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August 9, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex I)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: **DOT COM DISCLOSURES, P114506:**
COMMENTS ON BEHALF OF THE WORD OF MOUTH MARKETING ASSOCIATION

On behalf of the Word of Mouth Marketing Association (“WOMMA”), I respectfully submit these Comments in response to the request by the Federal Trade Commission (“FTC”) for public comments on the potential modification to DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING.

WOMMA’s Comments are in five Sections. Section I is an overview of WOMMA. Section II provides a snapshot of the current marketing environment, and discusses how the marketing and advertising industry is in the midst of a fundamental paradigm shift. Section III discusses the FTC jurisprudence concerning the application of the “clear and conspicuous” standard to advertising disclosures and the consideration by the Commission of four key factors: (i) prominence; (ii) presentation; (iii) placement; and (iv) proximity. Section IV provides a high-level discussion of emerging technology, identifying five general categories with examples: (1)

location-based tools; (2) Twitter; (3) generic endorsements; (4) question and answer sites; and (5) recommendation/listing sites. Section V sets forth general recommendations by WOMMA, and proposes that any guidance by the staff should be flexible and fluid, recognizing the practical constraints of certain media platforms, and without stifling innovation that may benefit consumers' access to and control over their commercial and personal information and communications.

In particular, WOMMA recommends that the FTC hold a public workshop on these issues to obtain full input from all stakeholders.

WOMMA looks forward to assisting the Commission and staff in evaluating the emerging "new media" technologies and trends in social media as well as the impact of any guidance on the marketing practices by advertisers and brands. Please let me know if you have any questions or need any additional information.

Respectfully Submitted.

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OVERVIEW OF THE WORD OF MOUTH MARKETING ASSOCIATION

WOMMA was founded in 2004 on the premise of fostering the growth of credible and ethical word of mouth ("WOM"). Since then, WOMMA has developed into the premier trade association dedicated to advancing and advocating the discipline of credible word of mouth marketing.

WOMMA represents more than 350 member companies, including brands, researchers, service providers, and agencies that are actively engaged in WOM and social media.

Members of WOMMA abide by mandatory Standards of Conduct and a Code of Ethics that establishes guidelines and criteria designed to assist in the development of compliance procedures to evaluate and execute marketing campaigns. This Code, in fact, was favorably received by the FTC in its 2009 release of its Guides Concerning the Use of Endorsements and Testimonials in Advertising.



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-II-

A SNAPSHOT OF THE CURRENT MARKETING ENVIRONMENT

The marketing and advertising industry is evolving on a daily basis -- in the midst of a fundamental paradigm shift. The world of advertising in 2011 is fundamentally different from that of May of 2000, when the staff issued DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING. Today, advertisers, marketers, consumers, brands, interested consumers groups, and associations, as well as governmental regulators, are witnessing the explosion of "social media platforms" through:

- media fragmentation through the proliferation of new media devices;
- the acceptance -- and daily use -- of consumer-generated content (such as YouTube, Facebook, and Twitter);
- the acceptance and utilization of "search" in the consumer experience that encourages 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, as WOMMA told the FTC in its Comments concerning the Endorsements Guides Review, reasonable standards -- that are workable, concrete, and flexible -- are appropriate to maintain the integrity and development of word of mouth marketing or social media platforms in commercial transactions as well as the trust by consumers in using new media in their commercial dealings. Yet, given emerging technologies and the benefits they provide to consumers, such standards must be flexible so as to prevent any stifling of innovation.

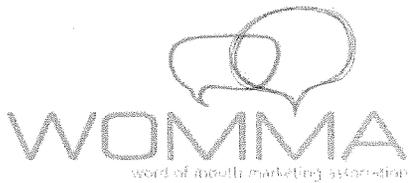
- III -

THE EXPECTATIONS FOR MEANINGFUL DISCLOSURE AND THE "CLEAR AND CONSPICUOUS" STANDARD

It is central in FTC jurisprudence that advertising must be truthful and nondeceptive; advertisers must have evidence to back up their claims; and advertisements cannot be unfair. It is equally well established that advertising is deceptive if it contains a statement -- or omits information -- that is likely to mislead consumers acting reasonably under the circumstances; and is "material," or important to consumers' decisions to buy or use the product. FTC DECEPTION POLICY STATEMENT, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 180-81 (1984).

