews ads in this manner because every advertisement has a unique set of elements – from the language in the ads to the media in which an advertisement is produced – and each element helps to shape the messages that an advertisement conveys. In view of this variation among advertisements, making generalized assessments of advertising based on the examination of one or a few advertisements is unreasonable. One cannot make changes in the content, appearance, or other elements of a particular ad and assume that it will communicate the same messages. Thus, advertisements are to be judged separately and the elements of each ad are to be evaluated in the context of the particular advertisement as a whole.

The Commission's previous statements regarding the use of consumer perception studies are consistent with the principle that ads are to be evaluated independently. In its September 13, 2002 comments to the United States Food and Drug Administration ("FDA") regarding First Amendment issues, the Commission Staff discussed in detail copy tests used to determine consumer perceptions of an advertisement, including copy tests prepared on the Commission's behalf.[18] The Staff noted in the comments that "[t]he specific design of the [copy] test must reflect the format and style of the particular advertisement, the media in which the advertising is run, and the product advertised."[19] In explaining the reason why copy tests should be designed to accurately reproduce the

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[17] *Am. Home Prods.*, 695 F.2d 681, 688 (3d Cir. 1982); see also *In re Pfizer Inc.*, 81 F.T.C. 23, 58 (1972) ("the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling").

[18] In re Request for Comment on First Amendment Issues, FTC Staff Comments, App. 1 (Sept. 13, 2002).

[19] *Id.*

entire layout of the tested advertisement and simulate its dissemination, the FTC observed that "[e]ach advertisement, media, and accompanying alleged implied claim(s) present unique analytical issues that require various design techniques."[20]

This principle is well-understood in the advertising field; courts and self-regulatory entities invariably review and assess advertisements on a case-by-case basis, examining the entire advertisement and evaluating its components in the context of the particular ad as a whole. *See*, *e.g.*, *Fed. Exp. Corp. v. U.S. Postal Serv.* ("a court should evaluate the entire advertisement and consider the alleged misleading statement in its context");[21] *Unilever* ("NAD uses its own expertise to determine the messages reasonably conveyed in an advertisement by considering the totality or overall net impression created by an advertisement as a whole and not merely words or phrases standing alone.");[22] *MGA Entm't, Inc*, ("The case presents issues similar to those addressed in the recently decided Rock Angelz case. However, while the Rock Angelz decision provides guidance in deciding the matter at hand, the specifics of the advertisements are not the same. Thus CARU reviewed this challenged commercial on its own merits.");[23] *see also Abbott Labs. v. Gerber Prods. Co.* ("This Court notes that these NAD decisions [cited by one of the parties] were analyzed on a case-by-case basis,

[20] *Id.*

[21] 40 F. Supp.2d 943, 953 (W.D. Tenn. 1999)

[22] NAD Case Rep. No. 4951 (Jan. 2009)

[23] CARU Case Rep. No. 4489 at 3 (May 2006)

looking at the specific advertisement, product, and tests conducted. These decisions do not contain hard and fast rules . . . ."). [24] With respect to disclaimers specifically, the National Advertising Division of the Council of Better Business Bureaus, Inc. has stated that it "reviews supers on a case-by-case basis."[25]

Indeed, federal courts in Lanham Act cases have recognized the principle that a consumer perception study does not demonstrate how reasonable consumers will interpret an ad if the study did not test the specific advertisement at issue. For example, in *Gillette Co. v. Norelco Consumer Prods. Co.*, the district court noted that applying the results of a study – which tested only one of the challenged ads – to the challenged advertisements that had not been tested would be unsound:

> It is worth noting that Gillette only submitted a consumer reaction study of one of the many challenged advertisements. Gillette argues that, given the similarity of the advertisements, the results from one can be generalized to the others. In the words of Dr. Jacoby, the study can be generalized to other advertisements with "comparable key executional elements."
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> Even if this is true, . . . there are some advertisements which clearly do not have such comparable elements. For example, one print advertisement shows a man with a face covered with bees. Nowhere does the image of the mischievous wet shaver appear in that advertisement. Thus, there are clearly some advertisements for which Gillette has produced no consumer reaction evidence from which generalizations from the Jacoby Study can be made.[26]

