

ALERTS

Advertising & Marketing Alert - Are Your Ad Disclosures Clear And Conspicuous? The FTC Dictates Disclosures In Digital Advertising

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On March 12, 2013, the Federal Trade Commission (FTC) released its revised guidelines for Dot Com Disclosures, the first update to these guides since the year 2000. It has always been the law that disclosure of information has to be clear and conspicuous if it is necessary to prevent an advertising claim from being deceptive or unfair. The revised guides reach advertising through devices and platforms such as mobile devices and social media. Those familiar with the FTC's general truth-in-advertising principles will not be surprised that the FTC has now adopted a stricter stance regarding disclosures in the ever-changing landscape of digital advertising where space to disclose important information to consumers is limited.

The FTC's Deception Policy Statement states that an advertisement 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 a consumer's decision to buy or use the product. The FTC has highlighted four key points for advertisers to consider in their approach to disclosures in light of the revised Dot Com Disclosures.

First, no matter what innovative technologies or advertising methods become "hot" now or in the future, the well-established truth in advertising principles still apply.

Second, disclosures must be clear and conspicuous, and advertisers should make sure that disclosures are clear and conspicuous on all devices and platforms that consumers may use to view ads. If a disclosure cannot be made clearly and conspicuously on a particular device or platform, the FTC warns that the ad should not be run. This is a warning to all advertisers to review and perhaps revise their advertising that contain disclosures on websites and mobile devices to reflect how consumers are viewing their advertisement.

Third, it is no longer sufficient that disclosures be "near, and when possible, on the same screen." Now, disclosures should be "as close as possible" to the relevant claim. In addition, the FTC has warned advertisers against using hyperlinks to disclosure material information to consumers, especially key categories of information such as health or safety information. Advertisers should label hyperlinks as specifically as possible and repeat those hyperlinks as need-be depending on the nature of the mobile device or webpage.

Finally, if you have an advertisement on a social media platform that is space-constrained, such as a TweetTM, be prepared to drastically

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reformat your advertising. In the example portion of the revised guide, the FTC provides a sample Tweet advertising a weight loss supplement that both signals that the person making an ad claim is a paid endorser by beginning the Tweet with “Ad:” and discloses the typical weight-loss expected with that supplement. The FTC states that a Tweet that follows this pattern will contain the required disclosures, and that Tweets that follow similar patterns can easily incorporate necessary disclosures to consumers. Lastly, the FTC states that marketers should avoid conveying disclosures through pop-ups because they are often blocked.

If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violates a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that advertisement should not be disseminated.

The revised Dot Com Disclosures signal how the FTC will review an advertiser’s disclosures and how consumers might view and be deceived by an advertisement where a disclosure is not “as close as possible” to the claim. Advertisers and marketers are now on notice as to what the FTC might consider deceptive and what could lead the FTC to bring a deceptive advertising claim as part of its statutory authority.

For more information, please contact the attorney with whom you work or Joan Long, chair of the firm’s Advertising and Marketing group, at (312) 214-4576 or joan.long@btlaw.com; and Olivia Fleming at olivia.fleming@btlaw.com or 317-231-6444.

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