



Federal Trade Commission

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Association of National Advertisers
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“Advertising Resolutions For The New Year”

Good morning and Happy New Year! I am pleased to be here, and I thank the Association of National Advertisers for inviting me.

Last year, I had occasion to speak to a more intimidating audience: a classroom full of 8-year-olds. Finally succumbing to my nephew’s exhortations that I just *had* to speak to his class (and realizing that I should be happy for any opportunity to indoctrinate some young capitalists), I was faced with the challenge of communicating the FTC’s mission. Let’s just say “they got it” and quite easily. I began by talking about the importance and elements of competition, and I used sports examples to draw this out. When I then switched to the commercial setting and asked if they could think of how businesses compete, they looked at me as though I must be stupid not to know and said confidently, “They advertise!” I then used this as a segue into consumer protection and showed them videos of toy advertisements that the FTC had challenged. I had the toys with me and when I demonstrated how they actually functioned, I faced a class full of 8-year-olds yelling, “It’s a ripoff!” I was pleased to see that Beaver Falls, PA is raising savvy

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

consumers. As usual, kids remind us of the basics: advertising is a critical part of our consumer-centric, competition-based economic system, so much so that false or misleading advertising, which distorts the system's foundations, cannot be tolerated.

As we begin the new year, many of us will endeavor to return to basics as we make resolutions: eat right and exercise, spend more time with family, be a better friend. Today, I have a few to propose to you. Make this a year to: trim the fat in marketing to kids; take the empty calories – that is, unsupported claims – out of advertising; do not succumb to the temptation of spying on consumers; and enhance the exercise regime of self regulation.

Childhood Obesity and Food Marketing to Kids

My first recommended resolution is to trim the fat in marketing to kids. Many of you in this room attended the 2005 workshop on Marketing, Self-Regulation, and Childhood Obesity, sponsored jointly by the FTC and the Department of Health & Human Services. What experts confirmed there was alarming. Obesity rates have doubled among young children and tripled among adolescents since 1980.² The Institute of Medicine report on Food Marketing to Children and Youth, released last year, describes obesity as “the most common serious contemporary public health concern faced by young people in the United States.”³

² National Center for Health Statistics, “Prevalence of Overweight Among Children and Adolescents: United States, 1999-2002,” *available at* <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm>. Moreover, many of these children – even as young as 5-10 years of age – are already showing one or more cardiovascular risk factors, including elevations in cholesterol, insulin, glucose, or blood pressure. *Perspectives on Marketing, Self-Regulation, & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services* (April 2006) p. 1, *available at* <http://www.ftc.gov/opa/2006/05/childhoodobesity.htm>.

³ Institute of Medicine, “Food Marketing to Children and Youth: Threat or Opportunity?” (2006) pp. 2-2 – 2-3. The IOM further notes that if the epidemic continues at its

Many in the U.S. (and around the world) are engaged in a vigorous debate about who is to blame for rising childhood obesity rates. The only point on which there may be wide agreement is that obesity is a complex problem with many contributing factors. I do not believe that we will ever fully resolve the debate about how we have arrived at this public health crisis and who is most to blame. But I am not interested in blame. I am interested in action. All segments of society – parents, schools, government, health care professionals, food companies, and the media – need to work to help improve our children’s health.

Thus, the FTC/HHS workshop report did not attempt to assign blame to food marketers (or anyone else) for the rising obesity rates, and it did not call for advertising bans. Instead, the recommendations that came out of the FTC/HHS workshop emphasized the need to increase industry self-regulatory efforts, as well as new and creative initiatives from both the food marketing and entertainment industries. We are pleased that many positive steps along these lines have been taken. But any widespread and difficult problem requires continued effort and vigilance.

I am encouraged by the establishment of the Children’s Food and Beverage Advertising Initiative, announced in November by the Council of Better Business Bureaus and the National Advertising Review Council, which endeavors to shift the mix of advertising to children under 12 to encourage healthier eating choices and lifestyles.⁴ And I congratulate the charter

current rate, the serious health conditions associated with type 2 diabetes may become commonplace in middle age. *Id.* at p. 2-3.