The Commission's proposal to discard the safe harbor available to even clear and conspicuous disclaimers of typicality ignores these settled principles. The proposed rules regarding "disclaimers of typicality" are based on two studies that are narrow in scope and have limited applicability. The studies tested only a few variations of one type of

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[24] 979 F. Supp. 569, 574 n.4 (W.D. Mich. 1997)

[25] *Kellogg Co.*, NAD Case Rep. No. 4866 at 3 (June 2008).

[26] 946 F. Supp. 115, 129 n.13 (D. Mass. 1996).

advertisement, all of which were in print. The studies did not test any television or radio ads, nor did they test any form of Internet or other "new media" advertising, nor did they test ads that combined testimonials with other elements. Because the media in which an advertisement is disseminated plays an integral part in shaping the messages communicated by the advertisement, it is unreasonable to apply the results of two consumer perception studies involving only print advertisements to all advertising in all forms of media.

Consistent with Commission policy in litigated cases – and as the Commission recognized in the Notice, 73 Fed. Reg. 72380 – each advertisement containing a consumer endorsement must be judged on its own, and typicality disclosures should be evaluated in the context of the advertisement containing the disclosure, not against the backdrop of consumer perception studies conducted on other advertisements. But for the same reason, it makes no sense to reach general policy judgments about the effectiveness of disclaimers generally on two flawed studies of such a limited slice of the entire spectrum of advertisements.

IV. IN REJECTING THE USE OF DISCLAIMERS, AN APPROACH USED ELSEWHERE BY THE COMMISSION AND MANY OTHER FEDERAL AGENCIES, THE COMMISSION RISKS ENTRENCHING UPON SETTLED PRINCIPLES OF FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH.

As discussed above, the Commission's proposal to replace the typicality disclaimer currently permitted under the testimonial Guides with a requirement of disclosure of "generally expected results" is based on an inapplicable lesson from its enforcement history, excessive deference to two flawed studies on print ads, and the unsupportable conclusion that studies on any type of ad can teach sweeping lessons about

how consumers will respond to other kinds of ads in other media. The Commission appears to have generated a rule of specific application for one type of communication – consumer testimonials in advertising – that is at variance with the general presumption utilized elsewhere by the Commission and numerous other federal agencies that consumers read and understand what is legibly presented to them. Although the Commission states that it cannot rule out the possibility that a stronger disclaimer of typicality would be effective in the context of a particular advertisement (and admits that it would have the burden of proof in any enforcement action),[27] the revised Guides and the examples that accompany them suggest that it would be difficult if not impossible to draft such a typicality disclaimer without, at minimum, considerable experience with the product and the addition of considerable specificity as to that experience.[28]

The Commission claims that according to its limited testing, typicality disclaimers do not effectively communicate information regarding the limitations of consumer endorsements to consumers.[29] Yet the Commission and many other federal agencies have long relied on the use of disclaimers to communicate important information in many different contexts, exhibiting considerable confidence in the consuming public's ability to understand such disclosures. Requiring disclaimers is commonplace in American federal regulation. Indeed, the FDA relies on disclaimers to communicate detailed information about prescription drugs and side effects in its direct-to-consumer advertising; moreover, under the Dietary Supplement Health and Education Act, all structure/function claims must be accompanied by a blanket disclaimer that "[t]his statement has not been

[27] 73 Fed. Reg. 73492 n.106,

[28] *E.g.,* 73 Fed. Reg. 73492 Exs. 1-2.