When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, the information must be presented "clearly and conspicuously" so that consumers can actually notice and understand it. See, e.g., *Thompson Medical Co.*, 104 F.T.C. 648, 842-43 (1984), *aff'd*, 791 F.2d 189 (D.C.

Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (requiring simultaneous audio and visual disclosure of certain information). See also *FTC v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006) (holding that fine-print statement on purported rebate check was insufficient to disclose clearly and conspicuously that cashing the check would prompt monthly charges for Internet access services); *United States v. Bayer Corp.*, No. CV 00-132 (NHP) (D.N.J. Jan. 11,



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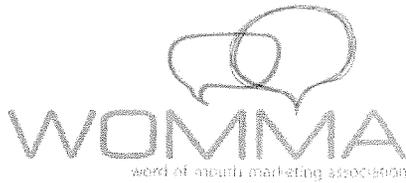
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2000) (consent decree) (requiring audio and visual disclosure of information when ads make certain representations about the benefits of aspirin in the prevention of heart attacks); Micron Electronics, Inc., 128 F.T.C. 137 (1999) (consent order) (challenging print and Internet ads for consumer leases that placed material cost information in inconspicuous or unreadable fine print).

The Commission has held workshops and issued policy statements to reiterate the "clear and conspicuous" standard. See, e.g., Disclosure Exposure: An FTC-NAD Workshop on Effective Disclosures in Advertising (May 22, 2001); Dot Com Disclosures: Information About Online Advertising (May 3, 2000); Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000); Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms: A Bureau of Economics Staff Report (June 13, 2007). The Commission also sent letters to search engine companies on June 27, 2002, regarding the clear and conspicuous disclosure of paid placements. See Letter from Heather Hipsley, Acting Director of FTC's Division of Advertising Practices, to Gary Ruskin, Executive Director of Commercial Alert.

In print ads and point-of-sale materials, the Commission has frequently found fine-print footnotes or blocks of text to be inadequate to disclaim or modify a claim made elsewhere in the promotion. See, e.g., Budget Rent-A-Car Systems, Inc., C-4212 (Jan. 4, 2008) (consent order) (challenging car rental company's failure adequately to disclose fuel fees automatically charged to customers who drove fewer than 75 miles); Gateway Com., 131 F.T.C. 1208 (2001) (consent order) (challenging ads for "free" or flat-fee Internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges); Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Com., 131 F.T.C. 1113 (2001) (consent orders) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and email, while revealing in fine print, "Modem required. Sold separately."); Value America, Inc., C-3976, Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for low-cost computer systems that disclosed true costs of the offer and important restrictions in fine-print footnotes); Haagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging effectiveness of fine-print footnote modifying claim that frozen yogurt was "98% fat free"); Stouffer Food Com., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were false and unsubstantiated and not cured by fine-print footnote).

The Commission has also scrutinized television disclosures, as video superscripts that are difficult to understand, superimposed over distracting backgrounds, compete with audio elements, or are placed in parts of the ad less likely to be remembered have been found to be ineffective in modifying a claim made in the body of the ad. See, e.g., United States v. Mazda Motor of Am., Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) (\$5.25 million total civil penalty for violations of FTC and state orders related to disclosures in car leasing advertising); General Motors Co., 123 F.T.C. 241 (1997); American Honda Motor Co., 123 F.T.C. 262 (1997); American Isuzu Motor Co., 123 F.T.C. 275 (1997); Mitsubishi Motor Sales of Am., Inc., 123 F.T.C. 288 (1997); Mazda Motor of Am., Inc., 123 F.T.C. 312 (1997); Toyota Motor Sales, U.S.A., Inc., 125 F.T.C. 39 (1998); and Volkswagen of Am., Inc., 125 F.T.C. 74 (1998) (consent orders) (requiring clear and conspicuous disclosure of terms in ads for car leases, defined as "readable [or audible] and understandable to a reasonable consumer"); Frank Bommarito Oldsmobile, Inc., 125 F.T.C. 1 (1998); Beuckman Ford, Inc., 125 F.T.C. 59 (1998); Suntrup Buick-Pontiac-GMC Truck, Inc., 125 F.T.C. 91 (1998); and Lou Fusz Automotive Network, Inc., 125 F.T.C. 111 (1998) (consent orders) (requiring clear and conspicuous disclosure of terms in ads for car leases, defined as "readable [or audible] and understandable to a reasonable consumer");



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Foote, Cone & Belding, Inc., 125 F.T.C. 528 (1998); Grey Advertising, Inc., 125 F.T.C. 548 (1998); Rubin Postaer and Assoc., Inc., 125 F.T.C. 572 (1998); Bozell Worldwide, Inc., 127 F.T.C. 1 (1999); and Martin Advertising, Inc., 127 F.T.C. 10 (1999) (consent orders) (challenging advertising agencies' roles in ads containing deceptive representations of car leasing terms); Kraft, Inc., 114 F.T.C. at 124 (Initial Decision) (holding that complicated superscript "one 3/4 ounce slice has 70% of the calcium of five ounces of milk" does not cure deceptive calcium content claim for cheese slices).

