

August 10, 2011

Via Electronic Filing

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

RE: P114506—Comments of the Direct Marketing Association and the Association of National Advertisers on the FTC’s Dot Com Disclosures Business Guidance Publication

Dear Secretary Clark:

The Direct Marketing Association (“DMA”) and the Association of National Advertisers (“ANA”) (collectively the “Associations”) are pleased to submit these comments in response to the Federal Trade Commission’s (“FTC” or the “Commission”) invitation for comments regarding its Dot Com Disclosures business guidance publication (the “Guidance”).

The DMA (www.the-dma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. The DMA advocates industry standards for responsible marketing; promotes relevance as the key to reaching consumers with desirable offers; and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, the DMA today represents thousands of companies from dozens of vertical industries in the United States (U.S.) and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

Founded in 1910, the ANA (www.ana.net) leads the marketing community by providing its members with insights, collaboration, and advocacy. ANA's membership includes 400 companies with 10,000 brands that collectively spend over \$250 billion in marketing communications and advertising. ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote, and protect all advertisers and marketers.

The Associations support the principles embodied in the existing Guidance and recommend that the Commission maintain this approach that has worked so well over the past decade. The Associations also recommend that the Commission not subject

emerging technologies and channels, including mobile and social media, to reflexive, proscriptive rules, which run the risk of stifling innovation and damaging the rich online economy.

I. The Guidance Should Continue to Promote Responsible Online Marketing And Should Not Be Abandoned

As the leading global trade associations promoting responsible multichannel marketing and advertising, the Associations and our members live by the three basic principles reiterated by the Guidance—advertising must be truthful and not misleading; advertisers must be able to substantiate both express and implied claims; and advertisements cannot be unfair. Since its original publication, the Guidance has encouraged the growth of the online marketplace while protecting consumers, and the Associations recommend that the Commission continue supporting this flexible, adaptable framework.

In 2000, when the Guidance was published, the Internet was still seen as a “new frontier” by consumers. Against this backdrop, a primary concern of online retailers was developing consumer trust in this emerging marketing and retail channel. The primary message of the Guidance—that the same general principles of advertising law and consumer protection apply to online commerce—served to assure consumers regarding the online channel.

Consumer behavior overwhelmingly demonstrates consumer confidence in online commerce. Online commerce in the United States continues to rapidly rise. One research study reports that the proportion of the general U.S. population that has purchased products such as books, music, toys or clothing online rose from 36% to 52% in the period from May 2000 to May 2010. The proportion of the general population that has made travel reservations or bought travel services online rose from 22% to 52% in the same time period.¹ In 2010 alone, more than 106 million consumers planned to shop on Cyber Monday – a considerable jump from the previous year’s count of 96.5 million, and nearly double the rate of five years ago.² Over seven million of those consumers planned to use their smart phones for Cyber Monday shopping.³ This activity is driven by responsible marketing, which informs consumers about products and provides information to assist with online purchasing decisions.

There has been an unprecedented explosion in consumer confidence in the online marketplace, evidenced by exponential growth in online commerce, in the eleven years

¹ Pew Internet Project, *Online Product Research* (Sept. 29, 2010), available at <http://www.pewinternet.org/~media/Files/Reports/2010/PIP%20Online%20Product%20Research%20final.pdf>.

² Press Release, Shop.org, Over 106 Million Americans to Shop on Cyber Monday, According to Shop.org Survey (Nov. 28, 2010), available at <http://www.shop.org/press/20101128>.

³ Press Release, comScore, Billion Dollar Bonanza: Cyber Monday Surpasses \$1 Billion in U.S. Spending as Heaviest Online Shopping Day in History (Dec. 1, 2010), available at http://comscore.com/Press_Events/Press_Releases/2010/12/Billion_Dollar_Bonanza_Cyber_Monday_Surpasses_1_Billion_in_U.S._Spending.

since publication of the Guidance. This clearly demonstrates that the approach taken by the Commission has been extremely successful.

The Associations believe it is of paramount importance that the existing framework be maintained in order to continue fostering growth in the online marketplace while protecting consumers. Absent a specific showing that consumers are no longer being served by this framework, the principles that companies have relied upon for the previous decade should continue to guide them going forward.

The Internet has grown into a comprehensive repository of consumer information. The Guidance makes clear that important information once provided to consumers in “written” or “printed” form can now be provided online.⁴ Aside from important information provided to consumers prior to purchase, consumers have grown accustomed to visiting the homepages of their favorite electronics or appliance brands to download copies of owners’ manuals and warranty information or find technical troubleshooting advice. For many consumers, the Internet is the preferred source for product information before, during, and after a purchase.

