

FTC Invites Public Comments on the Revision of the “Dot Com Disclosures” Business Guidance Document

June 10, 2011

The Federal Trade Commission (FTC) is considering updating and reissuing the “Dot Com Disclosures” business guide¹ that it originally issued in 2000 to assist online advertisers in complying with consumer protection laws. In a nod to the times, the FTC has acknowledged that the online world has changed dramatically since the guide was published 11 years ago. In particular, the FTC noted that when the guide was issued mobile devices were not prevalent, the “app” economy did not exist, use of pop-up blockers was not widespread, and online social networking was not popular or sophisticated.

Designed to help advertisers and others maintain compliance with the FTC Act, the “Dot Com Disclosures” business guide is not binding law, but it does provide insight on the FTC’s current thinking as to compliance with the FTC Act. In fact, although not a formal regulation, the business guide has been cited by the FTC in its comments accompanying Consent Orders (*see, e.g., In the Matter of Basic Research, L.L.C.*, 2004 F.T.C. LEXIS 273 (F.T.C. Aug. 20, 2004) and *In the Matter of Advertising.com, Inc.*, 140 F.T.C. 220 (F.T.C. Sept. 12, 2005)) and by federal courts considering unfair and deceptive advertising claims (*see, e.g., In re VistaPrint Corp Mktg. & Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 77509 (S.D. Tex. Aug. 31, 2009)).

Through its recent announcement, the FTC seeks input on how it may ensure that the “Dot Com Disclosures” guide remains relevant and useful. In particular, given the complicated issues facing online marketers in today’s rapidly changing electronic marketplace, it is expected that the FTC will seek to address subjects such as the ones listed below with its revisions:

- **Social Media:** The nature of social networking sites makes it difficult for advertisers to meet their obligations to ensure that their goods and services are described honestly and fairly, and that all necessary disclosures are made in a clear and conspicuous manner. User-created content on sites like Twitter and Facebook is generally not under the advertiser’s control. Moreover, such content may be created by anonymous parties without the advertiser’s consent and limitations posed by these mediums (e.g., the 140-character limit on Twitter) make meaningful disclosure challenging. The same issues are currently being considered by the Food and Drug Administration as it develops its long-awaited social media guidelines for prescription drugs.

1. Available online at <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf>.

- **Behavioral Advertising:** The use of technology such as “cookies” to track consumers’ online activity and provide targeted online advertising raises privacy concerns and disclosure issues. While there are benefits to consumers from such technologies, which help companies deliver more personalized content and advertisements, since the technology is largely invisible and relies upon personal information that is generally collected without consent, the FTC publicly has stated that it supports providing consumers with an easy browser-based “Do Not Track” mechanism.
- **New Technologies:** Every year consumers are offered access to new and exciting tools they can use to surf the web, interact with their friends and families, conduct business, and engage in commerce. Regardless of the type of mobile device—a BlackBerry, Android, or iPhone smartphone, or an iPad or Android tablet—these devices present significant technological advances yet pose unique challenges to advertisers seeking to describe their product offerings truthfully and fairly. The challenges stem from the operating systems on which these devices run; the mobile networks these devices use, which allow for consumer location information; and the limited space their screens offer. Yet other new advances, such as facial recognition by these devices, raise additional privacy and disclosure issues.

We also expect consumer perception evidence to be of interest to the FTC as it engages in its review of the “Dot Com Disclosures” guide. It is unclear whether the FTC plans to conduct its own consumer perception study, as it did with the recent proposed revision of the FTC Green Guides, but it seems likely considering that consumer surveys are regularly used in false advertising litigation under the Lanham Act, as well as in contentious administrative proceedings at the National Advertising Division of the Council for Better Business Bureaus. It appears that the FTC is also interested in considering any relevant studies conducted by advertisers, consumer groups, and other parties.

The FTC has invited the public to comment on the following specific questions:

- What issues have been raised by online technologies or Internet activities or features that have emerged since the guide was issued (e.g., mobile marketing, including screen size) that should be addressed in a revised guidance document?
- What issues raised by new technologies or Internet activities or features on the horizon should be addressed in a revised guide?
- What issues raised by new laws or regulations should be addressed in a revised guide?
- What research or other information regarding the online marketplace, online advertising techniques, or consumer online behavior should the staff consider in its revisions?
- What research or other information regarding the effectiveness of disclosures—and, in particular, online disclosures—should the staff consider?
- What specific types of online disclosures, if any, raise unique issues that should be considered separately from general disclosure requirements?
- What guidance in the original “Dot Com Disclosures” document is outdated or unnecessary?

- What guidance in “Dot Com Disclosures” should be clarified, expanded, strengthened, or limited?
- What issues relating to disclosures have arisen from such multiparty selling arrangements in Internet commerce as (1) established online sellers providing a platform for other firms to market and sell their products online, (2) website operators being compensated for referring consumers to other Internet sites that offer products and services, and (3) other affiliate marketing arrangements?
- What additional issues or principles relating to online advertising should be addressed in the business guidance document?
- What other changes, if any, should be made to “Dot Com Disclosures”?

The deadline for submitting comments to the FTC on the “Dot Com Disclosures” business guide and the issues discussed in this LawFlash is July 11, 2011. If you have any questions, would like more information on these issues, or would like assistance preparing and filing comments with the FTC, please contact any of the following Morgan Lewis attorneys:

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