In evaluating the effectiveness of disclosures, the Commission considers four key factors: (i) prominence; (ii) presentation; (iii) placement; and (iv) proximity.

(i) The factor of prominence concerns the issue of whether the qualifying information is sufficient in size and volume for consumers to notice and read, or hear. Questions to consider are whether (1) the type size is large enough for consumers to read the information easily; and (2) is there a sharp contrast between the disclosure and the background. Through public statements, the staff of the FTC has made clear that the test is not "is it readable?" but rather, "is it read?"

(ii) The factor of presentation concerns the issue of whether the qualifying information is presented in easy-to-understand language that does not contradict other things said in the ad and is presented at a time when a consumer's attention is not distracted elsewhere. Questions to consider are whether (1) the wording is understandable and free of legal or unnecessary jargon; (2) the format encourages careful attention; (3) the font encourages reading; and (4) there are distractions that compete for the consumer's attention.

(iii) The factor of placement concerns the issue of whether the qualifying information is located in a place and conveyed in a format that consumers will read or hear. Simply put, the question presented is whether the information is located in a place where the consumer will look.

(iv) Finally, the factor of proximity concerns the issue of whether the qualifying information is close to the claim being qualified. Questions to consider are whether (1) the information is located by the claim or representation so that it cannot be missed; and (2) the information is in close physical proximity to the claim it qualifies.

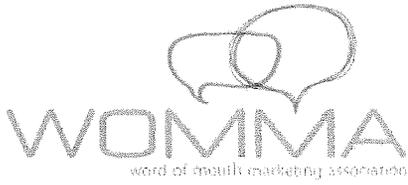
- IV -

CHALLENGES PRESENTED BY EMERGING TECHNOLOGY

A WOMMA task force was created in connection with the submission of these Comments and asked to identify emerging technology platforms currently used in advertising and marketing practices that may present challenges for clear and conspicuous disclosures in light of FTC jurisprudence and expectations. The task force has identified five general categories and examples for consideration: (1) location-based tools; (2) Twitter; (3) generic endorsements; (4) question and answer sites; and (5) recommendation/listing sites. Each is described below.

1. Location-based tools:

Location-based technologies, such as Gowalla, Foursquare, and Yelp, now exist, and some provide consumers with an opportunity to earn "badges" or "mayorships" with the possibility of completing tasks on behalf of brands. These



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"badges" might have no financial value, merely providing a social status to the consumer, but some "badges" or "mayorships" might provide something of value to the consumer, like product discounts.

The key concern for these technologies is where consumers are given incentives to do certain tasks, such as checking in with a certain frequency so that the brand/store is getting persistent exposure, but the incentive is not disclosed.

2. Twitter:

Twitter is known as a "microblogging" platform, and was made for publishing and sharing. Yet, the application created by Twitter through which consumers access the Twitter community allows a Twitter user to "re-tweet" someone else's content into their "news" feed or updates, where the identities of both the original poster and the re-tweeter are displayed. However, the "automatic" process of republication, through the "Auto-RT" function, provides no opportunity to append any text -- such as a disclosure -- to the tweet. This creates a situation for someone to re-tweet a message in which he, she, or it has a material connection, yet no disclosure is made because of technical limitations. The WOMMA Task Force recommends, therefore, that the Auto-RT function should not be used when such bias exists.

3. Generic endorsements:

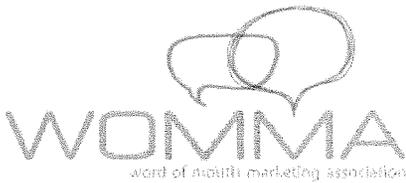
Facebook has two features that challenge clear and conspicuous disclosure. The first is the generic "Like" button that can be placed on a web page or within Facebook to show endorsement of a company, service or status update/content. This action appears within a user's wall to his or her social network without the opportunity to state if there is a material relationship of any kind.