⁴ “New Food, Beverage Initiative to Focus Kids’ Ads on Healthy Choices; Revised Guidelines Strengthen CARU’s Guidance to Food Advertisers” (Nov. 14, 2006), *available at* <http://www.bbb.org/alerts/article.asp?ID=728>.

participants – Cadbury Schweppes USA, Campbell Soup Company, The Coca-Cola Company, General Mills, The Hershey Company, Kellogg Company, Kraft Foods, McDonald’s, PepsiCo, and Unilever – for their pledges to change the message to kids about what they should be consuming.⁵

The Initiative shows real promise. And we will be watching closely to see how it actually works in practice and what effect it has. For example, ads and promotions that show or encourage physical activity are great. But if the activity is always accompanied by promotion of a food or drink high in calories and low in nutritional value, it is unclear whether a true “healthy lifestyle” message will be conveyed.

I also welcome the recent revisions to the Children’s Advertising Review Unit (CARU) guidelines to address unfairness in advertising targeted to children; the “blurring” of distinctions between advertising and program or editorial content; and the use of commercial messages in interactive games (sometimes referred to as “advergaming”). The revisions also afford increased

⁵ By joining the Initiative, these companies have agreed to:

1. Devote at least half of their advertising directed to children via TV, radio, print, and the Internet to promote healthier dietary choices and/or to messages that encourage good nutrition or healthy lifestyles.
2. Limit products shown in interactive games to healthier dietary choices, or incorporate healthy lifestyle messages into the games.
3. Refrain from advertising food or beverage products in elementary schools.
4. Refrain from placing food and beverage products in editorial and entertainment content.
5. Reduce the use of third-party licensed characters in advertising that does not meet the Initiative’s product or message criteria.

guidance to food advertisers, addressing, for example, portion size and depiction of the product within the appropriate overall nutritional framework. It is important that the CARU guides remain a work in progress – providing additional, specific guidance to marketers as the nature of products available for kids and the techniques for promoting products to kids change.

Individual companies and other joint initiatives also are making changes. For example, characters popular with children are being used to promote healthy eating. Nickelodeon’s SpongeBob and Dora the Explorer now appear on packages of carrots and spinach, and Disney has partnered with Imagination Farms to produce the Disney Garden, where favorite Disney characters promote fresh fruits and vegetables. Disney’s new nutritional guidelines for children – announced in October – will govern all of its future character licensing and promotional activities directed at kids. And a new “healthy kids” Disney website went online about two weeks ago, featuring games that teach kids about healthy eating.⁶ Disney has a special ability to reach the youngest children, and that is why these initiatives are so important and encouraging.

For school-age children, the Alliance for a Healthier Generation – a joint initiative of the American Heart Association and the William J. Clinton Foundation – is working with food industry members to replace unhealthy foods with healthy choices in schools. In October, the Alliance announced an agreement with several leading manufacturers – Campbell Soup Company, Dannon, Kraft Foods, Mars, and PepsiCo – to establish nutritional guidelines for snack and side items sold in schools, through vending machines and snack carts for example. The companies will invest in product reformulation and new product development in order to provide more nutritious offerings in the schools. Earlier last year, the Alliance also announced

⁶ Available at <http://www.disney.com/healthykids>.

an agreement with the American Beverage Association and major beverage producers PepsiCo, Coca Cola, and Cadbury Schweppes to limit the portion size and calorie content of drinks available to children during the school day.

A number of companies are developing healthier product lines with fewer calories and lower fat levels, particularly saturated and trans fats. And Kraft has taken the extra step of shifting its advertising viewed primarily by children ages 6-11 to its “better-for-you” foods, while at the same time continuing its policy of not advertising in media with a principal audience under age 6.

Over the past few months, I have observed the reactions of interested parties to these voluntary and self-regulatory efforts. Some argue that the efforts are wholly insufficient and fail to even begin to address the serious issues involved. Others argue that industry has no obligation to change its practices and should not be making any changes in its marketing practices towards kids.

I disagree with both positions. These industry initiatives are commendable, and my hope is that they will prompt competition among food marketers and entertainment companies to use their resources to develop healthy and appealing alternatives and to use their creativity to promote effectively those healthier foods and drinks to children and youth. This will not alone solve the problem and it will not happen overnight. But I do not need to tell you that advertising is a powerful tool, and the problem of childhood obesity is serious enough that we should all be trying to contribute to finding effective solutions.