[29] 73 Fed. Reg. 72392 n. 106.

evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent any disease."[30] Similarly, the Securities & Exchange Commission requires certain disclosures in advertising mutual funds.[31] And the Commission has regularly utilized disclaimers and disclosures as a means of providing information to consumers: as part of the Pay-Per-Call regulations implementing the Telephone Disclosure and Dispute Resolution Act,[32] for example, or as a "fencing-in" remedy in the credit advertising cases brought against the auto manufacturers in the late 1990s.[33] Indeed, in the weight loss cases brought by the Commission against the major weight loss programs, the Commission specified various typicality disclaimers to be used. *See, e.g., Jenny Craig,* No. 9260 (1998); *NutriSystem, Inc.*, 116 F.T.C. 1408 (1993).

Generally speaking, the assumption of regulators has been that the consuming public will read and understand a disclaimer of sufficient size, clarity and prominence. This was the assumption of the FTC in the Endorsements and Testimonials Guide until its most recent revision, consistent with its activity in consent orders, trade regulation rules, and public documents such as *Dot com Disclosures: Information About Online Advertising,*[34] which described in detail how to makes clear and conspicuous disclosures on the Internet. But with Revised Section 255.2, the Commission has departed from

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[30] 21 U.S.C. § 343(r) (2005).

[31] 17 C.F.R. § 230.482.

[32] 15 U.S.C. 5711; 16 C.F.R. Part 308.

[33] *U.S. v. Mazda Motor of Am., Inc.*, Civ. Action No. 8:99-cv-0213-AHS-EE (C.D. Cal. Sept. 30, 1999) (consent order); *Gen. Motors Corp.*, 123 F.T.C. 241 (Feb. 6, 1997) (consent order); *Am. Honda Motor Co.*, 123 F.T.C. 262 (Feb. 6, 1997) (consent order); *Mazda Motors of Am.*, 123 F.T.C. 312 (Feb. 6, 1997) (consent order); *Mitsubishi Motor Sales of Am.*, 123 F.T.C. 288 (Feb. 6, 1997) (consent order); *Toyota Motor Sales, U.S.A.*, 125 F.T.C. 29 (Jan. 5, 1998) (consent order); *Volkswagen of Am., Inc.*, 125 F.T.C. 74 (Jan. 5, 1998) (consent order).

[34] *See* FTC, *Dot com Disclosures: Information About Online Advertising*, *at* www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf.

established practice by abandoning the safe harbor for typicality representations and essentially taking the stance that almost no typicality representation can pass muster. While the FTC claims that it has merely withdrawn the safe harbor for "results not typical" statements, and it "cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement," [35] that footnote, taken together with the examples that accompany the Revised Section 255.2,[36] strongly suggests that it will be difficult for any advertiser to prove to the Commission that a typicality disclaimer is not deceptive. Moreover, even though the Commission admits that it would have the burden of proof to show that a disclaimer of typicality is ineffective in an enforcement action, [37] it has in effect turned the burden around and placed it on marketers to prove that those disclaimers will work, with the dangerous result of chilling commercial speech, as this action will serve to effectively suppress the use of such disclaimers without requiring the FTC to take formal action. While the Commission's response in the Notice is that the marketer may say what the actual expected performance will be, this ignores the reality that it may be difficult or impossible to measure actual or expected performance with new products or products used under highly variable conditions.

The Commission's position thus implicates free speech concerns, similar to those discussed at length in *Pearson v. Shalala,*[38] which also involved an agency's concerns about whether the public would understand a disclaimer. In *Pearson,* the United States

[35] 73 Fed. Reg, 72392 n.106.

[36] *Id.*

[37] 73 Fed. Reg, 72392 n.106.

[38] 164 F.3d 650 (D.C. Cir. 1999).

Court of Appeals for the District of Columbia Circuit held that the FDA was required, under the commercial speech doctrine, to consider whether the inclusion of appropriate disclaimers would negate the potentially misleading nature of health claims regarding folic acid supplements that the FDA had sought simply to suppress rather than include with qualifications.[39] The *Pearson* court applied the analytical standard established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*[40] to determine "whether the asserted government interest is substantial, . . . whether the regulation *directly* advances the governmental interest asserted . . . and whether the fit between the government's ends and the means chosen to accomplish those ends is . . . reasonable"[41] finding that the FDA failed the *Central Hudson* test on its final factor when it chose suppression over disclosure.[42]

In *Pearson,* the court rejected the agency's argument that the disclaimers should be suppressed because the health claims in question "lacked significant scientific agreement," instead suggesting that a clarifying disclaimer could be added to the effect

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[39] 164 F.3d at 661.

