

**Anthony E. DiResta**  
Direct Phone: 202.414.9488  
Email: [adiresta@reedsmith.com](mailto:adiresta@reedsmith.com)

**John P. Feldman**  
Direct Phone: 202.414.9230  
Email: [jfeldman@reedsmith.com](mailto:jfeldman@reedsmith.com)

Reed Smith LLP  
1301 K Street, N.W.  
Suite 1100 - East Tower  
Washington, D.C. 20005-3373  
202.414.9200  
Fax 202.414.9299

March 2, 2009

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, N.W.  
Room H-135 (Annex S)  
Washington, D.C. 20580

Re: **ENDORSEMENT GUIDES REVIEW, PROJECT NO. P034520:  
COMMENTS ON BEHALF OF THE WORD OF MOUTH MARKETING ASSOCIATION**

The Word of Mouth Marketing Association (“WOMMA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC”) for public comments on the proposed revisions to the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”). *See Guides Concerning the Use of Endorsements and Testimonials in Advertising: Request for Public Comments*, 73 Fed. Reg. 72374 (Fed. Trade Comm’n Nov. 28, 2008) [hereinafter “COMMENT REQUEST”].

- I -

## **OVERVIEW OF THE WORD OF MOUTH MARKETING ASSOCIATION**

WOMMA is the leading trade association in the marketing and advertising industries that focuses on word of mouth, consumer-generated and social media platforms - - or marketing techniques that include buzz, viral, community, and influencer marketing as well as brand blogging.

WOMMA is committed to developing and maintaining appropriate ethical standards for marketers and advertisers engaging in such marketing practices, identifying meaningful

measurement standards for such marketing practices, and defining “best practices” for the industry. Founded in 2005, WOMMA currently has approximately 400 members. Its members include: (i) marketers and brands that use word of mouth marketing to reinforce their core customers and to reach out to new consumers; (ii) agencies that deliver word-of-mouth services and technologies; (iii) researchers that track the word of mouth experience; and (iv) offline and online practitioners.

Members of WOMMA promise to abide by a Code of Ethics that establishes aspirational and practical guidelines designed to assist in the development of compliance procedures and in the evaluation and execution of marketing campaigns. A copy of WOMMA’s Code is attached hereto as an Appendix.

- II -

**THE INTEREST OF THE WORD OF MOUTH MARKETING ASSOCIATION  
IN THE FTC PROPOSED REVISIONS**

**A. Standards - - That Are Workable and Concrete - - Are Needed to Maintain the Integrity of Word-of-Mouth Marketing and Other Consumer-Generated or Social Media Platforms.**

The marketing industry is in the midst of a shifting paradigm. Today, advertisers, marketers, consumers, and governmental regulators are witnessing:

- media fragmentation (such as the proliferation of new media devices);
- the development of consumer-generated media (such as YouTube, Facebook, and MySpace);
- the utilization of “search” in the consumer experience (that encompasses consumer-to-consumer communications about brands); and
- a shift in the nature of commercial discourse, whereby consumers are playing a more active role in shaping and sharing commercial messages..

Accordingly, generally acceptable standards that have been applied to measured media platforms require evaluation and clarification to adapt to these contemporary platforms, as the FTC has recognized. WOMMA believes that the core elements of any revisions require meaningful disclosure and transparency, as such principles are essential to establish: (i) consumer interest and trust, (ii) respect for industry self-regulation, (iii) integrity in the commercial marketplace. As a result, these principles form the basis of WOMMA's Ethics Code.

**B. Specific Proposed Revisions to the Guides Address Word-of-Mouth or Consumer-Generate Marketing Platforms, and Are Relevant to the Interests of WOMMA's Members.**

**1. Section 255.1(d)**

The proposed revisions provide a general principle for liability for communications made through endorsements and testimonials: "Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements." § 255.1(d). In support of that proposition, several examples are provided, one of which relates to bloggers, a communications platform that is relevant to WOMMA's mission:

**Example 5:** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that

the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for false or unsubstantiated statements made through the blogger's endorsement. The blogger also is subject to liability for representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

## 2. Section 255.5

The proposed revisions also provide a principle requiring material disclosures: "When there exists a connection between the endorser and the seller of the advertised product that 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." § 255.5. In support of that proposition, several examples are provided, three of which relate to word-of-mouth, consumer-generated, or social media platforms:

**Example 7:** A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and

asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. The readers of his blog are unlikely to expect that he has reviewed the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact would likely materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge.