For the FTC going forward, the Commission’s appropriation legislation for FY 2006 directed the agency to submit a report on food industry marketing expenditures and activities

targeted toward children and adolescents. This report must include an analysis of commercial advertising on television and radio and in print media; in-store marketing, including payments for preferential shelf placement; event sponsorship; promotions on packaging; Internet activities; and product placements in TV programs, movies, and video games. This is a very large undertaking, and the work has begun. The comment period on the “60-day” *Federal Register* notice⁷ (required by the Paperwork Reduction Act) closed on December 21, with 11 comments filed by public interest groups, food industry members and trade associations, the California Department of Health Services, and several individuals. A “30-day” *Federal Register* notice, providing an additional opportunity for comment, will be published in the spring. The Commission staff has also held informal meetings with various associations and their members to obtain background information that will facilitate preparation of the information requests. Our goal is to get the information the Commission needs to provide the thorough analysis that Congress expects of us, through a process that is no more burdensome than necessary.

Endorsement and Testimonial Guides

My second recommended resolution is to take the empty calories – that is unsupported claims – out of advertising. Sometimes those “empty calories” come in the form of product endorsements or testimonials.

The Commission’s Guides Concerning Use of Endorsements and Testimonials in Advertising⁸ have been slated for review. A Federal Register notice seeking comments on the Guides was published yesterday, January 16, 2007.

⁷ 71 *Fed. Reg.* 62109 (Oct. 23, 2006).

⁸ 16 C.F.R. 255.

Since 1992, the FTC has undertaken to review existing regulations and to repeal or reform those that are no longer valid or relevant. In the nearly 15 years since the program began, nearly half of the rules and guides then in effect have been repealed. Of those retained, many have undergone revisions – resulting in rules and guides that are streamlined and updated to remain relevant and meaningful to both the affected industries and consumers.

Industry guides, as you know, are not rules. However, they provide guidance to certain industries as to how the Commission would interpret Section 5 of the FTC Act – which prohibits unfair or deceptive practices in commerce – with respect to practices specific to particular business sectors. I know that the Endorsement Guides provide important advice to many of you. I also know that the type of advertising claims addressed in these Guides are persuasive to consumers; the endorsement can be a powerful statement – giving enhanced credibility to a seller’s own product claims – because it comes from a third party, one with either relevant expertise or actual experience with the product.

The Guides advise that an advertisement using a consumer endorsement with regard to a central or key product attribute will be interpreted as representing that the endorser’s experience is representative of what consumers generally will achieve, which is sometimes called a “typicality” claim. If the advertiser does not have adequate substantiation that the endorser’s experience is representative, the advertisement should contain a clear and conspicuous disclosure.

As you can see from the *Federal Register* notice, the Commission has released reports on two studies it commissioned regarding the messages conveyed by consumer endorsements. The Commission is seeking comments on the implications of these studies and other relevant

research, as well as on the effects on advertisers and consumers if the guides were to be changed. I encourage you to participate in this review process. The Commission needs to hear from a broad spectrum of interested parties before it determines whether and how best to make changes to these Guides.

Recent Advertising Cases

The Commission continues to take action in cases where the second resolution regarding unsupported claims was not followed. Let me discuss a few recent cases.

Weight-loss cases: On January 4, along with three other cases, the Commission announced that Bayer Corporation had agreed to pay a \$3.2 million civil penalty – the highest ever obtained in a case involving health claims – to settle Commission allegations that the company violated a 1991 order against a predecessor company with its advertising claims for One-A-Day WeightSmart, a multivitamin and green-tea extract dietary supplement. The Commission charged Bayer with making unsubstantiated claims that One-A-Day WeightSmart increases metabolism; helps prevent weight gain associated with decline in metabolism in users – particularly women – over 30; and helps with weight control by enhancing metabolism. One of the ads featured a mock exercise – “just lift, and twist and bend” – that is, lift the pill bottle, twist off the cap, and bend your wrist to tip the bottle. Unfortunately, the science did not support Bayer, nor the sellers of the other well-known weight-loss products targeted in the cases announced on January 4, products including Xenadrine EFX, CortiSlim and CortiStress, and TrimSpa. The combined settlements with these companies reached about \$25 million to be paid

as penalties or in consumer redress – so the cost of deceiving consumers is going up.⁹

