Baker Hostetler

Baker&Hostetler LLP

Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304

T 202.861.1500
F 202.861.1783
www.bakerlaw.com

Barry J. Cutler
direct dial: 202.861.1572
BCutler@bakerlaw.com

August 9, 2011

VIA ELECTRONIC MAIL and HAND DELIVERY

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
Room H-113 (Annex)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments about Planned Revisions to the 2000 "Dot Com Disclosures: Information About Online Advertising" - FTC Matter No. P114506

Dear Secretary Clark:

I submit this comment on behalf of the Electronic Retailing Association ("ERA") in response to the Commission staff's invitation to address questions about planned revisions to the 2000 Dot Com Guidelines. Given that the 2000 guidance was based primarily, if not exclusively, on Internet advertising, we agree that this is a good time for a fresh look.

The ERA is a leading trade association in the U.S. and international markets that represents leaders in the direct to consumer marketplace. The members maximize revenues through electronic retailing utilizing the television, Internet, radio and other devices. ERA works with regulators and legislators to create a favorable climate that ensures e-retailers' ability to bring quality products and services to consumers in this $300 billion marketplace.

ERA represents more than 450 companies in 45 countries with membership consisting of e-commerce companies, traditional advertisers, home-shopping networks, direct response marketers and associated supplier categories, including call centers, fulfillment companies, international distributors and payment processors. Member companies include some of the world's most prominent retail merchants such as Allstar Products Group, eBay, Discovery Communications, Gaim, Google, Guthy-Renker, HSN, Oak Lawn Marketing, Product Partners, QVC, Telebrands, ShopNBC and Thane.

ERA was originally formed in 1990 for short- and long-form broadcast ads, particularly on television and radio. During two decades, its scope has broadened to newer forms of retailing through devices other than TV and radio. ERA members now use a broad range of communications, including smart phones and other mobile devices, both to advertise their products and to complete their transactions.

A. DISCUSSION

The issues and concerns that led up to the original Dot Com Disclosure Guidelines in May, 2000 seemed quite serious and complex at the time. Specifically, the Internet presented novel issues that had not been seen in other, more traditional media. For example, although viewers with a 13-inch television screen saw the very same "page" (although smaller) as viewers with a 26-inch screen, the appearance of the same material on a 13-inch computer monitor screen could appear quite differently than the presentation of that same material on a 17-inch screen. One might find the entire "page" on a single 17-inch screen, while someone else might have to scroll down on a 13-inch screen to see the same material. And, the differences in these screen size examples from the year 2000 pale by comparison with the differences consumers face in browsing websites on a handheld device versus a computer monitor of any size.

Another distinction was the total viewing experience. Different consumers starting at the same home page of a computer website might arrive at a qualifying disclosure on the same website via a very different route than others, depending on what pages were clicked or scrolled and in what order. Specifically, consumers may have acquired different information along the way, depending on their pathway, perhaps making the disclaimer more or less clear to some than to others.

To deal with such disparities in presentation, the Commission adopted some very broad concepts, such as a requirement of "unavoidability," so that consumers in differing situations would find it hard to miss the material disclosure. Although there have been some disputes about "unavoidability" at the edges, the concept conveyed pretty good guidance to ad writers.

The perceived challenges of the original Guidelines seem pretty simple today through the lens of 2011 technology. Even a small laptop will display ad materials and accompanying disclosures very differently than a Blackberry, a Smart Phone, or other handheld devices. The attention span and visual quality for a person seated at a computer or laptop likely will be very different from those a person who is moving while using a small phone or other handheld device. Some communication forms, such as tweets, are limited to 140 characters of plain text only that sharply contrast with other message forms that can use much more text and incorporate icons and other graphics, including links that click through to another page.

These examples go beyond modest technological changes. They represent a sea of change that will force the Commission to think very differently and solve very different problems than it did eleven years ago. Some basic principles emerge:

- There can be no "one-size-fits-all" solutions. The notion of "unavoidability," for example, will be very different for, *e.g.*, computers versus handheld devices.

- Assumptions about what will be "clear and conspicuous" to consumers who may be sitting at a desktop versus moving with small handheld devices will be difficult to intuit and may need testing and empirical data to appreciate what the term requires in actual practice for different contexts.

- It may be much more difficult for the Commission to decide whether a disclosure form or technique, *e.g.*, a tweet or text message, is adequate without doing tests with actual consumers to determine how disclosures work in real-life conditions.

- Unlike the long Appendix of Mock Ads attached to the 2000 Guidelines, paper or fixed graphics may not adequately communicate how a disclosure should be made in various 2011 contexts. The Commission should develop "online" video clips that simulate the actual use of disclosures to make clear the intended standard.