[40] 447 U.S. 557 (1980).

[41] 164 F.3d at 656 (emphasis in original and citations omitted). The *Pearson* court in fact discussed only three of the four *Central Hudson* factors in detail. The four-part test is as follows: (1) if the commercial speech concerns unlawful activity or is misleading, it is not protected; (2) if the speech concerns lawful activity and is not misleading, the court will ask whether the asserted government interest is substantial; (3) if it is substantial, the court will ask whether the regulation *directly* advances the governmental interest asserted; (4) the court must determine whether the regulation is not more extensive than is necessary to serve the government's interest.

[42] The Commission cites *Pearson* in its discussion of the comments received on the proposed Guides for the proposition that preventing fraud and deception is a substantial state interest. 73 Fed. Reg. 72386. However, the FTC fails to cite the case that *Pearson* cites as support for this proposition – *In re R.M.J* – which states that "while [inherently m]isleading advertising may be prohibited entirely . . . [, the government] may not place an absolute prohibition on . . . potentially misleading information . . . if that information also may be presented in a way that is not deceptive." 455 U.S. at 191, 203 (1982). The Commission's two flawed studies do not establish that information in truthful testimonials is "inherently misleading."

that "the evidence is inconclusive" or "the FDA does not support this claim."[43] While the court ultimately remanded the matter back to the FDA, it indicated that it was "skeptical that the government could demonstrate with empirical evidence that disclaimers similar to the ones that the court suggested above would bewilder consumers and fail to correct for deceptiveness."[44]

After the D.C. Circuit remand, the FDA continued to refuse to authorize the Plaintiffs' proposed folic acid claim on the grounds that it was "inherently misleading," but proposed four alternative – albeit significantly more limited – claims. The *Pearson* plaintiffs then filed an action for declaratory relief with the D.C. District Court.[45] In that case, the District Court also found for the plaintiffs, stating that the agency could not prohibit a health claim "unless it first makes a 'showing' that the claim's alleged 'misleadingness' could not be cured through the use of a disclaimer or other types of disclosure" (and finding that no such showing had been made), and granting a preliminary injunction because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 118-119.

As with the agencies, then, the courts have recognized the ability of consumers to understand the information that is being imparted in the disclaimers being presented to them – even, in some cases, disclaimers that indicate that the claims being made have not been conclusively proven. The D.C. Circuit in *Pearson* clearly stated that "disclaimers

[43] *Id.* at 559-60.

[44] *Id.*

[45] 130 F. Supp.2d 105 (2001)

are constitutionally preferable to outright suppression,"[46] which is exactly the effect that the revised Guides will have on many if not most typicality claims

It is ironic that the Commission has, in the past, applied different standards for consumer endorsements in the context of attorney advertising, rejecting restrictions on attorney advertising adopted by the state of New Jersey and endorsing client endorsements and testimonials as long as they are truthful and non-misleading.[47] In a letter dated March 1, 2006, the Commission stated that

> [c]onsumers are better off if concerns about potentially misleading advertising are addressed through the adoption of advertising restrictions that are narrowly tailored to prevent deceptive claims. By contrast, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information is likely to inhibit competition and to frustrate informed consumer choice.[48]

It is not clear why the Commission is no longer prepared to accept this particular disclaimer in this narrow circumstance, based on the limited evidence it has, when there are potentially such chilling effects on commercial speech, and there is such a long, rich history of the successful use of disclaimers at the FTC and other agencies. To abandon the safe harbor based on two faulty studies, thus risking the financial health of nascent businesses and even entire industries in a difficult economic climate, seems foolhardy. Moreover, the Commission's reply to commenters who raised First Amendment concerns in January 2009, saying that "the available evidence suggests that such [typicality] disclaimers are ineffective" and restricting the safe harbor to disclosure of generally

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[46] 164 F.3d at 657.

