

Frankfurt Kurnit Klein + Selz PC

2024 ANA Masters of Advertising Law Conference

*It's Not Your Father's
Oldsmobile: Ten Things You
Need To Understand To
Counsel in Advertising Today*

Presented by:
Jeffrey A. Greenbaum and Hannah E. Taylor

Wednesday, November 13th, 2024
9:50 AM to 10:45 AM

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Attachment 1

FTC Policy Statement on Deception

DATE: October 14, 1983

Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts or practices.¹ We also hope this letter will provide guidance to the public.

Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."² Numerous Commission and judicial decisions have defined and elaborated on the phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, however, is there a single definitive statement of the Commission's view of its authority. The Commission believes that such a statement would be useful to the public, as well as the Committee in its continuing review of our jurisdiction.

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.³

I. SUMMARY

Certain elements undergird all deception cases. *First*, there must be a representation, omission or practice that is likely to mislead the consumer.⁴ Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.⁵

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances,

materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. We discuss each of these elements below.

II. THERE MUST BE A REPRESENTATION, OMISSION, OR PRACTICE THAT IS LIKELY TO MISLEAD THE CONSUMER.

Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.⁶

Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.⁷ In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.⁸ In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.

Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.⁹ Information may be omitted from written¹⁰ or oral¹¹ representations or from the commercial transaction.¹²

In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission. At other times, however, the Commission may require evidence on consumers' expectations.¹³

Marketing and point-of-sales practices that are likely to mislead consumers are also deceptive. For instance, in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer.¹⁴ The Commission has also found deception where a sales representative misrepresented the purpose of the initial contact with customers.¹⁵ When a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.¹⁶ There may be a concern about the way a product or service is marketed, such as where inaccurate or incomplete information is provided.¹⁷ A failure to perform services promised under a warranty or by contract can also be deceptive.¹⁸

III. THE ACT OR PRACTICE MUST BE CONSIDERED FROM THE PERSPECTIVE OF THE REASONABLE CONSUMER

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.¹⁹ The test is whether the consumer's interpretation or reaction is reasonable.²⁰ When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a

reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.

A company is not liable for every interpretation or action by a consumer. In an advertising context, this principle has been well-stated:

An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country.? Of course not, A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

To be considered reasonable, the interpretation or reaction does not have to be the only one.²¹ When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.²² An interpretation will be presumed reasonable if it is the one the respondent intended to convey.

The Commission has used this standard in its past decisions. "...The test applied by the Commission is whether the interpretation is reasonable in light of the claim."²³ In the Listerine case, the Commission evaluated the claim from the perspective of the "average listener."²⁴ In a case involving the sale of encyclopedias, the Commission observed "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."²⁵ The decisions in *American Home Products*, *Bristol Myers*, and *Sterling Drug* are replete with references to reasonable consumer interpretations.²⁶ In a land sales case, the Commission evaluated the oral statements and written representations "in light of the sophistication and understanding of the persons to whom they were directed."²⁷ Omission cases are no different: the Commission examines the failure to disclose in light of expectations and understandings of the typical buyer²⁸ regarding the claims made.

When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.²⁹ For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particularly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.³⁰

As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in

advertising the Commission will examine "the entire mosaic, rather than each tile separately."³¹ As explained by a court of appeals in a recent case:

The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. *American Home Products*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982).³²

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.³³ Written disclosures or fine print may be insufficient to correct a misleading representation.³⁴ Other practices of the company may direct consumers' attention away from the qualifying disclosures.³⁵ Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.³⁶ Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.³⁷ Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.³⁸

Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures, which applies to television advertising, are generally adequate, *CCH Trade Regulation Reporter*, ¶ 7569.09 (Oct. 21, 1970). Less elaborate disclosures may also suffice.³⁹

Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.⁴⁰ Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.⁴¹

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.⁴² Some exaggerated claims, however, may be taken seriously by consumers and are actionable. For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated:

Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae. *Jay Norris*, 91 F.T.C. 751, 847 n.20 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

In sum, the Commission will consider many factors in determining the reaction of the ordinary consumer to a claim or practice. As would any trier of fact, the Commission will evaluate the totality of the ad or the practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist? how familiar is the public with the product or service?⁴³

IV. THE REPRESENTATION, OMISSION OR PRACTICE MUST BE MATERIAL

The third element of deception is materiality. That is, a representation, omission or practice must be a material one for deception to occur.⁴⁴ A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.⁴⁵ In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.⁴⁶

The Commission considers certain categories of information presumptively material.⁴⁷ First, the Commission presumes that express claims are material.⁴⁸ As the Supreme Court stated recently, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."⁴⁹ Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.⁵⁰ Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.⁵¹

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose,⁵² safety,⁵³ efficacy,⁵⁴ or cost,⁵⁵ of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.⁵⁶

Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony.⁵⁷

A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms.⁵⁸ Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.

V. CONCLUSION

The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment. The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers or the materiality of a challenged claim, but in some instances extrinsic evidence will be necessary.

The Commission intends to enforce the FTC Act vigorously. We will investigate, and prosecute where appropriate, acts or practices that are deceptive. We hope this letter will help provide you and the public with a greater sense of certainty concerning how the Commission will exercise its jurisdiction over deception. Please do not hesitate to call if we can be of any further assistance.

By direction of the Commission, Commissioners Pertschuk and Bailey dissenting, with separate statements attached and with separate response to the Committee's request for a legal analysis to follow.

/s/James C. Miller III
Chairman

cc: Honorable James T. Broyhill
Honorable James J. Florio
Honorable Norman F. Lent

ENDNOTES:

¹S. Rep. No. 97-451, 97th Cong., 2d Sess. 16; H.R. Rep. No. 98-156, Part I, 98th Cong., 1st Sess. 6 (1983). The Commission's enforcement policy against unfair acts or practices is set forth in a letter to Senators Ford and Danforth, dated December 17, 1980.

²In determining whether an ad is misleading, Section 15 requires that the Commission take into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U.S.C. 55. If an act or practice violates Section 12, it also violates Section 5. *Simeon Management Corp.*, 87 F.T.C. 1184, 1219 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); *Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

³Chairman Miller has proposed that Section 5 be amended to define deceptive acts. Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 2d Sess. *FTCs Authority Over Deceptive*

Advertising, July 22, 1982, Serial No. 97-134, p. 9. Three Commissioners believe a legislative definition is unnecessary. *Id.* at 45 (Commissioner Clanton), at 51 (Commissioner Bailey) and at 76 (Commissioner Pertschuk). Commissioner Douglas supports a statutory definition of deception. Prepared statement by Commissioner George W. Douglas, Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 98th Cong. 1st Sess. (March 16, 1983) p. 2.

⁴A misrepresentation is an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers. As the Commission noted in rejecting a proposed requirement for nutrition disclosures, "In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." *ITT Continental Baking Co. Inc.*, 83 F.T.C. 865, 965 (1976). In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation. For example, the practice of offering a product for sale creates an implied representation that it is fit for the purposes for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission. [See discussion below at 5-6] Omissions may also be deceptive where the representations made are not literally misleading, if those representations create a reasonable expectation or belief among consumers which is misleading, absent the omitted disclosure.

Non-deceptive omissions may still violate Section 5 if they are unfair. For instance, the R-Value Rule, 16 C.F.R. 460.5 (1983), establishes a specific method for testing insulation ability, and requires disclosure of the figure in advertising. The Statement of Basis and Purpose, 44 FR 50,242 (1979), refers to a deception theory to support disclosure requirements when certain misleading claims are made, but the rule's general disclosure requirement is based on an unfairness theory. Consumers could not reasonably avoid injury in selecting insulation because no standard method of measurement existed.

⁵Advertising that lacks a reasonable basis is also deceptive. *Firestone*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *National Dynamics*, 82 F.T.C. 488, 549-50 (1973); *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued*, 85 F.T.C. 391 (1976). *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 191 (1976), *aff'd*, 570 F.2d 157 (7th Cir.), *cert. denied*, 439 U.S. 821, *reissued*, 92 F.T.C. 848 (1978). The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim. This letter does not address the nuances of the reasonable basis doctrine, which the Commission is currently reviewing. 48 FR 10,471 (March 11, 1983).

⁶In *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), the court noted "the likelihood or propensity of deception is the criterion by which advertising is measured."

⁷On evaluation of the entire document:

The Commission finds that many of the challenged Anacin advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven [footnote omitted]. It is immaterial that the word "established", which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. *American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd*, 695 F.2d (3d Cir. 1982).

On the juxtaposition of phrases:

On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and Resultant Sore Throats" [footnote omitted]. By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can *cure*, prevent and ameliorate colds and sore throats [footnote omitted]. *Warner Lambert*, 86 F.T.C. 1398, 1489-90 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (emphasis in original).

On the nature of the claim, *Firestone* is relevant. There the Commission noted that the alleged misrepresentation concerned the safety of respondent's product, "an issue of great significance to consumers. On this issue, the Commission has required scrupulous accuracy in advertising claims, for obvious reasons." 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.

⁸The evidence can consist of expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.

⁹As the Commission noted in the Cigarette rule, "The nature, appearance, or intended use of a product may create an impression on the mind of the consumer . . . and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." Cigarette Rule Statement of Basis and Purpose, 29 FR 8324, 8352 (July 2, 1964).

¹⁰*Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Simeon Management Corp.*, 87 F.T.C. 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).

¹¹*See, e.g., Grolier*, 91 F.T.C. 315,480 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

¹²In *Peacock Buick*, 86 F.T.C. 1532 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977), the Commission held that

absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer ... *Id.* at 1555.

[E]ven in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put... When a later model used car is sold at close to list price ... the assumption likely to be made by some purchasers is that, absent disclosure to the contrary, such car has not previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead. *Id.* at 1557-58.

¹³In *Leonard Porter*, the Commission dismissed a complaint alleging that respondents' sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives. Complaint counsel had failed to show that consumers of Alaskan craft assumed respondents' products were handmade by Alaskans in Alaska. The Commission was unwilling, absent evidence, to infer from a viewing of the items that the products would tend to mislead consumers.

By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimony evidence must be added. 88 F.T.C. 546, 626, n.5 (1976).

¹⁴*Bait and Switch Policy Protocol*, December 10, 1975; Guides Against Bait Advertising, 16 C.F.R. 238.0 (1967). 32 FR 15,540.

¹⁵*Encyclopedia Britannica* 87 F.T.C. 421, 497 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*, 100 F.T.C. 500 (1982).

¹⁶See the complaints in *Bayley Suit*, C-3117 (consent agreement) (September 30, 1983) [102 F.T.C. 1285]; *Figgie International, Inc.*, D. 9166 (May 17, 1983).

¹⁷The Commission's complaints in *Chrysler Corporation*, 99 F.T.C. 347 (1982), and *Volkswagen of America*, 99 F.T.C. 446 (1982), alleged the failure to disclose accurate use and care instructions for replacing oil filters was deceptive. The complaint in *Ford Motor Co.*, D. 9154, 96 F.T.C. 362 (1980), charged Ford with failing to disclose a "piston scuffing" defect to purchasers and owners which was allegedly widespread and costly to repair. See also *General Motors*, D. 9145 (provisionally accepted consent agreement, April 26, 1983). [102 F.T.C. 1741]

¹⁸See *Jay Norris Corp.*, 91 F.T.C. 751 (1978), *aff'd with modified language in order*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of "immediate and prompt" delivery as well as money back guarantees); *Southern States Distributing Co.*, 83 F.T.C. 1126 (1973) (failure to honor oral and written product maintenance guarantees, as represented); *Skylark Originals, Inc.*, 80 F.T.C. 337 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure to promptly honor moneyback guarantee as represented in advertisements and catalogs); *Capitol Manufacturing Corp.*, 73 F.T.C. 872 (1968) (failure to fully, satisfactorily and promptly meet all obligations and requirements under terms of service guarantee certificate).

¹⁹The evidence necessary to determine how reasonable consumers understand a representation is discussed in Section II of this letter.

²⁰An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

²¹A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *aff'd* 676 F.2d 385 (9th Cir. 1982); *Chrysler*, 87 F.T.C. 749 (1976), *aff'd*, 561 F.2d 357 (D.C. Cir.), *reissued* 90 F.T.C. 606 (1977); *Rhodes Pharmacal Co.*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955).

²²*National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

²³*National Dynamics*, 82 F.T.C. 488, 524, 548 (1973), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 F.T.C. 391 (1976).

²⁴*Warner-Lambert*, 86 F.T.C. 1398, 1415 n.4 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

²⁵*Grolier*, 91 F.T.C. 315, 430 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

²⁶*American Home Products*, 98 F.T.C. 136 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982). "... consumers may be led to expect, quite reasonably..." (at 386); "... consumers may reasonably believe..." (*Id.* n.52); "... would reasonably have been understood by consumers..." (at 371); "[t]he record shows that consumers could reasonably have understood this language . . ." (at 372). *See also*, pp. 373, 374, 375. *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83-4167 (2nd Cir. Sept. 12, 1983). "... ads must be judged by the impression they make on reasonable members of the public . . ." (Slip Op. at 4); ". . . consumers could reasonably have understood . . ." (Slip Op. at 7); ". . . consumers could reasonably infer . . ." (Slip Op. at 11) [102 F.T.C. 21 (1983)]. *Sterling Drug, Inc.*, D. 8919 (July 5, 1983), appeal docketed, No. 83-7700 (9th Cir. Sept. 14, 1983). "... consumers could reasonably assume . . ." (Slip Op. at 9); ". . . consumers could reasonably interpret the ads . . ." (Slip Op. at 33). [102 F.T.C. 395 (1983)]

²⁷*Horizon Corp.*, 97 F.T.C. 464, 810 n.13 (1981).

²⁸*Simeon Management*, 87 F.T.C. 1184, 1230 (1976).

²⁹The listed categories are merely examples. Whether children, terminally ill patients, or any other subgroup of the population will be considered a special audience depends on the specific factual context of the claim or the practice.

The Supreme Court has affirmed this approach. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977).

³⁰In one case, the Commission's complaint focused on seriously ill persons. The ALJ summarized:

According to the complaint, the frustrations and hopes of the seriously ill and their families were exploited, and the representation had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money and to undergo the inconvenience of traveling for a non-existent "operation." *Travel King*, 86 F.T.C. 715, 719 (1975).

In a case involving a weight loss product, the Commission observed:

It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster. *Porter & Dietsch*, 90 F.T.C. 770, 864-865 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

Children have also been the specific target of ads or practices. In *Ideal Toy*, the Commission adopted the Hearing Examiner's conclusion that:

False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

See also, Avalon Industries Inc., 83 F.T.C. 1728, 1750 (1974).

³¹*FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

³²Numerous cases exemplify this point. For instance, in *Pfizer*, the Commission ruled that "the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling." 81 F.T.C. 23, 58 (1972).

In a subsequent case, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts." *Standard Oil of Calif*, 84 F.T.C. 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 F.T.C. 380 (1980).

The Third Circuit stated succinctly the Commission's standard. "The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or

phrases apart from their context." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

³³In *Litton Industries*, the Commission held that fine print disclosures that the surveys included only "Litton authorized" agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. 97 F.T.C. 1, 71, n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure "Litton and one other brand" was reasonable to quote the claim that independent service technicians had been surveyed. "[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance." 97 F.T.C. 1, 70, n.5 (1981).

In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. *D.L. Blair*, 82 F.T.C. 234, 255-256 (1973).

In one case respondent's expert witness testified that the headline (and accompanying picture) of an ad would be the focal point of the first glance. He also told the administrative law judge that a consumer would spend [t]ypically a few seconds at most" on the ads at issue. *Crown Central*, 84 F.T.C. 1493, 1543 nn. 14-15 (1974).

³⁴In *Giant Food*, the Commission agreed with the examiner that the fine-print disclaimer was inadequate to correct a deceptive impression. The Commission quoted from the examiner's finding that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." 61 F.T.C. 326, 348 (1962).

Cf. Beneficial Corp. v. FTC, 542 P.2d 611, 618 (3d Cir. 1976), where the court reversed the Commission's opinion that no qualifying language could eliminate the deception stemming from use of the slogan "Instant Tax Refund."

³⁵"Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and that this disclosure obviated the possibility of deception. We disagree. It is clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning in their sales agreement. . ." *Peacock Buick*, 86 F.T.C. 1532, 1558-59 (1974).

³⁶*Exposition Press*, 295 F.2d 869, 873 (2d Cir. 1961); *Gimbel Bros.*, 61 F.T.C. 1051, 1066 (1962); *Carter Products*, 186 F.2d 821, 824 (1951).

By the same token, money-back guarantees do not eliminate deception. In *Sears*, the Commission observed:

A money-back guarantee is no defense to a charge of deceptive advertising.... A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement.

Sears, Roebuck and Co., 95 F.T.C. 406, 518 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982). However, the existence of a guarantee, if honored, has a bearing on whether the Commission

should exercise its discretion to prosecute. *See* Deceptive and Unsubstantiated Claims Policy Protocol, 1975.

³⁷*See American Home Products*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982), Whether a disclosure on the label cures deception in advertising depends on the circumstances:

... it is well settled that dishonest advertising is not cured or excused by honest labeling [footnote omitted]. Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission [footnote omitted]. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment? *Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule*, 1965, pp. 89-90. 29 FR 8325 (1964).

Misleading "door openers" have also been found deceptive (Encyclopedia Britannica, 87 F.T.C. 421 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *as modified*, 100 F.T.C. 500 (1982)), as have offers to sell that are not bona fide offers (*Seekonk Freezer Meats, Inc.*, 82 F.T.C. 1025 (1973)). In each of these instances, the truth is made known prior to purchase.

³⁸In the Listerine case, the Commission held that *pro forma* statements of no absolute prevention followed by promises of fewer colds did not cure or correct the false message that Listerine will prevent colds. *Warner Lambert* 86 F.T.C. 1398, 1414 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

³⁹*Chicago Metropolitan Pontiac Dealers' Ass'n*, C. 3110 (June 9, 1983). [101 F.T.C. 854 (1983)]

⁴⁰An opinion is a representation that expresses only the belief of the maker, without certainty, as to the existence of a fact, or his judgement as to quality, value, authenticity, or other matters of judgement. American Law Institute, *Restatement on Torts, Second* ¶ 538 A.

⁴¹*Id.* ¶ 539. At common law, a consumer can generally rely on an expert opinion. *Id.*, ¶ 542(a). For this reason, representations of expert opinion will generally be regarded as representations of fact.

⁴²"[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation." *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

The term "Puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess [cite omitted]. Statements made for the purpose of deceiving prospective purchasers cannot

properly be characterized as mere puffing. *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

⁴³In *Avalon Industries*, the ALJ observed that the "'ordinary person with a common degree of familiarity with industrial civilization' would expect a reasonable relationship between the size of package and the size of quantity of the contents. He would have no reason to anticipate slack filling." 83 F.T.C. 1728, 1750 (1974) (I.D.).

⁴⁴"A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product." *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982). A claim is material if it is likely to affect consumer behavior. "Is it likely to affect the average consumer in deciding whether to purchase the advertised product-is there a material deception, in other words?" Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, 1965, pp. 86-87. 29 FR 8325 (1964).

⁴⁵Material information may affect conduct other than the decision to purchase a product. The Commission's complaint in *Volkswagen of America*, 99 F.T.C. 446 (1982), for example, was based on provision of inaccurate instructions for oil filter installation. In its *Restatement on Torts, Second*, the American Law Institute defines a material misrepresentation or omission as one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. Section 538(2). The Restatement explains that a material fact does not necessarily have to affect the finances of a transaction. "There are many more-or-less sentimental considerations that the ordinary man regards as important." Comment on Clause 2(a)(d).

⁴⁶In evaluating materiality, the Commission takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified. *See Algoma Lumber*, 291 U.S. 54, 78 (1933). Similarly, objective differences among products are not material if the difference is not likely to affect consumer choices.

⁴⁷The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.

⁴⁸Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.

⁴⁹*Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980).

⁵⁰*Cf. Restatement on Contracts, Second* ¶ 162(1).

⁵¹In *American Home Products*, the evidence was that the company intended to differentiate its products from aspirin. The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers." *American Home Products*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

⁵²In *Fedders*, the ads represented that only Fedders gave the assurance of cooling on extra hot, humid days. "Such a representation is the *raison d'etre* for an air conditioning unit-it is an extremely material representation." 85 F.T.C. 38, 61 (1975) (I.D.), *petition dismissed*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

⁵³"We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers." *Firestone*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

⁵⁴The Commission found that information that a product was effective in only the small minority of cases where tiredness symptoms are due to an iron deficiency, and that it was of no benefit in all other cases, was material. *J.B. Williams Co.*, 68 F.T.C. 481, 546 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967).

⁵⁵As the Commission noted in *MacMillan, Inc.*:

In marketing their courses, respondents failed to adequately disclose the number of lesson assignments to be submitted in a course. These were material facts necessary for the student to calculate his tuition obligation, which was based on the number of lesson assignments he submitted for grading. The nondisclosure of these material facts combined with the confusion arising from LaSalle's inconsistent use of terminology had the capacity to mislead students about the nature and extent of their tuition obligation. *MacMillan, Inc.*, 96 F.T.C. 208, 303-304 (1980).

See also, Peacock Buick, 86 F.T.C. 1532, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977).

⁵⁶*Simeon Management Corp.*, 87 F.T.C. 1184 (1976), *aff'd*, 579 F.2d 1137, 1168, n.10 (9th Cir. 1978).

⁵⁷In *American Home Products*, the Commission approved the ALJ's finding of materiality from an economic perspective:

If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is a reason to believe consumers are willing to pay a premium for a product believed to contain a special analgesic ingredient but not for a product whose analgesic is ordinary aspirin. *American Home Products*, 98 F.T.C. 136, 369 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

⁵⁸The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "lure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted.

Attachment 2

Ninth Circuit Weighs in on the "Reasonable Consumer"

By Jeffrey Greenbaum

Published: August 3, 2021

Trader Joe's sells jars of Manuka Honey, promoting the product on the front of the label as "100% New Zealand Manuka Honey" or "New Zealand Manuka Honey." When bees make honey, however, they don't just visit one type of flower. That means that, when the honey is made, some of the pollen in the final product comes from sources other than the manuka flower.

In a lawsuit brought in federal court in California, the plaintiffs alleged that Trader Joe's falsely advertised the product as "Manuka Honey," since samples of the products that they tested showed that the product only contained between 57.3% and 62.6% manuka pollen. In 2019, the United States District Court for the Northern District of California [dismissed](#) the case, holding that the label wasn't misleading since, consistent with FDA guidance, the chief floral source of the honey was the manuka flower. The plaintiffs appealed, and the Ninth Circuit, relying on the "reasonable consumer" standard, just affirmed the decision.

In order to state a claim for false advertising (under California, New York, and North Carolina law), the plaintiffs were required to demonstrate that the label is likely to be misleading to a "reasonable consumer." In order to meet this standard, the plaintiff must prove "more than a mere possibility that the seller's label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."

The Ninth Circuit acknowledged that there is some ambiguity as to what the "100%" means in the phrase "100% New Zealand Manuka Honey." Does it mean that the product is all made of honey, all imported from New Zealand, or all derived from the manuka flower? In light of this ambiguity, the court wrote that "reasonable consumers would necessarily require more information before they could reasonably conclude Trader Joe's label promised a honey that was 100% derived from a single, floral source."

In order to analyze whether the ambiguity in the label would be likely to mislead a reasonable consumer, the court adopted the reasoning of the lower court, which held that it was necessary to consider other information readily available to consumers that could easily resolve the alleged ambiguity. The court wrote, "deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used."

Here, the Ninth Circuit found that -- taking the "contextual inferences" into account -- a reasonable consumer would be "quickly dissuaded" into thinking that the product "100% New Zealand Manuka Honey" was made, in fact, entirely from the manuka flower. What were those inferences?

First, the court said, "given the foraging nature of bees, a reasonable honey consumer would know that it is impossible to produce honey that is derived exclusively from a single floral source." The court explained, "A reasonable consumer would not understand Trader Joe's label here as promising something that is impossible to find."

Second, the court said that the low cost of the honey would signal to a reasonable consumer that the product has a lower concentration derived from manuka flower nectar. The court explained, "A reasonable consumer in the market for Manuka honey, who is well aware of the varying concentrations of Manuka in different Manuka honeys, would thus not reasonably expect a jar of honey that is '100%' derived from Manuka to cost only \$13.99."

Third, the court said that the "10+" notation on the label, which is a Unique Manuka Factor rating that indicates the concentration of manuka flower nectar in the product, puts reasonable consumers on notice that "it must represent *something* about the product." The court concluded, then, that "a reasonable consumer could not be left with the conclusion that '100% New Zealand Manuka Honey' represents a claim that the product consists solely of honey derived from Manuka."

There's nothing newsworthy about the fact that advertising claims are typically considered from the perspective of the reasonable consumer. There's also no big news in the fact that, in order to interpret a claim, it's necessary to consider the context in which it appears. What's striking about this decision, however, is the court's view about what a reasonable consumer is and what context that consumer should be taking into account. In the Ninth Circuit's view, it appears that the reasonable consumer isn't just reading the front (and potentially the back) of the label in the supermarket and making a determination about what's contained in the product. Rather, this reasonable consumer is examining and thinking about the label and considering not only the information provided, but other inferences that can be drawn, based on other information that the consumer might know -- such as how bees make honey and the relative prices of honey at the market. Perhaps even more striking is the fact that the Ninth Circuit expected a consumer, when faced with a potentially unfamiliar symbol -- such as "10+" -- to realize that this information communicated "something," even if the consumer might not know what it communicates. This suggests, then, that the court may be expecting a consumer to review advertising critically and perhaps even to do some further research to make sure the label is fully understood.

Moore v. Trader Joe's Company, No. 19-16618 (9th Cir. July 15, 2021).

Attachment 3

"All" Doesn't Mean "All," At Least According to New York's Highest Court

By Jeffrey Greenbaum

Published: June 23, 2021

The publisher Matthew Bender & Company sells a legal resource manual called *New York Landlord-Tenant Law*. The book, which is also called the "Tanbook," is published annually. It's sold on Amazon, through Matthew Bender's website, and as part of a subscription service. In advertising for the book, the publisher claimed that the book "brings together all the laws and regulations governing landlord/tenant matters in New York, providing the text of State statutes, regulations, and local laws." Apparently, notwithstanding this claim, the book did not, in fact, contain all of the relevant laws. Not surprisingly -- given that the book was sold to lawyers -- a lawsuit ensued. What is surprising, however, is that the lawsuit made its way all the way up to New York's highest court, the Court of Appeals. And, even more surprising than that, the Court [affirmed](#) the dismissal of the complaint, saying that reasonable consumers wouldn't think that a book promoting the fact that it contains "all" of New York's landlord-tenant laws, does, in fact, contain all of those laws. Here's why.

New York's General Business Law prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." In order to prove a violation of the statute, a plaintiff must show that: (1) the defendant's conduct was consumer-oriented, (2) the defendant's act or practice was deceptive or misleading in a material way, and (3) the plaintiff suffered an injury as a result of the deception. The Court of Appeals' decision here turned on whether Matthew Bender's conduct violated the second prong of the test by being materially misleading. A defendant's actions are materially misleading when they are "likely to mislead a reasonable consumer acting reasonably under the circumstances."

The plaintiffs argued in the lawsuit that Matthew Bender's advertising was a classic "bait and switch," since the publisher advertised that the book contained all laws, but that, when it arrived, it didn't. Matthew Bender argued, essentially, that given the nature of the claim, the product involved, and because of the disclaimers used in the sales contracts with annual subscribers, that reasonable consumers would not have been misled.

So, why did the Court hold that "all" didn't mean "all" here?

First, the Court suggests that it's not reasonable for consumers to rely on the representation that the book contains all of the relevant laws, since the laws are subject to legislative amendment at any time. While it makes perfect sense that consumers would not expect that representation to be true during the course of the entire year, the Court doesn't provide any rationale why consumers wouldn't expect the representation to be true at least at the time when the book is published.

Second, the Court points to the terms and conditions governing subscribers to the annual edition of the book, which was apparently included in invoices that the plaintiffs received after purchasing the book. The terms includes a broad disclaimer of warranties, which states, "WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS." While the disclaimer undoubtedly makes clear that the publisher is not making any promises about the accuracy or completeness of the book, the Court doesn't explain how a disclaimer -- that is sent to consumers after they have been misled by an advertising claim and purchased the item based on that representation -- can cure the harm that was already caused.

In affirming the dismissal of the complaint, the Court concluded, "The Tanbook's susceptibility to revision at any time, coupled with the fact that the disclaimer addresses the precise deception alleged in plaintiffs' complaint, leaves no possibility that a reasonable consumer would have been misled about the contents of the Tanbook."

What does the Court's decision mean for advertisers? Can it really be that "all" does not mean "all"? Well, it probably doesn't mean all that. Here are some potential (useful) take-aways.

In order to interpret an advertising claim, the claim must be viewed in the context of the advertising as a whole, taking into account the specific product being promoted. While, in the abstract, a claim may have a variety of meanings, the relevant question is what the claim means in the specific context in which it is used. Whether you agree or disagree with the Court's decision here, the Court's decision is, in large part, focused on the question of how a reasonable consumer would interpret the "all" claim in the context in which it was communicated.

As regular readers of this blog know, courts -- as opposed to the [Federal Trade Commission](#) or the [National Advertising Division](#) -- do bring a high degree of skepticism to false advertising claims and a real reluctance to allow these cases to move forward. It seems to me that, notwithstanding plaintiffs' assertions that advertisers have made claims which appear to be false on their face, courts often dismiss lawsuits when they just don't buy the argument that consumers were truly deceived or that they were actually damaged in any meaningful way.

And what about the Court's holding that appears to suggest that a disclaimer provided after the fact, that also contradicts the main message of the advertising, can cure a false advertising claim? At a minimum, this holding -- if it means what it appears to mean -- would be contrary to a well-established body of state and federal law. As Associate Judge Eugene M. Fahey's dissenting opinion stated, "This theory would allow routine disclaimers to render the consumer protections, codified by the statute, meaningless."

Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Company, 2021 WL 2228800 (N.Y. 2021).

Attachment 4

Implied Claims, "Up To" Claims, and How Judges Approach False Advertising Cases

By Jeffrey Greenbaum

Published April 1, 2022

Rubbermaid makes portable ice coolers, such as its Marine Chest Cooler and its DuraChill Cooler, which the company promotes as being able to keep ice for five days. Specifically, the label for the DuraChill cooler says "5 DAY*" in large type and then further explains that the cooler, "keeps ice up to 5 days at 90 F." The Marine Chest includes similar claims. What does this "5 day" claim communicate to consumers? That was the issue in a recent lawsuit in the United States District Court for the Southern District of New York.

In the lawsuit, the plaintiffs alleged that the 5-day claim communicated to them that the coolers would keep ice for five days and would keep food at a safe temperature for that period of time as well. The plaintiffs argued, however, that this was not, in fact, the case. The plaintiffs said that not only do the coolers not retain ice for five days under real-world conditions (i.e., opening and closing the cooler), but they do not maintain a food-safe temperature for more than two days.

The plaintiffs sued, alleging false advertising and other claims, under New York law. In order to state a claim for false advertising, the plaintiffs needed to plausibly allege that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." The court dismissed the false advertising claim, however, holding that, based on plaintiff's allegations, no reasonable consumer could be misled.

First, the court pointed to the fact that Rubbermaid's labels do not make any express representation at all as to what temperature the coolers can maintain, what temperature constitutes a food-safe temperature, or how long the coolers can maintain a food safe temperature. The court explained, "As such, no reasonable consumer could be deceived into believing that the Products would maintain a food-safe temperature for any amount of time."

Second, the court pointed to the fact that the labels didn't claim that they would retain ice for "5 days," but that they only said that they would retain ice for "up to" that period of time. The court held that there was no basis that "up to" somehow communicated a "minimum level of performance." The court said, "This is simply not plausible."

Regardless of whether you think the court got it right here, what's so striking about this case is how easily another court, a regulator, or a self-regulatory body could have come to a different decision.

The plaintiff argues, essentially, that if you're advertising that a cooler keeps ice for "up to 5 days," that claim must necessarily communicate that it keeps food at a proper temperature for that period of time as well. Whether you agree or not with that argument, the court dismisses out-of-hand the notion that any claim at all was communicated about whether the cooler keeps food at a food-safe temperature for any period of time. Because the advertiser didn't make any express claims about whether it keeps food at food-safe temperatures, the court was not willing to consider whether any implied claims were communicated. At the National Advertising Division, for example, "It is well-established that an advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey." While reasonable people may disagree about what reasonable interpretations may have been communicated by Rubbermaid's claims, it does seem that there may be at least some disagreement about whether the existence of implied claims should be considered at all.

This case is also further evidence of the differing approaches that courts, regulators, and self-regulatory bodies take to interpreting "up to" claims. (For a in-depth discussion of this issue, check out my post from last year on [Substantiating "Up To" Claims](#).) While the plaintiffs argued here that the "up to 5 days" claim communicated to consumers that they should expect the ice (and food) to stay cold for five days, the court -- taking a very different approach than the Federal Trade Commission on this issue -- simply refused to ignore the words "up to," holding that "up to" communicates maximum performance, not minimum performance. In fact, in a footnote, the court wrote, "Nor is the Court convinced by Plaintiff's vague arguments concerning the Federal Trade Commission's . . . interpretation of 'up to' statements and unsupported assumption that the Products' labels violate the FTC Act."

Turk v. Rubbermaid, No. 21-CV-270 (KMK) (S.D.N.Y. March 21, 2022).

Attachment 5

Are Disclosures on the Back of Packaging Effective?

By Jeffrey Greenbaum

Published: February 25, 2024

If an advertiser includes a claim on the front of packaging, but puts the qualifying language on the back, will that disclaimer be effective? This was the issue in a case decided in December that I've been meeting to blog about since then. And, since the case involves sunscreen, and I'm headed out tomorrow morning to speak about the effectiveness of disclosures at the Consumer Brands Association [CPG Legal Forum](#) in Los Angeles (where hopefully I'll need sunscreen), this seemed like a great time to do so.

This case involves a number of different foundation products sold by L'Oreal that are promoted on the front of the packaging as lasting up to twenty-four hours. The front of the packaging also promotes the fact that the foundation includes sunscreen (but the sunscreen doesn't last all day). The issue in the case, then, is whether consumers will think that the "up to 24 hr" foundation claim applies to sun protection as well.

The plaintiffs alleged false advertising and other claims under California law. The plaintiffs alleged that the "up to 24 hr" claims misled them into believing that these products provided twenty-four hours of sunscreen protection. Whether a claim is misleading is governed by the "reasonable consumer" standard. This means that the plaintiffs must show that "members of the public are likely to be deceived." And, you can't just show that a few people are deceived. Instead, the question is whether "it is probable that a significant promotion of the general consumer public or of targeted consumers, acting reasonably in the circumstances, could be misled."

Moreover, in the Ninth Circuit, where a claim on the front of the packaging is ambiguous, "the ambiguity can be resolved by reference to the back label." In other words, if the meaning of the claim is clear, consumers have no reason to turn over the package to learn more. On the other hand, if the claim is ambiguous, "a reasonable consumer would consider all of the information available at the time of purchase, including the back labels."

Here, the court held that the "up to 24 hr" claim was ambiguous. So, the question – at the motion to dismiss stage – was whether this ambiguity was resolved by the language on the back of the packaging. The case actually involved several different plaintiffs, who bought several different products, but I want to focus on two of the plaintiffs in particular.

One consumer bought "Lancome Teint Idole Ultra 24H Long Wear Matte Foundation." The back label of the product clearly explains that, for sunscreen use, consumers must reapply it every two hours. The court held that this information resolved any ambiguity about the statement and dismissed this consumers' claim.

Another consumer bought "L'Oreal Infallible Pro-Glo Foundation" which also made a similar twenty-four hour claim. The back label of the product also explained that, for sunscreen protection, it needed to be reapplied every two hours. On this packaging, however, the instruction was included under a peel-back sticker which was "not immediately visible to consumers at the time of purchase." The court held, therefore, that it could not conclude as a matter of law "that a reasonable consumer would peel back the label in the store, before purchasing the product, to find and read these instructions."

