

LEGAL UPDATE

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THE REALM OF ADVERTISING IN 140 CHARACTERS OR LESS: HOW THE FTC ADDRESSES MODERN CONCERNS OVER DIGITAL ADVERTISING

On Tuesday, March 12, 2013, the Federal Trade Commission (FTC) issued a new report that provides the latest guidance to those that advertise and market their products and services online. The detailed report, titled “.com Disclosures: How to Make Effective Disclosures in Digital Advertising” (the “Revised Guide”), is an update to the FTC’s initial Dot Com Disclosures guide that was released in May 2000.

In a society where more than 53% of all cell phone owners in the United States have smartphones as their primary mobile device, and where millions of Americans are drawn to Facebook, Twitter and other social media on a daily basis, it is evident why the FTC sought to address the disclosure concerns that surround social, mobile and digital advertising today. The Revised Guide addresses the modern concerns involving advertising and marketing via the Internet and other electronic networks. The FTC provides guidance on how and when companies should effectively disclose their digital advertisements in accordance with the laws that the FTC enforces.

The Revised Guide emphasizes the importance for advertisers to make clear and conspicuous online disclosures, while simultaneously taking into account the growing means of reaching the consuming audience, ranging from pop-ups to Twitter advertisements using 140 characters or less. The Revised Guide makes one thing clear: the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.

THE FTC’S UPDATED GUIDELINES ON EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING

The Revised Guide begins with a general overview of the FTC’s “Clear and Conspicuous” requirement. The FTC provides that advertisers must not only make all disclosures necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of FTC rules, but these disclosures must also be presented “clearly and conspicuously” to consumers. This is a growing concern in today’s digital age because many space-constrained platforms, such as mobile devices, Facebook and Twitter, often limit a consumer’s ability to locate and recognize what constitutes a disclosure, let alone an actual paid-for advertisement.

To evaluate whether a particular disclosure is clear and conspicuous, the Revised Guide sets forth a number of general factors that advertisers should consider when developing their advertisements. These factors include: (i) the placement of the disclosure and its proximity to the claim it is qualifying; (ii) the prominence of the disclosure; (iii) whether the disclosure is unavoidable; (iv) the extent to which items in other parts of the advertisement might distract attention from the disclosure; and (v) whether the disclosure needs to be repeated several times and in different locations. The important notion that the FTC sets forth in the Revised Guide is that irrespective of the medium in which the advertisement is displayed, an advertiser is not exempt from taking the FTC’s factors into consideration when advertising or marketing goods or services. Merely because an advertiser is using the medium of Facebook, for instance, to market its goods and services does not permit the advertiser to hide certain disclosures to consumers that are

required and enforced by the FTC. Accordingly, advertisers must consider whether technological limitations, such as smaller screen sizes on mobile phones/tablets and the limitation of only 140 characters on Twitter, require the advertisers to make changes to their digital advertisements that appear on a desktop computer's Internet browser.

Advertisers have the difficult task of creating promotional, digital advertisements that capture the attention of the target consumers, which is made even more challenging given that they must simultaneously ensure the delivery of notice and disclosures to these same consumers. For advertisers to best ensure that their digital advertisements satisfy the FTC's compliance guidelines set forth in the Revised Guide, advertisers must evaluate the location of the disclosure and its proximity to the claim that raises the need for disclosure (often referred to as a "triggering claim") on the same screen. Often, some disclosures are long and therefore difficult to place next to the claims they qualify. Also, computers, tablets, smartphones and other connected devices have varying screen sizes that display ads and websites differently, and where a consumer is required to scroll down a page a significant amount, this can be very problematic. Consumers frequently choose not to scroll all the way down to read the disclosures associated with the triggering claim or advertised offer. Accordingly, the FTC recommends that advertisers use text prompts as well as various visual design modifications to ensure consumers view the disclosures. For instance, an advertiser including the phrase "see below for important information on restocking fees" in immediate proximity to the triggering claim can be the difference between a FTC-compliant advertisement and one that is not.