[47] Letter from FTC Staff to New Jersey Supreme Court Committee on Attorney Advertising (Mar. 1, 2006), *available* at http://www.ftc.gov/be/V060009pdf.

[48] *Id.* The Commission's position on client endorsements in attorney advertising is consonant with Supreme Court First Amendment precedent, which holds that "incomplete" attorney advertising is not inherently misleading and disclaimers are preferable to outright suppression. *Bates v. State Bar of Ariz.,* 433 U.S. 350 (1977).

expected results "materially advances the government's interest in preventing deception" without being "more extensive than necessary to serve the government's interest,"[49] is a flat assertion unsupported by logic or the Commission's two weak and flawed studies. The weaknesses in the studies are discussed in Part II above, and while the FTC claims that it has merely withdrawn the safe harbor for "results not typical" statements, and it "cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement," [50] its actions in withdrawing the safe harbor, the examples that accompany the revised Section 255.2, and even the tone of the quoted footnote will serve to effectively suppress the use of such disclaimers without requiring the FTC to take formal action. Withdrawal of the safe harbor is not merited when there is a long tradition, in the Commission and in other agencies, of successful use of disclaimers, and as demonstrated in the context of multiple other regulatory schemes, consumers are clearly capable of understanding disclaimers that are much more complicated than a simple "results not typical."

V. NEW DISCLOSURE REQUIREMENTS FOR UNANTICIPATED CONNECTIONS REQUIRE ADDITIONAL STUDY

The requirement that the advertiser must disclose any unanticipated connections between the endorser and the marketer that may materially affect the weight or credibility of the endorsement has been part of the Guides for almost 30 years. 16 C.F.R. § 255.5. The Commission does not propose to change materially the literal language of the rule but does, in several examples introduced late in the process of receiving comments on the

[49] 73 Fed. Reg. 72386.

[50] 73 Fed. Reg, 72392 n.106.

Guides,[51] significantly broaden the scope of the rule beyond its existing coverage to new methods of marketing such as blogs, message boards and street teams – forms of "word-of-mouth marketing" that the Commission has previously said it will address on a case-by-case basis, in an area where the technology and methods are changing and the industry has thus far been successful in efforts at self-regulation. Because some of these new examples are ambiguous, and could change the way in which advertising is reviewed by compliance counsel in important ways and require post-dissemination "policing" by the advertiser in a way that is fundamentally different from the duties currently imposed on marketers, the introduction of this new approach through examples added to the Guides late in the process is unfair to the advertising community. Instead, any attempt to address these issues should be conducted through a more robust discussion than has heretofore taken place, one which takes into account the full panoply of new media marketing techniques, as well as all the parties involved and their respective duties.

The issue of new media and "viral" or "word-of-mouth" marketing and how to regulate it is not a new or unfamiliar one for the FTC. On October 18, 2005, Commercial Alert filed with the Commission a "Request for Investigation of Companies That Engage in 'Buzz Marketing.'"[52] The Petition asserted that it is a violation of Section 5 of the FTC Act for a marketer to compensate a consumer for disseminating a message to other consumers, especially children, without disclosing the consumer's relationship with the marketer. In its response, the FTC declined to issue guidelines or recommend a formal

[51] The initial *Guides Concerning the Use of Endorsements and Testimonials in Advertising: Request for Comments ("Request for Comments")*, were published on January 18, 2007 (72 Fed. Reg. 2214). Examples 6, 7, 8 and 9 were not added until the November, 2008 Notice. 73 Fed. Reg. 72395 (Nov. 28, 2008).

