

packaging, is neither relevant nor available to consumers.

Example 4: The president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser in its business. Since the cleaning service's professional success depends largely upon the performance of the cleansers it uses, consumers would expect the service to be expert with respect to judging cleansing ability, and not be satisfied using an inferior cleanser in its business when it knows of a better one available to it. Accordingly, the cleaning service's endorsement must at least conform to those consumer expectations. The service must, of course, actually use the endorsed cleanser. Additionally, on the basis of its expertise, it must have determined that the cleansing ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of competing products with which the service has had experience and which remain reasonably available to it. Since in this example, the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having to have performed side-by-side or scientific comparisons.

Example 5: An association of professional athletes states in an advertisement that it has "selected" a particular brand of beverages as its "official breakfast drink". As in Example 4, the association would be regarded as expert in the field of nutrition for purposes of this section, because consumers would expect it to rely upon the selection of nutritious foods as part of its business needs. Consequently, the association's endorsement must be based upon an expert evaluation of the nutritional value of the endorsed beverage. Furthermore, unlike Example 4, the use of the words "selected" and "official" in this endorsement imply that it was given only after direct comparisons had been performed among competing brands. Hence, the advertisement would be deceptive unless the association has in fact performed such comparisons between the endorsed brand and its leading competitors in terms of nutritional criteria, and the results of such comparisons conform to the net impression created by the advertisement.

[Guide 3]

[40 FR 22128, May 21, 1975]

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as rep-

resenting the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors which vary from individual to individual. Therefore an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 of this part (Expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products.

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Since the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an expert evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the particular attributes of the advertised mattress in mind. (See also § 255.3, Example 5.)

[Guide 4]

[40 FR 22128, May 21, 1975]

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly

and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.

Example 1: A drug company commissions research on its product by a well-known research organization. The drug company pays a substantial share of the expenses of the research project, but the test design is under the control of the research organization. A subsequent advertisement by the drug company mentions the research results as the "findings" of the well-known research organization. The advertiser's payment of expenses to the research organization need not be disclosed in this advertisement. Application of the standards set by Guides 3 and 4 provides sufficient assurance that the advertiser's payment will not affect the weight or credibility of the endorsement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must of course comply with §255.1; but even though the compensation paid the endorser is substantial, neither the fact nor the amount of compensation need be revealed.

Example 3: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein "steak". This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

[Guide 5]

[45 FR 3873, Jan. 18, 1980]

PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

Sec.

259.1 Definitions.

259.2 Advertising disclosures.

AUTHORITY: 15 U.S.C. 41-58.

§ 259.1 Definitions.

For the purposes of this part, the following definitions shall apply:

(a) *New automobile.* Any passenger automobile or light truck for which a fuel economy label is required under the Energy Policy and Conservation Act (42 U.S.C. 6201 *et seq.*) or rules promulgated thereunder, the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser. The term *manufacturer* shall mean any person engaged in the manufacturing or assembling of new automobiles, including any person importing new automobiles for resale and any person who acts for and is under control of such manufacturer, assembler, or importer in connection with the distribution of new automobiles. The term *dealer* shall mean any person, resident or located in the United States or any territory thereof, engaged in the sale or distribution of new automobiles to the ultimate purchaser. The term *ultimate purchaser* means, for purposes of this part, the first person, other than a dealer purchasing in his or her capacity as a dealer, who in good faith purchases such new automobile for purposes other than resale, including a person who leases such vehicle for his or her personal use.

(b) *Estimated city mpg.* The gasoline consumption or mileage of new automobiles as determined in accordance with the city test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR 600.209-85 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, published, or accepted by the U.S. Environmental Protection Agency.

(c) *Estimated highway mpg.* The gasoline consumption or mileage of new automobiles as determined in accordance with the highway test procedure employed and published by the U.S.