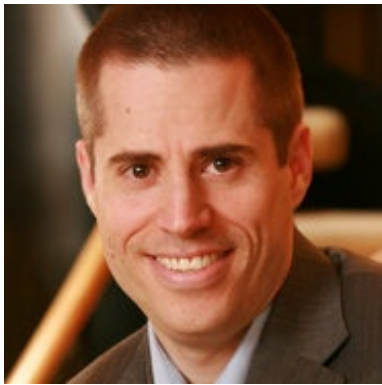


COLUMNS

How the FTC's revised dot-com disclosures affect online, social and mobile advertising

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In May 2000, long before the creation and launch of Facebook and Twitter, the Federal Trade Commission (“FTC”) issued its “Dot Com Disclosures.” That document addressed how the FTC’s consumer protection rules and regulations regarding unfair and deceptive business practices applied to the brave new world of online advertising.

Fast forward 13 years. With the advent and proliferation of social and mobile media, the advertising landscape of today is dramatically different.

In light of these technological and cultural changes, the FTC decided it was time to dust off its original guidelines and, in March 2013, it issued its revised “.com Disclosures: How to Make Effective Disclosures in the Digital Age” (the “.com Disclosures”).

Although the new guidelines do not have the force and effect of law and adherence to them does not serve as a safe harbor, they are intended to provide businesses examples and direction on how to avoid unfair or deceptive business practices in connection with digital advertising.

In addition, the FTC could use a failure to comply with the .com Disclosures as a basis to bring an enforcement action under the FTC Act. Therefore, brands and agencies are well-advised to reevaluate their advertisements and disclosure practices in light of these new revisions and to adopt certain best practices.

Fundamental principles of digital advertising law

The FTC Act prohibits “unfair or deceptive acts or practices,” and it extends to virtually every sector of the economy, including advertising.

Three central principles govern the law of advertising.

First, the advertisement must be truthful and not misleading or deceptive.

The FTC defines a “deceptive” ad as one that “contains a statement – or omits information – that is likely to mislead consumers acting reasonably under the circumstances and is ‘material’ or important to a consumer’s decision to buy or use the product.”

Second, whenever an advertiser makes an express or implied objective claim – such as that the product will help you lose weight, gain muscle, or grow hair – the company must have evidence to support the claim, which is known as substantiation.

Finally, the ad cannot be “unfair,” which the FTC defines as causing or likely to cause “substantial consumer injury that consumers could not reasonably avoid and that is not outweighed by the benefit to consumers or competition.”

These principles apply to any form of advertising, regardless of the medium, including print, television, radio, or online.

So, in connection with digital advertising, they govern advertisements served on Web sites, social networks, mobile devices, tablets, smart televisions, connected gaming consoles and whatever gadget comes next.

Advertisers are responsible for ensuring that their ads comply with these broad principles.

When performing their analysis regarding a particular advertisement, advertisers must consider the ad as a whole.

If an ad makes a claim that is likely to be misleading to a reasonable consumer without certain additional information, the advertiser must disclose such qualifying information.

The original Dot Com Disclosures provided guidance on the nature and scope of the disclosures that advertisers should make to avoid misleading or deceiving consumers.

Of paramount importance, the disclosures had to be “clear and conspicuous.”

However, in light of numerous technological changes since the publication of its original guidelines – the rise of mobile devices with limited screen sizes and the advent of social media platforms that are continuously propagated with user-generated content – the FTC decided that what was “clear and conspicuous” in 2000 may not be so in 2013.

Accordingly, the FTC concluded that it was time to provide additional guidance to

address these new technologies.

Overview of the revised guidelines

The .com Disclosures maintain the general principles noted above and reiterate many of the recommendations and practices set forth in the original guidelines.

The new guidelines do, however, offer much clearer guidance in connection with the technologies that have emerged and proliferated since the release of the initial report, especially mobile and social platforms.

Here are some of the most significant elements of the revised guidelines.

1. When practical, advertisers should incorporate qualifying information into the underlying claim itself, rather than providing a separate disclosure. This is particularly relevant for space-constrained ads, such as banner ads and tweets.

For example, calling an item an “imitation pearl” is preferable to labeling it a pearl with a separate disclosure.

2. Disclosures cannot cure false claims. They can only qualify or limit claims to avoid creating a misleading impression.

If a disclosure is required and it cannot be made in a clear and conspicuous fashion, the advertisement should not be disseminated.

3. Disclosures must be communicated properly to consumers before they make a purchase or incur any financial obligation.

Advertisers should not focus exclusively on order pages, however, because if the disclosures appear only on the checkout page and a consumer purchases the product from the advertiser’s bricks-and-mortar store, he or she will not have had the opportunity to view the disclosure.

