



March 2, 2009

Via electronic filing: <https://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: Endorsement Guides Review, Project No. P034520

Dear Secretary Clark:

The Interactive Advertising Bureau, Inc. (“IAB”) appreciates this opportunity to provide comments on the Federal Trade Commission’s (“Commission” or “FTC”) proposed changes to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guides”). While we appreciate the Commission’s efforts to update the Guides to reflect changes in technology, we believe that given the lack of record at the present time, there are other more appropriate opportunities to provide guidance pertaining to new media.

Founded in 1996 and headquartered in New York City, the IAB (www.iab.net) represents over 375 leading companies that actively engage in and support the sale of interactive advertising. IAB members include AOL, CNET Networks, ESPN.com, Forbes.com, Google, MSN, New York Times Digital, Yahoo!, and others. Collectively, our members are responsible for selling over 86% of online advertising in the United States. IAB is actively engaged in regulatory matters, legislative affairs, and public policy initiatives that affect the interactive advertising industry.

We appreciate the underlying spirit of the Guides to provide businesses with guidance on how to conform endorsement and testimonial advertising practices to the requirements of the FTC Act. We also recognize the need to strike a balance between protecting consumers and encouraging the creativity of advertisers to reach customers. As technological advances are made, the interests of both consumers and advertisers will best be served if efforts by advertisers to harness new media to more effectively reach consumers are not stifled. The Commission itself has acknowledged that new media is still evolving, and we support more thoughtful consideration of the evolving technologies and how they have been and may be used to provide consumers with meaningful advertisements.¹

¹ See 73 Fed. Reg. 72374, 72377 (November 28, 2008).

The Commission has proposed the addition of examples pertaining to new media specifically addressing bloggers, online message board participants, and street teams:

- Sec. 255.1 Example 5: This example addresses a scenario where a skin care products advertiser participates in a blog advertising service, and the advertiser requests the blogger to write a product review. If the blogger wrote a review of the product and made claims about the product, the Guides provide that both the advertiser and blogger would be subject to liability for false or unsubstantiated statements made through the blogger's endorsement. Additionally, the Guides indicate that the blogger would face liability if she failed to disclose that she were being paid for her reviews. To limit this liability, the Guides suggest that the advertiser ensure that the advertising service provides guidance to bloggers on the requirement of making truthful and substantiated statements. The Guides also suggest that the advertiser monitor bloggers and take steps to stop the publications if the advertiser discovers deceptive representations.²
- Sec. 255.4 Example 7: This example describes a situation where a student with a reputation as a video game expert who maintains a blog receives a free copy of a video game system from a manufacturer asking him to write a review. The Guides explain that if the gamer wrote a review, readers of the blog would likely not be aware that he had received the game system for free in exchange for his review. In such a situation, the Guides advise that the blogger should clearly and conspicuously disclose that he received the video game system for free.³
- Sec. 255.4 Example 8: This example describes an online message board designated for a specified topic, and elaborates on a scenario where an employee of a manufacturer of the leading product of the specified topic promotes the product on the online message board without revealing her identity. The Guides provide that the poster should clearly and conspicuously disclose her relationship with the manufacturers to members and readers of the message board.⁴
- Sec. 255.5 Example 9: This example describes a scenario where a person joins a "street team" program in which he is awarded points that may be exchanged for prizes each time he talks to his friends about an advertiser's products. The Guides provide that these incentives should be clearly and conspicuously disclosed, and the advertiser should "take steps" to ensure that such disclosures are made.⁵

Due to the evolving nature of the marketing industry in response to developing technologies, and the need for further inquiry on this complex topic, we believe that there has not been sufficient discussion to revise the Guides explicitly to address new media at this time. We therefore urge the Commission to refrain from adopting the proposed examples pertaining to new media.

² 73 Fed. Reg. at 72392 (Section 255.1 Example 5).

³ 73 Fed. Reg. at 72395 (Section 255.4 Example 7).

⁴ 73 Fed. Reg. at 72395 (Section 255.4 Example 8).

⁵ 73 Fed. Reg. at 72395 (Section 255.4 Example 9).