Telebrands Corporation: In August, the U.S. Court of Appeals for the 4th Circuit affirmed the Commission’s decision that *Telebrands* and its principal made unsubstantiated claims that its Ab Force electronic device (1) causes loss of weight, fat, or inches; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise.¹⁰ As stated by the Commission in the opening lines of its opinion, the case “illustrates how false and unsubstantiated claims can be communicated indirectly but with utter clarity.”¹¹ The text of both radio and television ads invited comparison between the Ab Force and competitors’ products, described as “fantastic,” “amazing,” and “the latest craze to sweep the country.” The ads did not identify a particular purpose for the Ab Force devices, but claimed they offered “the same powerful technology” as competing products, could direct “10 different intensity levels at your abdominal area,” and cost substantially less – \$10 as opposed to \$120.¹² TV ads featured the same kinds of images used in competitors’ infomercials – muscled males and trim women in exercise apparel wearing Ab Force belts and experiencing abdominal contractions. In its opinion, the Commission stated that “facial analysis of the ads is informed by the market context in which the ads were disseminated and respondents’ intent to take advantage of that context by presenting the Ab Force as a substitute for other heavily advertised but more expensive ‘ab

⁹ “Federal Trade Commission Reaches ‘New Year’s Resolutions with Four Major Weight-Control Pill Marketers” (Jan. 4, 2007), *available at* <http://www.ftc.gov/opa/2007/01/weightloss.htm>.

¹⁰ *Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006).

¹¹ *Telebrands Corp.*, 140 F.T.C. 278 (2005).

¹² *Id.* at 296-99.

belts.’”¹³ Both the Commission and the U.S. Court of Appeals rejected the company’s argument that it was simply making a truthful “compare and save” claim.

As stated in the 4th Circuit opinion, the company “wanted to capitalize on the popularity of existing . . . abdominal belts,” knowing “that infomercials for those devices, which it referenced in its advertisements, had claimed that they caused the loss of weight, inches or fat, developed well-defined abdominal muscles, and offered an effective alternative to regular exercise.”¹⁴ While I do not believe that the Commission broke new ground in the *Telebrands* case, or created a novel theory of liability, I do believe the case brings home an important principle – indirect advertising claims can be just as powerful and as deceptive as direct claims. There are many ways to make claims indirectly, but creativity will not substitute for having adequate scientific substantiation.

Spyware

My third recommended resolution is to not succumb to the temptation to spy on consumers. Spyware, an area with enormous implications for privacy and data security, is another FTC priority. Spyware can range, in its most pernicious form, from a keystroke logger to track all of a consumer’s online activity, causing a significant risk of identity theft, to producing a barrage of advertising that the online consumer cannot escape.

The Commission has brought nine enforcement actions involving spyware in the past two years. These actions have reaffirmed three key principles: First, a consumer’s computer belongs to him or her, not the software distributor. Second, buried or fine print disclosures do not work,

¹³ *Id.* at 296-99.

¹⁴ *Telebrands Corp. v. FTC*, 457 F.3d at 359.

just as they have never worked in more traditional areas of commerce. And third, if a distributor puts a program on a consumer's computer that the consumer does not want, the consumer must be able to uninstall or disable it.

The Commission illustrated these principles in our most recent spyware settlement with Zango, Inc., formerly known as 180solutions.¹⁵ Zango provides advertising software programs, or adware, that monitor consumers' Internet use in order to display targeted pop-up ads. The consent order settles allegations that the company installed its advertising software programs on consumers' computers without adequate notice or consent. Zango's distributors frequently offered consumers free programs or software, such as screensavers, peer-to-peer file sharing software, and games, without disclosing that downloading it would also result in installation of Zango's adware. In other instances, Zango's third-party distributors exploited security vulnerabilities in Web browsers to install the adware via "drive-by" downloads. As a result, millions of consumers received pop-up ads without knowing why and had their Internet use monitored without their knowledge. Moreover, the company deliberately made these adware programs difficult for consumers to identify, locate, and remove from their computers so consumers were stuck with them no matter how they tried to get rid of them. The company used its adware to send billions of pop-up ads over several years. As part of the settlement, Zango agreed to disgorge \$3 million in ill-gotten gains derived from its past actions. The company also agreed to injunctive provisions that will protect consumers against these practices in the future.