**Example 8:** An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

**Example 9:** A young man signed up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

DISCUSSION

**A. Application of Proposed Guides to Blogs and other Consumer-Generated or Social Media Platforms: Section 255.0 (b) and Example 5 to Section 255.1 (d)**

Blogs, or other forms of consumer-generated or social media platforms, are presented in many different forms and contexts. Some are merely personal communication spaces, where private individuals communicate with others about a range of topics, including the sharing of personal experiences with products and services and the providing of personal recommendations. In such spaces, these subjective opinions or recommendations are merely neutral, uninfluenced by third-parties, and free-flowing. Simply put, these spaces are not designed to promote a product or service, but to express personal preferences to friends, colleagues, or others who share similar interests. In contrast are those commercial communication spaces where an individual is “sponsored,” or where a representative of an advertiser or seller is introduced to the consumer to promote the advertiser’s or seller’s goods or services.

However, simply because a consumer might conclude that the opinions provided in both spaces are the sincere opinions of the blogger or communicator does not make both situations subject to the proposed revised Guides, as an “advertising message” is intended in one situation, but not the other. As Section 255.0 (b) to the proposed guides instructs: “An endorsement means any *advertising message* (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the *sponsoring advertiser*, even if the views expressed by that party are identical to those of the *sponsoring advertiser*.” (Emphasis added).

Example 5 to Section 255.1 (d) of the proposed revised guides is intended to illustrate a situation where a blogger is subject to liability for representations made in the course of an

endorsement, and for failure to disclose that she is being paid for her services. To clarify the point that liability for endorsements only exists in certain commercially-intensive forms, contexts, or spaces, WOMMA submits that the term “advertiser” in the third, fourth, and fifth sentences be modified by the term “sponsoring,” so that Section 255.1 (d) is consistent with Section 255.0 (b).

In addition, to clarify the commercial nature between the sponsoring advertiser and the blogger, WOMMA submits that the word “requests that” in the third sentence be replaced with the term “engages,” so that the sentence would read, “The sponsoring advertiser engages a blogger to try a new body lotion and write a review on her blog.”

**B. Disclosure Requirements: Section 255.5**

WOMMA’s ethical code has several goals:

- To develop the credibility in the word-of-mouth medium;
- To encourage honesty and transparency in the word-of-mouth medium;
- To advance the discipline of advertising, but promoting platforms that create dynamic conversations between the consumer and product supplier (or marketing platforms that do not constitute a mere one-sided transmission of data by the advertiser to the consumer);  
and
- To respect the consumer such that there is no manipulation of information.

These goals are demonstrated very clearly in WOMMA’s adoption of an “Honesty ROI: Honesty of Relationship, Opinion, and Identity.” As reflected in WOMMA’s Code of Ethics:

- Word of mouth advocates should disclose their relationship with marketers in their communications with other consumers.
- Marketers should disclose their relationships with word of mouth advocates.
- Marketers should effectively monitor disclosure of their word of mouth advocates.

- WOMMA discourages marketing practices where word of mouth advocates are paid cash to make recommendations, unless full disclosure is made to the consumer.
- WOMMA requires word of mouth advocates to disclose the material aspects of their commercial relationship with a marketer, including the specific type of any remuneration or consideration received.
- WOMMA requires advocates to disclose the source of product samples or incentives received from a marketer.

Therefore, WOMMA's Ethics Code is consistent with the intent behind the proposed revisions to the Guides; and, accordingly, WOMMA supports and applauds the FTC's efforts in promoting transparency and honesty in advertising and marketing. Through such principles, the integrity of advertising is preserved, and marketing practices that utilize word-of-mouth, consumer generated, and social media platforms can develop as credible and viable forms of marketing.

Section 255.5 of the proposed revisions addresses such interests of transparency and honesty, providing that the connection between the endorser and seller must be fully disclosed when "the connection is not reasonably expected by the audience." Yet, for purposes of word-of-mouth marketing or consumer-generated or social media platforms, such a principle has the potential to be read too broadly, and thus needs clarification.

Specifically, in distinguishing between circumstances where disclosure is warranted from those where disclosure is not warranted under Section 255.5, the appropriate analysis should be governed by the reaction or expectation of the reasonable consumer in light of the context presented. Accordingly, WOMMA submits that the first sentence of 255.5 should read: "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e., the connection is not*



*reasonably expected by the reasonable consumer in light of the context presented*), such connection must be fully disclosed.” WOMMA believes that the current parenthetical that reads “the connection is not reasonably expected by the audience” is vague and ambiguous, and does not appropriately account for those contexts where reasonable consumers would immediately apprehend the commercial nature of communication and weigh the endorsement accordingly.

