

**Testimony of
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Advertising Trends and Consumer Protection

**Before the Commerce, Science and Transportation Subcommittee on Consumer
Protection, Product Safety, and Insurance
United States Senate**

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Introduction

Good morning, Mr. Chairman, Mr. Ranking Member and members of the subcommittee. My name is Sally Greenberg and I am the Executive Director of the National Consumers League (NCL).¹ I appreciate this opportunity to appear before the subcommittee on Consumer Protection, Product Safety, and Insurance of the Senate

¹ The National Consumers League, founded in 1899, is America's pioneer consumer organization. Our non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org.

Commerce, Science, and Transportation Committee to discuss the issue of consumer protections against deceptive advertising.

Over its more than one hundred years of existence, NCL has been a fierce critic of misleading advertising, deceptive labeling, and other anti-consumer marketing practices. At the 1904 St. Louis World's Fair, NCL volunteers demonstrated to fairgoers that canned green beans touted by food processors as a labor-saving home product were adulterated with green dye. More recently, NCL's advocacy prompted the FDA in 2001 to investigate misleading claims by tomato juice manufacturers that their products were "fresh."² In 2008, we supported legislation introduced by Senator Bill Nelson of Florida aimed at curbing the use of deceptive advertising practices in the prepaid calling card industry.³ Earlier this year, in response to an NCL letter to the agency, the Food and Drug Administration (FDA) warned General Mills to stop printing misleading health claims on box of their Cheerios cereal.⁴

² National Consumers League. "National Consumers League Asks FDA to Crack Down on Companies that Violate Labeling Laws," Press Release. October 11, 2001. Online: <http://www.nclnet.org/freshpr1001.htm>

³ National Consumers League. "Testimony of Sally Greenberg, Executive Director, National Consumers League on S. 2998, the 'Prepaid Calling Card Consumer Protection Act of 2008' Before the U.S. Senate Commerce, Science and Transportation Committee." September 10, 2008. Online: http://www.nclnet.org/news/2008/prepaid_testimony_09102008.htm

⁴ National Consumers League. "National Consumers League Applauds FDA for Warning General Mills for Misbranding Cheerios," Press Release. May 13, 2009. Online: http://www.nclnet.org/news/2009/fda_cheerios_05132009.htm

NCL believes that knowledgeable consumers can participate more fully and effectively in the marketplace. The more consumers know about their rights and responsibilities with regards to the goods and services they buy, the better they are able to protect themselves and make sound purchasing decisions. For this reason, it is imperative that the advertising consumers receive is accurate and transparent.

In 2008 alone, more than \$141 billion was spent on advertising in the United States, despite reduced corporate advertising budgets dragged down by the souring economy.⁵ Omnicom Group Inc., one of the largest advertising agencies in the world, last year made nearly \$1.7 billion in profits on more than \$13.3 billion in revenues.⁶ The advertising business is a large industry in its own right and its vitality affects virtually every other sector of the economy. NCL believes that the advertising industry plays a special role in both informing and persuading consumers to buy products and services. The reliability and transparency of advertising therefore requires special scrutiny by policy makers to ensure that the industry meets its obligations to the public.

Our testimony today will focus on proposed revisions to the Federal Trade Commission's (FTC) *Guides Concerning Use of Endorsements and Testimonials in*

⁵ TNS Media Intelligence. "TNS Media Intelligence Reports U.S. Advertising Expenditures Declined 4.1 Percent in 2008," Press Release. May 4, 2009. Online: <http://www.tns-mi.com/news/05042009.htm>

⁶ Omnicom Group Inc. *2008 Annual Report*. Online: <http://files.omnicomgroup.com/ReportManagement/UploadedFiles/128836875883178750.pdf>

Advertising (“the *Guides*”),⁷ proposed by the Commission in November 2008 and currently under final review.⁸ In addition, we will discuss the issue of video news releases (VNRs), and whether the use of such advertising should fall under the jurisdiction of the *Guides*.