In another recent case, the Commission persuaded the U.S. District Court for Nevada to

¹⁵ "Zango, Inc. Settles FTC Charges" (Nov. 3, 2006), *available at* <http://www.ftc.gov/opa/2006/11/zango.htm>.

shut down the Media Motor spyware program operated by ERG Ventures, LLC, and its affiliates.¹⁶ The Commission complaint charged that the defendants tricked consumers into downloading malevolent software by hiding the Media Motor program within seemingly innocuous free software, including screensavers and video files. Once installed, the Media Motor program downloaded “malware” that changed consumers’ home pages, added difficult-to-remove toolbars, tracked Internet activity, generated disruptive and sometimes pornographic pop-up ads, added advertising icons, altered browser settings, degraded computer performance, and attacked consumers’ anti-spyware and anti-virus software.

The message for you is that advertisers need to be vigilant to ensure that their advertising dollars do not fund – either deliberately or inadvertently – illegal activity. You need to understand just how your Internet advertising reaches consumers. If you choose to advertise via adware, it is important that you select adware providers who ensure that consumers receive adequate notice of and knowingly consent to the installation of the adware, have a meaningful way of monitoring their distribution channels, allow consumers to uninstall their adware easily, and otherwise respect consumers’ rights. This is an area where policing by the advertising industry is critical to creating a culture of security and respect for consumer privacy. If you do not do so, you risk undermining consumer confidence in the Internet as a vehicle for commercial information and transactions.

Self Regulation

My final recommended resolution is to enhance the exercise regime of self regulation.

¹⁶ “Court Shuts Down Media Motor Spyware Operation” (Nov. 13, 2006), *available at* <http://www.ftc.gov/opa/2006/11/mediamotor.htm>.

The self regulation in your industry is an enormous success story. But what has struck me during my tenure at the FTC is how many people, here and around the world, either do not know about it or, worse, simply do not believe it. In other parts of the world, for example, when I talk about the work of the National Advertising Division (NAD)/ National Advertising Review Council (NARC) arm of the Council of Better Business Bureaus and its importance to the U.S. marketplace and the FTC's work to eliminate deceptive marketing, some of my foreign counterparts look at me in disbelief. They do not believe that businesses can be trusted to self-regulate. It is critical that you continue to prove them wrong.

We welcome the new initiative, announced in September by the NAD and the Council for Responsible Nutrition, to increase monitoring of advertising for dietary supplements. Supplement ads have generated a great deal of Commission enforcement activity over the past decade. It is appropriate that industry now assume a greater share of the responsibility for ensuring truthful, substantiated claims for these products.

The Electronic Retailing Self-Regulation Program (ERSP) – another program established under the auspices of the NARC – has made great strides since its inauguration in 2004. In the first two years of operation, ERSP has issued 125 decisions and has established a compliance rate greater than 90 percent. This is a significant accomplishment for an industry where the term “infomercial” became largely synonymous with “deception.” Of course, the cooperation of broadcasters and the cable television industry is particularly critical to the success of the program. ERSP's advertising review is not limited to ERA members. For non-ERA members, the threat of loss of revenue that will occur if media outlets refuse to disseminate non-compliant advertisements may be even more effective than the threat of referral to the FTC. When I spoke

to the ERA about nine months ago, I noted that while some broadcast and cable companies had chosen to cooperate with the program, others had not. I understand there has been some increased participation since that time, and that is welcome news. Media participation will ensure the ultimate success of this program.¹⁷

One sector that does not appear yet to have benefitted from the self-regulatory programs I have just discussed is advertising targeting the Hispanic population through Spanish-language media. Accordingly, last September, the FTC coordinated a one-day surf of Spanish-language media by 60 law enforcement partners across the U.S. and in five Latin American countries. As a result of the surf, the FTC and its partners sent warning letters to 166 advertisers and 77 media outlets informing them that their advertisements may be deceptive.¹⁸ More than half of the ads uncovered were health related and made dubious claims for weight loss products and “disease cures.” Significantly, more than half of the weight-loss ads contained false Red Flag claims.