What are some important take-aways here?

First off, it's always going to be better to ensure that the claims you make on the front of your packaging are clear and are not subject to misinterpretation – since advertisers are generally responsible for all reasonable interpretations of their claims. If you think that the claim may be misunderstood, it's best to revise your claim to correct the ambiguity.

If you can't revise the claim, then it's best to include the necessary qualifying language in close proximity to the claim. The more prominent a disclaimer is, the more likely it is that it will be effective.

If you're going to include your qualifying language on the back, you'd better hope that the court finds that your front-of-package-claim is ambiguous, and that the court believes that you've adequately cleared things up on the back in a way that consumers will understand.

And, whatever you do, don't include your qualifying language in a peel-back label – since you're likely to have an uphill battle convincing a court that reasonable consumers will see it.

Zimmerman v. L'Oreal USA, 2023 WL 8587620 (N.D. Cal. 2023).

Attachment 6

FTC Takes Action to Stop Lyft from Deceiving Drivers with Misleading Earnings Claims

Proposed court order requires Lyft to have evidence to back up earnings claims, clearly notify drivers about terms of incentives, pay more than \$2 million civil penalty

Published: October 25, 2024

The FTC [is taking action](#) against rideshare operator Lyft for making deceptive earnings claims about how much money drivers could expect to make per hour and how much they could earn in special incentives.

Lyft has agreed to [a proposed settlement](#) that would require its claims about drivers' pay to be based on typical earnings. In addition, Lyft has agreed to back up with evidence any claims it makes about drivers' pay, clearly notify drivers about the terms of its "earnings guarantee" offers, and pay a \$2.1 million civil penalty.

The U.S. Department of Justice filed the lawsuit and proposed settlement upon notification and referral from the FTC.

"It is illegal to lure workers with misleading claims about how much they will earn on the job," said FTC Chair Lina M. Khan. "The FTC will keep using all its tools to hold businesses accountable when they violate the law and exploit American workers."

The complaint against Lyft alleges that as demand for rideshare services increased in 2021 and 2022, Lyft made numerous false and misleading claims in its advertising and marketing about how much money consumers could make if they chose to drive for Lyft.

Ads for Lyft advertised that drivers around the country could make specific hourly amounts. For example, potential drivers in Atlanta were offered up to \$33 an hour, potential drivers in Portland were offered \$41 an hour and potential drivers in Los Angeles were offered up to \$43 an hour. Lyft failed to disclose that these amounts did not represent the income an average driver could expect to earn, but instead were based on the earnings of the top one-fifth of drivers. The complaint notes that these figures overinflated the actual earnings achieved by most drivers by as much as 30%.

In addition, the complaint notes that the hourly earnings claims Lyft made in its ads included tips paid by passengers, even though many drivers would assume any tips they received would be in addition to an hourly pay figure.

In its advertisements, Lyft also tried to entice drivers by touting "earnings guarantees," which supposedly guaranteed that drivers would be paid a set amount if they completed a specific number of rides in a certain time. For example, one guarantee promised

drivers they would make \$975 if they completed 45 rides in a weekend. But these guarantees did not clearly disclose that drivers were only paid the difference between what they actually earned, and Lyft's advertised guaranteed amount. Drivers complained to the company in large numbers that they believed the amount Lyft guaranteed would be paid as a bonus on top of whatever pay they received for completing the assigned number of rides.

One driver complained to the FTC that: "...This [is] unacceptable and not fair. . . . [Lyft] is misleading their drivers. [Lyft] should pay their driver[s] as stated, it shows I completed the task. As the driver, I expected to be paid for the service I rendered."

The court complaint notes that Lyft continued to make these deceptive earnings claims even after receiving the FTC's Notice of Penalty Offenses that put the company on notice that deceptive earnings claims were unlawful.

In addition to requiring the company to pay a \$2.1 million civil penalty, the proposed settlement also will prohibit Lyft from making any earnings claim unless they have meaningful evidence to back that claim up. In addition, Lyft will be prohibited from making any claims about hourly earnings that include tips as part of the stated hourly amount. The settlement will also require Lyft to clearly disclose to drivers that, under its earnings guarantees, drivers will receive only the difference between their regular earnings and the guaranteed amount. The settlement also requires Lyft to provide notice to its drivers about the settlement.

Today's action is part of the FTC's ongoing efforts to protect workers in the gig economy. In 2021, the FTC [reached a settlement with Amazon](#) returning more than \$60 million to Amazon Flex drivers whose tips were illegally withheld. In 2022, the FTC took action against HomeAdvisor for misleading service providers, and the following year [obtained an order](#) barring false claims and providing millions in redress. This year, the FTC challenged deceptive earnings claims and other unlawful practices by [Arise](#) and [Care.com](#), securing conduct relief and more than \$15 million for affected workers. The FTC has detailed how its authorities apply in the gig economy in its [Policy Statement on Enforcement Related to Gig Work](#).

The Commission vote to authorize the staff to refer the complaint to the DOJ and to approve the proposed consent decree was 3-2, with Commissioners Melissa Holyoak and Andrew Ferguson dissenting. Chair Lina M. Khan [issued a statement](#) joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya. Commissioner Holyoak [issued a statement](#). Commissioner Andrew N. Ferguson [issued a statement](#). The DOJ filed the complaint and proposed consent decree upon notification and referral from the Commission in U.S. District Court for the Northern District of California.

NOTE: The Commission authorizes the filing of a complaint when it has "reason to believe" that the named defendants are violating or are about to violate the law and it appears to the Commission that a proceeding is in the public interest. Consent decrees have the force of law when approved and signed by the District Court judge.

The staff attorneys on this matter were Evan Rose and Abdiel T. Lewis of the FTC's Western Region San Francisco.

Attachment 7

PART 260– GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

Sec. 260.1	Purpose, Scope, and Structure of the Guides.
260.2	Interpretation and Substantiation of Environmental Marketing Claims.
260.3	General Principles.
260.4	General Environmental Benefit Claims.
260.5	Carbon Offsets.
260.6	Certifications and Seals of Approval.
260.7	Compostable Claims.
260.8	Degradable Claims.
260.9	Free-Of Claims.
260.10	Non-Toxic Claims.
260.11	Ozone-Safe and Ozone-Friendly Claims.
260.12	Recyclable Claims.
260.13	Recycled Content Claims.
260.14	Refillable Claims.
260.15	Renewable Energy Claims.
260.16	Renewable Materials Claims.
260.17	Source Reduction Claims.

Authority: 15 U.S.C. 41-58.

§ 260.1 Purpose, Scope, and Structure of the Guides.

(a) These guides set forth the Federal Trade Commission’s current views about environmental claims. The guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. They do not confer

any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.

(b) These guides do not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act.

(c) These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals. These guides also apply to business-to-business transactions. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.

(d) The guides consist of general principles, specific guidance on the use of particular environmental claims, and examples. Claims may raise issues that are addressed by more than one example and in more than one section of the guides. The examples provide the Commission's views on how reasonable consumers likely interpret certain claims. The guides are based on marketing to a general audience. However, when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue. In addition, although many examples present specific claims and options for qualifying claims, the examples do not illustrate all permissible claims or qualifications under Section 5 of the FTC Act. Nor do they illustrate the only ways to comply with the guides. Marketers can use an alternative

approach if the approach satisfies the requirements of Section 5 of the FTC Act. All examples assume that the described claims otherwise comply with Section 5. Where particularly useful, the Guides incorporate a reminder to this effect.

§ 260.2 Interpretation and Substantiation of Environmental Marketing Claims.

Section 5 of the FTC Act prohibits deceptive acts and practices in or affecting commerce. A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers' decisions. See FTC Policy Statement on Deception, 103 FTC 174 (1983). To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims. See FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (1984). In the context of environmental marketing claims, a reasonable basis often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Such evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true.

§ 260.3 General Principles.

The following general principles apply to all environmental marketing claims, including those described in §§ 260.4 - 16. Claims should comport with all relevant provisions of these guides.

(a) **Qualifications and disclosures:** To prevent deceptive claims, qualifications and disclosures should be clear, prominent, and understandable. To make disclosures clear and prominent, marketers should use plain language and sufficiently large type, should place disclosures in close proximity to the qualified claim, and should avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.

(b) **Distinction between benefits of product, package, and service:** Unless it is clear from the context, an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service. In general, if the environmental attribute applies to all but minor, incidental components of a product or package, the marketer need not qualify the claim to identify that fact. However, there may be exceptions to this general principle. For example, if a marketer makes an unqualified recyclable claim, and the presence of the incidental component significantly limits the ability to recycle the product, the claim would be deceptive.

Example 1: A plastic package containing a new shower curtain is labeled "recyclable" without further elaboration. Because the context of the claim does not make clear whether it refers to the plastic package or the shower curtain, the claim is deceptive if any part of either the package or the curtain, other than minor, incidental components, cannot be recycled.

Example 2: A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because the bottle cap is a minor, incidental component of the package, the claim is not deceptive.

(c) **Overstatement of environmental attribute:** An environmental marketing claim should not overstate, directly or by implication, an environmental attribute or benefit. Marketers should not state or imply environmental benefits if the benefits are negligible.

Example 1: An area rug is labeled “50% more recycled content than before.” The manufacturer increased the recycled content of its rug from 2% recycled fiber to 3%. Although the claim is technically true, it likely conveys the false impression that the manufacturer has increased significantly the use of recycled fiber.

Example 2: A trash bag is labeled “recyclable” without qualification. Because trash bags ordinarily are not separated from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no meaningful benefit exists.

(d) **Comparative claims:** Comparative environmental marketing claims should be clear to avoid consumer confusion about the comparison. Marketers should have substantiation for the comparison.

Example 1: An advertiser notes that its glass bathroom tiles contain “20% more recycled content.” Depending on the context, the claim could be a comparison either to the advertiser’s immediately preceding product or to its competitors’ products. The advertiser should have substantiation for both interpretations. Otherwise, the advertiser should make the basis for comparison clear, for example, by saying “20% more recycled content than our previous bathroom tiles.”

Example 2: An advertiser claims that “our plastic diaper liner has the most recycled content.” The diaper liner has more recycled content, calculated as a percentage of

weight, than any other on the market, although it is still well under 100%. The claim likely conveys that the product contains a significant percentage of recycled content and has significantly more recycled content than its competitors. If the advertiser cannot substantiate these messages, the claim would be deceptive.

Example 3: An advertiser claims that its packaging creates “less waste than the leading national brand.” The advertiser implemented the source reduction several years ago and supported the claim by calculating the relative solid waste contributions of the two packages. The advertiser should have substantiation that the comparison remains accurate.

Example 4: A product is advertised as “environmentally preferable.” This claim likely conveys that the product is environmentally superior to other products. Because it is highly unlikely that the marketer can substantiate the messages conveyed by this statement, this claim is deceptive. The claim would not be deceptive if the marketer accompanied it with clear and prominent language limiting the environmental superiority representation to the particular attributes for which the marketer has substantiation, provided the advertisement’s context does not imply other deceptive claims. For example, the claim “Environmentally preferable: contains 50% recycled content compared to 20% for the leading brand” would not be deceptive.

§ 260.4 General Environmental Benefit Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.
- (b) Unqualified general environmental benefit claims are difficult to interpret and likely convey a wide range of meanings. In many cases, such claims likely convey that the product,

package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact. Because it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims, marketers should not make unqualified general environmental benefit claims.

(c) Marketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that limits the claim to a specific benefit or benefits. Marketers should not imply that any specific benefit is significant if it is, in fact, negligible. If a qualified general claim conveys that a product is more environmentally beneficial overall because of the particular touted benefit(s), marketers should analyze trade-offs resulting from the benefit(s) to determine if they can substantiate this claim.

(d) Even if a marketer explains, and has substantiation for, the product's specific environmental attributes, this explanation will not adequately qualify a general environmental benefit claim if the advertisement otherwise implies deceptive claims. Therefore, marketers should ensure that the advertisement's context does not imply deceptive environmental claims.

Example 1: The brand name "Eco-friendly" likely conveys that the product has far-reaching environmental benefits and may convey that the product has no negative environmental impact. Because it is highly unlikely that the marketer can substantiate these claims, the use of such a brand name is deceptive. A claim, such as "Eco-friendly: made with recycled materials," would not be deceptive if: (1) the statement "made with recycled materials" is clear and prominent; (2) the marketer can substantiate that the entire product or package, excluding minor, incidental components, is made from recycled material; (3) making the product with recycled materials makes the product

more environmentally beneficial overall; and (4) the advertisement's context does not imply other deceptive claims.

Example 2: A marketer states that its packaging is now "Greener than our previous packaging." The packaging weighs 15% less than previous packaging, but it is not recyclable nor has it been improved in any other material respect. The claim is deceptive because reasonable consumers likely would interpret "Greener" in this context to mean that other significant environmental aspects of the packaging also are improved over previous packaging. A claim stating "Greener than our previous packaging" accompanied by clear and prominent language such as, "We've reduced the weight of our packaging by 15%," would not be deceptive, provided that reducing the packaging's weight makes the product more environmentally beneficial overall and the advertisement's context does not imply other deceptive claims.

Example 3: A marketer's advertisement features a picture of a laser printer in a bird's nest balancing on a tree branch, surrounded by a dense forest. In green type, the marketer states, "Buy our printer. Make a change." Although the advertisement does not expressly claim that the product has environmental benefits, the featured images, in combination with the text, likely convey that the product has far-reaching environmental benefits and may convey that the product has no negative environmental impact. Because it is highly unlikely that the marketer can substantiate these claims, this advertisement is deceptive.

Example 4: A manufacturer's website states, "Eco-smart gas-powered lawn mower with improved fuel efficiency!" The manufacturer increased the fuel efficiency by 1/10 of a percent. Although the manufacturer's claim that it has improved its fuel efficiency

technically is true, it likely conveys the false impression that the manufacturer has significantly increased the mower's fuel efficiency.

Example 5: A marketer reduces the weight of its plastic beverage bottles. The bottles' labels state: "Environmentally-friendly improvement. 25% less plastic than our previous packaging." The plastic bottles are 25 percent lighter but otherwise are no different. The advertisement conveys that the bottles are more environmentally beneficial overall because of the source reduction. To substantiate this claim, the marketer likely can analyze the impacts of the source reduction without evaluating environmental impacts throughout the packaging's life cycle. If, however, manufacturing the new bottles significantly alters environmental attributes earlier or later in the bottles' life cycle, *i.e.*, manufacturing the bottles requires more energy or a different kind of plastic, then a more comprehensive analysis may be appropriate.

§ 260.5 Carbon Offsets.

(a) Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.

(b) It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.

(c) It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.

Example 1: On its website, an online travel agency invites consumers to purchase offsets to “neutralize the carbon emissions from your flight.” The proceeds from the offset sales fund future projects that will not reduce greenhouse gas emissions for two years. The claim likely conveys that the emission reductions either already have occurred or will occur in the near future. Therefore, the advertisement is deceptive. It would not be deceptive if the agency’s website stated “Offset the carbon emissions from your flight by funding new projects that will begin reducing emissions in two years.”

Example 2: An offset provider claims that its product “will offset your own ‘dirty’ driving habits.” The offset is based on methane capture at a landfill facility. State law requires this facility to capture all methane emitted from the landfill. The claim is deceptive because the emission reduction would have occurred regardless of whether consumers purchased the offsets.

§ 260.6 Certifications and Seals of Approval.

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.
- (b) A marketer’s use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guides, 16 C.F.R. Part 255, including Definitions (§ 255.0), General Considerations (§ 255.1), Expert Endorsements (§ 255.3), Endorsements by Organizations (§ 255.4), and Disclosure of Material Connections (§ 255.5).¹

¹ The examples in this section assume that the certifiers’ endorsements meet the criteria provided in the Expert Endorsements (255.3) and Endorsements by Organizations (255.4) sections of the Endorsement Guides.

- (c) Third-party certification does not eliminate a marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.
- (d) A marketer’s use of an environmental certification or seal of approval likely conveys that the product offers a general environmental benefit (see § 260.4) if the certification or seal does not convey the basis for the certification or seal, either through the name or some other means. Because it is highly unlikely that marketers can substantiate general environmental benefit claims, marketers should not use environmental certifications or seals that do not convey the basis for the certification.
- (e) Marketers can qualify general environmental benefit claims conveyed by environmental certifications and seals of approval to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that clearly conveys that the certification or seal refers only to specific and limited benefits.

Example 1: An advertisement for paint features a “GreenLogo” seal and the statement “GreenLogo for Environmental Excellence.” This advertisement likely conveys that:

(1) the GreenLogo seal is awarded by an independent, third-party certifier with appropriate expertise in evaluating the environmental attributes of paint; and (2) the product has far-reaching environmental benefits. If the paint manufacturer awarded the seal to its own product, and no independent, third-party certifier objectively evaluated the paint using independent standards, the claim would be deceptive. The claim would not be deceptive if the marketer accompanied the seal with clear and prominent language:

(1) indicating that the marketer awarded the GreenLogo seal to its own product; and (2) clearly conveying that the award refers only to specific and limited benefits.

Example 2: A manufacturer advertises its product as “certified by the American Institute of Degradable Materials.” Because the advertisement does not mention that the American Institute of Degradable Materials (“AIDM”) is an industry trade association, the certification likely conveys that it was awarded by an independent certifier. To be certified, marketers must meet standards that have been developed and maintained by a voluntary consensus standard body.² An independent auditor applies these standards objectively. This advertisement likely is not deceptive if the manufacturer complies with § 260.8 of the Guides (Degradable Claims) because the certification is based on independently-developed and -maintained standards and an independent auditor applies the standards objectively.

Example 3: A product features a seal of approval from “The Forest Products Industry Association,” an industry certifier with appropriate expertise in evaluating the environmental attributes of paper products. Because it is clear from the certifier’s name that the product has been certified by an industry certifier, the certification likely does not convey that it was awarded by an independent certifier. The use of the seal likely is not deceptive provided that the advertisement does not imply other deceptive claims.

² Voluntary consensus standard bodies are “organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. . . . A voluntary consensus standards body is defined by the following attributes: (i) openness, (ii) balance of interest, (iii) due process, (iv) an appeals process, (v) consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus members are given an opportunity to change their votes after reviewing the comments.” Memorandum for Heads of Executive Departments and Agencies on Federal Participation in the Development and Use of Voluntary Consensus Assessment Activities, February 10, 1998, Circular No. A-119 Revised, Office of Management and Budget at www.whitehouse.gov/omb/circulars_a119.

Example 4: A marketer’s package features a seal of approval with the text “Certified Non-Toxic.” The seal is awarded by a certifier with appropriate expertise in evaluating ingredient safety and potential toxicity. It applies standards developed by a voluntary consensus standard body. Although non-industry members comprise a majority of the certifier’s board, an industry veto could override any proposed changes to the standards. This certification likely conveys that the product is certified by an independent organization. This claim would be deceptive because industry members can veto any proposed changes to the standards.

Example 5: A marketer’s industry sales brochure for overhead lighting features a seal with the text “EcoFriendly Building Association” to show that the marketer is a member of that organization. Although the lighting manufacturer is, in fact, a member, this association has not evaluated the environmental attributes of the marketer’s product. This advertisement would be deceptive because it likely conveys that the EcoFriendly Building Association evaluated the product through testing or other objective standards. It also is likely to convey that the lighting has far-reaching environmental benefits. The use of the seal would not be deceptive if the manufacturer accompanies it with clear and prominent qualifying language: (1) indicating that the seal refers to the company’s membership only and that the association did not evaluate the product’s environmental attributes; and (2) limiting the general environmental benefit representations, both express and implied, to the particular product attributes for which the marketer has substantiation. For example, the marketer could state: “Although we are a member of the EcoFriendly Building Association, it has not evaluated this product. Our lighting is made from 100 percent recycled metal and uses energy efficient LED technology.”

Example 6: A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text “EarthSmart.” EarthSmart is an independent, third-party certifier with appropriate expertise in evaluating chemical emissions of products. While the marketer meets EarthSmart’s standards for reduced chemical emissions during product usage, the product has no other specific environmental benefits. Either seal likely conveys that the product has far-reaching environmental benefits, and that EarthSmart certified the product for all of these benefits. If the marketer cannot substantiate these claims, the use of the seal would be deceptive. The seal would not be deceptive if the marketer accompanied it with clear and prominent language clearly conveying that the certification refers only to specific and limited benefits. For example, the marketer could state next to the globe icon: “EarthSmart certifies that this product meets EarthSmart standards for reduced chemical emissions during product usage.” Alternatively, the claim would not be deceptive if the EarthSmart environmental seal itself stated: “EarthSmart Certified for reduced chemical emissions during product usage.”

Example 7: A one-quart bottle of window cleaner features a seal with the text “Environment Approved,” granted by an independent, third-party certifier with appropriate expertise. The certifier granted the seal after evaluating 35 environmental attributes. This seal likely conveys that the product has far-reaching environmental benefits and that Environment Approved certified the product for all of these benefits and therefore is likely deceptive. The seal would likely not be deceptive if the marketer accompanied it with clear and prominent language clearly conveying that the seal refers only to specific and limited benefits. For example, the seal could state: “Virtually all

products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].” The referenced webpage provides a detailed summary of the examined environmental attributes. A reference to a website is appropriate because the additional information provided on the website is not necessary to prevent the advertisement from being misleading. As always, the marketer also should ensure that the advertisement does not imply other deceptive claims, and that the certifier’s criteria are sufficiently rigorous to substantiate all material claims reasonably communicated by the certification.

Example 8: Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a non-profit third-party association. Great Paper Company paid the No Chlorine Products Association a reasonable fee for the certification. Consumers would reasonably expect that marketers have to pay for certification. Therefore, there are no material connections between Great Paper Company and the No Chlorine Products Association. The claim would not be deceptive.

§ 260.7 Compostable Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable.
- (b) A marketer claiming that an item is compostable should have competent and reliable scientific evidence that all the materials in the item will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner (i.e., in approximately the same time as the materials with which it is composted) in an appropriate composting facility, or in a home compost pile or device.

(c) A marketer should clearly and prominently qualify compostable claims to the extent necessary to avoid deception if: (1) the item cannot be composted safely or in a timely manner in a home compost pile or device; or (2) the claim misleads reasonable consumers about the environmental benefit provided when the item is disposed of in a landfill.

(d) To avoid deception about the limited availability of municipal or institutional composting facilities, a marketer should clearly and prominently qualify compostable claims if such facilities are not available to a substantial majority of consumers or communities where the item is sold.

Example 1: A manufacturer indicates that its unbleached coffee filter is compostable.

The unqualified claim is not deceptive, provided the manufacturer has substantiation that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If so, the extent of local municipal or institutional composting facilities is irrelevant.

Example 2: A garden center sells grass clipping bags labeled as “Compostable in California Municipal Yard Trimmings Composting Facilities.” When the bags break down, however, they release toxins into the compost. The claim is deceptive if the presence of these toxins prevents the compost from being usable.

Example 3: A manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should clearly and prominently disclose that the package is not suitable for home composting.

Example 4: Nationally marketed lawn and leaf bags state “compostable” on each bag. The bags also feature text disclosing that the bag is not designed for use in home compost

piles. Yard trimmings programs in many communities compost these bags, but such programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive because it likely conveys that composting facilities are available to a substantial majority of consumers or communities. To avoid deception, the marketer should clearly and prominently indicate the limited availability of such programs. A marketer could state “Appropriate facilities may not exist in your area,” or provide the approximate percentage of communities or consumers for which such programs are available.

Example 5: A manufacturer sells a disposable diaper that states, “This diaper can be composted if your community is one of the 50 that have composting facilities.” The claim is not deceptive if composting facilities are available as claimed and the manufacturer has substantiation that the diaper can be converted safely to usable compost in solid waste composting facilities.

Example 6: A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, “Compostable Yard Trimmings Bag for County Composting Programs.” The claim is not deceptive. Because the bags are compostable where they are sold, a qualification is not needed to indicate the limited availability of composting facilities.

§ 260.8 Degradable Claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable. The

following guidance for degradable claims also applies to biodegradable, oxo-degradable, oxo-biodegradable, and photodegradable claims.

(b) A marketer making an unqualified degradable claim should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (i.e., decompose into elements found in nature) within a reasonably short period of time after customary disposal.

(c) It is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal.

Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.

(d) Degradable claims should be qualified clearly and prominently to the extent necessary to avoid deception about: (1) the product's or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.

Example 1: A marketer advertises its trash bags using an unqualified “degradable” claim. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. Consumers, however, place trash bags into the solid waste stream, which customarily terminates in incineration facilities or landfills where they will not degrade within one year. The claim is, therefore, deceptive.

Example 2: A marketer advertises a commercial agricultural plastic mulch film with the claim “Photodegradable,” and clearly and prominently qualifies the term with the phrase “Will break down into small pieces if left uncovered in sunlight.” The advertiser possesses competent and reliable scientific evidence that within one year, the product

will break down, after being exposed to sunlight, into sufficiently small pieces to become part of the soil. Thus, the qualified claim is not deceptive. Because the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the consumer expectations for an unqualified photodegradable claim, i.e., that the product will not only break down, but also will decompose into elements found in nature.

Example 3: A marketer advertises its shampoo as “biodegradable” without qualification. The advertisement makes clear that only the shampoo, and not the bottle, is biodegradable. The marketer has competent and reliable scientific evidence demonstrating that the shampoo, which is customarily disposed in sewage systems, will break down and decompose into elements found in nature in a reasonably short period of time in the sewage system environment. Therefore, the claim is not deceptive.

Example 4: A plastic six-pack ring carrier is marked with a small diamond. Several state laws require that the carriers be marked with this symbol to indicate that they meet certain degradability standards if the carriers are littered. The use of the diamond by itself, in an inconspicuous location, does not constitute a degradable claim. Consumers are unlikely to interpret an inconspicuous diamond symbol, without more, as an unqualified photodegradable claim.³

Example 5: A fiber pot containing a plant is labeled “biodegradable.” The pot is customarily buried in the soil along with the plant. Once buried, the pot fully

³ The Guides’ treatment of unqualified degradable claims is intended to help prevent deception and is not intended to establish performance standards to ensure the degradability of products when littered.

decomposes during the growing season, allowing the roots of the plant to grow into the surrounding soil. The unqualified claim is not deceptive.

§ 260.9 Free-Of Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service is free of, or does not contain or use, a substance. Such claims should be clearly and prominently qualified to the extent necessary to avoid deception.
- (b) A truthful claim that a product, package, or service is free of, or does not contain or use, a substance may nevertheless be deceptive if: (1) the product, package, or service contains or uses substances that pose the same or similar environmental risks as the substance that is not present; or (2) the substance has not been associated with the product category.
- (c) Depending on the context, a free-of or does-not-contain claim is appropriate even for a product, package, or service that contains or uses a trace amount of a substance if: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level;⁴ (2) the substance’s presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been added intentionally to the product.

Example 1: A package of t-shirts is labeled “Shirts made with a chlorine-free bleaching process.” The shirts, however, are bleached with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim overstates the product’s benefits because reasonable consumers

⁴ “Trace contaminant” and “background level” are imprecise terms, although allowable manufacturing “trace contaminants” may be defined according to the product area concerned. What constitutes a trace amount or background level depends on the substance at issue, and requires a case-by-case analysis.

likely would interpret it to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A substantiated claim, however, that the shirts were "bleached with a process that releases 50% less of the harmful byproducts associated with chlorine bleaching" would not be deceptive.

Example 2: A manufacturer advertises its insulation as "formaldehyde free." Although the manufacturer does not use formaldehyde as a binding agent to produce the insulation, tests show that the insulation still emits trace amounts of formaldehyde. The seller has substantiation that formaldehyde is present in trace amounts in virtually all indoor and (to a lesser extent) outdoor environments and that its insulation emits less formaldehyde than is typically present in outdoor environments. Further, the seller has substantiation that the trace amounts of formaldehyde emitted by the insulation do not cause material harm that consumers typically associate with formaldehyde. In this context, the trace levels of formaldehyde emissions likely are inconsequential to consumers. Therefore, the seller's free-of claim would not be deceptive.

§ 260.10 Non-Toxic Claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service is non-toxic. Non-toxic claims should be clearly and prominently qualified to the extent necessary to avoid deception.

(b) A non-toxic claim likely conveys that a product, package, or service is non-toxic both for humans and for the environment generally. Therefore, marketers making non-toxic claims should have competent and reliable scientific evidence that the product, package, or service is non-toxic for humans and for the environment or should clearly and prominently qualify their claims to avoid deception.

Example 1: A marketer advertises a cleaning product as “essentially non-toxic” and “practically non-toxic.” The advertisement likely conveys that the product does not pose any risk to humans or the environment, including household pets. If the cleaning product poses no risk to humans but is toxic to the environment, the claims would be deceptive.

§ 260.11 Ozone-Safe and Ozone-Friendly Claims.

It is deceptive to misrepresent, directly or by implication, that a product, package, or service is safe for, or friendly to, the ozone layer or the atmosphere.

Example 1: A product is labeled “ozone-friendly.” The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and others subsequently designated by EPA as ozone-depleting substances. These chemicals include chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide, hydrobromofluorocarbons, and hydrochlorofluorocarbons (HCFCs).

Example 2: An aerosol air freshener is labeled “ozone-friendly.” Some of the product’s ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim likely conveys that the product is safe for the atmosphere as a whole, and, therefore, is deceptive.

§ 260.12 Recyclable Claims.

(a) It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.

(b) Marketers should clearly and prominently qualify recyclable claims to the extent necessary to avoid deception about the availability of recycling programs and collection sites to consumers.

(1) When recycling facilities are available to a substantial majority of consumers or communities where the item is sold, marketers can make unqualified recyclable claims. The term “substantial majority,” as used in this context, means at least 60 percent.

(2) When recycling facilities are available to less than a substantial majority of consumers or communities where the item is sold, marketers should qualify all recyclable claims. Marketers may always qualify recyclable claims by stating the percentage of consumers or communities that have access to facilities that recycle the item.

Alternatively, marketers may use qualifications that vary in strength depending on facility availability. The lower the level of access to an appropriate facility is, the more strongly the marketer should emphasize the limited availability of recycling for the product. For example, if recycling facilities are available to slightly less than a substantial majority of consumers or communities where the item is sold, a marketer may qualify a recyclable claim by stating: “This product [package] may not be recyclable in your area,” or “Recycling facilities for this product [package] may not exist in your area.” If recycling facilities are available only to a few consumers, marketers should use stronger clarifications. For example, a marketer in this situation may qualify its recyclable claim by stating: “This product [package] is recyclable only in the few communities that have appropriate recycling facilities.”

(c) Marketers can make unqualified recyclable claims for a product or package if the entire product or package, excluding minor incidental components, is recyclable. For items that are

partially made of recyclable components, marketers should clearly and prominently qualify the recyclable claim to avoid deception about which portions are recyclable.

(d) If any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable.⁵

Example 1: A packaged product is labeled with an unqualified claim, “recyclable.” It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim likely conveys that both the product and its packaging, except for minor, incidental components, can be recycled. Unless the manufacturer has substantiation for both messages, it should clearly and prominently qualify the claim to indicate which portions are recyclable.

Example 2: A nationally marketed plastic yogurt container displays the Resin Identification Code (RIC)⁶ (which consists of a design of arrows in a triangular shape containing a number in the center and an abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. This conspicuous use of the RIC constitutes a recyclable claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the manufacturer should qualify the claim to disclose the limited

⁵ Batteries labeled in accordance with the Mercury-Containing and Rechargeable Battery Management Act, 42 U.S.C. § 14322(b), are deemed to be in compliance with these Guides.

⁶ The RIC, formerly known as the Society of the Plastics Industry, Inc. (SPI) code, is now covered by ASTM D 7611.

availability of recycling programs. If the manufacturer places the RIC, without more, in an inconspicuous location on the container (e.g., embedded in the bottom of the container), it would not constitute a recyclable claim.

Example 3: A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

Example 4: A paperboard package is marketed nationally and labeled either “Recyclable where facilities exist” or “Recyclable – Check to see if recycling facilities exist in your area.” Recycling programs for these packages are available to some consumers, but not available to a substantial majority of consumers nationwide. Both claims are deceptive because they do not adequately disclose the limited availability of recycling programs. To avoid deception, the marketer should use a clearer qualification, such as one suggested in § 260.12(b)(2).

Example 5: Foam polystyrene cups are advertised as “Recyclable in the few communities with facilities for foam polystyrene cups.” A half-dozen major metropolitan areas have established collection sites for recycling those cups. The claim is not deceptive because it clearly discloses the limited availability of recycling programs.

Example 6: A package is labeled “Includes some recyclable material.” The package is composed of four layers of different materials, bonded together. One of the layers is made from recyclable material, but the others are not. While programs for recycling the 25 percent of the package that consists of recyclable material are available to a substantial majority of consumers, only a few of those programs have the capability to

separate the recyclable layer from the non-recyclable layers. The claim is deceptive for two reasons. First, it does not specify the portion of the product that is recyclable. Second, it does not disclose the limited availability of facilities that can process multi-layer products or materials. An appropriately qualified claim would be “25 percent of the material in this package is recyclable in the few communities that can process multi-layer products.”

Example 7: A product container is labeled “recyclable.” The marketer advertises and distributes the product only in Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents but are not yet available nationally. Because programs are available to a substantial majority of consumers where the product is sold, the unqualified claim is not deceptive.

Example 8: A manufacturer of one-time use cameras, with dealers in a substantial majority of communities, operates a take-back program that collects those cameras through all of its dealers. The manufacturer reconditions the cameras for resale and labels them “Recyclable through our dealership network.” This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop-off recycling programs.

Example 9: A manufacturer advertises its toner cartridges for computer printers as “Recyclable. Contact your local dealer for details.” Although all of the company’s dealers recycle cartridges, the dealers are not located in a substantial majority of communities where cartridges are sold. Therefore, the claim is deceptive. The manufacturer should qualify its claim consistent with § 260.11(b)(2).

Example 10: An aluminum can is labeled “Please Recycle.” This statement likely conveys that the can is recyclable. If collection sites for recycling these cans are available to a substantial majority of consumers or communities, the marketer does not need to qualify the claim.

§ 260.13 Recycled Content Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled content. Recycled content includes recycled raw material, as well as used,⁷ reconditioned, and re-manufactured components.
- (b) It is deceptive to represent, directly or by implication, that an item contains recycled content unless it is composed of materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). If the source of recycled content includes pre-consumer material, the advertiser should have substantiation that the pre-consumer material would otherwise have entered the waste stream. Recycled content claims may – but do not have to – distinguish between pre-consumer and post-consumer materials. Where a marketer distinguishes between pre-consumer and post-consumer materials, it should have substantiation for any express or implied claim about the percentage of pre-consumer or post-consumer content in an item.
- (c) Marketers can make unqualified claims of recycled content if the entire product or package, excluding minor, incidental components, is made from recycled material. For items that are partially made of recycled material, the marketer should clearly and prominently qualify

⁷ The term “used” refers to parts that are not new and that have not undergone any re-manufacturing or reconditioning.

the claim to avoid deception about the amount or percentage, by weight, of recycled content in the finished product or package.

(d) For products that contain used, reconditioned, or re-manufactured components, the marketer should clearly and prominently qualify the recycled content claim to avoid deception about the nature of such components. No such qualification is necessary where it is clear to reasonable consumers from context that a product's recycled content consists of used, reconditioned, or re-manufactured components.

Example 1: A manufacturer collects spilled raw material and scraps from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in production of the same product. A recycled content claim is deceptive since the spills and scraps are normally reused by industry within the original manufacturing process and would not normally have entered the waste stream.

Example 2: Fifty percent of a greeting card's fiber weight is composed from paper that was diverted from the waste stream. Of this material, 30% is post-consumer and 20% is pre-consumer. It would not be deceptive if the marketer claimed that the card either "contains 50% recycled fiber" or "contains 50% total recycled fiber, including 30% post-consumer fiber."

Example 3: A paperboard package with 20% recycled fiber by weight is labeled "20% post-consumer recycled fiber." The recycled content was composed of overrun newspaper stock never sold to customers. Because the newspapers never reached consumers, the claim is deceptive.

