



FTC Considers Updating Online Advertising Guide

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The Federal Trade Commission (“FTC”) [announced](#) on May 25, 2011, that it is considering updating and reissuing its Online Advertising Guide known as “[Dot Com Disclosures](#)” issued in 2000 in order to provide guidance to businesses about how FTC law applies to current online activities. The FTC has invited public comments on specific issues addressing the 2000 publication for online or paper submission by **July 11, 2011**.

The FTC indicated in its invitation to comment that the online world has changed dramatically since it issued the “Dot Com Disclosures” 11 years ago. At that time, mobile marketing was just a vision, and we were not in the “App” economy that exists today. The use of “pop-up blockers” was not widespread and online social networking was not nearly as sophisticated or extensive as it is today.

Purpose of 2000 Publication

The primary focus of the 2000 publication “Dot Com Disclosures” was to counsel marketers on how to provide a clear and conspicuous disclosure of information that consumers needed to make informed decisions about goods and services being offered on the Internet. In particular, the 2000 publication advised online advertisers that the same consumer protection laws that applied to commercial activities in other media apply online and that the Commission’s role in protecting consumers from unfair and deceptive acts or practices encompasses advertising, marketing and sales online, as well as the same activities in print, television, telephone and radio.

The FTC stated specifically in the 2000 publication that the FTC Act’s prohibition in Section 5 against “Unfair and Deceptive Acts or Practices,” which broadly cover advertising claims, marketing and promotional activities and sales practices, was not limited to any particular medium. The FTC also said that the plain language in many FTC rules and guides applies to claims made on the Internet. For example, the mail or telephone order merchandise rule which addresses the sale of merchandise that is ordered by mail, telephone, facsimile or computer applies to those sales regardless of “the method used to solicit the order.” The 2000 Dot Com Disclosures included an appendix that contains mock advertisements that illustrated these particular factors.

Legal Effect of Guidance

Even though the “Dot Com Disclosures” are considered guidance and not law or formal regulations, the FTC has used its “Dot Com Disclosures” as a basis to educate marketers about possible Section 5



enforcement actions. For example, in a 2005 [Consent Order](#) with Advertising Dot.com Inc., the FTC [approved](#) a requirement that Advertising Dot.com's representation about its advertising disclose "clearly and prominently" that consumers who install the program will receive advertisements if that is the case. The definition of "clearly and prominently" was taken almost verbatim from the Dot Com Disclosures in 2000.

The FTC also cited the 2000 Dot Com Disclosures guidance in a 2002 [response](#) to a complaint brought by Commercial Alert against search engines like AOL and Microsoft for allegedly misleading disclosures about the advertisements placed on search results lists. Federal courts have also cited the 2000 publication guidance. For example, in 2009 a Federal District Court stated that in determining what constitutes deceptive conduct under "Massachusetts Unfair Practice Act," the court should be guided by the interpretation of that term in the guidelines of the FTC that require disclosures to be "clear and conspicuous based on the placement of those disclosures on webpages and their proximity to the other relevant information."

Questions for Comment

In its invitation for comments, the FTC identified a series of questions to help companies consider what type of revisions need to be made. Examples of questions asked were:

- What issues have been raised by online technologies or Internet activities or features that have emerged since the business guide was issued (e.g., mobile marketing, including the 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 guidance document?
- 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 is outdated or unnecessary"?
- What guidance in "Dot Com Disclosures" should be clarified, expanded, strengthened or limited?
- What additional issues or principles relating to online advertising should be addressed in the revised guidance document?

Conclusion

By announcing consideration of updating and reissuing the 2000 Dot Com Disclosures, the FTC has raised the profile of online advertising compliance and perhaps signaled upcoming enforcement efforts. It is advisable for companies to review the Dot Com Disclosures guidance, questions proposed for comments and compliance of their online advertising. Locke Lord is available to help Companies with compliance issues and to submit comments to the FTC in response to the questions identified above.

Endnotes

¹ *In re Vistaprint Corp. Mktg. & Sales Practices Litig.*, No. 4:08-md-1994, 2009 WL 2884727, at *11 (S.D. Tex. Aug. 31, 2009).

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