Advertisers should also take into consideration the use of hyperlinking to a disclosure, which is especially relevant for advertisements on Facebook, Twitter, Pinterest, and other social media. While the FTC makes it clear that disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink (in which case, these types of disclosures should be placed on the same page and immediately next to the triggering claim, while also being sufficiently prominent so that the claim and the disclosure are read simultaneously), hyperlinks can be a very useful tool to ensure that a consumer has the

capability to review the more complex details associated with an advertisement's disclosure. Therefore, when using hyperlinks, it is recommended that advertisers take into consideration the labeling or description of the hyperlink, the consistency in the use of hyperlink styles, the placement and prominence of the hyperlink on the webpage or screen, and the handling of the disclosure on the click-through page or screen. It is especially important that advertisers also account for technological differences and limitations across various digital media. While an advertiser's use of a hyperlink within a promotional Tweet may be appropriate, an advertisement on a website using a hyperlink to view the disclosure may not be a sufficient method of disclosure. Although this is only one of many considerations that advertisers must take into account, it is illustrative of the level of attention to detail to which advertisers must adhere to ensure that their disclosures are accessible as well optimized for visibility on any device or platform.

#ADVERTISEMENT: WHAT ABOUT ADS ON TWITTER?

Companies that utilize Twitter to advertise goods and services are faced with an inescapable digital reality: how can they successfully market goods or services to their target consumers while simultaneously attaining compliance with the FTC's disclosure guidelines in 140 characters or less. Thankfully, the FTC's Revised Guide alleviates some of the difficulties associated with this concern by providing guidance and examples of how to meet the FTC's guidelines.

The FTC recommends the use of ad signals in space-constrained mediums such as Twitter. For instance, it is recommended that companies make use of the ad signal "Ad:" at the beginning of a promotional Tweet, such as a Tweet by a celebrity endorser. This space-constrained ad signal, while only using four characters, discloses that the Twitter-user is a potentially paid endorser for a product or service. There are also vendors that provide disclosure tools, such as natural language disclosure url links (such [rul.es](#) and [comp.ly](#)), that will likely satisfy the FTC's disclosure guidelines.

The Revised Guide further indicates that when Twitter advertisements include a "triggering claim," for instance, "I lost 30lbs in 6 wks easily using Fat-

away Pills,” such an advertisement shall also include the necessary disclosure associated with the claim. The use of a short phrase, such as “Typical loss: 1lb/wk” or “results not typical,” with a short-cite hyperlink to the promoting company’s full disclosure concerning the advertisement, may be necessary to ensure compliance with the FTC’s guidelines.

It is further recommended that advertisers, or others marketing goods or services such as paid endorsers, should include all the necessary disclosures along with the triggering claim in a single Tweet, as opposed to separating the original claim from the disclosure. Commonly, social media users will not see subsequent messages from the same Twitter or Facebook user in succession, and unrelated messages may arrive in the interim. It is possible that a social media viewer will see only the triggering claim without ever seeing the Tweet or post containing the disclosure, or alternatively, users simply may not realize that the separated disclosures pertain to the original, triggering claim message. Advertisers and others using social media and other digital forums to promote goods and services must develop advertisements that effectively convey disclosures to consumers. Through the use of these guidelines and the additional guidelines set forth in the FTC’s Revised

Guide, advertisers ultimately can find the balance between engaging advertising and commercial transparency.

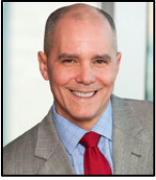
HOW CAN YOU MAKE EFFECTIVE DIGITAL DISCLOSURES?

Contact your Pryor Cashman attorney for more information, and to discuss the impact this may have on your business.

The foregoing is merely a discussion of the FTCs latest guidelines on how to make effective disclosures in digital advertising. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Robert J. deBrauwere at rdebrauwere@pryorcashman.com or Ryan S. Klarberg at rklarberg@pryorcashman.com.

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