¹⁷ The Commission’s Red Flags Initiative provides a good example of how media can step up and take some responsibility for ensuring that deceptive advertising claims are not disseminated. About five years ago, FTC staff conducted a survey of ads for weight-loss products and found that almost half of them included at least one claim that was facially false. In response, we published a guide – appropriately titled *Red Flag Bogus Weight Loss Claims* – describing seven claims for non-prescription weight-loss products that should raise red flags because they are always false. For example, any claim that you can lose substantial weight, e.g., more than two pounds per week, without diet or exercise is false. My predecessor, Chairman Muris, and former Commissioner Leary met with members of the media and asked that they “do the right thing” and refuse to run advertisements that contain “Red Flag” claims. While many protested at the time, it now appears that a number of media members – though clearly not all – have responded by doing the right thing. In a follow-up survey, our staff found that the percentage of ads with Red Flag claims had fallen from almost 50 to 15 percent. For some of the worst claims – like the promise of substantial weight loss without diet or exercise – the results were even better, down from 43 percent to 5 percent of weight-loss product ads

¹⁸ “FTC Warns Advertisers and Media That Ads May Be Deceptive” (Sept. 27, 2006), available at <http://www.ftc.gov/bcp/online/edcams/redflag/index.html>.

Clearly, this is a segment of the advertising industry where much greater efforts are required.

Technology Developments

Looking towards the future, the FTC is committed to understanding the implications of technology changes on privacy and consumer protection – as they are happening or even before they happen. Last week I was in Las Vegas for the Consumer Electronics Show. Being there, hearing the predictions of what is in store for us in the “Digital Decade,” as Bill Gates called it, and seeing the new devices and innovations that will be a part of our lives, assured me that capitalism is alive and well in our nation and consumers’ demands are setting the course. It also reminded me, though, of the Yogi Berra quote that: “The future ain’t what it used to be.”

I have committed the FTC to preparing for this exciting future, to the extent that any of us can. In November, we gave ourselves a glimpse into the future by convening public hearings on the subject of “Protecting Consumers in the Next Tech-Ade.” We heard from more than 100 of the best and brightest in the tech world about new technologies on the horizon and their potential effect on consumers. With the digitization of media, the mass marketing world is shifting to a micro marketing world, with advertisers able to fine tune their messages for specific micro audiences. In addition, advertising is becoming more interactive, with consumers having greater ability to exercise control over the commercial messages they receive. Interestingly, consumer-to-consumer communications are becoming more important in a kind of “back to the future” trend.¹⁹ Our report on the Tech-Ade conference will be published in the spring. I can assure you,

¹⁹ One area of marketing that is becoming increasingly popular is word-of-mouth marketing, sometimes called “buzz” marketing. The Commission received a complaint from a consumer advocacy group called Commercial Alert asking that the Commission issue guidelines

as one of my resolutions, that we will continue to educate ourselves to ensure that our policies and enforcement agenda remain relevant and supportive of a competitive marketplace – free of over-regulation, but also free of deception that harms consumers and depletes their confidence in our economic system. Thank you.

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requiring disclosure when consumers are paid to talk about a product. Last month, the FTC staff issued a response letter agreeing that when marketers pay consumers to advocate for products by word of mouth, such payment generally must be disclosed. Rather than setting out new guidelines, however, the letter pointed out that word-of-mouth marketing is covered by the Commission’s existing Endorsements and Testimonials Guides. The Guides require disclosure of material connections between a marketer and an endorser, that is, connections that might affect the weight or credibility of what the endorser says. This stems from the common sense principle that when advertisements feature the opinions of consumer endorsers, consumers expect the endorsers to be independent from the advertiser, unless they’re told otherwise.

Following publication of the staff opinion letter, the blog word-of-mouth marketing company PayPerPost – which pays bloggers to mention brand name products in their blogs – began requiring its bloggers to disclose their paid relationships with marketers. I believe this is a positive development and reflects what the Word of Mouth Marketing Association has emphasized: Honesty about the relationship is key to consumer trust and therefore to effective word of mouth marketing.