



March 2, 2009

Via electronic filing: <http://secure.commentworks.com/ftc-endorsements>

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex S)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: DMA's Comments on Endorsement Guides Review, Project No. P034520

Dear Secretary Clark:

The Direct Marketing Association ("DMA") appreciates the opportunity to provide comments on the proposed revisions to the Federal Trade Commission's ("FTC" or "Commission") Guides Concerning the Use of Endorsements and Testimonials in Advertising ("the Guides").¹ The DMA has joined a broader coalition of associations in a joint comment on the proposed revisions to the Guides and have submitted this comment separately to address certain concerns.² Specifically, the DMA is concerned that the proposed revisions to the Guides could have a negative affect on emerging media channels and impede the ability of businesses to communicate with consumers through legitimate testimonials and endorsements.

The DMA (www.the-dma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. DMA advocates industry standards for responsible marketing, promotes relevance as the key to reaching consumers with desirable offers, and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, DMA today represents more than 3,600 companies from dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

The DMA supports truthful and responsible marketing, as well as consumer fraud prevention safeguards in the marketplace, but is concerned that the proposed revisions

¹ Notice of Proposed Changes and Request for Public Comments to Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72374 (Nov. 28, 2008).

² The DMA has jointly filed comments with American Association of Advertising Agencies, American Advertising Federation, Council for Responsible Nutrition, Direct Selling Association Electronic Retailing Association, Interactive Advertising Bureau, and U.S. Chambers of Commerce.

raise several issues, which are not addressed by the proposal. For instance, the proposal does not provide sufficient support to demonstrate that the current regulatory framework or FTC's enforcement authority and its efforts inadequately protect consumers. In addition, the DMA is concerned with the Commission's application of findings from two discrete print-based surveys to new and emerging medial channels, such as blogs and street teams. The proposed revisions attempt to apply rules based on a traditional advertiser-endorser relationship to new media, which is drastically different, particularly in the context of control over the content of an endorsement. Finally, the proposed Guides do not account for the practical implications associated applying the Guides to dynamic new media channels. Set forth below we provide the following comments:

- The new substantiation requirements would hinder economic development and create an unfair marketplace;
- The current Guides, self-regulation, and FTC enforcement adequately protects consumers;
- Media channels should not be subject to one-size, fits-all rules; and
- Guidance is necessary with respect to monitoring and policing endorsers.

The new substantiation requirements would hinder economic development and create an unfair marketplace.

The proposed revisions to section 255.2 could serve as a barrier to new businesses entering the market or an obstacle to the introduction of new products and services. Section 255.2 of the proposed revision would require an advertiser employing a consumer endorsement to “possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements...”³ Specifically, in circumstances where an advertiser knows an endorsement is not representative of what consumer will generally achieve, “the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances.”⁴ This is problematic because the type of substantiation that would be required for this type of disclosure is not available to new businesses or for new product offerings, particularly if “generally expected performance” can only be substantiated through continuous or prolonged use of a product or service. This requirement could create an unfair competitive advantage in the marketplace by favoring more established companies or product lines.

The DMA recognizes the importance of truthful representations, as promoted through our Guidelines, and providing consumers with adequate information so that they can make informed decisions. The DMA believes that the current Guides and regulatory framework, however, already ensure that these issues are addressed. For instance, businesses are required to make truthful representations through their endorsements or face an enforcement action under Section 5 of the FTC Act. In addition, the current Guides require a business to disclose that the results depicted in their endorsement may not be typical. This combination protects consumers from deceptive advertising and

³ 73 Fed. Reg. 72392

⁴ *Id.*

provides consumer with adequate notice as to the expected performance of a product or service. With the current economic conditions, new regulations, particularly those that could restrain commerce and speech, should not be imposed unless a clear and substantiated market failure exists, which is not evident in this proceeding.

The current Guides, self-regulation, and FTC enforcement protects consumers.