Deceptive Testimonial Ads and Bogus “Expert” Endorsements Distort the Market

Consumers turning on their televisions at nearly any time of the day or night have grown accustomed to advertisements claiming that simply by taking a pill or eating a certain type of submarine sandwich they can expect to shed pounds and achieve a desired weight. Other advertisements trumpet that with a minimal investment and only part-time work from home, consumers can achieve financial wealth “in as little as six months!”⁹ These advertisements are typically accompanied by small print, quickly flashed at the bottom of the screen indicating that “results are not typical,” or that “your results may vary.” Such advertisements frequently feature a “noted expert” on the topic of the

⁷ Available online at <http://www.ftc.gov/bcp/guides/endorse.htm>.

⁸ Federal Trade Commission. “16 C.F.R. Part 255: Guides Concerning the Use of Endorsements and Testimonials in Advertising: Notice of Proposed Changes to the Guides, and Request For Public Comments,” November 21 2008. Online: <http://www.ftc.gov/os/2008/11/P034520endorsementguides.pdf>

⁹ Federal Trade Commission. “FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn,” Press Release. July 1, 2009. Online: <http://www.ftc.gov/opa/2009/07/shortchange.shtm>

advertisement, often clothed in a trust-inducing white medical coat.¹⁰ It does not take a Ph.D. to realize that through the use of such examples of success – which tend to be outliers if they exist at all – and the reputations of supposed “experts,” advertisers are attempting to persuade consumers that they can easily and quickly get rich or resemble the attractive person on the screen. The advertising industry does not generally release data on the effectiveness of testimonial advertisements. However, the impact of one of the most famous testimonial advertising pitchmen, Subway’s Jared Fogle, is illustrative. When Subway briefly ceased using Fogle in its advertising in 2005, same store sales decreased by 10% until Fogle was reinstated.¹¹ Clearly, Jared’s crediting of his substantial weight loss to Subway’s sandwiches in the company’s advertisements had a large impact on consumers’ preference for Subway.

¹⁰ See: Hobbs, Renee *et al.* “How adolescent girls interpret weight-loss advertising,” *Health Education Research*. Pg. 723. July 2006. Online: <http://her.oxfordjournals.org/cgi/reprint/21/5/719>: “By contrast, only 17% of participants in our study recognized the persuasive technique of claiming that products are ‘doctor-endorsed and scientifically proven’. Many weight-loss ads attempt to bolster their own credibility by depicting ‘doctors’ or ‘scientists’ using phrases like ‘clinically tested’ or ‘studies confirm ...’. This strategy is particularly manipulative considering that most consumers rarely question the advice of their doctors. Most girls in this study viewed with trust the image of the white-coated doctor, seeing it as a sign of credibility. For example, one participant said, ‘If I had a weight problem, then I’d probably be more confident in that product because the specialist was in it.’”

¹¹ York, Emily Bryson. “Subway Can’t Stop Jonesing for Jared,” *Advertising Age*. Pg.1. February 18, 2008.

We believe that the proliferation of such ads¹² clearly highlights three factors pertaining to deceptive advertising. First, the present ubiquity of the use of such testimonials indicates that the spirit of the FTC's *Guides* – last revised in 1980 – has been thoroughly circumvented by advertisers. Second, such advertising practices are proving to be very successful for advertisers and their clients. Were this not the case, advertisers would be unlikely to invest in the broadcast of such ads. Third, consumers are being harmed by these ads. Indeed, the two FTC staff reports^{13 14} examining this issue concluded that current efficacy and typicality disclosure practices (the “results not typical” and “your results may vary,” disclaimers) were insufficient in adequately warning consumers that they were not likely to enjoy the same results highlighted by these testimonials.

To address this issue, the Commission has proposed several revisions to Sections 255.2 (“Consumer Endorsements”) and 255.3 (“Expert Endorsements”) of the *Guides*.