[52] Letter dated Oct. 18, 2005 from Gary Ruskin, Commercial Alert to the Federal Trade Commission (the "Petition").

action and stated that such issues should be determined on a case-by-case basis, elaborating that consumer expectation would inform any decision regarding the use of "sponsored consumers," per the Endorsement Guides.[53]

In fact, most regulation of new media and word-of-mouth marketing activities to date has been undertaken by the industry: the Word of Mouth Marketing Association ("WOMMA"), the official trade association for the word of mouth marketing industry, released an Ethics Code in February of 2005 which emphasizes "Honesty of ROI" ("Relationship, Opinion and Identity") in all types of word-of-mouth marketing.[54] Some of the key provisions in the WOMMA Code of Ethics include: a prohibition on the use by marketers of third parties to promote a product without disclosure of the relationship with the marketer when communicating with the public; a requirement that consumers who are speaking on behalf of the marketer give their honest opinions and clearly disclose their identities; and a prohibition on the targeting of children under 13. WOMMA has revised that Code since its initial release and also supplemented it with its "10 Principles for Ethical Contact by Marketers," for use when sending products to bloggers.[55] The Commission has recognized WOMMA's Ethical Code and its role in the world of word of mouth marketing, both its 2006 letter to Commercial Alert[56] and the January, 2008 Notice in which the new examples were first proposed, where the Commission said:

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[53] Letter dated December 7, 2006 from Mary K. Engle, Assoc. Dir. for Ad. Practices, Federal Trade Commission ("FTC Response to Commercial Alert").

[54] *See* www.womma.org.

[55] *See id; see also* www.blogcouncil.org, discussed further below, for other self-regulatory efforts by the industry.

[56] FTC Response to Commercial Alert.

> The Commission has long believed that industry self-regulatory codes play an important role in consumer protection, and that the development of ethical standards emphasizing transparency for marketers who engage in new forms of marketing is an important step to this end.[57]

The issues raised in Examples 6, 7, and 8, then, are not new ones, and they are already being addressed via industry self-regulation.

The new examples to Section 255.5 of the Guides raise significant issues in the context of emerging and alternative advertising media, and these issues are too fundamental and too nuanced to be raised this late in the process without the opportunity for a full discussion and comment. The most fundamental of these questions concerns the responsibility of the marketer for actions (or, in some cases, inaction) of third parties over whom the marketer has uncertain control. Examples 7, 8 and 9 to revised Guide Section 255.5 all involve actions by third parties which may take place outside the direct control of the advertiser. 73 Fed. Reg. 72395. As such, they raise questions of third-party liability of bloggers, participants in message boards and independent non-employee members of a "street team." But for advertisers and traditional full-service advertising agencies that use such third parties for marketing purposes, the more fundamental questions are about the degree of due diligence, if not "policing," that they are now required to perform. These difficult and emerging issues are raised in the context of new examples to the pre-existing requirement that material connections between the endorser and the seller of the product that are not reasonably anticipated by the consumer must be disclosed. It is one thing to require such disclosure in the context of an advertising message the tone and content of which is under the direct, immediate control of the advertiser and its advertising agency. The difficulty with examples 7, 8 and 9 is that they

[57] 73 Fed. Reg. 72395 (Nov. 28, 2008).

all involve conduct that takes place potentially without the knowledge of the and outside of the control of advertiser, and potentially after the commercial or other marketing piece in which the "disclaimer" would be incorporated has already been disseminated. In short, there is no question that the relationship may, in some cases, be material to a purchase decision by the consumer who is viewing the advertisement – the question is who should be responsible for disclosing the relationship and the consequences of non-disclosure.

Specifically, in Example 7, the Commission appears to be concerned about a free copy of a video game which is sent to a college student who has earned a reputation as a video game expert and maintains a blog about video games. 73 Fed. Reg. 72395. The company provides the blogger with a free copy of its video game system and asks him to write about the system on his blog, after which the blogger tests the system and writes a favorable review. The example states that the blogger should disclose that he received the system for free because this fact would materially affect the credibility of the review. *Id*. Yet it is not clear who would be liable if he does not, or what steps should be taken to ensure that such disclosures are made. What makes this particular example even more confusing is that it appears to distinguish between this blogger and the common practice in marketing in other industries, whereby free samples of a product are provided to reviewers (generally in more traditional media), who are then expected to provide a review of the product. It is commonplace that movie critics will watch movies at no cost, book reviewers receive free books, fashion industry journalists receive free entry to fashion shows and automobile manufacturers provide cars on a temporary basis to automotive industry journalists at no cost. All of these arrangements are directly analogous to Exhibit 7, yet no similar disclosure is expected of these reviewers.

