

Client Alert.

March 14, 2013

FTC Updates Its “Dot Com Disclosures” with a Focus on Social Media Advertising

By D. Reed Freeman, Jr., Julie O’Neill, and Nicholas Datlowe

On March 12, 2013, the Federal Trade Commission (“FTC”) issued an update to its “Dot Com Disclosures” guide to advertisers on making effective online disclosures. In doing so, the FTC has driven home the points that:

- The consumer protection laws apply to *all* advertisers, regardless of the medium used—and including social media, even where there is limited space;
- Disclosures required to avoid deception or to otherwise comply with the law must be presented in a *clear and conspicuous* manner;
- Advertisers need to understand how their ads—including any disclosures required to avoid deception or to otherwise comply with the law—*will actually display* in the medium or media in which they appear; and
- If an advertiser cannot make a required disclosure effectively in a particular medium, *then it should not run the ad in that medium.*

The FTC issued the original Dot Com Disclosures in 2000, and the recent revision provides guidance with respect to technologies that have emerged since then. Although the fundamental rules have not changed, the guidance provides useful information on how the FTC believes advertisers should comply with the law when making claims in various media.

WHAT DO THE CHANGES MEAN?

Advertisers should review the media in which their ads are running, in order to ensure that required disclosures are clearly and conspicuously displayed in all such media. For instance, the disclosures on an advertiser’s website may be fine when the site is viewed on a desktop, but they may not be sufficiently clear and conspicuous when viewed on a mobile browser.

According to the FTC, if there are indications that a significant proportion of consumers are either not seeing or not comprehending an advertiser’s disclosures – such as through consumer complaints or low click-through rates on relevant links, and other empirical evidence an advertiser receives about its site or other property – *then the advertiser should modify them.*

Finally, if it is not possible to make a required disclosure clear and conspicuous in a particular medium, then the advertiser *should either modify the ad or not run it.* If the limitations of a particular platform make it impossible to make the required disclosures, then an advertiser should not advertise on that platform. This is particularly important in space-constrained ads, such as tweets and other social media.

Client Alert.

BASIC PRINCIPLES

In its revised Dot Com Disclosures (formally known as .com Disclosures: How to Make Effective Disclosures in Digital Advertising), the FTC reminds advertisers that its authority to pursue unfair or deceptive acts or practices broadly covers advertising claims, marketing, and promotion in almost every sector of the economy, and in all media. Accordingly, the basic principles of advertising law – that ads be truthful, not misleading, and supported by adequate substantiation – apply regardless of the media in which they are disseminated. The FTC explains in the guide that, where it has issued more specific guidance with regard to a specific sector of the economy or a specific practice, the Dot Com Disclosures guide is not intended to replace, but rather to supplement, that guidance.

THE CLEAR AND CONSPICUOUS REQUIREMENT

It has long been a staple of advertising law that, if a disclosure is necessary to keep an advertisement from being deceptive, or a disclosure is otherwise required by law, then it must be presented clearly and conspicuously.¹ Whether or not the disclosure meets this requirement is measured by performance—that is, whether reasonable consumers actually perceive and understand the disclosure in the context of the ad.

There is no set formula for making a clear and conspicuous disclosure. Whether a particular disclosure meets the standard must be judged in the context of the ad, including the information the disclosure must convey. *Notably, the revised Dot Com Disclosures make clear, over and over, and with examples, that space constraints such as those in social media do not relieve advertisers of their responsibilities.* Advertisers should consider how important the disclosure is, what information needs to be disclosed, and the extent of the burden of placing the disclosure in the ad when determining the media in which to place it.

STANDARD FOR “CLEAR AND CONSPICUOUS”

In evaluating whether a disclosure is sufficiently clear and conspicuous, the FTC recommends that advertisers consider the following factors:

- The placement of the disclosure, its proximity to the claim being modified, and its prominence;
- Whether it is unavoidable to consumers;
- Whether other parts of the ad distract from the disclosure;
- Whether it needs to be repeated in order to ensure that it is seen and understood by consumers;
- Whether audio and visual disclosures are presented in a style and duration sufficient to ensure comprehension by consumers; and
- Whether the language of the disclosure is understandable to the intended audience.

¹ Moreover, while a disclosure can qualify or limit a claim, it cannot cure a false claim.

Client Alert.