4. Certain short-form disclosures are more effective than others. This is particularly significant for advertisers who engage celebrities and athletes to issue sponsored or promotional tweets, and provides an important clarification to the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, which it released in 2009.

According to the FTC, inserting “Ad” or “Sponsored” at the beginning of a tweet or similar short-form message is likely an adequate disclosure that the message is sponsored by a brand, whereas “#spon” at the end of a tweet may not be sufficient.

5. The FTC provides the following additional recommendations to assist advertisers in making their disclosures clear and conspicuous:

Proximity and placement. To the maximum extent possible, disclosures should be placed on the same screen as the triggering claim (i.e., the claim that raises the need for disclosure).

When users have to scroll to see a disclosure, the FTC recommends that the advertiser use text or visual cues (e.g., “see below for important warranty information”) to alert the reader to scroll and that the disclosure be “unavoidable” (i.e., that the consumer be precluded from proceeding without scrolling through the entire disclosure).

In light of the smaller screen for mobile devices, Web sites should be optimized when viewed on mobile devices to eliminate users from having to scroll left or right to view the entire disclosure.

For a disclosure that is not integral to the triggering claim, a hyperlink to the disclosure may be appropriate when the disclosure is lengthy and/or needs to be repeated because of multiple triggering claims.

The FTC cautions, however, that hyperlinks should generally not be used for cost information or certain health and safety disclosures.

The .com Disclosures provides extensive guidance regarding how to employ properly hyperlinks, including:

- making the hyperlink obvious;
- using clear, understandable language to convey the importance, nature, and relevance of the link and providing readers a reason to click on it;
- using consistent hyperlink styles so the consumer knows it is a link;
- placing the hyperlink adjacent, or in close proximity, to the triggering claim;
- bringing users directly to the disclosure when they click on the link; and
- monitoring and evaluating data, such as click-through rates, to determine if the users are actually viewing and reading the disclosures.

The FTC recommends that advertisers consider the technical limitations of users’ browsers and devices when making disclosures.

For example, because certain mobile devices do not support Adobe Flash, it may not be appropriate to display the disclosure in Flash.

Similarly, advertisers should not communicate disclosures in a pop-up window that can be blocked.

Prominence. It is axiomatic that the prominence of a disclosure is essential in determining whether it is “clear and conspicuous.”

For the FTC, the size, color, and graphics of the disclosure in relation to the other parts of the site, message, app or the ad itself are most critical.

Specifically, the disclosure should be at least as large as the triggering claim in a color that distinguishes it from the rest of the text.

Although not required, graphics often help set the disclosure apart and make it more

prominent.

With the variety of platforms and devices available to consumers, advertisers should account for the different ways in which a disclosure may appear on a particular screen and optimize the design so the disclosure can be viewed more easily.

Additionally, disclosures should not be buried in lengthy terms of use or similar documents, and must be drafted in clear and understandable language.

Finally, when the disclosure addresses a subject other than the primary subject of the ad, the advertiser should consider using a click-through, with no preselected options, to require consumers to acknowledge that they have read and understand the disclosure.

For example, if the purchase of a pot comes with an automatic enrollment in a cooking class, the disclosure should have such heightened prominence.

Repetition. In certain circumstances, it may be necessary or advisable to repeat a disclosure.

For example, if a Web site or application is lengthy or provides multiple points from which a user may access it, repetition of the disclosure may be needed.

The same is true if there are multiple triggering claims or if an ad is republished multiple times across the same service.

Multimedia messages and campaigns. Today, online ads often contain multimedia components, such as audio, video, animation, or augmented reality.

The FTC advises that when evaluating the sufficiency of a disclosure in connection with such multimedia ads, the advertiser should:

- use audio disclosures for audio claims in a volume and cadence sufficient for consumers to hear and understand it;
- use written disclosures for written claims; and
- display video disclosures for a sufficient time for consumers to notice, read, and understand them.

IN RECENT MONTHS, the FTC has been updating its regulations and guidelines in a variety of areas – such as consumer privacy to account for the seismic shifts in online and digital communications, particularly with respect to mobile and social media.

Although the .com Disclosures do offer some additional and more specific recommendations with respect to these technologies and platforms, the fundamental principles of online advertising, as articulated in the original Dot Com Disclosures, still apply.

Thus, businesses still need to ensure that their advertisements are fair, truthfully describe their products and services, and are substantiated. The new guidelines offer businesses new and specific criteria to do so.

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