

## FTC to Update Online Advertising Guidelines

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Much has changed since the Federal Trade Commission last updated its guidelines for online advertising in 2000. Facebook founder Mark Zuckerberg was still in high school, Google had less visitors than Geocities.com and Netscape.com, and the total number of Internet users worldwide was less than 20 percent of what it is today.

So last month, the FTC announced that it will dust off its guidelines for online advertising, “Dot Com Disclosures: Information About Online Advertising,” and freshen them up. Among the questions it is considering: What issues raised by new Internet activities or features, or by new laws or regulations, should be addressed? And what specific types of online disclosures raise unique issues?

The agency is asking for public comment through July 11.

Predicting how the FTC will modify its guidance is difficult, but few experts expect significant changes. “As far as I can tell, the same principles apply. Disclosures should be clear and conspicuous,” says Brian Rosenblatt, co-chair of the entertainment, media, and privacy practice at law firm Smith Amundsen.

The FTC appears to be trying to align its guidance with issues raised by current technology. One example concerns pop-up blockers, the applications that block ads or other items that automatically appear on computer screens. An advertiser could use a pop-up to convey disclosure, and then the disclosure itself would be blocked, Rosenblatt notes. So does the marketer need to ensure that its disclosures can get through any blockers?

The FTC also may address concerns about applications that use algorithms to track consumers' behavior online, or that mine data from social media sites such as Facebook or LinkedIn, and then use the data to develop marketing campaigns, Rosenblatt says. This raises several concerns. First, do consumers know that their information is being collected and shared with others? In addition, how should data collected be protected from hackers and criminals?

The growing popularity of mobile devices also poses some questions, says Lee Ann Lockridge, a law professor at Louisiana State University. The smaller screens make it difficult to ensure that any disclosures needed within an ad remain both “prominent and proximate,” as the guidance requires. So the new guidance may include examples showing companies how to address the challenges that come with the multiplicity of screen sizes used today, she says.

Another area that may come under review: paid ads that appear in search engine results. Say a consumer does an online search for information on knee pain. The first few results may be paid ads for companies that provide knee braces. The FTC wants to make sure consumers are aware of this, Lockridge says.

“Tell the truth, have substantiation, and educate the consumer as to what they're getting.” — Brian Hall, Internet, Trademark Lawyer, Traverse Legal

### ***PRIVACY CONCERNS***

As of mid-June, most of the comments about the guidance update submitted to the FTC were from individuals or small-business owners expressing concerns about deceptive ads and practices that could compromise privacy, such as marketers' use of software that tracks individuals' online actions. One example came from James Simon with Holistic Health: “I believe the reason for the proliferation of the Websites that sell products of dubious nature is there is no way for the consumer to verify or validate any of the information contained on these Websites.”

The FTC did address such concerns somewhat in 2009, with fresh guidance for online marketers (nothing as extensive as what the agency plans to do now). At that time FTC added a guideline specifically focusing on endorsements and testimonials by online bloggers. “Bloggers who make an endorsement must disclose the material connection they share with the seller of the product or service,” the FTC said in a statement announcing the changes.

Companies that already follow the principles laid out by the FTC and are avoiding deceptive or unfair ads probably won't need to make substantial changes any time soon. “Nothing in this jumps out as something that I wouldn't already be advising my clients to do to begin with,” says Brian Hall, an Internet, trademark, and copyright lawyer with Traverse Legal.

At the same time, compliance officers will want to make sure their firms' marketing and computer programming employees have an understanding of the guidance, says **David Shaw, a partner at the law firm Kirton & McConkie, Salt Lake City**. They may want to change the corporate Website daily; indeed, the ability to make changes on the fly is seen as a benefit of marketing online. But if a fresh change ends up burying an important disclosure deep in a company's Website, that could expose the company to serious liability.

### ***DOT COM DISCLOSURE Q'S***

The FTC is seeking comment on the following questions/concerns about “Dot Com Disclosures”:

- 1) What issues have been raised by online technologies or Internet activities or features that have emerged since the business guide was issued (e.g., mobile marketing, including screen size) that should be addressed in a revised guidance document?
- 2) What issues raised by new technologies or Internet activities or features on the horizon should be addressed in a revised business guide?
- 3) What issues raised by new laws or regulations should be addressed in a revised guidance document?

- 4) What research or other information regarding the online marketplace, online advertising techniques, or consumer online behavior should the staff consider in revising “Dot Com Disclosures”?
- 5) What research or other information regarding the effectiveness of disclosures – and, in particular, online disclosures – should the staff consider in revising “Dot Com Disclosures”?
- 6) What specific types of online disclosures, if any, raise unique issues that should be considered separately from general disclosure requirements?
- 7) What guidance in the original “Dot Com Disclosures” document is outdated or unnecessary?
- 8) What guidance in “Dot Com Disclosures” should be clarified, expanded, strengthened, or limited?
- 9) What issues relating to disclosures have arisen from such multi-party selling arrangements in Internet commerce as (1) established online sellers providing a platform for other firms to market and sell their products online, (2) website operators being compensated for referring consumers to other Internet sites that offer products and services, and (3) other affiliate marketing arrangements?
- 10) What additional issues or principles relating to online advertising should be addressed in the business guidance document?
- 11) What other changes, if any, should be made to “Dot Com Disclosures”?

The FTC will seek public comment for 45 days, beginning today and continuing through July 11, 2011. Interested parties can submit written comments electronically or in paper form. Submit comments by [clicking here](#). Hard-copy comments should be mailed or delivered to: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex I), 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

Source: Federal Trade Commission, May 26, 2011.

The use of social media sites poses similar risks. “It’s highly interactive and always changing,” **Shaw says**. The constant change can make it difficult to ensure that the actions a company takes via social media remain in compliance with advertising regulations.

Not everyone is convinced of the need for additional or updated guidance. “Self-regulation in this area is pretty vibrant,” says Doug Wood, chair of the media and entertainment industry group with the law firm of Reed Smith, and founder and chair of the Global Advertising Lawyers Alliance.

As an example, he points to an earlier call from the FTC to the industry to develop self-regulatory practices for online behavioral advertising. In response, last year the Digital Advertising Alliance—a collaboration of the American Association of Advertising Agencies, the Direct Marketing Association, and several other industry groups—began its Self-Regulatory Program for Online Behavioral Advertising. Among the participants are advertisers such as Toyota and Kraft Foods, media companies such as ESPN, and ad

networks such as Google. The initiative is working and just needs time to mature, Wood adds.

Finally, any guidance the FTC promulgates is just that, Wood says: guidance.

While acknowledging that guidance isn't law, Rosenblatt says FTC pronouncements “are highly persuasive to the courts, especially when they're establishing liability.”

He points to the \$35 million settlement in the class-action lawsuit against Dannon, makers of Activia and other yogurt products. The plaintiff alleged that Dannon's marketing, which claimed the products promoted digestive health, was misleading. The courts found that the company lacked proof of its claims, Rosenblatt says. (Dannon denied the allegations, and said the settlement was just to settle the matter.)

While the Dannon case didn't center solely on Internet advertising, the same principles apply both on and offline. “Tell the truth, have substantiation, and educate the consumer as to what they're getting,” Hall says.