

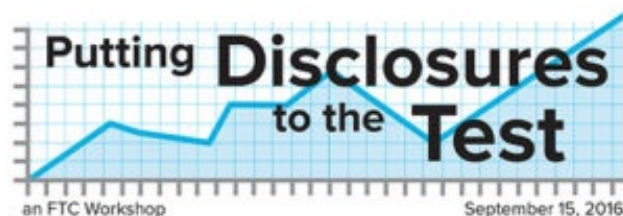
Beyond “Clear and Conspicuous”: FTC Workshop Highlights Issues Related to Testing of Consumer Disclosures

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On advertisements, websites, and legal documents, disclosures are everywhere. But how do consumers notice, understand, and use disclosures in their decision-making? And how can businesses and advertisers effectively design and evaluate disclosures? These were questions that the Federal Trade Commission explored during its September 15 public workshop, “Putting Disclosures to the Test.” Throughout the one-day workshop, academics, industry researchers, and regulators (from the FTC and CFPB) presented research and discussed issues related to the use of disclosures, including evaluation criteria, testing methods, and future areas for exploration.

In opening the workshop, Chairwoman Ramirez identified three primary goals of disclosures: (1) ensure that consumers see or hear the disclosure; (2) convey information in a manner that promotes consumer understanding of the disclosure’s content; and (3) facilitate consumer’s use of the information to make informed choices. Unlike effective disclosures, ineffective disclosures have a tendency to overwhelm, confuse, or distract consumers. Chairwoman Ramirez stated that the same legal principles that have guided the Commission’s approach to disclosures for some time have been applied to new media and technology. She highlighted the Commission’s efforts to provide guidance on these emerging issues, such as through [the 2013 updates to the .Com Disclosures Guide](#) and the [May 2015 release of “The FTC’s Endorsement Guides: What People Are Asking.”](#)



Some speakers noted that even disclosures that comply with the FTC’s clear and conspicuous standard may still be ineffective at communicating necessary information to consumers. Chairwoman Ramirez suggested that use of disclosures in certain areas may be inappropriate altogether, although she declined to specify those areas. Other speakers emphasized the ways that effective disclosures can benefit consumers by preventing advertisements from being deceptive, communicating privacy policies, and providing consent mechanisms. Private research also suggests that there may be additional benefits to businesses from effective disclosures through improved market differentiation and customer satisfaction. Some disclosures, however, may have adverse

consequences like increasing complexity, producing consumer confusion, and creating unintended biases.

Testing disclosures can be helpful to ensure that they have the intended effect without adverse consequences. Testing can also help advertisers design simpler and more comprehensible disclosures. Speakers generally lauded the capacity for disclosure testing to improve the effectiveness of disclosures, although they stopped short of suggesting that testing was legally required and acknowledged that testing is not always feasible. Evaluating disclosures can be expensive and require resources outside of the reach of many businesses. Further, there often is a lack of agreement over the ideal methods and procedures for testing disclosures.

While speakers discussed various methods for testing disclosures and shared their studies and conclusions, the common theme was that no one methodology should be relied upon exclusively. Researchers noted that the objective of a study should determine the methodology used and they emphasized that studies should clearly set forth the procedure and evaluation process at the outset. For example, eye-tracking studies can offer valuable objective information about what consumers pay attention to when approaching disclosures, although they are less effective at measuring comprehension. An online comprehension study may be cheaper than a field comprehension study but it doesn't offer the same capacity to replicate what consumers will actually experience in the marketplace. While the evaluation criteria – along with practical constraints such as cost and time – should guide the methodology chosen to test disclosures, consensus emerged that, ideally, advertisers would simultaneously use different methodologies to ensure that disclosures are operating effectively in each necessary way (*e.g.*, garnering consumer attention, conveying information, facilitating informed choices).

In discussing a study her firm completed for the CFPB on mortgage disclosures, Susan Kleimann of the Kleimann Communication Group emphasized that comprehension entails much more than being able to identify or even recall a disclosure. In order for disclosures to actually be effective, consumers must be able to understand them and integrate the content into their decision-making choices. Joel Reidenberg of Fordham University's Center on Law and Information Policy discussed a technique known as a paired comparison study to analyze the effectiveness of privacy policies at communicating businesses' privacy practices. Reidenberg explained that the use of vague qualifying terms substantially reduced consumer's understanding of privacy policies. Although there are complexities and unanswered questions surrounding the testing and evaluation of disclosures, there was a consensus among researchers and regulators at the workshop on the need for better disclosures, and better and more sophisticated testing of disclosures. Specifically criticized were privacy policies, which speakers noted are often long, complex, and vague.

Given the complexity in evaluating disclosures, and the impetus to improve them, what can businesses do to ensure that their disclosures are noticed and understood? Some specific recommendations from the workshop that may prove helpful include the following:

- Follow FTC guidance to ensure that disclosures are clear and conspicuous, including by using large, high contrast font and making disclosures in simple and clear language. Use headings and bullets where possible to break up information in easily digestible pieces.
- Make multiple or redundant disclosures where the advertising medium allows for it.
- Disclosures should not just be noticeable, but also comprehensible. This means that consumers should not just notice disclosures, but that they should be able to understand the disclosures and be able to make decisions based on the disclosures.

- Don't treat all information in a disclosure as equal. Prioritize information that needs to be disclosed and draw attention to it. Cut out extraneous information that does not promote understanding. Legal counsel can help guide what disclosures may be required by law.
- Think about ways to communicate the same concept in ways that may have more impact. For example, one study involving short-term loans found that disclosing specific dollar amounts associated with higher interest rates was more effective than disclosing the interest rate itself.
- Adapt disclosures to the context in which they appear. A disclosure on a social media page, for example, may need to be formatted differently than disclosures in other media to make clear that it is not part of the user content on the social media page.

It remains to be seen whether the workshop signaled a new era or an incremental step in the FTC's oversight of disclosures. While it's clear that the FTC views testing as potentially valuable, it did not go as far as to suggest that advertisers are required to test a particular disclosure before use. Nor was it suggested that a particular methodology should always be used when advertisers do conduct testing.

Nonetheless, given that advertisers must substantiate the claims that they convey before use and the FTC's clear interest in the issue, advertisers should seriously consider testing risky claims with questionable disclosures before dissemination. When testing is conducted, advertisers should work with researchers to develop and implement an appropriate methodology to evaluate the desired variable. Attorneys may also need to be consulted, particularly in instances where the testing should be maintained under attorney-client privilege. We will continue to monitor and post updates here related to the FTC's approach to and regulation of disclosures.