12 According to Cleland, Richard et al. [*Weight-loss advertising: An Analysis of Current Trends*. Federal Trade Commission. September 2002.], weight-loss advertisements in magazines more than doubled between 1992 and 2001. Among the magazines sampled, 65% of weight-loss advertisements utilized consumer testimonials and 42% contained before-and-after pictures.

13 Hastak, Manoj and Mazis, Michael. “The Effect of Consumer Testimonials and Disclosures on Ad Communication for a Dietary Supplement,” Report submitted to the Federal Trade Commission. September 30, 2003. Online: <http://www.ftc.gov/reports/endorsements/study1/report.pdf>

14 Hastak, Manoj and Mazis, Michael. “Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements,” Report submitted to the Federal Trade Commission. September 22, 2004. Online: <http://www.ftc.gov/reports/endorsements/study2/report.pdf>

First, the proposed revisions to Section 255.2 would require that advertisers who use consumer testimonials be able to substantiate claims made by the endorsement. The revision would prohibit the use of consumer testimonials as a replacement for clear scientific evidence when quantifiable claims are made in the advertisement. The proposed revisions would also make the use of the “results not typical,” “your results may vary,” and similar disclaimers insufficient to meet disclosure requirements. Instead, the proposed guideline would require “clear and conspicuous” notification of the results that consumers can generally expect to see from the use of the advertised product or service. Second, the Commission’s proposed changes to Section 255.3 would clarify two important requirements – i) that the experts endorsing a particular product or service must be qualified and have exercised their expertise in their decision to endorse and ii) that endorsements made by experts “certified” by advertiser-connected institutions are inherently deceptive.

NCL applauds these proposed changes. The threat of consumer deception is high when an advertisement promises extraordinary results and such claims are reinforced by “experts” or “people just like you.” Given the troubling increase in the use of such tactics in advertisements, we support action by the FTC to clamp down on these practices via the proposed revisions to the *Guides*. We believe that approval of the revisions to Sections 255.2 and 255.3 of the *Guides* would encourage advertisers to be more truthful in their advertising, help ensure that consumers get more accurate information from advertisements, and ultimately increase consumer confidence in the marketplace.

Enhanced Blogger Disclosure Requirements Strengthen Consumer Confidence

The Commission has proposed significant revisions to section 255.1 (“General Consideration”) and 255.5 (“Disclosure of Material Connection”) of the *Guides* to address the growing problem of bloggers and other users of social media platforms failing to disclose compensatory relationships in product and service reviews and endorsements¹⁵. The proposed changes to the *Guides* would require bloggers compensated (either monetarily or in the form of free samples or gifts) for their roles in advertising campaigns to disclose the relationship. In addition, bloggers and the advertisers who pay them would explicitly be held liable for false or misleading representations made through an endorsement on a blog or other online platform.

Blogging, by its nature, is a communications medium open to any consumer with access to the Internet. This openness has encouraged an unprecedented explosion in consumer discourse about practically every category of consumer product available. The inherently open qualities of the blogosphere suggest that the inclusion of bloggers as parties subject to the revised guidelines could present unique challenges for regulators.

There are those who argue that the blogosphere is and should remain a place where consumer-bloggers are free to say what they wish without fear of government

¹⁵ This practice is commonly known as “blogola,” a variation on the term “payola,” an illegal business practice in which record companies compensate radio stations in return for airplay of the company’s artists.

regulators or of law enforcement holding them liable for their statements. Another argument against the change is that the blogosphere is inherently self-regulating and thus not in need of government oversight. Those making such arguments frequently cite cases where the credibility of blogs reviewing products was reduced when it was discovered that the bloggers had not disclosed a financial benefit given in return for a review. A third argument against the revisions maintains that given the dynamic nature of the social Web – where anyone can voice an opinion on a blog or via Twitter, Facebook, or other platform – it will be practically impossible for the FTC to effectively administer the proposed rule.