Example 8, which discusses the practice of employees of the seller posting favorable online discussion board messages (or for that matter, blog entries) about the employer's product, is equally problematic. While the example specifies that the poster is acting "unbeknownst to the message board community" with respect to his or her employment status, it does not specify the level of knowledge of the employer concerning the posting. This should be clarified, as it is not clear whether an employer would be held liable, for example, only if it knew or should have known of the employee's posting/blogging, or only if the employee was acting within the scope of his or her employment or on "company time" (rather than independently). More and more often, savvy employers recognize that their employees are posting on blogs and message boards on the Internet, and many companies have social media policies that address these issues. But many of these same technologically-savvy employers – comprising some of the world's largest companies, including General Electric, Dell, Nokia, Intel, Procter & Gamble, and UPS – have recognized that these social media issues are so thorny that they have joined together to form the "Blog Council," in an effort to come up with a best practices document for "social media participation" by their employees.[58] Thus, these issues are far from simple. And while it may be clear that an employee should be disclosing the nature of her relationship to the manufacturer when pitching her company's products on the Internet as part of a sales effort, it is considerably less clear what the extent of the manufacturer's liability should be when an employee acts "off-duty," with or without the employer's knowledge, in a variety of different factual contexts. Even a cursory examination of the complexity of this matter indicates that the

[58] *See* www.blogcouncil.org

issue is not something that should be dropped into an example to the Guides at the last minute, but rather should be addressed in a full and nuanced discussion of the issues.

Finally, in Example 9, there is a host of issues that remain unexplored concerning a person joining a marketer's "street team" promoting the marketer's product. Example 9 suggests that incentives provided to street team members every time they talk to friends about the product should be disclosed, because such incentives materially affect the weight and credibility of the team members' endorsements. 73 Fed. Reg. 72395. Obviously, there may be street team programs that visually identify the team member's connection with the advertiser, through signage, team apparel or distributed material, and in those situations, the points/prizes incentive connection between the street team and the advertiser might not materially affect the weight or credibility of the endorsement because the connection would already have been reasonably expected by the audience. And an additional sentence carving out the case of such disclosure through signage or apparel should clearly be added to the example.

However, the broad point of Example 9 is directed at the degree of "policing" or "due diligence" that is required by the marketer.[59] Plainly, it is impracticable for marketers to insure that material connection disclosures accompany endorsements made through street teams or similar channels, as policing employees and individuals engaged in word-of-mouth marketing is very difficult in light of the impromptu, unscripted nature of these communications -- and these teams are frequently hired by third party agencies. The Commission has failed to include any guidelines concerning the level or manner of policing that will be required of these communications by the marketer in order to avoid

[59] *I.e.*, "[T]he advertiser should take steps to ensure that these disclosures are being provided." 73 Fed. Reg. at 72395.

liability or other methods, such as blanket disclaimers posted on the marketer's Internet site, disclosing that street teams or employees may be issuing communications that favorably describe the marketer's products.