**C. Potential Liability for Advertisers and Bloggers: Example 5 to Section 255.1 (d) and Examples 7, 8, and 9 to Section 255.5**

The proposed guides provide a general principle that both advertisers and bloggers themselves can be liable when promoting their products and services. Yet, WOMMA submits that clarification is needed in several instances to identify those circumstances and contexts where liability cannot be triggered.

For example, in Example 5 to Section 255.1 (d), the blogger is subject to liability for the statements made by her endorsements even if she provides an honest appraisal of the product and its impact upon her. Yet, requiring bloggers to request substantiation for their experience and to apparently comprehend the meaning of that substantiation - - separate and apart from providing an honest/transparent appraisal and opinion about their experience - - potentially chills the value of such speech. Bloggers might be afraid to state their opinions or experiences if they believe that it “might go against the grain” or if their enthusiasm might not be supported by some stringent scientific support that they do not understand.

Furthermore, in Example 7 to Section 255.5, if the blogger does not disclose his receipt of the product free of charge, there is no identification of who is responsible - - just the blogger, or the manufacturer as well. In example 8 to Section 255.5, if the poster does not disclose the relationship to the manufacturer, the potential exists for the manufacturer to be held liable for the non-disclosure by its employee; but, if that is the intent, there is no discussion of what circumstances trigger such liability. For example, if the employer has instituted policies and

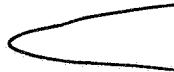
practices concerning “social media participation” by its employees, and the employee fails to comply with such policies and practices, WOMMA submits that the employer should not be subject to liability. In example 9 to Section 255.5, where points are awarded to members of a “street team program,” the proposed revision provides that sponsoring advertiser “should take steps to ensure that these disclosures are being provided.” Yet, there is no description of precisely what types of steps are contemplated to ensure compliance. Likewise, there is no discussion of the types of monitoring activities by the sponsoring advertiser that are necessary and sufficient.

#### CONCLUSION

WOMMA looks forward to assisting the Commission in its commitment to self-regulation, by evaluating the nature of “unmeasured media,” the utility of the current Guides, and the impact of any proposed revisions to the Guides on the marketing practices related to word-of-mouth, consumer-generated, and social media platforms.

DATED: Washington, D.C.  
March 1, 2009

Respectfully Submitted,



By:

Anthony E. DiResta

Counsel to the Word of Mouth Marketing  
Association

REED SMITH LLP  
1301 K Street, N.W.  
Washington, D.C. 20005  
(202) 414-9488  
[adiresta@reedsmith.com](mailto:adiresta@reedsmith.com)

**Appendix**  
**Code of Ethics**

# Word of Mouth Marketing Ethics Code of Conduct (The "WOMMA Code")

---

## Fundamental Principles

---

### **1. Happy, interested people will say good things about you.**

It's doesn't take much more than that. Understand this concept, devote yourself to it, and you will be a successful word of mouth marketer.

### **2. Honest, genuine opinion is our medium.**

We don't tell people what to say or how to say it. We fundamentally believe that people should be free to form their own opinions and share them in their own words. While supporting the natural conversation, we take great care to ensure that we do not distort it.

### **3. We start, support, and simplify the sharing.**

Word of mouth marketers use creative techniques to encourage communications. We make it easier for people to talk to each other, we create interesting things to talk about, we create communities to share ideas, and we work to find the right people who should know about what we do. Traditional advertising pushes ideas on consumers. We help naturally occurring good ideas move around.

### **4. Word of mouth cannot be faked.**

Deception, infiltration, dishonesty, shilling, and other attempts to manipulate consumers or the conversation are bad. Honest marketers do not do this, will not do this, and will get caught if they try. Sleazy behavior will be exposed by the public and backfire horribly on anyone who attempts it.

### **5. Word of mouth marketing empowers the consumer.**

Consumers have control, and they dictate the terms of a new, healthier relationship between marketers and the people who use their products. Consumers demand satisfaction, respect, and great products and services. When companies deliver, people will tell their friends. Word of mouth marketers work to accelerate this process, replacing aggressive advertising with customer-centric service, support, and open communications.



# WOMMA Code of Conduct

---

WOMMA recognizes that the WOMM space is ever-evolving and changing and as such has created its Living Ethics Program whereby the Ethics Code is regularly and periodically reviews and updates the Ethics Code as appropriate.

## Summary

1. Consumer protection and respect are paramount
2. The Honesty ROI: Honesty of Relationship, Opinion, and Identity
3. We respect the rules of the venue
4. We manage relationships with minors responsibly
5. We promote honest downstream communications
6. We protect privacy and permission

## Purpose

**WOMMA members believe this Code is a foundation for an ethical, prosperous industry.** To survive and succeed, word of mouth marketing must earn the trust of consumers by protecting their right to open, honest communication.

