

This is the property of the Daily Journal Corporation and fully protected by copyright. It is made available only to Daily Journal subscribers for personal or collaborative purposes and may not be distributed, reproduced, modified, stored or transferred without written permission. Please click "Reprint" to order presentation-ready copies to distribute to clients or use in commercial marketing materials or for permission to post on a website.

Thursday, April 4, 2013

FTC's new online advertising guidelines focus on Internet-dependent public

Angela C. Agrusa is a partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP. She can be reached at aagrusa@linerlaw.com. This article is not legal advice and should not be relied upon in making decisions that may have legal consequences.



In March, the Federal Trade Commission released new guidelines for online advertisements, the culmination of a two-year process aimed at addressing the rapidly evolving ways in which advertisers are innovating to capture the attention of an increasingly Internet-dependent public. See ".com Disclosures: How to Make

Effective Disclosures in Digital Advertising," FTC (2013). The new guidelines do not announce any new rules, but rather make clear that the rules governing advertisements in other media apply to the same extent in the electronic marketplace. In order to help advertisers comply with the FTC's standards, these guidelines suggest specific practices in the design and dissemination of electronic advertisements in order to reduce the likelihood that they could run afoul of the agency's rules.

The new guidelines focus on advertisements in the context of social media and mobile technology and are especially concerned with the space constraints of Twitter messages and screens on mobile devices. In this light, three aspects of the new guidelines deserve special attention.

First, advertisers using Twitter should note that compliance with FTC regulations likely requires: (1) that each "tweet" clearly indicate that it is sponsored or an advertisement up front, such as by using "#Ad" or "#Sponsored"; and (2) that the required disclosure must be in the same "tweet" as the claim requiring qualification. If the claim and disclosure (or a clearly identified hyperlink to it) cannot be accomplished in 140 characters, the guidelines counsel against making the claim at all in this medium.

Second, for advertisements destined for mobile devices, such as smart phones and tablets, proximity between the claim and disclosure becomes very important. Because people often "zoom" in order to read the text of mobile ads, the guidelines suggest that disclosure statements should be very close to the claims they qualify, such that they are likely to be read in tandem without requiring the consumer to scroll to another part of the advertisement. If scrolling appears necessary, the claim likely should not be made.

Finally, recognizing that hyperlinks can be an effective way to communicate additional information when space is limited, the guidelines approve of using them only when necessary and only when they clearly and conspicuously communicate to the consumer that following the link is important to understand how a claim is qualified. Again, space constraints are important, and the guidelines recommend placing hyperlinks in locations where they will be noticed along with their respective claims.

If the claim and disclosure ... cannot be accomplished in 140 characters, the guidelines counsel against making the claim

MICHAEL G. GERNER

A PROFESSIONAL LAW CORPORATION

- 30+ YEARS EXPERIENCE
- STATE BAR OF CALIFORNIA
- FORMER ASST. CHIEF TRIAL COUNSEL

STATE BAR DEFENSE

- Attorney Discipline ■ Admissions
- Reinstatements ■ Ethics Consultations
- Conviction Referrals

MGG Ethics

310-556-1300
mggethics@msn.com

JEFF KICHAVEN
COMMERCIAL MEDIATION

888-425-2520 jk@jeffkichaven.com

at all in this medium.

The following is a practical framework for complying with FTC rules in light of these new guidelines. It is important to remember that the guidelines are not an exhaustive list of criteria upon which the FTC will rely in deciding whether an online advertisement is unfair, deceptive, or otherwise in violation of a rule. As always, such determinations depend on the nature and circumstances of any given advertisement.

A practical framework

The same consumer protection laws apply to digital media to the same extent as they do to traditional media to prevent an advertisement or marketing tool from being unfair or deceptive.

Whenever possible, disclosures should be made on the advertisement or marketing piece itself, rather than relying on a separate disclosure to qualify the claim (like a hyperlink to a new page).

Required disclosures must be clear and conspicuous. In order to make the disclosure conspicuous, online advertisers should make the following five considerations.

First, place the disclosure where the consumer is most likely to see it and consider it - usually as close as possible to the claim it qualifies. It should be in a location where it can be seen and understood without having to scroll away from the claim, taking into account how consumers use mobile platforms (e.g., zooming on smart phones and tablets), as well as empirical research about where people look on screens. Repeat disclosures as needed in more lengthy advertisements, and make disclosures independent of "terms of use" language or contractual information, which often go unread. Avoid putting disclosures in pop-up windows, which are often blocked or disregarded by consumers. If using a pop-up, require affirmative action (like selecting "yes" or "no" options) to ensure the disclosure is seen and understood

Second, display disclosures in a location where they are likely to be considered before the consumer makes the decision to purchase. For instance, a check-out window is too late in the purchasing process to make an effective, conspicuous disclosure.

Third, use language and syntax that is understandable to the intended audience. Symbols and icons meant to indicate a disclosure likely will not be sufficient. If the medium is audio, use volume and cadence to make it understandable to the intended audience.

Fourth, employ hyperlinks only when necessary, and only when the hyperlink is noticeable and clearly labeled as leading to relevant disclosure information, placed near the claim it qualifies, and linking directly to the disclosure language; and

Finally, for Twitter, use "#Ad" or "#Sponsored" up front and include disclosure language or a clearly labeled hyperlink leading directly to disclosure information within the same "tweet" as the claim to which it relates.

The basic rule of thumb is this: if disclosure is required to keep a claim from being unfair or deceptive, and the disclosure cannot be made clearly and conspicuously in the medium desired, then the claim should not be made in that medium.

Angela C. Agrusa is a partner at *Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP*. She can be reached at aagrusa@linerlaw.com This article is not legal advice and should not be relied upon in making decisions that may have legal consequences.