Many of the recommendations in the Guidance have become commonplace practices since its first publication. For example, the Guidance urges companies to take advantage of the email address provided by consumers to communicate important information to consumers, such as a delayed shipment time.⁵ The practice of providing consumers with email confirmation, often containing information on estimated processing and shipping time, with a follow-up email upon shipment, is now ubiquitous. Consumers have come to expect these types of transactional communications to occur over email. The Guidance also speaks about using text or visual cues to encourage consumers to scroll or avoiding webpage formats that discourage scrolling.⁶ It is now a widespread practice to permit consumers to press “next” and move forward with a transaction only after the consumer scrolls through disclosures or a terms and conditions document.

The existing Guidance continues to protect consumers. Its recommended practices have widely become incorporated into the e-commerce landscape and have come to play an important role in helping consumers navigate online purchases. The Commission’s flexible approach recognizes that businesses can comply with the concepts set forth in the Guidance through a variety of means and are free to select the technological approach that best supports the integrity of their creative design. In light of its proven effectiveness, the Commission should largely retain the existing framework in the Guidance. Instead of developing a new framework out of whole cloth, the Commission should focus on simply clarifying and refining the current approach.

⁴ Guidance, p. 15.

⁵ Guidance, p. 16.

⁶ Guidance, p. 7.

II. Industry Self-Regulation Continues To Represent The Best Approach

The Associations firmly believe that industry self-regulation continues to represent the best approach for promoting the practices outlined in the Guidance. The DMA and the Council of Better Business Bureaus (“CBBB”) both maintain robust self-regulatory programs that reflect the Guidance. The comprehensive *DMA Guidelines for Ethical Business Practice* (“DMA Guidelines”) incorporate the principles outlined in the Guidance, ensuring that DMA members fully embrace those best practices, as well as other applicable laws and Commission guidance, as part of their standard business procedures.

The Guidance, for example, requires advertisers to provide “clear and conspicuous” disclosures in connection with online advertisements, if the disclosure is required to prevent deception or to provide consumers with material information.⁷ Similarly, the DMA Guidelines urge advertisers to gauge whether their disclosures are clear and conspicuous by looking towards the (1) placement of the disclosure in an advertisement; (2) its proximity to the claim it is qualifying; and (3) the prominence of the disclosure.⁸ To meet these standards, under the current DMA Guidelines, companies commit to the following:

- All offers should be clear, honest, and complete so that the consumer may know the exact nature of what is being offered, the price, the terms of payment (including all extra charges) and the commitment involved in the placing of an order. ... Advertisements or specific claims that are untrue, misleading, deceptive, or fraudulent should not be used.⁹
- Simple and consistent statements or representations of all the essential points of the offers should appear in the promotional material. The overall impression of an offer should not be contradicted by individual statements, representations, or disclaimers.¹⁰
- Representations which, by their size, placement, duration, or other characteristics are unlikely to be noticed or are difficult to understand should not be used if they are material to the offer.¹¹
- All descriptions, promises, and claims of limitation should be in accordance with actual conditions, situations, and circumstances existing at time of the promotion.¹²

⁷ Guidance, pp. 4-5.

⁸ Guidance, p. 5.

⁹ Guidelines, Article 1.

¹⁰ Guidelines, Article 2.

¹¹ Guidelines, Article 3.

¹² Guidelines, Article 4.

- Photographs, illustrations, artwork, and the situations they describe should be accurate portrayals and current reproductions of the products, services, or other subjects they represent.¹³

The DMA Guidelines also provide DMA members with more specific guidance on a variety of related marketing practices, including use of the word “free” and similar representations,¹⁴ price comparisons and warranties,¹⁵ sweepstakes,¹⁶ and testimonials and endorsements¹⁷ – all in a manner consistent with the Guidance.

Through these examples and many others, the DMA Guidelines provide DMA member companies with a comprehensive blueprint for ethical marketing practices. Compliance with the DMA Guidelines is required for all DMA members, and the DMA takes action to enforce compliance by its members. In addition, companies that represent to the public that they are DMA members but fail to comply with the DMA Guidelines may be referred to the Commission for investigation.

The DMA has a long history of proactive and robust enforcement, and the DMA Guidelines have been applied to hundreds of cases concerning deception, unfair business practices, and other ethics issues. The DMA’s Committee on Ethical Business Practice examines promotions and practices that may violate DMA Guidelines. The Committee works with both member and non-member companies to gain voluntary cooperation in adhering to the Guidelines and to increase good business practices. If a company fails to rectify its practices through this voluntary process, the case can be referred for Commission investigation of potential liability pursuant to the FTC’s authority to enforce Section 5’s prohibition against unfair or deceptive acts or practices.

