



Comment on Proposed Rule 16 C.F.R. § 255: Endorsement Guides Review,  
Project No. P034520

We are two Mercer University Law students, Amanda Heath and Heather McLeod, who would like to take the opportunity to comment on the proposed modifications to the Guides. We are enrolled in an Administrative Law class that is currently learning about the progression of administrative rulemaking. Our professor, Linda Jellum, encouraged us to review current rule proposals and make comments on one that interested us. In reviewing the different proposals, your "Notice of Proposed Changes to Guides Concerning the Use of Endorsements and Testimonials in Advertising" caught our attention. We, like many Americans, succumb to watching the many commercials and late night infomercials and wonder if we should believe those giving the endorsements.

By researching the history of the Guides, we understand that the purpose of the regulations is to put necessary restrictions on advertisers without stifling creativity in the field. We understand that the guides are meant to ensure that endorsements reflect the honest findings and beliefs of the endorsers. As consumers, we agree with the assumption mentioned in the guides that consumers trust that the endorsers are truthfully sharing their experiences. We also believe that most consumers rely on an endorser's opinion of a product's effectiveness. After reviewing the current and proposed regulation, we believe that the FTC has taken appropriate measures to protect all who are involved in testimonial advertisements. The regulation protects consumers as well as advertisers and endorsers. While we agree with the overall purpose of the regulation, we want to comment primarily on the language of proposed sections.

The first issue that we wish to comment on is the proposed example 7 addition to section 255.0. The proposed example represents the notion that "well-known persons can appear in advertising without being deemed endorsers." While this modification seems to be a remedy for frivolous liability claims to well known persons, the statement is too broad. In actuality, the average consumer likely believes that if a well known figure or celebrity is on an advertisement, that he or she is endorsing the product. This rule substantially threatens the public's awareness of the celebrity's lack of connection from the product. The average consumer does not know that all

celebrities are not endorsers. The definition for an expert endorser is listed in the modified Guides under § 255.0(e) and § 255.3(a) as:

One who possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. In addition, one who's qualifications must, in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement.

There needs to be a set guideline to show where the agency will draw the line between well known figures being persons giving their opinions and when they are considered expert endorsers who are held to a higher standard and who may be liable for their opinions.

The second section we want to bring to your attention is §255.2(b). This section mandates that advertisers clearly and conspicuously disclose the typical results of a product if the endorser's results are unique. Even if the disclaimer is ineffective in communicating to the consumer that the results are not typical, the advertiser can rebut that effect by producing "reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive" and will not be subject to a law enforcement action. Who will determine if the testing is reliable? Can the advertisement agency conduct the study itself, or will it be an independent entity? The purpose of the disclaimer is to inform the consumer that the product advertised may not produce similar results for everyone. If it does not have this effect clearly and conspicuously, then the agency should be held liable under the regulation as stated in the plain language of the rule.

The final comment that we have concerns the first principle under §255.1(d), which states:

Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.

The language needs to be more clearly defined. The terms "failing to disclose" could be ambiguous to consumers and advertisers. The agency needs to set forth a minimum requirement for disclosure. For example, is a very small printed statement at the bottom of a television screen, or very fast

and hard to understand messages on a radio commercial sufficient? Does disclosure have a requirement that the average consumer actually be able to read or hear the statements of the material connections? The agency needs to set forth a minimum requirement in order to prevent lawsuits over whether the disclosure provision has been met.