Example 4: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive because, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 5: A manufacturer makes a package from laminated layers of foil, plastic, and paper, although the layers are indistinguishable to consumers. The label claims that “one of the three layers of this package is made of recycled plastic.” The plastic layer is made entirely of recycled plastic. The claim is not deceptive, provided the recycled plastic layer constitutes a significant component of the entire package.

Example 6: A frozen dinner package is composed of a plastic tray inside a cardboard box. It states “package made from 30% recycled material.” Each packaging component is one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 7: A manufacturer labels a paper greeting card “50% recycled fiber.” The manufacturer purchases paper stock from several sources, and the amount of recycled fiber in the stock provided by each source varies. If the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the papermaking production process, the claim is not deceptive.

Example 8: A packaged food product is labeled with a three-chasing-arrows symbol (a Möbius loop) without explanation. By itself, the symbol likely conveys that the

packaging is both recyclable and made entirely from recycled material. Unless the marketer has substantiation for both messages, the claim should be qualified. The claim may need to be further qualified, to the extent necessary, to disclose the limited availability of recycling programs and/or the percentage of recycled content used to make the package.

Example 9: In an office supply catalog, a manufacturer advertises its printer toner cartridges “65% recycled.” The cartridges contain 25% recycled raw materials and 40% reconditioned parts. The claim is deceptive because reasonable consumers likely would not know or expect that a cartridge’s recycled content consists of reconditioned parts. It would not be deceptive if the manufacturer claimed “65% recycled content; including 40% from reconditioned parts.”

Example 10: A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified “Recycled” label. This claim is deceptive because reasonable consumers likely would believe that the helmet is made of recycled raw materials, when it is, in fact, a used item. An acceptable claim would bear a disclosure clearly and prominently stating that the helmet is used.

Example 11: An automotive dealer, automobile recycler, or other qualified entity recovers a serviceable engine from a wrecked vehicle. Without repairing, rebuilding, re-manufacturing, or in any way altering the engine or its components, the dealer attaches a “Recycled” label to the engine, and offers it for sale in its used auto parts store. In this situation, an unqualified recycled content claim likely is not deceptive because

reasonable consumers in the automotive context likely would understand that the engine is used and has not undergone any rebuilding.

Example 12: An automobile parts dealer, automobile recycler, or other qualified entity purchases a transmission that has been recovered from a salvaged or end-of-life vehicle. Eighty-five percent of the transmission, by weight, was rebuilt and 15% constitutes new materials. After rebuilding⁸ the transmission in accordance with industry practices, the dealer packages it for resale in a box labeled “Rebuilt Transmission,” or “Rebuilt Transmission (85% recycled content from rebuilt parts),” or “Recycled Transmission (85% recycled content from rebuilt parts).” Given consumer perception in the automotive context, these claims are not deceptive.

§ 260.14 Refillable Claims.

It is deceptive to misrepresent, directly or by implication, that a package is refillable. A marketer should not make an unqualified refillable claim unless the marketer provides the means for refilling the package. The marketer may either provide a system for the collection and refill of the package, or offer for sale a product that consumers can purchase to refill the original package.

Example 1: A container is labeled “refillable three times.” The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least three times. The manufacturer, however, has established no

⁸ The term “rebuilding” means that the dealer dismantled and reconstructed the transmission as necessary, cleaned all of its internal and external parts and eliminated rust and corrosion, restored all impaired, defective or substantially worn parts to a sound condition (or replaced them if necessary), and performed any operations required to put the transmission in sound working condition.

collection program. The unqualified claim is deceptive because there is no means to return the container to the manufacturer for refill.

Example 2: A small bottle of fabric softener states that it is in a “handy refillable container.” In the same market area, the manufacturer also sells a large-sized bottle that consumers use to refill the smaller bottles. The claim is not deceptive because there is a reasonable means for the consumer to refill the smaller container.

§ 260.15 Renewable Energy Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable energy or that a service uses renewable energy. A marketer should not make unqualified renewable energy claims, directly or by implication, if fossil fuel, or electricity derived from fossil fuel, is used to manufacture any part of the advertised item or is used to power any part of the advertised service, unless the marketer has matched such non-renewable energy use with renewable energy certificates.
- (b) Research suggests that reasonable consumers may interpret renewable energy claims differently than marketers may intend. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable energy claims. For instance, marketers may minimize the risk of deception by specifying the source of the renewable energy (e.g., wind or solar energy).
- (c) It is deceptive to make an unqualified “made with renewable energy” claim unless all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy matched by renewable energy certificates. When this is not the case, marketers should clearly and prominently specify

the percentage of renewable energy that powered the significant manufacturing processes involved in making the product or package.

(d) If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.

Example 1: A marketer advertises its clothing line as “made with wind power.” The marketer buys wind energy for 50% of the energy it uses to make the clothing in its line. The marketer’s claim is deceptive because reasonable consumers likely interpret the claim to mean that the power was composed entirely of renewable energy. If the marketer stated, “We purchase wind energy for half of our manufacturing facilities,” the claim would not be deceptive.

Example 2: A company purchases renewable energy from a portfolio of sources that includes a mix of solar, wind, and other renewable energy sources in combinations and proportions that vary over time. The company uses renewable energy from that portfolio to power all of the significant manufacturing processes involved in making its product. The company advertises its product as “made with renewable energy.” The claim would not be deceptive if the marketer clearly and prominently disclosed all renewable energy sources. Alternatively, the claim would not be deceptive if the marketer clearly and prominently stated, “made from a mix of renewable energy sources,” and specified the renewable source that makes up the greatest percentage of the portfolio. The company may calculate which renewable energy source makes up the greatest percentage of the portfolio on an annual basis.

Example 3: An automobile company uses 100% non-renewable energy to produce its cars. The company purchases renewable energy certificates to match the non-renewable energy that powers all of the significant manufacturing processes for the seats, but no other parts, of its cars. If the company states, “The seats of our cars are made with renewable energy,” the claim would not be deceptive, as long as the company clearly and prominently qualifies the claim such as by specifying the renewable energy source.

Example 4: A company uses 100% non-renewable energy to manufacturer all parts of its product, but powers the assembly process entirely with renewable energy. If the marketer advertised its product as “assembled using renewable energy,” the claim would not be deceptive.

Example 5: A toy manufacturer places solar panels on the roof of its plant to generate power, and advertises that its plant is “100% solar-powered.” The manufacturer, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the manufacturer uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The manufacturer’s claim is therefore deceptive. It also would be deceptive for this manufacturer to advertise that it “hosts” a renewable power facility because reasonable consumers likely interpret this claim to mean that the manufacturer uses renewable energy. It would not be deceptive, however, for the manufacturer to advertise, “We generate renewable energy, but sell all of it to others.”

§ 260.16 Renewable Materials Claims.

- (a) It is deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials.
- (b) Research suggests that reasonable consumers may interpret renewable materials claims differently than marketers may intend. Unless marketers have substantiation for all their express and reasonably implied claims, they should clearly and prominently qualify their renewable materials claims. For example, marketers may minimize the risk of unintended implied claims by identifying the material used and explaining why the material is renewable.
- (c) Marketers should also qualify any “made with renewable materials” claim unless the product or package (excluding minor, incidental components) is made entirely with renewable materials.

Example 1: A marketer makes the unqualified claim that its flooring is “made with renewable materials.” Reasonable consumers likely interpret this claim to mean that the flooring also is made with recycled content, recyclable, and biodegradable. Unless the marketer has substantiation for these implied claims, the unqualified “made with renewable materials” claim is deceptive. The marketer could qualify the claim by stating, clearly and prominently, “Our flooring is made from 100 percent bamboo, which grows at the same rate, or faster, than we use it.” The marketer still is responsible for substantiating all remaining express and reasonably implied claims.

Example 2: A marketer’s packaging states that “Our packaging is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials.” By identifying the material used and explaining why the material is renewable, the marketer has minimized the risk

of unintended claims that the product is made with recycled content, recyclable, and biodegradable. The marketer has adequately qualified the amount of renewable materials in the product.

§ 260.17 Source Reduction Claims.

It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume, or toxicity. Marketers should clearly and prominently qualify source reduction claims to the extent necessary to avoid deception about the amount of the source reduction and the basis for any comparison.

Example 1: An advertiser claims that disposal of its product generates “10% less waste.” The marketer does not accompany this claim with a general environmental benefit claim. Because this claim could be a comparison to the advertiser’s immediately preceding product or to its competitors’ products, the advertiser should have substantiation for both interpretations. Otherwise, the advertiser should clarify which comparison it intends and have substantiation for that comparison. A claim of “10% less waste than our previous product” would not be deceptive if the advertiser has substantiation that shows that the current product’s disposal contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the product.

Attachment 8

the intervening years, BIS hopes to obtain additional information at the BCI conference, including as to innovations, current research initiatives and applications, and information regarding national security implications. BIS is not seeking consensus advice or recommendations from the invited speakers or any members of the public. Instead, it is interested in learning from the perspectives of individuals in their own capacity or as members of a company or entity. Any information provided during the BCI conference, including remarks by industry and academia participants and members of the public, will be made part of the record in any future rulemaking pertaining to BCI technology.

Agenda

Following opening remarks by BIS officials, Day 1 will focus on understanding the neurotech industry. It will include speakers from leading companies and academic institutions involved in BCI technology who will address patient advocacy for obtaining BCI technology for patients, government funding for BCI technology, BCI technology state of the art and applications, and the importance of developing BCI technology further and expanding its usage. The rest of Day 1 will feature presentations by leaders in the BCI technology industry and community, *e.g.*, leaders in research institutes in this area. While the Day 2 agenda is still being finalized, it will include additional remarks by BIS officials on export controls, including how BIS identifies Section 1758 technologies. This session will be followed by speakers from leading companies and academic research institutes involved in BCI, along with other speakers who will address existing work being done on ethics involving BCI technology and dual-use applications for BCI technology. As detailed below, interested members of the public may request to speak at the conference by following the procedures identified in this document. Once the agenda is finalized, BIS will post the final agenda for the BIS conference on the BIS website at <https://www.bis.doc.gov/BCIconference2023>.

The seventeen speakers who have been identified by BIS to speak at this conference are leaders and experts in the BCI industry and community, *e.g.*, researchers and scholars at academic research institutes, and have been invited to give an overview of the current state of the art, including recent innovations in BCI technology, including potential dual-use

applications that could be of concern for national security reasons.

Procedure for Attending or Viewing the BCI Conference via Microsoft Teams

RSVP for in-person attendance: As the room capacity is limited to 45 persons, the public is encouraged to participate virtually. Individuals who wish to attend the BCI conference in person are required to RSVP by emailing Betty.Lee@bis.doc.gov and include the subject line "Request to attend BCI conference" in the email. In the email, please provide your name, job title, organization name, contact information, and a brief description (no longer than 3 sentences) on why you are interested in attending the BCI conference in person. Requests to attend the BCI conference in person must be submitted by 5:00 p.m. EST on February 10, 2023. BIS will notify persons selected to attend in person no later than 5:00 p.m. EST on February 14, 2023, with priority given to persons who are selected to make a presentation on the second day of the BCI conference. Persons interested in attending the BCI conference in person on both days and making a presentation on the second day do not need to submit an RSVP email and instead should follow the guidance below under "Procedures for requests to make a presentation at the BCI conference." Please note that individuals who wish to attend the BCI conference virtually are not required to submit an RSVP request.

Webcast: As noted in the Dates section of this document, the BCI conference will be available live via Microsoft Teams. See the Dates section for Microsoft Teams link to attend virtually.

Visitor Access Requirement: For individuals attending in person, please note that identification is required for access and that Federal agencies will only accept a state-issued driver's license or identification card for access to Federal facilities if such license or identification card is issued by a state that is compliant with the REAL ID Act of 2005 (Pub. L. 109-13), or by a state that has an extension for REAL ID compliance. The main entrance of the Department of Commerce is located at 1401 Constitution Avenue NW, Washington, DC 20230, between Pennsylvania Avenue and Constitution Avenue and directly across from the Ronald Reagan Building. Upon entering the building, please go through security and check in at the guard's desk. BIS staff will meet and escort visitors to the auditorium.

Non-U.S. Citizens/Non-Permanent Residents: All foreign national visitors

who do not have permanent resident status in the United States and who wish to register to attend the BCI conference in person must send an email to Betty.Lee@bis.doc.gov to request registration instructions no later than 5:00 p.m. EST on February 7, 2023. Please also bring a copy of your passport on the day of the hearing to serve as identification.

Procedures for Requests To Make a Presentation at the BCI Conference

The agenda for the BCI conference includes several leading experts in BCI technology from industry and academia. Other participants attending in person or virtually will have an opportunity to ask questions. In addition, there will be a limited number of spots for individuals to make short presentations either in person or virtually on February 17, the second day of the BCI conference.

Individuals who wish to make a presentation at the BCI conference on February 17, either in person or virtually, who have not already been identified by BIS as speakers are required to submit an email by 5:00 p.m. EST on Friday, February 10, 2023, to Betty.Lee@bis.doc.gov with the subject line "Request to speak at BCI conference." In that email, please include your name, job title, organization name, contact information, a brief description (no longer than 3 sentences) of why you are interested in speaking, a copy of any slides that will be used, and specify whether you will be attending in person or virtually. The email must also include a copy of any presentation that you plan to use. Presentations must be no longer than 10 minutes. BIS reserves the right to impose additional time constraints in order to accommodate potential speakers. In selecting speakers, BIS will seek to represent a range of views. BIS will notify persons selected to speak no later than 5:00 p.m. EST on February 14, 2023.

Thea D. Rozman Kendler,
Assistant Secretary for Export Administration.

[FR Doc. 2023-02413 Filed 2-3-23; 8:45 am]

BILLING CODE 3510-33-P

FEDERAL TRADE COMMISSION

16 CFR Part 260

RIN 3084-AB15

Guides for the Use of Environmental Marketing Claims

AGENCY: Federal Trade Commission.

ACTION: Regulatory review; extension of comment period.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) extends the comment period for its Regulatory Review Notice regarding its Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”).

DATES: The deadline for comments on the document published on December 20, 2022 (87 FR 77766) is extended from February 21, 2023, to April 24, 2023.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome (202–326–2889) or Julia Solomon Ensor (202–326–2377), Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: On December 20, 2022 (87 FR 77766), the Commission published a document initiating its review of the Green Guides as part of the Commission’s periodic review of all rules and guides to: (1) examine their efficacy, costs, and benefits; and (2) determine whether to retain, modify, or rescind them. The publication set the comment deadline as February 21, 2023.

Several interested parties have now requested a 60-day extension of the public comment period to conduct consumer survey research and account for issues such as the extensive range of issues involved with the review, significant market changes since the last review of the Guides, the fact that the comment period spanned the holiday season, and supply chain disruptions affecting commenting organizations.¹

The Commission agrees that allowing additional time for filing comments in response to the document would help facilitate the creation of a more complete record. The Commission has therefore decided to extend the comment period to April 24, 2023.

¹ See Docket ID FTC–FTC–2022–0077–0008 (Jan. 9, 2022) (“Comment Submitted by FMI—The Food Industry Association”), <https://www.regulations.gov/comment/FTC-2022-0077-0008>; Docket ID FTC–FTC–2022–0077–0010 (Jan. 11, 2022) (“Comment Submitted by Household & Commercial Products Association”), <https://www.regulations.gov/comment/FTC-2022-0077-0010> (“Comment Submitted by Household & Commercial Products Association”); Docket ID FTC–2022–0077–0011 (Jan. 10, 2023) (“Comment Submitted by Consumer Brands Association on behalf of Coalition of Stakeholders”), <https://www.regulations.gov/comment/FTC-2022-0077-0011>; Docket ID FTC–2022–0077–0022 (Jan. 18, 2023) (“Comment Submitted by American Sustainable Business Network, Beyond Plastics, Just Zero, The Last Beach Cleanup, Plastic Pollution Coalition”), <https://www.regulations.gov/comment/FTC-2022-0077-0022>.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–02354 Filed 2–3–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2023–F–0147]

Micro-Tracers, Inc.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of petition.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that we have filed a petition, submitted by Micro-Tracers, Inc., proposing that the food additive regulations be amended to permit the use of ethyl cellulose as a matrix scaffolding in tracers for use in feeds at no more than 0.09 grams per ton of feed (0.1 ppm).

DATES: The food additive petition was filed on December 12, 2022.

ADDRESSES: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and insert the docket number found in brackets in the heading of this document into the “Search” box and follow the prompts, and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Megan Hall, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl. (HFV–221), Rockville, MD 20855, 301–796–3801.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5))), we are giving notice that we have filed a food additive petition (FAP 2316), submitted by Micro-Tracers, Inc., 1375 Van Dyke Ave., San Francisco, CA 94124. The petition proposes to amend Title 21 of the Code of Federal Regulations (CFR) in 21 CFR part 573, *Food Additives Permitted in Feed and Drinking Water of Animals*, to provide for the safe use of ethyl cellulose as a matrix scaffolding in tracers for use in feeds at no more than 0.09 grams per ton of feed (0.1 ppm).

The petitioner has claimed that this action is categorically excluded under

21 CFR 25.32(r) because it is of a type that does not individually or cumulatively have a significant effect on the human environment. In addition, the petitioner has stated that, to their knowledge, no extraordinary circumstances exist that may significantly affect the quality of the human environment. If FDA determines a categorical exclusion applies, neither an environmental assessment nor an environmental impact statement is required. If FDA determines a categorical exclusion does not apply, we will request an environmental assessment and make it available for public inspection.

Dated: February 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–02449 Filed 2–3–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Part 585

[Docket No. BOEM–2023–0005]

RIN 1010–AE04

Renewable Energy Modernization Rule; Correction

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Proposed rule; correction.

SUMMARY: This document makes a technical correction in the preamble to a proposed rule entitled, *Renewables Energy Modernization Rule*, which the Department of the Interior published in the **Federal Register** on January 30, 2023. This correction clarifies that the proposed rule’s FDMS Docket Number is BOEM–2023–0005.

DATES: February 6, 2023.

FOR FURTHER INFORMATION CONTACT: Georgeann Smale, Renewable Energy Modernization Rule Lead, Office of Regulations, BOEM, at telephone number 703–544–9246 or email address Georgeann.Smale@boem.gov; or Karen Thundiyl, Chief, Office of Regulations, BOEM, at telephone number 202–742–0970, or email address Karen.Thundiyl@boem.gov.

SUPPLEMENTARY INFORMATION:

Correction

In proposed rule FR Doc. 2023–00668, beginning on page 5968 in the **Federal Register** issue of January 30, 2023, the following corrections are made:

Attachment 9

California AG Sues Exxon Mobile For Plastic Pollution and Misrepresenting Benefits of Recycling

By Terri Seligman

Published: October 4, 2024

Describing its action as the “first-of-its-kind lawsuit seek[ing] to hold one of the largest petrochemical companies in the world accountable for misleading the public on plastic’s recyclability and polluting California’s environment and communities,” the California Attorney General has [announced](#) the filing of a complaint against Exxon Mobile. The lawsuit alleges that ExxonMobil “has misled consumers and continues to do so by engaging in an aggressive campaign to deceive the public and perpetuate the myth that recycling will solve the crisis of plastic pollution.”

In its nearly 150 page detailed and highly technical [complaint](#), describing the myriad of harms to the environment and human health likely caused by plastic pollution and microplastics, the Attorney General alleges that ExxonMobil -- at the “top of the plastic production pyramid” --- is responsible for those harms. It alleges that the company is the world’s largest producer of the plastic polymers used to manufacture single-use plastics and that it is these plastics that have caused or substantially contributed to the “deluge” of plastic pollution harming California. Further, the AG alleges, ExxonMobil not only promotes and produces the largest amount of plastic that becomes plastic waste in California, but it has also deceived the public by promising that both mechanical and chemical recycling could and would solve the plastic waste crisis when it knew that it couldn’t. According to the complaint, Exxon Mobile has, for decades, been “falsely reassuring consumers that they can continue using plastics because recycling...is an effective solution to the plastic waste and pollution crisis.” Thus, greenwashing is at the heart of this complaint: Exxon Mobile knew how bad plastic waste would be for the environment but tried to convince the public otherwise by promoting feel-good but useless recycling efforts. And it engaged in these efforts in order to protect its bottom line: as the complaint alleges, “ExxonMobil depends on single-use plastics production and consumption for its rapidly growing and profitable petrochemical business.”

To further its business purposes, the complaint alleges, Exxon Mobile both convinced the public that plastic single-use products were necessary and that any problems associated with their accumulation could be solved by recycling. However, Exxon Mobile knew that this was not true, as early as the 1970s. As noted in the complaint “[r]ecycling most plastics was technologically infeasible, as the plastics industry knew, and subsequent scientific research would confirm.” Yet the company, through a trade association, spent millions on PR and advertising saying otherwise, urging the public to recycle. In fact, according to the complaint, a key aspect of the strategy to promote plastic recycling was to convince consumers that “they were responsible for the proliferation of plastic waste through their own personal habits, rather than through Mobil’s and Exxon’s efforts to produce an

increasing number of plastic products designed for single-use. This strategy shifted attention from Mobil's and Exxon's creation of the plastic to consumers' behavior."

In furtherance of this strategy, as detailed in the complaint, the company also adopted the chasing arrow symbol for plastic containers with numbers that would correspond to the type of resin the item was made from, leading consumers to believe that all labeled plastic items were recyclable, which they are not because there are no recycling facilities capable of recycling several of the resins. It also details the company's aggressive promotion of so-called "advanced" recycling, a chemical process, which (despite its name), according to the complaint, is no more successful than mechanical recycling in reducing plastic waste.

Further, it could not be any more successful because "[t]he economic problems with recycling plastics are well-known and widespread throughout the petrochemical industry" and there is too much money to be made in producing virgin plastic instead. Indeed, as the complaint states, "[l]ike its promotion of mechanical recycling decades ago, ExxonMobil's promotion of 'advanced recycling' is another deceptive marketing campaign designed to encourage unabated consumption of its plastic products, rather than a real solution to the extraordinarily harmful plastic waste and pollution crisis that ExxonMobil's deception substantially caused and continues to exacerbate."

After detailing the harm caused by plastics to the public, the environment, ocean life, wildlife, workers, low income communities and communities of color, and more, the complaint states causes of action for public nuisance; pollution, impairment, and destruction of natural resources under the Government Code; water pollution under the Fish and Game Code; and untrue or misleading advertising, misleading environmental marketing, and unfair competition under the Business & Professions Code. The prayer for relief seeks nuisance abatement, disgorgement, civil penalties; and injunctive relief.

As [my partner Jeff Greenbaum wrote](#) in reporting on New York City's greenwashing suit against Exxon Mobile and other fossil fuel companies, it may be too soon to know either how this case will play out, or what it will mean for other companies and their environmental claims. But we do know that when producers of petroleum-based products talk about the environmental benefits of their risk mitigation strategies, consumers – and regulators – are going to be paying very close attention.

Attachment 10

.com **Disclosures**

**How to Make Effective Disclosures
in Digital Advertising**

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Overview

In the online marketplace, consumers can transact business without the constraints of time or distance. One can log on to the Internet day or night and purchase almost anything one desires, and advances in mobile technology allow advertisers to reach consumers nearly anywhere they go. But cyberspace is not without boundaries, and deception is unlawful no matter what the medium. The FTC has enforced and will continue enforcing its consumer protection laws to ensure that products and services are described truthfully online, and that consumers understand what they are paying for. These activities benefit consumers as well as sellers, who expect and deserve the opportunity to compete in a marketplace free of deception and unfair practices.

The general principles of advertising law apply online, but new issues arise almost as fast as technology develops — most recently, new issues have arisen concerning space-constrained screens and social media platforms. This FTC staff guidance document describes the information businesses should consider as they develop ads for online media to ensure that they comply with the law. Briefly,

1. The same consumer protection laws that apply to commercial activities in other media apply online, including activities in the mobile marketplace. The FTC Act’s prohibition on “unfair or deceptive acts or practices” encompasses online advertising, marketing, and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to the wide spectrum of online activities.
2. When practical, advertisers should incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure qualifying the claim.
3. Required disclosures must be clear and conspicuous. In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim. The closer the disclosure is to the claim to which it relates, the better. Additional considerations include: the prominence of the disclosure; whether it is unavoidable; whether other parts of the ad distract attention from the disclosure; whether the disclosure needs to be repeated at different places on a website; whether disclosures in audio messages are presented in an adequate volume and cadence; whether visual disclosures

appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience.

4. To make a disclosure clear and conspicuous, advertisers should:

- Place the disclosure as close as possible to the triggering claim.
- Take account of the various devices and platforms consumers may use to view advertising and any corresponding disclosure. If an ad is viewable on a particular device or platform, any necessary disclosures should be sufficient to prevent the ad from being misleading when viewed on that device or platform.
- When a space-constrained ad requires a disclosure, incorporate the disclosure into the ad whenever possible. However, when it is not possible to make a disclosure in a space-constrained ad, it may, under some circumstances, be acceptable to make the disclosure clearly and conspicuously on the page to which the ad links.
- When using a hyperlink to lead to a disclosure,
 - make the link obvious;
 - label the hyperlink appropriately to convey the importance, nature, and relevance of the information it leads to;
 - use hyperlink styles consistently, so consumers know when a link is available;
 - place the hyperlink as close as possible to the relevant information it qualifies and make it noticeable;
 - take consumers directly to the disclosure on the click-through page;
 - assess the effectiveness of the hyperlink by monitoring click-through rates and other information about consumer use and make changes accordingly.
- Preferably, design advertisements so that “scrolling” is not necessary in order to find a disclosure. When scrolling is necessary, use text or visual cues to encourage consumers to scroll to view the disclosure.
- Keep abreast of empirical research about where consumers do and do not look on a screen.
- Recognize and respond to any technological limitations or unique characteristics of a communication method when making disclosures.
- Display disclosures before consumers make a decision to buy — e.g., before they “add to shopping cart.” Also recognize that disclosures may have to be

repeated before purchase to ensure that they are adequately presented to consumers.

- Repeat disclosures, as needed, on lengthy websites and in connection with repeated claims. Disclosures may also have to be repeated if consumers have multiple routes through a website.
 - If a product or service promoted online is intended to be (or can be) purchased from “brick and mortar” stores or from online retailers other than the advertiser itself, then any disclosure necessary to prevent deception or unfair injury should be presented in the ad itself — that is, before consumers head to a store or some other online retailer.
 - Necessary disclosures should not be relegated to “terms of use” and similar contractual agreements.
 - Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color, and graphic treatment of the disclosure in relation to other parts of the webpage.
 - Review the entire ad to assess whether the disclosure is effective in light of other elements — text, graphics, hyperlinks, or sound — that might distract consumers’ attention from the disclosure.
 - Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them.
 - Display visual disclosures for a duration sufficient for consumers to notice, read, and understand them.
 - Use plain language and syntax so that consumers understand the disclosures.
5. If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.

Negative consumer experiences can result in lost consumer goodwill and erode consumer confidence. Clear, conspicuous, and meaningful disclosures benefit advertisers and consumers.

I. Introduction

Day in and day out, businesses advertise and sell their products and services online.¹ The online universe presents a rewarding and fast-paced experience for consumers, but also raises interesting — and occasionally complex — questions about the applicability of laws that were developed long before “dot com,” “smartphone,” and “social media” became household terms.

In May 2000, following a public comment period and a public workshop held to discuss the applicability of FTC rules and guides to online activities, FTC staff issued Dot Com Disclosures. That guidance document examined how the Commission’s consumer protection statutes, rules, and guides apply to online advertising and sales and discussed FTC requirements that disclosures be presented clearly and conspicuously, in the context of online advertising.

In May 2011, FTC staff began seeking input to modify and update the guidance document to reflect the dramatic changes in the online world in the preceding eleven years. After three public comment periods and a public workshop, this revised staff guidance document was issued in March 2013.²

This document provides FTC staff guidance concerning the making of clear and conspicuous online disclosures that are necessary pursuant to the laws the FTC enforces. It does not, however, purport to cover every issue associated with online advertising disclosures, nor is it intended to provide a safe harbor from potential liability. It is intended only to provide guidance concerning practices that may increase the likelihood that a disclosure is clear and conspicuous. Whether a particular ad is deceptive, unfair, or otherwise violative of a Commission rule will depend on the specific facts at hand. The ultimate test is not the size of the font or the location of the disclosure, although they are important considerations; the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.

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1. In this document, the term “online” includes advertising and marketing via the Internet and other electronic networks. It is device neutral and encompasses advertising and marketing on mobile devices, such as smartphones and tablets.
 2. This staff guidance document only addresses disclosures required pursuant to laws that the FTC enforces. It does not address disclosures that may be required pursuant to local, state (e.g., many sweepstake requirements), or other federal laws or regulations (e.g., regulations issued by the Consumer Financial Protection Bureau or the Food and Drug Administration).

There is no litmus test for determining whether a disclosure is clear and conspicuous, and in some instances, there may be more than one method that seems reasonable. In such cases, the best practice would be to select the method more likely to effectively communicate the information in question.

II. The Applicability of FTC Law to Online Advertising

The FTC Act's prohibition on "unfair or deceptive acts or practices" broadly covers advertising claims, marketing and promotional activities, and sales practices in general.³ The Act is not limited to any particular medium. Accordingly, the Commission's role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online, as well as the same activities in print, television, telephone, and radio. The Commission has brought countless law enforcement actions to stop fraud and deception online and works to educate businesses about their legal obligations and consumers about their rights.

For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive.⁴ Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices.⁵ Many rules and guides address claims about products or services or advertising in general and apply to online

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3. The Commission's authority covers virtually every sector of the economy, except for certain excluded industries, such as common carrier activities and the business of insurance, airlines, and banks.
 4. The Commission issues rules pursuant to Section 5 of the FTC Act when it has reason to believe that certain unfair or deceptive acts or practices are prevalent in an industry. 15 U.S.C. § 57a(a)(1)(B). In addition, the Commission promulgates rules pursuant to specific statutes, which are designed to further particular policy goals.
 5. Guides are "administrative interpretations of laws administered by the Commission." 16 C.F.R. § 1.5. Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the Commission might bring an enforcement action alleging an unfair or deceptive practice in violation of the FTC Act.

advertising, as well as to other media.⁶ Therefore, the plain language of many rules and guides applies to claims made online.⁷ For example, the Mail or Telephone Order Merchandise

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6. The following rules and guides are included in this category: Guides for the Nursery Industry (16 C.F.R. Part 18); Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry (16 C.F.R. Part 20); Guides for the Jewelry, Precious Metals, and Pewter Industries (16 C.F.R. Part 23); Guides for Select Leather and Imitation Leather Products (16 C.F.R. Part 24); Guides Against Deceptive Pricing (16 C.F.R. Part 233); Guides Against Bait Advertising (16 C.F.R. Part 238); Guides for the Advertising of Warranties and Guarantees (16 C.F.R. Part 239); Guide Concerning Use of the Word “Free” and Similar Representations (16 C.F.R. Part 251); Guides for Private Vocational and Distance Education Schools (16 C.F.R. Part 254); Guides Concerning Use of Endorsements and Testimonials in Advertising (16 C.F.R. Part 255); Guides Concerning Fuel Economy Advertising for New Automobiles (16 C.F.R. Part 259); Guides for the Use of Environmental Marketing Claims (16 C.F.R. Part 260); Rules and Regulations Under the Wool Products Labeling Act of 1939 (16 C.F.R. Part 300); Rules and Regulations Under Fur Products Labeling Act (16 C.F.R. Part 301); Rules and Regulations Under the Textile Fiber Products Identification Act (16 C.F.R. Part 303); Energy and Water Use Labeling for Consumer Products under the Energy Policy and Conservation Act (“Energy Labeling Rule”) (16 C.F.R. Part 305); Contacts Lens Rule (16 C.F.R. Part 315); Prohibition of Energy Market Manipulation Rule (16 C.F.R. Part 317); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 C.F.R. Part 410); Retail Food Store Advertising and Marketing Practices (16 C.F.R. Part 424); Use of Prenotification Negative Option Plans (16 C.F.R. Part 425); Power Output Claims for Amplifiers Utilized in Home Entertainment Products (16 C.F.R. Part 432); Preservation of Consumers’ Claims and Defenses (16 C.F.R. Part 433); Mail or Telephone Order Merchandise (16 C.F.R. Part 435); Disclosure Requirements and Prohibitions Concerning Franchising (16 C.F.R. Part 436); Business Opportunity Rule (16 C.F.R. Part 437); Credit Practices (16 C.F.R. Part 444); Used Motor Vehicle Trade Regulation Rule (16 C.F.R. Part 455); Labeling and Advertising of Home Insulation (16 C.F.R. Part 460); Interpretations of Magnuson-Moss Warranty Act (16 C.F.R. Part 700); Disclosure of Written Consumer Product Warranty Terms and Conditions (16 C.F.R. Part 701); Pre-Sale Availability of Written Warranty Terms (16 C.F.R. Part 702); Informal Dispute Settlement Procedures (16 C.F.R. Part 703).
7. A rule or guide applies to online activities if its scope is not limited by how claims are communicated to consumers, how advertising is disseminated, or where commercial activities occur. The Commission has a program in place to systematically review its rules and guides to evaluate their continued need and to make any necessary changes. As needed, the Commission has and will continue to amend or clarify the scope of any particular rule or guide in more detail during its regularly scheduled review. For example, the Energy Labeling Rule was updated to clarify that “catalog” includes “material disseminated over the Internet” and to allow certain disclosures to be made available using the Internet. See 72 Fed. Reg. 49,948, 49,957, 49,961 (Aug. 29, 2007).

The first Dot Com Disclosures guidance document contained a section discussing how certain FTC rules and guides apply to online activities. Since that time, the Commission has addressed many of these issues in rulemakings or its periodic rule and guide reviews, and the information is widely understood given the ubiquitous nature and use of online technology. Nevertheless, the principles articulated in the original Dot Com Disclosures remain the same. For the most part, rules and guides that use terms such as “written,” “writing,” and “printed” apply online, and email may be used to comply with certain requirements to provide or send required notices or documents to consumers as long as consumers understand or expect to receive such information by email. For example, warranties communicated through visual text online are no different than paper versions and the same rules apply. The requirement to make warranties available at the point of purchase can be accomplished easily online by, for example, using a clearly-labeled hyperlink, in close proximity to the description of the warranted product, such as “get warranty information here” to lead to the full text of the warranty, and presenting the warranty in a way that it can be preserved either by downloading or printing so consumers can refer to it after purchase. Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. § 701.3 and Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. § 702.3. Another example involves the Telemarketing Sales Rule. Advertisers who send email and text messages that invite consumers to telephone the sender in order to make a purchase are subject to the Telemarketing Sales Rule, unless they qualify for the direct mail exemption under 16 C.F.R. 310.6(b)(6) by clearly and conspicuously making certain specified disclosures in the original solicitation.

rule, which addresses the sale of merchandise that is ordered by mail, telephone, facsimile or computer, applies to those sales regardless of “the method used to solicit the order.”⁸ Solicitations made in print, on the telephone, radio, TV, or online naturally fall within the rule’s scope. In addition, the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”) apply to “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser”⁹ The Guides refer to advertising without limiting the media in which it is disseminated and, therefore, encompass online ads.¹⁰

III. Clear and Conspicuous Disclosures in Online Advertisements

When it comes to online ads, the basic principles of advertising law apply:

1. Advertising must be truthful and not misleading;¹¹
2. Advertisers must have evidence to back up their claims (“substantiation”);¹² and
3. Advertisements cannot be unfair.¹³

8. 16 C.F.R. § 435.2(a).

9. 16 C.F.R. § 255.0(b).

10. Indeed, when the Endorsement Guides were reviewed in 2009, examples involving blogs were included, to make clear that the FTC Act applies to this then-new form of social media marketing.

11. As explained in the FTC’s Deception Policy Statement, an ad is deceptive if it contains a statement — or omits information — that is likely to mislead consumers acting reasonably under the circumstances and is “material” or important to a consumer’s decision to buy or use the product. See *FTC Policy Statement on Deception*, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (“Deception Policy Statement”), also available at www.ftc.gov/bcp/policystmt/ad-decept.htm. A statement also may be deceptive if the advertiser does not have a reasonable basis to support the claim. See *FTC Policy Statement on Advertising Substantiation*, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), also available at www.ftc.gov/bcp/guides/ad3subst.htm.