- The Commission's guidance will need to contain "performance standards" rather than "design standards." As implied above, even some performance standards may not be adequate to apply to all new forms of communications.

- Try as it may, the Commission cannot anticipate all changes in technology and communications to ensure that its revised Guidelines will not be obsolete, at least in part, even over the next three to five years. The FTC should favor clear general principles over detailed examples that may have a short shelf-life.

With these principles in mind, we turn to some of the specific questions posed by the FTC staff.

B. DISCUSSION OF STAFF QUESTIONS

Question 1: Issues raised by new online technologies.

The Commission over the years has crafted criteria for "clear and conspicuous" in varying contexts, *e.g.,* print, TV, radio, and telephone. These are used regularly in consent agreements and litigated orders. We think they have served their purpose well until now, but these standards must be updated for the newer communications devices and formats. The Commission will need to demonstrate some flexibility on elements such as font size, format, graphics, and placement. As we discuss below, the Commission also will likely have to prioritize content disclosures in ads that arise long before consummation of a transaction. Advertisers will still have to deal with "conspicuous" standards, but the requirement that a disclosure be "on the same page" or even the same medium as the qualified claim simply will not be workable in some contexts.

The FTC should consider standards to permit disclosures on alternate "pages" because mobile devices have small screens and Twitter "pages" or tweets are very short and allow only 140 characters.[1] Without this latitude, ERA already has heard from members who are unable to utilize certain technology for advertising campaigns, *e.g.,* sweepstakes, that require a considerable amount of mandated disclosures. This is problematic. The FTC should explore, test and adopt disclosure techniques that do the necessary job but without inhibiting the full legitimate use of new technology for marketing. This issue will get harder, not easier, over time.

Question 2: Issues with new technologies "on the horizon" that should be addressed.

As one may infer from the discussion above, to a large extent it is futile to try to anticipate the new hardware and software that will come out of the explosion in new communications devices and techniques. One thing is clear—certain requirements such as long disclosures "on the same page" simply cannot work in some formats like Twitter and others. There are and will be many other examples.

This is an old concern in a new context. In the 1990's, automobile dealers were required to disclose some auto lease terms that were nearly impossible to disclose in an intelligible manner to consumers in a 15- to 30-second broadcast ad. The inevitable result was six to eight lines of small type at the bottom of an otherwise ordinary car lease ad. After FTC challenges and Congressional hearings, it was agreed that some of these disclosures could be made in full on a website or taped toll-free telephone message independent of the broadcast ad, so long as certain basic information appeared in the ad.[2] The approach solved the problem at that time.

The same challenge now arises for new communications technology. The options may go far beyond the internet and recorded telephone messages. The Commission will have to consider what alternatives would work for each of the new media that are and will be available.

Once again, this is an old concern in a new context. Current rules require that disclosures be made *prior to* when a customer purchases a product. As long as forty years ago, regulators found ways in the Mail Order Sales TRR and under the Truth-in-Lending Act (Regulation Z), respectively, to allow advertisers to defer some disclosures until the details of the transaction were more clear, but still in time to benefit consumers prior to consummation of the purchase. In the context of today's and future mobile devices, sellers need to be allowed comparable opportunities to comply after the initial advertising contact with a consumer but prior to the time a consumer commits to a transaction.

---

[1] To put this in perspective, several of the exhibits to the 2000 Guidelines have disclaimers for "typicality" and "paid endorsers" that alone would consumer 50 to 70 of the characters available for the entire tweet.

[2] The problem was even worse on radio ads, where the long disclosure, which could consume the entire time of the ad, had to be spoken with no video to provide context.

The Commission should consider logos and icons that can simply link preliminary ad language to more extensive disclosures in another medium or format. An icon, for example, could become an industry standard that would be recognized as a link or direction for additional disclosure information. The public today is much more sophisticated than in 2000 about how such transfer techniques are used on the internet and in other communications and it should be adequate to guide them to disclosures more easily than in the early days of the Internet.

But even such an approach will not work the same way in all instances. An icon like an online behavioral advertising icon could be workable in some contexts, but it could not work on Twitter, which uses limited amounts of text and characters exclusively. In other situations involving Twitter, the FTC already has considered using a truncated text disclosure for the recent Endorsement Guidelines. Perhaps a hash-tag may be used in some small text format advertising to indicate there are other disclosures, *e.g.,* #ad or #details. The point remains, as above, that the "one-size-fits-all" approach will no longer work here.

Question 4-5: Research regarding online consumer behavior and effectiveness of disclosures.