In short, the three examples raise more questions than they answer, and including them as a last-minute "add" to the process of revising the Endorsements Guides is not an appropriate way to address the complex issues of marketing using the new media and word-of-mouth methods. Indeed, there are many, many other examples that the Commission could have included: for example, a viral marketing example, involving a video spread without identifying the creator, who may or may not be the product sponsor;[60] online "buzz marketing," where "normal" people are enlisted to create buzz in their social networks online; and examples of subtle product placement on blogs, YouTube, *etc*.[61] The full panoply of new media, word-of mouth and viral marketing techniques should be examined in-depth by the Commission, soliciting the input of industry members and self-regulatory bodies such as Word of Mouth Marketing Association and the Blog Council, as well as the signatories to this petition and other interested parties, rather than addressing the issues in a few late additions to the examples of Section 255.5. Ultimately, it may be that the addition of the examples is not necessary where the industry has shown the clear ability to regulate itself in this sphere, with the adoption of the Word of Mouth Marketing Association Ethics Code and Principles for

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[60] An example being a viral Volkswagen video created by a British ad agency that depicted a suicide bomber's failed attempt to blow up a VW Polo, intended to show the car's solid construction; the company failed to squelch speculation that it was deliberately leaked. *See* http://buzzbuilder.typepad.com/my_weblog/2005/02/the_ethics_of_b.html

[61] Disclosure of product placements is required by the Federal Communications Commission for broadcast and cable, including video news releases (although there is an exemption for feature films), but there are no similar rules on the Internet. *See* 47 U.S.C. §§ 508, 317; 47 C.F.R. §§ 73.1212, 76.1615; 40 Fed. Reg. 41,936 (Sept. 9, 1975).

Ethical Contact by Marketers, the formation of the Blog Council, and similar efforts to act in an ethical and lawful manner, but it is certainly clear that in this quickly developing and ever-changing new area of marketing, where the consumer is an active participant in the media and not just a passive recipient of the message being communicated, a hasty effort to regulate with incomplete guidance would be ill-advised.

As a final note about Section 255.5, an equally troubling situation arises in the context of "extras" who want to work in commercials or recruited to use a product in order to give endorsements in exchange for compensation and exposure. The Commission believes that viewers "would not expect that 'consumer endorsers' are actors who are asked to use the product so that they could appear in the commercial or that they were compensated." 73 Fed. Reg. 72390. The exact example referred to is included as new Example 6 to Section 255.5, which hypothesizes that an infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial but "because the product has not yet been sold, there are no consumer users." *Id.* at 72395. The production staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles who have been asked to use the product for several weeks and report back to the producer. *Id.* The extras are told that if they are selected to endorse the product in the infomercial, they will receive a small payment, and the Commission then observes in the example that viewers would not expect that these "consumer endorsers" are actors who are asked to use the product so that they could appear in the commercial or that they were compensated. *Id.*

Using actors for testimonials is a common fact of life in the television industry. Actors are available during the day, are accustomed to speaking on camera and, because they are interested in appearing on television, have an incentive to follow the instructions for product use that are given. Although it has long been understood that compensation for the testimonial (as opposed to reimbursement of travel and meal expenses and the like) is inappropriate, it is not clear whether the Commission's proposed change would apply to *any* use of actors, even when no compensation is provided. Clarification of this new policy – again dropped into the Guides solely as an example – is critical to the advertising industry.

CONCLUSION

The Commission's Guides on testimonials and endorsements have been in their current form essentially since 1980. For almost 30 years, the advertising industry has been able to rely on these clear and well-understood rules of the road as a guide for the appropriate use of endorsements, and the Commission has pointed to no clear, compelling reason to change the rules now. Certainly, neither a concern that some disclaimers are illegible (a concern which has been addressed in numerous law enforcement actions) nor two flawed studies limited to print media can support supplanting the well-understood rule on typicality disclaimers with a new, burdensome requirement for disclosure of the "typical result" which may be unknowable in many cases. Finally, the addition of new examples in the rule requiring disclosure of unanticipated connections, without further discussion of the level of due diligence that will be necessary on the part of advertisers, or further exploration of the conditions of liability that may attach to failure to disclose such connections, is inadvisable. Rules which will guide new types of marketing in

emerging media should themselves be the subject of specific discussion and interchange with the advertising industry rather than added at the last minute to guides that are primarily directed at other issues.

For the reasons discussed in these comments, we request that the Commission reassess its proposed amendments to the Guides. We appreciate the opportunity to submit comments regarding the proposed changes.