12. Before disseminating an ad, advertisers must have appropriate support for all express and implied objective claims that the ad conveys to reasonable consumers. When an ad lends itself to more than one reasonable interpretation, there must be substantiation for each interpretation. The type of evidence needed to substantiate a claim may depend on the product, the claims, and what experts in the relevant field believe is necessary. If an ad specifies a certain level of support for a claim — “tests show x” — the advertiser must have at least that level of support.

13. According to the FTC Act, 15 U.S.C. § 45(n), and the FTC’s Unfairness Policy Statement, an advertisement or business practice is unfair if it causes or is likely to cause substantial consumer injury that consumers could not reasonably avoid and that is not outweighed by the benefit to consumers or competition. See *FTC Policy Statement on Unfairness*, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984), also available at www.ftc.gov/bcp/policystmt/ad-unfair.htm.

Unique features in online ads — including advertising delivered via social media platforms or on mobile devices — may affect how an ad and any required disclosures are evaluated.

A. Background on Disclosures

Advertisers are responsible for ensuring that all express and implied claims that an ad conveys to reasonable consumers are truthful and substantiated. When identifying these claims, advertisers should not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name, and depictions.¹⁴ If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed.

A disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

Many Commission rules and guides spell out the information that must be disclosed in connection with certain claims. In many cases, these disclosures prevent a claim from being misleading or deceptive.¹⁵ Other rules and guides require disclosures to ensure that consumers receive material information to assist them in making better-informed decisions,¹⁶ or to implement statutes furthering public policy goals.¹⁷ In all of these instances, if a disclosure is required, it must be clear and conspicuous.

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14. Copy tests or other evidence of how consumers actually interpret an ad can be valuable. In many cases, however, the implications of the ad are clear enough to determine the existence of the claim by examining the ad alone, without extrinsic evidence.
 15. For example, if an endorsement is not representative of the performance that consumers can generally expect to achieve with a product, advertisers must disclose the generally expected performance in the depicted circumstances. Endorsement Guides, 16 C.F.R. § 255.2.
 16. For example, any solicitation for the purchase of consumer products with a warranty must disclose the text of the warranty offer or how consumers can obtain it for free. Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. § 702.3.
 17. For example, the required energy disclosures in the Energy Labeling Rule, 16 C.F.R. § 305, further the public policy goal of promoting energy conservation by providing consumers with clear comparative information.

B. The Clear and Conspicuous Requirement

Disclosures that are required to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, must be presented “clearly and conspicuously.”¹⁸ Whether a disclosure meets this standard is measured by its performance — that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the overall net impression of the ad — that is, whether the claims consumers take from the ad are truthful and substantiated.¹⁹ If a disclosure is not seen or comprehended, it will not change the net impression consumers take from the ad and therefore cannot qualify the claim to avoid a misleading impression.

In reviewing their ads, advertisers should adopt the perspective of a reasonable consumer.²⁰ They also should assume that consumers don’t read an entire website or online screen, just as they don’t read every word on a printed page.²¹ Disclosures should be placed as close as possible to the claim they qualify. Advertisers should keep in mind that having to scroll increases the risk that consumers will miss a disclosure.

In addition, it is important for advertisers to draw attention to the disclosure. Consumers may not be looking for — or expecting to find — disclosures. Advertisers are responsible for ensuring that their messages are truthful and not deceptive. Accordingly, disclosures must be communicated effectively so that consumers are likely to notice and understand them in connection with the representations that the disclosures modify. Simply making the disclosure available somewhere in the ad, where some consumers might find it, does not meet the clear and conspicuous standard.

If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated. Moreover, if a particular platform does not provide an

18. Some rules and guides, as well as some FTC cases, use the phrase “clearly and prominently” instead of “clearly and conspicuously.” As used in FTC rules, guides, and cases, these two phrases are synonymous. They may have different meanings under other statutes.

19. Deception Policy Statement at 175-76.

20. Deception Policy Statement at 178. The Deception Policy Statement also says that “[w]hen representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.” *Id.* at 179 (footnote omitted).

21. Deception Policy Statement at 180-81.

opportunity to make clear and conspicuous disclosures, it should not be used to disseminate advertisements that require such disclosures.²²

C. What Are Clear and Conspicuous Disclosures?

There is no set formula for a clear and conspicuous disclosure; it depends on the information that must be provided and the nature of the advertisement. Some disclosures are quite short, while others are more detailed. Some ads use only text, while others use graphics, video, or audio, or combinations thereof. Advertisers have the flexibility to be creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to consumers is not misleading.

To evaluate whether a particular disclosure is clear and conspicuous, consider:

- the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying;
- the prominence of the disclosure;
- whether the disclosure is unavoidable;
- the extent to which items in other parts of the advertisement might distract attention from the disclosure;
- whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure;
- whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and
- whether the language of the disclosure is understandable to the intended audience.

If there are indications that a significant proportion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved.

The following discussion uses these traditional factors to evaluate whether disclosures are likely to be clear and conspicuous in the context of online ads. Hyperlinks labeled as

22. This approach mirrors one articulated by the Commission in 1970, when it said that if disclosures in television ads could not be understood, then ads containing representations requiring those disclosures should not be aired. See *Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosures in Television Advertising* (Oct. 21, 1970).

[Examples](#) in the text link to mock ads in the appendix. Each mock ad presents a scenario to illustrate one or more particular factors. Advertisers must consider all of the factors, however, and evaluate an actual disclosure in the context of the ad as a whole.

1. Proximity and Placement

A disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosure and relate it to the relevant claim or product. For print ads, an advertiser might measure proximity in terms of whether the disclosure is placed adjacent to the claim, or whether it is separated from the claim by text or graphics. The same approach can be used for online ads. Websites, and mobile applications, however, are interactive and have a certain depth — with multiple pages or screens linked together and pop-up screens, for example — that may affect how proximity is evaluated. Mobile devices also present additional issues because a disclosure that would appear on the same screen of a standard desktop computer might, instead, require significant vertical and horizontal scrolling on a mobile screen. In evaluating placement, advertisers should also take into consideration empirical research about where consumers do and do not look on a screen.

a. Evaluating Proximity

A disclosure is more likely to be effective if consumers view the disclosure and the claim that raises the need for disclosure (often referred to as a “triggering claim”) together on the same screen. [Example 1](#) Even if a disclosure is not tied to a particular word or phrase, it is more likely that consumers will notice it if it is placed next to the information, product, or service to which it relates.

Often, disclosures consist of a word or phrase that may be easily incorporated into the text, along with the claim. Doing so increases the likelihood that consumers will see the disclosure and relate it to the relevant claim.

In some circumstances, it may be difficult to ensure that a disclosure appears on the “same screen” as a claim or product information. Some disclosures are long and thus difficult to place next to the claims they qualify. In addition, computers, tablets, smartphones, and other connected devices have varying screen sizes that display ads and websites differently. In these situations, an advertiser might place a disclosure where consumers might have to scroll to reach it. Requiring consumers to scroll in order to view a disclosure may be

problematic, however, because consumers who don't scroll enough (and in the right direction) may miss important qualifying information and be misled.

When advertisers are putting disclosures in a place where consumers might have to scroll in order to view them, they should use text or visual cues to encourage consumers to scroll and avoid formats that discourage scrolling.

Text prompts can indicate that more information is available. An explicit instruction like "see below for important information on restocking fees" will alert consumers to scroll and look for the information. The text prompt should be tied to the disclosure to which it refers. General or vague statements, such as "details below," provide no indication about the subject matter or importance of the information that consumers will find and are not adequate cues.

The visual design of the page also could help alert consumers to the availability of more information. For example, text that clearly continues below the screen, whether spread over an entire page or in a column, would indicate that the reader needs to scroll for additional information. Advertisers should consider how the page is displayed when viewed on different devices.

Scroll bars along the edges of a screen are not a sufficiently effective visual cue. Although the scroll bars may indicate to some consumers that they have not reached the bottom or sides of a page, many consumers may not look at the scroll bar and some consumers access the Internet with devices that don't display a scroll bar.

The design of some pages might indicate that there is no more information following and, therefore, no need to continue scrolling. If the text ends before the bottom of the screen or readers see an expanse of blank space, they may stop scrolling and miss the disclosure. [Example 2](#) They will also likely stop scrolling when they see the information and types of links that normally signify the bottom of a webpage, e.g., "contact us," "terms and conditions," "privacy policy," and "copyright." In addition, if there is a lot of unrelated information — either words or graphics — separating a claim and a disclosure, even a consumer who is prompted to scroll might miss the disclosure or not relate it to a distant claim they've already read.

If scrolling is necessary to view a disclosure, then, ideally, the disclosure should be unavoidable — consumers should not be able to proceed further with a transaction, e.g., click forward, without scrolling through the disclosure. Making a disclosure unavoidable increases the likelihood that consumers will see it.

Because of their small screens, smartphones (and some tablets) potentially require horizontal, as well as vertical, scrolling. Placing a disclosure in a different column of a webpage from the claim it modifies could make it unlikely that consumers who have to zoom in to read the claim on a small screen will scroll right or left to a different column and read the disclosure. [Example 3](#) Optimizing a website for mobile devices will eliminate the need for consumers to scroll right or left, although it will not necessarily address the need for vertical scrolling.

b. Hyperlinking to a Disclosure

Hyperlinks allow additional information to be placed on a webpage entirely separate from the relevant claim. Hyperlinks can provide a useful means to access disclosures that are not integral to the triggering claim, provided certain conditions (discussed below) are met. Hyperlinked disclosures may be particularly useful if the disclosure is lengthy or if it needs to be repeated (because of multiple triggering claims, for example).

However, in many situations, hyperlinks are not necessary to convey disclosures. If a disclosure consists of a word or phrase that may be easily incorporated into the text, along with the claim, this placement increases the likelihood that consumers will see the disclosure and relate it to the relevant claim.

Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is particularly true for cost information or certain health and safety disclosures. [Example 4](#) Indeed, required disclosures about serious health and safety issues are unlikely to be effective when accessible only through a hyperlink. Similarly, if a product's basic cost (e.g., the cost of the item before taxes, shipping and handling, and any other fees are added on) is advertised on one page, but there are significant additional fees the consumer would not expect to incur in order to purchase the product or use it on an ongoing basis, the existence and nature of those additional fees should be disclosed on the same page and immediately adjacent to the cost claim, and with appropriate prominence.

However, if the details about the additional fees are too complex to describe adjacent to the price claim, those details may be provided by using a hyperlink. [Example 5](#) The hyperlink should be clearly labeled to communicate the specific nature of the information to which it

leads, e.g., “Service plan required. [Get service plan prices.](#)” The hyperlink should appear adjacent to the price. Moreover, because consumers should not have to click on hyperlinks to understand the full amount they will pay, all cost information — including any such additional fees — should be presented to them clearly and conspicuously prior to purchase.

The key considerations for evaluating the effectiveness of all hyperlinks are:

- the labeling or description of the hyperlink;
- consistency in the use of hyperlink styles;
- the placement and prominence of the hyperlink on the webpage or screen; and
- the handling of the disclosure on the click-through page or screen.

Choosing the right label for the hyperlink. A hyperlink that leads to a disclosure should be labeled clearly and conspicuously. The hyperlink’s label — the text or graphic assigned to it — affects whether consumers actually click on it and see and read the disclosure.

- **Make it obvious.** Consumers should be able to tell that they can click on a hyperlink to get more information. Simply underlining text may be insufficient to inform consumers that the text is a hyperlink. Using multiple methods of identifying hyperlinks, such as both a different color from other text and underscoring, makes it more likely that hyperlinks will be recognized.
- **Label the link to convey the importance, nature, and relevance of the information to which it leads.** [Example 6](#) The hyperlink should give consumers a reason to click on it. That is, the label should make clear that the link is related to a particular advertising claim or product and indicate the nature of the information to be found by clicking on it. The hyperlink label should use clear, understandable text. Although the label itself does not need to contain the complete disclosure, it may be necessary to incorporate part of the disclosure to indicate the type and importance of the information to which the link leads. On the other hand, in those cases where seeing a hyperlinked disclosure is unavoidable if a consumer is going to take any action with respect to a product or service — e.g., the product or service can only be purchased online and the consumer must click on that link to proceed to a transaction — the label of the hyperlink may be less important.
- **Don’t hide the ball.** Some text links provide no indication about why a claim is qualified or the nature of the disclosure. [Example 7](#) In many cases, simply

hyperlinking a single word or phrase in the text of an ad is not likely to be effective. Although some consumers may understand that additional information is available, they may have different ideas about the nature of the information and its significance.

Hyperlinks that simply say “disclaimer,” “more information,” “details,” “terms and conditions,” or “fine print” do not convey the importance, nature, and relevance of the information to which they lead and are likely to be inadequate. Even labels such as “important information” or “important limitations” may be inadequate.

[Examples 8 & 9](#) Unfortunately, there is no one-size-fits-all word or phrase that can be used as a hyperlink label, but more specificity will generally be better.

- **Don’t be subtle.** Symbols or icons by themselves are not likely to be effective as hyperlink labels leading to disclosures that are necessary to prevent deception.²³ [Example 10](#) A symbol or icon might not provide sufficient clues about why a claim is qualified or the nature of the disclosure.²⁴ It is possible that consumers may view a symbol as just another graphic on the page. Even if a website explains that a particular symbol or icon is a hyperlink to important information, consumers might miss the explanation, depending on where they enter the site and how they navigate through it.
- **Account for technological differences and limitations.** Consider whether and how your linking technique will work on the various programs and devices that could be used to view your advertisement.²⁵

Using hyperlink styles consistently increases the likelihood that consumers will know when a link is available. Although the text or graphics used to signal a hyperlink may differ across websites and applications, treating hyperlinks inconsistently within a single site or application can increase the chances that consumers will miss — or not click on — a

23. The Commission has, however, acknowledged the potential utility of icons in the privacy area. See FTC, *Protecting Consumer Privacy in an Era of Rapid Change, Recommendations for Businesses and Policymakers* (Mar. 2012), available at www.ftc.gov/os/2012/03/120326privacyreport.pdf; see also FTC Staff, *Mobile Apps for Kids: Current Privacy Disclosures are Disappointing* (Feb. 2012), available at www.ftc.gov/os/2012/02/120216mobile_apps_kids.pdf.

24. Symbols and icons also are used in different ways online, which could confuse consumers as to where the related disclosure can be found. Some online symbols and icons are hyperlinks that click through to a separate page; some are meant to communicate disclosure information themselves; and others are static, referring to a disclosure at the bottom of the page.

25. For example, “mouse-overs” may not work on mobile devices that have no cursor to hover over a link.

disclosure hyperlink. For example, if hyperlinks usually are underlined in a site, chances are consumers wouldn't recognize italicized text as being a link, and could miss the disclosure.

Placing the link near relevant information and making it noticeable. The hyperlink should be proximate to the claim that triggers the disclosure so consumers can notice it easily and relate it to the claim. [Examples 11 & 12](#) Typically, this means that the hyperlink is adjacent to the triggering term or other relevant information. Consumers may miss disclosure hyperlinks that are separated from the relevant claim by text, graphics, blank space, or intervening hyperlinks, especially on devices with small screens. Format, color, or other graphics treatment also can help to ensure that consumers notice the link. (See below for more information on prominence.)

Getting to the disclosure on the click-through should be easy. The click-through page or screen — that is, the page or screen the hyperlink leads to — must contain the complete disclosure and that disclosure must be displayed prominently. Distracting visual factors, extraneous information, and opportunities to “click” elsewhere before viewing the disclosure can obscure an otherwise adequate disclaimer.

- **Get consumers to the message quickly.** The hyperlink should take consumers directly to the disclosure. They shouldn't have to search a click-through page or go to other places for the information. In addition, the disclosure should be easy to understand.
- **Pay attention to indicia that hyperlinked disclosures are not effective.** Although advertisers are not required to use them, some available tools may indicate to advertisers that their disclosures accessed through hyperlinks are not effective. For example, advertisers can monitor click-through rates, *i.e.*, how often consumers click on a hyperlink and view the click-through information. Advertisers also can evaluate the amount of time visitors spend on a certain page, which may indicate whether consumers are reading the disclosure.
- **Don't ignore your data.** If hyperlinks are not followed, another method of conveying the required information would be necessary.

c. Using High Tech Methods for Proximity and Placement

Disclosures may be displayed on websites or in applications in many ways. For example, a disclosure may be placed in a frame that remains constant even as the consumer scrolls down the page or navigates through another part of the site or application. A disclosure

also might be displayed in a window that pops up or on interstitial pages that appear while another webpage is loading. New techniques for displaying information are being developed all the time. But there are special considerations for evaluating whether a technique is appropriate for providing required disclosures.

- **Don't ignore technological limitations.** Some browsers or devices may not support certain techniques for displaying disclosures or may display them in a manner that makes them difficult to read. For example, a disclosure that requires Adobe Flash Player will not be displayed on certain mobile devices.
- **Don't use blockable pop-up disclosures.** Advertisers should not disclose necessary information through the use of pop-ups that could be prevented from appearing by pop-up blocking software.
- **Be aware of other issues with pop-up disclosures.** Even the use of unblockable pop-ups to disclose necessary information may be problematic. Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don't associate information in a pop-up window or on an interstitial page to a claim or product they haven't encountered yet. However, advertisers can take steps to avoid such problems, *e.g.*, by requiring the consumer to take some affirmative action to proceed past the pop-up or interstitial (for example, by requiring consumers to choose between "yes" and "no" buttons without use of preselected buttons before continuing). Research may be useful to help advertisers determine whether a particular technique is an effective method of communicating information to consumers.

d. Displaying Disclosures Prior to Purchase

Disclosures must be effectively communicated to consumers before they make a purchase or incur a financial obligation. In general, disclosures are more likely to be effective if they are provided in the context of the ad, when the consumer is considering the purchase. Different considerations apply, however, in different situations. Where advertising and selling are combined on a website or mobile application — that is, the consumer will be completing the transaction online — disclosures should be provided before the consumer makes the decision to buy, *e.g.*, before clicking on an "order now" button or a link that says "add to shopping cart." [Example 13](#)

- **Don't focus only on the order screen.** Some disclosures must be made in conjunction with the relevant claim or product. Consumers may not relate a disclosure on the order screen to information they viewed much earlier. It also is possible that after surfing a company's website, some consumers may decide to purchase the product from the company's brick and mortar store. Those consumers would miss any disclosures placed only on the ordering screen. So that these consumers do not miss a necessary disclosure, it may have to be on the same page as the claim it qualifies.

When a product advertised online can be purchased from brick and mortar stores or from online retailers other than the advertiser itself, necessary disclosures should be made in the ad before consumers go to other outlets to make their purchase. [Example 14](#) An in-store disclosure or one placed on an unrelated online retailer's website is unlikely to cure an otherwise deceptive advertisement.

e. Evaluating Proximity in Space-Constrained Ads

Many space-constrained ads displayed today are teasers. Because of their small size and/or short length, space-constrained ads, such as banner ads and tweets, generally do not provide very much information about a product or service. Often, consumers must click through to the website to get more information and learn the terms of an offer. If a space-constrained ad contains a claim that requires qualification, the advertiser disseminating it is not exempt from disclosure requirements.

- **Disclose required information in the space-constrained ad itself or clearly and conspicuously on the website to which it links.** In some cases, a required disclosure can easily be incorporated into a space-constrained ad. [Example 15](#) In other instances, the disclosures may be too detailed to be disclosed effectively in the ad itself. These disclosures may sometimes be communicated effectively to consumers if they are made clearly and conspicuously on the website to which the ad links. In determining whether the disclosure should be placed in the space-constrained ad itself or on the website to which the ad links, advertisers should consider how important the information is to prevent deception, how much information needs to be disclosed, the burden of disclosing it in the ad itself, how much information the consumer may absorb from the ad, and how effective the disclosure would be if it were made on the website. If a product promoted in a space-constrained ad can be bought in a brick and mortar store, consumers who do

not click through to a linked website would miss any disclosure that was not in the space-constrained ad itself. If the disclosure needs to be in the ad itself but it does not fit, the ad should be modified so it does not require such a disclosure or, if that is not possible, that space-constrained ad should not be used.

- **Use creativity to incorporate or flag required information.** Scrolling text or rotating panels in a banner ad can present an abbreviated version of a required disclosure that indicates additional important information and a more complete disclosure are available on the click-through page.
- **Use disclosures in each ad.** If a disclosure is required in a space-constrained ad, such as a tweet, the disclosure should be in each and every ad that would require a disclosure if that ad were viewed in isolation. Do not assume that consumers will see and associate multiple space-constrained advertisements. [Example 16](#)
- **Short-form disclosures might or might not adequately inform consumers of the essence of a required disclosure.** For example, “Ad:” at the beginning of a tweet or similar short-form message should inform consumers that the message is an advertisement, and the word “Sponsored” likely informs consumers that the message was sponsored by an advertiser. Other abbreviations or icons may or may not be adequate, depending on whether they are presented clearly and conspicuously, and whether consumers understand their meaning so they are not misled.²⁶ [Example 17](#) Misleading a significant minority of reasonable consumers is a violation of the FTC Act.²⁷
- **Maintaining disclosures with republication.** Advertisers should employ best practices to make it less likely that disclosures will be deleted from space-constrained ads when they are republished by others. Some disclosures can be placed at the beginning of a short-form message. Alternatively, if a disclosure is placed at the end of a message, the original message can be written with enough free space that the disclosure is not lost if the message is republished with a comment by others.

26. Empirical evidence may be necessary to demonstrate that certain abbreviations or icons are effective, at least until such time that their usage is sufficiently widespread to provide confidence that consumers see them and understand what they mean. As of the date of publication of this document, such evidence was not available.

27. Deception Policy Statement at 177 n.20.

- **Disclosures on the click-through.** In some instances — *e.g.*, when a teaser ad does not actually identify the product being advertised, so the consumer must click through to learn its identity, or when the advertised product is sold only through the advertiser’s own website and the consumer must click through in order to take any action — a space-constrained ad can direct consumers to a website for more information if a detailed disclosure is necessary but will not fit in the space-constrained ad. The full disclosure must then be clearly and conspicuously displayed on the website.
- **Providing required disclosures in interactive ads.** If consumers can purchase a product within an interactive ad, all required disclosures should be included in the ad itself.

2. Prominence

It is the advertiser’s responsibility to draw attention to the required disclosures.

Display disclosures prominently so they are noticeable to consumers. The size, color, and graphics of the disclosure affect its prominence.

- **Size Matters.** Disclosures that are at least as large as the claim to which they relate are more likely to be effective.
- **Color Counts.** A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the ad is likely to be missed.

[Example 18](#)

- **Graphics Help.** Although using graphics to display a disclosure is not required, they may make the disclosure more prominent.

Evaluate the size, color, and graphics of the disclosure in relation to other parts of the website, email or text message, or application.²⁸ The size of a disclosure should be compared to the type size of the claim and other text on the screen. If a claim uses a particular color or graphic treatment, the disclosure can be formatted the same way to help ensure that consumers who see the claim are also able to see the disclosure and relate it back to the claim

28. Websites may display differently, depending on the program and device used. Advertisers should consider different display options to ensure that qualifying information is displayed clearly and conspicuously. Evaluating the prominence of the disclosure in relation to the rest of the ad, as it may appear on various devices, helps ensure that consumers are able to view the disclosure.

it modifies. In addition, the graphic treatment of the disclosure may be evaluated in relation to how graphics are used to convey other items in the ad.

Account for viewing on different devices. Most webpages viewable on desktop devices may also be viewable on smartphones. Therefore, unless a website defaults to a mobile-optimized (or similarly responsive) version,²⁹ advertisers should design the website so that any necessary disclosures are clear and conspicuous, regardless of the device on which they are displayed. [Example 19](#) Among many other considerations, if a disclosure is too small to read on a mobile device and the text of the disclosure cannot be enlarged, it is not a clear and conspicuous disclosure. If a disclosure is presented in a long line of text that does not wrap around and fit on a screen, it is unlikely to be adequate.

Don't bury it. The prominence of the disclosure also may be affected by other factors. A disclosure that is buried in a long paragraph of unrelated text will not be effective. The unrelated text detracts from the message and makes it unlikely that a consumer would notice the disclosure or recognize its importance. Even though the unrelated information may be useful, advertisers must ensure that the disclosure is communicated effectively. For example, it is highly unlikely that consumers will read disclosures buried in "terms of use" and similar lengthy agreements. Even if such agreements may be sufficient for contractual or other purposes, disclosures that are necessary to prevent deception or unfairness should not be relegated to them. Similarly, simply because consumers click that they "agree" to a term or condition, does not make the disclosure clear and conspicuous.

A disclosure that addresses a subject other than the primary subject of the ad. Consumers who are trying to complete a task and obtain a specific product or service may not pay adequate attention to a disclosure that does not relate to the task at hand. This can be problematic if, for example, an advertiser is selling a product or service together with a negative option trial for a different product or service. In these circumstances, even a relatively prominent disclosure about the negative option trial could be missed by consumers because this additional product or service is not their primary focus. One way to increase the likelihood that consumers have actually read and understood a disclosure in such circumstances is to require consumers to affirmatively acknowledge having seen the disclosure by choosing between multiple answer options, none of which is preselected. Any such affirmative

29. Website operators can identify visitors who are using mobile devices to visit their websites and display a version of the site that has been designed or "optimized" to enable those consumers to view the site more easily.

acknowledgement should be displayed early in the decision-making process, e.g., before the primary item is actually added to a shopping cart. [Example 20](#)

3. Distracting Factors in Ads

The clear and conspicuous analysis does not focus only on the disclosure itself. It also is important to consider the entire ad. Elements like graphics, sound, text, links that lead to other screens or sites, or “add to cart” buttons may result in consumers not noticing, reading, or listening to the disclosure. [Example 21](#)

- **Don’t let other parts of an ad get in the way.** On television, moving visuals behind a text message make the text hard to read and may distract consumers’ attention from the message. Using graphics online raises similar concerns: flashing images or animated graphics may reduce the prominence of a disclosure. Graphics on a webpage alone may not undermine the effectiveness of a disclosure. It is important, however, to consider all the elements in the ad, not just the text of the disclosure. [Example 22](#)

4. Repetition

It may be necessary to disclose information more than once to convey a non-deceptive message. Repeating a disclosure makes it more likely that a consumer will notice and understand it, and will also increase the likelihood that it will be seen by consumers who may be entering the website at different points. Still, the disclosure need not be repeated so often that consumers would ignore it or it would clutter the ad.

- **Repeat disclosures on lengthy sites and applications, as needed.** Consumers can access and navigate websites or applications in different ways. Many consumers may access a site through its home page, but others might enter in the middle, perhaps by linking to that page from a search engine or another website. Consumers also might not click on every page of the site and might not choose to scroll to the bottom of each page. And many may not read every word on every page of a website. As a result, advertisers should consider whether consumers who see only a portion of their ad are likely to be misled because they will either miss a necessary disclosure or not understand its relationship to the claim it modifies.
- **Repeat disclosures with repeated claims, as needed.** If claims requiring qualification are repeated throughout an ad, it may be necessary to repeat the

disclosure, too. In some situations, the disclosure itself is so integral to the claim that it must always accompany the claim to prevent deception. In other instances, a clearly-labeled hyperlink could be repeated on each page where the claim appears, so that the full disclosure would be placed on only one page of the site.

5. Multimedia Messages and Campaigns

Online ads may contain or consist of audio messages, videos, animated segments, or augmented reality experiences (interactive computer-generated experiences) with claims that require qualification. As with radio and television ads, the disclosure should accompany the claim. In evaluating whether disclosures in these multimedia portions of online ads are clear and conspicuous, advertisers should evaluate all of the factors discussed in this guidance document, as well as these special considerations:

- **For audio claims, use audio disclosures.** The disclosure should be in a volume and cadence sufficient for a reasonable consumer to hear and understand it. The volume of the disclosure can be evaluated in relation to the rest of the message, and in particular, the claim. Of course, consumers who do not have speakers, appropriate software, or devices with audio capabilities or who have their sound turned off will not hear either the claim or the disclosure.
- **For written claims, use written disclosures.** Disclosures triggered by a claim or other information in an ad's written text should be made in writing, and not be placed solely in an audio or video clip. Consumers who do not have speakers, appropriate software, or devices with audio capabilities or who have their sound turned off will not hear an audio disclosure; similarly, consumers might not be able to view a video clip on some devices or simply might not choose to watch it.
- **Display visual disclosures for a sufficient duration.** Visual disclosures presented in video clips or other dynamic portions of online ads should appear for a duration sufficient for consumers to notice, read, and understand them. As with brief video superscripts in television ads, fleeting online disclosures are not likely to be effective.

Advertisers should also recognize that consumers today may be viewing their messages through multiple media (e.g., watching television, surfing the web on a computer, viewing space constrained messages on a smartphone, etc.). This multiple media access does not

alter the requirement that required disclosures be made clearly and conspicuously in each advertisement that would require a disclosure if viewed in isolation.

6. Understandable Language

For disclosures to be effective, consumers must be able to understand them. Advertisers should use clear language and syntax and avoid legalese or technical jargon. Disclosures should be as simple and straightforward as possible. Icons and abbreviations are not adequate to prevent a claim from being misleading if a significant minority of consumers do not understand their meaning.³⁰ Incorporating extraneous material into the disclosure also may diminish communication of the message to consumers.

IV. Conclusion

Although online commerce (including mobile and social media marketing) is booming, deception can dampen consumer confidence in the online marketplace. To ensure that products and services are described truthfully online and that consumers get what they pay for, the FTC will continue to enforce its consumer protection laws. Most of the general principles of advertising law apply to online ads, but new issues arise almost as fast as technology develops. The FTC will continue to evaluate online advertising, using traditional criteria, while recognizing the challenges that may be presented by future innovation. Businesses, as well, should consider these criteria when developing online ads and ensuring they comply with the law.

30. See *supra* note 23.

Appendix: Examples

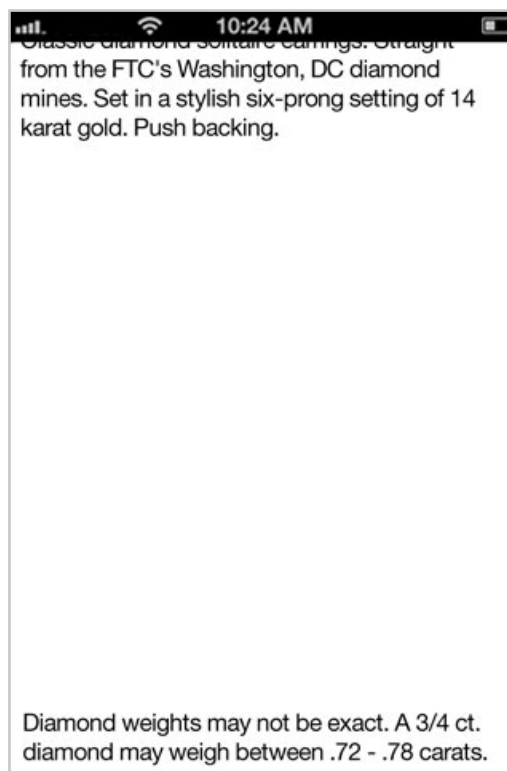
Example 1

The disclosure “imitation” needs to accompany the triggering term “pearl,” so that consumers are not misled about the type of pearls being sold. The disclosure would not be as effective if it was separated from the word “pearl” or placed on a different page. The FTC’s Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. § 23.19, recognize this and advise that the disclosure “imitation” immediately precede the word pearl. In this situation, there is no reason to evaluate proximity differently in online ads than other types of ads.



Example 2

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Here, though, because of the blank space between the textual description of the product and the disclosure, even consumers who scroll down to the end of the text (see second screen) will probably think that there is no more information to view and are likely to miss the disclosure.



Example 3

Advertisers should take into consideration the variety of devices and platforms that consumers can use to view their ads and ensure that necessary disclosures are clear and conspicuous on any device or platform that is capable of displaying their message.

In this example, consumers might not expect a monthly service fee for cameras used to monitor their homes over the Internet, so a disclosure is necessary to prevent the ad from being misleading. Placing the disclosure in a different column than the camera price it qualifies, as in this example, rather than directly under the price information, makes it less likely that consumers viewing this webpage on a desktop computer would notice the disclosure here.

The screenshot shows the 'Eye on Your Home' website. At the top left is the logo, and at the top right are links for 'Login or Register', 'About Us', and 'Certification'. Below the navigation is a hero banner with three images: a child, a woman on a smartphone, and a dog. A text overlay reads 'Keep an Eye on Your Home for Safety and Security'. Below the banner, on the left, is a product image of a camera with a disclosure: '*Usage requires a \$9.99 monthly service fee.' In the center, there is a 'Buy Now' button and a price of '\$99.99* per camera'. To the right is a testimonial from Julie Brown, an 80-year-old mother, who says she uses the cameras to check on her mother. The footer contains links for 'Contact Us', 'Privacy Policy', and 'Terms of Service'.

Webpage on a desktop

Example 3 (cont'd)

Consumers viewing this webpage on a smartphone or other device with a small screen, however, would likely find it too small to read (see mobile screen without zooming, below), requiring them to zoom in on the part or parts that they wish to read.

They are likely to zoom in on the center column (see zoomed-in mobile screen, below), which contains the main information on the page and might not scroll left to see the disclosure in the left column. As a result, consumers who use a smart phone to view this website, which has not been optimized for mobile devices, might easily miss the monthly monitoring fee disclosure.



Mobile screen (no zooming)



Mobile screen (zoomed-in)

Example 4

Hyperlinks should not be used to communicate disclosures that are an integral part of a claim or inseparable from it, including important health and safety information. In this example, the hyperlink “Important Health Information” leads to a disclosure, “Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80°F, such as in a hot car. Use in these conditions could lead to food-borne illness.” The fact that the cooler might not keep food cold enough to prevent the growth of dangerous bacteria should not be hidden behind a hyperlink, even one labeled “Important Health Information.” This is especially true when the cooler is promoted for keeping perishable food fresh and cold on road trips. Moreover, any disclosure that is integral to the primary claim should be immediately adjacent to that claim.

FROST-A-TRON
so fresh & cool

Order Now | FAQ | Reviews | Contact Us

Home Order Now FAQ Reviews



AS SEEN ON TV

For space travel, scientists had to find something better than traditional refrigeration. Their research led them to discover a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Only \$129
plus shipping & handling

Satisfaction is guaranteed.

[Important Health Information](#)

Price: **\$129**
Color:
Qty:

ORDER NOW



Buy now
and get 2
for just
\$199.99!

Example 5

Although hyperlinks generally should not be used to disclose information integral to the claim — such as the existence and nature of additional fees consumers might not expect — a hyperlink can be used to disclose the details if they are too complex to describe next to the basic price information. Here the hyperlink leads to the disclosure, “Monitoring plan price: \$15.95 per month with one camera, \$9.95 per month/per camera with two cameras, \$7.95 per month/per camera with three or more cameras. Save 10% with a 12-month commitment, 20% with a 24-month commitment. Additional 5% discount for seniors and families of active duty military personnel.”

This information about the monitoring plan’s prices is likely is too complex to appear adjacent to the price per camera claim, and thus can be placed behind a properly labeled hyperlink. The statement “Service plan required” and the hyperlink are next to the price per camera; and together, the statement and the hyperlink’s label communicate to consumers the specific nature and importance of the information to which the hyperlink leads.

The screenshot shows the homepage for "Eye on Your Home". At the top left is the logo, which consists of a house icon with an eye inside, followed by the text "Eye on Your Home". To the right of the logo are links for "Login or Register", "About Us", and "Certification". Below the logo is a navigation bar with the text "Call us now 1-800-XXX-XXXX". The main content area features three images: a young boy in a green shirt, a woman looking at her smartphone, and a dog. Below these images is a banner with the text "Keep an Eye on Your Home for Safety and Security". The advertisement includes a product image of a camera on a tripod, a testimonial from Julie Brown, and a "Buy Now" button. The price is listed as \$99.99 per camera, with a note that a service plan is required and a link to "Get service plan prices".