These are, perhaps, the most important questions the Staff has raised because they open the door to reliance on empirical data over the knee-jerk assumptions that have informed some consumer disclosure rules and guides in the past, both at the FTC and throughout government. In short, the question should not be solely related on "how to make" disclosures in the new and future technological age. The topic must also include "what disclosures are really necessary for consumers in the first place."

In the past, piling up disclosures in print ads (newspapers and catalogs) and even broadcast ads was the normal, expected approach until a situation like the "auto lease" ads proved that the system was broken. Now, with the advent of handheld devices and texting (including tweets), the Commission must consider, and hopefully develop evidence, not only about the technique of disclosures but the content of necessary disclosures as well.

Any amendment to the Guidelines should not automatically presume that it is necessary to require full disclosure about every claim qualification, privacy policy or term of service, and even explanation of all offer terms, either immediately next to those claims or in a way that unnecessarily clutters the screen or otherwise causes customer confusion. There should be an acceptance by the FTC both that it is unnecessary and not feasible to require the disclosure of every possibly relevant fact on the same page or screen of every advertisement. There needs to be a realization that these full terms, conditions and disclosures can be on additional pages that may even be in a different medium, *e.g.:* a TV ad that sends consumers to a dot com page; Twitter's sending a consumer to a company website; or a text alert of 140 characters that links to a web page. In addition, the Commission needs to accept that consumers do not need all of this "required" information upon viewing advertising that is the very first step in the selling process.

The high-water mark of this phenomenon may have been the above-referenced auto lease ads,[3] which truly demonstrated the different mindset of the Commission versus advertisers at the time. The mandated disclosures included not only lease terms such as duration and monthly payments (very material), but the fact that there was a $175 early termination fee or a per mile charge over an annual allowance.

To the Commission (and the Federal Reserve Board), it was important for consumers to understand virtually the entire transaction before contacting a dealer for more information. To manufacturers and dealers, the high priorities of the ads were (1) to get consumers thinking about looking at a certain brand and model, and (2) to educate them that financing by lease was an option to outright purchase. At the risk of hyperbole, it was no more important to consumers to know through the initial ad the cost per overage mile than the colors available for the advertised model.[4]

This citation to auto lease ads is informative because it is representative of the "everything up front" bias of the rules and guides of a simpler age. With the technology of the last decade and the next, such a luxury of unlimited detail, simply cannot be an option. In addition, the Commission should focus, as much as possible, on performance guides that cut across types of media.

The best way to do this is for the Commission to conduct, and encourage others to submit, research (and comments) both on what information consumers think they need in an initial ad and the most effective ways to communicate that information in the new era of communications. The Commission has used such research in the last 15 years. Examples are "Made in USA" and "typicality disclaimers." Though neither was free of controversy,[5] both produced the kinds of evidence that could be helpful in today's Brave New World of telecommunications.

In fact, the FTC should act on two fronts here. The first is to produce mock ads and disclosures in various media (handhelds, tweets) for the rulemaking record to make sure that the method it is selecting is feasible in actual practice. The second is to incorporate these mock ads into the actual published guidance to demonstrate, not just describe, how it believes disclosures should be made.

---

[3] The undersigned was counsel to a trade association of auto manufacturers that were heavily involved in the Reg M campaign, both as potential defendants and reformers who sought a solution to the problem of disclosures that could not be read by consumers in the time-frame of a short ad.

4 Once a consumer became interested in a particular brand and a financing option, there would be no dearth of opportunities to drill down to the fine details of leasing. Putting the various potential disclosures on an equal footing both cluttered up the ad beyond hope (many lines of text at the bottom of the screen of a 15-second ad) and made it very hard for consumers to isolate the elements of the lease (*e.g.*, monthly payments) that really mattered to them.

[5] The Made in USA data was extremely useful but, as we know, was mooted by political factors outside the Commission's control. While many advertisers believed that the Commission's "typicality" copy test was flawed and overextended in application, it nevertheless was a positive attempt to get empirical data that was relevant to the issue generally.

The exhibits in the 2000 Guides, for example, adequately demonstrated what the Commission wanted in the context of simple jewelry ads. Advertisers in the new media will need more visual and "real time" video examples to see and comprehend what the Commission expects now. Incorporation of actual examples, including videos, into the Guides will, of course, also serve the first goal of confirming that the FTC's approach is technologically feasible.

C. CONCLUSION

ERA appreciates the opportunity to submit comments now and to participate in this matter as it unfolds. In short, the Commission must look beyond the issue of how to make clear disclosures in today's media (which is hard enough). It must also understand what information consumers really need in the very first ad versus what they can defer until before a transaction is finished. This will take considerable empirical data and trade-offs so that the benefits of new technology are not scuttled by 20th Century notions about how and when disclosures should be made.

Sincerely,

Barry J. Cutler
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
Counsel for ERA