

FTC Updates Social Media & Online Advertising Guidelines – Disavowing Settled Practices and Imposing Tighter Disclosure Requirements for Digital Advertising

The Federal Trade Commission (FTC) recently released [new guidance](#) for making effective disclosures in digital advertising, proposing stricter requirements that should lead all those participating in digital advertising to re-examine their current practices and procedures. Released on March 12, 2013, the new FTC *.com Disclosures* guidance updates its original May 2000 *Dot Com Disclosures* that provided guidance for making disclosures in the online world. The FTC's recent update attempts to account for the current mobile advertising environment, the rise of social media marketing, and experience under the original disclosure guidance. The old guidance merely allowed for "proximity" of disclosures – that is, disclosures that were "near, and when possible, on the same screen." The new guidance places heightened emphasis on disclosures being clear and conspicuous to consumers across all platforms. The newly announced principle is that disclosures should be "as close as possible," with short form disclosures such as hyperlinks or hashtags permitted only when their meaning is understood by consumers.

This change is potentially significant, and the new *.com Disclosures* guidance should be carefully understood by those participating in digital advertising. For example, under the new guidance, the FTC advises that "#Sponsored" likely is acceptable in a sponsored tweet, but that "#spon" likely is not acceptable – and is deceptive – because consumers might not understand what "#spon" means. The new guidance also addresses at length the challenges presented by advertisements on mobile devices, taking the position that if a platform is not capable of displaying clear and conspicuous disclosures, then the platform should not be used for digital advertising. On this basis, the FTC advises against using Flash media for disclosures since its use is not yet universal.

Before releasing the revised guidance, the FTC sought input through three public comment periods and a public workshop. Although technically not binding, the new *.com Disclosures* guidance reflects the FTC's current interpretation of the legal requirements applicable to disclosures pursuant to Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices." Under the Act, if an advertisement makes express or implied claims that are likely misleading unless qualified, then the qualification or disclaimer must be disclosed "clearly and conspicuously" to the consumer.

The FTC is now placing increased emphasis on advertisers going to greater lengths to make disclosures unavoidable to consumers, advocating that advertisers take steps to ensure that consumers read disclosures made on "space-constrained" social platforms and mobile devices. Consistent with the FTC's recent guidance on privacy disclosures, the updated guidance's new emphasis on disclosures being "as close as possible" demonstrates a keen interest by the FTC in the user interface design of consumer disclosures generally. The Agency's revised guidance provides a number of detailed examples and suggested approaches that illustrate its current thinking:

- **Social Media Platforms.** The new guidance, in directly addressing the rise of advertising on social media platforms in the last decade, clarifies that "space-constrained" platforms such as Facebook and Twitter are not exempt from disclosure requirements. Rather, in the FTC's view, space-constrained advertisements present special difficulties that require thoughtful handling. Advertisers should make disclosures in the space-constrained advertisement itself, whenever possible, or clearly and conspicuously on the linked website:

- The revised guidance provides the example of a celebrity endorser tweeting about her atypical experience with a weight loss supplement. Two disclosures, according to the FTC, are necessary: (1) the celebrity is a paid endorser of the product; and (2) the typical weight loss experienced by a consumer. The FTC indicated that the following tweet has acceptable disclosures: “Ad: Shooting movie beach scene. Had to lose 30lbs in 6 wks. Thanks Fat-away Pills for making it easy. Typical loss: 1lb/wk.”
- The FTC indicated, though, that a tweet with the following attempts at disclosure were all unacceptable: #spon, as consumers might not understand that the hashtag was intended to indicate that the message was sponsored; and bit.ly/f56 and bit.ly/f56/disclose[6], as consumers might not realize the relevance of either link. With respect to the #spon hashtag, the FTC did advise that #Sponsored is acceptable and, more important, that abbreviations or icons generally may require empirical evidence to demonstrate they are effective disclosures until their usage is “sufficiently widespread to provide confidence that consumers see them and understand what they mean.”
- If a product promoted in a space-constrained advertisement can be purchased in a brick-and-mortar store or through a third-party online retailer, consumers who do not click through to a linked website would arguably miss any disclosure not included in the advertisement. Accordingly, for such products, the FTC indicated that “[i]f the 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 or, if that is not possible, that space-constrained ad should not be used.”
- The FTC also suggests advertisers consider how disclosures will appear if a space-constrained advertisement is republished or retweeted. In a questionable portion of the updated guidance, the FTC recommends that if a disclosure is placed at the end of a message, the original message should include enough free space so that the disclosure is not lost if the message is republished or retweeted.
- **Mobile Platforms.** The updated guidance also advises businesses ensure that their online advertisements remain clear and conspicuous when viewed on mobile devices, taking into account the limited screen space and technical capabilities of such devices. An advertisement that is clear and conspicuous when viewed on a standard computer screen may not be when viewed on a smaller screen. Unless the advertisement is mobile-optimized to be clear and conspicuous regardless of the device on which it is displayed, the FTC advises not using it.
- **Screen Proximity.** A disclosure should be viewable on the “same screen” as the triggering claim where possible. Ideally, advertisements should not require scrolling for a user to view a disclosure. If scrolling is necessary to view a disclosure, such as on a smartphone with a small screen size, advertisements should include text or visual cues to encourage scrolling. Advertisers should also attempt to ensure that a user cannot advance to a subsequent page or proceed with a transaction without scrolling to the disclosure.
- **Hyperlinks.** The revised guidance significantly narrows the FTC’s perspective on when and how hyperlinks may be used generally. Disclosures that are an integral part of a claim or inseparable from it, such as certain cost or health and safety information, should not be communicated through a hyperlink and instead should be placed directly next to the claim. When used, hyperlinks should be placed close to the triggering claim. Hyperlinks should also be labeled to convey the importance,

nature, and relevance of the linked information. Generic hyperlink labels such as “disclaimer” or “terms and conditions” are now seen as inadequate.

- **Pop-Up Disclosures.** Having disclosures appear in pop-up windows is discouraged because users may automatically block pop-up windows or instantly close them without reading the qualifying information. So too is using display software that is not universally deployed, such as Adobe’s Flash Player, for delivering disclaimers.
- **Disclosures Displayed Prior to Purchase.** The revised guidance expresses the FTC’s view that qualifying information or disclosures should be provided before the user clicks on an “add to shopping cart” or “order now” link.
- **Prominence & Repetition.** In addition to making sure that disclosures are capable of being viewed by varied devices, the updated guidance advises that disclosures be prominent, and that advertisers not bury disclosures in “terms of use” or other lengthy text. Also, given the multiple ways consumers can access and navigate websites and applications, the Agency suggests advertisers repeat disclosures on lengthy sites and applications as necessary.
- **Multimedia Messages.** Finally, according to the revised guidance, if an advertisement contains an audio claim, then an audio disclosure should be used to qualify the claim. Similarly, the revised guidance indicates that, for video advertisements containing a claim, visual disclosures should be displayed for a sufficient duration, analogous to disclosures in television commercials.

For more information about the FTC’s recent *.com Disclosures* guidance and its impact on your business, please contact [Peter Brody](#), [Jim DeGraw](#), [David McIntosh](#), or [Paul Rubin](#) of our [Social Media](#) team or your usual Ropes & Gray advisor.