Eye on Your Home

Login or Register | About Us | Certification

Call us now 1-800-XXX-XXXX

Keep an Eye on Your Home for Safety and Security

Do you worry that the nanny is putting your toddler in front of the television for hours, instead of reading to her? Or do you have older children who come home to an empty house after school? An elderly parent at home alone? Or do you just want to see what the dog does while you're at work?

Get our wireless home monitoring system!

Set up our cameras whenever you need them, and relax. You'll be able to check on everyone and everything wherever you are, using either your computer, tablet, or smartphone equipped with our [free Eye app](#).

Our wide-angle cameras can be wall mounted or free standing. [See camera specifications.](#)

Price: \$99.99 per camera
Service plan required.
[Get service plan prices.](#)

[Buy Now](#)

"My 80 year-old mother lives with us. I was always worried about her when I was out of the house because she had a bad fall last year. With Eye-On-Your-Home cameras in the kitchen and the family room, I can just check my smart phone when I'm out and know she's okay."

- Julie Brown
Satisfied Customer

Moreover, all cost information, including any such fees, should be presented clearly and conspicuously to consumers prior to purchase.

Example 6

Because the advertiser's assertion that "Satisfaction is guaranteed" implies that dissatisfied consumers can get a full refund of the purchase price, the advertiser should clearly and conspicuously disclose any restocking fees.

The hyperlink "Restocking fee applies to all returns." leads to the disclosure, "If you return the Frost-a-tron within 30 days there is a restocking fee of \$19.95. After 30 days and before 90 days, the restocking fee is \$29.95. After 90 days, the restocking fee is \$49.95. Shipping and handling fees are non-refundable. No COD on returns." The details in this return policy are likely too complex to disclose next to the guarantee. The label of the hyperlink adequately conveys the nature and relevance of the information to which it leads.

FROST-A-TRON
so fresh & cool

Order Now | FAQ | Reviews | Contact Us

Home Order Now FAQ Reviews

For space travel, scientists had to find something better than traditional refrigeration. They discovered a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80°F, such as in a hot car. Use in these conditions could lead to food-borne illness.

Price: **\$129**

Color:

Qty:

ORDER NOW

AS SEEN ON TV

Only \$129, plus shipping & handling

Satisfaction is guaranteed.
Restocking fee applies to all returns.

Buy now and get 2 for just **\$199.99!**

Example 7

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Even if the hyperlink “3/4 Ct.” clicks through to a page that lists the weight range for every size diamond sold by the advertiser, this disclosure is not clear and conspicuous.

Underlining “3/4 Ct.” may or may not indicate to consumers that this is a hyperlink. Even if consumers recognize it as a hyperlink, the label here does not communicate the relevance of the information to which that link leads — in this case, to a disclosure that diamond weights are not exact, that the diamonds sold by this merchant may vary in weight, and that the advertised 3/4 carat diamonds might each actually weigh less than 0.75 carats. Consumers might expect to find additional general information about “carats” or diamond weights generally, but not necessarily information that qualifies the claim that they are purchasing diamonds of a specific weight.



The image is a screenshot of a mobile advertisement for diamond earrings. At the top, the status bar shows signal strength, Wi-Fi, and the time 10:24 AM. Below the status bar is a photograph of a pair of diamond earrings. The main headline is "3/4 Ct. Diamond Earrings" in blue, with the "3/4 Ct." portion underlined. Below the headline, the suggested price is listed as "\$1,599.99" and the current price is "\$1,099.99" in red. A blue button with white text says "Add to Cart" with a right-pointing arrow. Below the button, a short description reads: "Classic diamond solitaire earrings. Straight from the FTC's Washington, DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. Push backing." At the bottom, there is a section for "Customer Reviews" with the text "Be the first to review this item".

10:24 AM



3/4 Ct. Diamond Earrings

Suggested Price: \$1,599.99

Our Price: \$1,099.99

Add to Cart ▶

Classic diamond solitaire earrings. Straight from the FTC's Washington, DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. Push backing.

Customer Reviews
Be the first to review this item

Example 8

Because the advertiser’s assertion that “Satisfaction is guaranteed” implies that dissatisfied consumers can get a full refund of the purchase price, the advertiser should disclose any restocking fees. The hyperlink “Disclaimer” leads to the disclosure, “If you return the Frost-a-tron within 30 days there is a restocking fee of \$19.95. After 30 days and before 90 days, the restocking fee is \$29.95. After 90 days, the restocking fee is \$49.95. Shipping and handling fees are non-refundable. No COD on returns.”

The hyperlink label “Disclaimer” does not adequately convey that the information to which this hyperlink leads concerns significant restocking fees applied to all product returns; nor would hyperlinks labeled “Disclosure,” “Details,” or even “Return Information.”

FROST-A-TRON
so fresh & cool

Order Now | FAQ | Reviews | Contact Us

Home Order Now FAQ Reviews

For space travel, scientists had to find something better than traditional refrigeration. They discovered a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80°F, such as in a hot car. Use in these conditions could lead to food-borne illness.

Price: **\$129**

Color: light blue

Qty: 1

ORDER NOW

AS SEEN ON TV

Only \$129, plus shipping & handling

Satisfaction is guaranteed.


[Disclaimer](#)

Buy now and get 2 for just **\$199.99!**

In contrast, the hyperlink in Example 6, “Restocking fee applies to all returns,” does convey the nature and importance of the information in question.

Example 9

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Even if the hyperlink clicks through to a page that lists the weight range for every size diamond sold by the advertiser, this disclosure is not clear and conspicuous because the hyperlink's label does not indicate the importance of the information to which the link leads so that consumers understand why they should click on it. Although the label does indicate that more information about the earrings is available if the consumer clicks through, it does not indicate that it is related to the weight of the diamonds being advertised. Consumers could expect, for example, that this link takes them to shipping and ordering information, rather than information about the diamond weights.



The screenshot shows a mobile advertisement for diamond earrings. At the top, there is a status bar with signal strength, Wi-Fi, and the time 10:24 AM. Below the status bar is a photograph of a pair of diamond earrings. Underneath the photo is a blue hyperlink: "See more details on this jewelry item." Below the link is the product title "3/4 Ct. Diamond Earrings" in blue. Under the title, the suggested price is listed as "\$1,599.99" and the current price is "\$1,099.99" in red. A blue button with the text "Add to Cart" and a right-pointing arrow is positioned below the prices. Under the button, there is a short description: "Classic diamond solitaire earrings. Straight from the FTC's Washington, DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. Push backing." At the bottom of the ad, there is a section titled "Customer Reviews" with the text "Be the first to review this item."

Example 10

Julie Brown's endorsement is followed by a symbol consisting of the letters "FS" in a circle that is intended to disclose that she received a free sample (in this case, a free camera) in exchange for providing her endorsement.

Eye on Your Home

Login or Register | About Us | Certification

Call us now 1-800-XXX-XXXX

Keep an Eye on Your Home for Safety and Security

Do you worry that the nanny is putting your toddler in front of the television for hours, instead of reading to her? Or do you have older children who come home to an empty house after school? An elderly parent at home alone? Or do you just want to see what the dog does while you're at work?

Get our wireless home monitoring system!

Set up our cameras wherever you need them, and relax. You'll be able to check on everyone and everything wherever you are, using either your computer, tablet, or smartphone equipped with our [free Eye app](#).

Our wide-angle cameras can be wall mounted or free standing. [See camera specifications](#).

Price: \$99.99* per camera [Buy Now](#)

*Service plan required. [Get service plan prices](#).

"My 80 year-old mother lives with us. I was always worried about her when I was out of the house because she had a bad fall last year. With Eye-On-Your-Home cameras in the kitchen and the family room, I can just check my smart phone when I'm out and know she's okay."

- Julie Brown (FS)
Satisfied Customer

Icons, abbreviations, and symbols such as this are not adequate to prevent a claim from being misleading if they do not provide sufficient clues about why a claim is qualified or about the nature of the disclosure, or if consumers simply do not understand their meaning. The fact that the icon or symbol also functions as a hyperlink to an explanation of its meaning would not be sufficient to make the disclosure clear and conspicuous.

Example 11

Hyperlinks should be adjacent to the claims to which they relate, in order to increase the likelihood that consumers will see them and understand their relevance.

In this example, the hyperlink about restocking fees is right next to the claim that triggers the need for this qualifying information — that satisfaction is guaranteed.

FROST-A-TRON

so fresh & cool

[Order Now](#) | [FAQ](#) | [Reviews](#) | [Contact Us](#)

Home
Order Now
FAQ
Reviews





For space travel, scientists had to find something better than traditional refrigeration. They discovered a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80°F, such as in a hot car. Use in these conditions could lead to food-borne illness.

Price: **\$129**

Color:

Qty:

ORDER NOW



Buy now
and get 2
for just
\$199.99!

Only \$129, plus shipping & handling

Satisfaction is guaranteed.
Restocking fee applies to all returns.

Example 12

Hyperlinks should be adjacent to the claim to which they relate, in order to increase the likelihood that consumers will see them and understand their relevance.


In this example, the substantial gap between the end of the webpage's main text and the hyperlink makes it unlikely that consumers will notice the hyperlink. In addition, as noted in Example 9, the hyperlink is inadequately labeled.






Example 13

If the purchase or use of the advertised product entails significant additional charges beyond the basic price of the product and consumers reasonably might not expect those charges, they should be disclosed prominently on the same page as, and immediately adjacent to, statements of the product's basic cost.


In this example, disclosure of the existence and amount of a monthly monitoring fee only on the check-out page (see next page) would likely be deemed insufficiently clear and conspicuous; this fee should be clearly stated next to the price of the cameras on the preceding website pages that provide that price information.


Login or Register | About Us | Certification

Call us now 1-800-XXX-XXXX

Keep an Eye on Your Home for Safety and Security




Do you worry that the nanny is putting your toddler in front of the television for hours, instead of reading to her? Or do you have older children who come home to an empty house after school? An elderly parent at home alone? Or do you just want to see what the dog does while you're at work?

Get our wireless home monitoring system!

Set up our cameras wherever you need them, and relax. You'll be able to check on everyone and everything wherever you are, using either your computer, tablet, or smartphone equipped with our [free Eye app](#).

Our wide-angle cameras can be wall mounted or free standing. [See camera specifications](#).

Price: \$99.99* per camera Buy Now



"My 80 year-old mother lives with us. I was always worried about her when I was out of the house because she had a bad fall last year. With Eye-On-Your-Home cameras in the kitchen and the family room, I can just check my smart phone when I'm out and know she's okay."

- Julie Brown
Satisfied Customer

(continue on next page)

Example 13 (continued)

However, disclosure on the check-out page of the sales tax the consumer owes on this purchase, as well as reasonable shipping and handling charges, would not be problematic, because consumers expect these charges.

The screenshot shows a checkout page for 'Eye on Your Home'. The page has a dark blue header with the company logo and name on the left, and navigation links ('Login or Register | About Us | Certification') and a phone number ('Call us now 1-800-XXX-XXXX') on the right. The main content area is white and titled 'Checkout'. It is divided into two main sections: 'Order Summary' and 'Credit Card/Billing Address'.

Order Summary

	Camera	Qt	
	\$99.99 each	2	\$199.98
	Monitoring - First Month*	Qt	
	\$9.99 per camera	2	\$19.98
	Standard Shipping & Handling		\$9.99
	Taxes		\$11.88
Total			\$241.83

* Monthly monitoring service billed to your credit card every month on the date of your purchase. Cancellation details included with your shipment.

Credit Card

Credit card number CCV

Name on card

Expiration date

Billing Address Use shipping address

First name Last name

Address line 1

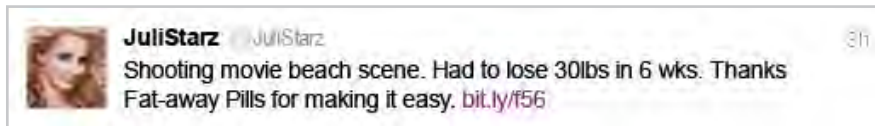
Address line 2 (optional)

City State Zip code

Example 14

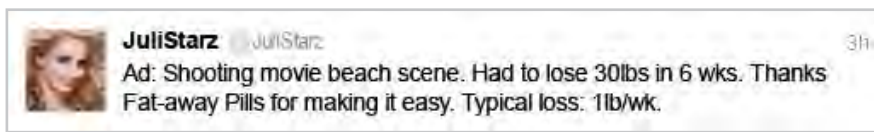
This space-constrained message requires two disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

Even if the link in the message led directly to those disclosures on the Fat-away website, those disclosures would not be adequate if consumers could purchase Fat-away at a brick and mortar store or from a third-party online retailer (a retailer that is not affiliated with the advertiser). In either case, they might not click through to the Fat-away website, and thus would not see these disclosures.



Example 15

In some cases, required disclosures can easily be incorporated into a space-constrained ad. This space-constrained message requires two disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. This space-constrained ad signals that Juli is a paid endorser by beginning with “Ad:” which only takes up four characters. It also succinctly discloses, “Typical loss: 1lb/wk.”



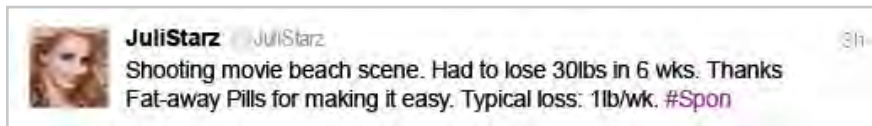
Example 16

The initial space-constrained message requires two disclosures: (1) that Juli is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. Putting that information in a subsequent message is problematic, because unrelated messages may arrive in the interim. By the time Juli's disclosures arrive, consumers might no longer be reading these messages, or they simply might not realize that those disclosures pertain to the original message.

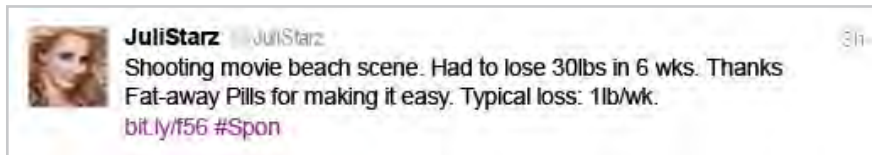
The screenshot displays a vertical list of tweets. The first tweet is from JuliStarz (@JuliStarz) posted 1 minute ago, containing the text: "I am a paid spokesperson for Fat-away Pills. Typical weight loss: 1 lb/wk." This is followed by a tweet from DevAnvegr (@DevAnvegr) at 1m ago: "#app Check out my latest app <http://t.co/iASs40576>". Next is MomingJoey (@MomingJoey) at 2m ago: "Post lunch coffee run. Yum." Then JeniRathi (@ElizaRathi) at 3m ago: "#20factsaboutmysister Her bday is today and all I got her is this tweet! #lol!". This is followed by two tweets from JimGudr (@TaylerTiff) at 3m and 6m ago, both using the hashtag #reasonsthatismile. The next tweet is from MomingJoey (@MomingJoey) at 6m ago: "Stellar column from Rorker. Rorker.co/drgf". Then JeniRathi (@JeniRathi) at 7m ago: "Warm apple cinnamon slices! Place sliced apples on buttered bake sheet, sprinkle cinnamon, bake @ 350 for 30min. pic.twitter.com/ugjhg87". This is followed by MomingJoey (@MomingJoey) at 7m ago: "I can't wait for the world to hear the music I made over the weekend. Ty/kjkkd56". The final tweet in the sequence is from JuliStarz (@JuliStarz) at 7m ago: "Shooting movie beach scene. Had to lose 30lbs in 6 wks. Thanks Fat-away Pills for making it easy."

Example 17

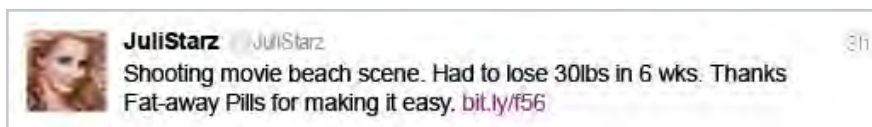
These space-constrained messages all require the following disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances which is much less than the 30 pounds Juli says she lost in 6 weeks. Although each of these messages includes an abbreviation or link that leads to disclosure of the relevant information, each of them may be inadequate to prevent consumers from being misled.



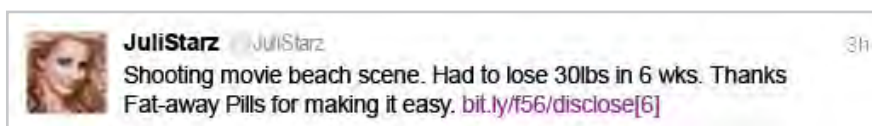
Consumers might not understand that “#spon” means that the message was sponsored by an advertiser. If a significant proportion of reasonable viewers would not, then the ad would be deceptive.



Putting #spon directly after the link might confuse consumers and make it less likely that they would understand that it is a disclosure.



Consumers viewing “bit.ly/f56,” which links to the advertiser’s official website for the product, might not realize the nature and relevance of the information that could be found by clicking on it. Moreover, if consumers can buy Fat-away in brick and mortar stores, at third-party online retailers, or in any way other than by clicking on the link, consumers who do not click on the link would be misled.



Similarly, consumers viewing “bit.ly/f56/disclose[6],” which leads to a third-party website with disclosures, would not necessarily understand what they will find at that website, or why they should click on that link.

Example 18

Both disclosures in this ad appear in text that contrasts poorly with the background of the page and they therefore are both easy to miss. Because the disclosures are not prominent, they are not clear and conspicuous.

FROST-A-TRON

so fresh & cool

[Order Now](#) | [FAQ](#) | [Reviews](#) | [Contact Us](#)

Home
Order Now
FAQ
Reviews



AS SEEN ON
TV

For space travel, scientists had to find something better than traditional refrigeration. They discovered a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Only \$129

, plus shipping & handling

Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80°F, such as in a hot car. Use in these conditions could lead to food-borne illness.

Satisfaction is guaranteed.

Restocking fee applies to all returns.

Price: \$129

Color:

Qty:

ORDER NOW



Buy now
and get 2
for just

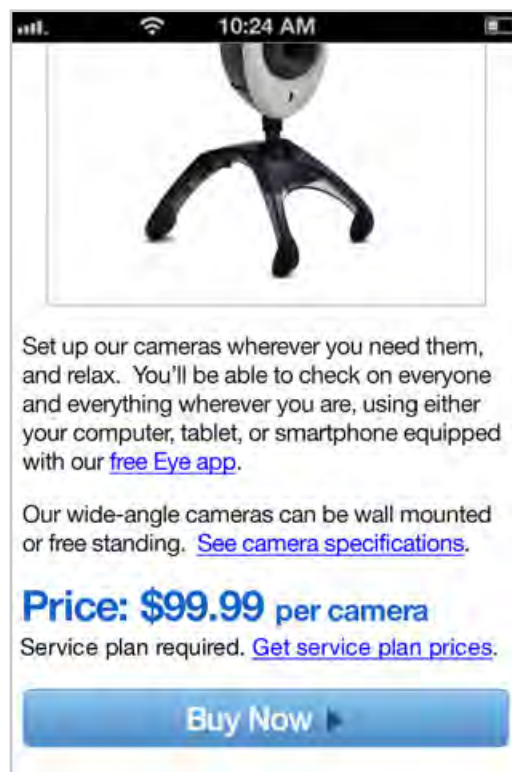
\$199.99!

Example 19

Most webpages viewable on desktop devices may also be viewable on smartphones, but, as discussed earlier, consumers may miss disclosures on mobile devices because of the need to zoom in on text and to scroll horizontally as well as vertically.

Disclosures are more likely to be clear and conspicuous on websites that are optimized for mobile devices or created using responsive design, which automatically detects the kind of device the consumer is using to access the site and arranges the content on the site so it makes sense for that device.

In this example, the website is optimized for mobile devices, and both the information about the service plan requirement and the hyperlink to the plan's prices are immediately adjacent to the camera price they qualify.



Example 20

Because the negative option in this example (enrollment in a recipe club) addresses a different subject than the main offer (cookware), the advertiser should take special care to ensure that the disclosure of the negative option is clear and conspicuous. In this case, requiring consumers to affirmatively acknowledge the disclosure by clicking on one of the two boxes on the second page — neither of which has been preselected — before they can proceed to checkout, should achieve that goal.

Fantastique Cuisine

[Login or Register](#) | [Gift Registry](#) | [Wish List](#) | [Store Locator](#)

Shopping Basket (0 Item) [Checkout](#)

[Gift Registry](#) | [Recipes](#) | [Culinary Classes](#) | [Blog](#)

[Cookware](#) | [Cook's Tools](#) | [Cutlery](#) | [Electric](#) | [Bakeware](#) | [Tabletop](#) | [Glasses & Bar](#) | [Outdoor](#) | [Sale & Clearance](#)

Roll over image to zoom

Signature Oval 6 Quart Dutch Oven

[SHARE](#)

★★★★★ [Read reviews](#) | [Write a review](#)

Suggested Price: \$325.00

Our Price: \$220.00

Qty [Add to Cart](#) [Add to Registry](#) [Add to Wish List](#)

With your purchase, you'll also enjoy a 30-day free trial membership in our [Fantastique Gourmet Cook's Club](#). You will receive ten recipes each month for delicious appetizers, main dishes, and desserts. At the end of the free trial, your credit card will be billed \$4.95 each month for membership to the Gourmet Cook's Club. [Cancellation details](#).

[Description](#) | [Specifications](#) | [Use & Care](#)

Fantastique's cast iron Dutch oven is perfect for slow cooking and simmering soups and stews. You'll find yourself reaching for this cookware day after day thanks to Fantastique's superior culinary craftsmanship.

This Dutch oven combines the latest ergonomic and culinary innovations.

- It is designed specifically to enhance slow-cooking by heating evenly and locking in moisture for more tender results.
- Optimized for up to 700°F, Fantastique's enamel interior resists wear and tear.
- Improved ergonomic top knob resists temperatures up to 700°F and provides a sure grip in the most heated situations.

(continue on next page)

Example 20 (continued)

Fantastique Cuisine


Login or Register | Gift Registry | Wish List | Store Locator

Shopping Cart (1 Item) [Checkout](#)

[Gift Registry](#) | [Recipes](#) | [Culinary Classes](#) | [Blog](#)

[Cookware](#) | [Cook's Tools](#) | [Cutlery](#) | [Electric](#) | [Bakeware](#) | [Tabletop](#) | [Glasses & Bar](#) | [Outdoor](#) | [Sale & Clearance](#)

✔ 1 item added to your Cart

	quantity	price
 Signature Oval 6 Quart Dutch Oven	1	\$220.00

With my purchase, I will be automatically enrolled in a 30-day free trial membership in the [Fantastique Gourmet Cook's Club](#). At the end of the free trial, my credit card will be billed \$4.95 each month for membership to the Gourmet Cook's Club. [Cancellation details](#).

Yes, continue to checkout
 No, remove this item from my shopping cart.

Order Subtotal: 1 (item) \$220.00

[Edit your Cart](#) [Checkout](#)

Example 21

The blogger in this example obtained the paint she is reviewing for free and must disclose that fact. Although she does so at the end of her blog post, there are several hyperlinks before that disclosure that could distract readers and cause them to click away before they get to the end of the post. Given these distractions, the disclosure likely is not clear and conspicuous.

Master Bath - A Splash of Color
by Katie on May 7, 2012

This was my week to tackle the master bathroom. As you've seen from the "before" photos, it's tiny and very 1950s. I decided to paint the walls canary yellow to brighten the room, but it was very difficult finding the right shade of yellow. I tried eight different swatches on the wall. Some were clearly too pale and some were alarmingly gold! I finally ended up using [PaintWorld's Just One Coat in Canary Sunrise](#). This paint is amazing. It required no primer and went on smoothly and easily. Believe it or not, one coat provided perfect coverage. I added a shower curtain that I made from a terrific tropical flower print on sale for \$4.99/yard from the [Discount Fabric Factory](#), and replaced the old sink fixtures with new ultra-modern white ones from [HardwareHideout.com](#). In no time at all, my master bathroom was canary yellow, fresh, and fabulous. I plan to use Just One Coat when I paint the gift-wrapping nook in my craft room next week. By the way, PaintWorld gave me the paint to try out, but it's so terrific I'll buy it myself this time.

[Read more about the Kraftys.](#)

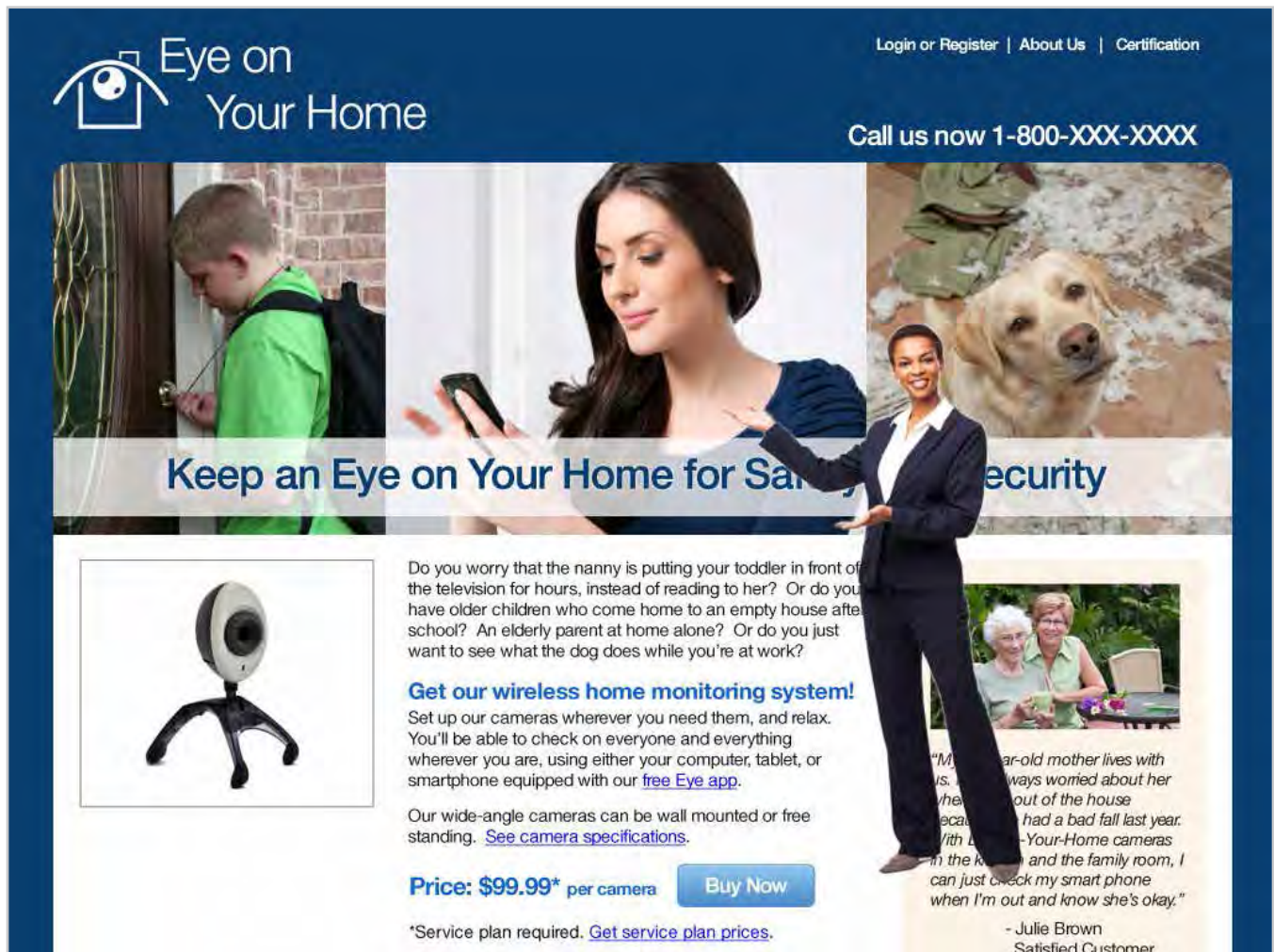
Recent Posts

- [Master Bath - A Splash of Color](#)
May 7, 2012
- [Spring for Window Boxes!](#)
May 1, 2012
- [Mood Boards for Rainy Days](#)
April 22, 2012
- [Laundry Room Makeover](#)
April 19, 2012
- [DIY coffee table](#)
April 15, 2012

Example 22

All of the elements of an ad should be considered in assessing whether a disclosure is clear and conspicuous. In some cases, elements that the advertiser might think make an ad more eye-catching could actually distract consumers from important disclosures.

In this example, an animated spokesperson moving around and discussing the benefits of the Eye on Your Home monitoring cameras might distract consumers from the disclosure of the monthly monitoring fee.



The advertisement is set against a dark blue background. At the top left is the logo for "Eye on Your Home" featuring a stylized eye inside a house icon. To the right of the logo are links for "Login or Register | About Us | Certification". Further right is the phone number "Call us now 1-800-XXX-XXXX". The main visual is a collage of images: a young boy in a green jacket, a woman looking at her smartphone, a dog, and a woman in a dark suit (the spokesperson) pointing towards the text. Below the collage is a white banner with the text "Keep an Eye on Your Home for Safety and Security". To the left of the text is an image of a white, dome-shaped wireless camera on a black tripod. To the right of the camera is a testimonial from Julie Brown, a satisfied customer, with a small photo of her and an elderly woman. The testimonial text reads: "My 85-year-old mother lives with us. I've always worried about her when I'm out of the house because she had a bad fall last year. With Eye on Your Home cameras in the kitchen and the family room, I can just check my smart phone when I'm out and know she's okay." Below the testimonial is the name "- Julie Brown Satisfied Customer".

Eye on Your Home

Login or Register | About Us | Certification

Call us now 1-800-XXX-XXXX

Keep an Eye on Your Home for Safety and Security

Do you worry that the nanny is putting your toddler in front of the television for hours, instead of reading to her? Or do you have older children who come home to an empty house after school? An elderly parent at home alone? Or do you just want to see what the dog does while you're at work?

Get our wireless home monitoring system!

Set up our cameras wherever you need them, and relax. You'll be able to check on everyone and everything wherever you are, using either your computer, tablet, or smartphone equipped with our [free Eye app](#).

Our wide-angle cameras can be wall mounted or free standing. [See camera specifications](#).

Price: \$99.99* per camera [Buy Now](#)

*Service plan required. [Get service plan prices](#).

"My 85-year-old mother lives with us. I've always worried about her when I'm out of the house because she had a bad fall last year. With Eye on Your Home cameras in the kitchen and the family room, I can just check my smart phone when I'm out and know she's okay."

- Julie Brown
Satisfied Customer




Attachment 11

D ● T C ● M

DISCLOSURES

INFORMATION ABOUT ONLINE ADVERTISING

D  T C  M

DISCLOSURES

OVERVIEW

Although the number of companies advertising online—and the number of consumers shopping online—are soaring, fraud and deception may dampen consumer confidence in the e-marketplace. But cyberspace is not without boundaries, and fraud and deception are unlawful no matter what the medium. The FTC has enforced and will continue enforcing its consumer protection laws online to ensure that products and services are described truthfully in online ads and that consumers get what they pay for. These activities benefit consumers as well as sellers, who expect and deserve a fair marketplace.

Many of the general principles of advertising law apply to Internet ads, but new issues arise almost as fast as technology develops. This booklet describes the information businesses should consider as they develop online ads to ensure that they comply with the law. Briefly,

- ① The same consumer protection laws that apply to commercial activities in other media apply online. The FTC Act’s prohibition on “unfair or deceptive acts or practices” encompasses Internet advertising, marketing and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to online activities.
- ② Disclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction or to further public policy goals, must be clear and conspicuous. In evaluating whether disclosures are likely to be clear and conspicuous in online ads, advertisers should consider the *placement* of the disclosure in an ad and its *proximity* to the relevant claim. Additional considerations include: the *prominence* of the disclosure; whether items in other parts of the ad *distract attention* from the disclosure; whether the ad is so lengthy that the disclosure needs to be *repeated*; whether disclosures in audio messages are presented in an adequate *volume and cadence* and visual disclosures appear for a sufficient *duration*; and, whether the language of the disclosure is *understandable* to the intended audience.
- ③ To make a disclosure clear and conspicuous, advertisers should:
 - Place disclosures near, and when possible, on the same screen as the triggering claim.
 - Use text or visual cues to encourage consumers to scroll down a Web page when it is necessary to view a disclosure.
 - When using hyperlinks to lead to disclosures,
 - make the link obvious;
 - label the hyperlink appropriately to convey the importance, nature and relevance of the information it leads to;
 - use hyperlink styles consistently so that consumers know when a link is available;

- place the hyperlink near relevant information and make it noticeable;
 - take consumers directly to the disclosure on the click-through page;
 - assess the effectiveness of the hyperlink by monitoring click-through rates and make changes accordingly.
- Recognize and respond to any technological limitations or unique characteristics of high tech methods of making disclosures, such as frames or pop-ups.
 - Display disclosures prior to purchase, but recognize that placement limited only to the order page may not always work.
 - Creatively incorporate disclosures in banner ads or disclose them clearly and conspicuously on the page the banner ad links to.
 - Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color and graphic treatment of the disclosure in relation to other parts of the Web page.
 - Review the entire ad to ensure that other elements—text, graphics, hyperlinks or sound—do not distract consumers’ attention from the disclosure.
 - Repeat disclosures, as needed, on lengthy Web sites and in connection with repeated claims.
 - Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them.
 - Display visual disclosures for a duration sufficient for consumers to notice, read and understand them.
 - Use clear language and syntax so that consumers understand the disclosures.
- ④ Commission rules and guides that use specific terms—“written,” “writing,” “printed” or “direct mail”—are adaptable to new technologies.
- Rules and guides that apply to written ads or printed materials also apply to visual text displayed on the Internet.
 - If a seller uses email to comply with Commission rule or guide notice requirements, the seller should ensure that consumers understand that they will receive such information by email and provide it in a form that consumers can retain.
 - “Direct mail” solicitations include email. If an email invites consumers to call the sender to purchase goods or services, that telephone call and subsequent sale must comply with the Telemarketing Sales Rule requirements.

I. INTRODUCTION

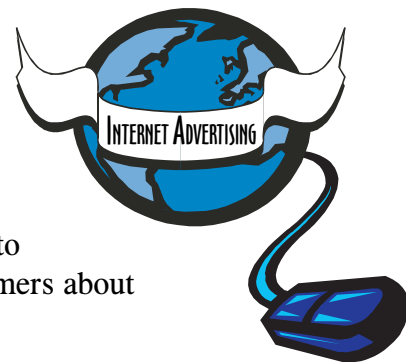
Day in and day out, businesses are going online to advertise and sell their products and services. The Internet combines aspects of print, television, and radio advertising in an interactive environment, and while it presents a new and fast-paced experience for consumers, it also raises interesting—and occasionally complex—questions about the applicability of laws that were developed long before “dot com” became a household phrase.

The Federal Trade Commission has examined how its own consumer protection rules and guides apply to advertising and sales made via the Internet. This staff working paper discusses FTC requirements that disclosures be presented clearly and conspicuously, in the context of Internet advertisements. It also discusses how certain rules and guides apply to online activities, when the rule or guide refers to “written” ads or “direct mail” solicitations or requires notices to be sent to consumers.

The publication of this staff working paper follows a public comment period and a public workshop which was held to discuss the applicability of FTC rules and guides to online activities.¹ In evaluating how disclosures can be displayed clearly and conspicuously in online ads, the comments and workshop discussion focused specifically on disclosures required by the rules and guides.² The same analysis that applies to rule and guide disclosures also applies to disclosures that are necessary to prevent deception under Section 5 of the FTC Act. They, too, must be clear and conspicuous. Therefore, this paper addresses both types of disclosures.³

II. THE APPLICABILITY OF FTC LAW TO INTERNET ADVERTISING

The FTC Act’s prohibition on “unfair or deceptive acts or practices” broadly covers advertising claims, marketing and promotional activities, and sales practices in general.⁴ The Act is not limited to any particular medium. Accordingly, the Commission’s role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online, as well as the same activities in print, television, telephone and radio. Indeed, since 1994, the Commission has brought over 100 law enforcement actions to stop fraud and deception online and is working to educate businesses about their legal obligations and consumers about their rights.



