

Client Alert

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FTC Warns Advertisers to Check the Fine Print in “Operation Full Disclosure”; Shot Across the Bow Could Signal Law Enforcement Actions to Come

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The Federal Trade Commission (FTC) [announced this week](#) that it sent warning letters to more than 60 national advertisers regarding the inadequacy of disclosures in their television and print ads. The letters are part of an initiative named “Operation Full Disclosure,” which the FTC implemented to review fine print disclosures and other disclosures that it believed were difficult to read or easy for consumers to overlook, yet included critical information that consumers would need to avoid being misled.

WHAT DOES IT MEAN FOR A DISCLOSURE TO BE “CLEAR AND CONSPICUOUS”?

Disclosures may be necessary to clarify a claim or to ensure that the full terms of an offer are adequately disclosed, in order to avoid a charge of deception by material omission. In FTC jurisprudence, disclosures must be “clear and conspicuous,” and while they may *modify* claims in the text of an ad itself, they may not *contradict* any such claims. The most recent pronouncement on how to make effective disclosures (this one was focused on online disclosures, but the general principles are the same) was issued in [March 2013](#). *The key is that if a disclosure is necessary to make an ad truthful and not misleading, it must be clear and conspicuous; otherwise, it is as though the disclosure was not made at all.*

Whether a disclosure is adequate to meet the “clear and conspicuous” test depends on a number of factors, the most important of which are:

- the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying;
- the prominence of the disclosure;
- whether the disclosure is unavoidable;
- the extent to which items in other parts of the advertisement might distract attention from the disclosure;
- whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss 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.

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NEXT STEPS: LAW ENFORCEMENT SWEEP?

In light of the FTC's recent warnings, advertisers would be well-advised to review their ads and disclosures anew to make sure they comply with the FTC's standards for clear and conspicuous disclosures in both offline and online advertising. We expect the FTC may well follow this group of warning letters with a series of enforcement actions, as it did in 1996 against a number of auto manufacturers for the mouse print in their leasing ads. The FTC followed up with Mazda in 1999, alleging that it failed to abide by the FTC's stipulated order on proper disclosures, settling for \$5.25 million.

WHAT DID THE FTC HIGHLIGHT IN THE WARNING LETTERS? – MAKE SURE YOU GET THESE RIGHT!

Although the FTC has not disclosed which companies received the warning letters, it indicated that the 60-plus recipients include 20 of the largest advertisers in the country, a wide range of industries and types of products, and both English- and Spanish-language ads. FTC staff sought to identify a representative sample of advertisers that made inadequate disclosures and emphasized that advertisers who did not receive a letter should not assume that their ads are fine simply because they did not receive a warning letter.

Similarly, the FTC's focus on television and print ads does not mean that other forms of advertising get a pass; the FTC is equally concerned about disclosures that appear in other media, such as online and on mobile devices.

The FTC identified several types of inadequate disclosures in the television and print ads it reviewed. Examples of the inadequate disclosures include the following:

- quoting the price of a product or service without disclosing conditions for obtaining the price;
- failing to disclose an automatic billing feature;
- claiming that a product capability of an accessory was included without disclosing the need to first buy or own an additional product or service;
- claiming that a product was unique or superior in a product category without disclosing the advertiser's narrow definition of the category;
- making comparative claims without disclosing the basis of the advertiser's comparisons;
- promoting a "risk-free" or "worry-free" trial period without disclosing that consumers have to pay shipping costs; and
- making absolute or broad statements without explaining relevant exceptions or limitations.

CONCLUSION

In light of the FTC's recent warnings, advertisers would be well-advised to review their ads and disclosures anew to make sure they comply with the FTC's standards.

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