

Articles

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FTC's Updated .com Disclosures Guidance

DM Confidential

The Federal Trade Commission ("FTC") issued new guidance for digital advertisers and marketers, "**.com Disclosures: How to Make Effective Disclosures in Digital Advertising**" ("**.com Disclosures Guide**" or "**Guide**"), on March 12, 2013. The guidance is designed to help mobile and other online advertisers make disclosures clear and conspicuous to avoid deception.

The revision to the Dot Com Disclosures Guide is the first since 2000, when smartphones, tablets, and social media marketing were not in wide use. The revised Guide emphasizes that consumer protection laws apply equally to marketers across all mediums, whether delivered on a desktop computer, a mobile device, or more traditional media such as television, radio, or print.

The Guide emphasizes timeless truth-in-advertising principles, including that "if a disclosure is needed to prevent an online ad claim from being deceptive or unfair, it must be clear and conspicuous." The FTC says this principle means advertisers should ensure that the disclosure is clear and conspicuous on all devices and platforms that consumers may use to view the ad.

Among the revisions, the Guide includes updated guidance taking into account the increase in the use of small screens and mobile advertising and contains mock ads that illustrate the updated principles. For example, the Guide illustrates how placing a web page disclosure in a different column than the statement it explains, rather than directly under the statement, may make it difficult for consumers to notice the disclosure when the consumer is viewing the web page on a mobile device that has not been optimized for mobile viewing. In that case, the consumer must zoom in to read the statement, and the zoomed-in view is unlikely to encompass the disclosure. The new Guide also explains that if an advertisement without a disclosure would be deceptive or unfair, or would otherwise violate a Commission rule, and the disclosure cannot be made clearly and conspicuously on a device or platform, then that device or platform should not be used.

The new Guide says disclosures should be "as close as possible" to the relevant claim. Like the original guidance, the updated .com Disclosures Guide calls on advertisers to avoid using hyperlinks for disclosures that involve information integral to the offer or claim, such as product cost or certain health and safety issues. The new guidelines also call for labeling hyperlinks as specifically as possible, and they caution advertisers to consider how their hyperlinks will function on various programs and devices.

For space-constrained ads, such as on some social media platforms, the new guidance says advertisers must still provide disclosures necessary to prevent an ad from being deceptive, and it advises marketers to avoid conveying such disclosures through pop-ups, because they are often blocked.

The .com Disclosures Guide is not a rule or regulation but general principles that describe the type of disclosures the FTC expects for digital advertisements. Although the Guide does not have the force and effect of law, the failure to comply with a guide might result in an enforcement action alleging an unfair or deceptive practice in violation of the Federal Trade Commission Act.

General Background

Generally, advertisers are responsible for ensuring that all express and implied claims that an ad conveys to reasonable consumers are truthful and substantiated. When identifying these claims, advertisers should not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name, and depictions. If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed.

A disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be

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sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

Scope of the Guide

The .com Disclosures Guide only addresses disclosures required pursuant to laws that the FTC enforces. It does not address disclosures that may be required pursuant to local, state (e.g., many sweepstake requirements), or other federal laws or regulations (e.g., regulations issued by the Consumer Financial Protection Bureau (“CFPB”) or the Food and Drug Administration (“FDA”)). Specific statutes and regulations, including those enforced by the CFPB and FDA may have different requirements. Nonetheless, the Guide provides principles that federal and state regulators and private litigants may point to as a basis for when and how a disclosure should be made in digital advertising.

Guidance Highlights

Below are some highlights from the new Guide:

- **Disclosure Standard** – Advertisers should make sure their disclosures are clear and conspicuous on all devices and platforms that consumers may use to view their ads. Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. Additional guidance includes:
 - Don’t assume that consumers read the entire website.
 - Draw attention to the disclosure.
 - If the disclosure can’t be made to be clear and conspicuous, modify the claim so the disclosure is not necessary or don’t use the claim.
 - If the platform doesn’t support the appropriate placement of the disclosure, then don’t use it to disseminate the advertisement.
- **Design Considerations** – Disclosures should be “as close as possible” to the relevant claim. Hyperlinks should be avoided for disclosures involving key information and should not be used to bury advice or be buried themselves. Advertisers should label hyperlinks as specifically as possible. If there are indications that a significant portion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved. Hyperlinks should be used consistently and be obvious. Don’t use pop-ups or other means to convey a disclosure that can be bypassed.
- **Space Constraints** – Unique features in online ads including social media and mobile devices, may affect how an ad and any required disclosures are evaluated. Don’t assume that consumers will see each and every space-constrained advertisement if done in sequence, such as on Twitter. In addition, the Guide suggests that short-form disclosures might not be adequate to inform consumers of the essence of a required disclosure. Tweets, for example, could begin with “Ad:” and use “Sponsored” to convey when a message is sponsored. Consider what processes are in place to retain disclosures upon republication and if the content is printed.
- **Evaluation of Disclosures** – To evaluate whether a particular disclosure is clear and conspicuous, consider:
 - Proximity and Placement – evaluate proximity; hyperlinks may be used, but not for integral or inseparable information; consider the label and placement of hyperlink
 - Prominence – consider the size, color, device, and graphics
 - Distracting Factors in Ads – don’t let other parts of the ad get in the way
 - Repetition – repeat as needed
 - Multimedia Messages and Campaigns – for audio claims, use audio disclosures; for written claims, use written disclosures, display visual disclosures for a sufficient duration
 - Understandable Language – avoid legalese or technical jargon, avoid diminishing the disclosure with extra material, icons and abbreviations cannot prevent a claim of misleading if a significant minority of consumers do not understand the meaning

The Guide uses 22 mock advertisements to present scenarios to illustrate one more of the above factors.

The FTC provides a summary of the .com Disclosures Guide at <http://www.ftc.gov/opa/2013/03/dotcom.shtm>.

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