We reject all these arguments in the name of consumer protection. As with any emerging means of communication, “rules of the road” must govern to protect against deceptive advertising. With regard to the first critique of the proposed changes, we believe that the need for consumer confidence online outweighs any potential “chilling effect” that FTC review might produce. Indeed, reasonable disclosure requirements could provide much needed guidance to bloggers unfamiliar with the ethics guidelines commonly adhered to by professional journalists in product reviews produced for “traditional” media outlets.

Second, consumer groups generally do not believe that self-regulation works in highly competitive, financially lucrative marketing environments. The effectiveness of the blogosphere and other social media platforms as consumer empowerment tools is built on trust. Without trust, such tools lose their value to consumers. The increasing

frequency of revelations that bloggers did not disclose that they were compensated for their endorsements suggests that the self-regulatory model is breaking down in the face of relentless monetary inducements from the advertising industry.¹⁶ Marketers all-too-frequently fabricate “spontaneous” Internet “buzz” around products and services by paying for endorsements by influential bloggers and other “e-celebrities.” With each new news story of such incidents, the trust that has made the blogosphere such a powerful consumer tool is eroded. Given that the blogosphere is growing more sophisticated and influential by the day, and that advertisers are investing significant resources in trying to tap that influence, we believe that FTC guidelines and oversight in this area are appropriate and needed.

Third, we acknowledge that there are practical difficulties in policing the ever-changing social Web. Any consumer with an Internet connection can quickly and easily create a blog, Facebook Page, and/or Twitter account dedicated to reviewing products and services. We believe that the practical difficulties of policing blogs and other social media platforms can be addressed by focusing enforcement on the most egregious violators of the proposed guidelines and the advertisers that provide them with

¹⁶ For example, in 2006, Microsoft sent laptop computers preloaded with its Vista operating system to bloggers on highly-trafficked blogs, asking them to review the then-new operating system. The company only vaguely encouraged the bloggers to disclose that they had received the laptop computer as a gift. See: Solis, Brian. “This is Not a Sponsored Post: Paid Conversations, Credibility & the FTC,” TechCrunch.com. May 24, 2009. Online: <http://www.techcrunch.com/2009/05/24/this-is-not-a-sponsored-post-paid-conversations-credibility-the-ftc/>

compensation. The FTC has similarly voiced an intention to narrowly target its enforcement efforts at repeat offenders of the proposed guidelines.¹⁷

Over time, consumers have developed a healthy skepticism of traditional print, radio, and television advertising. Properly enforced disclosure requirements in federal statutes and regulations help build consumer confidence in the marketplace, enabling them to make informed decisions about the products and services they purchase for themselves and their families. NCL supports FTC rules requiring disclosure when a blogger is compensated for voicing his or her opinions on a particular product or service. Consumers have a right to know if a product endorsement is paid for by the company. We do not want to see the viral spread of word-of-mouth recommendations enabled by social media technologies give rise to rampant consumer deception.

Video News Releases Damage Consumer Trust in the Fourth Estate

We believe that the same consumer trust that has helped consumer-oriented blogs flourish has been endangered by the use of video news releases (VNRs) that purport to be news but are really paid advertising.

VNRs are corporate, government, or non-profit-produced video made to resemble “news” segments but which in reality are advertisements designed to promote a product,

¹⁷ Yao, Deborah. “FTC plans to monitor blogs for claims, payments,” Associated Press. June 21, 2009.

Online: http://tech.yahoo.com/news/ap/20090621/ap_on_hi_te/us_tec_bloggers_freebie_disclosures

service, public image, and/or point of view of the client(s) who funded them.¹⁸ While exact figures on the scope of VNR use are difficult to obtain, one of the largest VNR production agencies, Medialink Worldwide, reported that it produced approximately 1,000 VNRs per year.¹⁹ The typical newsroom may have ten to fifteen VNRs available per day.²⁰

It is easy to see why VNRs are so popular with advertisers and news organizations. First, newsrooms are under increasing pressure to provide expanded news coverage but lack additional staff resources to make that happen. The use of VNRs is a time and cost-saving way to address this pressure. In addition, news agencies are under enormous financial strain due to the proliferation of news outlets competing for advertising dollars. VNRs bring in additional revenue beyond ads sold to fill the time between news segments. Production and airtime costs typically range from \$25,000 to \$75,000 for a VNR, making them significantly cheaper than traditional advertisements. The cost for a traditional 30-second advertisement can easily run into the tens of millions