The advertising industry system of self-regulation, including the National Advertising Division of the Council of Better Business Bureaus (NAD), the CBBB’s Children’s Advertising Review Unit (CARU), the Electronic Retailing Self-Regulation Program (ERSP) and the National Advertising Review Board (NARB), are instrumental in assuring that advertising published in any medium, including online or mobile, provides consumers with the information necessary to make informed choices, including, where necessary, clear and conspicuous disclosures of material information.

NAD examines advertising that is national in scope, including advertising that appears at company or third-party websites, in online videos, Twitter feeds and blogs. ERSP reviews core claims in direct-response advertising to assure that claims are truthful, accurate and not misleading. CARU reviews websites directed to children under the age of 12 and since 1996 has had in place specific guidelines related to online privacy protection. NARB, the appellate unit of the self-regulatory system, examines issues appealed from the NAD or CARU level. Recent NARB decisions have addressed

¹³ Guidelines, Article 7.

¹⁴ Guidelines, Article 17

¹⁵ Guidelines, Articles 18 and 19.

¹⁶ Guidelines, Articles 22-27.

¹⁷ Guidelines, Article 21.

disclosures in online advertising for claims related to high-speed Internet service, retail loyalty programs and advertising formatted to appear as news content.

Each of the self-regulatory units, through their casework, provide detailed guidance to advertisers on what constitutes clear and conspicuous disclosures, including whether the disclosures are sufficiently prominent, understandable to consumers, and do not contradict the main claims in the advertisements. The self-regulatory system provides independent oversight to assure that advertising claims are truthful, accurate and not misleading. Should an advertiser decline to participate in the self-regulatory process or fail to abide by the terms of a decision, the self-regulatory system may refer the claims at issue to the FTC or other federal regulatory agency for further review. Over 6,000 self-regulatory decisions provide case specific guidance for advertisers in a broad array of actual situations.

The DMA and NARC/BBB self-regulatory programs demonstrate how industry carefully considers the Commission's guidance, then goes on to develop detailed and dynamic policies that cover the full range of situations that advertisers face. Self-regulation has the powerful benefit of being able to respond immediately to specific situations as they arise, to evolve or create new guidance as situations change, and to provide swift investigation of and enforcement against bad actors. It remains the most responsive, effective, efficient, and appropriate way to promote responsible marketing and advertising.

III. Mobile Marketing Should Be Given Time To Develop Best Practices Tailored To This New Marketing Channel

The Commission has expressed interest in the rise of mobile devices and the unique issues raised by marketing through this new channel. Mobile marketing enriches consumers' daily lives by supporting a host of exciting and innovative tools and services designed specifically for mobile devices. Consumers have flocked to such resources, and have widely embraced marketing through mobile technologies, including the ability to get special offers or compare products while shopping, or to access product-supported apps for entertainment, news, and productivity purposes.

With the many benefits of the mobile environment come new challenges. The mobile space is differentiated by its limited "real estate"—small screen sizes, graphics on a different scale, and strict limits on the number of characters through which to convey a message. Marketers are keenly aware of the need to continue providing consumers with relevant information and disclosures, and are constantly experimenting with new techniques for providing information to consumers effectively within the limited scale of mobile real estate.

In this dynamic environment, proscriptive rules would become quickly outdated, potentially inhibiting innovation or allowing technology to outpace consumer protection. Instead, the Associations strongly believe that the challenges presented by mobile marketing and advertising necessitate giving the industry time to develop both technological and policy solutions to these singular problems. It is the Associations' firm

belief that the most innovative solutions will emerge from industry, who work with these issues on a daily basis, in consultation with the interested government stakeholders. To protect these consumer benefits, the Associations caution the Commission against setting forth new guidance that could endanger the thriving, but still fast-evolving mobile market. The best way to realize the full benefits of mobile marketing, while protecting consumers, is through robust and enforceable industry self-regulation combined with consumer education. Self-regulation strikes the ideal balance between consumer protection and innovation. Industry self-regulation is flexible and can adapt in a timely manner to changes in markets, business practices, and advances in technology. This flexibility ensures that rules do not become outdated, which could inhibit innovation or allow technology to outpace consumer protection.

While the mobile marketplace is ideally suited to self-regulation, government agencies have the unique ability to provide consumer education about the mobile environment and thus should play an important role in that arena. This benefits the industry as a whole by making consumers educated and more able to provide businesses with feedback on mobile practices. The Commission's publication, "What You Should Know About Mobile Apps" provides information and practical tips about how mobile applications function. The Associations support such efforts to help consumers become more informed about the marketplace and encourages the Commission to explore ways to continue and expand these efforts.

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The DMA and ANA appreciate the opportunity to submit these comments and look forward to continuing to work with the Commission to promote innovation and protect consumers. Please contact Linda Woolley at (202) 861-2444 or lwoolley@the-dma.org or Dan Jaffe at (202) 296-2359 or djaffe@ana.net with questions.

Sincerely,

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