

FTC Issues Revised Guidelines on Effective Disclosures in Digital Advertising

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On Tuesday, the Federal Trade Commission ("FTC" or "Commission") announced final revisions to the guidance it gives to advertisers on how to keep endorsement, testimonial, and other digital ads in compliance with the FTC Act. [".com Disclosures, How to Make Effective Disclosures in Digital Advertising"](#) ("the Revised Guide") updates a 2000 guidance and addresses the increased use of smartphones and space-constrained advertising platforms such as Twitter and Facebook. The Revised Guide makes clear that the "same consumer protection laws that apply to commercial activities in other media apply online, including activities in the mobile marketplace."

While the Revised Guide is not a rule and does not carry the force of law, it does provide important insight into how the Commission will examine advertisements and related disclosures to assess whether they are false or misleading under federal law.

Background

Initially released in 2000 as ["Dot Com Disclosures, Information About Online Advertising"](#) ("the Original Guide"), the Original Guide begins with the general proposition that if an ad makes express or implied claims that are likely to be misleading without certain qualifying information, then that qualifying information must be disclosed and must be presented "clearly and conspicuously."

Determining whether a disclosure is clear and conspicuous is necessarily fact specific. The Original Guide sets forth six factors to consider when evaluating whether a disclosure is clear and conspicuous:

- the placement of the disclosure and its proximity to the claim it is qualifying;
- the prominence of the disclosure;
- whether the items in other parts of the advertisement distract attention from the disclosure;
- whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and
- whether the language of the disclosure is understandable to the intended audience.

The Revised Guide retains these general considerations, but adds two additional overarching factors to assess whether a disclosure is clear and conspicuous. First, the Revised Guide suggests that

advertisers additionally consider whether the disclosure is "unavoidable." Second, and relatedly, the Revised Guide adds that the necessity of repeating a disclosure will depend on whether "consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure."

Expanding on these general considerations, the Revised Guide provides further insight into the FTC's position on when and how disclosures will be required. The Revised Guide newly recommends discontinuing certain ads altogether if they cannot be supplemented with disclosures that will be clear and conspicuous regardless of how the ad will be viewed. In other words, the Revised Guide makes clear that advertisers must account for the range of devices on which an ad could be viewed – whether conventional desktop browser, smartphone or tablet – in determining whether a disclosure will be clear and conspicuous.

Summary of Updates to Revised Guide

The most important revisions contained in the Revised Guide address (1) evaluating proximity of a disclosure in light of the different mediums that may be used to view the same ad, (2) the use of pop-up disclosures, and (3) the use of space-constrained ads such as banner ads and tweets.

Evaluating Proximity

The closer a disclosure is to the claim it is modifying, the greater the likelihood that a consumer will see it, thus reducing the likelihood that the ad will be misleading. Nonetheless, the FTC has acknowledged that the length and complexity of a disclosure may make it difficult to include on the same screen as the modified claim itself.

While the Revised Guide retains the initial recommendation that advertisers use text or visual cues to encourage a consumer to scroll to the disclosure, it goes a step further in recommending that certain disclosures be made "unavoidable." A disclosure is "unavoidable" when a consumer cannot proceed further with a transaction without scrolling through it.

The Revised Guide additionally explains that advertisers must account for small screens of smartphones and tablets. In order to ensure that disclosures are clear and conspicuous under all anticipated circumstances, an advertiser should either (1) create a mobile-optimized version that the advertisement will default to and ensure that the version provides adequate clear and conspicuous disclosures, or (2) design the ad such that disclosures are clear and conspicuous regardless of how they are viewed.

Use of Pop-Up Disclosures

The Revised Guide strengthens language in the Original Guide, which warned that "research may show that consumers don't actually read information in pop-up windows." Specifically, the Revised Guide goes a step further and expressly advises advertisers to avoid the use of pop-up disclosures unless certain precautions are taken.

For instance, the Revised Guide provides that advertisers cannot ignore the existence of pop-up blockers and therefore "should not disclose necessary information through the use of pop-ups that could be prevented from appearing by pop-up blocking software."

Use of Space-Constrained Ads

The Revised Guide expands significantly on how the FTC will assess disclosures for space-constrained ads. Importantly, the Revised Guide provides that certain claims will never be

appropriate for space-constrained ads. The Commission explains that if a "disclosure needs to be in the ad itself but it does not fit, the ad should be modified so it does not require such a disclosure." If that cannot be done, then the advertiser should simply not use a space-constrained ad.

The Revised Guide sets forth additional considerations for advertisers assessing the capacity to use space-constrained ads such as banner ads and tweets:

- Consider whether a product can be purchased in a conventional retail store or whether consumers must click through to a linked website. The capacity to purchase at physical retail locations means that consumers may miss disclosures that were not part of the space-constrained ad itself and, therefore, increase the likelihood that the disclosure must be included in the ad itself.
- Do not assume that consumers will see and associate multiple space-constrained ads. For instance, subsequent tweets attempting to provide a disclosure regarding an earlier tweet will likely be considered insufficient.
- Consider whether consumers are likely to understand short-form disclosures. For example, the Commission suggests that while the phrase "Ad:" at the beginning of a tweet or similar message would adequately inform consumers that the message is a paid ad, the phrase "Spon" is less likely to be understood to indicate a sponsored message.
- Account for the possibility of republication. To the extent disclosures are necessary in space-constrained ads that may be republished, advertisers should either place them at the beginning of the message or ensure adequate space at the end of the message so the disclosure is likely to be included in republication.

Conclusion

The Revised Guide provides important information as to how the FTC will assess whether certain digital ads provide effective disclosures under federal law. After much deliberation, the release of the Revised Guide is likely to result in increased oversight and enforcement actions with regard to digital disclosures. Advertisers should consider the factors discussed in the Revised Guide when developing digital advertisements, determining whether disclosures are necessary, and assessing how to make required disclosures.

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The attorneys in Kelley Drye & Warren's [Advertising and Marketing practice group](#) have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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