I. Effective Guidelines Encompassing New Media Already Exist.

The Commission's proposed guidelines listed above would expand the Guides explicitly to cover new media (*e.g.*, blogs, online message boards, street teams to the extent that they apply to online activities *etc.*). The Commission has a long history of deferring to self-regulation when industry has proven that it is capable of protecting consumers. In this case, strong and effective self-regulatory programs already exist. For instance, the Word of Mouth Marketing Association has developed the *Ethical Blogger Contact Guidelines*, which inform marketers that when they send bloggers products for review, they are "not obligated to comment on them" and "can return the products at their own discretion." These guidelines also advise marketers to proactively ask bloggers to disclose the sources of products if they write about products sent to them by marketers.⁶ Additionally, the Direct Marketing Association's *Guidelines for Ethical Business Practice* provides that testimonials and endorsements should only be used if they are "authorized by the person quoted, genuine and related to the experience of the person giving them both at the time made and at the time of the promotion and not taken out of context so as to distort the endorser's opinion or experience with the product."⁷

Providing industry with flexibility to develop standards addressing endorsements and testimonials in new media will facilitate advertiser creativity, with the ultimate benefit of better serving and meeting consumers' interests. If the Commission were to adopt guidelines addressing new media without a sufficient understanding of how such new technologies are being harnessed or may be used in the future, the Commission might risk dissuading the development of novel means of advertising that effectively serve the interests of consumers in ways not yet imagined. We recommend that the FTC provide industry with an opportunity to innovate and refine already existing standards that address new media.

II. The Record Lacks Development on the Proposed Guides Pertaining to New Media.

In an effort to respond to comments suggesting that the Commission should consider whether the Guides ought to be revised to address new types of advertising, the Commission's proposed guidelines of November 28, 2008 now provide examples of blogs,⁸ online message boards,⁹ and street teams (to the extent that they encompass online activities).¹⁰ These examples did not appear in the Commission's original request for public comment back on January 18, 2007.¹¹ As a result, the administrative record has yet to be developed on the implications of expanding the Guides to new media.

We propose that the Commission refrain from addressing new media in this proceeding. Rather than including examples on blogs and online message boards and other forms of new media at this time, the Commission should consider taking measures to further develop the record on this topic, perhaps by holding a separate hearing.

⁶ Word of Mouth Marketing Association, *Ethical Blogger Contact Guidelines*, available at <http://womma.org/bloggerethics/guidelines/>.

⁷ Direct Marketing Association, *Guidelines for Ethical Business Practice*, at Article #21 (2009).

⁸ 73 Fed. Reg. at 72393 (Example 5) and 73 Fed. Reg. at 72395 (Example 7).

⁹ 73 Fed. Reg. at 72395 (Example 8).

¹⁰ 73 Fed. Reg. at 72395 (Example 9).

¹¹ 72 Fed. Reg. 2214 (January 18, 2007).

III. IAB Supports Further Inquiry into the Implications of Expanding Guidelines Developed for Traditional Media to Online Platforms.

The Commission has sought to expand the Guides to address new media. These Guides pertaining to testimonials were originally developed before there were dynamic channels such as the Internet. We suggest that further deliberation is necessary prior to adopting examples of new media, if at all, in the revised Guides. Since the development of advertising for television, the marketing industry has transformed from one in which marketers once exercised direct control over advertisements to an industry of fragmentation. Now, marketers no longer exercise the same level of control over advertisements. For example, in “user-generated video,” video content is created by the public at large, generally not professionally edited, and directly uploaded to websites. Proposed Example 5 of Section 255.1 and Examples 7, 8, and 9 of Section 255.5 of the Guides address actions by third parties outside the direct control of marketers.¹² These examples raise concerns pertaining to the level of responsibility a marketer has over the actions of such third parties (*e.g.*, bloggers, online message board participants *etc.*).

Requiring marketers to be responsible for the actions of third parties over whom they exercise uncertain control could create unintended consequences for new media. Much like the movie critic who is provided advanced screening, without any quid pro quo that she will provide a glowing review (and a review often does not), bloggers are often provided goods because the marketers believe in their product and want the unbiased feedback of consumer product reviewers. In addition, tens of millions of Americans maintain blogs, and more than 100 million create content through social networks and video sharing sites. Creating a new advertising obligation in this ecosystem should not be taken without due consideration. Establishing new legal liabilities for marketers, publishers, and platform providers could restrict the supply of advertising revenue that is just beginning to flow into this nascent marketplace. Such requirements could also impose serious compliance issues as interested parties attempt to police the millions of sites that may fall under the new Guides. We therefore support more consideration into how endorsements and testimonials ought to be addressed in the Internet and new media context.

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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 202/253-1466.

Sincerely,

Michael Zaneis
Vice President, Public Policy

¹² See 73 Fed. Reg. at 72393 and 73 Fed. Reg. at 72395.