The second is within third party Facebook applications. Most applications will ask for permission to post a message, icon, or other update to a user's wall as soon as the application is being engaged with. At the end of the process, whether it's a contest, sweepstakes, game, or other type of application, the user has the option of posting that they just engaged with this application to their wall. In some instances, consumers are unable to add their comments to these posts. Additionally, some games and other types of applications will automatically post to a user's wall while engaging with the application; one example of this is Zynga's popular Farmville application, whereby if a user's farm requires a specific item, the user will post this need to their wall to ask friends for help obtaining this item.

Similarly, in April 2011 Google launched a new endorsement service called "+1." This service, akin to a Facebook "Like," allows consumers to "plus one" a web page that appears in search results or, if a company has opted in to place a +1 button on their site, a web page. This endorsement does not allow for disclosure if it is sponsored.

More recently, Google's new social network, "Google+," has similar functionality, whereby consumers can +1 a status update (text, photos, videos, links) without an opportunity to provide any type of disclosure.

Finally, the recently popular blogging platform Tumblr has a built-in feature whereby anyone with a Tumblr account can "love" something by clicking on a heart-shaped icon. This, much like the previous examples, merely accrues a running tally of "hearts," but does not allow for disclosure.



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4. Question and answer (Q&A) sites:

There are several sites, such as Quora and Focus, that ask communities to help answer questions or provide solutions. Yet, like social news sites (such as Digg), there is no disclosure option when “voting up” an answer so that it appears as trusted by consumers.

5. Recommendation/listings sites:

Similar to a blogroll, whereby users can list their favorite blogs on their site, an emerging platform of recommendation and listing sites via mobile applications (e.g. Frenzapp) allows consumers to simply list their favorite mobile apps, whereby their followers can see what apps they run and what apps they like. In such instances, it would be very easy for a mobile application company to pay a service or incentivize consumers to repeatedly list their app without the opportunity for disclosure. The WOMMA Task Force recommends, therefore, that disclosure should be provided if a vendor or a service sponsors a listing.

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GENERAL RECOMMENDATIONS

WOMMA is committed to four key concepts that reside at the heart of consumer protection jurisprudence: (i) transparency (or the disclosure of “material connections”); (ii) accuracy (or the communication of truthful information to consumers); (iii) honesty (or the avoidance of misleading or deceptive communications); and (iv) respect (or the recognition of the personal rights of others). At the same time, however, WOMMA is committed to the appropriate development of emerging media that is designed not only to enhance commercial transactions but to provide mechanisms for meaningful social dialogue and appropriate entertainment for consumers of all ages.

Therefore, any guidance by the FTC should be flexible and fluid, recognizing the practical constraints of certain media platforms, and without stifling innovation that may benefit consumers’ access to and control over their commercial and personal information and communications. Indeed, the fundamental intent of consumers communicating on many of these emerging technologies is to engage in social interaction or entertainment, not obtain information that could materially influence their commercial business decisions. Furthermore, it must be recognized that even for those communications that constitute commercial transactions, consumers have become sophisticated and savvy in navigating through various platforms to locate material information and discern what is and is not material to their decision-making. Simply put, whether “disclosure” in certain platforms and contexts is even needed warrants careful scrutiny.

Accordingly, WOMMA recommends that the FTC hold a public workshop on these issues to obtain the full input from all stakeholders.

In addition, WOMMA believes that certain features of the guidance provided in the Dot Com Disclosures need to be re-evaluated in light of these emerging technologies. Specifically, with respect to the factor of “prominence,” considerations of size, color, and graphics must be re-evaluated given the nature of certain new media platforms

found in the mobile environment. With respect to the factor of “presentation,” text may not be available to prompt a consumer’s attention, and sound is not available on many platforms. Yet, for those environments with character limitations, the use of a mouseover or jump-linking may be available options that advertisers can consider.



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Obviously, hyperlinks can play a key role for qualifying information, and links such as More Info., Legal, or Disclosure should now be considered appropriate in many media environments. Finally, with respect to the factors of "placement" and "proximity," scrolling may not be a viable option, and the ability to engage in more clicks should not be interpreted as constituting less comprehension.

CONCLUSION

WOMMA hopes that these Comments are beneficial, and looks forward to assisting the Commission and staff in evaluating the emerging technologies and trends in social media as well as the impact of any guidance on the marketing practices by advertisers and brands.

DATED: Washington, D.C.

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Respectfully Submitted,

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