Proximity and Placement

- **Close proximity.** A disclosure will be more effective if it is placed *near the qualified claim*. It should therefore be as close as possible to that claim. If a simple disclosure can be easily placed right into the product description or claim, it should be.
 - *Considerations for scrolling.* If the placement of a disclosure might require a consumer to scroll (in any direction—consider viewing a website on a mobile device) in order to see it, the ad should *encourage the consumer to scroll* to see it. Generic statements such as “Details below” are likely insufficient, as they do not convey the importance of viewing the disclosure. A statement along the lines of “See below for important terms and conditions” may work, depending on the context. If it is unavoidable for a consumer to have to scroll to see a disclosure, then *the disclosure should be made unavoidable*, too—by, for example, placing the link to proceed with a transaction below the disclosure. *Optimizing the ad for mobile screens will eliminate the need for scrolling left or right on any platform and thus is encouraged.*
- **Use of a hyperlink – when not permitted.** Simple disclosures should not be placed behind a hyperlink, nor should disclosures that are an integral part of a claim or inseparable from a claim. This is particularly true of cost information, and health or safety information. Such disclosures should be made *on the same page, immediately next to the claim, and sufficiently prominent to ensure the disclosure and the claim are read at the same time.*
- **Use of a hyperlink – when permitted.** If a disclosure is placed behind a hyperlink, the link should be named specifically to indicate the nature and importance of the information behind it. Generic statements such as “Disclaimer” or “More information” are likely inadequate because they do not convey such information. A more specific name along the lines of the following example would be required: “Service plan required. [See service plan options and prices.](#)” In addition, links should be styled so that they are recognizable as links, and the information behind them should be easily and immediately accessible. Advertisers should be aware of technological limitations when designing links, as sufficient indication of importance in one medium may not be effective in another. For example, mouse-over indicators may not be effective on mobile screens, which generally do not have cursors.
 - Finally, if there are indicia, such as low click-through rates or short periods of time spent on disclosure pages, that indicate that disclosures are not being read, it will be necessary to find another method for making the required disclosure.
- **High-tech methods of disclosure, such as pop-ups.** High-tech methods of disclosure, such as panes that scroll with the window or pop-ups, may be effective. *Advertisers should be aware, however, that certain devices cannot take advantage of such technologies. Furthermore, many pop-ups can be blocked, and many that are not blocked are ignored.* Disclosures made via a pop-up can be made more effective by requiring the customer to take affirmative action—e.g., selecting a “Yes” or “No” button, where no choice has been preselected—in order to proceed.

Client Alert.

- **Timing.** *Disclosures must be effectively communicated before the decision to purchase.* In the online space, this means before the consumer clicks the “Buy Now” or “Add to Cart” button. Advertisers should keep in mind that disclosures related to a particular product should not be made only on the order screen because the consumer may never proceed that far; he or she may decide to purchase the product in another on- or offline store.

Prominence

- **Prominent presentation.** To be clear and conspicuous, a disclosure must be prominent in the context of the ad. In evaluating prominence, advertisers should consider the color, size, and graphics of the disclosure in relation to other parts of the ad. Advertisers should also be aware that websites may display on different programs and devices, and should account for such differences. *Disclosures should be prominent, no matter the device on which they are viewed.*
- **Not buried.** Disclosures should not be buried in long paragraphs of text or in unrelated pages, such as a website’s terms of use. *Even if such disclosures may be effective according to contract law, they may not immunize advertisers from enforcement under consumer protection laws.*
- **Additional disclosure and receipt of acknowledgment.** Disclosures relating to products or services not related to the advertised product (such as when a negative option trial is packaged with an advertised product) may require additional disclosures to ensure that consumers are able to see and understand all applicable terms and conditions. Such disclosures may require consumers to affirmatively select an option indicating they have actually read and understood the disclosure.

Other Considerations

- **Space-constrained ads.** Space constraints, such as those in social media, do not relieve advertisers of their consumer-protection responsibilities. The same rules apply. *Required disclosures should still be made in the ad itself or conspicuously on the page to which the ad links.* Advertisers should consider how important the disclosure is, what information needs to be disclosed and the extent of the burden of placing the disclosure in the ad when determining where to place it.
- **Distraction elements.** When determining whether a disclosure is sufficiently clear and conspicuous, the ad must be considered as a whole. Thus, elements of the ad that distract from the disclosure should be minimized.
- **Repetition.** Repeating the disclosure may be necessary to ensure that it has been presented in a sufficiently clear and conspicuous manner. This is particularly true on long websites or applications, or in cases where consumers may enter the website not through a home page but (for example) from a link in a search engine. Moreover, if the claim requiring the disclosure is repeated throughout the ad, the disclosure should accompany the claim each time.
- **Same method of presentation.** A disclosure should be made in the same manner as the claim requiring the disclosure. For example, audio claims should be accompanied by audio disclosures.

Client Alert.

- **Method of delivery.** In all cases, disclosures should be accessible to consumers—displayed long enough to be read, or delivered at a volume and cadence sufficient to allow the consumer to understand. Furthermore, the language used for the disclosure should be clear, simple, and straightforward. If icons are used, they should be icons that the majority of consumers will understand. Advertisers should keep in mind that the test for whether a disclosure is effective is to the extent to which consumers actually perceive and understand it.
- **Be sure the disclosure is displayed and sticks.** Disclosures should appear in each ad; should stick with the ad through republication (if the medium allows it); and, if interactive, should appear in the ad itself (rather than via hyperlink).

Contact:

D. Reed Freeman, Jr.
(202) 887-6948
rfreeman@mofo.com

Julie O'Neill
(202) 887-8764
joneill@mofo.com

Nicholas Datlowe
(202) 887-1590
ndatlowe@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for nine straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.