For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive.⁵ Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices.⁶ Many rules and guides address claims about products or services or

advertising in general and are not limited to any particular medium used to disseminate those claims or advertising.⁷ Therefore, the plain language of many rules and guides applies to claims made on the Internet.⁸ For example, the Mail or Telephone Order Merchandise Rule, which addresses the sale of merchandise that is ordered by mail, telephone, facsimile or computer, applies to those sales regardless of “the method used to solicit the order.”⁹ Solicitations made in print, on the telephone, radio, TV or online naturally fall within the Rule’s scope. In addition, the Guides Concerning the Use of Endorsements and Testimonials in Advertising apply to endorsements, which are defined as “any advertising message . . . [that] consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.”¹⁰ The Guides refer to advertising without limiting the media in which it is disseminated, and therefore, encompass online ads.

THE PLAIN LANGUAGE OF MANY RULES AND GUIDES APPLIES TO CLAIMS MADE ON THE INTERNET.

III. CLEAR AND CONSPICUOUS DISCLOSURES IN ONLINE ADVERTISEMENTS

When it comes to online ads, the basic principles of advertising law apply:

1. Advertising must be truthful and not misleading;¹¹
2. Advertisers must have evidence to back up their claims (“substantiation”);¹² and
3. Advertisements cannot be unfair.¹³

Unique features in Internet ads also may affect how an ad and any required disclosures are evaluated.



A. Background on Disclosures

Advertisers must identify all express and implied claims that the ad conveys to consumers. When identifying claims, advertisers should not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name and depictions.¹⁴ If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed. Advertisers must determine which claims might need qualification and what information should be provided in a disclosure. If qualifying information is necessary to prevent an ad from being misleading, advertisers must present the information clearly and conspicuously.

A disclosure only qualifies or limits a claim, to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

Many Commission rules and guides spell out the information that must be disclosed in connection with certain claims. In many cases, these disclosures prevent a claim from being misleading or deceptive.¹⁵ Other rules and guides require disclosures to ensure that consumers receive material information about the terms of a transaction,¹⁶ or to further public policy goals.¹⁷ These disclosures also must be clear and conspicuous.

B. The Clear and Conspicuous Requirement

Disclosures that are required to prevent deception—or to provide consumers material information about a transaction—must be presented “clearly and conspicuously.”¹⁸ Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the *overall net impression* of the ad—that is, whether the claims consumers take from the ad are truthful and substantiated.¹⁹

In reviewing their online ads, advertisers should adopt the perspective of a reasonable consumer.²⁰ They also should assume that consumers don’t read an entire Web site, just as they don’t read every word on a printed page.²¹ In addition, it is important for advertisers to draw attention to the disclosure. Making the disclosure available somewhere in the ad so that consumers who are looking for the information *might* find it doesn’t meet the clear and conspicuous standard.

Even though consumers have control over what and how much information they view on Web sites, they may not be looking for—or expecting to find—disclosures. Advertisers are responsible for ensuring that their messages are truthful and not deceptive. Accordingly, disclosures must be communicated effectively so that consumers are likely to notice and understand them.

C. What are Clear and Conspicuous Disclosures?

There is no set formula for a clear and conspicuous disclosure. In all media, the best way to disclose information depends on what information must be provided and the nature of the advertisement. Some disclosures are quite short, while others are more detailed. Some ads use only text, while others use graphics, video and audio. Advertisers have the flexibility to be creative in designing their ads, so long as necessary disclosures are communicated effectively and the overall message conveyed to consumers is not misleading.

To evaluate whether a particular disclosure is clear and conspicuous, consider:

- the **placement** of the disclosure in an advertisement and its **proximity** to the claim it is qualifying,
- the **prominence** of the disclosure,

- whether items in other parts of the advertisement **distract attention** from the disclosure,
- whether the advertisement is so lengthy that the disclosure needs to be **repeated**,
- whether disclosures in audio messages are presented in an adequate **volume and cadence** and visual disclosures appear for a sufficient **duration**, and
- whether the language of the disclosure is **understandable** to the intended audience.

The following discussion uses these traditional factors to evaluate whether disclosures are likely to be clear and conspicuous in the context of online ads. In the online version of this booklet, the underlined hyperlinks link to mock ads. In the printed booklet, the circles in the margin correspond to mock ads in the appendix. Each mock ad presents a scenario to illustrate one or more particular factors. Advertisers must consider all of the factors, however, and evaluate an actual disclosure in the context of the ad as a whole.

Ex.

Refer to Example #
in the Appendix.

1. Proximity and Placement

A disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosure and relate it to the relevant claim or product. For print ads, an advertiser might measure proximity in terms of whether the disclosure is placed adjacent to the claim, or whether it is separated from the claim by text or graphics. The same approach can be used for Internet ads. Web sites, however, are interactive and have a certain depth—with multiple pages linked together and pop-up screens, for example—that may affect how proximity is evaluated.

a. Evaluating Proximity in the Context of a Web Page

Some disclosures must be made when an ad contains a certain claim (often referred to as a “triggering claim”). On a Web page, the disclosure is more likely to be effective if consumers view the claim and disclosure together on the same screen. Even if a disclosure is not tied to a particular word or phrase, it is more likely that consumers will notice it if it is placed next to the information, product, or service to which it relates.

Ex.
1

In some circumstances, it may be difficult to ensure that a disclosure appears on the “same screen” as a claim or product information. Some disclosures are long and difficult to place next to the claims they qualify. In addition, computers and other information “appliances” have varying screen sizes that display Web sites differently.²² In these situations, consumers may need to scroll to view a disclosure. If scrolling is necessary, advertisers should ask whether consumers are likely to do it. If consumers don’t scroll, they may miss important qualifying information and be misled.

In these circumstances, advertisers are advised to:

Use text or visual cues to encourage consumers to scroll.

Text prompts can indicate that more information is available. An explicit instruction like “see below for important information on diamond weights” will alert consumers to scroll and look for the information. The text prompt should be tied to the disclosure that it refers to. General or vague statements, such as “see below for details,” provide no indication about the subject matter or importance of the information that consumers will find and are not adequate cues.

Ex.
2

The visual design of the page also could help alert consumers to the availability of more information. For example, text that clearly continues below the screen, whether spread over an entire page or in a column, would indicate that the reader needs to scroll for additional information. Advertisers should consider how the Web page is displayed by the default Web browser setting for which the ad is designed, as well as for different display options.

A scroll bar on the side of a computer screen is not a sufficiently effective visual cue. Although the scroll bar may indicate to some consumers that they have not reached the end of a page, many consumers may not look at the scroll bar. In fact, some consumers access the Internet with devices that don’t display a scroll bar.

Avoid Web page formats that discourage scrolling.

Ex.
3

The design of some pages might indicate that there is no more information on the page and no need to continue scrolling. If the text ends before the bottom of the screen or readers see several inches of blank space, chances are they will stop scrolling and miss the disclosure. In addition, if there is a lot of unrelated information—either words or graphics—separating a claim and a disclosure, even a consumer who is prompted to scroll might miss the disclosure or not relate it to a distant claim they’ve already read.

b. Hyperlinking to a Disclosure

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4

With hyperlinks, additional information, including disclosures, might be placed on a Web page entirely separate from the relevant claim. Disclosures that are an integral part of a claim or inseparable from it, however, should be placed on the same page and immediately next to the claim. In these situations, the claim and the disclosure should be read at the same time, without referring the consumer somewhere else to obtain the disclosure. This is particularly true for cost information or certain health and safety disclosures. For example, if the total cost of a product is advertised on one page, but there are significant additional fees that the consumer would not expect to be charged, the existence of those additional fees should be disclosed on the same page and immediately adjacent to the total cost claim.²³ In other situations, it may not even be necessary to use a hyperlink to convey disclosures. Often, disclosures consist of a word or phrase that may be

Ex.
5

easily incorporated into the text, along with the claim. This placement increases the likelihood that consumers will see the disclosure and relate it to the relevant claim.

Under some conditions, however, a disclosure accessible by a hyperlink may be sufficiently proximate to the relevant claim. Hyperlinked disclosures may be particularly useful if the disclosure is lengthy or if it needs to be repeated (because of multiple triggers, for example). The key considerations for effective hyperlinks are:

- the labeling or description of the hyperlink,
- the consistency in the use of hyperlink styles,
- its placement and prominence on the Web page, and
- the handling of the disclosure on the click-through page.

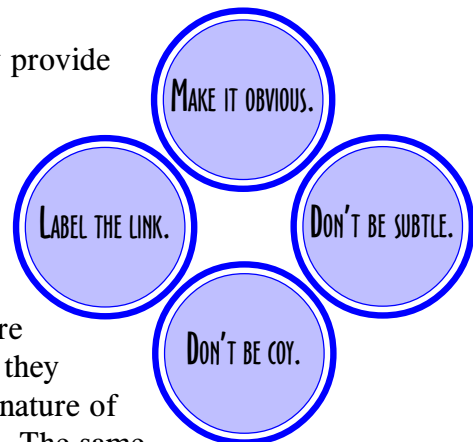
Choosing the right label for the hyperlink. A hyperlink that leads to a disclosure should be labeled clearly and conspicuously. The hyperlink's label—the text or graphic assigned to it—affects whether consumers actually click on it and see and read the disclosure.

- **Make it obvious.** Consumers should be able to tell that they can click on a hyperlink to get more information.
- **Label the link to convey the importance, nature and relevance of the information it leads to.** The hyperlink should give consumers a *reason* to click on it. That is, the label should make clear that the link is related to a particular advertising claim or product and indicate the nature of the information to be found by clicking on it. The hyperlink label should use clear, understandable text. Although the label itself does not need to contain the complete disclosure, it may be useful to incorporate part of the disclosure to indicate the type and importance of the information the link leads to.

Ex.
6

- **Don't be coy.** Some text links may provide no indication about why a claim is qualified or the nature of the disclosure. In most cases, simply hyperlinking a single word or phrase in the text of an ad may not be effective. Although some consumers may understand that there is additional information available, they may have different ideas about the nature of the information and its significance. The same

Ex.
7



Ex.
8-10

may be true of hyperlinks that simply say “disclaimer,” “more information,” “details,” or “terms and conditions.”

Ex.
11-12

- **Don’t be subtle.** Asterisks or other symbols by themselves may not be effective. Typically, they provide no clues about why the claim is qualified or the nature of the disclosure.²⁴ In fact, consumers may view an asterisk or another symbol as just another graphic on the page. Even if a Web site explains that a particular symbol is a hyperlink to important information, consumers might miss the explanation, depending on where they enter the site and how they navigate through it.

Using hyperlink styles consistently allows consumers to know when a link is available. Although the text or graphics used to signal a hyperlink may differ among Web sites, treating hyperlinks inconsistently within a single site can increase the chances that consumers will *not* notice—or click on—a disclosure hyperlink. For example, if hyperlinks usually are underlined in a site, chances are consumers wouldn’t recognize italicized text as being a link, and could miss the disclosure.

Ex.
13-14

Placing the link near relevant information and making it noticeable. The hyperlink should be proximate to the claim that triggers the disclosure so that consumers can notice it easily and relate it to the claim. Typically, this means that the hyperlink is adjacent to the triggering term or other relevant information. Consumers may miss disclosure hyperlinks that are separated from the relevant claim by text, graphics, blank space, or intervening hyperlinks. Format, color or other graphics treatment also can help to ensure that consumers notice the link. (See below for more information on prominence.)

Ex.
15

Getting to the disclosure on the click-through page should be easy. The click-through page—that is, the page the hyperlink leads to—must contain the complete disclosure. The disclosure must be displayed prominently. Distracting visual factors, extraneous information, and many “click-away” opportunities to link elsewhere before viewing the disclosure can obscure an otherwise adequate disclaimer.

Ex.
16

- **Get consumers to the message quickly.** The hyperlink should take consumers directly to the disclosure. They shouldn’t have to search a click-through page or go to other pages for the information. In addition, the disclosure should be easy to understand.
- **Assessing the effectiveness of a hyperlink disclosure is important.** Tools are available to allow advertisers to evaluate the effectiveness of disclosures through hyperlinks. For example, advertisers can monitor click-through rates—how often consumers click on a hyperlink and view the click-through page—for accurate data on the efficacy of the hyperlink. Advertisers also can evaluate the amount of time visitors spend on a certain page, which may indicate whether consumers are reading the disclosure.

- **Don't ignore your data.** If hyperlinks are not followed, another method of conveying the required information would be necessary.

c. Using High Tech Methods For Proximity and Placement

Disclosures may be displayed on Web sites in many ways. For example, a disclosure may be placed in a frame that remains constant even as the consumer scrolls down the page or navigates through another part of the site. A disclosure also might be displayed in a window that pops-up or on interstitial pages that appear while another Web page is loading. New techniques for displaying information are being unveiled all the time. But there are special considerations for evaluating whether a technique is appropriate for providing required disclosures.

Ex.
17-18

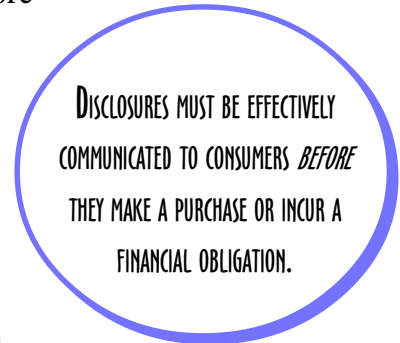
- **Don't ignore technological limitations.** A scrolling marquee—information that scrolls through a box on a Web site—may display differently depending on the type of browser a consumer uses. Similarly, some browsers or information appliances may not support or display frames properly, so a disclosure placed in one portion of the frame may not be viewable. Certain Internet tools may overcome this limitation by determining if a consumer's Web browser can view frames and if not, serving a page that is formatted differently. Without such tools, advertisers should be concerned about whether a required disclosure will appear; if it won't, they should choose different ways to communicate the disclosure.

Ex.
19

- **Recognize and respond to characteristics of each technique.** Some consumers may miss information presented in a pop-up window or on an interstitial page if the window or page disappears and they are unable or unaware of how to access it. Others may inadvertently minimize a pop-up screen by clicking on the main page and may not know how to make the pop-up screen reappear. There may be ways to get around these drawbacks, such as requiring the consumer to take some affirmative action to proceed past the pop-up or interstitial (for example, by clicking on a "continue" button).
- **Research can help.** Research may be useful to help advertisers determine whether a particular technique is an effective method of communicating information to consumers. For example, research may show that consumers don't actually read information in pop-up windows because they immediately close the pop-up on the page they want to view. It also may indicate whether consumers relate information in a pop-up window or on an interstitial page to a claim or product they haven't encountered yet. Advertisers should consider this information in determining effective methods of presenting required disclosures.

d. Displaying Disclosures Prior to Purchase

Disclosures must be effectively communicated to consumers *before* they make a purchase or incur a financial obligation. Disclosures are more likely to be effective if they are provided in the context of the ad, when the consumer is considering the purchase. Where advertising and selling are combined on a Web site, disclosures should be provided before the consumer makes the decision to buy, say, before clicking on an “order now” button or a link that says “add to shopping cart.”



Ex.
20

- **Don't focus only on the order page.**

Some disclosures must be made in connection with a particular claim or product. Consumers may not relate a disclosure on the order page to information they viewed many pages earlier. It also is possible that after surfing a company's Web site, some consumers may decide to purchase the product from the company's "bricks and mortar" store. Those consumers would miss any disclosures placed only on the ordering page.

e. Evaluating Proximity With Banner Ads

Most banner ads displayed today are teasers. Because of their small size, they generally do not provide complete information about a product or service. Instead, consumers must click through to the Web site to get more information and learn the terms of an offer. In some instances, a banner may contain a claim that requires qualification.

- **Disclose required information in the banner itself or clearly and conspicuously on the Web site it links to.** In some cases, a required disclosure can be incorporated into a banner ad easily. Because of the space constraints of banner ads, other disclosures may be too detailed to be disclosed effectively in the banner. In some instances, these disclosures may be communicated effectively to consumers if they are made clearly and conspicuously on the Web site the banner links to and while consumers are deciding whether to buy a product or service. In determining whether the disclosure should be placed in the banner itself or on the Web site the banner links to, advertisers should consider how important the information is to prevent deception, how much information needs to be disclosed, the burden of disclosing it in the banner ad, how much information the consumer may absorb from the ad, and how effective the disclosure would be if it was made on the Web site.²⁵

Ex.
21

- **Use creativity to incorporate or flag required information.** Scrolling text or rotating panels in a banner can present an abbreviated version of a required disclosure that indicates that there is additional important information and a more complete disclosure available on the click-through page. With lengthier disclosures, the banner can direct consumers to the Web site for more information. The full disclosure then must be clearly and conspicuously displayed on the Web site.
- **Provide any required disclosures in interactive banners.** Some banner ads allow consumers to interact within the banner, so that they may conduct a transaction without clicking through to a Web site. If consumers can get complete information about a product or make a purchase within an interactive banner, all required disclosures should be included in the banner.



USE CREATIVITY TO INCORPORATE
OR FLAG REQUIRED INFORMATION.

2. Prominence

It's the advertiser's responsibility to draw attention to the required disclosures.

- **Display disclosures prominently so they are noticeable to consumers.** The size, color, and graphics of the disclosure affect its prominence.
 - **Size Matters.** Disclosures that are at least as large as the advertising copy are more likely to be effective.
 - **Color Counts.** A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the ad is likely to be missed.
 - **Graphics Help.** Although using graphics to display a disclosure is not required, they may make the disclosure more prominent.
- **Evaluate the size, color, and graphics of the disclosure in relation to other parts of the Web site.**²⁶ The size of a disclosure should be compared to the type size of the claim and other text on the page. If a claim uses a particular color or graphic treatment, the disclosure can be formatted the same way to help ensure that consumers who view the claim are able to view the disclosure as well. In addition, the graphic treatment of the disclosure may be evaluated in relation to how graphics are used to convey other items in the ad.

Ex.
22-23

- **Don't bury it.** The prominence of the disclosure also may be affected by other factors. A disclosure that is buried in a long paragraph of unrelated text would not be effective. The unrelated text detracts from the message and makes it unlikely that a consumer would notice the disclosure or recognize its importance. Even though the unrelated information may be useful, advertisers must ensure that the disclosure is communicated effectively.

3. Distracting Factors in Ads

The clear and conspicuous analysis does not focus only on the disclosure itself. It also is important to consider the entire ad. Elements like graphics, sound, text or even hyperlinks that lead to other pages or sites, may result in consumers not noticing, reading or listening to the disclosure.

Ex.
24

- **Don't let other parts of an ad get in the way.** On television, moving visuals behind a text message make the text hard to read and may distract consumers' attention from the message. Using graphics online raises similar concerns: flashing images or animated graphics may reduce the prominence of a disclosure. Graphics on a Web page *alone* may not undermine the effectiveness of a disclosure. It is important, however, to consider all the elements in the ad, not just the text of the disclosure.

4. Repetition

It may be necessary to disclose important information more than once in an advertisement to convey a non-deceptive message. Repeating a disclosure makes it more likely that a consumer will notice and understand it. Still, the disclosure need not be repeated so often that consumers would ignore it and that it would clutter the ad.

- **Repeat disclosures on lengthy Web sites, as needed.** Consumers can access and navigate Web sites differently. Many consumers may access a site through its homepage, but others might enter in the middle, perhaps by linking to that page from a search engine or another Web site. Consumers also might not click-on every page of the site and may not choose to scroll to the bottom of each page. And many may not read every word on every page of a Web site. As a result, advertisers should question whether consumers who see only a portion of their ad are likely to miss a necessary disclosure and be misled.²⁷
- **Repeat disclosures with repeated claims, as needed.** If claims requiring some qualification are repeated throughout an ad, it may be necessary to repeat the disclosure too. In some situations, a disclosure is tied so closely to a claim that it must always accompany the claim to prevent deception. Depending on the disclosure, a clearly-labeled hyperlink could be repeated on various pages so that the full disclosure would be placed on only one page of the site.

5. Multimedia Messages

Internet ads may contain audio messages, video clips and other animated segments with claims that require qualification. As with radio and television ads, the disclosure should accompany the claim. In evaluating whether disclosures in these multimedia portions of online ads are clear and conspicuous, advertisers should evaluate all of the factors discussed in this paper and these special considerations:

- **For audio claims, use audio disclosures.** The disclosure should be in a volume and cadence sufficient for a reasonable consumer to hear and understand it. The volume of the disclosure can be evaluated in relation to the rest of the message, and in particular, the claim. Of course, consumers who do not have speakers, appropriate software, or appliances with audio capabilities will not hear the claim or the disclosure. Because some consumers may miss the audio portion of an ad, disclosures triggered by a claim or other information in an ad's text should not be placed solely in an audio clip.
- **Display visual disclosures for a sufficient duration.** Visual disclosures presented in video clips or other dynamic portions of online ads should appear for a duration sufficient for consumers to notice, read and understand them. As with brief video superscripts in television ads, fleeting disclosures on Web sites are not likely to be effective.

6. Understandable Language

To ensure that disclosures are effective, consumers must be able to understand them. Advertisers should use clear language and syntax and avoid legalese or technical jargon. Disclosures should be as simple and straightforward as possible. Incorporating extraneous material into the disclosure also may diminish the message that must be conveyed to consumers.

IV. SPECIFIC ISSUES IN APPLYING CERTAIN RULES AND GUIDES TO INTERNET ACTIVITIES

A. It's Not Just Paper Anymore

Some Commission rules and guides use certain terms—such as “written,” “writing” and “printed”—that connote words or information on paper. With the increasing use of computers and other electronic devices, that meaning is changing. In addition, thanks to email, businesses are no longer limited to using traditional communications vehicles like mail or the telephone to comply with rule or guide requirements to notify consumers.

1. Rules and Guides that Use the Terms “Written,” “Writing” or “Printed”

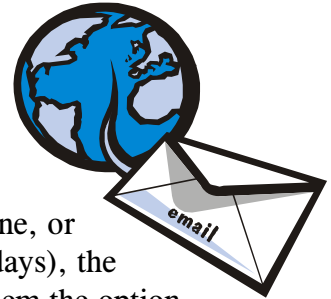
Many rules and guides use the terms “written,” “writing” and “printed,” but in different ways. Some apply to written ads or transactions, using the term written to connote visual text. Others require information to be disclosed in writing, signaling the importance of text and the ability to retain and refer to the information more than once. Because each term must be analyzed within the context of the rule and guide itself, the Commission will continue to examine the exact nature of how these rules and guides apply to the paperless world of e-commerce and online advertising on a case-by-case basis and through periodic rule and guide reviews.²⁸

For the most part, however, Commission rules and guides that use the words “written,” “writing” and “printed” will apply online. In many cases, an Internet ad that uses visual text is the equivalent of a “written” ad. Consumers expect to receive the same information and protections whether they’re looking at a paper catalog or an online one. For example:

- Claims “in writing . . . or in any broadcast advertisement” about an appliance’s energy use or efficiency must be tested in accordance with the Appliance Labeling Rule.²⁹ Common sense dictates that this includes online claims. An energy use claim presented in visual text on a Web site should be treated the same as a claim in a print ad.
- If certain information about energy efficiency must be provided in “printed” catalogs featuring appliances,³⁰ the information also should be provided online. There are no more constraints to providing this information on a Web site than there would be on paper.

2. Using New Technologies to Comply with Rules & Guides

As more activities and transactions take place online, businesses are using email to communicate with their customers. In some cases, email may be used to comply with a rule or guide requirement to provide or send required notices or documents to consumers. A key consideration for choosing this method of delivery is whether consumers understand or expect that they will receive important information by email. In addition, information should be provided in a form that consumers can retain, either by saving or printing. Here are examples of how these considerations apply to particular rules:



- If a seller cannot ship goods ordered by mail, telephone, or computer within the time promised (or otherwise 30 days), the seller must inform consumers of the delay and give them the option to agree to the delay or cancel the order and get a refund.³¹ Sellers are not required to use a particular method to send delay notices and online merchants may use email to send these notices. Consumers often provide their email address as part of an online order form. It may make good business sense for a seller to tell consumers that they plan to send any delay notices to that email address. This information may be added to an online order form without substantial cost or difficulty and may alert consumers that future communications about the order will occur online.
- Online sellers of negative option plans—such as book-of-the-month clubs—also may use email to communicate with consumers. With these plans, sellers send announcements that identify the merchandise that will be shipped and billed for that month unless the consumer declines by a certain date.³² These monthly notices are an important part of the plan. If consumers don't understand that notices are sent by email, they may not respond and may incur charges for merchandise they don't want. Because sellers are required to clearly and conspicuously disclose the material terms of the plan in their promotional materials, they should clearly inform consumers about how the notices will be sent before consumers enroll in the plan.
- Sellers that offer written warranties on consumer products must include certain information in their warranties and make them available for review at the point of purchase.³³ Warranties communicated through visual text on Web sites are no different than paper versions and the same rules apply. The requirement to make warranties available at the point of purchase can be accomplished easily on the Internet. For example, Internet merchants may use a clearly-labeled hyperlink such as “click here for warranty information” to lead to the full text of the warranty. Because consumers may need to refer to the warranty while comparison shopping or after the purchase, the warranty should be presented in a way that is capable of being preserved, either by downloading or printing. This is especially important if a paper warranty is not included with the product.

B. Direct Mail Solicitations Online

“Direct mail” solicitations generally refer to promotional materials that consumers receive through traditional mail. With technological advances, these kinds of solicitations have moved online.

Although the Telemarketing Sales Rule applies largely to telemarketing calls from business-to-consumer, it also applies to telephone calls the consumer places in response to a “direct mail” advertisement.³⁴ As with direct mail sent by traditional means, email can convey the false impression that the recipient has been “specially selected” for an offer not available to the general public. That impression may be exploited in a telemarketing call, particularly if the direct mail piece omits important information about the products or services offered. Therefore, if an email invites consumers to telephone the sender to purchase goods or services, the phone call is subject to the Telemarketing Sales Rule³⁵—as is the subsequent sale.

Not all online advertisements are considered “direct mail” solicitations. Consumers who view most Web sites, newsgroups, or electronic bulletin board postings are likely to understand that the goods or services are being offered on the same terms and conditions to all consumers—and that they haven’t been “specially selected” for the offer. Like television and newspaper advertisements, Web sites generally, newsgroups, and electronic bulletin board postings are different forms of advertising than “direct mail.”³⁶ Telephone calls placed in response to these types of ads would generally be exempt from the Telemarketing Sales Rule.³⁷

V. CONCLUSION

Although the number of companies advertising online—and the number of consumers shopping online—are soaring, fraud and deception may dampen consumer confidence in the e-marketplace. To ensure that products and services are described truthfully in online ads and that consumers get what they pay for, the FTC has, and will continue to, enforce its consumer protection laws. Many of the general principles of advertising law apply to online ads, but new issues arise almost as fast as technology develops. The FTC will continue to evaluate online advertising, using traditional criteria, while recognizing the uniqueness of the new medium. Businesses as well should consider these criteria when developing online ads and ensuring they comply with the law.



ENDNOTES

- ¹ The Commission initially requested written comment on a proposal that discussed how it would apply its rules and guides to online activities. 63 Fed. Reg. 24998 (May 6, 1998). After reviewing the comments, the Commission held a public workshop on May 14, 1999, to explore the issues further. *See* 64 Fed. Reg. 14156 (Mar. 24, 1999) (announcing the workshop). Twenty-five groups, including businesses, trade associations and consumer organizations, participated in the workshop discussion. The focus of the workshop was an evaluation of how disclosures required by FTC rules and guides can be displayed clearly and conspicuously in Internet advertisements. A shorter session examined how terms such as “written,” “writing” and “printed” are used in FTC rules and guides and should be interpreted in light of the use of electronic media. Additional written comments were submitted after the workshop. The public comments and the workshop transcript are available at <http://www.ftc.gov/bcp/rulemaking/elecmedia/index.htm> or from the FTC’s Consumer Response Center, 600 Pennsylvania Avenue, NW, Room 130, Washington, DC 20580.
- ² With the rules and guides, the content of the disclosure generally is prescribed. Thus, it was unnecessary to examine broader issues that might arise in examining advertising in general—for example, whether a disclosure is even necessary or what it should say.
- ³ This working paper, however, does not address disclosures required by regulations issued by the Federal Reserve Board: Regulation B, 12 C.F.R. Part 202; Regulation E, 12 C.F.R. Part 205; Regulation M, 12 C.F.R. Part 213; Regulation Z, 12 C.F.R. Part 226. This paper also does not address which country’s laws govern a particular transaction or sale. The FTC and other countries and organizations have been evaluating these issues and will continue to work cooperatively in this area. *See* <http://www.ftc.gov/bcp/icpw/index.htm> for more information about international issues.
- ⁴ The Commission’s authority covers virtually every sector of the economy, except for certain excluded industries, such as the business of insurance and banks.
- ⁵ The Commission issues rules pursuant to Section 5 of the FTC Act when it has reason to believe that certain unfair or deceptive acts or practices are prevalent in an industry. 15 U.S.C. § 57a(a)(1)(B). The Commission may seek civil penalties from any person or company that violates a rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.” 15 U.S.C. § 45(m)(1)(A). The Commission also may seek redress for consumers. 15 U.S.C. § 57b(a)(1). In addition, the Commission promulgates rules pursuant to specific statutes, which are designed to further particular policy goals. The remedies available to enforce these rules vary.

- ⁶ Guides are “administrative interpretations of the laws administered by the Commission.” 16 C.F.R. § 1.5. Although the guides do not have the force and effect of law, the Commission may bring an enforcement action if a person or company fails to comply with a guide and engages in an unfair or deceptive practice in violation of the FTC Act.
- ⁷ The following rules and guides are included in this category: Guides for the Nursery Industry (16 C.F.R. Part 18); Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry (16 C.F.R. Part 20); Guides for the Jewelry, Precious Metals, and Pewter Industries (16 C.F.R. Part 23); Guides for Select Leather and Imitation Leather Products (16 C.F.R. Part 24); Tire Advertising and Labeling Guides (16 C.F.R. Part 228); Guides Against Deceptive Pricing (16 C.F.R. Part 233); Guides Against Bait Advertising (16 C.F.R. Part 238); Guides for the Advertising of Warranties and Guarantees (16 C.F.R. Part 239); Guides for the Household Furniture Industry (16 C.F.R. Part 250); Guide Concerning Use of the Word “Free” and Similar Representations (16 C.F.R. Part 251); Guides for Private Vocational and Distance Education Schools (16 C.F.R. Part 254); Guides Concerning Use of Endorsements and Testimonials in Advertising (16 C.F.R. Part 255); Guides Concerning Fuel Economy Advertising for New Automobiles (16 C.F.R. Part 259); Guides for the Use of Environmental Marketing Claims (16 C.F.R. Part 260); Rules and Regulations Under the Wool Products Labeling Act of 1939 (16 C.F.R. Part 300); Rules and Regulations Under Fur Products Labeling Act (16 C.F.R. Part 301); Rules and Regulations Under the Textile Fiber Products Identification Act (16 C.F.R. Part 303); Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (“Appliance Labeling Rule”) (16 C.F.R. Part 305); Rule Concerning Automotive Fuel Ratings, Certification and Posting (16 C.F.R. Part 306); Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles (16 C.F.R. Part 309); Telemarketing Sales Rule (16 C.F.R. Part 310); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 C.F.R. Part 410); Retail Food Store Advertising and Marketing Practices (16 C.F.R. Part 424); Use of Prenotification Negative Option Plans (16 C.F.R. Part 425); Power Output Claims for Amplifiers Utilized in Home Entertainment Products (16 C.F.R. Part 432); Preservation of Consumers’ Claims and Defenses (16 C.F.R. Part 433); Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435); Credit Practices Rule (16 C.F.R. Part 444); Used Motor Vehicle Trade Regulation Rule (16 C.F.R. Part 455); Labeling and Advertising of Home Insulation (16 C.F.R. Part 460); Interpretations of Magnuson-Moss Warranty Act (16 C.F.R. Part 700); Disclosure of Written Consumer Product Warranty Terms and Conditions (16 C.F.R. Part 701); Pre-Sale Availability of Written Warranty Terms (16 C.F.R. Part 702); Informal Dispute Settlement Procedures (16 C.F.R. Part 703).
- ⁸ A rule or guide applies to online activities if its scope is not limited by how claims are communicated to consumers, how advertising is disseminated, or where commercial activities occur. As needed, the Commission will amend or clarify the scope of any particular rule or guide in more detail during its regularly scheduled

review. The Commission has a program in place to periodically review its rules and guides to evaluate their continued need and to make any necessary changes.

⁹ 16 C.F.R. § 435.2(a).

¹⁰ 16 C.F.R. § 255(b).

¹¹ As explained in the FTC’s Deception Policy Statement [hyperlink], an ad is deceptive if it contains a statement—or omits information—that is likely to mislead consumers acting reasonably under the circumstances and is “material” or important to a consumer’s decision to buy or use the product. *See FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc.*, 103 F.T.C. at 174 (“Deception Policy Statement”). A statement also may be deceptive if the advertiser does not have a reasonable basis to support the claim. Advertising Substantiation Statement [hyperlink]. *See FTC Policy Statement on Advertising Substantiation, appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

¹² Before disseminating an ad, advertisers must have reasonable support for all express and implied objective claims that the ad conveys to consumers. When an ad lends itself to more than one reasonable interpretation, there must be substantiation for each interpretation. The type of evidence needed to substantiate a claim may depend on the product, the claims, and what experts believe is necessary. If an ad specifies a certain level of support for a claim—“tests show x”—the advertiser must have at least that level of support.

¹³ According to the FTC Act, 15 U.S.C. § 45(n) and the FTC’s Unfairness Policy Statement [hyperlink], an advertisement or business practice is unfair if it causes or is likely to cause substantial consumer injury that consumers could not reasonably avoid and that is not outweighed by the benefit to consumers or competition. *See FTC Policy Statement on Unfairness, appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

¹⁴ Copy tests or other evidence of how consumers actually interpret an ad can be valuable. In many cases, however, the implications of the ad are clear enough to determine the existence of the claim by examining the ad alone, without extrinsic evidence.

¹⁵ For example, if an endorsement is not representative of the performance that consumers can generally expect to achieve with a product, advertisers must disclose this fact so that consumers are not misled. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.2.

¹⁶ For example, any solicitation for the purchase of consumer products with a warranty must disclose the text of the warranty offer or how consumers can obtain it for free. *Pre-Sale Availability of Written Warranty Terms*, 16 C.F.R. § 702.3.

- ¹⁷ For example, the required energy efficiency disclosures in the Appliance Labeling Rule, 16 C.F.R. § 305.4, further the public policy goal of promoting energy conservation.
- ¹⁸ Some rules and guides, as well as some FTC cases, use the phrase “clearly and prominently” instead of “clearly and conspicuously.” These two phrases are synonymous.
- ¹⁹ Deception Policy Statement at 175-76.
- ²⁰ Deception Policy Statement at 178.
- ²¹ Deception Policy Statement at 180-81.
- ²² Web pages can vary in length, and one Web page may be the equivalent of many printed pages.
- ²³ In some cases, the details about the additional fees might be too complex to describe adjacent to the price claim and may be provided by using a hyperlink. But, a clear statement about the existence and nature of the extra fees should appear adjacent to the price. Of course, all cost information should be presented to consumers at the time of purchase. Consumers should understand the exact amount they will be charged and should not have to learn this information by clicking on hyperlinks.
- ²⁴ Asterisks and other symbols also are used in different ways on Web pages, which may confuse consumers as to where the related disclosure may be found. Some online asterisks and symbols are hyperlinks that click-through to a separate page and others are static, referring to a disclosure at the bottom of the page.
- ²⁵ This approach is consistent with Commission policy for disclosures in other media. For example, the Commission has required fuller disclosures in print ads and a shorter disclosure in a short television ad with a referral to another location for more complete information. *See, e.g., Nutri/System, Inc.*, 116 F.T.C. 1408 (1993) (consent order requiring a shorter disclosure for 15 second television ads).
- ²⁶ Web sites may display differently depending on the browser, computer screen, or other information appliance used. Advertisers may be working with a default view, but also evaluating different display options so that the site will be attractive and accessible to most consumers. Considering different display options also may be necessary to ensure that qualifying information is displayed clearly and conspicuously. Evaluating the prominence of the disclosure in relation to the rest of the ad helps ensure that consumers are able to view the disclosure.
- ²⁷ *See, e.g., Kent & Spiegel Direct, Inc.*, 124 F.T.C. 300 (1997); *Synchronal Corp.*, 116 F.T.C. 1189 (1993) (consent orders requiring disclosures to be repeated during television infomercials).