There is an insufficient basis to support a conclusion that the current regulatory and market safeguards inadequately protect consumers. The current Guides have provided appropriate guidance with respect to testimonials for advertisers for almost 30 years. The Guides aptly balance the need to protect consumers by requiring advertisers to make truthful representation with respect to their products and services with providing advertisers the flexibility to communicate with consumers. This balanced approach, supplemented by industry self-regulation and an active FTC enforcement effort, provides adequate protection to consumers. Until there is a demonstrated market failure across all media channels, the current approach should continue unchanged.

The DMA has long been a leader in establishing comprehensive self-regulatory guidelines for its members on important issues related to marketing and advertising. Our members understand that their success in the marketplace is dependent on consumers' confidence in the representations and advertising messages associated with their products and services. Understanding the importance of standards and best practices in building consumer confidence, DMA, working with its members, developed and adopted standards for testimonials and endorsements as part of our *Guidelines for Ethical Business Practice* ("Guidelines"), to specifically discourage misrepresentations with respect to product and service offerings and promote truthful and responsible advertising. In our experience, industry guidelines are the most effective way to address concerns that arise in the continuously changing marketplace, particularly due to the emerging digital advertising channels. Such guidelines are flexible and adaptable in a timely manner so as to cover bad practices and not unintentionally or unnecessarily cover legitimate actors. We recommend that the Commission look to industry to address problems in the marketplace and, when necessary, to appropriately revise self-regulatory frameworks to address evolving concerns.

The FTC's active enforcement program is a critical component to protecting consumers from deceptive advertising. The Commission has a strong success rate, as highlighted in footnote 19 in the Commission's notice, in actions against parties making improper representations or not clearly or conspicuously providing disclaimers.⁵ The DMA believes the Commission has adequate enforcement authority and tools at its disposal to target illegitimate actors in the marketplace. From our experience, we know that a healthy enforcement program does not necessarily indicate a problem exists with the rules. The DMA believes that a need for more enforcement actions against bad actors does not necessarily mean that the Guides themselves require revision. Imposing additional obligations on advertisers will not result in additional parties complying with

⁵ 73 Fed. Reg. at 72738.

the Guides. Simply, bad actors will continue to act in improper ways, while legitimate actors would be forced to bear new and unnecessary burdens.

Media channels should not be subject to one-size, fits-all rules.

The Commission proposes to apply the revisions to the Guides broadly across all media channels. This approach raises particular concern for emerging dynamic channels such as the Internet. This one-size, fits-all approach does not consider the unique characteristics or limitations of the alternative media channels. This approach could constrain the emergence of new channels and the development of current mediums. The DMA is concerned that the FTC has based its proposed revision on two limited consumer perception tests of purely print advertisements. This is troublesome considering the vast difference between print and other channels, particularly those channels that do not provide advertisers with control over the content of the endorsement. Each media channel poses unique issues that must be considered and the Guides should account for these characteristics. The DMA believes that a more deliberative approach is necessary and that the Commission should not apply print-based constructs addressing narrow concerns associated with endorsements made through a print medium to dynamic channels such as the Internet.

This concern is borne out through the proposed revisions that would impose liability on advertisers for conduct of third parties not under the control of advertisers. The proposed revisions to section 255.1 would subject advertisers “to liability for false or unsubstantiated statements made through endorsements.”⁶ In a traditional advertiser-endorser relationship, concerns regarding liability are mitigated because an advertiser has control over the endorsement. In particular, the advertiser can review and approve any endorsement because the advertiser has the ability to screen scripts and draft promotions, limit the frequency and location by which an endorsement is delivered, and attach, if necessary, specific and approved disclaimers. However, with emerging channels, such as the Internet, this level of control becomes problematic. Advertisers are not in the position to control the endorsement, and, at best, can only provide guidance as to what is and not acceptable.