**The WOMMA Code establishes guidelines when planning and executing word of mouth marketing campaigns.** Its purpose is to help define best practices, unacceptable practices, and baseline rules of the road. It is a tool for ethical marketers to understand where the lines are drawn and how to do the right thing. Word of mouth that occurs naturally through the process of serving and satisfying customers isn't addressed here, because it is fundamentally genuine.

**This is a work in progress.** The word of mouth marketing environment is changing rapidly, the rules are unclear, and ethical practices are still being defined. We will continue to review and revise the WOMMA Code as the practice of word of mouth marketing evolves through our Living Ethics Project and annual review of this Ethics Code.

**This is a code that WOMMA members choose to adhere by** and its adoption is a basic tenant of membership in the organization. We encourage all marketers to do the same. .



# The WOMMA Code

---

## 1. Consumer protection and respect are paramount

We respect and promote practices that abide by an understanding that the consumer – not the marketer – is fundamentally in charge, in control, and dictates the terms of the consumer-marketer relationship. We go above and beyond to ensure that consumers are protected at all times. WOMMA's ethical standards are applicable in a B2C and B2B environment. The term consumer is used generically throughout this document and applies to all individuals with whom marketers want to establish relationships.

## 2. The Honesty ROI: Honesty of Relationship, Opinion, and Identity

### Honesty of Relationship

- We practice openness about the relationship between consumers and marketers. Consumers engaged in a word of mouth program should disclose their relationship with marketers in their communications with other consumers. We don't tell consumers specifically what to say, but we do instruct them to be open and honest about any relationship with a marketer and about any products or incentives that they may have received.
- We require marketers to disclose their relationships with consumers in relation to word of mouth initiatives.
- We require marketers to effectively monitor disclosure of consumers involved in their word of mouth initiatives.
- We stand against marketing practices whereby the consumer is paid cash by the manufacturer, supplier, or one of their representatives to make recommendations, reviews, or endorsements.
- We require consumers involved in a word of mouth initiative to disclose the material aspects of their commercial relationship with a marketer, including the specific type of any remuneration received.
- We require consumers involved in a word of mouth initiative to disclose the source of product samples or incentives received from a marketer.
- We comply with FTC regulations that state: "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."



## **Honesty of Opinion**

- We never tell consumers what to say. People form their own honest opinions, and they decide what to tell others. We provide information, we empower them to share, and we facilitate the process -- but the fundamental communication must be based on the consumers' personal beliefs.
- We comply with FTC regulations regarding testimonials and endorsements, specifically: "Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, they may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser."

## **Honesty of Identity**

- Clear disclosure of identity is vital to establishing trust and credibility. We do not blur identification in a manner that might confuse or mislead consumers as to the true identity of the individual with whom they are communicating, or instruct or imply that others should do so.
- Campaign organizers should monitor and enforce disclosure of identity. Manner of disclosure can be flexible, based on the context of the communication. Explicit disclosure is not required for an obviously fictional character, but is required for corporate representation that could be mistaken for an average consumer.
- We comply with FTC regulations regarding identity in endorsements that state: "Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers, in both the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product."
- "Teaser" campaigns are acceptable when the average consumer would recognize the effects as part of a marketing program and when there is a planned revelation as part of the initiative.



### **3. We respect the rules of the venue**

We respect the rights of any online or offline communications venue (such as a web site, blog, discussion forum, traditional media, live setting, etc.) to create and enforce its rules as it sees fit. We never create campaigns or encourage behavior that would violate or disrespect those rules.

### **4. We manage relationships with minors responsibly**

- We believe that working with minors in word of mouth marketing programs carries important ethical obligations, responsibility, and sensitivity.
- We stand against the inclusion of children under the age of 13 in any word of mouth marketing program.
- We comply with all applicable laws dealing with minors and marketing, including COPPA and regulations regarding age restrictions for particular products.
- We ensure that all of our campaigns comply with existing media-specific rules regarding children, such as day-part restrictions.

### **5. We promote honest downstream communications**

Recognizing that we cannot control what real people say or how a message will be presented after multiple generations of conversation, we promote the Honesty ROI in downstream communications. In the context of each program, we instruct advocates about ethical communications and we never instruct or imply that they should engage in any behavior that violates the terms of this code.

### **6. We protect privacy and permission**

We respect the privacy of consumers at all times. All word of mouth marketing programs should be structured using the highest privacy, opt-in, and permission standards, and we comply with all relevant regulations. Any personally identifiable information gathered from consumers through their participation in word of mouth marketing programs should be used only in the confines of that particular program, unless the consumer voluntarily gives us permission to use it for other purposes.