- ²⁸ For example, the Commission specifically amended the Textile Rules' requirement to disclose textile origin in "print" catalogs to clarify that these disclosures must be made in online catalogs as well. *See* 63 Fed. Reg. 7507 (Feb. 13, 1998) or <http://www.ftc.gov/os/1998/9802/textile.htm> for a discussion of the amendments to the Rules and Regulations Under the Textile Fiber Products Identification Act, 16 C.F.R. Part 303.
- ²⁹ 16 C.F.R. § 305.1(d).
- ³⁰ 16 C.F.R. §§ 305.2(m), 305.14.
- ³¹ Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435.1(b).
- ³² Rule Concerning Use of Prenotification Negative Option Plans, 16 C.F.R. § 425(a)(2).
- ³³ Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. § 701.3, and Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. § 702.3. According to the Rule Regarding Pre-Sale Availability of Written Warranty Terms, an alternative to making the warranty terms available prior to purchase is for sellers to provide information about how consumers may obtain the written warranty for free by mail. 16 C.F.R. § 702.3(c)(2).
- ³⁴ 16 C.F.R. § 310.6. The Telemarketing Sales Rule prohibits deceptive and abusive telemarketing practices. Among other things, it requires that certain information be disclosed in telemarketing calls. The scope of the Rule does not extend to transactions that take place *entirely* online. The sales transaction must involve a traditional voice telephone call. *See* 60 Fed. Reg. 30,406, 30,411 (June 8, 1995). In addition, in most situations, the Rule does not apply if a consumer calls a business in response to an advertisement. However, if a consumer calls a business in response to a "direct mail" advertisement, that call *is* subject to the Rule.
- ³⁵ The telephone call may be exempt from the Rule's coverage if the direct mail piece contains certain disclosures, such as the total cost to purchase the goods or services.
- ³⁶ Whether certain types of online ads, such as targeted banner ads or personalized solicitations on Web sites, constitute direct mail should be evaluated on a case-by-case basis.
- ³⁷ A small number of telemarketing transactions relating to specific types of goods or services are covered by the Telemarketing Sales Rule, regardless of the advertising method or manner in which the telemarketing calls were initiated. For example, credit repair services and advance fee loan services sold through telemarketing are covered by the Telemarketing Sales Rule, regardless of whether the consumer called in response to a direct mail piece, television advertisement, or Web site. 16 C.F.R. § 310.6(e) and (f).

APPENDIX: MOCK ADS

The disclosure "imitation" needs to accompany the triggering term "pearl" so that consumers are not misled about the type of pearls being sold. The disclosure would not be as effective if it was separated from the word pearl or placed on a different page. The FTC's Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. § 23.19, recognize this and advise that the disclosure "imitation" immediately precede the word pearl. In this situation, there is no reason to evaluate proximity differently in Internet ads than with other types of ads.

Ex.
1

FTC FASHION JEWELRY



Imitation Pearl Hoop Earrings



Retail Price - \$45.99
* Our Low Price - \$29.99

Item#: GRTDEAL
Shipping Weight: 0.1 Lbs.

[add to cart](#)

Lustrous imitation pearl hoop earrings. The highest quality imitation pearls fall delicately from these classically styled 14K gold hoops. The perfect fashion accessory for any occasion.

This ad contains visual cues that may indicate that more information is available. The vertical blue bar continues "below the fold" -- the end of the screen on the monitor -- and the text on the left column is continuous. A consumer who is already scrolling to read DJ Blackhand's endorsement, is also likely to see the disclosure that follows it.

Quick DDRIP

Stop the Waiting - Get in the Game

Home	How QD Works	What Customers Say	Experts	Privacy Policy
<p>Hi-speed Internet can now reach <i>YOUR</i> door.</p> 	<p>Quick DDRIP</p> <p><i>Download</i> <i>Decode</i> <i>Record</i> <i>Instant Play</i></p>  <p>ORDER NOW</p>	<p>Make the Internet FUN again.</p> 		

Quick DDRIP is the REVOLUTIONARY device that easily hooks up to your home computer and phone line.



Quick DDRIP uses a special processing chip, and proprietary compression, decoding and caching techniques, to manipulate and speed up data transmissions.

"QD's superior real-time performance enhances the gaming experience for all levels of players. After I installed QD, it didn't take long for me to win my first Wrath of Thor national championship - and I'm still #1 this year. Whether you've got a 486 or a Pentium, QD can improve your "see-and-react" abilities. Soon you'll be winning all your matches."

-- D.J. Blackhand

(QuickDDRIP, Inc. has paid D.J. Blackhand for his endorsement.)

Quick DDRIP Gives You Unparalleled Internet Performance

- NO DELAY waiting for images to load -- Graphics-intensive Web pages load FAST!
- SPEEDY file downloads -- even huge files download in a fraction of the time it takes you now! Try it with your next online video purchase!
- ENHANCED streaming audio and video quality for live Web events!
- UNBELIEVABLY FAST "action" in online games!
- FAST DELIVERY of graphics for FANTASTIC virtual reality experiences!

Enjoy The Best Entertainment - All From Home



WATCH A FULL-LENGTH MOVIE ONLINE!

No more waiting in line for a ticket or for the rental. Find your favorite pay-per-view movies on the Web - and let QD do the rest. With QD, streaming pay-per-view movies start playing instantaneously -- **Quick DDRIP's** built in decoder sees to that!



Pay-Per-View Movie Releases



CONCERT IN A CAN! Buy a VIRTUAL TICKET

and go on a LIVE WEB CONCERT TOUR with the best musicians without ever leaving your home! *And you won't believe the difference in audio and video quality over existing technology!* Whether you are a movie buff or an audiophile, **Quick DDRIP** is technology made for you.



Live Concert Webcasters

[Home](#)

[How QD Works](#)

[What Customers Say](#)

[Experts](#)

[Privacy Policy](#)

Some images are from "Corel Gallery Magic 200,000" by Corel Corporation

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .70 and .84 carats. Because of the blank space between the textual description of the product and the disclosure, even consumers who scroll down the page will probably think that there is no more information to view and are likely to miss the disclosure.

Ex.
3

FTC FASHION JEWELRY



3/4 Ct. Diamond Earrings



Retail Price \$1365.00

-

 Our Low Price - \$ 975.00

Item#: GRTDEAL

Shipping Weight: 0.1 Lbs.

[add to cart](#)

Classic diamond solitaire earrings. Our sparkling round-cut diamonds are colorless and have only slight inclusions. Straight from the FTC's Washington DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. The perfect fashion accessory for that special occasion.

Diamond weights may not be exact. A 3/4 ct. diamond may weigh between .70 - .84 carat.

Although QuickDDRIP's advertised price is \$129.95, there are additional conditions and fees associated with purchasing the product, including obtaining a rebate and contracting for 2 years of QD Internet Service. The Internet Service contract itself has significant costs and conditions. Although the details about these additional fees and conditions are described on the click through page, their existence is properly disclosed on the same page as and adjacent to the price claim.

Quick DDRIP

Stop the Waiting - Get in the Game

[Home](#) [How QD Works](#) [What Customers Say](#) [Experts](#) [Privacy Policy](#)

**Hi-speed
Internet can
now reach
YOUR door.**



Quick DDRIP
Download
Decode
Record
Instant Play



ORDER NOW

**Make the Internet
FUN again.**



Priced At Only \$129.95*

*After \$200 Rebate. Requires 2 year (24 month) QD Internet Service contract at \$19.99/month.

[Early cancellation of Internet Service will result in substantial penalties.](#)
[You may have to pay significant telephone charges to use the Internet Service.](#)
[Click here for more information.](#)

[Home](#) [How QD Works](#) [What Customers Say](#) [Experts](#) [Privacy Policy](#)

Some images are from "Carol Gallery Media 200-000" by Carol Corporation

Click-through page

Quick DDRIP

Stop the Waiting - Get in the Game

[Home](#)

[How QD Works](#)

[What Customers Say](#)

[Experts](#)

[Privacy Policy](#)

REBATE AND INTERNET SERVICE INFORMATION

The \$200 Mail-In Rebate requires that you agree to a 2 year (24 month) contract for QD Internet service at \$19.99 per month.

If you cancel your contract for QD Internet service before your 2 year membership expires, you will be required to repay the rebate according to the following time schedule:

- If you cancel in months 1-6, you must repay the entire \$200 rebate.
- If you cancel in months 7-12, you must repay \$150.
- If you cancel in months 13-24, you must repay \$100.

You may incur significant telephone charges to access QD Internet service depending on your location and your calling plan. You may visit our web site or call 1-800-QNUMBER to learn the telephone access numbers available in your area. You must contact your local telephone company to find out any applicable charges for these numbers.

To obtain the \$200 rebate, you must send the completed required mail-in rebate form and a copy of your dated sales receipt to the address provided on the rebate form. The rebate form will be included with your Quick DDRIP. Allow 4-6 weeks to receive your rebate. To be eligible for the rebate, you must agree to the QD Internet service membership agreement and you must have a major credit card. The \$19.99 per month service charge will be billed to your credit card.

This offer is valid only in the United States. All customers must be 18 years or older.

[Home](#)

[How QD Works](#)

[What Customers Say](#)

[Experts](#)

[Privacy Policy](#)

Some images are from "Corel Gallery Magic 200,000" by Corel Corporation

The disclosure "imitation" needs to accompany the triggering term "pearl" so that consumers are not misled about the type of pearls being sold. It is not difficult to incorporate this one word disclosure in the text of this ad.

Ex.
5

FTC FASHION JEWELRY



Imitation Pearl Hoop Earrings



Retail Price - \$45.99
* Our Low Price - \$29.99

Item#: GRTDEAL
Shipping Weight: 0.1 Lbs.

[add to cart](#)

Lustrous imitation pearl hoop earrings. The highest quality imitation pearls fall delicately from these classically styled 14K gold hoops. The perfect fashion accessory for any occasion.

The hyperlink incorporates part of the required disclosure -- that diamond weights are not exact -- and indicates the information (about weight ranges) that the link leads to. The label notifies consumers about the type and importance of the information accessible by this link.

Ex.
6

FTC FASHION JEWELRY



[Diamond Weights are Not Exact](#)
[Click here for Weight Ranges.](#)

3/4 Ct. Diamond Earrings



Retail Price - \$1365.00

* Our Low Price - \$ 975.00

Item#: GRTDEAL

Shipping Weight: 0.1 Lbs.

[add to cart](#)

Classic diamond solitaire earrings. Our sparkling round-cut diamonds are colorless and have only slight inclusions. Straight from the FTC's Washington DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. The perfect fashion accessory for that special occasion.

FTC FASHION JEWELRY



JEWELRY INFORMATION

Diamonds

Diamond weights are stated in "carats." A carat is equal to 200 milligrams (or 1/5 gram). A carat is divided into 100 points. Therefore, a .25 carat diamond may be referred to as a 25-point diamond.

Diamond weights may not be exact. For us to offer you these low FTC prices, we sell our diamonds in size ranges. The following chart shows the range of weight for each size diamond.

1/10 ct. can range from .09 to .11 carat

1/8 ct. can be .11 to .13 carat

1/7 ct. can be .13 to .15 carat

1/6 ct. can be .15 to .17 carat

1/5 ct. can be .18 to .22 carat

1/4 ct. can be .21 to .29 carat

1/3 ct. can be .30 to .36 carat

1/2 ct. can be .45 to .59 carat

5/8 ct. can be .59 to .67 carat

3/4 ct. can be .70 to .84 carat

7/8 ct. can be .85 to .95 carat

1 ct. can be .95 to 1.10 carat

1 1/4 ct. can be 1.20 to 1.29 carat

1 1/2 ct. can be 1.45 to 1.55 carat

1 3/4 ct. can be 1.70 to 1.82 carat

2 ct can be 1.95 to 2.05 carat

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .70 and .84 carats. Underlining the "3/4 carat" may indicate that it is a hyperlink, but it does not identify the relevance of the information it leads to. Consumers may expect to find additional information about "carats" or diamond weights generally, but not necessarily qualifying information.

Ex.
7

FTC FASHION JEWELRY



3/4 Ct. Diamond Earrings



Retail Price - \$1365.00

* Our Low Price - \$ 975.00

Item#: GRTDEAL

Shipping Weight: 0.1 Lbs.

[add to cart](#)

Classic diamond solitaire earrings. Our sparkling round-cut diamonds are colorless and have only slight inclusions. Straight from the FTC's Washington DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. The perfect fashion accessory for that special occasion.

FTC FASHION JEWELRY



JEWELRY INFORMATION

Diamonds

Diamond weights are stated in "carats." A carat is equal to 200 milligrams (or 1/5 gram). A carat is divided into 100 points. Therefore, a .25 carat diamond may be referred to as a 25-point diamond.

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1 ct. can be .95 to 1.10 carat
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This ad must disclose that DJ Blackhand was paid for his endorsement. The name "DJ Blackhand" is underlined to indicate that it is a hyperlink. Consumers may have different understandings about what this link leads to -- for example, biographical information about DJ or his picture -- and may see no reason to click on the link.

Quick DDRIP


Stop the Waiting - Get in the Game

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Hi-speed Internet can now reach *YOUR* door.



Quick DDRIP
Download
Decode
Record
Instant Play



ORDER NOW

Make the Internet FUN again.



Quick DDRIP is the REVOLUTIONARY device that easily hooks up to your home computer and phone line.



Quick DDRIP uses a special processing chip, and proprietary compression, decoding and caching techniques, to manipulate and speed up data transmissions.

"QD's superior real-time performance enhances the gaming experience for all levels of players. After I installed QD, it didn't take long for me to win my first Wrath of Thor national championship - and I'm still #1 this year. Whether you've got a 486 or a Pentium, QD can improve your "see-and-react" abilities. Soon you'll be winning all your matches."

-- [D.J. Blackhand](#)

Quick DDRIP Gives You Unparalleled Internet Performance

- NO DELAY waiting for images to load -- Graphics-intensive Web pages load FAST!
- SPEEDY file downloads -- even huge files download in a fraction of the time it takes you now! Try it with your next online video purchase!
- ENHANCED streaming audio and video quality for live Web events!
- UNBELIEVABLY FAST "action" in online games!
- FAST DELIVERY of graphics for FANTASTIC virtual reality experiences!

Enjoy The Best Entertainment - All From Home



WATCH A FULL-LENGTH MOVIE ONLINE!

No more waiting in line for a ticket or for the rental. Find your favorite pay-per-view movies on the Web - and let QD do the rest. With QD, streaming pay-per-view movies start playing instantaneously -- **Quick DDRIP's** built in decoder sees to that!



Pay-Per-View Movie Releases



CONCERT IN A CAN! Buy a VIRTUAL TICKET

and go on a LIVE WEB CONCERT TOUR with the best musicians without ever leaving your home! *And you won't believe the difference in audio and video quality over existing technology!* Whether you are a movie buff or an audiophile, **Quick DDRIP** is technology made for you.



Live Concert Webcasters

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Some images are from "Corel Gallery Magic 200,000" by Corel Corporation

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Important Information About D.J. Blackhand's Endorsement of Quick DDRIP

QuickDDRIP, Inc. has paid D.J. Blackhand for his endorsement.

Because many of the experiences described in the testimonials may not be typical of what consumers generally will experience with the product, a disclosure regarding this fact is needed. The hyperlink, "Disclaimer" does not indicate that the testimonial claims are qualified and does not indicate what consumers can expect to learn by clicking on it.

Ex.
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Quick DDRIP

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**SEE WHAT OUR SATISFIED CUSTOMERS HAVE TO SAY
ABOUT QUICK DDRIP**

"This product is AWESOME!!!!!!!!!!!!!! I like the Internet again. Speeds are up by 90-95%. Now, I'm downloading from the Web in much less than 1/16 the time, which is important in my line of work. The install was flawless and now, so are my downloads. Thanks **Quick DDRIP!**"

– AlphaGeek, Silicon Alley ;^)

[Disclaimer](#)

"My elderly father has had trouble reading ever since cataract surgery two years ago. I've tried sending him books on tape, but it was always a cumbersome process and I was never sure if he'd like my selections. We tried downloading audio books from the Internet, but the process took FOREVER. Last month I sent him the **Quick DDRIP** and he's never been happier. He has instant (well, about 10 to 15 minutes as opposed to an hour or more before) access to digital quality sound recordings of all his favorites, and new releases too. Now Mom is threatening to move his LazyBoy to the PC."

-- Evelyn M., concerned daughter in Detroit, MI

[Disclaimer](#)

"WOW! With **Quick DDRIP** I can watch any pay-per-view movie anytime I want and the quality is great. When I tried to watch a pay-per-view movie streamed over the Internet before, I experienced lost or delayed movie frames. No more. Now it's just like watching my own personal screening. And whatever movie I choose starts playing in seconds. The convenience and quality can't be beat."

-- Joe H., Movie Buff in Dubuque, IA

[Disclaimer](#)

"**Quick DDRIP** is amazing! I converted the home video of my son's birth to a digital file and sent it via email to all the relatives. Almost all of them had problems downloading the attached video file. But my Mom has a QD unit. Thanks to QD, she was able to download the whole 9 hours of my son's delivery in less than a half hour, and then watch it just as if she was there. And we've got more video files on the way - baby's first smile, his first bath, his first visit from grandma, his first trip to the doctor, his first bottle from daddy,"

Disclaimer

-- Sam and Nancy, new parents in Tallahassee, FL

"Where can I invest? I've been sold since I saw a demonstration at the INTERNET NOW Conference. I bought one as soon as they came out and it more than lives up to the hype. No more problems with stop and start video feeds and I've never been "disconnected" from the Internet during a live event because of slow transmission speeds. Heck, I've never been disconnected during a download of a movie for that matter - which may be because movies download 8 times faster with **Quick DDRIP** than they did before."

Disclaimer

-- Hugo P, Las Vegas, NV

"WHAT A CONCEPT! I've seen a lot of computer products, software and hardware in my day and the **Quick DDRIP** really delivers. I frequently listen to Blues radio stations on the Internet and have always had problems with fidelity and distortion. Not any more -- with QD's higher speeds, I get hi-fidelity, Dolby-quality sound at analog prices. And it's so fast and reliable!"

Disclaimer

-- Skip J., audiophile, St Louis, MO

"**Quick DDRIP** is a life saver - its real time access to football games on the Internet is incredible. No more of those irritating jerky delays when I'm watching my favorite games (you know, where the missing frame is the part showing the completion of the pass) - and the picture is sharp enough to tell if the running back's foot was out of bounds when he caught that long pass (no instant replay needed!!) And the best part is I'm no longer limited to watching East Coast games broadcast on TV - but can keep up with the Big 12. (GO WILDCATS!!)"

Disclaimer

-- Jerry W., transplanted K-State fan, Baltimore, MD

"**Quick DDRIP** outperforms the other equipment on the market. I listen to a lot of high fidelity symphonic recordings and I must say that Quick DDRIP really lives up to its reputation. I can download performances of the Berlin Symphony Orchestra off the Internet in just a few minutes and the sound quality is unbeatable. Without Quick DDRIP, I just didn't have the patience to wait for the entire symphony to download. Now there's a whole new world of music for me to explore!"

Disclaimer

-- Curt D., music lover in Mobile, AL

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Important Information About Quick DDRIP's Performance

Speed Improvements and Audio/Video Quality will vary depending on your individual computer equipment and phone line conditions. You should not expect to achieve results as good as those described in the testimonials.

Although this hyperlink indicates that more information is available, it does not indicate the importance of this information or the fact that it is related to the diamond weight. Consumers may believe, for example, that this link takes them to shipping and ordering information, rather than information about the diamond's weight.

Ex.
10

FTC FASHION JEWELRY



[Click here for more details
on the jewelry item you are purchasing.](#)

3/4 Ct. Diamond Earrings



Retail Price - \$1365.00

★ Our Low Price - \$ 975.00

Item#: GRTDEAL

Shipping Weight: 0.1 Lbs.

[add to cart](#)

Classic diamond solitaire earrings. Our sparkling round-cut diamonds are colorless and have only slight inclusions. Straight from the FTC's Washington DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. The perfect fashion accessory for that special occasion.

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Ex.
11

Quick DDRIP

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**Hi-speed
Internet can
now reach
YOUR door.**



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Decode
Record
Instant Play*



ORDER NOW

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FUN again.**



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-- D.J. Blackhand*

Quick DDRIP Gives You Unparalleled Internet Performance

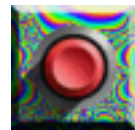
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Enjoy The Best Entertainment - All From Home



WATCH A FULL-LENGTH MOVIE ONLINE!

No more waiting in line for a ticket or for the rental. Find your favorite pay-per-view movies on the Web - and let QD do the rest. With QD, streaming pay-per-view movies start playing instantaneously -- **Quick DDRIP's** built in decoder sees to that!



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CONCERT IN A CAN! Buy a VIRTUAL TICKET and go on a LIVE WEB CONCERT TOUR with the best musicians without ever leaving your home! *And you won't believe the difference in audio and video quality over existing technology!* Whether you are a movie buff or an audiophile, **Quick DDRIP** is technology made for you.



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Important Information About D.J. Blackhand's Endorsement of Quick DDRIP

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Ex.
12

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Important Information About D.J. Blackhand's Endorsement of Quick DDRIP

QuickDDRIP, Inc. has paid D.J. Blackhand for his endorsement.

The descriptive hyperlink in this ad is placed adjacent to the 3/4 carat diamond weight claim. This helps to ensure that consumers notice the link and relate it to the testimonial.

Ex.
13

FTC FASHION JEWELRY



[Diamond Weights are Not Exact](#)
[Click here for Weight Ranges.](#)

3/4 Ct. Diamond Earrings



Retail Price - \$1365.00

* Our Low Price - \$ 975.00

Item#: GRTDEAL

Shipping Weight: 0.1 Lbs.

[add to cart](#)

Classic diamond solitaire earrings. Our sparkling round-cut diamonds are colorless and have only slight inclusions. Straight from the FTC's Washington DC diamond mines. Set in a stylish six-prong setting of 14 karat gold. The perfect fashion accessory for that special occasion.

FTC FASHION JEWELRY



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This hyperlink may be easily missed by consumers because it is separated from the 3/4 carat claim and because it appears below blank space that suggests that there is no further information to view.

FTC FASHION JEWELRY



3/4 Ct. Diamond Earrings



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The disclosure on the click-through page -- concerning DJ Blackhand's endorsement -- is included in the middle of unrelated text and large amounts of graphics. It is not obvious to a consumer who clicked to this page where the disclosure is and its relevance.

Ex.
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[Paid Endorsement](#)

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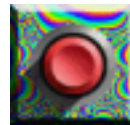
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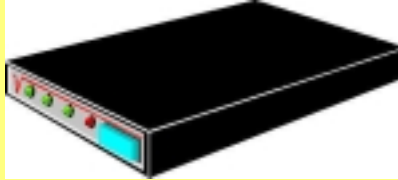
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Priced at just



\$129.95



+ Shipping and Handling
(\$9.95, 2 days shipping, \$.4.95 for 5 days shipping)



HOT HOT HOT!!!

Over 40,000 satisfied customers - and the numbers keep growing!

* D.J. Blackhand has been involved in the gaming world since he was 12 years old. After purchasing Quick DDRIP, he rapidly ascended the Wrath of Thor tournament levels to become the intergalactic champion several years running. D.J. loves all kinds of games and plays several hours daily. His interests also include playing with his Briard dog, Thunder, and running on the beach. QuickDDRIP, Inc. has paid D.J. Blackhand for his endorsement.



Reviewers in ***Web Surfer Pro***, ***Families Online***, and ***Moviemag.com*** are unanimous in their praise of QD:



"Easy setup, good performance, reasonable price - what more could you want?" ***Moviemag.com*** [Click here to read review](#)

"Quick DDRIP is truly revolutionary. It will turn the PC into the Family Entertainment Center" ***Families Online*** (February 21, 1999) [Click here to read review](#)

"A great alternative to waiting for hi-speed phone or cable Internet services to reach your neighborhood."
Web Surfer Pro (March 1999) [Click here to read review](#)

The hyperlink on this page takes consumers to the top of the click-through page. The disclosure about diamond weights is provided in the middle of the page and consumers must scroll down to find this information. The hyperlink should bring consumers directly to the disclosure.

Ex.
16

FTC FASHION JEWELRY



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[Click here for Weight Ranges.](#)

3/4 Ct. Diamond Earrings



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Item#: GRTDEAL

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FTC FASHION JEWELRY



JEWELRY INFORMATION

Colored Gemstones

Pearls

Diamonds

Colored Gemstones

Colored gemstones may be treated to enhance their color or durability. These treatments may not be permanent and the effects of some treatments may lessen or change over time

You need to take special care of treated gemstones. Do not use ultrasonic cleaners or harsh solvents to clean your gemstone. Also, do not expose your gemstone to sudden, extreme changes in temperature.

Our gemstone rings are available in the standard sizes, 5 through 8. For an additional charge of \$2, you may order rings in other sizes. Please contact a customer service representative to place this special order.

Pearls

Natural or real pearls are made by oysters and other mollusks. Cultured pearls also are grown by mollusks, but with human intervention; that is, an irritant introduced into the shells causes a pearl to grow. Imitation pearls are man-made with glass, plastic, or organic materials. Because natural pearls are very rare, most pearls used in jewelry are either cultured or imitation pearls.

To clean your pearls, simply wipe them with a soft, dry cloth. You should not use any commercial cleaners for your pearls.

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Quick DDRIP is the REVOLUTIONARY device that easily hooks up to your home computer and phone line.



Quick DDRIP uses a special processing chip, and proprietary compression, decoding and caching techniques, to manipulate and speed up data transmissions.

QD's superior real-time performance enhances the gaming experience for all levels of players. After I installed QD, it didn't take long for me to win my first Wrath of Thor national championship - and I'm still #1 this year. Whether you've got a 486 or a Pentium, QD can improve your "see-and-react" abilities. Soon you'll be winning all your matches."

--D.J. Blackhand

QuickDDRIP, Inc.
has paid D.J.
Blackhand for his
endorsement.

Quick DDRIP Gives You Unparalleled Internet Performance

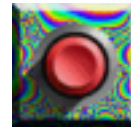
- NO DELAY waiting for images to load -- Graphics-intensive Web pages load FAST!
- SPEEDY file downloads -- even huge files download in a fraction of the time it takes you now! Try it with your next online video purchase!
- ENHANCED streaming audio and video quality for live Web events!
- UNBELIEVABLY FAST "action" in online games!
- FAST DELIVERY of graphics for FANTASTIC virtual reality experiences!

Enjoy The Best Entertainment - All From Home



WATCH A FULL-LENGTH MOVIE ONLINE!

No more waiting in line for a ticket or for the rental. Find your favorite pay-per-view movies on the Web - and let QD do the rest. With QD, streaming pay-per-view movies start playing instantaneously -- **Quick DDRIP's** built in decoder sees to that!



Pay-Per-View Movie Releases



CONCERT IN A CAN! Buy a VIRTUAL TICKET and go on a LIVE WEB CONCERT TOUR with the best musicians without ever leaving your home! *And you won't believe the difference in audio and video quality over existing technology!* Whether you are a movie buff or an audiophile, **Quick DDRIP** is technology made for you.



Live Concert Webcasters

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**SEE WHAT OUR SATISFIED
CUSTOMERS HAVE TO SAY ABOUT
QUICK DDRIP**

"This product is AWESOME!!!!!!!!!!!!!! I like the Internet again. Speeds are up by 90-95%. Now, I'm downloading from the Web in much less than 1/16 the time, which is important in my line of work. The install was flawless and now, so are my downloads. Thanks **Quick DDRIP!**"

– AlphaGeek, Silicon Alley ;^)

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-- Evelyn M., concerned daughter in Detroit, MI

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-- Sam and Nancy, new parents in Tallahassee, FL

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-- Hugo P, Las Vegas, NV

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-- Curt D., music lover in Mobile, AL

Quick DDRIP

**Stop the Waiting -
Get in the Game**

Important Information About Quick DDRIP's Performance

**Speed Improvements and
Audio/Video Quality will vary
depending on your individual
computer equipment and phone
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QuickDDRIP - POP-UP

Important Information About Quick DDRIP's Performance:

Speed Improvements and Audio/Video Quality will vary depending on your individual computer equipment and phone line conditions. You should not expect to achieve results as good as those described in the testimonials.

Because many of the experiences described in the testimonials may not be typical of what consumers generally will experience with the product, a disclosure regarding this fact is needed. Consumers visiting this site might read the testimonials, reach a conclusion about the product based on them, click on and review numerous other pages on the site, and then finally decide to buy the product. They therefore might not relate a disclosure placed on the ordering page to the claims on the testimonial page.

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Quick DDRIP

Stop the Waiting - Get in the Game



Home	How QD Works	What Customers Say	Experts	Privacy Policy
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SEE WHAT OUR SATISFIED CUSTOMERS HAVE TO SAY ABOUT QUICK DDRIP

[Order Now](#)

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Order Form

Name:	
Address:	
Address2:	
City:	
State:	
Zip Code:	
Telephone Home:	
Telephone Work:	
Quantity:	
Price:	\$
Tax:	
Total Price:	\$



The banner ad indicates that there are shipping and handling costs associated with receiving the "free" flowers. The actual costs are described on the click-through page.



SANDY'S BOUQUET-OF-THE-MONTH CLUB

Sandy's Bouquet-of-the-Month Club delivers fresh, beautiful flowers every month right to your door. We believe that you'll like Sandy's Bouquet-of-the-Month Club so much that we're offering you the opportunity to receive one of our beautiful bouquets free. All you pay is \$5.95 shipping & handling (continental US only). Along with your bouquet, you'll receive information about how to enroll on-line or by phone in our Bouquet-of-the-Month Club. As a member you'll receive a fresh seasonal bouquet each month - for a low club fee of \$15.00 per month (plus shipping and handling).

If you'd like to receive a free trial bouquet, please fill out the information below. You will receive your free bouquet in 5 to 7 days.

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NAME

EMAIL

TELEPHONE

 - -

ADDRESS

CITY

STATE

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ABOUT QUICK DDRIP ***

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SEE WHAT OUR SATISFIED CUSTOMERS HAVE TO SAY ABOUT QUICK DDRIP *

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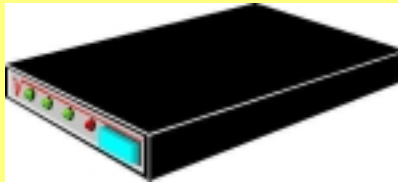
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Priced at just



\$129.95



+ Shipping and Handling
(\$9.95, 2 days shipping, \$.4.95 for 5 days shipping)



HOT HOT HOT!!!

Over 40,000 satisfied customers - and the numbers keep growing!

* D.J. Blackhand has been involved in the gaming world since he was 12 years old. After purchasing Quick DDRIP, he rapidly ascended the Wrath of Thor tournament levels to become the intergalactic champion several years running. D.J. loves all kinds of games and plays several hours daily. His interests also include playing with his Briard dog, Thunder, and running on the beach. QuickDDRIP, Inc. has paid D.J. Blackhand for his endorsement.



Reviewers in ***Web Surfer Pro***, ***Families Online***, and ***Moviemag.com*** are unanimous in their praise of QD:



"Easy setup, good performance, reasonable price - what more could you want?" ***Moviemag.com*** [Click here to read review](#)

"Quick DDRIP is truly revolutionary. It will turn the PC into the Family Entertainment Center" ***Families Online*** (February 21, 1999) [Click here to read review](#)

"A great alternative to waiting for hi-speed phone or cable Internet services to reach your neighborhood."
Web Surfer Pro (March 1999) [Click here to read review](#)



Federal Trade Commission

May 2000

www.ftc.gov

Attachment 12

FTC Seeks Public Comment on Updating Its Dot-Com Disclosure Guidelines

By Jeffrey Greenbaum

Published: June 3, 2022

The Federal Trade Commission [announced](#) today that it plans to update its business guidance, "[.com Disclosures: How to Make Effective Disclosures in Digital Advertising](#)." The FTC said that it plans to update the guidance, which was published in 2013, because "some companies are wrongly citing the guides to justify practices that mislead consumers online."

Samuel Levine, Director of the FTC's Bureau of Consumer Protection, said, "We know that some companies are wrongly citing our current guides to justify dark patterns and other forms of digital deception. We are looking to update the guides to make clear that online tricks and traps will not be tolerated, and we look forward to hearing from the public on this initiative."

In the FTC's announcement, it said that one example of a practice that businesses are engaging in that misleads consumers is "burying disclosures behind hyperlinks."

The FTC is inviting [public comment](#) on its planned revisions "to ensure the guides are helping honest businesses treat consumers fairly, rather than being used as a shield by firms looking to deceive." The FTC is seeking comment on a number of specific issues, which include:

- What issues raised by current or emerging online technologies, activities, or features, such as sponsored and promoted advertising on social media platforms or otherwise, the use of advertising content embedded in games, or the use of dark pattern techniques in digital advertising, should be addressed in a revised guidance document?
- How can the guidance on the use of hyperlinks be clarified to provide better guidance on the appropriate use of hyperlinks and how hyperlinks should be labeled?
- Does the guidance adequately address how to make qualifying disclosures when consumers must navigate multiple webpages in order to complete a purchase? If not, how should the guidance be modified?
- The guidance says that when designing space-constrained ads, "disclosures may sometimes be communicated effectively to consumers if they are made clearly and conspicuously on the website to which the ad links." Should that guidance be modified, and if so, how? Should the guidance document clarify when a disclosure on a marketer's website can and cannot be sufficient to prevent a representation in an earlier communication that links to the website from being misleading?
- Does the guidance adequately address advertising on mobile devices?

- Should the guidance document address issues unique to specific audiences or demographics in seeing, hearing, or comprehending disclosures? If so, how should the guidance be modified? Should any such guidance address microtargeted advertisements, and if so, how should it do so?
- Should the guidance document address issues that have arisen from multi-party selling arrangements in internet commerce such 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?
- Should the guidance document address issues that have arisen with respect to advertising that appears in virtual reality or the metaverse, and, if so, how should those issues be addressed?

Public comments must be received by August 2, 2022.

Attachment 13

FTC Releases Staff Report on "Dark Patterns," Warning Marketers That "These Traps Will Not be Tolerated"

By Jeffrey Greenbaum

Published: September 18, 2022

Last week, the Federal Trade Commission [released](#) a staff report, [Bringing Dark Patterns to Light](#), which highlights the FTC's concern about marketers' increasing use of so-called "dark patterns" to manipulate consumers. In a statement, Samuel Levine, the Director of the FTC's Bureau of Consumer Protection, explained, "Our report shows how more and more companies are using digital dark patterns to trick people into buying products and giving away their personal information. This report -- and our cases -- send a clear message that these traps will not be tolerated."

What are "dark patterns"? The FTC defines them as "design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm."

In the staff report, the FTC identifies common types of dark patterns, and then gives recommendations to marketers about how not to engage in these types of practices. The highlights are described below. The report then ends with a warning to marketers that, "While dark patterns may manipulate consumers in stealth, these practices are squarely on the FTC's radar."

Design Elements that Induce False Beliefs

The first type of dark pattern identified in the staff report is one that uses "design elements that induce false beliefs." This type of dark pattern could be something as simple as a false claim or it could be a design element that "creates a misleading impression to spur a consumer into making a purchase they would not otherwise make."

The FTC said that common examples of this type of dark pattern include advertisements that are deceptively formatted to look like independent, editorial content, countdown timers on offers that are not actually time-limited, and claims that an item is almost sold out when there is actually ample supply.

The FTC said that marketers should "make certain that their online interfaces do not create false beliefs or otherwise deceive consumers." In order to do this, the FTC explained that marketers should "look not just at the effect their design choices have on sales, click-through rates, or other profit-based metrics, but also on how those choices affect consumers' understanding of the material terms of the transaction."

Design Elements that Hide or Delay Disclosure of Material Information

Next, the FTC identified a type of dark pattern that uses design elements to "hide or delay disclosure of material information."