¹⁸ Center for Media and Democracy. "Fake TV News: Frequently Asked Questions." Online:
<http://www.prwatch.org/fakenews/faq>

¹⁹ Barstow, David and Stein, Robert. "Under Bush, a New Age of Prepackaged TV News," *The New York Times*. March 13, 2005. Online:
http://www.nytimes.com/2005/03/13/politics/13covert.html?_r=1&pagewanted=print&position=

²⁰ Center for Media and Democracy. "Fake TV News: Frequently Asked Questions." Online:
<http://www.prwatch.org/fakenews/faq>

of dollars.²¹ VNRs also benefit from the implicit trust that consumers place in news programs. The average viewer places a healthy dose of skepticism on claims made in traditional ads. In contrast, media stories are expected to be free of conflicts of interest. The lack of disclosure of the source and payments involved in the airing of VNRs preys on that trust and deceives consumers.

Regulation of VNRs has traditionally been the purview of the Federal Communications Commission (FCC). The FCC exercised this authority in 2007 when it fined Comcast repeatedly for failing to disclose VNRs that aired on its CN8 channel promoting products from companies like General Mills, Allstate, and Trend Micro.²²

As a consumer organization, NCL finds the rampant lack of disclosure by broadcasters that they are being paid to air VNRs extremely troubling. We support vigorous FCC enforcement of relevant regulations in this area. We would further argue that the FTC should consider investigating whether the use of VNRs should be subject to the terms of the FTC's *Guides*. In particular, we believe that when a VNR airs on a media program without sufficient disclosure, it could constitute a *de facto* endorsement of the product or service advertised by the news organization, thus invoking Section 255.4 requirements. In addition, we would urge the Commission to investigate whether a news

²¹ Mandese, Joe. "The Art of Manufactured News," *Broadcasting & Cable*. March 27, 2005. Online:

http://www.broadcastingcable.com/article/156596-The_Art_of_Manufactured_News.php

²² The FCC's 2007 *Notice of Apparent Liability for Forfeiture* in this case is available online at

http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-4075A1.pdf

organization's failure to disclose their compensatory arrangement with the providers of VNRs should invoke sanctions under Section 255.5 of the *Guides*.

Conclusion

The proliferation of advertising has made pitches for products and services an inescapable fact of modern life. Recognizing the singular power of the advertising industry to affect consumer attitudes and behavior, the FTC has rightfully sought to ensure that advertisements are accurate and not deceptive. When the *Guides* were last revised in 1980, the means for disseminating advertisements were largely limited to traditional print, radio, and television outlets. Cable television was in its infancy and the World Wide Web was virtually unknown. In the nearly three decades since, cable television has exploded in variety and viewership and Internet advertising has reached dizzyingly complex heights of sophistication. Both trends were fueled by an increasing abundance of advertising dollars. Given these facts, NCL fully supports the FTC's review of and proposed changes to the *Guides*. In addition, we would urge the Commission to undertake an investigation of the applicability of the *Guides'* rules to the use of video news releases.

Now more than ever, consumers need to be assured that products and services advertised to them deliver on what they promise. Where extreme results are promoted, typical results should be clearly disclosed. When an "expert" unequivocally stakes her or his reputation on an endorsement of a product, consumers should be informed whether

that person is qualified to make the statement. Readers of a product review on a blog or Facebook page deserve to know if the reviewer's opinion may have been swayed by a free gift or a hefty check. Finally, citizens of a democratic society should have confidence that the media is not passing off advertisements as hard news.

Thank you, Mr. Chairman, for giving the National Consumers League this opportunity to comment on the impact of advertising trends on consumer protection. We applaud you for your leadership in this area and look forward to answering any questions you or other members of the subcommittee may have.