Example 5 in section 255.1 illustrates the concern with imposing liability on advertisers for statements by endorsers.⁷ In this example, a blogger makes an unsubstantiated claim about the advertiser’s product through her blog.⁸ Advertisers generally have no control over the content of a third party’s blog. Despite this limitation, the proposed revisions would make an advertiser liable to the actions of a person for which it can exert no control. Even if the advertiser were to set parameters on acceptable statements, it is not practical to expect the advertiser to monitor or police the blog indefinitely. For instance, if a blogger decides to update a product review more than a year later, the proposed revision could still make the advertiser liable for the content of a subsequent endorsement.

⁶ 73 Fed. Reg. at 72377.

⁷ 73 Fed. Reg. at 72392.

⁸ *Id.*

The DMA suggests that the Commission continue to address issues on a case-by-case basis through enforcement actions under the current Guides so that the unique characteristics of the involved channel could be considered. If a particular concern becomes common through a specific channel, then the Commission should revise the Guides in manner that targets the particular medium where the concern exists. Otherwise, a broad rule, applicable to all channels, without regard to an advertiser's ability to control messaging, could have a chilling effect on the use of the Internet as a communication channel.

Guidance is necessary with respect to monitoring and policing endorsers.

The proposed revisions would impose new obligations on advertisers for the conduct of endorsers, but do not provide the necessary guidance as to how a business should ensure compliance with the Guides by third parties or other actors. For instance, the proposed revision would broadly impose liability on all advertisers, particularly in circumstances where the advertisers cannot control the conduct of third parties, such as in blogging. Third party liability is a very complicated issue and requires more deliberation and guidance than currently provide by the proposal. Advertisers are provided just three examples (ex. 7, 8, and 9 under sec. 255.5) to glean insight as to the scope of their obligations with respect to actions by third parties through new media channels. The DMA believes this matter should be addressed more thoroughly through a separate proceeding where the relevant issues can be explored and properly considered.

An examination of examples 7, 8, and 9 illustrate the significant concern with imposing liability on the advertiser for actions of a third parties. These examples are related to the proposed requirement that advertiser must disclose the material connection between themselves and their endorsers. Example 7 describes a scenario in which an advertiser is required to disclose the material connection between itself and a blogger that receives a free video game console to use as part of his review of the system. The example lacks guidance as to how an advertiser should provide this disclosure, where the disclosure must be provided, and what actions the advertiser should take if the blogger refuses to include the required disclosure.

Example 8 involves an employee posting a positive message about a product offered by her employer to other participants through an online message board.⁹ The example indicates that she should clearly and conspicuously disclose her relationship with the product manufacturer to members and readers of the message board. It is not clear whether an advertiser would be expected to police the conduct of its employees to ensure the proper disclosure is provided each time an employee comments about the advertiser's products. In a similar manner, Example 9 instructs advertisers to "take steps" to ensure that the incentives provided to street teams as part of an endorsement campaign be disclosed, but provides no detail as to what action by advertisers would be considered appropriate or necessary.¹⁰ Under the revisions, advertisers would be forced

⁹ 73 Fed. Reg. at 72395.

¹⁰ *Id.*

to abandon these new media channels or expose themselves to the risk of an enforcement proceeding by the FTC.

Examples 7, 8, and 9 all share a common concern – imposing liability on advertisers for actions by third parties, which are out of the control of the advertiser. The DMA recommends that new media channels be addressed through a separate proceeding to identify specific concerns and explore alternative solutions that account for the unique characteristics associated with these mediums.

* * *

I thank you for the opportunity to submit these comments. We look forward to continuing to work closely with the Commission on these important issues. Please do not hesitate to contact me with any questions at 202/861-2423.

Sincerely,

Jerry Cerasale
Senior Vice President, Government Affairs
1615 L Street, NW Suite 1100
Washington, DC 20036

Cc: Stuart Ingis, Venable LLP
Michael Signorelli, Venable LLP