
retail

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Dear Retail Clients and Friends,

The Federal Trade Commission (FTC) has released new guidance on the use of disclosures by mobile and online advertisers. This edition of *Morgan Lewis Retail Did You Know?* describes the new guidance and its application to retailers.

Background

In 2000, the FTC issued the guidance “Dot Com Disclosures: Information about Online Advertising,”¹ which emphasized that consumer protection laws applied equally across all mediums, including to computers and the Internet. The FTC counseled that, where a disclosure is needed to prevent an advertising claim from being misleading, the disclosure must be both “clear” and “conspicuous” and provided advice and examples on how the FTC would interpret and apply those terms.

With the rise of smartphones and tablets, which have smaller screens, and the prevalence of social media marketing, the FTC decided to update the guidance and began seeking public comment in May 2011. The FTC issued the new guidance, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,”² on March 12, 2013.

The new “Dot Com Disclosures” guidance emphasizes that consumer protection laws apply to all mediums, including smartphones and tablets, and to all formats, such as social media platforms, regardless of the space constraints those particular mediums and formats may impose. Space constraints are not considered an excuse for failure to provide the disclosures necessary to prevent advertising from being misleading or unfair. The new guidance includes helpful advice on compliance and an appendix with illustrative examples of ads and related disclosures.

The New Guidance

In the new guidance, the FTC recommends that problems with disclosures in the context of mobile devices and social media are best resolved by incorporating the relevant limitations and qualifying information into the ad itself and thus avoiding the need for any disclosure.

Where a disclosure is necessary to prevent an ad from being misleading, the disclosure must be “clear and conspicuous.” This requirement applies to all devices and platforms on which an ad may be viewed by consumers. If disclosures cannot be made in a clear and conspicuous manner on a particular medium, the advertiser should not use that medium for advertising.

In order to ensure that a disclosure is clear and conspicuous, the guidance advises advertisers to consider the placement and proximity of the disclosure to the specific advertising claim it is related to. The FTC says that disclosures should be “as close as possible” to the triggering claim. Advertisements should also be designed so that “scrolling” is not necessary to find a disclosure. Where a website is lengthy or where there are multiple routes through a website, it may be necessary to repeat disclosures.

1. View the original guidance at <http://www.ftc.gov/os/2000/05/0005dotcomstaffreport.pdf>.

2. View the new guidance at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

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Disclosures should be displayed so they are noticeable to consumers. To that end, advertisers should evaluate the size, color, and graphic treatment of a disclosure in comparison to the triggering claim and other parts of the website. The disclosure should be viewed in the context of the entire ad and other elements, such as graphics, sound, or audio, to ensure that consumers are not distracted from the disclosure.

Like the earlier guidance, the new guidance advises advertisers to avoid hyperlinks for disclosures that involve either product cost or significant health and safety issues. Where hyperlinks are used, care should be taken to (a) make the links obvious, (b) label the links accurately and as specifically as possible, (c) use hyperlink styles consistently, and (d) place the link as close to the relevant claim as possible. Advertisers should be careful to consider how hyperlinks may function on certain devices and assess the effectiveness by monitoring click-through rates.

Placement of disclosures on pop-ups is discouraged since they are often blocked and may not be viewed on certain devices.

Practical Implications

The new guidance is a reminder of the importance of ensuring that advertising complies with consumer protection laws, even where ads are viewed on new devices and in novel formats. The guidance indicates how the FTC will exercise its own enforcement powers, and it will be a touchstone for how state regulators, courts, and plaintiffs' attorneys evaluate retailers' marketing. Although particular advertising claims must be evaluated on a case-by-case basis and compliance with the guidance will not eliminate the threat of enforcement actions or class action litigation, the new "Dot Com Disclosures" guidance provides some helpful direction to retailers seeking to stay on the right side of the line.

How We Can Help

Morgan Lewis can assist with the analysis of a retailer's advertising practices, including assistance with developing guidelines and training materials for a company and representation regarding investigations or legal actions concerning advertising issues.

Contacts

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 24 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

About Morgan Lewis Retail Did You Know? This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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