

The Latest FTC Guidance on Making "Clear and Conspicuous" Disclosures

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The challenge of making effective disclaimers or disclosures continues to bedevil advertisers and embolden regulators. Last year, I wrote a series of articles about this issue, highlighting recent cases from the Federal Trade Commission against auto dealers whose advertisements did not adequately convey the limitations on their offers ("When It Comes to the FTC, the Second Time Is Not the Charm," January-February 2015; "When the 'Fine Print' Isn't So Fine," March 2015; "Is There Anything Clear About 'Clear and Conspicuous'?", April 2015; "Getting the Message on Disclosures," December 2015). Those cases follow a well-established principle: When you advertise promotions to consumers that come with material terms, exclusions, limitations, conditions, or qualifications ("TELCQs"), you need to disclose those TELCQs in such a way that consumers understand what the offer includes and doesn't include. The trick, of course, is knowing when and how TELCQs must be disclosed. Three recent actions by the Federal Trade Commission provide some additional compliance guidance.

My rule of thumb on disclosures is this: If the typical consumer would be surprised and unhappy to learn about a TELCQ on your offer, you need to disclose it clearly and conspicuously. (Note that TELCQ disclosures are in addition to those specifically mandated by state or federal law, including the Truth in Lending Act and the Consumer Leasing Act. Those disclosures must be "clear and conspicuous" as well.) For example, if you run a new car promotion offering a substantial discount off the regular price, but that discount is only available to a smaller subset of customers (those with high credit scores, say, or former military personnel), you need to make that fact clear. That means disclosing the limitation in a prominent location near the claim it is qualifying and in a manner that is readily noticeable and understood by typical consumers. Disclosures in tiny-fonted footnotes in a print ad, in a quickly flashed visual in a television ad, or buried in the "terms and conditions" in a digital ad are rarely sufficient. And disclosing TELCQs only at the dealership is not going to cut it; my advice is to avoid using the phrase "see dealer for details."

Unfortunately, there is no magic, one-size-fits-all formula for determining when and how a TELCQ needs to be disclosed. There is some helpful advice industry groups and others have put out in recent years, but it also is a good idea to familiarize yourself with what the FTC and other regulators have said and done in similar situations in the past. Of most relevance, the two dozen or so auto dealer advertising cases the FTC has brought over

the past few years indicate what types of TELCQs the agency considers important enough to disclose in advertising and what kinds of disclosures it deems to be insufficiently clear and conspicuous.

Two recent court rulings in FTC cases provide further guidance. The first, *FTC v. Amazon.com*, involved allegations that Amazon unfairly offered in-app products to children without adequately disclosing that the apps were not free and without requiring any sort of password or other parental control mechanism. A federal court in Seattle, in ruling in the FTC's favor, noted that Amazon's statement about the cost of the app was buried in a lengthy "disclosure" that the consumer had to scroll down to read. A later change to the website included the term "In-App Purchasing" on the initial screen as a hyperlink to the details about the costs, but the court found that new format still inadequate because the term was in small type and was not highlighted in any way to identify it as a hyperlink.

The second case, *John Fanning v. FTC*, challenged claims by a self-styled "reputation management website" (unfortunately named Jerk.com) that certain content on its website was created exclusively by website users, when in fact the defendant itself created some of the content. In rejecting the defendant's assertion that it had disclosed its role in the creation of the content, the U.S. Court of Appeals for the First Circuit held that a single, ambiguous "disclosure" statement on a separate screen from the claims at issue was not prominent enough to counteract and dispel the misimpression created by the claims.

Third, last December, the FTC provided useful guidance on how and when it expects disclosures to be made. The guidance appears in the agency's Enforcement Policy Statement on Deceptively Formatted Advertisements, which explains how established consumer protection principles apply to different advertising formats, including "native" ads that are integrated into non-advertising content in such a way as to disguise the fact that they are, in fact, commercial messages. The policy statement admonishes those using native advertising to disclose effectively its commercial nature and provides the following guidance on how to make such disclosures:

- The disclosure must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."
- The disclosure should be in "simple, unequivocal language" that consumers will comprehend.
- A disclosure generally should be made contemporaneously with the claim it is intended to qualify, not at a later point in the transaction or on a different screen or page.
- A disclosure in the text may not remedy a misleading impression created by a headline since consumers may glance only at the headline.
- Audio disclosures (e.g., in radio ads) must be delivered in a volume, cadence, and speed sufficient for ordinary consumers to hear and understand them.

Ultimately, whether a disclosure is effective is an empirical question: Does it actually work with real consumers? One way to find out is to test the disclosure through a consumer survey or copy test. On September 15, the FTC will be hosting a public workshop "aimed at encouraging and improving the evaluation and testing of disclosures by industry, academics, and the FTC." The workshop will focus on "areas where disclosures play a key role in consumer protection," including advertising disclosures designed to prevent ads from deceiving consumers, and will explore methods for testing disclosures "to ensure consumers notice them, understand them, and can use them in their decision-making."

As Shakespeare wrote in *The Tempest* (and as appears on the northeast corner of the National Archives building in Washington, D.C.), "[W]hat's past is prologue." When it comes to deciding when and how to disclose TELCQs, the FTC's past actions and statements provide a pretty good compliance roadmap for advertisers going forward. It may be worth your compliance department's time and attention to become familiar with what the FTC has said and done in the past and to follow what it does and says in the future.

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