

## FTC TurboTax Initial Order Offers Key Advertising Compliance Lessons

November 1, 2023 | [Michael A. Goodman](#)

On September 8, 2023, the Federal Trade Commission announced that its administrative law judge had issued an Initial Decision and Order in the FTC's case against Intuit, alleging that the company had deceptively marketed the availability of free tax return preparation and filing from TurboTax. Writing in the FTC's *Business Blog*, the director of the Consumer Protection Bureau, Samuel Levine, called the ALJ's opinion a "must-read for anyone in the advertising arena." That descriptor caught my eye, given that Director Levine was referring to a 237-page legal opinion. He also said that the opinion "merits a fresh yellow highlighter and your undivided attention." I'm well aware that there are plenty of people out there who are in the advertising arena but who might not have time to curl up with an FTC ALJ's legal opinion that is longer than *The Great Gatsby*, with or without a highlighter in hand. So I did it for you. Director Levine is not wrong: the TurboTax Initial Decision and Order is interesting reading with important lessons for people responsible for advertising compliance. I relay several of these lessons here.

### **Lesson #1: There are things about UDAP compliance that you don't want to believe, but they are true.**

Intuit advertised its "free" TurboTax offer a lot: tens of thousands of ads across television, radio, and online. These ads prominently promoted this free offer and used inconspicuous disclosures to explain that there were limits on the offer's availability. The ALJ, applying the federal deception standard, essentially assigned no value to these disclosures as a consumer comprehension tool. The shortcomings in Intuit's disclosures included: (1) small print; (2) insufficient contrast between a disclosure's type color and background; (3) providing disclosures at the end of an ad, after prominent claims had been repeated several times; (4) presenting disclosures behind a hyperlink or on a landing page, rather than within ads where prominent claims were featured; (5) ambiguous wording that was not sufficiently clear; (6) rapid-fire cadence for disclosures after making prominent claims at a slower pace; (7) placing disclosures behind non-descriptive references, such as "see details"; (8) displaying TV ad disclosures for only a couple of seconds; (9) using advertising features that attracted attention away from disclosures; and (10) failing to present a disclosure in the same format as the prominent claim it related to, such as a prominent voiceover claim with an inconspicuous video-only disclosure.

FTC guidance clearly cautions against these advertising techniques, but we see them throughout the advertising universe all the time: fine print is ubiquitous, high-speed oral disclosures are routine, and so on. Advertising compliance personnel should consider the Intuit opinion a powerful reminder about a lesson we first learned when we were little: just because everyone else is doing it doesn't make it right.

Treat the opinion as a checklist for your advertising compliance review. Your disclaimers should be as prominent as the claims they modify and in close proximity to those claims. Fine print creates risk. Light-color text on a light background creates risk. Displaying a disclaimer without giving your audience enough time to read it creates risk. Placing disclaimers a click away from your ad creates risk, especially if the link does not communicate the importance of the information. Distracting the audience's attention away from disclaimers creates risk.

**Lesson #2: If your offer cannot be accurately described in the format you are using to advertise it, that is your problem, not a UDAP defense.**

Intuit argued that its "free" TurboTax ads should not be subject to the full range of UDAP principles articulated by the FTC because the offers were complicated, consumers knew that, Intuit's website provided more information than the initial ads, and the ads simply could not communicate everything the FTC thought consumers needed to know about the offers.

The ALJ did not seem to find it hard to reject this line of argument. The opinion saw Intuit's ads as "deceptive door openers." The FTC uses this phrase to describe advertising campaigns that lead with a deceptive claim and rely on subsequent information to correct the initial misrepresentation. This technique does not create a persuasive defense to a UDAP claim. The ALJ further noted that this argument does not become stronger in an online context, compared to a brick-and-mortar context. In other words, the "door" referenced in the phrase "deceptive door opener" can be a metaphorical "virtual" door as well as a literal door.

The opinion explained that federal UDAP standards do not give credit to businesses that make additional information available to consumers down the road in the user experience, if the initial impression is misleading. The ALJ stated: "Even if some consumers may choose to conduct research in response to an advertising claim, the law protects those who do not: The public is not under any duty to make reasonable inquiry into the truth of advertising." Businesses should not rely on the fact that they make clarifying information available on their websites as a cure-all for potential challenges to their advertising. Businesses are unlikely to have success arguing that consumers would not have been deceived if they had just read information the businesses made available on their websites.

In addition, the opinion indicates that the ALJ did not think much of Intuit's argument that there was no reasonable way for its ads to communicate everything the FTC thought consumers needed to know to understand the "free" TurboTax offer accurately. In short, the "free" offer was limited to what the company defined as "simple" tax returns, but the ads did not explain what was and was not a "simple" return. Intuit's ads drove home the

"free" concept, and the ALJ found that reasonable consumers would not be able to assess whether they qualified for the offer or not. In fact, the FTC presented expert evidence showing that a significant percentage of consumers who did not qualify for the "free" offer thought that they did qualify. Intuit's response that there was no reasonable way to ensure consumers' understanding in brief ads was unavailing. The ALJ concluded that if the limitations on Intuit's "free" offer were too complicated to communicate in its ads, then Intuit needed to rethink those limitations and how it advertised the offer. The path that Intuit chose instead—introduce the best part of the offer now and explain the limitations later—constituted a deceptive act or practice.

**Lesson #3: "Free" claims are especially powerful, so they are subject to more rigorous scrutiny under federal UDAP standards.**

Finally, the Intuit opinion is a helpful reminder that, when the FTC applies its UDAP standards, it treats "free" claims as especially persuasive to consumers. Therefore, companies making such claims should provide especially robust disclosures regarding any material restrictions, conditions, or limitations regarding those offers. The ALJ cited 70 years of FTC case law to support this point. Intuit disclosed material information about its "free" offer using "small, inconspicuous lettering" in TV ads and "significantly faster speed" in radio ads. Because a "free" offer is "a powerful magnet that draws the best of us against our will," Intuit's disclosures were insufficient to overcome the misleading impression created by prominent "free" claims. The ALJ explained that the proper standard considers whether "a significant minority of reasonable consumers" would likely be misled by the advertising. FTC law answers this question by considering the advertisement's "net impression." The ALJ seems to suggest that an ad's "net impression" may be different when the ad includes a "free" claim, with the "free" offer acting like a black hole, exerting gravitational forces pulling at consumers' understanding. Under that line of thinking, an ad's disclosure of material information regarding the "free" offer would need to be even clearer and more conspicuous than usual in order for consumers to interpret the offer accurately.

**Final Thoughts:**

From a compliance perspective, all advertising involves risk. It is hard to imagine an ad that could effectively promote a product or service while creating zero risk of consumer confusion—or, at least, risk of a regulator's scrutiny along those lines. The Intuit opinion addresses many ubiquitous advertising techniques that can generate risk: fine print, quick end-of-ad placement, rapid-fire oral statements, and placing information behind "see details" hyperlinks. Companies that take UDAP risk mitigation seriously can use this opinion as an opportunity to take a fresh look at their advertising disclosures. For those who can't bear the thought of reading all 237 pages of the Intuit opinion, consider this summary to be a starting point for that review process.

Intuit has appealed the ALJ's Initial Order and Decision to the FTC. Stay tuned for updates on this proceeding. ❌

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