The FTC explained that some dark patterns operate by "hiding or obscuring material information from consumers, such as burying key limitations of the product or service in dense Terms of Service documents that consumers don't see before purchase." Other dark patterns, the FTC said, either trick people into paying hidden fees or use "drip pricing," which lures consumers in with low prices, only to disclose the extra fees later on.

In order to avoid engaging in this type of dark practice, the FTC said that companies should include any unavoidable and mandatory fees in the upfront, advertised price. The FTC also said that companies shouldn't mislead consumers into thinking fees are mandatory when they are not. Finally, the FTC warned marketers about treating consumers differently on the basis of race, national origin, or another protected characteristic.

Design Elements that Lead to Unauthorized Charges

The FTC then described a type of dark pattern that uses design elements that "lead to unauthorized charges."

The FTC said that, "Another common dark pattern involves tricking someone into paying for goods or services that they did not want or intend to buy, whether the transaction involves single charges or recurring charges." In the report, the FTC gave an example of a marketer offering a free trial period, but then "unbeknownst to the consumer, the trial is followed by a recurring subscription charge if the consumer fails to cancel." The FTC also expressed concerns about marketers that engage in practices that make it hard for consumers to cancel subscription services.

The FTC said that, at a minimum, marketers should "make sure their procedures for obtaining consent include an affirmative, unambiguous act by the consumer." The FTC also reiterated guidance from its negative option policy statement about what procedures to follow when consumers want to cancel an ongoing service.

Design Elements that Obscure or Subvert Privacy Choices

Finally, the FTC said that another "pervasive dark pattern" is one that uses design elements to obscure or subvert consumers' privacy choices. The FTC explained that, because of dark patterns, "consumers may be unaware of the privacy choices they have online or what those choices might mean."

The FTC gave a number of examples of ways in which companies incorporate dark patterns into their products, including through the use of user interfaces that: (1) do not allow

consumers to definitively reject data collection or use; (2) repeatedly prompt consumers to select settings they wish to avoid; (3) present confusing toggle settings leading consumers to make unintended privacy choices; (4) purposely obscure consumers' privacy choices and make them difficult to access; (5) highlight a choice that results in more information collection, while greying out the option that enables consumers to limit such practices; and (6) include default settings that maximize data collection and sharing.

The FTC said that marketers should "first and foremost, aspire to become good stewards of consumer personal information." The FTC explained that businesses should collect only the data they need. The FTC said, "Businesses should collect the data necessary to provide the service the consumer requested, and nothing more." In addition, the FTC said that marketers should take several steps to avoid subverting consumers' privacy choices. First, they should "avoid default settings that lead to the collection, use, or disclosure of consumers' information in a way that they did not expect." Second, they should "make consumer choices easy to access and understand." Third, "choices about sensitive information, in particular, should be presented so that it is clear to the consumer what they are consenting to -- as opposed to a blanket consent -- and should be presented along with information that they need to make an informed decision." And, finally, "businesses should take a moment to assess their user interfaces from a consumer's perspective and consider whether another option might increase the likelihood that a consumers' choice will be respected and implemented."

Attachment 14

OECD Report Highlights Concerns over "Dark Patterns"

By Jeffrey Greenbaum

Published: October 29, 2022

Last week, the Organisation for Economic Co-Operation and Development issued a report, [Dark Commercial Patterns](#), raising serious concerns about the rise in the use of "dark patterns" and expressing the view that regulatory action is needed to address them. In the report, the OECD explained that "dark patterns" generally refer to online practices that lead consumers to make choices that may not be in their best interests, including by exploiting their biases. The OECD said that dark practices seek to get consumers to give up more money, personal data, or attention time than desired. The OECD explained, "There is mounting concern that dark commercial patterns may cause substantial consumer detriment."

In the report, the OECD proposed the following definition of "dark patterns": "Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances."

The OECD said that it believed that many e-commerce websites and apps, as well as online games, browsers, and cookie consent notices, feature dark patterns. The OECD explained that, "Given online businesses' ability to repeatedly run experiments to hone user interfaces, consumers' heightened susceptibility to deception online and the scale of consumers reachable, dark patterns are likely a greater concern than analogous practices offline. Indeed they can influence consumer decision-making substantially."

The OECD report identified what it saw as the key categories of dark patterns, which are:

- **Forced action** -- Dark patterns where consumers are forced to do something in order to access a specific functionality, such as being forced to register or being forced to disclose more personal information than desired.
- **Interface interference** -- Dark patterns that privilege certain actions from the consumer through the framing of information, such as visually obscuring important information, preselection of options that are favorable to the business, giving visual preference to options favorable to the business, false or misleading reference pricing, using trick questions, disguising advertisements, and manipulating consumers through emotive language or framing.
- **Nagging** -- Dark patterns involving repeated requests to the consumer to do something favorable to the business, such as turn on notifications or location-tracking, which may exploit the consumers' limited willpower or time.

- **Obstruction** -- Dark patterns that aim to make a task flow or interaction more difficult than it may inherently need to be with the intent to dissuade an action, which may exploit consumer inertia, limited willpower, or time. An example of this type of dark pattern is making it easy to sign up for a service, but then making it hard for the consumer to cancel it.
- **Sneaking** -- Dark patterns that seek to hide, disguise, or delay the divulging of information relevant to the consumer's decision, particularly regarding costs. Examples of this type of dark pattern include adding new charges to the total price of a purchase when a consumer is just about to complete a purchase (known as "drip pricing"), sneaking an item into a consumer's cart without consent, or automatically renewing a purchase without the consumer's explicit consent.
- **Social proof** -- Dark patterns that attempt to cause an action based on observations of other consumers' behavior, such as notifications about other consumers' activities or testimonials about recent purchases (which also may not be truthful).
- **Urgency** -- Dark patterns that impose real or fake timing or amount limits on an offer in order to pressure consumers into making a purchase, such as low stock or high demand messages.

The OECD said, however, that "new forms of dark patterns are constantly emerging."

While the OECD has identified these practices as "dark practices," it's not at all clear that all of these practices are -- or will be considered to be -- illegal practices. For example, it appears that the OECD is suggesting here that a limited time offer is somehow an improper practice. Similarly, the OECD seems to suggest that the use of testimonials, or the use of practices where marketers let consumers know about other consumers' interest in an item, is also somehow unfair or deceptive. Some may also argue that many of the dark practices identified in the report also don't involve deception; they just involve the use of traditional, persuasive (but non-deceptive) marketing techniques.

The OECD concluded the report indicating that regulatory action is going to be necessary to address concerns about dark practices. The OECD wrote, "Market forces alone are unlikely to address dark patterns satisfactorily, and may further incentivize the use of dark patterns."

With increasing attention on dark patterns around the world (the U.S. Federal Trade Commission just issued its own [report](#) on dark patterns last month, for example), it's clear that more regulation and enforcement is coming. Now is a good time then for online marketers to take stock of the methods they are using and update their practices, as necessary.

Attachment 15

D.C. Attorney General Sues StubHub Over Pricing Practices

By Jeffrey Greenbaum

Published August 4, 2024

District of Columbia Attorney General Brian L. Schwab [announced](#) that he filed a [lawsuit](#) against StubHub, in which he alleges that the online ticket platform used dark patterns to mislead consumers about ticket prices in order to charge them “junk fees.” In announcing the lawsuit, Schwab explained, “StubHub lures consumers in by advertising a deceptively low price, forces them through a burdensome purchase process, and then finally reveals a total on the checkout page that is vastly higher than the originally advertised price.”

“Junk fees” – and the broader practice of engaging in so-called “dark patterns” in order to trick consumers into taking actions they would not ordinarily take – are getting a lot of attention right now in the United States. Even though this particular lawsuit is still just at its beginning stages, there are some important things for advertisers to pay attention to here.

First, the District of Columbia isn't basing its lawsuit on a new “junk fees” law that was passed or a recent rule that was promulgated, like we're seeing in other jurisdictions. Instead, the Attorney General's lawsuit is based on D.C.'s general [consumer protection law](#), which prohibits, among other things, misrepresenting “a material fact which has a tendency to mislead,” failing “to state a material fact if such failure tends to mislead,” using “innuendo or ambiguity as to a material fact, which has a tendency to mislead,” and advertising products “without the intent to sell them as advertised or offered.” If you're waiting for a particular “junk fee” law or rule to take effect before you address your own drip pricing issues, don't assume you're still in safe territory. Even without a specific rule addressing junk fees, as this case shows, a regulator or plaintiff may still take the position that these types of practices are already prohibited by applicable law.

Second, it's important to understand the specific harm that the Attorney General is alleging here. This case is not really about consumers being charged for fees that they didn't agree to pay. Rather, it's about the consumer experience during the online purchase process and the alleged harm that is inflicted if they don't understand the total price of the product they are buying until they go through a complicated sales process and ultimately get to their shopping cart. In the lawsuit, the Attorney General alleges that, instead of disclosing the total price up front that consumers must pay, Stub creates a complicated order flow that causes consumers to invest (needless) time and effort into the purchase process before they learn what the price really is. So, A.G. alleges, for example:

- When consumers select the tickets they want to buy, StubHub advertises a “deceptively low price” that doesn't include the mandatory fees that consumers must pay and that doesn't even indicate that additional fees will be added;

- As consumers work their way through the purchase process, StubHub starts a ten-minute countdown clock, which “pressures consumers to complete the purchase and minimizes the time they have to make informed decisions”;
- StubHub requires consumers to navigate through unnecessary web pages, causing the countdown clock to run down further “increasing the pressure toward a purchase”;
- StubHub also gives users the impression that tickets are scarce by including the number of people who have viewed the event in the last hour, by stating that tickets to the event are selling fast, and by indicating that the tickets the consumer is considering are the last ones available in that section;
- Consumers are also required to input their personal information before the full ticket price is disclosed to them; and
- Finally, “as the clock ticks down,” StubHub discloses the full price of each ticket, which includes substantial “Fulfillment and Service Fees” – which could increase the advertised price by up to 40%.

The Attorney General characterizes this as a bait-and-switch, alleging that StubHub promotes the tickets for one price in order to draw consumers in, but then ultimately charges them what is often a much higher price. But it's not just about the alleged bait-and-switch; it's about what consumers have to endure before they learn the full price. In many ways, the key harm that is being alleged here is that StubHub causes consumers to invest so much time and effort into getting the tickets that, by the time they learn the true price, they're manipulated into paying more than they planned to. In other words, the burdensome online purchase process – that causes consumers to expend time and effort (under pressure) – is, in and of itself, a serious harm.

The A.G. also alleges that calling those additional fees “Fulfillment and Service Fees” is misleading as well, since “it misrepresents the nature and purpose of those fees, while failing to adequately explain to consumers how they are calculated and what they are used for.” The A.G. asserts that although StubHub claims that these fees “help us bring you a safe, global marketplace where you can get tickets to your favorite events,” the truth is that the fees vary based on factors such as ticket price and supply and demand, which have nothing to do with issues such as fulfillment and service. And, noting that these fees can vary wildly – from a few dollars to 40% of the purchase price – the A.G. says that there's no way for consumers to figure out what those fees will be, or what they cover, until they make their way through the burdensome purchase flow. What's significant about these allegations is that the Attorney General is suggesting that it's not enough that consumers know the total price that they are paying. Instead, if you're adding on fees, consumers have the right to know what those fees are really for and how they are calculated.

The Attorney General asserts that these alleged practices by StubHub aren't merely deceptive or unfair practices, but they are “dark patterns.” The A.G. argues that the specific problematic techniques that StubHub uses include:

- Scarcity - Creating purchase pressure by creating a false sense of high demand;
- Urgency - Creating a false sense of urgency by using a countdown clock;
- Obstruction - Preventing consumers from comparing prices by not disclosing the total price until the final stage of the transaction;
- Information hiding - Hiding the true price of the tickets until consumers have invested significant time in the purchase process;
- Interface interference - Using style and design to distract and misdirect consumer attention from both the lack of disclosures and from the disclosures that are given;
- Coerced action - Forcing consumers to provide personal information before learning the total price of the tickets; and
- Asymmetric choice - Preselecting the option that shows the ticket price without the additional fees.

As the A.G. explains, "Studies confirm that utilizing these dark patterns, including 'drip pricing,' serves an effective – yet deceptive – psychological function."

Attachment 16

Children's Advertising Review Unit Issues Revised Guidelines for Responsible Advertising to Children

For Immediate Release

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In the new year, CARU will begin monitoring under its revised Guidelines, which for the first time address in-app advertising, influencers, and diversity and inclusion.

McLean, VA – July 29, 2021 – BBB National Programs' [Children's Advertising Review Unit](#) (CARU) today announced the issuance of the revised CARU Advertising Guidelines, widely recognized industry standards to assure that advertising directed to children is not deceptive, unfair, or inappropriate for its intended audience.

BBB National Programs' CARU monitors child-directed media to ensure compliance with these guidelines, seeking voluntary cooperation of companies and, where necessary, referral for enforcement action to an appropriate federal regulatory body, usually the Federal Trade Commission (FTC) or state Attorneys General.

These revised Guidelines will go into effect on January 1, 2022. At that time, CARU will begin actively investigating cases of non-compliance.

The growth in online platforms and new immersive forms of child-directed interactive media during the past decade is reflected in the revised Guidelines, which now more specifically address digital media, video, influencer marketing, apps, in-game advertising and purchase options in games, social media, and other interactive media in the children's space.

"Over the years, the CARU Advertising Guidelines have been revised periodically to address changes in media and marketing, and central to these new revisions are the changes taking into account today's digital environment," said Mamie Kresses, Vice President, Children's Advertising Review Unit, BBB National Programs. "In addition, recognizing the importance of diversity and inclusion in ad creative, the revised CARU Advertising Guidelines hold advertisers accountable for negative social stereotyping, prejudice, or discrimination."

Kresses added: "The Guidelines call on advertisers to recognize the power of their advertising to promote positive change, encourage responsible product use, and support the healthy development of the child."

The core principles of the CARU Advertising Guidelines have not changed. The Guidelines continue to address that advertising should be truthful and not misleading, clearly represent itself as advertising, and not depict or promote inappropriate or unsafe behavior. The Guidelines also continue to address the special responsibility of an advertiser when creating content for an audience of limited knowledge, experience, sophistication, and maturity.

The revised Guidelines:

- Move beyond television-centric to address and reflect today's digital advertising environment.
- Contain a new section dedicated to in-app and in-game advertising and purchases.
- Contain a new guideline requiring that advertising not portray or encourage negative social stereotyping, prejudice, or discrimination.
- Incorporate updated FTC guidance on endorsements and influencer marketing.
- Apply to children under age 13 across all child-directed content no matter the platform. The previous Guidelines applied primarily to children under age 12.
- More clearly spell out the factors that determine when an ad is primarily directed to children under age 13.
- Remove the children's privacy guidelines, included in the CARU Advertising Guidelines since 1996, to a separate document, the CARU Self-Regulatory Guidelines for Children's Online Privacy Protection.

Advertising approaches and technologies are constantly evolving. Interpretations of the CARU Advertising Guidelines will be updated on an ongoing basis through FAQs, as new challenges and questions about application of the Guidelines arise. As new FAQs about these Guidelines are released, they will be announced in the CARU section of the BBB National Programs website: bbbprograms.org/CARU

For in-depth training on these revisions to the Guidelines, industry professionals may register for [Kidvertising](#), scheduled for October 13, 2021. The CARU team will walk attendees through the changes, provide examples of real-world applications, and answer questions from attendees about what this might mean for campaigns in progress.

BBB National Programs also offers advertising [pre-screening services](#) to help companies, agencies, and developers spot and correct problems before child-directed advertisements and promotional websites go live.

Read the updated guidelines [here](#). Learn more about CARU [here](#).

Attachment 17



Self-Regulatory Guidelines for Children's Advertising

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Self-Regulatory Guidelines for Children's Advertising

1. Foundation of the Guidelines

The paramount principle underlying the Children's Advertising Review Unit (CARU) Advertising Guidelines is that advertisers should recognize that they have special responsibilities to children. Children have limited knowledge, experience, sophistication, and maturity. Advertisers should recognize that younger children have a limited capacity to evaluate the credibility of information, may not understand the persuasive intent of advertising, and may not even understand that they are viewing or hearing advertising.

While many influences affect a child's personal and social development, it remains the prime responsibility of parents to provide guidance for children. Advertising should not undermine this parent-child relationship.

Advertisers should capitalize on the potential of advertising to serve an informational role and influence positive personal qualities and behaviors in children, e.g., being honest and respectful to others, taking safety precautions, and engaging in physical activity. Advertising of products should encourage responsible use of the product with a view toward the healthy development of the child.¹

Advertisers should recognize the power of their advertising to promote positive change by reflecting the diversity of humanity and providing an inclusive space where all can feel valued and respected. Advertisers should strive to create content that is welcoming to children of all races, religions, cultures, genders, sexual orientations, and physical and cognitive abilities.

2. Scope

- a. These Guidelines apply to national advertising that is primarily directed to children under age 13 in any medium.
- b. Whether advertising is primarily directed to children, or to a particular age range of children, will be determined by an analysis of relevant factors, no one of which is controlling: subject matter; visual or audio content; use of child-oriented animated characters, child-oriented activities, or incentives; age of models; presence of child celebrities or celebrities who appeal to children; language or other characteristics; competent and reliable empirical evidence regarding audience composition; and evidence regarding the intended audience.
- c. Whether advertising complies with the Guidelines will be assessed based upon the particular age range of the children to whom it is directed.
- d. Placement or integration of a product, service, character, or brand in editorial, educational, entertainment, or other non-commercial content is not within the scope of these Guidelines unless such placement or integration constitutes an endorsement.

¹ CARU shares oversight of the self-regulation of advertising to children with the Children's Food and Beverage Advertising Initiative (CFBAI). CARU's Guidelines focus primarily on the substantive content of child-directed advertising and apply to any company that advertises products or services to children. In contrast, CFBAI is a pledge program under which participating companies agree to abide by certain Core Principles, which define what is covered by "food advertising to children," and then apply nutritional and media coverage. CFBAI's Principles apply only to those food, beverage, and restaurant companies that have committed to its Principles. For more information about CFBAI, visit <https://bbbprograms.org/programs/cfbai/home>.

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- e. Advertising should be neither deceptive nor unfair to the children to whom it is directed, as these terms are applied under the Federal Trade Commission Act.
- f. The online collection, use, or disclosure of children’s personal information is covered by the Children’s Online Privacy Protection Act² (COPPA) and the BBB National Programs’ Self-Regulatory Guidelines for Children’s Online Privacy Protection.

3. Definitions

- a. “Advertisement,” “Advertising,” or “Ad” means any commercial message or messaging primarily directed to children under age 13 (whether written, oral, or non-verbal) in Covered Media that promotes the sale of one or more products or services.³
- b. “Advertiser” means any person or other legal entity, including an Endorser, that engages in National Advertising.
- c. “Child” or “Children” means a person or persons residing in the United States of America who are under 13 years of age.
- d. “Clear” means easily understandable by ordinary Children.
- e. “Conspicuous” means presented in a manner that is easily noticeable, i.e., difficult to miss, by ordinary Children.
- f. “Covered Media” means all forms of media including, without limitation, all forms of print, television, radio, video, audio, internet, mobile, other digital media, influencer content, out-of-home, signage, sponsorships, event-based media, labeling, and the Advertiser’s websites, social media channels, and apps.
- g. “Endorsement” means any Advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of any individual or the name or seal of an organization) that Children are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring Advertiser, even if the views expressed by that party are identical to those of the sponsoring Advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the Endorser and may be an individual, group, or institution.⁴
- h. “Loyalty Program” means a marketing strategy created to reward Children who frequently shop at or use the services of a business. It can provide special incentives such as discounts or early access to new products.
- i. “National Advertising” means Advertising that is disseminated nationally or in a substantial portion of the United States or is test-market Advertising prepared for national campaigns.

² See 15 U.S.C. §§ 6501-6506.

³ Content generated by a user who has no material connection to the product, service, character, or brand mentioned or depicted in the content is not Advertising. However, if an Advertiser uses or incorporates such content in Covered Media, then the Advertiser’s use or incorporation of such content is Advertising.

⁴ Federal Trade Commission, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255(b).

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4. Guidelines

a. Deception

To ensure that Advertising directed to Children is not deceptive:

1. The overall or net impression of the entire Advertisement must not be misleading to Children, considering, among other things, the express and implied claims, depictions, any material omissions, and the overall format.
2. The Advertisement should be assessed from the standpoint of an ordinary Child, taking into account Children's levels of experience, sophistication, and maturity; limits on cognitive abilities; and ability to evaluate the claims being made.
3. Advertisers should have adequate substantiation for all objective claims conveyed by the Ad.

b. Product or Service Presentations and Claims

To avoid deceptive and/or inappropriate Advertising to Children involving product or service presentations and claims:

1. Copy, sound, and visual presentations should not mislead Children about product or performance characteristics. Such characteristics may include, but are not limited to, speed, method of operation, color, sound durability, nutritional benefits, and similar characteristics.
2. Presentations should not mislead Children about benefits from use of the product. Such benefits may include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency, or intelligence.
3. Claims should not unduly exploit a Child's imagination. While fantasy, using techniques such as animation and computer-generated imagery, is appropriate for Children, it should not create unattainable performance expectations nor exploit a Child's difficulty in distinguishing between the real and the fanciful.
4. Advertisements should demonstrate the performance and use of a product in a way that can be duplicated by Children.
5. Advertisements should not mislead Children about what is included with a purchase.
6. Advertising that compares the advertised product to another product should be based on product attributes and be understandable to Children.
7. The amount of product featured should not promote overconsumption or be more than would be reasonable to acquire, use, or consume by a person in the situation depicted. When showing food products in a group context, the amount of product shown should be proportionate to a serving for each group member and not be excessive.
8. Advertising of food products should not discourage consumption of or disparage: food provided by the Child's family or school;⁵ or fruits or vegetables, or other

5 The mere showing of a Child excited about a different food option is not necessarily considered disparaging food provided by the Child's family or school.

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food groups that the Dietary Guidelines for Americans recommend to support healthy eating patterns.

9. Advertisers should avoid depicting snack foods as substitutes for complete meals.

c. Material Disclosures

1. All disclosures material to Children should be Clear, taking into account Children's limited vocabularies and level of language skills. Simple words should be used, e.g., "You have to put it together."
2. All disclosures material to Children should be Conspicuous in the Advertising format and media used. In Advertisements with audio and video components, disclosures made in both audio and video are more likely to be noticed by Children and therefore most likely to be effective. When a claim requiring a disclosure, in an audio-video Advertisement, is made solely in audio or solely in video, a disclosure made only in the same format as the claim may be sufficient. In Advertisements longer than a few minutes, disclosures should be repeated periodically to increase the likelihood that Children will see/hear the disclosure.
3. A disclosure must not be contradicted by or inconsistent with anything else in the Advertisement.
4. Circumstances when material disclosures are needed include, but are not limited to, the following:
 - a. When unassembled products need to be put together.
 - b. When any item essential to use of the product is not included, such as batteries.
 - c. When depicted products, such as accessories or individual items in a collection, must be purchased separately.
 - d. When a telephone number is provided, that the Child must get a parent's or an adult's permission to call.

d. Endorsers and Influencers

1. Advertisers should recognize that the mere appearance of a celebrity, influencer, or authority figure with a product or service can significantly alter a Child's perception of the product or service. Advertising that uses such figures should not falsely imply that the use of the product or service enhanced the celebrity's, influencer's, or authority figure's performance.
2. All Endorsements should reflect the actual experiences and beliefs of the Endorser.
3. An Endorser who is represented, either directly or indirectly, as an expert must possess qualifications appropriate to the particular expertise depicted in the Endorsement.
4. Advertisers should ensure that Endorsements do not contain any claims, including in Endorser-generated content, that violate these Guidelines, or that if made by the Advertiser itself would require proof the Advertiser does not possess.

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5. Advertisers should ensure that their Endorsers Clearly and Conspicuously disclose that they have a material connection to the Advertiser (i.e., a connection that is not expected by ordinary Children).

e. Blurring of Advertising and Content

1. Advertisements must be easily identifiable as Advertising. Therefore, Advertising should not be presented in a manner that blurs the distinction between Advertising and non-Advertising content.
2. Given the increasing difficulty of distinguishing between Advertising and non-Advertising content, especially in the online context, Advertisers should take extra care to be transparent when Advertising to Children.
3. Some Advertising will require disclosures or contextual cues to help Children recognize it as Advertising. Attention to the wording used in Ads and common-sense design techniques, including text size and color, positioning, and other visual or contextual cues, such as the borders around or background shadings of Ads, can substantially increase the likelihood that Children will recognize an Ad as an Ad and reduce the potential for Children to be misled. Some Advertising, due to its wording, design, and context, may be so clearly commercial in nature that it is likely to be recognizable as Advertising even without a specific disclosure, e.g., traditional linear television commercials or, in many instances, an Advertiser’s own branded websites, social media channels, or apps.
4. Host-selling⁶
Prohibited practices in television Advertising:
 - a. Program personalities, live or animated, should not be used to Advertise products, premiums, or services in or adjacent to a television program primarily directed to Children, in which the same personality or character appears.
 - b. Products derived from or associated with a television program primarily directed to Children should not be Advertised during or adjacent to that program.
5. In online services directed to Children, Advertisements integrated into the content of a game or activity should be easily identifiable as Advertising.

f. Premiums, Loyalty Programs, Sweepstakes, and Contests

Because the use of premiums, Loyalty Programs, sweepstakes, and contests have the potential to enhance the appeal of products to Children, Advertisers should take special care in using these kinds of promotions to guard against exploiting Children’s immaturity.

1. Premiums
 - a. Since Children may have difficulty distinguishing an advertised product from an advertised premium, Advertising that contains a premium message should focus the Child’s attention primarily on the product.
 - b. Conditions of a premium offer should be Clearly and Conspicuously disclosed.

⁶ See Children’s Television Act, 47 U.S.C. §§ 303a, 303b, 394.

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2. Loyalty Programs
 - a. Before signup, Advertisers should Clearly and Conspicuously disclose all the rules and conditions of the Loyalty Program.
 - b. This disclosure should be proximate to and Conspicuously placed where Children sign up and include the following information:
 1. How points or rewards are accumulated and redeemed.
 2. When points or rewards expire.
3. Sweepstakes and Contests
 - a. Advertisers should recognize that Children may have unrealistic expectations about the chances of winning a sweepstakes or contest or inflated expectations of the prize(s) to be won.
 - b. The prize(s) should be Clearly and Conspicuously depicted.
 - c. The free or alternative means of entry should be Clearly and Conspicuously disclosed.⁷
 - d. The likelihood of winning should be Clearly and Conspicuously disclosed. Disclosures such as “Many will enter, a few will win.” should be used, where appropriate.
 - e. All prizes should be appropriate for Children.

g. Online Sales

1. If an Advertiser offers the opportunity to purchase any product or service through a “click here to order” button or other on-screen means, the ordering instructions must Clearly and Conspicuously state that a Child must have a parent’s or an adult’s permission to order.
2. Online Advertisers must make reasonable efforts, in light of all available technologies, to provide the person responsible for paying for such products and services the means to exercise control over the transaction.⁸
3. If no reasonable means is provided to avoid unauthorized purchases by Children online, the Advertiser should provide a reasonably accessible method to enable the person responsible for payment to cancel the order and receive full credit without incurring any charges.

h. Sales Pressure

1. Advertising should not urge Children to ask parents or others to buy products. It should not suggest that a parent or adult who purchases a product or service for a Child is better, more intelligent, or more generous than one who does not.
2. Advertisers should avoid using sales pressure in Advertising to Children, e.g., creating a sense of urgency by using words such as “Buy it now.”

⁷ Advertisers’ contests or sweepstakes should not require the child to provide more information than is reasonably necessary. Any online information collection must meet the requirements of the BBB National Program’s Self-Regulatory Guidelines for Children’s Online Privacy Protection and COPPA.

⁸ Requiring the use of a credit card in connection with a transaction is a reasonable effort to provide the person responsible for payment with control over the transaction. This is consistent with COPPA regulations. See 16 C.F.R. § 312.5(b).

Self-Regulatory Guidelines for Children's Advertising

3. Advertisements should not convey to Children that possession of a product will result in greater acceptance by peers or that lack of a product will result in less acceptance by peers.
4. Advertisements should not imply that purchase or use of a product will confer upon the user the prestige, skills, or other special qualities of characters appearing in Advertising.
5. Advertisements should not minimize the price of goods and services with words such as "only," "just," or "bargain price" that Children do not understand to be exaggeration or "puffing."

i. In-App or In-Game Advertising and Purchases

1. Advertisements, apps, or games should not use unfair, deceptive, or other manipulative tactics, including but not limited to deceptive door openers or social pressure or validation, to encourage ad viewing or in-app or in-game purchases, or to cause Children to inadvertently or unknowingly engage with an ad.
2. Any methods provided to dismiss or exit an Advertisement must be Clear and Conspicuous to Children.
3. Advertisements, apps, or games that allow Children to make purchases must make it Clear that the purchase involves real currency.

j. Unsafe and Inappropriate Advertising to Children

Advertisements must not condone or encourage practices that are detrimental to Children's health.

1. Safety
 - a. Advertisers should take into account that Children are prone to exploration, imitation, and experimentation and may imitate product demonstrations or other activities depicted in Advertisements without regard to risk.
 - b. Advertisers targeting Children should not knowingly advertise products that are illegal to sell to Children or pose a risk to their health and safety, e.g., tobacco, e-cigarettes, alcohol, or prescription drugs.
 - c. Advertising for products that are labeled "Keep out of Reach of Children" but are of benefit to Children, e.g., sunscreen or Child-targeted dental products, can be advertised to Children as long as they are shown being used as directed. Ads showing Children using the product should depict adult supervision. In such cases, Advertisers must be able to support the implied claim that the product does not present a danger to Children.
 - d. Advertisements for Children's products should show them being used by Children in the appropriate age range. For instance, young Children should not be shown playing with toys safe only for older Children.
 - e. Advertisements should not portray adults or Children in unsafe situations or in acts harmful to themselves or others. For example, when activities (such as bicycle riding or skateboarding) are shown, proper precautions and safety equipment should be depicted; when an activity would be unsafe without adult supervision, supervision should be depicted. This Guideline does not apply to the portrayal of animated or fanciful characters licensed from third parties.

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- f. Advertisers should be aware that many childhood injuries occur from the misuse of common household products and should avoid demonstrations that may encourage inappropriate use of such products by Children.
2. Inappropriate Advertising
 - a. Advertisers should take care to ensure that only age-appropriate games, videos, films, and interactive software are advertised to Children and, if an industry rating system applies to the product, the rating label is prominently displayed.⁹
 - b. Advertising should be respectful of human dignity and diversity. Advertising should not portray or encourage negative social stereotyping, prejudice, or discrimination.
 - c. Advertising should not include material that could unduly frighten or provoke anxiety in Children, that portrays or encourages behavior inappropriate for Children (e.g., violence or sexuality), or that is otherwise inappropriate for Children.
 - d. Advertisers should not knowingly link to content that could unduly frighten or provoke anxiety in Children, that portrays or encourages behavior inappropriate for Children (e.g., violence or sexuality), or that is otherwise inappropriate for Children.

⁹ Violations of this Guideline may be brought to the attention of the relevant rating entity.

Attachment 18

New CA Law Targets Gender Stereotyping in Toy Retailing

By Terri Seligman

Published January 2, 2024

A new year means new laws, rules and regulations. Advertising and consumer protection laws are no exception. We already posted about [New York's amendments to its auto-renewal statute](#), and the [FDA's new rule and guidance on direct-to-consumer prescription drug advertising](#). But did you know about the new law in California, which was signed in 2021 but just went into effect on January 1, 2024, requiring retailers to provide gender neutral sections for the toys they sell?

[AB 1084](#) amends the state's Unruh Civil Rights act to require a retail department store that is (i) physically located in California; (ii) has a total of 500 or more employees across all California retail department store locations; and (iii) that sells childcare items or toys to maintain a gender neutral section or area in which a reasonable selection of the items and toys for children that it sells shall be displayed, regardless of whether they have been traditionally marketed for either girls or for boys. So, retailers that have typically segregated their Barbies from their Legos now must also maintain a single section for both. State and local regulators are empowered to bring enforcement actions and violators are liable for a civil penalty not to exceed \$250 for a first violation or \$500 for a subsequent violation. There is no private right of action specifically provided for in new section. Not surprisingly, an argument in support of the legislation was concern about the pernicious effects of gender stereotyping. One proponent, Equality California, stated "Implying or stating that certain children's products are only appropriate for certain genders stifles the ability of California's youth to grow as their authentic selves, reinforces harmful gender stereotypes in the minds of people of all ages and has measurable mental health implications." Interestingly, proponents also cited the pernicious effect of the junior pink tax: apparently not only are products and services marketed to adult women priced higher than those marketed to adult men, but toys are too.

The law defines "childcare item" as any product designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething, which means that the stores covered extend beyond traditional toy stores. And "toy" is defined as something intended for those 12 or under to play with.

The law specifically allows the retailer to label the gender neutral section at its discretion. And it does not require the retailer to have three toy sections: a retailer could just sell all toys in one gender neutral toy section for all kids. However, it's unclear what constitutes a "section or area": could a retailer segregate the Barbies from the Legos by shelf without triggering the application of the statute? How big does the toy-dedicated space have to be to constitute a "section or area": would a few toys at the cash register in a general

purpose store constitute a “section” or “area”? I’m guessing that the state may proceed cautiously in enforcing the new law given some of these ambiguities.

What is clear is that retail stores in California must now recognize what kids have always known: it’s fun to play with all kinds of toys and there’s really no such thing as a boy’s toy or a girl’s toy. What’s also clear is that a new law like this, as well as [NAD’s recent case](#) addressing sexist video game ads, shows both that gender stereotyping is alive and well and that the adults in the room are taking steps to address it. Will pay equity be next?

Attachment 19

Advertising Self-Regulatory Codes Around the World Generally Prohibit Discrimination, According to New ICAS Report

By Jeffrey Greenbaum

Published: August 3, 2020

At the end of July, the International Council for Ad Self Regulation released a [report](#) on whether advertising self-regulatory standards around the world address non-discrimination. The report, which is based on a survey that was conducted of ICAS members at the end of 2019, found that all of the countries that participated in the survey -- except for the United States -- include the principle of non-discrimination.

ICAS noted that the [ICC Advertising and Marketing Communications Code](#) states that, "Marketing communications should respect human dignity and should not incite or condone any form of discrimination, including that based upon ethnic or national origin, religion, gender, age, disability or sexual orientation."

ICAS also identified the following jurisdictions, among ICAS members, that have general self-regulatory codes which address non-discrimination issues: Australia, Belgium, Brazil, Canada, Chile, France, Ireland, India, Netherlands, New Zealand, Peru, Phillipines, Portugal, Romania, Spain, United Kingdom, and South Africa.

ICAS reported that most non-discrimination issues handled by self-regulatory organizations related to gender portrayal and racial discrimination.

Noting that several self-regulatory organizations reported that they are working on new standards, or are updating existing standards, on non-discrimination, ICAS said that it planned to conduct a new survey in 2020, "to update the current report and to provide and additional in-depth view on how the rules are enforced and what SROs and the Advertising Industry are doing to fight racism and intolerance in advertising."

In light of the renewed focus in the United States, and around the world, on racial justice issues, it will be interesting to see whether the National Advertising Division -- which is the primary advertising self-regulatory program in the U.S. -- revises its own [procedures](#) to address non-discrimination issues. Unlike many self-regulatory organizations around the world, the NAD doesn't enforce a specific advertising code. Instead, its jurisdiction is currently limited to addressing questions related to the "truth or accuracy of national advertising." It is worth noting, however, that one of the core principles of the Children's Advertising Review Unit's [code](#) -- which generally covers advertising directed to children under age twelve -- is that, "Advertisers should avoid social stereotyping and appeals to prejudice, are encouraged to incorporate minority and other groups in advertisements and to present positive role models whenever possible."

Thank You!

These materials may not address all applicable issues or be relevant to all situations and are not intended to be legal advice.